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NO. 35048-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS PINES,

Appellant.

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STATE OF WASHINGTON
BY DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 06-1-00449-1

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED March 12, 2007, Port Orchard, WA
Original **AND ONE COPY** filed at the Court of Appeals, Ste. 300/950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court erred in excluding evidence of a witness's prior drug use when such evidence was not admissible under either ER 608 or ER 404?

2. Whether there was sufficient evidence to convict when, viewing the evidence in a light most favorable to the State, a rational jury could have found each element of the crime beyond a reasonable doubt?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Nicholas Pines was charged by first amended information filed in Kitsap County Superior Court with three counts of delivery of a controlled substance, each with school zone enhancement. CP 1-4. After a jury trial, Pines was found guilty as charged and the trial court imposed a standard range sentence. CP 38. This appeal followed.

B. FACTS

Prior to trial, the State filed written motions in limine including motion in limine number six which stated as follows:

No reference to the witness's alleged prior drug and/or alcohol use or addiction, unless previously approved by the Court via offer of proof.

CP 11. In support of this motion the State cited ER 403, ER 607, and *State v. Tigano*, 63 Wn. App. 336, 344, 818 P.2d 1369 (1991), *review denied*, 118 Wn.2d 1021 (1992). CP 11.

At the pretrial hearing on the motions in limine, Pines objected to this motion. RP 7. Pines noted that the case at bar involved a confidential informant, and that in a pretrial interview the informant had admitted to using drugs and alcohol in the past. RP 7. Specifically, Pines stated that the informant had admitted to using crack cocaine in the past, but denied that she used it during the times of the controlled buys at issue (although she did admit to using alcohol during this timeframe). RP 7. The State argued that it was proper for Pines to question the informant regarding “any substances she was using during the time of the buys,” but that her prior drug use had nothing to do with credibility and should be excluded. RP 8, 10. The trial court ruled that Pines could not make any reference to the informant’s past drug use, as it was “not relevant to what happened in the time frame we are talking about,” and also stated that such testimony was excluded under ER 404(b). RP 10-11. The court, however, did specifically state that it would allow discussion or testimony on the issue of whether the informant was using or was under the influence during the three controlled buys. RP 10-11.

At trial, Detective Martin Garland of the Bremerton Police Department’s Special Operations Group testified that Edwina Stokes

contacted him and inquired into working as a confidential informant. RP 58, 61-2. Ms. Stokes said she had worked as an informant in the past and wanted to do so again. RP 62. Ms. Stokes testified that she contacted the police because she got tired of, “the drug people coming around, and, you know, a lot of activity with drugs.” RP 129. Ms. Stokes had known Pines for nine years. RP 128-29.

Detective Garland then began using Ms. Stokes to perform controlled buys, and Ms. Stokes was financially compensated for her work. RP 95. On cross-examination, Detective Garland conceded that as far as he knew Ms. Stokes was not gainfully employed during the time that she worked with the police, and that when a person was working as a paid informant their obvious motivation was to earn money, which he acknowledged was the case with Ms. Stokes. RP 96-97.

December 30th Controlled Buy

On December 30, 2005, Ms. Stokes contacted Detective Garland and stated she was able to purchase drugs from Pines. RP 62-3. Detective Garland initiated an investigation, and decided to conduct a controlled buy. RP 62-3. Detective Garland talked with Ms. Stokes about the buy, searched her, gave her \$200 to use for the buy, and then drove her in an unmarked car

to an intersection about four blocks away from a residence at 1503 Park, where Ms. Stokes was to go and purchase drugs. RP 63-4.

Ms Stokes went into the residence and spoke with a female named "Marilyn," and then went to contact Pines, who was on the phone. RP 133, 135. Ms. Stokes sat down on a couch next to Pines who was sitting on the floor talking. RP 134. Pines had a plate that had crack cocaine on it. RP 134. Ms. Stokes was waiting for him while he was on the phone, and eventually Pines asked her, "Hey, what's up?" RP 134-35. Pines continued talking on the phone, and then Ms. Stokes got on the phone for a second and spoke briefly with Pines' mother. RP 135-36. Ms. Stokes then told Pines that she wanted \$200 worth of crack. RP 134-35. Ms. Stokes gave Pines the money and then got up and went and talked to Marilyn. RP 134. When Ms. Stokes came back in the room another individual named "Eric" or "EZ" handed her a napkin with crack cocaine in it, and she noticed that Pines was still on the phone. RP 134-35. Ms. Stokes then left and went back to meet Detective Garland. RP 136.

After the buy, Detective Garland picked her up at the same location where he had dropped her off. RP 68-69. Ms. Stokes gave the drugs that she had purchased to Detective Garland, and he searched her to make sure that she did have any drugs or money on her. RP 69, 136. Detective Garland paid Ms. Stokes for her participation in the transaction. RP 70, 96, 136.

March 13th Controlled Buy

On March 13, 2006, Detective Garland and Ms. Stokes arranged to make another controlled buy from Pines at the 1503 Park address. RP 72-3. Detective Garland searched Ms. Stokes to make sure she was not carrying drugs or money, and then drove her to the same drop off point that they used before. RP 74-5. On this occasion Ms. Stokes used \$60 in the transaction and Pines himself handed her the drugs in a little plastic bag. RP 137-38, 155.

Detective Berntsen was in also at the scene and was watching the residence, and he observed Ms. Stokes go into the residence and then come out. RP 181, 183. After the buy, Ms. Stokes walked back to Detective Garland's car and gave the drugs that she had purchased to Detective Garland. RP 75. Detective Garland searched Ms. Stokes to make sure that she did have any drugs or money on her. RP 75. Detective Garland paid Ms. Stokes for her participation in the transaction. RP 74, 96.

March 20th Controlled Buy

On March 20th, Detective Garland and Ms. Stokes arranged a third controlled buy from Pines, and this transaction was the same as the previous transaction except for the fact that Ms. Stokes was given \$100 and the amount of drugs purchased, therefore, was different than the previous buys.

RP 76-77. Detective Garland again transported Ms. Stokes to the scene in his car. RP 78. Detective Endicott was present at the scene and was in a location where he could observe the front door of the residence. RP 118. He saw the informant approach the residence, enter through the front door, and exit a short time later. RP 118.

Ms. Stokes testified that on this occasion she gave Pines the \$100 and he handed her the crack cocaine. RP 156. After the buy, Ms. Stokes returned to Detective Garland's car and gave the drugs that she had purchased to Detective Garland. RP 79. As with the other buys, Detective Garland searched Ms. Stokes after the buy and paid Ms. Stokes for her participation in the transaction. RP 96, 99, 101.

The Cross-Examination of Ms. Stokes

During cross-examination by the defense, Ms. Stokes admitted that she did not have another job during the time that she was working with the police and that she was living on \$542 a month that she received from SSI. RP 161-62. Ms. Stokes also admitted that she went to Pines' home a number of other times in between the controlled buys, and that on some of those occasions she drank, but she denied drinking during any of the three controlled buys. RP 168, 175. Defense counsel also asked Ms. Stokes if she ever used crack cocaine during the buys or on the other occasions when she

visited the residence. RP 169-70. Ms. Stokes denied ever using crack cocaine during any of the buys and denied using crack on the other occasions when she visited Pines' residence. RP 169-70. Defense counsel also asked Ms. Stokes if she had a drinking problem, but the State objected and the court sustained the objection. RP 175.

The Search Warrant and Pines' Statements to the Police

Later in the day on March 20th, Detective Garland and other officers served a search warrant on the residence at 1503 Park Avenue. RP 80. An officer knocked on the door and another officer announced their presence through the loudspeaker of his patrol car and instructed the occupants to answer the door. RP 83-84. No one, however, answered the door. RP 84. The officers made entry and found four individuals inside, including Pines. RP 84, 88.

After securing the residence, Detective Garland introduced himself to Pines and informed him that the officers were there to serve a search warrant related to narcotics. RP 88. Detective Garland then Mirandized Pines, and Pines stated he understood his rights and agreed to speak with the Detective. RP 88-89. Detective Garland told Pines that he wanted to talk to him about his drug dealing. RP 89. After Pines denied that he sold drugs at the residence, Detective Garland asked Pines about the "short-stay traffic" at the

residence and explained that the police had been watching the home and observed a lot of short-stay traffic. RP 89. Pines stated that people come to his house for prayer meetings and the hardly sells crack anymore at all. RP 90. Detective Garland testified that Pines' exact words were, "People come here for bible studies and a prayer group. I don't hardly sell crack at all anymore." RP 93.

Cynthia Graff, a forensic scientist with the Washington State Patrol Crime Laboratory in Seattle tested the drugs that Ms. Stokes purchased from Pines, and testified that each of the three substances contained cocaine. RP 142, 146-49. Doug Wagner, a transportation supervisor for the Bremerton School District testified that there were school bus stops near the 1503 Park residence, and Detective Garland testified that the residence was within 1000 feet of the school bus stop. RP 151-52, 177.

At the conclusion of the evidence the parties discussed the State's proposed jury instructions, including an instruction on accomplice liability relating to Count 1. RP 213-14. Pines had no objections to the State's proposed instructions, and the trial court read those instructions to the jury. RP 214, 219, CP 14.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN EXCLUDING EVIDENCE OF A WITNESS'S PRIOR DRUG USE BECAUSE SUCH EVIDENCE WAS NOT ADMISSIBLE UNDER EITHER ER 608 OR ER 404.

Pines argues that the trial court erred in precluding him from asking Ms. Stokes about her prior drug use. App.'s Br. at 9. This claim is without merit because the trial court properly allowed Pines to ask Ms. Stokes whether she was using drugs or alcohol during the controlled buys, but precluded questioning about her prior drug use because such evidence was not admissible under the rules of evidence.

A trial court's decision to admit or exclude evidence will not be disturbed on appeal absent abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). Likewise, a court's decision regarding the scope of cross-examination is reviewed for abuse of discretion. *State v. Campbell*, 103 Wn.2d 1, 20, 691 P.2d 929 (1984). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. *State v. Perrett*, 86 Wn. App. 312, 319, 936 P.2d 426 (1997) (quoting *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 168, 876 P.2d 435 (1994)). An appellate court may affirm a trial court's evidentiary ruling on any basis, even one not stated by the trial court. *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995); see also RAP 2.5(a).

As a preliminary matter, Washington courts recognize a fundamental distinction between evidence of a witness's prior drug usage and evidence showing that the witness was using or was influenced by the drugs at the time of the occurrence that is the subject of the testimony. Under Washington law, evidence of drug use is admissible to impeach the credibility of a witness if there is a showing that the witness was using or was influenced by the drugs at the time of the occurrence that is the subject of the testimony. *State v. Russell*, 125 Wn.2d 24, 83, 882 P.2d 747 (1994), *citing State v. Dault*, 19 Wn. App. 709, 719, 578 P.2d 43 (1978); *State v. Hall*, 46 Wn. App. 689, 692, 732 P.2d 524, *review denied*, 108 Wn.2d 1004 (1987); *State v. Smith*, 103 Wash. 267, 269, 174 P. 9 (1918). As otherwise stated, "Evidence of a witness' use of opium, morphine, or a similar drug is not admissible for the purpose of impeaching his credibility, unless the witness was under the influence of such a drug while testifying or when the event to which he testified occurred." *State v. Brown*, 48 Wn. App. 654, 658, 739 P.2d 1199 (1987), *citing* 2 C. Torcia, *Wharton on Criminal Evidence* § 459, at 398 (13th ed. 1972).

It was for this reason that the State did not object below to those questions that related to Ms. Stokes use of drugs or alcohol during the actual controlled buys. RP 8, 10. In addition, the trial court properly allowed Pines to ask Ms. Stokes about her use of drugs or alcohol during the buys. See RP

10-11, 168-70, 175. The State’s objection below, and the trial court’s ruling at issue on appeal, therefore, concerned only the issue of Ms. Stokes prior drug use. Because evidence regarding prior drug use, as opposed to drug use contemporaneous to the events at issue, is treated much differently under Washington law, the trial court did not err in excluding questions along these lines, as outlined below.

1. Evidence of Ms. Stokes’ Prior Drug Use Was not Admissible Under ER 608

In those Washington cases in which a defendant has sought to introduce evidence that a State’s witness had prior involvement with drugs, the courts have almost always characterized the issue as an ER 608 issue. *See, for example, State v. Benn*, 120 Wn.2d 631, 651, 845 P.2d 289, *cert denied*, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993); *State v. Stockton*, 91 Wn. App. 35, 42, 955 P.2d 805 (1998); *State v. Cochran*, 102 Wn. App. 480, 486-87, 8 P.3d 313 (2000).

Pursuant to ER 608, a trial court has the discretion to allow cross-examination of a witness regarding specific instances of conduct concerning “the witnesses’ character for truthfulness or untruthfulness.” Specifically, ER 608(b) provides that:

Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if

probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

In *Benn*, the defendant argued that the trial court unduly restricted his ability to cross examine a State's witness when the court ruled that the witness's drug related activities were collateral and beyond the scope cross examination. *Benn*, 120 Wn.2d at 651. The Supreme Court affirmed the trial court, holding that the allegations of the witness's drug related activities were not relevant to his credibility as a witness under ER 608(b) and did not relate to his ability to relate his discussions with the defendant on the witness stand. *Benn*, 120 Wn.2d 651. The court also held that the trial court properly refused to allow the defense to call an additional witness to the stand to testify regarding the State's witness's drug activities because the testimony would not have been relevant to credibility and because ER 608(b) expressly prohibits an attack on witness credibility through resort to extrinsic evidence for proof of specific instances of witness conduct. *Benn*, 120 Wn.2d 651-52.

Similarly, in *Stockton*, the State asked the defendant a number of questions during cross-examination that the court characterized as an attempt to elicit an admission from the defendant that he was a drug user. *Stockton*, 91 Wn. App. at 42. The court noted these questions were directed at prior

misconduct and were therefore governed by ER 608, which states that evidence of prior misconduct is admissible only if probative of a witness's character for truthfulness. *Stockton*, 91 Wn. App. at 42. The court, however, held that, "Drug possession and use are not probative of truthfulness because they have little to do with a witness's credibility," and held that the admission of such evidence was error. *Stockton*, 91 Wn. App. at 42-43, *citing Benn*, 120 Wn.2d at 651; *State v. Wilson*, 83 Wn. App. 546, 553-54, 922 P.2d 188 (1996), *review denied*, 130 Wn.2d 1024, 930 P.2d 1231 (1997).

In addition, courts have held that prior drug convictions are not admissible under ER 609 because drug crimes have "little to do with a defendant's credibility as a witness." *Cochran*, 102 Wn. App. at 487, *citing State v. Hardy*, 133 Wn.2d 701, 709, 946 P.2d 1175 (1997). Stated another way, there is "nothing inherent in ordinary drug convictions to suggest the person convicted is untruthful and prior drug convictions, in general, are not probative of a witness's veracity under ER 609(a)(1)." *State v. Saunders*, 91 Wn. App. 575, 579, 958 P.2d 364 (1998), *quoting Hardy*, 133 Wn.2d at 709-10.

Washington courts, therefore, have consistently held that evidence of prior drug usage, and even prior drug convictions, are not probative of truthfulness and have little bearing on credibility. Thus, such prior conduct

of a witness is not admissible under ER 608, and the trial court did not err in precluding Pines from questioning Ms. Stokes regarding her prior drug usage.

2. Evidence of Ms. Stokes' Prior Drug Use Was not Admissible Under ER 404

In addition to his arguments concerning ER 607, Pines also argues that evidence of Ms. Stokes prior drug use was admissible under ER 404(b). App.'s Br. at 13, 19. Under ER 404(b), evidence of a witness's prior misconduct may be admissible to prove intent, motive, plan, or absence of mistake. Prior bad acts are admissible only if the evidence is logically relevant to a material issue before the jury and the probative value outweighs any prejudice. *State v. Boot*, 89 Wn. App. 780, 788, 950 P.2d 964 (1998). Before a trial court may admit evidence of other crimes or misconduct, it must: (1) find by a preponderance of the evidence that the misconduct occurred; (2) determine whether the evidence is relevant to a material issue; (3) state on the record the purpose for which the evidence is being introduced; and (4) balance the probative value of the evidence against the danger of unfair prejudice. *State v. Brown*, 132 Wn.2d 529, 571, 940 P.2d 546 (1997). In doubtful cases, the evidence should be excluded. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

Pines cites only one case, *State v. Barker*, 75 Wn. App. 236, 881 P.2d 1051 (1994), in support of his argument. App.'s Br. at 14. In *Barker*, the defendant was charged with assaulting and robbing a hitchhiker. *Barker*, 75

Wn. App. at 238. The defendant sought to introduce evidence that the victim had been convicted of a DWI (and that as a condition of his probation he was not to have any alcohol or illegal drugs) to support the defense claim that the incident was really a fight over drugs and alcohol and that victim fabricated the robbery allegations to cover up his use of alcohol or drugs at the time of the incident. *Barker*, 75 Wn. App. at 242. The court of appeals rejected the defense argument and affirmed the trial court, stating,

We find that the court correctly denied the admission of the DWI evidence. The court found that the evidence was not relevant to prove the essential element of motive under ER 404(b), stating that “I don’t see that the existence of a conviction or the fact that he was under a probation condition makes it any greater or more likely that if he doesn’t want to be discovered that he’s under the influence of drugs. That motive is there regardless of the existence of a DWI conviction or not.” We agree.

Barker, 75 Wn. App. at 242-43. The *Barker* court also noted that the defendant did not try to admit the evidence to establish the victim’s lack of recall or his ability to observe or perceive, and thus, the evidence regarding the victim’s past was “neither relevant to show [the victim’s] motive nor did it make the existence of Barker’s robbery more or less probative.” *Barker*, 75 Wn.App at 243.

Although the court in *Barker* addressed the admissibility of the evidence under ER 404(b), at least one commentator has noted that *Barker*’s analysis of this issue as an ER 404(b) issue was unusual, noting that,

Interestingly, the court in *Barker* chose to analyze the issue of admissibility under ER 404(b)--the rule that limits the admissibility of person's prior misconduct to prove subsequent conduct conformity therewith. The court said the issue was whether the evidence was admissible to show motive, as the term is used in the rule. ER 404(b) is seldom regarded as governing the admissibility of incidents in a witness's past, offered to suggest bias or motive to fabricate. In fact, the Federal Rules of Evidence and their state counterparts have often been criticized for not addressing the admissibility of evidence to show bias or motive to fabricate.

5A Karl B. Tegland, *Wash. Prac., Evidence Law and Practice* §607.13 n.4 (Use of alcohol or drugs)(4th ed. 1999). For these reasons, it appears that ER 608, and not ER 404, is the proper rule for the specific facts before this court.

Even under a traditional ER 404(b) analysis, however, courts have held that if the only relevancy of the disputed evidence is to show propensity to commit similar acts, admission of prior acts may be reversible error. *See, State v. Pogue*, 104 Wn. App. 981, 985, 17 P.3d 1272 (2001). Thus, even in traditional ER 404(b) cases, the courts have held that use of prior drug related acts are not admissible under ER 404(b) to show things such as intent. For example, in *State v. Wade*, 98 Wn. App. 328, 989 P.2d 576 (1999), a trial for possession with intent to deliver, the trial court allowed the State to introduce evidence of two prior instances of drug dealing to show the defendant's intent. The court of appeals reversed, holding that the prior instances of drug dealing demonstrated intent only through an inference of propensity: because

the defendant had the intent in the past, he therefore had the same intent when committing the crime charged. *Wade*, 98 Wn. App. at 336.

Similarly, other courts that have addressed the balancing of the probative value of evidence of a witness's prior drug use against potential for prejudice in similar instances, and have concluded that the potential for prejudice outweighs any potential probative value. *See, for example, State v. Tigano*, 63 Wn. App. 336, 818 P.2d 1369 (1991), *review denied*, 118 Wn.2d 1021, 827 P.2d 1392 (1992) (in a prosecution for murder, the trial court properly refused to allow defendant to impeach a prosecution witness by introducing evidence that the witness used drugs over a period of years, where the defendant was unable to establish that the witness was under the influence of drugs at the time in question; "evidence of drug use on other occasions, or of drug addiction, is generally inadmissible on the ground that it is impermissibly prejudicial," *citing State v. Renneberg*, 83 Wn.2d 735, 737, 522 P.2d 835 (1974)). *See also, Saunders*, 91 Wn. App. at 579-80.

In addition, in *State v. Pogue*, 104 Wn. App. 981, 17 P.3d 1272 (2001), a drug possession case, the court held that evidence that a defendant had prior experience with drugs and that he had possessed drugs in the past was not admissible to rebut his unwitting possession defense or to rebut his defense that the police had planted the drugs. *Pogue*, 104 Wn. App. at 986-87. Agreeing with the State's concession of harmful error, the appellate court

held that the evidence was not admissible because it had no relevancy apart from suggesting that the defendant had a propensity to commit drug crimes. *Pogue*, 104 Wn. App. at 986-87. The court distinguished cases where the defendant had made sweeping assertions as to his or her good character, finding that *Pogue* had said nothing to imply that he was not the type of person to be involved in drugs. *Pogue*, 104 Wn. App. at 985- 86.

In the present case, Pines' argument concerning Ms. Stokes' prior drug activities necessarily relies on the presumption that once a person has used drugs, he or she always has a motive to use drugs, and also always has a motive to obtain money for future drug use. This is exactly the kind of propensity argument prohibited by ER 404(b).

The only additional argument raised by Pines is the claim that the Ms. Stokes' prior drug use was evidence of her motive for testifying against Pines. App.'s Br. at 15. Pines, however, cites no cases that have authorized evidence of prior drug use as motive evidence in a similar situation. Rather, Pines only citation is to *Barker*, where the court excluded the evidence when it was offered to show motive to fabricate, as outlined above. App.'s Br. at 14-15.

A similar motive argument was also rejected in *State v. LeFever*, 102 Wn.2d 777, 782-85, 690 P.2d 574 (1984), *overruled on other grounds by State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013, 80 A.L.R.4th 989 (1989),

overruled on other grounds by State v. Collins, 112 Wn.2d 303, 771 P.2d 350 (1989). In *LeFever*, the defendant was charged with three robberies and after his arrest, the defendant told his parole officer that he had a \$125 per day heroin habit. *LeFever*, 102 Wn.2d at 779. The State argued that the defendant's heroin addiction was relevant to show his financial need to support his habit and was, therefore, admissible to show motive for the bank robberies. *LeFever*, 102 Wn.2d at 782. The Supreme Court, however, rejected this argument. *LeFever*, 102 Wn.2d at 785.

Finally, it should be noted that Pines was allowed to cross examine Ms. Stokes regarding her financial situation at the time of the controlled buys, and she admitted that she was not gainfully employed and was living on SSI. RP 161-62. Thus, Pines was able to introduce evidence to show that the witness had a potential financial motivation. Given this evidence, Pines fails to show why it would be relevant or necessary to show that the witness had used drugs in the past. The only potential theory is that Ms. Stokes used drugs in the past, and thus must have wanted to use drugs again and needed money to enable her to do this. Pines was able, however, to show that the witness was living on extremely limited means, and there would be a litany of items that the witness may have wanted to purchase but was unable to due to her situation. Even if Pines could have shown that Ms. Stokes actually wanted money to purchase drugs, he has failed to show what relevance this

would have, especially in light of the fact that the jury was already aware of the witness's financial condition. Any minimal probative value would have been outweighed by the danger of unfair prejudice, and the evidence, therefore, would not be admissible under ER 404(b).

As the State conceded below, evidence regarding the witness's use of drugs or alcohol during the timeframe of the actual events at issue was relevant, and the trial court properly allowed Pines to ask Ms. Stokes about her drug and alcohol use at these relevant times. Evidence regarding Ms. Stokes' prior drug or alcohol use, however, was not admissible under either ER 608 or ER 404, and the trial court, therefore, did not err in excluding such evidence, and Pines' arguments to the contrary must fail.

B. THERE WAS SUFFICIENT EVIDENCE TO CONVICT BECAUSE, VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, A RATIONAL JURY COULD HAVE FOUND EACH ELEMENT OF THE CRIME BEYOND A REASONABLE DOUBT.

Pines next argues that there was insufficient evidence to convict him of the count of deliver of a controlled substance that occurred on December 30, 2005. App.'s Br. at 22. This claim is without merit because, viewing the evidence in a light most favorable to the State, a rational jury could have found each element of the crime beyond a reasonable doubt.

Evidence is sufficient if, taken in the light most favorable to the State, it permits a rational jury to find each element of the crime beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Moles*, 130 Wn. App. 461, 465, 123 P.3d 132 (2005), *citing State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Additionally, credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Accordingly, a reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

The crime of delivery simply requires the knowing, physical transfer of a controlled substance. *State v. Evans*, 80 Wn. App. 806, 814, 911 P.2d 1344 (1996); *See also*, RCW 69.50.401(a), WPIC 50.06. In addition, under RCW 9A.08.020(1), a person is guilty of a crime if it is committed by the conduct of another person for which the defendant is legally accountable, and a person is legally accountable for the conduct of another when he is an

accomplice. Furthermore, there is no distinction between principal and accomplice liability under Washington law. *State v. Mora*, 110 Wn. App. 850, 859, 43 P.3d 935 (2002), *State v. Molina*, 83 Wn. App. 144, 920 P.2d 1228 (1996). In the context of unlawful delivery, evidence is sufficient to support accomplice liability if it shows that the defendant knew that another person was delivering a controlled substance and was present for the purpose of aiding the other person in carrying out the illegal sale. *See State v. Sanchez*, 60 Wn. App. 687, 694, 806 P.2d 782 (1991).

In *State v. Wilson*, 95 Wn.2d 828, 631 P.2d 362 (1981), the court upheld a conviction where the defendant's only actions were to encourage a buyer to purchase marijuana from another by stating the marijuana was very good and was well worth the money. The court held that regardless of whether the sale would have occurred without this encouragement, the evidence was sufficient because it showed an intent to encourage. *Wilson*, 95 Wn.2d at 829-33.

In the present case the jury was instructed that to convict Pines of count one, the State had to prove that on or about December 30, 2005 the defendant or an accomplice delivered cocaine and that the defendant knew that the substance was cocaine. CP 29. In addition, the jury was instructed that a person who is present at the scene and ready to assist by his or her

presence is aiding in the commission of the crime can be an accomplice. CP 30.

In the present case the testimony showed that, during the December 30th buy, Ms. Stokes sat down on a couch next to Pines who was sitting on the floor talking, and that Pines had a plate with crack cocaine on it. RP 134. Ms. Stokes was waiting for him while he was on the phone, and eventually Pines asked her, "Hey, what's up?" RP 134-35. Ms. Stokes told Pines that she wanted \$200 worth of crack and gave the money to Pines, and then went into another room for a period of time. RP 134-35. When Ms. Stokes came back in the room another individual named "Eric" or "EZ" handed her a napkin with crack cocaine in it, and Ms. Stokes saw that Pines was still on the phone. RP 134-35.

This evidence, when viewed in a light most favorable to the state, was sufficient to show that Pines was present, and (at the very least) ready to assist in the delivery. Pines, of course, actually aided in the sale of the cocaine when he took the order for the cocaine and took the money for the cocaine from Ms. Stokes. RP 134-35. Although Pines did not personally hand Ms. Stokes the cocaine, he was seen with a plate of cocaine prior to the actual delivery. From these facts a reasonable jury could conclude that Pines acted as an accomplice in the delivery.

Pines argument appears to imply that there was a requirement that Pines personally hand the drugs to Ms. Stokes, but Pines fails to cite any authority for this position. In any event, the evidence presented below was clearly sufficient to show, at the least, that Pines acted as an accomplice in the delivery when he took the order and took the money for the sale of cocaine.

For all of these reasons, Pines' argument concerning the sufficiency of the evidence must fail.

IV. CONCLUSION

For the foregoing reasons, Pines' conviction and sentence should be affirmed.

DATED March 12, 2007.

Respectfully submitted,

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