71863-1

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Court of Appeals
Division I
State of Washington

NO. 71863-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RANDY SIMMS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LeROY McCULLOUGH

BRIEF OF RESPONDENT

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A. ISSUES

1. To prove delivery of methamphetamine to a minor, the State must prove that the substance was methamphetamine. Circumstantial evidence may be sufficient to establish the identity of the drug without a chemical analysis. The two minors testified that Simms called the substance he smoked with them "meth," it looked like crystals or broken glass, they smoked it in a distinctive glass pipe, and it gave them energetic feelings lasting about four hours followed by fatigue. Expert testimony corroborated these descriptions as characteristic of methamphetamine. Did the State present sufficient evidence for a rational trier of fact to find that Simms delivered methamphetamine?

2. Under the invited error doctrine, a defendant may not create an error at trial and then complain about it on appeal. Simms proposed the to-convict instruction that he now contends included an uncharged alternative means. Is Simms' claim precluded from review because he proposed the instruction to which he now assigns error?

3. Jury instructions may not include an uncharged alternative means of committing the crime. The jury was instructed that to convict Simms of counts 1 and 2 it must find that he

delivered a controlled substance to a minor. The jury instructions further defined methamphetamine as a controlled substance. No other substance was defined as a controlled substance. Did the trial court properly instruct the jury for counts 1 and 2 on only the charged means of delivery of methamphetamine to a minor?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Randy Simms by amended information with two counts of delivery of a controlled substance, methamphetamine, to a minor, P.I. (count 1) and N.B. (count 2), and sexual exploitation of a minor, P.I. (count 3).[1] CP 8-9. The Honorable LeRoy McCullough presided over the jury trial at which Simms was found guilty as charged. 1RP[2] 2; CP 71-73. Simms received standard range concurrent sentences of 60 months on each count of delivery of methamphetamine to a minor, counts 1 and 2, and 54 months on sexual exploitation, count 3. 9RP 34-36; CP 93-98. The court also ordered that Simms obtain an HIV test pursuant to RCW 70.24.340. CP 100.

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[1] This brief will refer to P.I. and N.B. by their initials as P.I. was the victim of a sex offense, count 3, and both were juveniles when these crimes occurred.

[2] The verbatim report of proceedings consists of 9 volumes, which will be referred to in this brief as: 1RP (1/23/2014); 2RP (1/27/2014); 3RP (1/28/2014); 4RP (1/29/2014); 5RP (2/3/2014); 6RP (2/4/2014); 7RP (2/5/2014); 8RP (2/11/2014); 9RP (2/12/2014, 3/28/2014, & 4/22/2014).

2. SUBSTANTIVE FACTS

In 2011, fifteen-year-olds P.I. and N.B. began regularly spending time with forty-eight-year-old Randy Simms. 5RP 110, 112; 6RP 44-46, 92-95; Ex. 10 at 1.[3] P.I., a female, and N.B., a male, were in a romantic relationship and P.I. was living at N.B.'s parents' home. 5RP 91, 95-96, 98; 6RP 87-88. They knew Simms because he was the live-in, longtime boyfriend of the mother of one of their former close friends from school. 5RP 92-93; 6RP 88-89; Ex. 10 at 1-4. Neither had spent much time with Simms until after Simms spoke to them about the dangers of drugs at the request of N.B.'s father. 5RP 98-100; 6RP 91. N.B. had recently been hospitalized after using ecstasy and N.B.'s father thought that Simms might be able to better relate to N.B. 5RP 98-100.

Shortly after that conversation, Simms began picking up N.B. and P.I. on a regular basis, supposedly to teach N.B. car mechanics. 5RP 112. The three mostly drove around or went up to the woods near Issaquah or Ravensdale. 5RP 101, 111-12; 6RP 94-95. Both N.B. and P.I. had used marijuana and sometimes used it with Simms, usually because N.B. had the drug. 5RP 101; 6RP 94; Ex. 10 at 60. Eventually, P.I. and N.B. asked Simms about

[3] Exhibit 10 is the transcript of Simms' statement to the detective, which was admitted at trial.

methamphetamine because they were curious. 5RP 102. Not long after, Simms brought them methamphetamine. 5RP 102-03.

P.I. and N.B. each recalled the first time that Simms brought "meth" on one of their drives out to the woods. 5RP 102-03; 6RP 96. Simms called the substance "meth." 5RP 103; 6RP 99. P.I. described the drug as in a "crystal form" and "see-through," and N.B. said it was a shard-like substance resembling a piece of broken glass. 5RP 106; 6RP 100-01. Simms brought out a clear glass pipe with a ball or bubble at one end and an opening at the other. 5RP 104-06; 6RP 100. Simms showed N.B. how to smoke it by holding a lighter under the glass bowl of the pipe and then inhaling or "hitting it." 6RP 100-01. The drug appeared to evaporate, generated smoke, and they inhaled the smoke. 5RP 107. The drug re-crystallized when the lighter was removed. 6RP 101.

P.I. described that the "meth" gave her an "endorphin rush" and she also felt paranoid. 5RP 107-08. The drug did not feel at all like marijuana, which she described as a "downer" and N.B. said was a "relaxed, down-type" feeling. 5RP 107; 6RP 105. N.B. described feeling "a bunch of energy" and "uppy" after smoking it

with Simms. 6RP 101. The energetic feeling lasted four to five hours, then he would feel tired and need to sleep. 6RP 106.

P.I. estimated that she smoked methamphetamine with Simms at least a dozen times and N.B. estimated he smoked it with Simms well over thirty times. 5RP 110; 6RP 6, 102. Simms always brought the drug. 6RP 8-9. N.B. would give Simms money that he had received from his father. 6RP 10, 106. The three discussed other ways to obtain money and Simms suggested that P.I. and N.B. take nude pictures for a biker magazine. 6RP 10-11, 106-07. Simms said he knew people at the magazine and that they could get $10,000 or more. 6RP 12, 106-07.

In May 2011, the week of N.B.'s sixteenth birthday, P.I. and N.B. let Simms take nude photographs of them for the magazine. 6RP 10-16, 46, 106-10. The three went to the woods and Simms photographed P.I. and N.B. using Simms' Kodak digital camera. 6RP 16, 109. Simms took photos of them several times over the course of about one week and they smoked methamphetamine before each session. 6RP 16-18, 109-12. Simms did not photograph their faces because they were minors. 6RP 42.

Afterwards, N.B. and P.I. never saw any money or heard anything more about the pictures. 6RP 113-14. In the summer,

P.I. moved to her mother's in Reno. 6RP 113-14. Simms and N.B. continued spending time together and went fishing for several weeks on the Olympic Peninsula. 6RP 113-14, 116-18. N.B.'s father gave Simms money for the trip, which they mainly spent on methamphetamine. 6RP 118.

Shortly after returning, N.B. entered inpatient drug treatment where he disclosed to a counselor what had occurred with Simms. 6RP 85, 121-23, 146. The counselor reported it to police. 6RP 85, 146. Detectives located 93 photographs of P.I. and N.B. nude or semi-nude on Simms' camera. 6RP 107-10; 7RP 82-83, 90; Ex. 13.[4] After taking the pictures, Simms had given the camera to N.B., who gave it to police. 6RP 110, 145-46.

Neither P.I. nor N.B. had used methamphetamine prior to smoking it with Simms, but both smoked it on their own later. 5RP 107; 6RP 96. P.I. used methamphetamine with N.B. after N.B. had left treatment. 6RP 22-23. N.B. obtained it from someone other than Simms. 6RP 121-22, 140-41. The drug he bought was a small bag of powder, rather than the large shards that Simms had. 6RP 142. They smoked it using a glass pipe, as they had with Simms. 6RP 22-23. Both felt high, similar to when they used

[4] Exhibit 13 is the report containing the photographs of P.I. and N.B., which was admitted at trial.

with Simms, but N.B. thought the drug might not have been as good as what he smoked with Simms. 6RP 23-24, 121-22.

At trial, toxicologist Brianna Peterson and forensic scientist Martin McDermott testified to the effects of methamphetamine on the human body and how it is used. 7RP 8-29, 118-31. Neither tested any samples from Simms' case. 7RP 19, 128. Peterson, lab manager for the Toxicology Division of the Washington State Patrol, testified that methamphetamine is a central nervous system stimulant that increases euphoria or good feelings when ingested. 7RP 10-12. Its use causes increased energy and excitement, which may lead to more risk-taking behavior. 7RP 12. The effects last four to eight hours, but it causes fatigue, agitation, or paranoia as it leaves the system. 7RP 12-13. While other stimulants can cause the same symptoms, ecstasy causes more emotional feelings rather than heightened energy. 7RP 21-23.

McDermott, a forensic scientist at the Washington State Patrol Crime Lab, testified that methamphetamine is one of the more common drugs that he tests. 7RP 120. It most often looks like clear crystals, similar to broken ice or rock salt; thus its name, "crystal meth." 7RP 121. It may also be in a fine white powder, a paste similar to peanut butter, or even in a tablet. 7RP 121. It is

normally ingested by snorting it or smoking it in a glass pipe. 7RP 122. The glass pipe has a ball the size of a ping pong ball on one end and a small hole at the other. 7RP 122. The drug is placed inside and the ball is heated so that the drug vaporizes and can be inhaled or smoked. 7RP 123-24, 130.

While other drugs may be smoked in pipes, the typical cocaine or marijuana pipe appears distinctly different and the vast majority of the time that he sees a glass pipe such as the one described it is used for methamphetamine. 7RP 123-24. McDermott had never seen a pipe used to smoke ecstasy. 7RP 125. Ecstasy is in pastel-colored tablets or a white or beige powder in a baggie or capsule; he had never seen it in crystal form. 7RP 125, 130-31.

C. ARGUMENT

1. SUFFICIENT EVIDENCE SUPPORTS SIMMS' CONVICTIONS FOR DELIVERY OF METHAMPHETAMINE TO MINORS.

Simms asserts that the State did not present sufficient evidence that the substance he delivered was methamphetamine, as required for counts 1 and 2. Simms' claim fails. The detailed testimony from the two minors, which was corroborated by expert testimony, was sufficient evidence.

The State must prove each element of the charged crime beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The appellate court draws all reasonable inferences in favor of the State and interprets them "most strongly against the defendant." Id.

A reviewing court must 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, 719, 995 P.2d 107, review denied, 141 Wn.2d 1023 (2000). Circumstantial and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

To convict Simms of delivery of a controlled substance to a minor, the State had to prove beyond a reasonable doubt that the substance Simms smoked with P.I. and N.B. was methamphetamine, a controlled substance. RCW 69.50.401(1); RCW 69.50.406; State v. Colquitt, 133 Wn. App. 789, 800, 137 P.3d 892 (2006). Lay testimony and circumstantial evidence may

be sufficient to prove the identity of the substance; a laboratory test identifying the substance is not required. Id. at 796, 800-01 (citing State v. Hernandez, 85 Wn. App. 672, 675, 935 P.2d 623 (1997)). In Colquitt, the court listed six non-exclusive factors to evaluate whether the State proved the identity of the substance:

1) Testimony by witnesses who have a significant amount of experience with the drug in question, so that their identification of the drug as the same as the drug in their past experience is highly credible;
2) Corroborating testimony by officers or other experts as to the identification of 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;
6) Sensory identification of the substance if the substance is sufficiently unique.

133 Wn. App. at 801.

Analyzing these factors, the Colquitt court found insufficient an officer's allegation that the substance "appeared to be rock cocaine" combined with a positive field test. 133 Wn. App. at 801-02. No evidence of the officer's training or experience supported his conclusion as to the identity of the substance in the stipulated trial. Id.

By contrast, in In re Pers. Restraint of Delmarter, a case analyzed in Colquitt, the positive field tests and the defendant's admission that the substances were heroin and cocaine were sufficient to uphold his convictions for heroin and cocaine possession.[5] 124 Wn. App. 154, 163-64, 101 P.3d 111 (2004).

In Simms' case, the State presented sufficient circumstantial evidence to prove the substance was methamphetamine. First, Simms identified the substance as "meth" when he spoke of it to P.I. and N.B or as "bree," their own term for the drug. 5RP 103; 6RP 99. He also brought the drug in response to P.I.'s and N.B.'s inquiry to him about "meth." 5RP 102; 6RP 129-30. Simms never called it ecstasy or any other drug, and P.I. and N.B. testified that ecstasy or marijuana were the only other drugs that they had used. 6RP 51, 127.

The defendant's own identification of the drug as methamphetamine, one of the Colquitt factors, weighs in favor of finding sufficient evidence. The fact that Simms in his statement to the detective denied delivering meth to N.B. and P.I. does not

[5] Delmarter challenged his conviction after it had been discovered that the lab chemist who tested the drugs in his case had tampered with evidence to hide his own heroin addiction. Id. at 157-58.

change the analysis. Ex. 10 at 60. The jury did not find Simms' statement credible, and that determination is not reviewable.

Second, P.I. and N.B. described the appearance of the substance as shards, glass-like, or see-through crystals. 5RP 106; 6RP 100-01. Martin McDermott corroborated their description. A forensic scientist for 18 years who had tested substances confirmed to be methamphetamine many hundreds of times, McDermott explained that it most commonly is in a clear crystal form, similar to broken ice or rock salt. 7RP 121. He had never seen ecstasy in a crystal form. 7RP 130-31.

Third, P.I. and N.B. described that Simms smoked it with them using a glass pipe, with a ball or bubble on one end and an opening on the other. 5RP 104-06; 6RP 100. McDermott described with strikingly similar detail the glass pipes that he has seen used to smoke methamphetamine. 7RP 122-24, 30. Both P.I., N.B., and McDermott described that the methamphetamine is placed in the ball of the pipe, it is heated, the drug melts or evaporates, and the resulting vapor or smoke is inhaled. 5RP 107; 6RP 100-01. While other drugs may be smoked, the typical

cocaine or marijuana pipe McDermott sees looks distinctly different, and when he has seen a glass pipe such as the one described it has been used for methamphetamine. 7RP 122-25. He had never seen a pipe used to smoke ecstasy. 7RP 125.

Next, P.I. and N.B. described the energetic high that they felt after smoking the drug with Simms, which Toxicologist Peterson corroborated. P.I. described that she felt an "endorphin rush" and also paranoid. 5RP 107-08. N.B. described that he had a "bunch of energy" and felt "uppy," and that this feeling lasted four to five hours after which he felt the need to sleep. 6RP 105-06. Peterson described methamphetamine as causing increased energy and excitement for four to eight hours, and as the drug left the person's system it causes fatigue and paranoia. 7RP 12-13. Peterson distinguished the methamphetamine high from that caused by marijuana, a sedative, and this testimony also corroborated P.I.'s and N.B.'s description of marijuana. 5RP 107; 6RP 99; 7RP 25. While Peterson acknowledged that other stimulants may cause similar reactions, the feelings caused by ecstasy are more euphoric. 7RP 21-23.

Moreover, P.I. and N.B. each testified that they had smoked methamphetamine that was not provided by Simms. Again, they smoked it using a glass pipe as they had with Simms. 6RP 22-23. While P.I. had difficulty describing its effects, she did testify that the meth she smoked on her own made her feel about the same as the drug she smoked with Simms. 6RP 23-24. N.B. described the effects of the drug as similar to when he had smoked with Simms, although the drug he obtained appeared different and was likely not of the same high quality as what he smoked with Simms. 6RP 121-22, 140-42. Such experience, while not dispositive, further supported the jury's finding that the substance was methamphetamine.

In sum, the detailed testimony of P.I. and N.B., corroborated by expert testimony from Toxicologist Peterson and Forensic Scientist McDermott, P.I.'s and N.B.'s comparison of the effects of the drug compared to methamphetamine that they smoked on their own, and Simms' identification of the drug as "meth" amounted to sufficient evidence for counts 1 and 2.

2. THE JURY INSTRUCTIONS FOR COUNTS 1 AND 2 DID NOT INCLUDE AN UNCHARGED ALTERNATIVE MEANS.

Simms contends that the jury instructions for counts 1 and 2 allowed the jury to convict him for the uncharged alternative means of delivering marijuana or some other substance to P.I. and N.B., rather than methamphetamine. Simms' claim fails because the instructions did not include an uncharged alternative means. In any event, Simms invited any error.

a. Any Error Was Invited.

A defendant may not set up an error in the trial court and then complain of it on appeal. State v. Momah, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). This well-established doctrine applies to jury instructions. City of Seattle v. Patu, 147 Wn.2d 717, 721, 58 P.3d 273 (2002). It precludes review of even an instructional error of constitutional magnitude. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (invited error doctrine precluded direct review of defendant's uncharged alternative means claim).

Simms' counsel proposed both to-convict instructions for count 1 and count 2. 8RP 12-14. The trial court's discussion with counsel clarifies that the defense-proposed instructions were the

ones that the court used to instruct the jury, even though the defense's proposed instructions do not appear in the court record.[6] 8RP 13. Thus, any error in including an uncharged alternative means was invited and Simms' claim is precluded from review.

b. The Jury Instructions For Counts 1 And 2 Did Not Include An Uncharged Alternative Means.

The appellate court reviews *de novo* whether jury instructions accurately state the law without misleading the jury. State v. Linehan, 147 Wn.2d 638, 645, 56 P.3d 542 (2002). When an information charges only one means of committing a crime, it is error to instruct the jury on an uncharged alternative means, regardless of the range of evidence admitted at trial. State v. Severns, 13 Wn.2d 542, 548, 125 P.2d 659 (1942); State v. Bray, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). Such an error is a manifest constitutional error that may be raised for the first time on

[6] The trial court began its discussion of the instructions by stating it had received the defense instructions that morning. 8RP 12. The trial court then discussed Simms' proposed to-convict instruction for count 1, noted the differences from the State's proposed instruction, and concluded that it would offer the defense version of the to-convict instructions for counts 1 and 2. 8RP 14. The trial court also offered the defense's proposed reasonable doubt and separate crime instructions, and those instructions and the to-convict instructions for counts 1 and 2 all appear in a different font from the remainder of the instructions that appear to be from the State's proposed instructions. CP 51, 59-60, 68, Supp. CP __ (sub no. 151, State's proposed jury instructions, filed on February 5, 2014). Despite these references to the defense proposed instructions, counsel was unable to locate a copy of the defense proposed instructions in the court file.

appeal. State v. Laramie, 141 Wn. App. 332, 342, 169 P.3d 859 (2007).

Even if an uncharged alternative means is included in the to-convict instruction, that error is harmless if the remaining instructions clearly limit the jury's decision to only the charged means. State v. Nicholas, 55 Wn. App. 261, 273, 776 P.2d 1385 (1989) (citing Severns, 15 Wn.2d at 549). In Nicholas, this Court held that submitting an uncharged alternative means of "displays what appears to be a firearm or other deadly weapon" when the defendant was charged with committing first-degree robbery by being "armed with a deadly weapon" was harmless beyond a reasonable doubt. 55 Wn. App. at 272-73. The jury had also been instructed and returned a special verdict that Nicholas was "armed with a deadly weapon at the time of the commission of the crime...", thus the State proved the charged means. Id. at 273.

Here, the trial court instructed the jury on only the charged means of delivery of methamphetamine. The State charged Simms with violation of the uniform controlled substances act by unlawfully and feloniously delivering methamphetamine, a controlled

substance, to P.I (count 1), and to N.B. (count 2).[7] CP 8-9.

Accordingly, the to-convict instruction for count 1 stated:

> To convict the defendant of the crime of Violation of the Uniform Controlled Substances Act—Delivery of a Controlled Substance to a Person Under Age Eighteen, as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That during a period of time intervening between April 1, 2011 and July 30, 2011, the defendant delivered a controlled substance to P.I.;
> (2) That the defendant was over 18 years of age;
> (3) That P.I. was under 18 years of age;
> (4) That the defendant knew the substance delivered was a controlled substance; and
> (5) That the acts occurred in the State of Washington.

CP 59 (Instruction #11). The to-convict instruction for count 2 differed only in the dates and that the minor was N.B. CP 60 (Instruction #12). The trial court also instructed the jury that "methamphetamine" is a controlled substance. CP 57 (Instruction #9). Marijuana was not defined as a controlled substance nor included in any of the instructions. CP 45-73.

The trial court further instructed the jury that the law was contained in the court's instructions, that they must consider the instructions as a whole, and that they must reach a decision based

[7] Simms does not challenge the adequacy of the charging document and concedes that it specifically notified Simms that the controlled substance he was accused of delivering was methamphetamine. Br. of App. at 14-16.

on the facts proved and the law given to them. CP 48-49. Jurors are presumed to have followed the instructions. State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008). The jury did not have the option to convict Simms of delivery of any other substance aside from methamphetamine because the instructions defined only methamphetamine as a controlled substance.

In Nicholas, this Court held that the inclusion of an uncharged means in the jury instructions was harmless due to the other instructions limiting the jury's consideration to the charged means. By comparison, here, the jury was not instructed on an uncharged means *and* the additional instructions limited the jury's consideration to only the charged means of delivery of methamphetamine. The trial court properly instructed the jury and did not include an uncharged alternative means for counts 1 or 2.

Moreover, the evidence focused only on methamphetamine. N.B. and P.I. each testified in detail about the methamphetamine that Simms smoked with them. 5RP 102-07; 6RP 96, 99-101. They mentioned marijuana only when distinguishing the effects of the methamphetamine from other drugs that they had used. Neither testified that Simms ever gave them marijuana. Simms said that N.B. always brought the marijuana. Ex. 10 at 60.

In closing arguments, the prosecutor specifically referred to methamphetamine when she read the to-convict instructions for counts 1 and 2:

> Members of the jury, you heard all the evidence,. . . . Count 1 is delivery of methamphetamine to a minor, a controlled substance to a minor. . . These are the elements that the State has to prove,. . . . And delivery of a controlled substance, meth.
>
> The defendant knew it was meth, he called it meth, he showed them how to smoke it.
>
> You're going to see the same elements, I will go through these, to N.B. . . . And again, the defendant knew that substance was meth and delivered it to those two.

8RP 28-29. The prosecutor then read the unanimity instruction, urging the jury to look to the day Simms took the photos of N.B. and P.I., the week of N.B.'s birthday, and gave each of them *methamphetamine*. 8RP 29; CP 29-30.

Counsel for Simms also focused exclusively on methamphetamine as the controlled substance. Counsel framed the issue in closing argument: "[Y]our personal preference cannot influence your decision as to whether the State has proved beyond a reasonable doubt that Randy Simms delivered methamphetamine to [N.B.] or [P.I.]." 8RP 41. Simms' counsel then told the jury that

the evidence that Simms used marijuana with N.B. and P.I. *could not be the basis to convict on counts 1 or 2*, she stated:

> You may not like the fact that Randy Simms smoked pot with [N.B.] and [P.I.]. He is not charged with supplying them with pot, that's not really relevant to the charges against him. And you're not here to decide whether you like Mr. Simms or you like all of his choices.

8RP 42. Defense counsel continued referencing only methamphetamine in her argument. 8RP 43-44, 47-48, 51-52. She also referred to the elements of counts 1 and 2 and specifically stated the drug was methamphetamine. 8RP 54-55.

While the prosecutor mentioned the marijuana use, those references were minimal and she never suggested it as a basis to convict for count 1 or 2. 8RP 20-22, 80. The marijuana use was simply part of how these teens had grown up. 8RP 20. The prosecutor referred to "meth" or "methamphetamine" 25 times, while she referred to marijuana only 7 times. Compare 8RP 20, 22, 23-25, 28-30, 72, 76-80 with 8RP 20-22, 26, 80. Three of the marijuana references were in recounting the inconsistencies in Simms' statement, since he told the detective that he did not believe any child should use marijuana, but then said that he had smoked marijuana with N.B. and P.I. 8RP 26.

Also, each of the to-convict instructions referenced the crimes "as charged." CP 59-60. The trial court read the charging document to the jury, including that Simms was charged with delivery of methamphetamine to N.B. and P.I.[8] 2RP 21-22. Thus, the jury was informed from the start of the trial that the only controlled substance at issue was methamphetamine.

Because the instructions provided that only methamphetamine was a controlled substance and the evidence and arguments of counsel focused only on methamphetamine, the trial court did not submit an uncharged alternative means to the jury for count 1 or 2.

3. SIMMS' CASE SHOULD BE REMANDED TO STRIKE THE HIV TESTING REQUIREMENT FROM THE JUDGMENT AND SENTENCE.

Simms also seeks remand to strike the HIV testing condition in the judgment and sentence. The State agrees that Simms' case should be remanded to correct this scrivener's error. While Simms was convicted of a sex offense, it is a sex offense under RCW 9.68A and the HIV testing requirement only applies to sex offenses under RCW 9A.44. CP 9; RCW 70.24.340(a). Simms was also

[8] The trial court mistakenly read the original information, which listed one count of delivery of methamphetamine to a minor for N.B. and P.I. rather than two counts. 2RP 21-22; CP 1-2, 8-9. Both charging documents stated that the controlled substance was methamphetamine. CP 1-2, 8-9.

convicted of drug offenses in counts 1 and 2, but there was no allegation that the drug offenses involved the use of hypodermic needles. CP 8-9; RCW 70.24.340(c). Therefore, the HIV testing requirement was ordered in error. Simms' case should be remanded so that this condition may be stricken from the judgment and sentence.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Simms' convictions and remand to strike the HIV testing requirement.

DATED this 23rd day of March, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Nancy Collins, the attorney for the appellant, at Nancy@washapp.org, containing a copy of the Brief of Respondent in State v. Randy Eugene Simms, Cause No. 71863-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 23rd day of March, 2015.

Name:
Done in Seattle, Washington