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NO. 65816-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

STATE OF WASHINGTON,  
Respondent,  
v.  
WOODIE KEES,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE REGINA CAHAN

**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. To prove a violation of the Uniform Controlled Substances Act for delivery of cocaine, the identity of the perpetrator must be proven beyond a reasonable doubt. The State presented evidence from two witnesses with direct personal knowledge that Woodie Kees was one of two individuals who provided Officer Tovar with cocaine on February 11, 2010. Additionally, the State presented evidence from a third individual that Kees was arrested at the scene of the transaction. Is this sufficient evidence to establish Kees' identity as a perpetrator?

2. Prior to imposing a sentencing, a trial court must conduct a sentencing hearing and determine the defendant's criminal history. The State proffered evidence of Kees' criminal history in its Presentence Statement of the King County Prosecuting Attorney and the defendant never objected to the proffered criminal history. Did the defendant acknowledge his criminal history as proffered?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged Woodie Kees with Violation of the Uniform Controlled Substances Act alleging that Kees delivered cocaine on or about February 11, 2010. CP 1. The jury convicted Kees as charged. CP 35. The trial court sentenced Kees without the standard range, imposing 60 months on the sole count. CP 37-44. Additionally, the trial court imposed 12 months of community custody. Id.

**2. SUBSTANTIVE FACTS**

On February 11, 2010, Seattle Police Department Officer Juan Tovar was acting as an undercover officer who was attempting to purchase narcotics by way of a "buy-bust" operation. 1RP 19, 27. A "buy-bust" operation involves a single undercover police officer who purchases narcotics, undercover officers in plain clothes who observe the transaction with the undercover purchasing officer, and uniformed officers who facilitate the arrest of suspects. 1RP 22-23. Once the purchasing officer successfully purchases narcotics, he or she signals to the observing officers, also known as trailing officers, who in turn call the uniformed arrest

team to facilitate an arrest of the individual or individuals engaged in the narcotics transaction. Id. Officer Tovar had previously been involved in well over one thousand arrests for narcotics related crimes. 1RP 23. Of those arrests, approximately 90-percent involved "buy-bust" operations. 1RP 23-24.

On the day in question, Officer James Lee of the Seattle Police Department was designated as Officer Tovar's trailer. 1RP 70. The role of the trailer is first to ensure the safety of the purchasing officer, next to observe transaction, and finally call the arrest team after a narcotics purchase is completed. Id. Officer Donald Johnson of the Seattle Police Department was designated as a part of the operation's arrest team. 1RP 89-90.

On February 11, 2010, officers involved in the operation dropped Officer Tovar near Second Avenue and South Main Street. 1RP 33. From there, Officer Tovar walked to the corner of Second Avenue South Extension and South Washington Street. 1RP 33, 71. Officer Lee previously positioned himself at this location. 1RP 71. At the corner, Officer Tovar saw a group of approximately 15 people standing about. 1RP 34. Officer Tovar made eye contact with one of the people standing at the corner. Id. The individual with whom Officer Tovar made eye contact was later

identified as Mark Smith. 1RP 36-37. Smith told Officer Tovar to come over to his side of the street. 1RP 34.

After Officer Tovar crossed the street, Smith asked him what he wanted. 1RP 35. Officer Tovar told him that he "needed 40." 1RP 35. Smith then moved a few steps away from the group of people. 1RP 36-37. Officer Tovar followed Smith. Id. After they moved away from the group, Smith asked for the money. 1RP 38. Officer Tovar then noticed a man, later identified as Woodie Kees, near him. 1RP 30-31, 38.

All the while Officer Lee was a distance of approximately two lanes of traffic away from Officer Tovar, Smith, and Kees. 1RP 72. According to Officer Lee, he had a clear, unobstructed view of the three the entire time, and there was no traffic on the street at that time. 1RP 72, 79.

Officer Tovar asked Smith to show him the cocaine before he would provide the money. 1RP 38. Smith told Officer Tovar to cup his hand, which Officer Tovar did, and Smith dropped a single piece of crack cocaine into his hand. 1RP 38. Officer Tovar proceeded to hand over the money for crack cocaine. Id. When Officer Tovar examined the piece of crack cocaine further, he believed the piece to be too small for the amount he paid. 1RP 38.

Officer Tovar told Smith that he owed him, meaning that an additional piece was still due. Id. Upon confronting Smith about the additional piece due, Kees said "he would get me," which Officer Tovar understood to mean that he had the additional piece. 1RP 38-39. Kees was within an arm's reach of Officer Tovar when he made the statement. 1RP 39. In court, Officer Tovar positively identified Kees as being the person who interjected into his conversation with Smith. 1RP 30-31, 39.

After making the statement, Kees reached into his mouth, pulled out a small piece of crack cocaine and handed it to Officer Tovar. 1RP 40. Smith then said to Tovar, "there you go." Id. From his vantage point, Officer Lee observed Officer Tovar receive something from Kees. 1RP 73. Officer Tovar then walked away from Smith and Kees. 1RP 40.

When Officer Lee saw Officer Tovar relay the pre-designated good-buy signal, Officer Lee instructed the arrest team to move in. 1RP 73. Officer Lee provided descriptions of Smith and Kees to the arrest team. Id. Officer Lee maintained his position on the corner until the arrest team took Smith and Kees into custody. Id. Officer Lee observed Smith and Kees at the same corner from the time Officer Tovar left until the time the arrest team, including

Officer Johnson, arrived. 1RP 73, 74. Officer Johnson listened to Officer Lee's description of the suspects as he approached them. 1RP 92. Officer Johnson and his partner arrested Kees and Smith on the corner. Id. In court, Officer Lee identified Kees as a person who provided Officer Tovar with what was later determined to be cocaine. 1RP 72-73. After arresting Kees, Officer Johnson confirmed with Officer Lee that he had arrested the correct suspects. 1RP 92.

Later, Officer Tovar secured the two pieces of suspected crack cocaine into evidence. 1RP 41-42. The pieces were tested and determined to be cocaine. 1RP 104.

At the police precinct, Officer Tovar viewed individual photographs of Smith and Kees taken by the arrest team. 1RP 43-44. Officer Tovar confirmed that the photographs were of the two individuals involved in the transaction. 1RP 44.

On June 7, 2010, the jury reached a verdict of guilty of the crime of Violation of the Uniform Controlled Substances Act- Delivery of a Controlled Substance as charged. CP 35.

After the trial, the State filed a Presentence Statement of King County Prosecuting Attorney. CP 45-55. The State's presentence statement included the defendant's comprehensive

criminal history. CP 53-54. The defendant's criminal history as reflected in the presentence statement showed that the defendant's offender score was an "11" for the purposes of sentencing under the Sentencing Reform Act. CP 53.

On July 30, 2010, at the defendant's sentencing hearing, the prosecutor orally indicated on the record that the defendant had an offender score of 11, and that his standard sentencing range was between 60 months and one day to 120 months. 2RP 2. At the hearing, the defense did not object to the State's assertion of the defendant's offender score. 2RP 1-15. The defense moved the court for an exceptional sentence downward to 12 months of confinement. 2RP 4. The court imposed a sentence of 60 months of confinement. 2RP 12.

**C. ARGUMENT**

**1. SUFFICIENT EVIDENCE SUPPORTS KEES' CONVICTION FOR DELIVERY OF COCAINE.**

On appeal, Kees challenges his conviction for Violation of the Uniform Controlled Substances Act for the delivery of cocaine and argues that the State failed to prove beyond a reasonable doubt that he delivered cocaine to the undercover officer. *App. Br.*

at 7. Viewing the evidence in the light most favorable to the State, Kees' argument fails. The State produced substantial direct and circumstantial evidence that Kees delivered cocaine to Officer Tovar on February 11, 2010.

It is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance. RCW 69.50.401(2)(a). At trial, the State must prove each element of the charged crime beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995).

Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that reasonably can be drawn therefrom. Id. at 201. Circumstantial and direct evidence are equally reliable. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000).

A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Id. at 719. The reviewing court need not be

convinced of the defendant's guilt beyond a reasonable doubt, but only that there is substantial evidence in the record to support the conviction. Id. at 718.

The identity of a criminal defendant and his presence at the scene of the crime charged must be proven beyond a reasonable doubt. State v. Thomson, 70 Wn. App. 200, 211, 852 P.2d 1104 (1993). The identity of the perpetrator is generally a question of fact for the jury. State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974).

Although counsel for the defendant argues that there is insufficient evidence of Kees being one of the individuals involved in the transaction, viewed in a light most favorable to the State, a rational trier of fact could have found that Kees was the individual who delivered cocaine to Officer Tovar based on the testimony of Officers Tovar, Lee, and Johnson.

Identity of the accused may be established at trial even when the defendant is not present at the trial. State v. Thomson, 70 Wn. App. 200, 852 P.2d 1104 (1993), aff'd, 123 Wn.2d 877, 872 P.2d 1097 (1994). In Thomson, police officers testified that they contacted Thomson's co-defendant about purchasing drugs. 70 Wn. App. at 204. The co-defendant led the officers to another

man. Id. at 205. After being told the price to purchase cocaine from the other man, the officers provided the co-defendant with a \$50 bill. Id. The co-defendant took the bill to the other man while the officers looked on. Id. The co-defendant then returned to the officers with a substance later determined to be cocaine. Id. The officers then arrested the co-defendant and the other man, who was identified as Thomson during a post-arrest interview. Id. After appearing for pre-trial motions, Thomson failed to appear for the empanelling of the jury and the trial itself. Id. at 204-05. Thomson was found guilty in absentia. Id. at 205. On appeal, the reviewing court found sufficient evidence to affirm Thomson's conviction even without an in-court identification of the accused. Id. at 211.

Although none of the recorded buy money was recovered from Kees, here there is greater quantum of evidence as to the identity of Kees as the person involved in the transaction than in Thomson where the court found there to be sufficient evidence to affirm the conviction.

First, unlike the officers in Thomson, Officer Tovar identified Kees in court as being the individual who interjected into his conversation with Smith and later gave him cocaine. 1RP 30-31, 39, 54. Officer Tovar was within an arm's distance of Kees during

the transaction. 1RP 39. Kees was close enough to Officer Tovar to hand the additional cocaine to him. 1RP 40. A rational trier of fact could infer that this immediate proximity allowed Officer Tovar the opportunity to view Kees at the scene. Additionally, after the arrests Officer Tovar viewed booking photographs of the individuals the arrest team took into custody, and Officer Tovar confirmed that those were the two men who delivered the cocaine, one of whom was Kees. 1RP 43-44, 56-57.

Next, like Officer Tovar, Officer Lee also identified Kees in court as being the individual who provided Officer Tovar an object, later determined to be cocaine. 1RP 72-73. Like the officers in Thomson, Officer Lee was only a short distance from Kees. Officer Lee was only two lanes of traffic distance away from Officer Tovar and Kees at the time of the transaction. 1RP 72. Officer Lee had an unobstructed view of the transaction involving Officer Tovar. 1RP 79. There was no traffic on the street between Officer Lee and Kees. 1RP 72. When considered as a whole, Officer Lee had ample opportunity to view Kees on the night in question.

Additionally, although Officer Lee was not one of the immediate arresting officers, he maintained his observation position and supervised as the arresting officers placed the suspects under

arrest. As in Thomson, the individuals involved in this transaction did not leave the area or enter any businesses from the time the good-buy signal was given by Officer Tovar to the time the individuals were arrested. 1RP 73, 83. Kees was arrested at the scene. 1RP 73. Kees was in the immediate area of where the transaction occurred when he was arrested. Id. Kees was arrested only a short time after the transaction occurred. 1RP 74. Officer Lee provided the arrest team with a description of the individuals involved in the transaction. 1RP 73, 81-82. Officer Lee never lost visual contact with either of the individuals involved in the transaction until after the arrest team arrested them. 1RP 74, 81.

Finally, like in Thomson, Officer Johnson testified that he arrested Kees at the scene on February 11, 2010. 1RP 91. Officer Johnson testified that the trailing officer provides updated, “play-by-play” radio announcements as the arrests are underway to ensure that the arresting officers targeted the correct individuals. 1RP 92. Officer Johnson confirmed with trailing officer that he arrested the correct targets. Id. Officer Johnson arrested Kees on February 11, 2010, in the immediate area of where Officers Tovar and Lee indicated the transaction occurred. 1RP 33, 71, 90.

As in Thomson, sufficient evidence in the record supports the jury's verdict that Kees was the individual who delivered cocaine to Officer Tovar on February 11, 2010. Viewing the evidence in the light most favorable to the State, the Court should affirm Kees' conviction for Violation of the Uniform Controlled Substances Act for the delivery of cocaine.

**2. THE TRIAL COURT PROPERLY DETERMINED  
KEES' OFFENDER SCORE.**

Kees challenges the propriety of the trial court's acts at his sentencing hearing. Kees contends that the trial court failed to properly determine his offender score; however, Kees failed to object to the offender score proffered by the State in its presentence statement thereby acknowledging the offender score. Furthermore, none of Kees' convictions "wash out" under RCW 9.94A.525, thus the trial court properly determined Kees' offender score and sentencing him appropriately.

Prior to imposing a sentence upon a defendant, the trial court must conduct a sentencing hearing. RCW 9.94A.500(1). In determining a sentence within the standard range, the trial court may rely on no more information than is admitted by the plea

agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. RCW 9.94A.530(2). Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing. Id. A criminal history summary relating to the defendant from the prosecuting authority or from a state, federal, or foreign governmental agency shall be prima facie evidence of the existence and validity of the convictions listed therein. RCW 9.94A.500(1).

In this case, the State proffered evidence of Kees' criminal history in the Presentence Statement of the King County Prosecuting Attorney ("presentence statement"). CP 45-55. In that document, each of Kees' adult misdemeanor, gross misdemeanor, and felony convictions are listed and accompanied by dispositional data. CP 53-54. The State's presentence statement reflects an offender score of "11" based on Kees' four prior felony drug convictions and seven other felony convictions. CP 52, 53.

**a. Kees Failed To Object At The Sentencing Hearing.**

In this case, Kees failed to object to the proffered criminal history attributable to him. On July 30, 2010, at the sentencing hearing, the State noted that Kees' standard range was between 60 months and a day and 120 months. 2RP 2. In addition, the State also noted that Kees' offender score was an "11" and that the seriousness level for the offense was a "2". *Id.* At the hearing, defense failed to raise an objection to the offender score as orally noted on the record and as proffered by the State's presentence statement. 2RP 1-15. The defense asked the trial court for a departure from the standard sentencing guidelines for Kees by asking for an exceptional sentence downward in the amount of 12 months of confinement. 2RP 4. Such a request implicitly recognized that Kees' standard range was in excess of 12 months of confinement.

**b. A Defendant's Failure To Object To A Proffered Criminal History Constitutes Acknowledgement.**

Kees' failure to object to the information contained in the Presentence Statement of the King County Prosecuting Attorney

constitutes acknowledgment of the criminal history for the purposes of sentencing. Pursuant to RCW 9.94A.530(2), acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing. Here, Kees never objected to his criminal history as proffered. 2RP 1-15.

In considering this issue previously, the Washington Supreme Court held that a defendant's failure to object to criminal history in a prosecutor's presentence report did not constitute acknowledgement of that history under the former RCW 9.94A.500(1). State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009). However, the Court in Mendoza explicitly limited the application of its holding to pre-2008 matters. In Mendoza, the Court noted that the legislature amended both RCW 9.94A.500 and RCW 9.94A.530, effective June 12, 2008. 165 Wn.2d at 924.

The revised RCW 9.94A.500(1) notes that a "criminal history summary relating to the defendant from the prosecuting authority or from a state, federal or foreign governmental agency shall be prima facie evidence of the existence and validity of the convictions listed therein." Furthermore, the revised RCW 9.94A.530(2) states that acknowledgement includes not objecting to the presentence reports

and not objecting to criminal history presented at the time of sentencing.

In this 2010 case, the prosecuting authority, the King County Prosecuting Attorney's Office, filed a presentence statement which included Kees' criminal history and the defense failed to object to the information included therein and orally stated at the sentencing hearing, and thereby acknowledged Kees' criminal history under RCW 9.94A.530(2).

**c. All Of Kees' Felony Convictions Count  
Toward His Offender Score Under RCW  
9.94.525(2).**

Pursuant to RCW 9.94A.525(2)(c), class C prior felony convictions other than sexual offenses shall not be included in the offender score of a defendant if, since the last date of release from confinement pursuant to a felony conviction, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction. Here, defense argues that Kees' criminal history as reflected in the Judgment and Sentence requires this court to find the five year "wash out" provision of RCW 9.94A.525(2)(c) applies resulting in an offender score of "0". *App. Br.* at 14. However,

Appendix B to Kees' Judgment and Sentence only lists the convictions which the court found counted toward his offender score for the purpose of sentencing him on this matter.

Kees' comprehensive criminal history, including misdemeanor and gross misdemeanor convictions, was properly before the trial court at the sentencing hearing as it was included in the State's presentence statement. CP 45-55. According to Kees' comprehensive criminal history as reflected in the State's presentence statement, Kees never spent five consecutive years in the community without committing a crime since his 1985 conviction for Indecent Liberties under cause number 85-1-04039-9. Id. As such, each of Kees' adult felony convictions counted towards his offender score of "11", which is the offender score the State proffered at the time of sentencing. Conversely, because Kees never spent five consecutive years in the community without a criminal conviction none of Kees' prior felony convictions "wash out" under RCW 9.94A.525(2).

Therefore, when the trial court signed Appendix B to Kees' Judgment and Sentence, it specified the convictions it found to exist from evidence proffered by the State in its presentence statement and pursuant to RCW 9.94A.500. As such, the trial court

acted appropriately when it sentenced Kees at his sentencing hearing on July 30, 2010.

**D. CONCLUSION**

Viewing the evidence in the light most favorable to the State, there is sufficient evidence that Kees was the individual who delivered cocaine to Officer Tovar on February 11, 2010.

Additionally, by not objecting at the time of sentencing, Kees acknowledged the criminal history proffered by the State, and the trial court properly sentenced Kees at the sentencing hearing.

Therefore, the Court should affirm Kees' conviction.

DATED this 8<sup>th</sup> day of February, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jan Trasen, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. WOODIE KEES, Cause No. 65816-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Angela Blocki  
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Done in Seattle, Washington

2/8/11  
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