

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR09-825

JORDAN WALLER

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered January 20, 2010

APPEAL FROM THE MILLER
COUNTY CIRCUIT COURT
[NO. CR-2008-0339-2]

HONORABLE JAMES SCOTT
HUDSON, JR., JUDGE

AFFIRMED

JOSEPHINE LINKER HART, Judge

Following a jury trial, appellant, Jordan Waller, was convicted of possession of methamphetamine with the intent to deliver, possession of marijuana with the intent to deliver, possession of drug paraphernalia, and furnishing prohibited articles. On appeal, he challenges the sufficiency of the evidence to support the convictions and further argues that the circuit court erred in denying his motion for a continuance and in rejecting a proffered jury instruction on justification. After considering his arguments, we affirm.

According to the testimony of the State's witnesses, around 2:00 a.m. on June 1, 2008, appellant, a correctional officer who was working the night shift at the Miller County Correctional Facility, was carrying a Wendy's food sack. Another correctional officer asked appellant to come to a control room for the purpose of searching the sack. Appellant responded that he had already searched it. The officer replied that the sack needed to be

searched. Upon inspection, the sack was found to contain a taco, a baked potato, and chili. Inside the baked potato was a cell phone and a charger wrapped in cellophane. Two syringes were in the taco. In the chili was a leafy substance wrapped in cellophane in small round discs so that it could fit in the chili cup. Rolling papers were also found. Appellant first stated that his sister had brought him the food. After the contraband was discovered, however, appellant stated that “some lady” he did not know had brought the food to him. An officer asked appellant if he had anything that the officer needed to know about. Appellant removed from his front pockets several small, shrink-wrapped plastic bags containing a leafy substance. From his back pocket he removed a small plastic bag containing a white substance. The substances included six packages of tobacco; three packages of marijuana weighing 29.1, 26.3, and 25.7 grams respectively; and 0.1895 grams of methamphetamine.

In his challenge to the sufficiency of the evidence to support the convictions, appellant notes that the methamphetamine was located in a bag that he pulled out of his pocket. Appellant asserts that the evidence was insufficient to establish that he intended to deliver the methamphetamine, because there was no testimony that he intended to sell or deliver the methamphetamine and because the amount of methamphetamine in the bag weighed 0.1895 grams, which is less than the amount required to trigger the statutory rebuttable presumption that the methamphetamine was possessed with the intent to deliver. *See* Ark. Code Ann. § 5-64-401(d)(3)(A)(ix) (Supp. 2009). Further, he notes that a witness for the State testified that, in his opinion, that quantity could be considered as for personal use. For the remaining

charges, appellant asserts that the evidence was insufficient because the items were found in a sack that he was carrying, and while the sack was in his possession, there was no evidence that it was his intent to bring the contraband into the jail. Rather, he argues, a jailer would necessarily have contraband in his possession if he had confiscated it or was taking it to his superior officer.

In determining whether there is substantial evidence to support a conviction, we consider only that evidence which supports the verdict. *Hurvey v. State*, 298 Ark. 289, 766 S.W.2d 926 (1989). A person's intent to commit a crime is not ordinarily susceptible of direct proof and may, therefore, be inferred from the circumstances. Intent to deliver may be proved by circumstantial evidence. *Id.* Circumstantial evidence is sufficient to constitute substantial evidence. *Id.*

The circumstantial evidence in this case supports the jury's verdict. Here, appellant was in possession of food from outside the facility in which contraband was concealed. Appellant provided different explanations of how it came into his possession. He further stated to a correctional officer that he had already searched the sack, indicating an attempt to preclude its discovery. Also, additional contraband was hidden in his pockets. The contraband was discovered only after appellant was confronted by other jail personnel. Multiple items of contraband were brought into the facility, including two hidden syringes, cigarette papers, a package of methamphetamine, packages of tobacco, and packages of marijuana, with the marijuana in an amount exceeding the amount necessary to trigger the rebuttable presumption

of intent to deliver. *See* Ark. Code Ann. § 5-64-401(d)(3)(A)(vii). From appellant's possession of multiple items of hidden contraband, his various explanations for his possession of the contraband, and his effort to evade detection, the jury could infer that appellant secreted all the contraband and brought the contraband into the jail with the intent to deliver all the contraband to the inmates. Accordingly, we affirm the convictions.

Appellant next argues that the circuit court erred in denying his motion for a continuance. Appellant requested a mental examination in a motion filed July 10, 2008. Exhibits to the motion included numerous psychiatric documents, including descriptions of appellant's behavior and a physician's provisional diagnosis of paranoid schizophrenia in 2004. In a pretrial hearing on February 10, 2009, appellant's counsel noted that appellant's mental evaluation had been conducted, and counsel concluded, "I don't think there's any issues as to sanity or competence, and it's our intent to go forward on the 23rd."

During jury selection on February 23, 2009, appellant, through counsel, requested a continuance. In support of his request, he presented the testimony of appellant's mother and Fred Stovall. Stovall testified that the physician who had determined that appellant could stand trial had four years earlier determined that appellant was a paranoid schizophrenic. The court denied the motion, stating that he had "not heard evidence of anything new that would substantially impair Mr. Waller's defense, or prevent him from receiving a fair trial." Counsel did not raise at trial the affirmative defense of lack of mental capacity.

On appeal, appellant asserts that the evidence he intended to admit was psychiatric

information recently given to him, and that trial counsel felt that in order to effectively represent appellant, additional time was needed to obtain the evidence and prepare for trial. A continuance is left to the sound discretion of the circuit court, and the circuit court's decision will not be reversed absent an abuse of discretion. *Baumgarner v. State*, 316 Ark. 373, 872 S.W.2d 380 (1994). Failure to exercise due diligence alone can be the basis to deny a motion for a continuance. *Id.*

As noted by the circuit court, the psychiatric evidence relied upon by appellant was not new. Some seven months prior to trial, medical records discussing appellant's mental state were attached to appellant's motion for a mental evaluation. Thus, appellant, in seeking a continuance on the day of trial, did not exercise due diligence. Accordingly, we cannot conclude that the court abused its discretion in denying the continuance.

Appellant's final argument is that he was entitled to an instruction based on the defense of justification. The statutory defense relied on by appellant provides a defense to a public servant, whose conduct would otherwise constitute an offense, when it is performed by a public servant in a reasonable exercise or performance of the public servant's official power, duty, or function. Ark. Code Ann. § 5-2-603(a)(2) (Repl. 2006). The circuit court refused the instruction, finding that the instruction was not supported by the evidence. On appeal, appellant asserts that there was a rational basis for the jury instruction because, there was testimony indicating that a jailer's possession of contraband in the jail is part of the job when that contraband is confiscated.

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When the evidence does not support the giving of an instruction, it is not error to refuse it. *Christian v. State*, 318 Ark. 813, 889 S.W.2d 717 (1994). Appellant did not testify at trial, and there was no evidence presented below supporting appellant's claim that his possession was the result of confiscating the contraband. Rather, the testimony indicates that appellant was attempting to evade detection. While a handwritten note by appellant was introduced into evidence in which he wrote that the "items recovered" were not his and that he "found that s***," the note does not indicate that he found it during the reasonable exercise or performance of his official duties. Thus, it was not error for the circuit court to refuse the instruction, as there was no evidence to support it.

Affirmed.

KINARD and HENRY, JJ., agree.