IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON , Respondent,	)	No. 65816-6-I
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
WOODIE DEWAYNE KEES,	)	
	)	
Appellant.	)	FILED: November 7, 2011
	)	
	)	
	)	

Appelwick, J. — Kees appeals his conviction for violation of the Uniform Controlled Substances Act, chapter 69.50 RCW, for delivery of cocaine. He argues there was insufficient evidence to prove his identity as a perpetrator. He also argues that the trial court erroneously relied on the State's presentence report and appended criminal history in determining his offender score. The State's evidence was sufficient, but the trial court erred at sentencing. We affirm the conviction, reverse the sentence, and remand.

FACTS

On February 11, 2010, Officer Juan Tovar of the Seattle Police

Department was working as the undercover purchaser in a buy/bust operation. He approached a group of people standing on a street corner and made contact with a man who was standing out from the group, later identified as Mark Smith. Smith asked Officer Tovar what he wanted, and Officer Tovar responded that he "needed 40," meaning $40 worth of crack cocaine. The two men moved a few steps away from the group of people, and Smith asked for the money. Smith dropped a piece of crack cocaine into Officer Tovar's hand, and Officer Tovar handed over the money. Officer Tovar believed the piece was too small for what he paid, so he told Smith he was owed another piece. Smith said, "'Well, I will owe you another one.'" At that point, a second man, later identified as Woodie Kees, joined the conversation and told Officer Tovar "he would get [him]." Officer Tovar took that to mean that Kees had the other piece of crack cocaine he was owed. Kees then reached into his mouth and pulled out a small piece of crack cocaine, which he handed over to Officer Tovar. Smith told Officer Tovar, "There you go."

Officer James Lee was one of Officer Tovar's trailing officers. Officer Lee testified that he had a clear view of the transaction and of the three men involved, from a distance of approximately two lanes of traffic. After Officer Tovar received the second rock of crack cocaine from Kees, he gave the good-buy sign to Officer Lee, who then instructed the arrest team to move in. Officer Lee described both Smith and Kees to the arrest team and maintained his position until both men were taken into custody. In court, Officers Tovar and Lee both identified Kees as the person who had provided the second rock of crack

cocaine.

The State charged Kees with violation of the Uniform Controlled Substances Act, chapter 69.50 RCW, for the delivery of cocaine. The jury found Kees guilty as charged.

DISCUSSION

I. Sufficiency of the Evidence

Kees was convicted of Violation of the Uniform Controlled Substances Act for the delivery of cocaine. Under RCW 69.50.401(1), it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance. The trial court set forth the elements of this crime in the jury instructions:

> (1) That on or about [the day in question], the defendant delivered a controlled substance (cocaine);
>
> (2) That the defendant knew that the substance delivered was a controlled substance (cocaine); and
>
> (3) That this act occurred in the State of Washington.

For the jury to convict, the State was required to prove each of these elements of the charged crime beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Additionally, 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).

Kees argues that there was insufficient evidence establishing his identity

as the second individual involved in the drug transaction. Where a party challenges the sufficiency of evidence at trial, we review the evidence in the light most favorable to the prosecution to determine whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). In applying this test in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Joy, 121 Wn.2d 333, 339, 851 P.2d 654 (1993). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000).

Weighing the evidence here in the light most favorable to the State, there was ample support for the jury's conclusion that Kees was the individual who delivered the second rock of crack cocaine to Officer Tovar. Chief amongst this evidence was Officer Tovar's own testimony. Officer Tovar identified Kees at trial, testified that it was Kees who interjected into his conversation with Smith, and stated that it was Kees who provided him with the second rock of crack cocaine. Officer Tovar and Kees were clearly only feet apart at the time of the transaction—Kees handed a rock of crack cocaine directly to Officer Tovar—and Officer Tovar thus had an opportunity to view Kees very closely. Officer Tovar also viewed booking photographs of both Smith and Kees following their arrests and confirmed that they were the two individuals who had delivered the cocaine to him.

Officer Lee also identified Kees in court as the individual who had provided the second rock of crack cocaine to Officer Tovar. Officer Lee testified he was two lanes of traffic away from Officer Tovar and Kees at the time of the transaction. He also testified that he had an unobstructed view of the transaction and that there was no traffic on the street between him and Kees. Officer Lee stayed at his post and maintained visual contact with both Smith and Kees from the time of the transaction until the time of arrest. He also relayed a description of Smith and Kees to the arrest team.

Kees argues that Officer Tovar's identification of him is unreliable, because Officer Tovar testified to being focused primarily on Smith and because he had never seen Kees before. Kees also argues that Officer Lee's identification is unreliable, since Officer Lee did not see Smith hand the first rock of crack cocaine to Officer Tovar. But, these arguments are unpersuasive, where we review the officers' testimony and all other evidence in the light most favorable to the State. Engel, 166 Wn.2d at 576. We conclude that there was sufficient evidence to support the jury's finding that Kees was the individual who handed the second rock of crack cocaine to Officer Tovar.

II. Kees's Offender Score

Kees also argues that the trial court erred in its determination of his offender score. He argues that his prior felony convictions should have "washed out" under RCW 9.94A.525(2)(c), and his offender score should have been zero. Under the "wash out" provision:

> [C]lass C prior felony convictions other than sex offenses shall not

> be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, 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.

RCW 9.94A.525(2)(c). Kees points to the trial court's judgment and sentence and its appended findings on his criminal history as the sole findings entered by the trial court regarding his prior convictions. That criminal history appendix contains the 11 prior felonies Kees was convicted for (between the years of 1986 and 2002) but none of his misdemeanors. As Kees correctly asserts, more than five years have transpired between his last felony conviction, sentenced on August 29, 2002, and this present crime, committed on February 11, 2010. He therefore contends that the trial court's own findings required it to conclude that there was a five year period in which he was crime-free and that the wash out provision should have applied.

Before the sentencing hearing, however, the State proffered a presentence report and an appended document entitled "Prosecutor's Understanding of [Kees's] Criminal History." That comprehensive criminal history contained not only Kees's felony convictions but also his misdemeanors and gross misdemeanors. With the dates of his misdemeanors factored in, it is apparent that Kees never spent five consecutive years in the community without committing a crime. If the misdemeanor crimes presented there by the State were adequately proven, there is no doubt that Kees would be ineligible for the wash out provision. The question then is whether the State's written presentence report and proffered criminal history were properly considered by

the trial court, and whether Kees acknowledged that proffered criminal history by failing to object to it.

Under a plain text reading of the Washington State Legislature's 2008 amendments to RCW 9.94A.500 and 530, it is clear that the trial court properly relied on the State's proffered criminal history. Under the applicable statute, a trial court determining a standard range sentence "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). And, under the 2008 amendments: "Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing." RCW 9.94A.530(2). RCW 9.94A.500(1) also provides 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." Here, Kees did not raise an objection to the criminal history presented by the State at the time of sentencing. Thus, under these statutes, Kees "acknowledged" the information contained in the State's proffered criminal history, and the trial court was statutorily entitled to rely on that history. That proffered criminal history reflected an offender score of "11," based on Kees's four prior felony drug convictions, seven other felony convictions, and based on the fact that his misdemeanors prevented those felony convictions from washing out.

After the 2008 amendments to RCW 9.94A.500 and .530, however,

Division II of this court has expressly held that this application of RCW 9.94A.500 and .530 is unconstitutional. State v. Hunley, 161 Wn. App. 919, 253 P.3d 448, ___ Wn.2d ___, ___ P.3d ___ (2011). The Hunley court, relying on State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999), emphasized that constitutional due process requires the State to prove the defendant's prior convictions by a preponderance of the evidence. Hunley, 161 Wn. App. at 927. The court concluded that a "defendant's silence is not constitutionally sufficient to meet this burden. . . . [T]he 2008 amendments to RCW 9.94A.500(1) and RCW 9.94A.530(2) cannot constitutionally convert a prosecutor's 'bare assertions' into evidence or shift the burden of proof by treating the defendant's silence as acknowledgment." Id. at 928-29. The court proceeded to vacate Hunley's sentence and remand for resentencing, where the State was entitled to present further evidence of the past convictions it had initially alleged. Id. at 929-930; see State v. Mendoza, 165 Wn.2d 913, 930, 205 P.3d 113 (2009) (where "there is no objection [from the defendant] at sentencing and the State consequently has not had an opportunity to put on its evidence [of prior convictions], it is appropriate to allow additional evidence at sentencing.").

Based on Hunley, we hold that Kees's silence regarding the State's proffered criminal history could not constitutionally have constituted an acknowledgment of that history, without improperly shifting the State's burden of proof. Accordingly, we vacate Kees's sentence and remand, with an opportunity for the State to present additional evidence at resentencing in support of Kees's criminal history.

We affirm in part, reverse in part, and remand.

Appelwick, J.

WE CONCUR:

Spearman, J.

Becker, J.