71863-1

NO. 71863-1-I
Amended version

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 OPENING BRIEF

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A. INTRODUCTION.

Randy Simms befriended two teenagers who begged him to supply them with drugs. Mr. Simms gave them something called "bree," and both teenagers thought it was methamphetamine. Neither had any prior experience with methamphetamine. The identity of the substance was never established by testing in a laboratory, observed by anyone with experience in identifying controlled substances, or corroborated by other evidence. Based on the teenagers' claim that Mr. Simms gave them methamphetamine, he was charged with delivering this specific substance. Due to the lack of evidence proving the identity of the substance, Mr. Simms' convictions must be overturned.

Additionally, the State sought a conviction for an uncharged offense by specifically charging Mr. Simms with delivering methamphetamine then encouraging the jury to convict him for delivering any controlled substance. It also improperly requested HIV testing as a sentencing condition without statutory authority.

B. ASSIGNMENTS OF ERROR.

1. There was insufficient evidence to prove the two counts of delivery of methamphetamine to a minor.

2. The prosecution deprived Mr. Simms of fair notice of the charges against him by obtaining a conviction based on conduct that was not charged in the Information.

3. Mr. Simms was denied his right to a fair trial and verdict by a unanimous jury when the prosecution's argument and court's instructions permitted the jury to convict him based on conduct that was not charged in the Information.

4. The court impermissibly imposed the sentencing condition of HIV testing without statutory authority.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. When the identity of the controlled substance is an essential element of the crime, the prosecution does not meet its burden of proof absent confirmatory testing, qualified expert opinion evidence, or significant circumstantial evidence such as a confession. Here, the only evidence indicating Mr. Simms gave methamphetamine to two inexperienced teenagers was the allegation of the teenagers that they believed they smoked methamphetamine. Did the prosecution fail to offer competent evidence establishing that methamphetamine was the substance Mr. Simms gave to the two teenaged complainants?

2. Principles of due process require the prosecution to provide fair notice of the charged offense. The prosecution specifically charged Mr. Simms with delivering methamphetamine but at trial, accused him of supplying some type of controlled substance that was a stimulant or marijuana and the court's instructions let the jury convict him for delivering any "controlled substance." Did the State fail to provide the essential notice to Mr. Simms of the acts underlying his conviction?

3. The prosecution must prove all essential elements of an offense to a unanimous jury. The court instructed the jury that its verdict could rest on any controlled substance supplied to the complainants. The State's evidence indicated Mr. Simms gave marijuana as well as some potential stimulant to the complainants even though he was only charged with delivering methamphetamine. Did the prosecution's arguments and courts instructions undermine Mr. Simms' right to a fair trial and unanimous jury verdict on the essential element of the identity of the controlled substance?

4. By statute, the court may order a person submit to an HIV test as a sentencing condition only when convicted of specified offenses. When Mr. Simms was not convicted of an offense specified in RCW

70.24.340, did the court lack authority to order HIV testing as a sentencing condition?

D. STATEMENT OF THE CASE.

At 15 and 16 years old, respectively, P.I. and her boyfriend N.B.[1] wanted to try more drugs, having used only marijuana and ecstasy in the past. 2/3/14RP 102, 110; 2/4/14RP 51, 96, 127.[2] N.B. befriended Randy Simms, who was the step-father of a school friend. 2/4/14RP 126-27. The teenagers asked Mr. Simms to get them methamphetamine in text messages sent to his phone. 2/4/14RP 53, 96. He gave them a crystal-type substance that they smoked in a pipe a number of times during the spring and summer of 2011. 2/3/14RP 106; 2/4/14RP 102. They also smoked marijuana "constantly," and at times with Mr. Simms. 2/4/14RP 94, 104, 144; Ex. 10 at 72, 96.

By the end of the summer, Mr. Simms grew concerned about N.B.'s behavior and, with N.B.'s father, convinced him to enter inpatient drug treatment. 2/4/14RP 143; Ex. 10 at 80-81. N.B. disliked the program and left before completing it. 2/4/14RP 67. While there, he

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[1] Because the complainants were minors at the time of the incident, their initials are used in deference to their privacy interests.

[2] The verbatim report of proceedings (RP) is referred to by the date of the proceeding.

told a counselor Mr. Simms had given him methamphetamine and the counselor called the police. 2/4/14RP 85, 115.

The State charged Mr. Simms with two counts of delivering methamphetamine to a minor based on N.B. and P.I.'s allegations. CP 8-9. The State did not obtain corroborating text messages, drug paraphernalia, or controlled substances in Mr. Simms' possession. 2/3/14RP 41. 68.

N.B. also told the police he had a camera Mr. Simms gave him. 1/29/14RP 32; 2/4/14RP 110-11. He claimed Mr. Simms encouraged him and P.I. to pose for seductive pictures by telling them he could sell the pictures to a magazine as a way for the teenagers to raise money. 2/4/14RP 106;135-36. Although the police found no evidence Mr. Simms took the pictures other than the complainants' allegations, he was additionally charged with sexual exploitation of a minor. CP 9.

Mr. Simms was convicted after a jury trial of two counts of delivery of a controlled substance to a minor and one count of sexual exploitation of a minor. CP 71-73. Having no criminal history, he received a standard range sentence of 60 months incarceration. CP 94, 96.

Pertinent facts are addressed in further detail in the relevant argument sections below.

E. ARGUMENT.

1. **With no chemist's report, no drug test, no drug paraphernalia, no independent observations, and relying solely on the non-expert testimony of two teenagers, there was insufficient evidence that Mr. Simms delivered methamphetamine**

a. *The prosecution was required to prove Mr. Simms delivered methamphetamine.*

The burden of proving the essential elements of a crime unequivocally rests upon the prosecution. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. 14; Const. art. I, § 3. Proof beyond a reasonable doubt of all essential elements is an "indispensable" threshold of evidence that the prosecution must establish to garner a conviction. *Id.* at 364. It reduces the risk that factual error results in a conviction and gives "concrete substance to the presumption of innocence." *Id.* at 363. While the sufficiency of the evidence is reviewed in the light most favorable to the prosecution, "the existence of a fact cannot rest upon guess, speculation, or conjecture." *State v. Colquitt*, 133 Wn.App. 789, 796, 137 P.3d 892 (2006).

When an essential element of a crime is the knowingly delivery of a specific controlled substance such as methamphetamine, the prosecution is required to prove the identity of the substance delivered was in fact methamphetamine. *Colquitt*, 133 Wn.App. at 800; RCW 69.50.406(1). In *Colquitt*, police report alleged the defendant had a small plastic bag with several white, rock-like items inside. *Id.* at 792. The arresting officer believed it was cocaine and a field test confirmed his suspicion. *Id.* at 792. He was convicted of possession of cocaine after a stipulated facts trial relying on the police reports. *Id.* at 792-93.

The Court of Appeals reversed Mr. Colquitt's conviction based on insufficient evidence that the substance was cocaine. The substance seized from Mr. Colquitt was not tested at a crime laboratory. *Id.* at 794. The officer's "visual identification of the items was based on his conjecture, at best." *Id.* at 800. Although confirmed by a field test, such a preliminary test is not a substitute for a laboratory test and does not carry the same probative weight. *Id.* at 802. Absent "other significant, sufficient corroborating evidence," proving the substance's identity, the conviction for possession of cocaine was reversed. *Id.*

Colquitt compared two other cases where there was a laboratory report of the seized substance but the testing chemist's credibility was

disputed and its accuracy could not be relied upon.[3] In *Roche*, police searched the defendant's home and found: a pouch containing a substance that looked like methamphetamine; a razor blade and rolled paper commonly used to ingest methamphetamine; several baggies that also appeared to contain methamphetamine; a ledger of past drug sales, a scale; and $3,000 cash. 114 Wn.App. at 431-32. A police officer believed the substance looked like methamphetamine, was packaged in a manner common in the trade, and field tests were positive for methamphetamine. *Id.* Even with this evidence, because the laboratory tests were deemed too unreliable, this Court found insufficient evidence to sufficiently establish that the drug that appeared to be methamphetamine was in fact methamphetamine.

On the other hand, in *Delmarter*, field tests indicated the substances were cocaine and heroin and the defendant confessed to having both cocaine and heroin in his possession. 124 Wn.App. at 157-58. In light of his confession and its corroboration by preliminary test results, the court found sufficient evidence to support his conviction despite the lack of confirmation from laboratory tests.

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[3] Citing *State v. Roche,* 114 Wn.App. 424, 59 P.3d 682 (2002) and *In re Pers. Restraint of Delmarter,* 124 Wn.App. 154, 163-64, 101 P.3d 111 (2004).

The *Colquitt* Court also offered a "non-exhaustive list" of the type of circumstantial evidence that could prove the identity of a controlled substance. 133 Wn.App. at 801 (citing *State v. Watson,* 231 Neb. 507, 514-17, 437 N.W.2d 142 (1989)). The factors included: (1) testimony by observing witnesses who have significant experience with the drug in question and who identify the drug based on prior observations of the same drug; (2) corroborating testimony by officers or other experts identifying the substance; (3) references made to the drug by the defendant and others, either by the drug's name or a slang term commonly used to connote the drug; (4) prior involvement by the defendant in drug trafficking; (5) behavior characteristic of use or possession of the particular controlled substance; and (6) sensory identification of the substance if the substance is sufficiently unique. *Id.*

Because Mr. Colquitt did not confess that he possessed cocaine and there was no drug paraphernalia associated with cocaine use in his possession, the court held that officer's belief it looked like cocaine and the field test for cocaine were insufficient to convict him of possessing this particular substance. 133 Wn.App. at 798. In Mr. Simms' case, there were no field tests, no lab reports, no visual comparison of drug appearances by experts, no confession, no drug paraphernalia, no

ledgers, and no physical evidence corroborating the claims of the two teenage accusers.

b. *There was insufficient evidence proving the identity of the controlled substance even though it was an essential element of the crime.*

The prosecution does not meet its burden of proof by asking the court to justify a conviction by "mere surmise or arbitrary assumption." *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318, 325 (2013) (quoting *Bailey v. Alabama,* 219 U.S. 219, 31 S.Ct. 145, 55 L.Ed. 191 (1911)). Here, the evidence that Mr. Simms supplied methamphetamine to two teenagers rested on speculation and conjecture by teenaged nonexperts who lacked prior experience with the drug in question, which is insufficient to prove the identity of the substance.

The two complainants alleged they had text message conversations with Mr. Simms about trying methamphetamine, but the State did not obtain text messages to corroborate this claim. 2/3/14RP 110; 2/4/14RP 96-97. Mr. Simms did not confess to delivering methamphetamine to the complainants, which was a critical component in *Delmarter*, 124 Wn.App. at 163-64. His home did not contain methamphetamine paraphernalia nor were there positive field tests, as in *Roche*, 113 Wn.App. at 438, 445. There was no evidence he spent

time in areas where methamphetamine is sold or that he had prior convictions for methamphetamine delivery, which was listed as a factor of potential circumstantial proof of a substance's identity in *Colquitt*, 133 Wn.App. at 801. No police officers saw him with something that appeared to be methamphetamine, no field tests ever occurred, and no laboratory reports confirmed the presence of methamphetamine in his possession or in the possession of either complainant.

The prosecution's case hinged on claims by two people who were 15 and 16 years old at the time they said Mr. Simms supplied methamphetamine to them. They described taking a drug that looked a certain way and described how they felt after ingesting it but neither had any prior experience with methamphetamine. P.I. said she later smoked something N.B. told her was methamphetamine but she could not say whether she felt the same as with the substance Mr. Simms gave her. 2/4/14/RP 22-23. In *Colquitt* and *Roche*, this Court found insufficient evidence proving the identity of a controlled substance based on the beliefs of police officers, even with confirmatory field tests. If a police officer's belief that a substance looks like a certain drug is not enough, when confirmed by a field test, the belief of an

unschooled teenager with limited drug experience that a substance was methamphetamine is insufficient.

The complainants said they called the drug "bree," but bree is not a slang term for methamphetamine. 2/4/14RP 23, 100. Mr. Simms told the police "bree" meant marijuana. Ex. 10 at 96. Moreover, when N.B. bought methamphetamine for himself, it looked differently than what Mr. Simms supplied. 2/4/14RP 142.

In an effort to bolster the complainants' belief they ingested methamphetamine, the prosecution had a toxicologist testify about training she received in methamphetamine use. 2/5/14RP 9. She conceded no universal experience distinguishes the sensation of using methamphetamine from other controlled substances, particularly stimulants like cocaine, ecstasy, or amphetamines. *Id.* at 20-23, 28. Drug tests can discern its presence in someone's body, but no such tests occurred here. *Id.* at 9.

Similarly, chemist Martin McDermott testified about what methamphetamine looks like, but he agreed it may appear in different forms. 2/5/14RP 121. It can be powder, crystal, clear, or brown. *Id.* at 121. While the complainants described smoking from a glass tube and Mr. McDermott said such a tube may be used for methamphetamine, no

one found Mr. Simms in possession of a similar tube and no one offered this particular pipe into evidence. 2/3/15RP 106; 2/4/15RP 1001 2/5/14RP 122. Other drugs are also smoked in pipes or tubes. 2/5/14RP 123-24. Many drugs may be ingested in many different fashions and the pipe does not confirm the identity of the substance. *Id.*

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 Colquitt*, 133 Wn.App. at 800. The inexpert opinion of inexperienced teenagers is too speculative to prove the identity of the substance, which is an essential element of the offense as charged. CP 8-9.

c. *Reversal is required.*

The prosecution's failure to prove Mr. Simms delivered methamphetamine to the complainants constitutes insufficient evidence of the charged offense. CP 8-9; *Colquitt*, 133 Wn.App. at 800. Absent proof of every essential element, the convictions must be reversed and the charges dismissed. *State v. Hundley*, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995).

2. **By instructing the jury that its verdict could rest on uncharged alternative means, the court denied Mr. Simms his right to notice of the charges against him.**

a. *The court may not instruct the jury on a manner of committing an offense that is not charged in the information.*

A charging document notifies a criminal defendant of the nature of the accusation. U.S. Const. amends. 6, 14;[4] Const. art. I, § 22;[5] *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S.Ct. 514, 92 L.Ed. 644 (1948); *State v. Kjorsvik*, 117 Wn.2d 93, 105, 812 P.2d 86 (1991); *State v. Williamson*, 84 Wn.App. 37, 42, 924 P.2d 960 (1996). It violates the defendant's right to notice of the charge to try him for an uncharged alternative means. *State v. Doogan*, 82 Wn.App. 185, 188, 917 P.2d 155 (1996).

When the information specifies only one manner of committing a charged crime, "it is error to instruct the jury that they may consider other ways or means by which the crime could have been committed."

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[4] The Sixth Amendment provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation." The due process clause of the 14th Amendment "provides essentially the same protection to defendants" pertaining to notice of charges. *See Fawcett v. Bablitch*, 962 F.2d 617, 618 (7th Cir. 1992).

[5] The Washington Constitution, article I, section 22 guarantees the right of an accused person "to demand the nature and cause of the accusation against him . . . ."

State v. Brewczynski, 173 Wn.App. 541, 549-50, 294 P.3d 825, *rev. denied*, 177 Wn.2d 1026 (2013) (quoting *State v. Bray,* 52 Wn.App. 30, 34, 756 P.2d 1332 (1988). A person "cannot be tried for an uncharged offense" and the defendant must be informed of "the manner of committing an offense" in the information. *Bray*, 52 Wn.App. at 34.

This error occurs "regardless of the strength of the trial evidence" pertaining to the charged or uncharged means presented to the jury. *State v. Chino*, 117 Wn.App. 538, 540, 72 P.2d 256 (2003). Since the constitution prohibits the court from instructing the jury on an uncharged alternative means of conviction, the error may be raised for the first time on appeal even if not objected to below. *Williamson*, 84 Wn.App. at 42; RAP 2.5(a)(3). The error is a "manifest error affecting a constitutional right" that Mr. Simms may raise on appeal without an objection below. *State v. Laramie*, 141 Wn.App. 332, 342, 169 P.3d 859 (2007); *Chino*, 117 Wn.App. at 538.

b. *Because the information specifically alleged that Mr. Simms knowingly delivered only methamphetamine, but the instructions and evidence let the jury convict him of delivering another controlled substance, reversal is required.*

The charging document accused Mr. Simms of two counts of violating the uniform controlled substances act, by alleging that he

"unlawfully and feloniously did deliver and distribute Methamphetamine, a controlled substance and a narcotic drug to P.L.I.," for count I, and to "N.A.B." for count II, during the charging period of the spring and summer, 2011. CP 8-9.

Yet the to-convict instructions for counts I and II required the prosecution to prove in pertinent part: (1) that Mr. Simms "delivered a controlled substance to P.I." and N.A.B., and (2) Mr. Simms "knew the substance delivered was a controlled substance." CP 59, 60. No instruction expressly limited the jury's consideration to methamphetamine, even though that was the only controlled substance Mr. Simms was charged with delivering.

Permitting the jury to convict a person based on an uncharged alternative is a constitutional error that is presumed prejudicial and requires reversal. *Chino*, 117 Wn.App. at 538. It may be harmless only in the narrow circumstance where other instructions "clearly and specifically defined the charged crime." *Id.* at 540. No instruction clearly and specifically limited the jury's verdict to delivery of the charged substance, methamphetamine.

Jurors may have concluded that Mr. Simms gave the complainants some type of stimulant based on the energy they felt after

smoking the pipe. Chemist Peterson explained that other drugs give users the same sensations, including cocaine, amphetamine such as Adderall, and others that stimulate the central nervous system. 2/5/14RP 21. Jurors may well have been convinced that Mr. Simms gave them some kind of drug but not the charged drug methamphetamine. CP 8-9. They may not have unanimously agreed on the type of controlled substance delivered.

There was also substantial discussion at trial and during closing arguments about Mr. Simms' use of marijuana with both complainants. "Delivery" is merely transferring a controlled substance to another person. CP 56. Both P.I. and N.B. said Mr. Simms regularly smoked marijuana with them in his car. 2/3/14RP 101; 2/4/14RP 94, 104, 117. Marijuana is a controlled substance. *State v. Jain*, 151 Wn.App. 117, 126, 210 P.3d 1061 (2009). Although a later-enacted initiative makes it now legal to possess marijuana, even under the new law, marijuana delivery is permitted only by a "validly licensed" entity. RCW 69.50.360; RCW 69.50.363; RCW 69.50.366. The jury was never told that it could not base its verdict on the marijuana Mr. Simms used with the complainants and the State mentioned Mr. Simms' sharing of marijuana with the complainants several times in its closing argument.

2/11/14RP 21, 22, 26, 80. The court's instructions did not tell the jury that their verdict must rest solely on the unanimous finding of delivery of methamphetamine as charged.

When it "remains possible" the jury convicted an accused person based on a manner of committing the offense that was not charged in the information, the error is not harmless. *Brewczynski*, 173 Wn.App. at 550. Mr. Simms was explicitly charged with delivering and distributing methamphetamine, but the generic jury instructions permitted a verdict for any controlled substance. CP 8-9, 59-60. In light of evidence that the stimulation the complainants felt could have been caused by a variety of controlled substances, as well as evidence Mr. Simms regularly used marijuana with the complainants, it remains possible that the jury's verdict rested on an uncharged controlled substance. This error requires remand for a new trial.

3. **The court was not authorized to order that Mr. Simms must submit to an HIV test as a sentence condition.**

RCW 70.24.340(1) authorizes HIV testing and counseling as a condition of sentence only when a person has been:

> (a) Convicted of a sexual offense under chapter 9A.44 RCW;
> (b) Convicted of prostitution or offenses relating to prostitution under chapter 9A.88 RCW; or
> (c) Convicted of drug offenses under chapter 69.50 RCW if the court determines at the time of conviction that the related drug offense is one associated with the use of hypodermic needles.

Mr. Simms was convicted of sexual exploitation of a minor, which is codified in RCW 9A.68A.040. CP 9. It is not "a sexual offense under chapter 9A.44 RCW." RCW 70.24.340(1)(a) explicitly conditions the court's authority authorizing an HIV test to sexual offenses "under chapter 9A.44 RCW." This limitation is sensible since the conduct underlying RCW 9A.68A.040 is limited to taking pictures, not engaging in sexual contact. RCW 70.24.340 plainly and reasonably excludes a conviction under RCW 9A.68A.040 from those offenses for which an HIV test is required.

Mr. Simms was also convicted of drug offenses for delivery methamphetamine to two minors. CP 8-9; CP 71-72. Under RCW 70.24.340(1)(c), the court must determine[ ] at the time of conviction that the related drug offense is one associated with the use of hypodermic needles." RCW 70.24.340(1)(c); CP 98. "HIV testing may not be ordered unless the trial court enters a finding that the defendant

used or intended use of a hypodermic needle at the time of committing the crime." *State v. Mercado*, 181 Wn.App. 624, 636, 326 P.3d 154 (2014).There was no claim at trial that the offense involved hypodermic needles and the court did not "determine" such needles were involved.

Mr. Simms was not convicted of an offense for which HIV testing may occur. The court "exceeded its authority" by imposing this condition and it should be stricken. *Mercado*, 181 Wn.App. at 637; CP 98.

F. CONCLUSION.

Mr. Simms' convictions for delivering methamphetamine to minors must be reversed and dismissed. The improper sentencing condition must be stricken.

DATED this 30th day of December 2014, amended the 23rd of March 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 ANA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF MARCH, 2015, I CAUSED THE ORIGINAL **AMENDED 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:

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