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NO. 69145-7-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ABDIRAZIK MOHAMED,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

OPENING BRIEF OF APPELLANT

JAN TRASEN  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, WA 98101  
(206) 587-2711

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COURT OF APPEALS  
STATE OF WASHINGTON  
ELECTRONIC  
RECORDS DIVISION

TABLE OF CONTENTS

A.	ASSIGNMENTS OF ERROR.....	1
B.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR. ....	1
C.	STATEMENT OF THE CASE.....	2
D.	ARGUMENT .....	4
	THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. MOHAMED OF DELIVERY OF COCAINE.....	4
	a. The prosecution bears the burden of proving all essential elements of an offense beyond a reasonable doubt.....	4
	b. In order to prove that Mr. Mohamed was guilty of delivery of cocaine, the State was required to prove beyond a reasonable doubt that he was the person involved in the transaction. ....	6
	c. The prosecution’s failure to prove all essential elements requires reversal.....	9
E.	CONCLUSION.....	9

TABLE OF AUTHORITIES

**Washington Supreme Court**

State v. Acosta, 101 Wn.2d 612, 683 P.2d 1069 (1984) ..... 4

State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000) ..... 4

State v. Green, 4 Wn.2d 216, 616 P.2d 628 (1980) ..... 5, 8

**Washington Court of Appeals**

State v. Prestegard, 108 Wn. App. 14, 28 P.3d 817 (2001) ..... 5

State v. Theroff, 25 Wn. App. 590, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980) ..... 5

State v. Thomson, 70 Wn. App. 200, 852 P.2d 1104 (1993) ..... 5

**United States Supreme Court**

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) ..... 4

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) ..... 5

Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) ..... 4

**Federal Courts**

United States v. Bautista-Avila, 6 F.3d 1360 (9<sup>th</sup> Cir. 1993) ..... 5

United States v. Lopez, 74 F.3d 575 (5<sup>th</sup> Cir. 1996) ..... 5

**Washington Constitution**

Article I, Sec. 3 .....4

**United States Constitution**

Fourteenth Amendment .....4

**Other Authorities**

McCormick's Evidence § 190 (Edward W. Cleary, gen. ed., 2d ed.  
1972 ed.) .....6

A. ASSIGNMENTS OF ERROR

1. In the absence of proof beyond a reasonable doubt of each element of the offense, the court denied Mr. Mohamed due process.

2. The State presented insufficient evidence to convict Abdirazik Mohamed of delivery of cocaine.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Due Process Clause of the Fourteenth Amendment of the United States Constitution requires the State to prove each element of a charged offense beyond a reasonable doubt. The identity of a defendant and his presence at the scene is an essential element that the State must prove in a criminal prosecution. Where the State failed to offer sufficient proof that Mr. Mohamed was the suspected seller, did his conviction for a Violation of the Uniform Controlled Substances Act (VUCSA) deprive him of due process?

2. To convict Mr. Mohamed of delivery of a controlled substance, the State had to prove he delivered cocaine to another person. Must Mr. Mohamed's conviction be reversed and dismissed where the State failed to prove beyond a reasonable doubt that Mr.

Mohamed was the individual who delivered the controlled substance?

C. STATEMENT OF THE CASE

Abdirazik Mohamed was charged with, tried for, and convicted of delivery of cocaine, in violation of the Uniform Controlled Substances Act (VUCSA), following his arrest on July 28, 2011. CP 1-4, 36, 39-48.

A police officer in an undercover “buy-bust” operation purchased a rock of crack cocaine from an individual in downtown Seattle, on Second Avenue near Pike Street. 6/28/12 RP 13-18. The undercover officer described engaging the individual in a transaction, by stopping him and asking, “You got it?” Id. at 14. When the individual replied that he did, the undercover officer followed the presumed seller in the direction the seller desired – in the direction of Native Park, just north of Pike Place Market. Id. at 14. The undercover officer, Detective Tovar, told the presumed seller that he wanted “60,” which the detective indicated meant \$60 worth of “crack cocaine.” Id. at 14. Tovar followed the seller some distance before completing the transaction, purchasing several pieces of cocaine from this individual, which the seller was storing in a small black film canister. Id. at 17.

Following the sale, the seller continued walking down Second Avenue, and Tovar crossed the street, signaling to his back-up team that he had just purchased a controlled substance. 6/28/12 RP 18. Tovar lost eye-contact with the seller when the seller began to run and “did like a big circle around this one small building.” Id. at 18-19. The next thing Tovar saw was the arrest of Mr. Mohamed, which he observed from across Second Avenue. Id. at 18-20. Tovar never came closer than the five lanes of traffic across Second Avenue to confirm whether Mr. Mohamed was, in fact, the individual from whom he had purchased the cocaine. Id. at 20.

Upon Mr. Mohamed’s arrest, the arresting officers found that there was no objective indication he was selling drugs – he was holding no money, no drugs, no cell phone, and no pager. 6/27/12 RP 45-46. On a strip search at the precinct, none of these items was found either – nor was the film canister of cocaine. 6/27/12 RP 47-48. Of the five bicycle-mounted police officers who stood side-by-side during the arrest of Mr. Mohamed, only one testified that he saw Mr. Mohamed throw some money to the ground prior to his arrest, which, when recovered and examined, corresponded to the pre-recorded buy money used by Detective Tovar during the buy operation. 6/27/12 RP 57-60, 69-70. This testimony concerning the

discarded buy money was contradicted by every other officer testifying for the State. Id. at 45-46, 96-99.

Following a jury trial, Mr. Mohamed was convicted of delivery of a controlled substance. CP 36.

D. ARGUMENT

THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. MOHAMED OF DELIVERY OF COCAINE.

a. The prosecution bears the burden of proving all essential elements of an offense beyond a reasonable doubt. The State has the burden of proving each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000). This allocation of the burden of proof to the prosecutor derives from the guarantees of due process of law contained in article I, section 3 of the Washington Constitution<sup>1</sup> and the 14<sup>th</sup> Amendment to the federal constitution. Sandstrom v. Montana, 442 U.S. 510, 520, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). On a challenge to the sufficiency of the evidence, this

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<sup>1</sup> Art. I, section 3 provides, "No person shall be deprived of life, liberty, or property, without due process of law."

Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

In a claim of insufficiency, the reviewing court presumes the truth of the State's evidence as well as all inferences that can be reasonably drawn therefrom. State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980). However, when an innocent explanation is as equally valid as one upon which the inference of guilt may be made, the interpretation consistent with innocence must prevail. United States v. Bautista-Avila, 6 F.3d 1360, 1363 (9<sup>th</sup> Cir. 1993). “[U]nder these circumstances, a reasonable jury must necessarily entertain a reasonable doubt.” United States v. Lopez, 74 F.3d 575, 577 (5<sup>th</sup> Cir. 1996). Speculation and conjecture are not a valid basis for upholding a jury’s guilty verdict. State v. Prestegard, 108 Wn. App. 14, 42-43, 28 P.3d 817 (2001).

b. In order to prove that Mr. Mohamed was guilty of delivery of cocaine, the State was required to prove beyond a reasonable doubt that he was the person involved in the transaction. Identity is, by definition, an essential element that must be proved by the State in any prosecution. See, e.g., State v. Thomson, 70 Wn. App. 200, 211, 852 P.2d 1104 (1993); McCormick's Evidence § 190, at 449 (Edward W. Cleary, gen. ed., 2d ed. 1972 ed.).

The jury here was instructed that to convict, the prosecution was required to prove beyond a reasonable doubt that Mr. Mohamed was the individual who delivered a controlled substance (cocaine). CP 30 (Jury Instruction 9). Here, however, the evidence linking Mr. Mohamed to the drug transaction was controverted by the State's own witnesses, leaving it insufficient to convict.

The undercover officer, Tovar, testified at length concerning his transaction with the seller. 6/28/12 RP 6-36. Tovar described approaching the seller and asking him, "You got it?" in order to initiate the deal. Id. at 13. Tovar then followed the seller some distance to conduct the sale. Id. at 13-17. However, Tovar was not present at the location of the arrest of the seller, and only observed the arrest of Mr. Mohamed from the opposite side of

Second Avenue – a distance of approximately five lanes of traffic.

Id. at 20.<sup>2</sup>

In addition, the strength of Tovar's identification of Mr. Mohamed as a suspect is weakened by the lack of physical evidence connecting him with the drug sale with which he was charged. Although Tovar testified that the seller was selling crack from a black film canister, no such canister was ever recovered from Mr. Mohamed. 6/27/12 RP 45-48. Each of the arresting officers was specifically asked about the film canister, and none of them found the canister on Mr. Mohamed's person at the scene, or at the precinct upon a strip search. 6/27/12 RP 45-48. Officer Pinkerton testified that following a "buy-bust" arrest, his team always searches the surrounding area for possible discarded narcotics, but none were found after Mr. Mohamed's arrest. Id. at 23-25, 45-48, 50.

As to the pre-recorded buy money, the State's efforts to connect the money to Mr. Mohamed were also problematic. Officer Etoh, the only officer who stated that he saw Mr. Mohamed throw

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<sup>2</sup> Tovar also identified Mr. Mohamed in at trial, but his only identification prior to arrest was made from the distance across the street. 6/28/12 RP 12. Officer Pinkerton also identified Mr. Mohamed in court; however, the value of such a suggestive identification is questionable, particularly since the officer was only identifying the person he arrested, not the person who made the sale.

money to the ground, also testified that Officer Pinkerton was standing right next to Mr. Mohamed at the time of arrest. 6/27/12 RP 71-73. Pinkerton, however, stated unequivocally that Mr. Mohamed did not throw anything to the ground upon his arrest. 6/27/12 RP 45, 50. Pinkerton testified that Mr. Mohamed was never out of his sight, that Mr. Mohamed essentially ran into his arms, whereupon Pinkerton detained and arrested him, and that Pinkerton never saw Mr. Mohamed discard anything -- neither drugs nor money. Id. Officer Oshikawa-Clay -- the partner of Officer Etoh, who claimed to see Mr. Mohamed drop the money -- also testified that Mr. Mohamed was in his view during the entire pursuit, except for "maybe a second." Id. at 98. Oshikawa-Clay testified that Mr. Mohamed never dropped any money to the ground. Id.

Without sufficient and reliable evidence that Mr. Mohamed was the individual with the pre-recorded buy money, and because Tovar admitted that he lost sight of the actual seller, there was insufficient proof adduced at trial that the arrest team detained, arrested, and ultimately that the State charged the right man for this offense.

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6/27/12 RP 27.

By offering conflicting and generally insufficient evidence that Mr. Mohamed was the individual who sold to the undercover officer, the State failed to prove all essential elements of the charged offense, and the trier of fact erred in finding sufficient evidence to render a verdict of guilt.

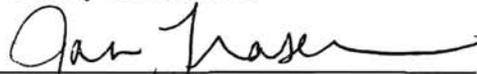
c. The prosecution's failure to prove all essential elements requires reversal. The prosecution failed to sufficiently connect Mr. Mohamed to the delivery of the cocaine, by failing to prove beyond a reasonable doubt that he was properly identified as the seller, an essential element of the charged offense. Absent proof of every essential element, the conviction must be reversed and the charge dismissed. State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995); Green, 94 Wn.2d at 221.

E. CONCLUSION.

For the foregoing reasons, Mr. Mohamed respectfully requests this Court reverse his conviction and remand for further proceedings.

DATED this 12<sup>th</sup> day of April, 2013.

Respectfully submitted,



JAN TRASEN (WSBA 41177)  
Washington Appellate Project (91052)  
Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 69145-7-I
v.	)	
	)	
ABDIRAZIK MOHAMED,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12<sup>TH</sup> DAY OF APRIL, 2013, 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 _____
<input checked="" type="checkbox"/> ABDIRAZIK MOHAMED 364508 WASHINGTON CORRECTIONS CENTER PO BOX 900 SHELTON, WA 98584	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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**SIGNED** IN SEATTLE, WASHINGTON THIS 12<sup>TH</sup> DAY OF APRIL, 2013.

X \_\_\_\_\_ *[Signature]*

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710