

64733-4

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NO. 64733-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

WILLIE JOE MAYES,

Appellant.

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COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY RAMSDELL

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUE</u>	1
B. <u>STATEMENT OF FACTS</u>	1
1. PROCEDURAL FACTS.....	1
2. SUBSTANTIVE FACTS.....	2
C. <u>ARGUMENT</u>	6
THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT MAYES'S CONVICTION FOR DELIVERY OF COCAINE.....	6
D. <u>CONCLUSION</u>	13

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Alvarez, 128 Wn.2d 1,
904 P.2d 754 (1995)..... 7

State v. Campbell, 59 Wn. App. 61,
795 P.2d 750 (1990)..... 9

State v. Fiser, 99 Wn. App. 714,
995 P.2d 107 (2000)..... 7, 8

State v. Ramirez, 62 Wn. App. 301,
814 P.2d 227 (1991), rev. denied sub nom,
State v. Barrerra, 118 Wn.2d 1010 (1992)..... 8

State v. Salinas, 119 Wn.2d 192,
829 P.2d 1068 (1992)..... 7

Other Jurisdictions:

Davila v. State, 664 S.W.2d 722
(Tex. Crim. App. 1984)..... 9, 10, 11, 12

State v. Hecht, 342 N.W.2d 721 (1984) 8

Swinney v. State, 828 S.W.2d 254
(Tex.App, 1992, no pet.)..... 10, 11

Statutes

Washington State:

RCW 69.50.101.....	8
RCW 69.50.206.....	8
RCW 69.50.401.....	8

A. ISSUE

Evidence is sufficient to support a conviction if, when 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. To deliver cocaine by constructive transfer, a defendant must transfer the cocaine under his direct or indirect control by some other person or manner at the instance or direction of the defendant. Here, Mayes directed every facet of the sale of crack cocaine to Detective Shepherd. Mayes instructed another to hand over the crack cocaine. Mayes requested payment for the drugs. Mayes provided reassurance as to the product Detective Shepherd received. Is there sufficient evidence in the record to support Mayes's conviction?

B. STATEMENT OF FACTS

1. PROCEDURAL FACTS.

Willie Mayes was charged with a Violation of the Uniform Controlled Substances Act—Delivery of a Controlled Substance after he arranged for and engaged in the sale of crack cocaine to an undercover police officer on September 22, 2008. CP 1-5.

Mayes was convicted by a jury as charged. CP 43. On December 18, 2009 Mayes was sentenced to 75 months in custody. CP 57-61; 3RP 161.¹

2. SUBSTANTIVE FACTS.

On September 22, 2008, a team from the Seattle Police Department conducted a “buy-bust” operation in the area of Rainier Avenue South and South Garden Street. 2RP 17-18. This “buy-bust” operation involved an undercover officer, Detective Adley Shepherd, whose role was to attempt to purchase drugs. 2RP 17-18. A “buy-bust” team has five components: undercover buyer(s), trailers to follow the undercover buyer(s), observation officers, an arrest team, and a supervising officer. 2RP 13-14.

At approximately 11:50 p.m., Detective Shepherd first observed Mayes standing in a small group on the northwest corner of South Garden Street and Rainier Avenue South. 2RP 19. Detective Shepherd walked in that direction, and had a conversation with a co-defendant, Mr. Jones. 2RP 20. Detective Shepherd had been involved in a previous controlled buy of

¹ The Verbatim Report of Proceedings consists of five volumes that are not consecutively paginated. The State has adopted the following reference system: 1RP (7/20/09), 2RP (7/21/09 – 7/22/09), and 3RP (7/23/09, 12/18/09).

cocaine earlier that day that had involved Jones. 2RP 20. After a brief conversation with Jones, Detective Shepherd told Jones that the crack cocaine he (Shepherd) had purchased a few hours ago was "really good," and Detective Shepherd asked Jones what was "popping" or "happening." 2RP 22. Jones replied to Detective Shepherd that "it's happening." 2RP 22. According to Detective Shepherd, that means that there are narcotics in the area. 2RP 22. As a result, Detective Shepherd told Jones that he wanted a "forty." 2RP 22. Detective Shepherd explained that a forty "is street value for the quantity of cocaine (he) was looking to purchase." 1 RP 23.

Jones responded by asking Detective Shepherd if he was going to "hook (Jones) up this time." 2RP 23. By this, Detective Shepherd understood that Jones wanted a portion of any drugs Shepherd purchased in exchange for Jones' role as a facilitator. 2RP 23. Detective Shepherd agreed to "hook (Jones) up." 2RP 23. At that point, Jones turned around and yelled the word, "slow." 2RP 23. Mayes, who had originally been in the group with Jones but now was walking away, stopped and turned around. 2RP 23. Detective Shepherd had the impression that "slow" was a street name for Mayes because Jones looked in Mayes's direction when he (Jones) yelled it, and then Mayes immediately turned around

and acknowledged Jones. 2RP 23-24. At the time, Mayes was walking with another male, Mr. Mills. 2RP 23. When Mayes turned around he tapped Mills on the arm in order to get Mills' attention. 2RP 24. At that point, Detective Shepherd and Jones approached and contacted Mayes and Mills. 2RP 23-24. The contact was mutual, as Mayes and Mills turned around and engaged Jones and Detective Shepherd. 2RP 42.

Jones informed Mayes that Detective Shepherd wanted a forty. 2RP 25. Mayes looked at Mills and instructed Mills to give Detective Shepherd a forty. 2RP 25, 56. Mayes "told Mr. Mills to give (Detective Shepherd) a forty." 2RP 53, 59. Mills reached into his coat pocket and handed two pieces of crack cocaine to Detective Shepherd. 2RP 25. Mayes then asked for the money, and Detective Shepherd produced \$40, which had been photocopied and noted prior to the operation. 2RP 25-26, 31-32, 56. The \$40 was handed directly to Mills. 2RP 25-26, 42. Upon receiving the crack cocaine, Detective Shepherd looked it over. 2RP 26. Mayes told Detective Shepherd, "it is what it is, man. That's a forty." 2RP 26, 53. Mills never said anything to Detective Shepherd. 2RP 26. Detective Shepherd described Mayes as the one "giving orders." 2RP 53.

Detective Shepherd then walked away, and Mayes and Mills also began to leave, heading southbound on Rainier Avenue South. 2RP 28. Detective Shepherd gave the "good buy" signal for the arrest team to come in and arrest those involved in the transaction. 2RP 28. Before the arrest team moved in, Jones approached Detective Shepherd and requested a "chip," or a piece of crack cocaine. 2RP 29. Detective Shepherd ultimately gave Jones \$20 of the pre-recorded buy money. 2RP 29, 47.

Detective Shepherd testified that it's typical for one drug transaction to involve many people, as this one did. 2RP 27. He said dealers will often use "puppets" or "clucks" in order to facilitate a deal because there is a perception that doing so makes prosecution more difficult. 2RP 27-28. Detective Shepherd explained that the terms "puppets" and "clucks" are simply terms for those who assist in facilitating a deal. 2RP 28.

The rocks of cocaine that Detective Shepherd purchased were placed into evidence. 2RP 29. They were eventually tested by Cynthia Graff, a forensic scientist from the Washington State Patrol Crime Lab. 2RP 85. Graff testified that based on her training and the chemical analysis of substance sold to Detective Shepherd, the substance contained cocaine. 2RP 97. The State

also presented evidence from two members of the arrest team, Officers Thomas Barnett and Steven Smith. 2RP 65, 158. Officer Smith testified that he observed Mills slough two bags of what appeared to be crack cocaine as officers were moving in. 2RP 160. Officer Smith took Mills into custody and recovered the two bags from the scene. 2RP 160-161. Mills also had cash on his person and this money was confiscated and photocopied. 2RP 174. Mills had a total of \$79, \$40 of which matched the pre-recorded buy money. 2RP 174.

C. **ARGUMENT**

THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT MAYES'S CONVICTION FOR DELIVERY OF COCAINE.

Mayes asserts that the State did not present sufficient evidence to support the charge of delivery of a controlled substance. Mayes points out that there is no evidence he physically touched the cocaine or the money. This argument should be rejected because there was sufficient evidence from which a rational jury could find that Mayes had constructively transferred the crack cocaine. When Detective Shepherd indicated he wished to purchase crack cocaine, Jones called out to Mayes.

Mayes stopped, turned around, and engaged Jones and Detective Shepherd. Mayes then verbally directed every facet of the transaction. Mayes directed Mills to hand over the crack cocaine. Mayes requested payment. Mayes provided reassurance to Detective Shepherd that what had been provided was, in fact, a "forty."

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.

A person is guilty of delivery of a controlled substance if he delivers a controlled substance to another knowing that the substance was a controlled substance. RCW 69.50.401(1), (2)(a). Cocaine is a controlled substance. RCW 69.50.206(4). Delivery means the actual or constructive transfer from one person to another of a substance, whether or not there is an agency relationship. RCW 69.50.101(f). The definition of the term "deliver" criminalizes participation in the transfer of unlawful drugs, regardless of whether the participation benefitted the buyer or the seller. State v. Ramirez, 62 Wn. App. 301, 308, 814 P.2d 227, 231 (1991), rev. denied sub nom, State v. Barrerra, 118 Wn.2d 1010 (1992) (citing State v. Hecht, 342 N.W.2d 721, 725-28 (1984)). Thus, when the legislature defined a delivery as a "transfer", it necessarily included as "deliverers" any persons who intentionally participated in bringing about the drug transaction. Ramirez, 62 Wn. App. at 309.

Although neither "transfer" nor "constructive transfer" is defined by the act, both are defined by case law. Transfer means

“to cause to pass from one person or thing to another”, as well as “to carry or take from one person or place to another”. Id. at 308-09 (citing State v. Campbell, 59 Wn. App. 61, 64, 795 P.2d 750 (1990)). Constructive transfer is defined as “the transfer of a controlled substance either belonging to the defendant or under his direct or indirect control by some other person or manner at the instance or direction of the defendant.” Campbell, 59 Wn. App. at 63.

Mayes asserts that he merely interjected commentary into drug transaction and he relies on Davila v. State, 664 S.W.2d 722, 724 (Tex. Crim. App. 1984) in support of his argument that the State’s evidence was insufficient to show constructive transfer.

In Davila, an undercover DEA² agent went to a residence with a confidential informant to purchase heroin. 664 S.W.2d at 723-24. The agent entered the house and told Davila simply that he wanted “four.” Id. at 723. Davila went outside to speak to her husband and then returned and resumed her seat. Id. Shortly thereafter the husband entered the house. The husband handed four party balloons, tied at the opening, to one of the undercover

² Drug Enforcement Administration.

officers. In exchange, the husband accepted \$120. Id. at 723-24. Immediately after the transaction, the undercover officers left. Id. at 724. The court held that the evidence presented failed to show that Davila had direct or indirect control over the heroin prior to the delivery, but rather that Davila conveyed the agent's purchase offer to her husband who then negotiated the quantity and price directly with the agent. Id.

In a subsequent case, Swinney v. State, 828 S.W.2d 254, 256 (Tex.App, 1992, no pet.), an undercover officer drove past Swinney and three other males who were standing on the side of the road and making head and hand gestures toward him that the officer recognized from previous experience as an offer to sell drugs. At Swinney's direction, the officers pulled his car up to the group and Swinney asked the officer what he needed. Id. at 256. When the officer said that he needed \$20 worth of crack, Swinney went back to the group and spoke with one of the young men. Id. Afterward, Swinney and a juvenile went back to the officer's car and the juvenile got into the passenger side of the undercover officer's car. Id. Swinney stood immediately outside the car while the undercover officer and the young man negotiated the terms of the deal and conducted the hand-to-hand exchange. Id. The Swinney

court held that this evidence was legally sufficient to establish Swinney's indirect control over the drugs and constructive transfer of the crack to the undercover officer. Id. at 257-58.

The instant case is closer to Swinney than Davila. Mayes was not a passive bystander, but an active participant, like Swinney, who orchestrated the entire deal. When Jones learned that Detective Shepherd was looking to buy crack cocaine, he called out the word, "slow." 2RP 23. As he yelled this, Jones was looking in Mayes's direction, and it was Mayes who stopped, turned around, acknowledged Jones, and then tapped Mills on the arm presumably to get Mills' attention. 2RP 23-24. It was Mayes who was informed by Jones that Detective Shepherd was looking to purchase a forty of crack cocaine. 2RP 25. At that point, Mayes verbally directed Mills to give Detective Shepherd the drugs. 2RP 53, 59. Once Mills had handed over the crack cocaine, it was Mayes who requested payment. It was also Mayes who reiterated, as Detective Shepherd was inspecting his purchase, that Detective Shepherd had in fact been provided with a forty. 2RP 26, 53. It was Mayes who provided the reassurance as to the content and/or amount of the product that Detective Shepherd had purchased. 2RP 26, 53. Mayes and Mills then walked away together. 2RP 28.

The facts in this case are distinguishable from Davila. In that case, Davila relayed to her husband that there was an offer to purchase some drugs. But there was no evidence to show that Davila had any control over either the substance or her husband's actions. 664 S.W.2d at 724-25. That is a very different scenario from the facts of this case. Here, Mayes was not merely a passive, disinterested observer who, as he asserts, only provided some unrelated commentary during a drug deal. On the contrary, Mayes's actions and the words he used demonstrate not only his direct involvement in, but also his control over the transaction.

Mayes argues that since he never physically touched the cocaine or the money, that there cannot be sufficient evidence to support a conviction. Not only is this contrary to the law, but the result of such a system would be one in which an individual could avoid prosecution by always using others to hold drugs and money for them. Such a system would not only encourage drug dealers to exploit others, but would also provide a simple way for drug dealers to perpetually avoid criminal liability. Fortunately, that system does not have recognition nor support in Washington law.

The evidence of Mayes's involvement in and control over the transaction in which crack cocaine was sold to Detective Shepherd,

when viewed in a light most favorable to the State, was sufficient for a rational jury to find the Mayes constructively transferred the crack cocaine to Detective Shepherd. Mayes's conviction should be affirmed.

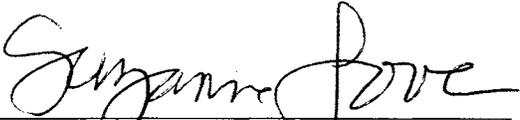
D. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm Mayes's conviction for delivery of cocaine.

DATED this 26 day of September, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

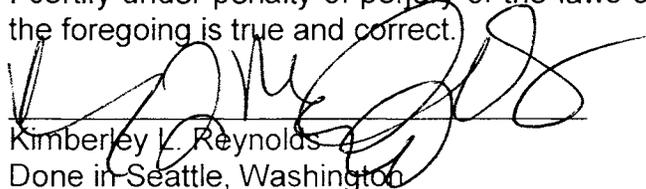
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Kari Dady and Dana M. Lind, the attorneys for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. WILLIE JOE MAYES, Cause No. 64733-4-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.



Kimberley L. Reynolds
Done in Seattle, Washington

9/29/10
Date