Supreme Court No. 92378-7
(COA No. 71863-1-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RANDY SIMMS,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Randy Simms, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Simms seeks review of the Court of Appeals decision dated September 14, 2015, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

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 teenagers' own belief that they smoked methamphetamine. Should this Court grant review to determine whether speculation about the identity of a controlled substance satisfies the State's burden of proof?

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 but 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 and the State's case indicated Mr. Simms gave marijuana and another 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?

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.

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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.

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 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. The facts are further set forth in the Court of Appeals opinion, pages 2-6 and Appellant's Opening Brief, pages 4-5 and in the relevant argument sections. The facts outlined in these pleadings are incorporated by reference herein.

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. 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 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).

This Court has never addressed whether and how the State may meet its burden of proving that a specific controlled substance was delivered when that substance it never seized or tested. In *Colquitt*, the Court of Appeals held that when 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. 133 Wn.App. at 800; RCW 69.50.406(1).

Colquitt involves a police officer's opinion and field test that a small plastic bag with several white, rock-like items inside seized from the defendant held cocaine. *Id.* at 792. The Court of Appeals reversed Mr. Colquitt's conviction because the substance 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 cited two other Court of Appeals 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, the 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

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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).

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.

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.*

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.

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. The teenaged complainants claimed that exchanges text messages with Mr. Simms but none were offered into evidence. 2/3/14RP 110; 2/4/14RP 96-97. There was no testimony that Mr. Simms 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.

The prosecution's case hinged on claims by two people who were 15 and 16 years old and had not experience identifying different controlled substances. In *Colquitt* and *Roche*, the Court of Appeals 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.

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. This Court should grant review to

determine whether the prosecution may rest an allegation of drug delivery without reliable evidence of the drug's identity.

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 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). 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." *State v. Brewczynski*, 173 Wn.App. 541, 549-50, 294 P.3d 825, *rev.*

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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 . . . ."

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.

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. A chemist testified 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. Some jurors may well have believed Mr. Simms offered some drug but

necessarily methamphetamine. CP 8-9. They may not have unanimously agreed on the type of controlled substance delivered.

There was 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 and was illegal to deliver or possess at the time of Mr. Simms' trial. *State v. Jain*, 151 Wn.App. 117, 126, 210 P.3d 1061 (2009). 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 invited the jury to rest on any controlled substance.

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 Court should grant review to address the failure to insure the verdict rested on the charged offense.

F. CONCLUSION

Based on the foregoing, Petitioner Randy Simms respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 14th day of October 2015.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant, v. RANDY EUGENE SIMMS, Respondent.	)	No. 71863-1-I DIVISION ONE UNPUBLISHED OPINION FILED: September 14, 2015

SPEARMAN, C.J. — Randy Eugene Simms was convicted of two counts of delivering the controlled substance methamphetamine to a minor.[1] He argues that the evidence is insufficient to support his conviction for many reasons, including the fact that there was no test confirming that the substance was methamphetamine. Simms also argues that he did not receive fair notice of the charges because the jury instruction contained an alternative means of conviction. We reject each of his arguments and affirm. However, because Simms was improperly ordered to undergo the human immunodeficiency virus (HIV) testing, we remand for correction of the error.

[1] Although Simms was also convicted of sexual exploitation of a minor, we do not recite the underlying facts of that charge because on appeal Simms does not challenge the conviction, only a condition of his sentence.

FACTS

In May 2011, Simms spent considerable time with teenagers P.I. and her boyfriend N. B., when they were fifteen and sixteen years old, respectively. N.B.'s father had asked Simms to speak to his son about the dangers of drug use after N.B. had been hospitalized after consuming a controlled substance. Simms began spending time with N.B. and P.I. on a regular basis, purportedly teaching N.B. about car mechanics. The trio would often drive around and spend time in the woods near Issaquah or Ravensdale.

P.I. and N.B. asked Simms if he could get them methamphetamine because they wanted to try it. Simms brought a substance he referred to as "meth" on one of their trips to the woods. Verbatim Report of Proceedings (VRP) (Feb. 3, 2014) at 103. Simms brought a clear glass pipe and showed N.B. and P.I. how to smoke it. P.I. estimated that she smoked this substance with Simms approximately a dozen times and N.B. thought he and Simms had smoked it together "well over thirty" times. VRP (Feb. 4. 2014) at 102. Each time Simms supplied the substance, N.B. gave Simms money that N.B. had received from his father. In addition, Simms would occasionally smoke marijuana with N.B. and P.I., when N.B. had the drug.

In the summer of 2011, P.I. moved to her mother's home in Reno while Simms and N.B. continued spending time together. At one point they went fishing on the Olympic Peninsula for several weeks and smoked meth often during that trip. After the trip, N.B. entered inpatient drug treatment and told a counselor about Simms providing him with methamphetamine. The counselor then told the

police. Simms was arrested and charged with two counts of violating the Uniform Controlled Substance Act (VUCSA) by delivering methamphetamine to a minor and one count of sexual exploitation of a minor.

At trial, P.I. testified that she first smoked methamphetamine with Simms and N.B., in Simms' car. She testified that Simms referred to the drug as "meth" and not anything else, but that she and N.B. would refer to it as "bree." Id. at (Feb. 4, 2014) at 23. P.I. also described the pipe as "clear," a "ball with a stem," and drew a picture, indicating where one would put the drug, where to put one's mouth to inhale, and where to light the pipe. VRP (Feb. 4, 2014) at 104. She described inhaling the smoke, and how it caused her to feel "a rush, an endorphin rush." Id. at 107. P.I. also described the drug's appearance as "crystals," that were "see-through." Id. at 106. She thought that she had smoked methamphetamine with Simms "[m]aybe a dozen" times. Id. at 110. She testified that she had used methamphetamine on other occasions, and its effect on her was the same.

N.B. testified that he first tried methamphetamine with Simms, but could not remember exactly how it came up. He thought that P.I. had sent Simms some text messages asking about methamphetamine and ecstasy and then Simms brought it with him on one of their trips to the woods. He testified that Simms told him that it was "nothing like weed" and that the "high [was] a lot different." VRP (Feb. 4, 2014) at 99. N.B. described in detail the pipe and the process of smoking the drug, its crystal form and the way it melted and then recrystallized. He described the feeling as "uppy" and that it "[g]ave [him] a bunch of energy." Id. at

101. He compared it to the high he would get from weed, stating that weed gave him a "kind of relaxed, downy feeling," but with methamphetamine, "it's a really energetic type of feeling. . . . You feel like you want to get a lot of things done." Id. at 105. According to him, the energetic feeling would last for about four or five hours and then he would feel tired and "[u]sually felt the need to go to sleep or something." Id. Occasionally he would smoke weed with Simms, if N.B. "had it ... but usually no." Id. at 117: N.B. had also used methamphetamine at least one subsequent occasion, without Simms, and that it had felt "close to the same." Id. at 122.

Toxicologist Brianna Peterson testified about her training and expertise in the specific effects of methamphetamine. She described methamphetamine as a "central nervous stimulant" that "increases your energy,...causes a lot of euphoria or good feelings,... can cause you to have ... a heightened sense of... your own strength or well-being." VRP (Feb. 5, 2014) at 12. According to Peterson, the effect can last "four to eight hours after that initial use." Id. at 12. She also described the potential after effect of taking methamphetamine as "hav[ing] maybe more fatigue, because you don't have that energy," and "agitation or restlessness." Id. at 13. She also testified that other drugs may produce a similar effect, such as amphetamines and ecstasy.

The jury also heard testimony from forensic scientist Martin McDermott. McDermott testified about his familiarity with methamphetamine through his work with the Washington State Patrol Crime Laboratory in the chemical analysis section. He testified about most often seeing in methamphetamine cases "a glass

tube pipe" that is "typically a clear glass tube a few inches long, ... with sort of a glass ball on one end of it." Id. (Feb. 5, 2014) at 122. He indicated that when he has encountered such a pipe, "the vast majority of the time it has been [used for] methamphetamine." VRP (Feb. 5, 2014) at 124. He indicated that "the typical cocaine pipe ... looks distinctly different from this, as well as does the typical marijuana pipe that I see. And it has been my experience that it's pretty reliable that a person would use one type or another for a certain drug." Id. at 124. McDermott testified that he did not do any testing of substances or receive any pipes related to the instances in this case.

Both parties submitted proposed jury instructions to the court. During the discussion about the "to convict" instruction, the parties and the court agreed to change the word "distribution" to "delivery." VRP (Feb. 11, 2014) at 12-14.The State suggested that the instruction "just includes delivering a controlled substance" without reference to RCW 69.50.401. Id. at 13. The court and the parties agreed to delete the statutory reference because providing that kind of information to a jury invites them to go and do research.

The instruction given to the jury read:

> 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.

Clerk's Papers (CP) at 59. Additionally, Instruction No. 9 stated that "[m]ethamphetamine is a controlled substance." CP 57. No other drugs or chemicals were defined in the instructions as controlled substances. Simms did not object to any of the jury instructions.

The jury found Simms guilty of both VUCSA counts and the charge of sexual exploitation of a minor. He was sentenced to sixty months of incarceration. Simms was also ordered to undergo an HIV test under RCW 70.24.340. Simms appeals.

DISCUSSION

The first issue is whether sufficient evidence supports Simms' conviction for delivery of a controlled substance, methamphetamine, as charged in counts one and two. Simms argues that the evidence was insufficient to identify the substance as methamphetamine, because there was no chemist report, no drug tests or paraphernalia and no independent observations. We disagree.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). "[W]hen the sufficiency of the evidence is challenged 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. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977) (quoting State v. Woods, 5 Wn. App. 399, 487 P.2d 624 (1971)). The trier of fact

judges the credibility of witnesses, and issues of credibility cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Generally, "a chemical analysis is not vital to uphold a conviction for possession of a controlled substance." State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). Circumstantial evidence and lay testimony may be sufficient to establish the identity of a drug in a criminal case. State v. Hernandez, 85 Wn. App. 672-75, 935 P.2d 623 (1997). Lay witnesses may testify if they are familiar with the substance through prior use, trading, or law enforcement. Id. at 676. Circumstantial evidence may include the substance's packaging as well as its physical characteristics. Id. at 677.

When determining whether circumstantial evidence proves the identity of the substance beyond a reasonable doubt, courts have considered the following non-exhaustive list of factors:

> (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; and (6) sensory identification of the substance if the substance is sufficiently unique.

Colquitt, 133 Wn. App. at 801 (citing State v. Watson, 231 Neb. 507, 514-17, 437 N.W.2d 142 (1989)).

Simms argues that the evidence was insufficient because there were no field tests, no paraphernalia found, no confession, no visual comparison by

experts, and no text messages referring to methamphetamine. Simms relies on Colquitt, where the court reversed Colquitt's conviction, even with a field test, because the only evidence the State submitted was the arresting officer's statement that the substance "appeared to be 'rock cocaine.'" Without more, the court was unable to "draw a conclusion based on more than the officer's bald statement, which by itself is insufficient." Id. at 802.

Here, the combined evidence, when viewed in the light most favorable to the State, is sufficient to convince a trier of fact that Simms delivered methamphetamine to a minor beyond a reasonable doubt. First, the record contains testimony from both P.I. and N.B. about the drug's appearance and method of use, the number of times they had used it with Simms, and its effect on them compared to other drugs they have used. They also described subsequent experiences they had had with methamphetamine as similar to the times they used it with Simms.

Second, P.I. and N.B.'s descriptions are supported by testimony from the expert witnesses about the characteristics of methamphetamine, its effects on the user, and the type of pipe associated with it. Third, the record contains evidence of Simms and others referring to the substance as methamphetamine. Finally, the testimony from P.I. and N.B. included descriptions of the drug's appearance and the pipe used that, combined with the expert testimony, suggested that methamphetamine was sufficiently unique and could be distinguished from other drugs based on the witnesses' descriptions.

In sum, we find that a jury could reasonably infer from this evidence that the substance Simms gave to P.I. and N. B was methamphetamine. Simms argues that the witness testimony and opinions were "inexpert" and "nonspecific, generic" and "ambiguous." Reply Br. at 4-5. These are issues of credibility that cannot be reviewed upon appeal. See Camarillo, 115 Wn.2d at 571.

Jury Instruction/Uncharged Alternative Means

Simms argues that he did not receive fair notice of the charged offense, because in the information he was specifically charged with delivery of methamphetamine, but at trial he was accused and convicted of delivering any "controlled substance." Brief of Appellant at 16. The "to convict" instruction did not "clearly and specifically limit[_] the jury's verdict to delivery of the charged substance, methamphetamine." Id. According to him, jurors may "have been convinced that [he] gave them some kind of drug but not the charged drug methamphetamine," and they "may not have unanimously agreed on the type of controlled substance delivered." Br. of Appellant at 17. Simms contends that the prosecution's arguments and court's instructions undermined Simms' right to a fair trial and unanimous jury verdict on identity of controlled substance. We review de novo whether a jury instruction accurately states the law without misleading the jury. State v. Chino, 117 Wn. App. 531, 538, 72 P.3d 256 (2003).

The State contends Simms did not properly preserve this issue for review because below he failed to take exception to the instruction of which he now

complains.[2] Thus, according to the State, review of this issue is precluded under RAP 2.5(a) which provides that the appellate court may refuse to review any claim of error which was not raised in the trial court.

Simms does not dispute that he did not object to the instruction below, but argues that he falls within the exception provided in RAP 2.5(a)(3) which permits a claim of error to be raised for the first time on appeal where it is a "manifest error affecting a constitutional right." To fall within the exception, an appellant must demonstrate (1) that the error is manifest, and (2) the error is truly of constitutional dimension. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

Simms argues that the error implicates his constitutional rights because "the constitution prohibits the court from instructing the jury on an uncharged alternative means of conviction. . . ." Br. of Appellant at 15. We agree. In analyzing the asserted constitutional interest, we look to the allegation of a constitutional violation, and the facts alleged, to determine whether, if true, the defendant's constitutional rights were violated. O'Hara, 167 Wn.2d at 98-99. It is

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[2] The State also argues that any issue with the jury instructions arose as a result of invited error, because Simms proposed the to convict instruction that did not contain the definition of "controlled substance." The doctrine of invited error precludes a party from requesting an instruction at trial and then later on, seeking reversal on the basis of a claimed error in the instruction given at the defendant's request. State v. Henderson, 114 Wn.2d 867, 869, 792 P.2d 514 (1990). But the State concedes that the record does not contain a copy of the defense's proposed instructions and points only to the report of proceedings which reflects that Simms participated in discussions that resulted in the final draft of the instruction and that he did not take exception to the instruction. Because the record does not show that Simms proposed the instruction, we decline to apply the invited error doctrine. See State v. LeFaber, 128 Wn.2d 896, 904, 913 P.2d 369, n.1 (1996) (unable to preclude review based on invited error where the record was unclear as to whether defendant proposed instruction with similar language), abrogated on other grounds by State v. O'Hara, 167 Wn.2d 91, 101-02, 217 P.3d 756 (2009).

reversible error to try a defendant under an uncharged statutory alternative because it violates the defendant's right to notice of the crime charged. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996).

However, after determining the error is of constitutional magnitude, we must still determine whether the error was manifest. Manifest error under RAP 2.5(a)(3) requires a showing of actual prejudice. In order to show actual prejudice, there must be a "'plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.'" O'Hara, 167 Wn.2d at 99 (quoting Kirkman, at 935).

Simms argues that the lack of definition in the to convict instruction could have resulted in some jurors basing his conviction on a finding that he delivered marijuana to a minor. But he identifies little, other than speculation, to support this claim. Simms points to testimony that he smoked marijuana on a number of occasions with P.I. and N.B. But the record shows the likelihood that the jury considered marijuana as a basis for the charge was remote. At the beginning of the trial, the court advised the jury of the allegation against Simms that he "unlawfully and feloniously did deliver and distribute methamphetamine, a controlled substance to ... [N.B. and P.I.], a person who was under 18 years of age. . . ." VRP (Jan. 27, 2014) at 21-22. The only controlled substance mentioned in the court's instructions to the jury was methamphetamine. ("Methamphetamine is a controlled substance."). CP at 57.

Furthermore, during closing arguments the State and Simms made it abundantly clear that the charge for the jury to consider involved only

methamphetamine and not some other drug. The State referred to Instruction No. 12 (the to convict instruction) and the "elements that the State has to prove." VRP (Feb. 11, 2014) at 28. She noted that "Count 1 is delivery of methamphetamine to a minor, a controlled substance to a minor." Id. Simms' attorney also drove the point home, stating that Simms "[was] not charged with supplying them with pot, that's not really relevant to the charges against him." VRP (Feb. 11, 2014) at 42. Because the record does not support a finding of manifest error affecting a constitutional right, we decline to review this claim of error raised for the first time on appeal.

Simms submits a statement of additional grounds in which he raises challenges to the sufficiency of the evidence and witness credibility. A defendant may submit a pro se statement of additional grounds for review pursuant to RAP 10.10. Such statement must "'inform the court of the nature and occurrence of [the] alleged errors.'" State v. Meneses, 149 Wn. App. 707, 715-16, 205 P.3d 916 (2009). Simms argues that there was no evidence that he took the pictures, because they were not from any one of his phones. He also claims that P.I. and N.B. were not credible witnesses, because they lied about other events and had a motive to retaliate against him. Again, we defer to the jury's determinations regarding the persuasiveness of the evidence and the credibility of witnesses; we will not reweigh the evidence and substitute our judgment for that of the jury.

Finally, Simms argues that he was improperly ordered to submit to HIV testing under RCW 70.24.340(1). The statute imposes HIV testing and counseling of all persons:

(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.

The State agrees that this condition was a scrivenor's error; Simms was not convicted of a sexual offense under Chapter 9A.44 RCW, nor was the drug offense related to his conviction associated with the use of hypodermic needles. We therefore remand for revision of the judgment and sentence accordingly.

Affirm, but remand to strike the HIV testing requirement.

Spearman, C.J.

WE CONCUR:

Becker, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 71863-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: October 14, 2015

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