

original

NO. 35048-3-II

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS TODD PINES,

Appellant.

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DIVISION II

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Pines' right to confront and cross-examine the witnesses against him guaranteed by the Sixth Amendment to the United States Constitution was violated when the trial court precluded cross-examination of the police informant regarding her drug use.

2. The record contains insufficient evidence to support a guilty finding on one of the charges filed against Mr. Pines.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court violate Mr. Pines' rights under the Sixth Amendment to the United States Constitution by precluding him from confronting a police informant regarding her drug use when the informant was the only witness presented testifying that Mr. Pines sold illegal drugs?

2. Was insufficient evidence presented at trial to support conviction on the charges of delivery of a controlled substance occurring on December 30, 2005?

III. STATEMENT OF THE CASE

1. Procedural History

Mr. Pines was charged with three counts of Delivery of a Controlled Substance as reflected in the first amended information. CP 1. A special allegation alleging that the delivering occurred within one thousand feet of a school bus route was attached to each count. CP 1. Mr Pines was found guilty of all counts following a trial by jury. CP 38. The jury also found each delivery occurred within one thousand feet of a school bus stop. CP 38. Mr. Pines was sentenced to a total of sixty four months of confinement. CP 38. The trial court considered motions in limine presented by the Prosecution and the Defense. RP 2-17; CP 8; CP 9. This appeal timely follows the convictions rendered by the jury. CP 48.

2. Statement of Facts

The Honorable Judge Laurie made one of the most significant rulings in this matter when resolving one of the motions in limine presented in this case. The key witness for the State in this trial was Ms. Edwina Stokes, who worked as police informant by conducting controlled buys for law enforcement. The State presented a motion in limine seeking to exclude any reference to Ms. Stokes' prior drug use. CP 9. Specifically, the State's motion in limine number 6 read: "No reference to the witness',(sic) alleged

prior drug and/or alcohol use or addiction, unless previously approved by the Court via offer of proof.”. CP 9. Trial counsel for Mr. Pines, Mr. Kibbe, objected to that proposed motion in limine. RP 7. Mr. Kibbe requested to question Ms. Stokes regarding her past drug use. RP 7.

In arguing for the admissibility of the evidence, Mr. Kibbe described an interview he conducted with Ms. Stokes. RP 7-8. Mr. Kibbe explained that during the interview Ms. Stokes had admitted prior use of alcohol and drugs. RP 7. Ms. Stokes admitted that she had used drugs previous to the drug buys in question, but was using alcohol at the time of the buys. RP 7. Mr. Kibbe presented an offer of proof indicating that Mr. Pines was prepared to testify that he saw Ms. Stokes on numerous occasions during the time period of the controlled buys and witnessed her using crack cocaine during the winter months of 2005 through 2006. RP 9. Mr. Kibbe requested to present impeachment testimony through Mr. Pines indicating that Ms. Stokes was using drugs during the time of the buys. RP 9-10.

Ms. Lewis responded to argument presented by Mr. Kibbe by indicating that she understood Ms. Stokes had used drugs five

to six years prior to the buys. RP 8. Ms. Lewis did concur with Mr. Kibbe's assertion that Ms. Stokes reported using alcohol at the time of the controlled buys. RP 8. Ms. Lewis further objected to the admission of testimony from Mr. Pines indicating that Ms. Stokes used controlled substances during the time of the controlled buys following Mr. Kibbe's offer of proof. RP 10. The Court excluded any reference to Ms. Stokes' past drug or alcohol use that occurred contemporaneously to the buys under ER 404(b). RP 10. However, the Court did allow testimony regarding any alcohol or drug use that occurred during each buy. RP 11.

Ms. Edwina Stokes testified that she purchased drugs from Mr. Pines while working as a police informant. Ms. Stokes had been a friend of Mr. Pines for the last nine years. RP 129. Ms. Stokes socialized at Mr. Pines' residence during the time period of the buys. RP 132, 168. Ms. Stokes spent the night at Mr. Pines' residence between the first and second buys. RP 166.

Ms. Stokes worked with Officer Garland as a confidential informant in the past, several years prior to her involvement in this case. RP 61, 94. Ms. Stokes contacted Officer Garland requesting to work as a confidential informant again. RP 62, 94. On

December 30, 2005 Officer Garland worked with Ms. Stokes to execute a controlled buy at Mr. Pines' residence. RP 62. Officer Garland described the search conducted of Ms. Stokes before she went into Mr. Pines' residence. RP 63. The search was limited to emptying out pockets, checking hats and shoes, and searching any exterior garments such as jackets. RP 63. Detective Garland admitted that it could be possible for someone to hide a small amount of crack cocaine in area that would not be found in his search of Ms. Stokes. RP 101. Ms. Stokes was seated in a vehicle at the time of the search. RP 172. Ms. Stokes recalled that Detective Garland did not touch her during the search. RP 173. Ms. Stokes believed that someone could successfully hide drugs in the type of search administered by Detective Garland. RP 174.

Officer Garland, on approximately half of the controlled buys he works, requires female operatives to lift their bras and shake them to be sure that nothing is inside the bras. RP 64. However, Officer Garland did not specifically recall if he required Ms. Stokes to "shake out" her bra on this occasion. RP 64. He did not recall using a female officer to search inside of Ms. Stokes' bra. RP 100.

Officer Garland dropped Ms. Stokes off and lost sight of her before she entered Mr. Pines' residence on each occasion. RP 67.

Detective Garland could not see inside of Mr. Pines' residence. RP 101, 118. Detective Garland relied on Ms. Stokes' descriptions of the events inside of Mr. Pines' residence. RP 101-102. No video or audio surveillance was used during the buys. RP 102. Ms. Stokes recalled that when she arrived at Mr. Pines' residence on December 30, 2005 he was on the phone and other people were at the residence. RP 133. Ms. Stokes gave Mr. Pines money and left the room to talk to another individual. She reported observing drugs on the floor near Mr. Pines. RP 133; RP 136. A person by the name of Eric (also known as EZ) handed her a napkin with crack cocaine inside of it. RP 134-136. Ms. Stokes left after the cocaine was given to her. RP 136. Ms. Stokes was paid \$60.00 for her work as a police informant on that day. RP 70.

Ms. Stokes worked as a police informant with Detective Garland again on March 13, 2006. Detective Garland described following the same procedure for conducting the second buy. RP 73-75. Again, Detective Garland did not keep Ms. Stokes under surveillance during the buy. RP 75-75. Detective Bernstein was

involved in surveillance for this buy. RP 187. Detective Bernsten could not be certain that Ms. Stokes received drugs from Mr. Pines. RP 186-187. Ms. Stokes recalled on this occasion that her encounter with Mr. Pines was very brief. RP 137-138. Ms. Stokes was paid another \$60.00 for her work as a police informant that day. RP 74.

Ms. Stokes worked as a police informant with Detective Garland again on March 20, 2006. Detective Garland again testified that the procedure for conducting this buy was the same as the prior buys. RP 76. However, on this occasion Detective Endicott observed Ms. Stokes enter Mr. Pines' residence and depart shortly later. RP 118. Detective Endicott could not see inside Mr. Pines' residence. RP 118. Ms. Stokes was financially compensated for this buy as well. RP 95, 158. In addition to direct payment, Detective Garland recalled that he may have paid for some minutes for Ms. Stokes' cell phone and bought food for her in addition to the direct cash payment. RP 95-96. At the time of the buys and at the time of trial Ms. Stokes was not employed and her only other source of income was SSI payments. RP 130, 161-162. Ms. Stokes recalled that she would only get paid for successful

buys. RP 163. Ms. Stokes was not employed during the time she worked as an informant. RP 96.

Detective Garland was not certain that Ms. Stokes was abstaining from the use of controlled substances during the time period she was working with him. RP 107. Ms. Stokes testified as to her motivations for working as a confidential informant. RP 161. The following dialogue between Mr. Kibbe and Ms. Stokes occurred:

Q: Ms. Stokes, would you describe yourself as a good Samaritan, a concerned citizen?

A: Yes. After - after going through a lot of things, yeah. You know, trying to change my life to do better things.

Q: Okay. Are you trying to change your life?

A: Yes.

Q: Do you have a reason to want to change your life?

A: Yes, a lot of reasons. I've been through a lot.

Q: What kind of things?

RP 161.

At that point Ms. Lewis objected to Mr. Kibbe's question. RP 161. The Court sustained the objection. RP 161. Ms. Stokes admitted that she drank while at Mr. Pines' residence. RP 170.

However, Ms. Stokes denied using alcohol during the buys. RP 175. Mr. Kibbe asked Ms. Stokes if she had a drinking problem. RP 175. Ms. Lewis objected to the question and the Court sustained the objection. RP 175.

A search warrant was executed on Mr. Pines' residence on March 20, 2006 after the third buy occurred. RP 80. No drugs or drug paraphernalia were found on Mr. Pines at that time. RP 109. Multiple individuals were at the residence at the time the search warrant was executed. RP 126. The baggies containing the methamphetamine were not tested for fingerprints. RP 103.

IV. ARGUMENT

A. Did the trial court violate Mr. Pines' rights under the Sixth Amendment to the United States Constitution by precluding him from confronting a police informant regarding her drug use when the informant was the only witness presented who testified that Mr. Pines sold illegal drugs?

Generally the scope of cross examination is within the discretion of the trial court and reviewed for abuse of discretion. State v. Hoffman, 116 Wash.2d 51, 96, 804 P.2d 577 (1991)

However, errors of manifest constitutional error are reviewed

de novo. State v. Elmore, 121 Wash.App. 747, 90 P.3d 1110 (2004) Since a defendant's right to cross-examine witnesses against him is a fundamental constitutional right, review should be de novo. On review of 404(b) claims the trial court's interpretation of ER 404(b) is reviewed de novo. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). If the interpretation of the rule is correct, the decision to exclude the evidence is reviewed for abuse of discretion. Id.

The right to confrontation includes the right to impeach a witness for the prosecution with evidence of bias or inconsistent statements. Davis v. Alaska, 415 U.S. 308, 31618, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); State v. Johnson, 90 Wn.App. 54, 69, 950 P.2d 981 (1988).

The definition of relevant evidence is found in ER 401.

Relevant evidence is defined as follows:

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401

A showing of minimal logical relevance is required. State v. Bebb, 44 Wn.App. 803, 723 P.2d 512 (1986), *affirmed* 108 Wn.2d 515,

740 P.2d 829 (1987). Facts that bear on the credibility or probative value of other evidence are facts of consequence under the rule.

State v. Rice, 48 Wn.App 7, 737 P.2d 726 (1987)

Relevant evidence is generally admissible. ER 402. The Confrontation Clause of the Sixth Amendment to the Constitution requires that a defendant be allowed to cross-examine a witness for bias. State v. Dolan, 118 Wn.App. 323, 73 P.3d 1011 (2003) *see also* Olden v. Kentucky, 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988); Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). The defendant's right to cross-examine witnesses against him is a fundamental constitutional right. State v. York, 28 Wash.App. 33, 621 P.2d 784 (1981). The issue of bias is relevant to the credibility of a witness and of special significance when the entire State's case depends on the credibility of one witness. State v. Tate, 2 Wash.App 241, 469 P.2d 999 (1970); State v. Wills, 3 Wash.App. 643, 476 P.2d 711 (1970)

The rules of evidence also provide for cross examination on the issue of bias. United States v. Abel, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984). Pursuant to ER 607 a party may attack the credibility of a witness. Information regarding bias for the purpose

of impeachment provides information at the time of trial that a jury can use to test the witness' accuracy. State v. Harmon, 21 Wash.2d 581, 590-91, 152 P.2d 314 (1944); State v. Tigano, 63 Wash.App. 336, 344-45, 818 P.2d 1369 (1991), *review denied*, 118 Wash.2d 1021, 827 P.2d 1392 (1992) Evidence of a witness' prior statements can be offered for either impeachment or for the purpose of showing bias or prejudice. State v. Harmon, 21 Wash.2d 581, 590, 152 P.2d 314 (1944) Evidence of bias is admissible to weigh-in on a witness' credibility. State v. Whyde, 30 Wash.App. 162, 166, 632 P.2d 913 (1981) Bias may be shown through cross examination or admission of extrinsic evidence. State v. Jones, 25 Wash.App. 746, 751, 610 P.2d 934 (1980)

In the case of State v. Spencer, 111 Wash.App. 401, 45 P.3d 209 (2002), the Court held that the trial court's decision precluding the defendant from calling a witness to impeach the credibility of another witness presented by the prosecution was in error.

A witness may be cross examined as to her ill feelings towards the other party. Stossel v. Van De Vanter, 16 Wash.9, 47 P. 221 (1896) In that case the court held that the plaintiff had the

right to have testimony regarding the ill feelings between the parties before the jury. Stossel v. Van De Vanter, 16 Wash. at 15. In the case of State v. York, 28 Wash.App. 33, 621 P.2d 784 (1981), the court determined that the trial court erred in failing to allow defense counsel to cross-examine the negative characteristics of the State's most important witness.

1. The testimony regarding Ms. Stokes' drug use was admissible under ER 404(b).

Under ER 404(b) a witness' prior bad acts are admissible if the evidence is relevant to a material issue and the probative value outweighs any prejudice. ER 404(b); State v. Boot, 89 Wn.App. 780, 788, 950 P.2d 964 (1998). ER 404(b) states as follows: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent..." ER 404(b) To determine the admissibility of evidence under ER 404(b) the Court is to engage in a balancing test weighing the relevancy of the evidence against the potential for unfair prejudice. State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982) The Court must first identify

the purpose for which the evidence is offered; 2) determine if the evidence is relevant to establish an essential element of the crime; 3) balance the probative value against the prejudicial effect of the evidence; and 4) determine that the acts occurred by a preponderance of the evidence. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995)

Bad acts are admissible under ER 404(b) not to show the character of a person, but to show proof of motive. ER 404(b). Once the court determines the relevancy issue, the court is to next engage in a balancing test weighing the probative value against the potential for prejudice. State v. Kelly, 102 Wn.2d 188, 198, 685 P.2d 564 (1984); State v. Saltarelli, 98 Wn.2d 358, 361-63, 655 P.2d 697 (1982).

An example of the Court utilizing ER 404(b) in determining the admissibility of a witnesses' prior bad acts is found in State v. Barker, 75 Wn.App. 236, 881 P.2d 1051 (1994). In that case the Defendant sought to admit into evidence the victim's prior DWI conviction to establish the motive for the victim's testimony describing the events in question. The trial court engaged in a balancing test in considering the admissibility of the evidence which

resulted in a decision to exclude the evidence. The Court of Appeals upheld that decision concluding that the victim's conviction was not insightful into the issue of motive. Finally, the probative value of the evidence outweighed the prejudice created by the evidence as described below.

In this case the trial court's interpretation of 404(b) was not correct. Mr. Pines should have been allowed to present evidence of Ms. Stokes prior drug use. Ms. Stokes' prior drug use does demonstrate her motive for testifying that she obtained drugs from Mr. Pines, which is allowed under the rule. The evidence was relevant to establishing her motive for her testimony. Furthermore, the evidence was necessary to establish Ms. Stokes' motive. Mr. Pines was prepared to testify as to his observations of Ms. Stokes' drug use which would establish by a preponderance of evidence that the misconduct occurred. RP 9-10.

Ms. Stokes was paid for her work in law enforcement both in direct payment and other financial assistance. RP 95-96, 138. Ms. Stokes was not employed at either the time she worked with law enforcement or the time of trial. RP 130, 161-162. Ms. Stokes lived on her SSI payments and the money she made from working

with law enforcement. RP 130, 161-162. Ms. Stokes' continued drug use establishes her motive for working with law enforcement. Specifically, Ms. Stokes needed the monies she obtained from successful buys to purchase drugs. As Ms. Stokes testified, it was her belief that she was paid only for successful buys. RP 163. Consequently, Ms. Stokes was required to tell law enforcement that she obtained drugs from Mr. Pines to get paid.

The facts presented in this case indicate that Ms. Stokes could have fabricated her story that Mr. Pines sold drugs to her. Ms. Stokes has the ability to hide drugs on her person before going into Mr. Pines' residence as the search conducted by law enforcement was minimal. Both Detective Garland and Ms. Stokes testified that the brief search conducted by Detective Garland would not uncover drugs hidden on Ms. Stokes' person. RP 101, 174. This information was relevant to establish Ms. Stokes' motive for testifying that Mr. Pines sold drugs to her. This evidence was extremely important as Ms. Stokes' testimony was the only basis for the conviction. Ms. Stokes was the only person who could testify that she purchased drugs from Mr. Pines. The law enforcement officers could not testify that the drugs produced from Ms. Stokes

came from Mr. Pines. RP 101-102, 186-187. Thus Ms. Stokes' testimony necessarily provided the basis for the jury to conclude that Mr. Pines was guilty of the charged offense. The evidence of Ms. Stokes' motive was probative, as it goes to her motivation to fabricate the story that Mr. Pines provided her with drugs. The probative nature of the evidence outweighs the prejudicial value of the evidence. Ms. Stokes was not on trial, so the concerns of prejudice are not as significant as when the Court is considering the admission of the defendant's prior bad acts. Secondly, since Ms. Stokes' testimony was essential to gain a conviction, any prejudice that may be created by reference to Ms. Stokes' drug use is outweighed by the probative value of the evidence. As previously stated, Ms. Stokes' testimony provided the basis for the conviction.

The court's failure to state the reasons on the record for its ruling is harmless error when the record as a whole permits the reviewing court to determine the admissibility of the evidence. State v. Gogolin, 45 Wn.App. 640, 645, 727 P.2d 683 (1986). In this matter the court made an insufficient record of the basis for the ruling. In this case the court did not fully analyze all of the factors required for consideration as described in the case law cited

previously. The trial court's failure to adequately address the factors is error. State v. Jackson, 102 Wn.2d 689, 694, 689 P.2d 76 (1984). The absence of a record in which the court balances probative value against prejudice precludes effective appellant review. Id. In this case the court did not make a complete record of the reasoning for excluding the evidence. At the least, this matter should be sent back to the trial court level for resolution of this issue by providing a detailed rationale for the trial court's ruling.

The trial court's error in excluding the evidence was not harmless error. The error effectively prevented Mr. Pines from arguing his theory of the case. As Ms. Stokes was the primary witness in this case, her testimony was crucial. If the jury would have known Ms. Stokes' involvement with drug activities, the conviction would likely have been different. Finally, Mr. Pines' presentation of the case would have been different but for the trial court's ruling at the beginning of trial.

The court erred in excluding evidence of Ms. Stokes' drug use around the time of the buys. Judge Laurie did allow testimony of Ms. Stokes use of drugs during the buys themselves, but that ruling was not as broad as it should have been under the

ER 404(b) analysis described above. Mr. Pines should have been allowed to ask Ms. Stokes of her drug use during the time around the buys, from December 2005 through March 2006. Judge Laurie's ruling precluded Mr. Pines from testifying regarding his observations of Ms. Stokes' drug use during the winter of 2005-2006.

2. Evidence of Drug and/or Alcohol use was admissible under ER 607.

Under ER 607 the credibility of a witness may be attacked by any party. ER 607. A witness' addiction or use of alcohol or drugs is admissible to impeach if it is reasonable to infer that the witness was under the influence at the time of the events in question or at trial and the credibility of the witness is thereby affected. State v. Dault, 19 Wn.App. 709, 578 P.2d 43 (1978); State v. Brown, 48 Wn.App. 654, 739 P.2d 1199 (1987).

Previous Washington State cases have allowed testimony regarding a witness' drug and/or alcohol use. In the case of State v. Clark, 48 Wn.App. 850, 743 P.2d 822 (1987), defendant's use of marijuana was admissible to assess the defendant's memory of events and overall credibility. In the case of State v. Kendrick, 47

Wn.App. 620, 736 P.2d 1079 (1987) the defendant's use of alcohol and cocaine was admissible to impeach the defendant's recollection of events in question.

Mr. Pines should have been permitted to testify regarding Ms. Stokes' drug use under ER 607. A witness may be impeached by introducing evidence to contradict the witness on a material fact. United States v. DiMatteo, 716 F.2d 1361 (11th Cir. 1983), *cert. granted and judgment vacated* 469 U.S. 1101, 105 S.Ct. 769, 83 L.Ed.2d 767 (1985), *on remand* 759 F.2d 831 (11th Cir. 1985). The issue of Ms. Stokes' drug use is a material fact of consequence in determining the outcome of the case. Ms. Stokes was the only witness testifying that Mr. Pines exchanged drugs for money. Ms. Stokes' recollection of events is imperative for a conviction. Consequently, any evidence that goes to her ability to accurately recall events is relevant and material.

In the case at hand Ms. Stokes was only superficially searched prior and after the buys, other individuals were present in Mr. Pines' residence, and finally, Ms. Stokes was the only witness asserting that Mr. Pines delivered drugs. The ruling of the trial court precluded Mr. Pines from testifying regarding his observations

of Ms. Stokes using drugs and/or alcohol near the time of the alleged deliveries. That ruling prevented Mr. Pines from presenting evidence contradicting Ms. Stokes' assertion that she was clean and sober. The trial court's ruling also precluded Mr. Pines from presenting Ms. Stokes' inconsistent statements regarding her alcohol use at the time of the buys. Ms. Stokes testified at trial that she had not been consuming alcohol at the time of the buys. However, Ms. Stokes admitted to consuming alcohol during the time of the buys in an interview prior to trial. RP 7, 8. The trial court cut off Mr. Kibbe's line of questioning regarding Ms. Stokes' alcohol use by sustaining the Prosecutor's objection. RP 175.

Although the trial court allowed testimony regarding Ms. Stokes use of controlled substances and/or alcohol at the same time as the alleged buys, the ruling precluded Mr. Pines from raising an assertion that Ms. Stokes may have been under the influence from drugs and/or alcohol from the days just prior to the alleged buys. Ms. Stokes was socializing and even staying with Mr. Pines during the time period of the buys. RP 132, 166, 168. As the offer of proof indicated, Mr. Pines observed Ms. Stokes using drugs and alcohol during time periods of the alleged buys. RP 9-10.

The court erred in precluding Mr. Pines from testifying regarding his observations of Ms. Stokes, as such testimony was admissible under ER 607. Ms. Stokes' drug and alcohol use during the time periods surrounding the buys would affect her ability to accurately recall the events. The trial court's ruling allowing testimony regarding use of drugs and alcohol only during the instant of the buy was unduly limiting. The court's ruling was especially problematic in light of the testimony of Detective Garland and Ms. Stokes indicating that she could have hid drugs from law enforcement. RP 101.

B. Was insufficient evidence presented at trial to support conviction on the charges of delivery of a controlled substance occurring on December 30, 2005?

The state originally charged Mr. Pines with delivery of a controlled substance as a principal. CP 1. However, the State presented a jury instruction on the charge of delivery of a controlled substance as an accomplice. CP 14. Insufficient evidence was presented to support a conviction of count one, delivery of a controlled substance occurring on December 30, 2005. Likewise, Mr. Pines should not have been found guilty of the special

allegation of the delivery occurring in a protected zone under RCW 69.50.401. Under RCW 69.50.401, a person is guilty of the crime of delivery of a controlled substance if he delivered a controlled substance to another.

Evidence is sufficient to support a conviction if when the evidence is viewed in the light most favorable to the prosecution, any rational trial of fact could find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992)

In the case at hand insufficient evidence was presented to support a finding of guilty of the first count of delivery of a controlled substance alleged to have been committed on December 30, 2005. On that occasion, following the testimony provided by Ms. Stokes, Mr. Pines was on the phone during the time Ms. Stokes was at his residence. RP 133-136. Ms. Stokes told Mr. Pines that she wanted to purchase drugs, gave Mr. Pines money, and left the room to talk to another person at the residence. RP 133-136. An individual called "EZ" gave drugs to Ms. Stokes. RP 134-136. Ms. Stokes did not see any communication take place between Mr. Pines and "EZ". Nor did she see Mr. Pines hand over any drugs to any

person. Consequently the evidence presented does not establish that Mr. Pines took a substantial step in delivering drugs to Ms. Stokes as required to support a conviction. The conviction for Count one of the information, and the accompanying special allegation should be reversed.

V. CONCLUSION

For the reasons cited above, Mr. Pines respectfully requests the court to reverse the convictions entered in this matter.

Respectfully submitted this 22 day of November, 2006.



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DECLARATION OF MAILING

I, Jeanne L. Hoskinson, declare under penalty of perjury under the laws of the State of Washington that the following statements are true and based on my personal knowledge, and that I am competent to testify to the same.

That on this day I had the Brief of Appellant in the above-captioned case hand-delivered or mailed as follows:

Original and copy of Brief of Appellant Mailed to:

Clerk of the Court
COURT OF APPEALS, DIVISION II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

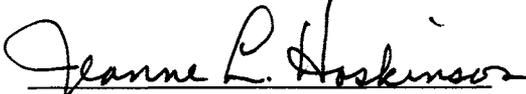
Copy of Brief of Appellant Hand-Delivered to:

Mr. Randall Sutton
Kitsap County Prosecuting Attorney's Office
614 Division Street, MS-35
Port Orchard, WA 98366

Copy of Brief of Appellant Mailed to:

Nicholas Todd Pines / DOC #634744
c/o Stafford Creek Corrections Center
191 Constantine Way Center
Aberdeen, WA 98520

DATED this 22nd day of November, 2006, at Port Orchard, Washington.


JEANNE L. HOSKINSON
Legal Assistant

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