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Court of Appeals
Division I
State of Washington

No. 71863-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RANDY SIMMS,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. The speculation of two teenagers about the identity of a controlled substance does not meet the State's burden of proving the specific identity of a drug when that drug substantially increases the offense's penalty.

The State charged Randy Simms with delivering "methamphetamine, a controlled substance and narcotic drug" to two teenagers. CP 8-9. It did not present any forensic evidence, such as lab tests or field tests, confirming the identity of the controlled substance. No professional or lay person with experience in drug detection looked at the substance to identify it. Mr. Simms was not found in possession of the paraphernalia used for ingesting methamphetamine. The State did not locate any corroborating communications from cell phones even though the two teenagers claimed to have discussed this drug exchange in text messages with Simms conducted by cell phone.

When methamphetamine is the controlled substance alleged in a drug prosecution, its identity is an "essential element" of the offense because it increases the available penalty. *State v. Goodman,* 150 Wn.2d 774, 785-86, 83 P.3d 410 (2004). The identity of the controlled substance is necessary when it "aggravates the penalty a court may impose." *State v. Zillyette*, 178 Wn.2d 153, 161, 307 P.3d 712 (2013).

"[I]f a crime can be committed in one of several ways," the information must allege, "and the State need prove, the specific way it was committed only where it affects the penalty facing the defendant." *State v. Eaton*, 164 Wn.2d 461, 469, 191 P.3d 1270 (2008). Delivery of methamphetamine increases the penal consequences and it must be alleged and proven beyond a reasonable doubt. Former RCW 69.50.401(2) (2011) (setting forth different penalties for different types of controlled substances).

To enforce the prosecution's burden of proof, a court reviewing the sufficiency of evidence may not assume that a properly instructed jury will reach the correct result as long as there is some evidence in the record that supports a conviction. *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, 221-22, 616 P.2d 628 (1980). The reviewing court does not simply ask whether "substantial evidence" supports the conviction, because *Jackson* rejected that standard and requires more rigorous review for sufficient evidence. *State v. Vasquez*, 178 Wn.2d 1, 6, 309 P.3d 318 (2013).

Under the more rigorous test of *Jackson*, reasonable inferences from the evidence are construed in favor of the prosecution but a case

may not rest on speculation or conjecture. *United States v. Nevils*, 598 F.3d 1158, 1167 (9th Cir. 2010). "[E]vidence is insufficient to support a verdict where mere speculation, rather than reasonable inference, supports the government's case." *Id*. A reasonable inference is not based on "patently equivocal" evidence. *Vasquez*, 178 Wn.2d at 14.

The prosecution misrepresents the speculative nature of its accusations. Mr. Simms denied giving methamphetamine to the police, which is a more significant indication of his lack of involvement than the two teenagers' assertion that he said he was giving them "meth," but he also called it, "bree." Bree is not a known nickname for methamphetamine, and Mr. Simms told police "bree" referred to marijuana. Ex. 10 at 96; 2/4/14RP 23, 100. The teenagers claim about the sometime-label Mr. Simms used for the drug the teenagers wanted to try is far afield from an actual admission to police after being advised of the right to counsel, as occurred in *Delmarter*, where there were also corroborative field tests indicated the substances were cocaine and heroin. *In re Pers. Restraint of Delmarter,* 124 Wn.App. 154, 157-58, 101 P.3d 111 (2004).

The State also vastly overstates the probative value of "expert" testimony. A toxicologist testified about coursework giving her insight

into how people taking methamphetamine may feel, but she conceded no unique or universal experience distinguishes using methamphetamine from other controlled substances, particularly stimulants like cocaine, ecstasy, or amphetamines. 2/5/14RP 9 9-11, 20-23, 28. No drug tests occurred to discern its presence in someone's body and no trained observer gave the opinion that either P.I. or N.B. appeared to be under the effect of methamphetamine. *Id*. at 9.

Presenting similarly generic and ambiguous testimony, chemist Martin McDermott described the many different forms in which methamphetamine may appear, including powder, crystal, clear, or brown. 2/5/14RP 121. It may be ingested in a glass tube, like one the complainants described smoking from, but no one found Mr. Simms in possession of a similar tube, no one produced the pipe they used, and other drugs are also smoked in pipes or tubes. 2/3/15RP 106; 2/4/15RP 100; 2/5/14RP 122-24. The speculative and general testimony from drug experts did not make it more likely that Simms gave the teenagers methamphetamine as opposed to another stimulant, like rock cocaine which is also a drug ingested in a pipe.

To prove the identity of a controlled substance based on someone's opinion, without a confirmatory test, the person offering the

opinion must be "sufficiently experienced with the drug." *Clifton v. State*, 499 N.E.2d 256, 258 (Ind. 1986); *see State v. Colquitt*, 133 Wn.App. 789, 800, 137 P.3d 892 (2006). The inexpert opinion of inexperienced teenagers coupled with nonspecific, generic testimony about the variable appearance and effects of drugs such as methamphetamine did not prove the identity of the substance was methamphetamine to a reasonable degree, which is an essential element of the offense as charged and essential to the punishment imposed.

Furthermore, the jury was not properly instructed, which this Court must take into account when assessing the sufficiency of the jury's verdict. *Jackson*, 443 U.S. at 319. On the contrary, it was instructed that any controlled substance would suffice to meet the State's burden of proof, even though Mr. Simms was charged with delivering only the specific substance methamphetamine, which was an essential element of the State's burden of proof.

2. The non-specific to-convict instruction deviated from the charging document, diluted the State's burden of proof, and constitutes a verdict on uncharged alternative means.

The prosecution asserts that defense counsel invited the error in the to-convict instructions that permitted the jury to rest its verdict on an uncharged controlled substance, but it does not supply the written instructions on which this claim is based. Response Brief at 16 n.6. CrR 6.15(a) directs that in order to propose jury instructions, they "shall be" filed with the clerk, in addition to being served on the court and counsel. *See State v. Blazina*, _ Wn.2d _, 344 P.3d 680, 685 (2015) ("we treat the word 'shall' as presumptively imperative—we presume it creates a duty rather than confers discretion"). The State concedes the record does not contain any written instructions submitted by the defense. The record shows that the prosecution's own instruction made the very error complained of on appeal. CP 177-78. Even if the defense proposed different language than the State used in order to correct some errors in the State's instructions, and did not notice this particular error, the defense did not invite the State to seek a verdict based on uncharged alternative means or waive his right to have the State prove the essential elements of the crime charged. "[A] criminal defendant has the

right to require the State prove every element constituting the crime." *State v. Humphries*, 181 Wn.2d 708, 714, 336 P.3d 1121 (2014). Mr. Simms was not informed that he was waiving his right to have the State prove the essential element and has not waived that right.

In claiming the error was not harmful, the State points to particular parts of the closing arguments that were about methamphetamine. But the closing arguments also repeatedly referenced "drugs" generically, "substances" generically, as well as "weed." 2/11/4RP 20-80.[1] Given the weak and speculative evidence that Mr. Simms supplied methamphetamine to the teenagers as opposed to some other drug, and the harsh penalties that follow from methamphetamine delivery, the State's efforts to dilute its burden of proof by inviting the jury to consider any controlled substance beyond the specific substance charged violated Mr. Simms' rights to notice and due process of law, as a manifest constitutional error requiring reversal and a new trial.

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[1] Methamphetamine was mentioned 42 times during closing arguments, while other drugs by name or generically were referred to at least 51 times. 2/11/14RP 20-80 (counting "drugs" 28 times, "substances" 16 times, and "weed" seven times).

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Simms respectfully requests this Court vacate and reverse his delivery convictions and remand his case for further proceedings.

DATED this 22nd day of May 2015.

Respectfully submitted,

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

STATE OF WASHINGTON, Respondent, v. RANDY SIMMS, Appellant.	)))))))))	NO. 71863-1-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF MAY, 2015, I CAUSED THE ORIGINAL **REPLY 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:

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SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF MAY, 2015.

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