

67732-2

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COA No. 67732-2-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

HOA TANG,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Mariane Spearman

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. In Mr. Tang's trial on a charge of delivery of a controlled substance, the evidence was insufficient.

2. The trial court violated ER 801(d)(2)(v) and ER 802 in admitting hearsay statements by Edward Hughes which implicated Mr. Tang.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was the evidence insufficient to prove delivery of a controlled substance where the State failed to show that the defendant, Hoa Tang, engaged in transfer of the cocaine to the undercover officer?

2. In the alternative, must the defendant's delivery conviction be reversed where the verdict was obtained in reliance on the statements of an alleged co-conspirator, which were improperly admitted into evidence at trial, without the trial court first properly finding that the statements were uttered during the existence of a conspiracy?

C. STATEMENT OF THE CASE

Hoa Tang was charged with delivery of a controlled substance (cocaine) in violation of RCW 69.50.401(1), (2)(a). CP

The Seattle Police Department was conducting a “buy bust” operation in the South Jackson Street area of Seattle, using pre-recorded buy money. 7/21/11RP at 6-9. An undercover officer, Garza, entered a van at the behest of Edward Hughes, who asked him what he wanted, and told him to enter the van, where Tang and others were present. 7/21/11RP at 72-73.

While inside the van, a man in the rear of the van asked the officer to smoke drugs with him, but the officer declined. 7/21/11RP at 74-76. The man then gave the officer four “rocks” of cocaine¹ from a bag, and the officer leaned back and placed \$40 dollars of “buy money” on the floor of the van, because the man was not then within his reach. CP 2; see 7/21/11RP at 76-78.

After a signal was given, multiple individuals were ordered out of the front and the rear of the vehicle. 7/21/11RP at 80-83. Officer Garza identified one of them, Hoa Tang, as the person who had delivered the cocaine to him. 7/21/11RP at 83.

Following the jury trial, Mr. Tang was found guilty as charged. CP 38. Mr. Tang had an offender score of 15, resulting

¹ At trial, the parties stipulated to the forensic report indicating that the substance was cocaine. 7/25/11RP at 16.

in a standard range of 60+ to 120 months incarceration. 9/16/11RP at 3-4; CP 39. The trial court rejected the State's request to impose 80 months incarceration and instead imposed a prison-based DOSA (Drug Offender Sentencing Alternative), requiring 45 months of incarceration followed by 45 months of community custody. 9/16/11RP at 4, 8-9; CP 39-48.

Mr. Tang appeals. CP 49.

D. ARGUMENT

1. MR. TANG'S CONVICTION MUST BE REVERSED WHERE THE TRIAL COURT ERRED IN ADMITTING THE STATEMENTS OF EDWARD HUGHES UNDER ER 801(d)(2)(v) WITHOUT FIRST FINDING THE EXISTENCE OF A CONSPIRACY.

a. The trial court admitted statements made by Edward

Hughes. Edward Hughes was the person who Officer Garza claimed asked him what he "wanted," and then allegedly arranged for him to complete a drug transaction inside the van. 7/21/11RP at 72. However, Hughes did not testify at trial.

Prior to trial, the defendant argued that Hughes' statements were inadmissible under ER 801(d)(2)(v), which defines statements made in furtherance of a conspiracy as "non hearsay," unless a conspiracy existed and the statements were in furtherance of a

conspiracy found to exist. CP 7-16. At a pre-trial hearing, the court confirmed that the disputed issue pertained to any statements by Hughes during the alleged undercover operation which failed to fit this definition. 7/20/11RP at 6-7.

b. Hughes' statements were not admissible under ER 801(d)(2) where the court failed to first find the existence of a conspiracy in reliance on independent evidence. "Hearsay" is inadmissible. ER 801; ER 802. The rule that statements uttered by a co-conspirator are not hearsay requires the existence of a conspiracy between the defendant on trial, and the person who uttered the statements.

ER 801(d)(2) states:

ER 801

* * *

(d) Statements Which Are Not Hearsay. A statement is not hearsay if--

* * *

(2) Admission by Party-Opponent. The statement is offered against a party and is . . . (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

ER 801(d)(2)(v).

In order for statements to be admissible under ER 801(d)(2)(v), the State must establish a *prima facie* case of

conspiracy, and must do so not considering the statements themselves; by definition this is a prerequisite to finding that the statements in question were uttered in furtherance of the alleged conspiracy. State v. St. Pierre, 111 Wn.2d 105, 118–119, 759 P.2d 383 (1988); see Tegland, Evidence Law and Practice, § 801.62 – 801.63 (2007). Here, Hughes' statements were not shown to be admissible under the ER 801(d)(2)(v) rule, because the trial court failed to first find the existence of a conspiracy, much less to do so by consideration of evidence other than the statements themselves. See also State v. Guloy, 104 Wn.2d 412, 420, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). Mr. Tang argues that the absence of this required finding, which is for the court to make under ER 104(a), defeats admission of the statements.

c. The delivery conviction must be reversed. Evidentiary error is grounds for reversal if it results in prejudice. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Here, Hughes' statements were critical to Mr. Tang's conviction. During trial, Officer Garza testified that Mr. Hughes instructed him to get into the van, close the door, and made other oral assertions connecting

him with Mr. Tang, and indicating that Mr. Tang was in possession of drugs and would sell some to the officer. 7/21/11RP at 71-75.

And in closing argument, the deputy prosecutor relied heavily on Hughes' alleged conduct of working in concert with Mr. Tang, and his statements that the undercover officer claimed indicated to him that Tang would sell him drugs, to urge the jury to find guilt. 7/25/11RP at

But these statements were improperly admitted. Given the paucity of evidence that Mr. Tang was the person inside the van who delivered drugs to Officer Garza, and under the standard for reversal in the presence of evidentiary error, Mr. Tang, within "reasonable probabilities," would not have been convicted of Delivery absent the erroneously admitted evidence. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (citing State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)).

2. MR. TANG'S CONVICTION FOR DELIVERY OF A CONTROLLED SUBSTANCE WAS UNSUPPORTED BY SUFFICIENT EVIDENCE.

Mr. Tang's conviction for delivery of a controlled substance must be reversed for insufficiency of the evidence in the absence of evidence that Mr. Tang was the individual who delivered the

cocaine to undercover police officer. Pursuant to RCW 69.50.401(1), a person is guilty of Delivery of a Controlled Substance when he unlawfully delivers a controlled substance knowing it to be a controlled substance. CP 29, CP 30 (jury instructions 3, 4); see RCW 69.50.401(1).

“Deliver or delivery means the actual transfer of a controlled substance from one person to another.” CP 31 (jury instruction 5); see RCW 69.50.101(f); WPIC 50.07; State v. Johnson, 116 Wn. App. 851, 857, 68 P.3d 290 (2003).

The test for sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980); U.S. Const. amend. 14. Any challenge to the sufficiency of the evidence admits all inferences that reasonably can be drawn therefrom. State v. Delmarter, 94 Wn.2d 634, 618 P.2d 99 (1980).

However, the above statutory and constitutional standards are not met in this case. Here, Hoa Tang contends there is no

evidence that he was the person who delivered the drugs to Officer Garza. Officer Garza never exchanged buy money with any individual, much less Hoa Tang. As Officer Chris Brownlee testified, Mr. Tang was only one of five individuals arrested after being pulled from the van or standing beside it. 7/21/11RP at 13-16. Among the other males arrested from inside the van was Tony Van Lee. 7/21/11RP at 16.

The State must establish the identity of the accused as the person who committed the offense. State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974). Identity is a question of fact for the jury, Hill, 83 Wn.2d at 560, but it must always be proved beyond a reasonable doubt. Here, as Hoa Tang testified repeatedly, he did not deliver drugs to Officer Garza. 7/25/11RP at 25, 33. Mr. Tang was inside the van when a man entered, but Mr. Tang only asked the man to come to the rear of the van and smoke drugs with him. 7/25/11RP at 20-22. Mr. Tang was in an area of town known for drug activity, hoping simply to encounter persons who might have drugs to share. 7/25/11RP at 23.

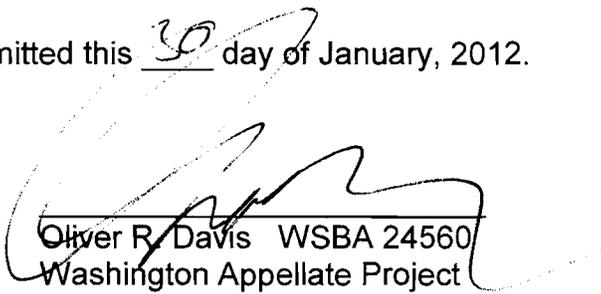
Under the Uniform Controlled Substances Act, guilt requires proof that the defendant – here, Hoa Tang -- was the person who

delivered a controlled substance or possessed it with intent to deliver. See State v. Thomson, 70 Wn. App. 200, 211, 852 P.2d 1104 (1993), aff'd, 123 Wn.2d 877, 872 P.2d 1097 (1994); State v. Brown, 68 Wn. App. 480, 483-84, 843 P.2d 1098 (1993). The evidence in the present case was insufficient to prove that Hoa Tang delivered cocaine.

E. CONCLUSION

Based on the foregoing, Mr. Tang respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this 30 day of January, 2012.



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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 67732-2-I
v.)	
)	
HOA TANG,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF JANUARY, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY
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<input checked="" type="checkbox"/> HOA TANG 749131 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) () ()	U.S. MAIL HAND DELIVERY
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SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF JANUARY, 2012.

X _____ 

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