No. 32637-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

RIGOBERTO G. SANCHEZ,

Appellant.

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

The Honorable Judges William D. Acey and Scott D. Gallina

APPELLANT'S OPENING BRIEF

JILL S. REUTER, Of Counsel
KRISTINA M. NICHOLS
Nichols Law Firm, PLLC
Attorneys for Appellant
P.O. Box 19203
Spokane, WA 99219
(509) 731-3279
Wa.Appeals@gmail.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court

Washington Supreme Court

Washington Courts of Appeal

Washington State Statutes

Washington Court Rules

Other Authorities

A. SUMMARY OF ARGUMENT

Rigoberto G. Sanchez was charged with a single count of delivery of methamphetamine. The State filed a notice of intent to seek an exceptional sentence, asserting that it would argue for consecutive sentences on each felony conviction. Aware that there was only one charge, and that, therefore, consecutive sentences could not be sought, Mr. Sanchez entered a plea to the charge, under *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976), and requested the case proceed to sentencing before the trial court. Instead, the trial court erroneously permitted the State to amend its notice of intent to seek an exceptional sentence after Mr. Sanchez entered his *Newton* plea to assert it would argue for a sentence above the standard range, on the basis that the crime was a major violation of the Uniform Controlled Substances Act. The trial court then held a jury trial on the exceptional sentence. Jury Instruction Number 6 instructed the jury on the elements of the aggravating factor, but it did not require the jury make the required factual finding that the offense "is one which is more onerous than the typical offense." The jury found the presence of the aggravating factor, and the trial court imposed an aggravated exceptional sentence on this basis. The trial court also imposed a $3,000.00 "Methamphetamine Clean Up Assessment" based upon the erroneous assumption that this fine was mandatory.

B. ASSIGNMENTS OF ERROR

1. The State gave insufficient notice of its intent to seek an exceptional sentence on the basis that the offense was a major violation of the Uniform Controlled Substances Act.

2. The trial court erred in allowing the State to file an "Amended Notice of Intent to Seek an Exceptional Sentence."

3. The trial court erred in permitting the case to proceed to a jury trial on the State's request for an exceptional sentence.

4. The trial court erred in giving Jury Instruction Number 6. (CP 73).

5. The trial court erred by imposing the following Findings of Fact in support of an exceptional sentence above the standard range:

> The jury found that this offense was a major violation of the Uniform Controlled Substances Act (RCW 69.50) as described in RCW 9.94A.535 (3)(e). Specifically, this crime involved the delivery of 412.69 grams of methamphetamine that appeared to trained officers to be of a very high purity. This is a very large quantity and substantially more that is [sic] ordinarily seen in this area for personal use.

(CP 101).

6. The trial court erred by imposing the following Conclusions of law in support of an exceptional sentence above the standard range:

> The Court concludes that this was a major violation of RCW 69.50.401(2)(b) and concludes that a sentence within the standard range would be clearly too lenient under the circumstances. The Court further concludes that 84 months incarceration is appropriate in light of the purposes of RCW 69.50 and the Sentencing Reform Act (RCW 9.94A).

(CP 101).

7. The trial court erred by imposing a $3,000 "Mandatory 'Methamphetamine Clean Up' Assessment."

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: The trial court erred by permitting the State to amend its notice of exceptional sentence after Mr. Sanchez entered a *Newton* plea; the State's original notice of intent to seek a *consecutive* sentence did not provide Mr. Sanchez sufficient notice for the State to later seek an exceptional sentence based on a major violation of the Uniform Controlled Substances Act.

Issue 2: Jury Instruction Number 6 was constitutionally deficient because it relieved the State of its burden to prove all of the elements of the aggravating circumstance beyond a reasonable doubt.

Issue 3: The trial court abused its discretion by imposing a $3,000 "Mandatory 'Methamphetamine Clean Up' Assessment."

D. STATEMENT OF THE CASE

Law enforcement officers set up a controlled buy of methamphetamine, where an individual was supposed to bring methamphetamine to a residence in Clarkston for purchase. (RP 91-92, 103-105, 110, 119, 121, 137, 149). 412.69 grams of methamphetamine was recovered from the residence. (RP 96-97, 103-104, 123-126). Rigoberto G. Sanchez was one of two individuals observed entering and exiting this residence prior to the recovery of the methamphetamine. (RP 93, 95-96, 120-121, 123). Law enforcement officers later found the pre-recorded money involved in the controlled buy on Mr. Sanchez's person. (RP 98, 123).

The State charged Mr. Sanchez with one count of delivery of methamphetamine. (CP 10). On the same day as the Information was filed, the State filed a document entitled "Notice of Intent to Seek Exceptional Sentence" stating the following:

> The above-named Defendant is hereby given notice that the State intends to seek an exceptional sentence in the above matter, *and will argue for the sentences on each felony conviction in this case to be ordered consecutive to each other.* The basis for the State's argument may be found in RCW 9.94A.535(3)(e). The State hereby alleges that the offense charged against the Defendant was a major violation of the Uniform Controlled Substance Act, chapter 69.50 RCW, relating to trafficking in controlled substances, which was more onerous that the [sic] typical offence of its statutory definition.

(CP 13) (first emphasis added). Mr. Sanchez received this notice at his arraignment. (RP 51-52).

Mr. Sanchez was originally represented by R. Victor Bottomly. (CP 17, 24-27). Following his arraignment, Mr. Sanchez wrote letters to the trial court expressing concern with Mr. Bottomly's representation and requested to remove Mr. Bottomly from the case. (CP 18-23). Subsequently, Mr. Bottomly withdrew as defense counsel and Etoy Alford, Jr. substituted as defense counsel for Mr. Sanchez. (CP 29; RP 7-8).

On the same day as Mr. Alford substituted as defense counsel, Mr. Sanchez entered a *Newton*[1] plea to one count of delivery of methamphetamine, as charged. (CP 30-40; RP 17-27). At the plea hearing, the State informed the trial court and Mr. Sanchez it intended to seek an exceptional sentence. (RP 18, 20-21). Mr. Sanchez acknowledged the State "filed a document that states that they intend to seek a sentence outside of the standard range[.]" (CP 32; RP 21-22, 24).

Following Mr. Sanchez's plea, the trial court scheduled the case for sentencing. (RP 28-29). At this sentencing hearing, Mr. Sanchez requested the trial court impose a sentence immediately. (RP 39). The State requested a trial on its request for an exceptional sentence. (RP 39). The trial court set the matter over to allow the parties to submit briefing on the issue. (CP 42-48; RP 39-45).

In his briefing, Mr. Sanchez argued:

> The State's notice informed the reader that it's [sic] intended sentence was for the standard range sentences to run consecutive to each other as opposed to concurrent. . . . The problem with the State's intent to impanel a jury to determine an aggravating factor is that Mr. Sanchez is only charged with one crime. As there is no additional crime for which a standard range sentence could be run consecutive it would be a waste of judicial resources to . . . impanel a jury. The issue is moot.

(CP 43-44).

[1] *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976).

In its brief, the State argued it informed Mr. Sanchez of its intention to seek an exceptional sentence and the basis upon which it would rely, and therefore, the matter should be set for a jury trial on its request for an exceptional sentence. (CP 45-48). The State also filed a document entitled "Amended Notice of Intent to Seek Exceptional Sentence" stating the following:

> The above-named Defendant is hereby given notice that the State intends to seek an exceptional sentence in the above matter, *and will argue for the sentences on a felony conviction in this case to be ordered in excess of the standard range.* The basis for the State's argument may be found in RCW 9.94A.535(3)(e). The State hereby alleges that the offense charged against the Defendant was a major violation of the Uniform Controlled Substance Act, chapter 69.50 RCW, relating to trafficking in controlled substances, which was more onerous that the [sic] typical offence of its statutory definition.

(CP 41) (first emphasis added). This document was filed almost one month after Mr. Sanchez entered his *Newton* plea. (CP 41).

Mr. Sanchez objected to this document. (CP 51-53; RP 52-53). He argued that when he entered his *Newton* plea "[t]he Defense knew full well that the State of Washington's Notice of Intent to Seek Exceptional Sentence prevented the State from arguing for a sentence beyond the standard sentencing range." (CP 51).

The trial court overruled Mr. Sanchez's objections to the State's notice and amended notice of its intent to seek an exceptional sentence. (RP 56-58). The trial court stated, in relevant part:

> I will concede that the State, as it turns out since Mr. Sanchez was only charged with one count initially of delivery of controlled substance . . . methamphetamine, that it seemed a bit odd for the State to say - - state in its first sentence of that February 21 notice, "The above named defendant is hereby given notice that the State intends to seek an exceptional sentence in the above matter and will argue for the sentences on each felony conviction in this case to be ordered consecutive to each other." Ah, that doesn't make sense when somebody's only charged with one offense. How can you run something consecutive to itself? However, ah, as any information filed by the State can, ah, be sought to be amended at any time until the matter is finally submitted, ah, to a -- to a jury or a finder of fact to conform to the evidence so to speak. The State has, ah, recently . . . filed an amended notice of intent to seek exceptional sentence, just making it generic, hey, we intend to ask for a sentence above the standard range and . . . leaving out the part about, ah, whether or not it's going to be consecutive. Ah, so, I don't find any legal disqualification or error, ah, by having included that consecutive wording.
> . . .
> They did file an amended, ah, information; they have the right; and clearly, the defendant had notice of the intent to seek exceptional sentence.
> . . .
> I rule that the State didn't box itself in, ah, or cut itself off by using the word consecutive in the original notice.

(RP 56-58). The case then proceeded to a jury trial on the exceptional sentence. (CP 54; RP 89-151).

Quad Cities' Drug Task Force Detective Bryson Aase testified he had not seen a larger single purchase of methamphetamine in his six years working as a narcotics detective. (RP 89-90, 99-100, 104).

Quad Cities' Drug Task Force Detective Jonathan Coe testified that a heavy methamphetamine user would use .25 grams of methamphetamine in a single session, and 1 to 1 ½ grams per day. (RP 106, 109, 117, 134). Detective Coe testified that in almost 30 years as a police officer and 2 and ½ years as a narcotics detective, he had not seen a single delivery case involving more methamphetamine. (RP 135, 149).

In Jury Instruction Number 6, the trial court instructed the jury:

> A major trafficking violation of the Uniform Controlled Substances Act is one which is more onerous than the typical offense. The presence of any of the following factors may identify this offense as a major trafficking violation:
>
> > Whether the current offense involved an attempted or actual sale or transfer of controlled substances in quantities larger than for personal use; or
> >
> > Whether the circumstances of the current offense reveal that the Defendant occupied a high position in the drug distribution hierarchy.

(CP 73; RP 163-164).

Mr. Sanchez did not object to this instruction. (RP 153-157).

The jury returned a verdict answering "yes" to the question "[w]as the crime a major violation of the Uniform Controlled Substance Act[.]"

(CP 76; RP 178). The trial court entered findings of fact and conclusions of law for an exceptional sentence. (CP 101; RP 202, 204-205).

The trial court sentenced Mr. Sanchez to an aggravated exceptional sentence of 84 months confinement, above the standard range of 12+ to 20 months confinement. (CP 93, 95; RP 199-201). The trial court imposed a $3,000.00 "Mandatory 'Methamphetamine Clean Up' Assessment" under RCW 69.50.401. (CP 93; RP 201, 203-204). Mr. Sanchez objected to this fine, arguing it was not mandatory. (RP 203). The trial court overruled his objection and agreed with the State's argument that the fine was mandatory. (RP 203-204).

Mr. Sanchez timely appealed. (CP 109-119).

E. ARGUMENT

Issue 1: The trial court erred by permitting the State to amend its notice of exceptional sentence after Mr. Sanchez entered a *Newton* plea; the State's original notice of intent to seek a *consecutive* sentence did not provide Mr. Sanchez sufficient notice for the State to later seek an exceptional sentence based on a major violation of the Uniform Controlled Substances Act.

The legislature set forth certain aggravating circumstances as criteria for an exceptional sentence, the facts for which are to be determined by procedures specified in RCW 9.94A.537. *See* RCW 9.94A.535. The aggravating circumstances supporting an exceptional sentence include "[t]he current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA),

related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition[.]" RCW 9.94A.535(3)(e).

Consecutive sentences for multiple current offenses is an exceptional sentence. *See* RCW 9.94A.535 ("[a] departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section[.]"); RCW 9.94A.589(1)(a) ("Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535."). However, the procedures set forth in RCW 9.94A.537 do not apply to an exceptional sentence imposed on this basis; "a sentencing judge, not a jury, may find facts to support consecutive sentences." *State v. Vance*, 168 Wn.2d 754, 762, 230 P.3d 1055 (2010).

Pursuant to RCW 9.94A.537:

> The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.

RCW 9.94A.537(3).

The procedures specified in RCW 9.94A.537 apply to both a defendant who pleads guilty and a defendant who goes to trial on the underlying

crime. *See State v. Pillatos*, 159 Wn.2d 459, 477-78, 150 P.2d 1130 (2007).

RCW 9.94A.537 requires the State to provide pretrial notice of an aggravated exceptional sentence, as follows:

> *At any time prior to trial or entry of the guilty plea* if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

RCW 9.94A.537(1) (emphasis added).

"RCW 9.94A.537(1) permits the imposition of an exceptional sentence *only* when the State has given notice, prior to trial, that it intends to seek a sentence above the standard sentencing range . . . ." *State v. Womac*, 160 Wn.2d 643, 663, 160 P.3d 40 (2007); *see also State v. Bobenhouse*, 143 Wn. App. 315, 331, 177 P.3d 209 (2008). Although "an aggravating factor is not the functional equivalent of an essential element and need not be charged in the information[,]" RCW 9.94A.537(1) requires the State to provide pretrial notice that it will seek an aggravated exceptional sentence. *State v. Siers*, 174 Wn.2d 269, 277, 282, 274 P.3d 358 (2012).

In addition to the statutory notice requirement, notice of an aggravated exceptional sentence is required by constitutional due process:

> [N]otice of aggravating circumstances is required as a matter of due process. Due process is satisfied when the defendant receives sufficient notice from the State to

> prepare a defense against the aggravating circumstances that the State will seek to prove in order to support an exceptional sentence.

Id. at 278 (quoting *State v. Powell*, 167 Wn.2d 672, 682, 223 P.3d 493 (2009), *overruled on other grounds by Siers*, 174 Wn.2d at 282). Due process generally requires pretrial notice of aggravating circumstances to allow the defense a sufficient opportunity to plan and prepare an adequate defense. *See id*. at 277. Specifically, "to allow the defendant to 'mount an adequate defense' against an aggravating circumstance listed in RCW 9.94A.535(3), the defendant must receive notice prior to the proceeding in which the State seeks to prove those circumstances to a jury." *Id*. at 277 (citing *State v. Schaffer*, 120 Wn.2d 616, 620, 845 P.2d 281 (1993)).

Statutory interpretation is an issue of law reviewed de novo. *State v. Bright*, 129 Wn.2d 257, 265, 916 P.2d 922 (1996). Constitutional challenges are also subject to de novo review. *Vance*, 168 Wn.2d at 759.

Here, prior to the entry of his *Newton* plea, the State gave Mr. Sanchez notice that it intended to seek an exceptional sentence, by "argu[ing] for the sentences on each felony conviction in this case to be ordered consecutive to each other." (CP 13; RP 51-52). Although the State's notice then referenced the major violation of the Uniform Controlled Substances Act aggravating factor set forth in RCW

9.94A.535(3)(e), the notice specifically stated the State was seeking consecutive sentences. (CP 13).

The notice given prior to Mr. Sanchez's *Newton* plea did not inform him the State would argue for a sentence above the standard range on the basis that the offense was a major violation of the Uniform Controlled Substances Act, other than via a consecutive sentence. (CP 13). Instead, the notice informed Mr. Sanchez the State would "argue for the sentences on each felony conviction in this case to be ordered consecutive to each other." (CP 13). Aware that there was only one charge, and that therefore, consecutive sentences could not be sought, Mr. Sanchez entered a *Newton* plea based upon this fact. (CP 51).

Almost one month after Mr. Sanchez entered his *Newton* plea, the State was permitted, over Mr. Sanchez's objection, to file an amended notice of intent to seek an exceptional sentence. (CP 41, 51-53; RP 52-53, 56-58). For the first time, the State informed Mr. Sanchez it would argue for a sentence above the standard range on the basis that the offense was a major violation of the Uniform Controlled Substances Act rather than pursuant to those grounds that would support consecutive sentences. (CP 41). Because such notice must be given prior to trial or entry of a guilty plea, the trial court erred in allowing the State to file the amended notice of intent to seek an exceptional sentence after Mr. Sanchez's *Newton* plea.

See RCW 9.94A.537(1) (the State may give notice of its intent to seek an aggravated exceptional sentence "[a]t any time prior to trial or entry of the guilty plea. . . ."); *see also Womac*, 160 Wn.2d at 663; *Bobenhouse*, 143 Wn. App. at 331; *Siers*, 174 Wn.2d at 282. There is no procedure authorizing such notice to be amended after trial or entry of a guilty plea. *Cf.* CrR 2.1(d) (permitting an amendment to an information or bill of particulars before a verdict or finding is reached).

Constitutional due process also required the State to give notice of the aggravating circumstance, in order to allow Mr. Sanchez to prepare a defense against the aggravating circumstance. *See Siers*, 174 Wn.2d at 277-78. The record shows that Mr. Sanchez was denied this opportunity; he entered his *Newton* plea on the basis that the State's notice regarding consecutive sentences precluded a sentence beyond the standard sentencing range, because Mr. Sanchez was only before the court on one crime. (CP 51). In addition, consecutive sentences can be imposed by a judge, not a jury. *Vance*, 168 Wn.2d at 762. Accordingly, based on the State's notice, Mr. Sanchez would be making sentencing arguments to the trial court, versus face a jury trial on an aggravating factor. Mr. Sanchez did not receive sufficient notice of the basis for an exceptional sentence, that a non-consecutive sentence would be sought because the offense was

a major violation of the Uniform Controlled Substances Act, in order to prepare an adequate defense. *See Siers*, 174 Wn.2d at 277-78.

Both constitutional due process and the applicable statute required notice that the State would seek an exceptional sentence prior to the entry of Mr. Sanchez's *Newton* plea. *See* RCW 9.94A.537(1); *Siers*, 174 Wn.2d at 277. Where the notice given prior to Mr. Sanchez's *Newton* plea alleged an inapplicable ground for an exceptional sentence, i.e., consecutive sentences where there was only a single count charged, the State gave insufficient notice of its intent to seek an exceptional sentence. Further, the amended notice given almost one month after Mr. Sanchez entered his *Newton* plea did not provide him with adequate notice under the constitutional due process principles or the applicable statute. *See* RCW 9.94A.537(1); *Siers*, 174 Wn.2d at 277.

The trial court erred in permitting the case to proceed to a jury trial on the State's request for an exceptional sentence. This court should reverse Mr. Sanchez's sentence and remand for resentencing within the standard range before a different judge. *See, e.g., State v. Hooper*, 100 Wn. App. 179, 188, 997 P.2d 936 (2000) (setting forth the following remedy: "[w]hen a court bases an exceptional sentence on an invalid factor, remand is required unless the record clearly indicates the court would have imposed the same sentence absent the factor.").

Issue 2: Jury Instruction Number 6 was constitutionally deficient because it relieved the State of its burden to prove all of the elements of the aggravating circumstance beyond a reasonable doubt.

Should this Court disagree that the State gave insufficient notice of its intent to seek an exceptional sentence as argued above, then the jury instructions given during the jury trial on the exceptional sentence were constitutionally deficient.

As stated above, "[t]he facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt." RCW 9.94A.537(3). In *Apprendi v. New Jersey*, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). In *Blakely v. Washington*, the Supreme Court held that Washington's sentencing procedure violated the Sixth Amendment rights articulated in *Apprendi*. *See Blakely v. Washington*, 542 U.S. 296, 305, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Washington enacted RCW 9.94A.537 in order to comply with the holdings of *Apprendi* and *Blakely*. *See* Laws of 2005, ch. 68, § 1 ("The legislature intends to conform the sentencing reform act, chapter 9.94A RCW, to comply with the ruling in *Blakely v. Washington*. . . .").

"[A]ggravating factors must be proved to the jury just as the elements of the underlying offense must be proved to the jury." *State v. Gordon*, 172 Wn.2d 671, 678, 260 P.3d 884 (2011). "Failure to include every element of the crime charged amounts to constitutional error that may be raised for the first time on appeal." *State v. Fisher*, 165 Wn.2d 727, 753-54, 202 P.3d 937 (2009) (citing *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005)). "To convict" jury instructions are subject to de novo review. *Id*. at 754 (citing *Mills*, 154 Wn.2d at 7).

As stated above, the aggravating circumstances supporting an exceptional sentence include "[t]he current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, *which was more onerous than the typical offense of its statutory definition*[.]" RCW 9.94A.535(3)(e) (emphasis added). This statutory provision further provides:

> The presence of ANY of the following may identify a current offense as a major VUCSA:
> (i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;
> (ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;
> (iii) The current offense involved the manufacture of controlled substances for use by other parties;

> (iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;
> (v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or
> (vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

RCW 9.94A.535(3)(e).

Proof of any of these six factors can justify an exceptional sentence. *State v. Solberg*, 122 Wn.2d 688, 706-07, 861 P.2d 460 (1993).

The statutory requirement that "[t]he current offense . . . was more onerous than the typical offense of its statutory definition" is a factual determination that must be made by a jury. RCW 9.94A.535(3)(e); *State v. Flores*, 164 Wn.2d 1, 22, 186 P.3d 1038 (2008). Thus, under the major violation of the Uniform Controlled Substances Act aggravating factor, the State is required to prove two facts: (1) a major violation of the Uniform Controlled Substances Act; and (2) that the violation is "more onerous than the typical offense of its statutory classification." *See* 11A Washington *Practice: Washington Pattern Jury Instructions: Criminal* (WPIC) 300.14 (3d ed.2008) (stating that the statute is not clear on the required proof for this aggravating circumstance, noting this is a possible construction of the statute).

Here, the trial court instructed the jury on the required elements of the aggravating factor, in Jury Instruction Number 6:

> A major trafficking violation of the Uniform Controlled Substances Act is one which is more onerous than the typical offense. The presence of any of the following factors may identify this offense as a major trafficking violation:
>
> > Whether the current offense involved an attempted or actual sale or transfer of controlled substances in quantities larger than for personal use; or
> >
> > Whether the circumstances of the current offense reveal that the Defendant occupied a high position in the drug distribution hierarchy.

(CP 73; RP 163-164).

The verdict form asked the jury "[w]as the crime a major violation of the Uniform Controlled Substance Act[.]" (CP 76; RP 178). Jury Instruction Number 6 permitting the jury to answer "yes" to this question if either of the following factors was present:

> Whether the current offense involved an attempted or actual sale or transfer of controlled substances in quantities larger than for personal use; or
>
> Whether the circumstances of the current offense reveal that the Defendant occupied a high position in the drug distribution hierarchy.

(CP 73, 76; RP 163-164).

Although Jury Instruction Number 6 defined a major violation of the Uniform Controlled Substances Act as "one which is more onerous

than the typical offense[,]" it did not require the jury to find this fact when determining if Mr. Sanchez's offense was a major violation of the Uniform Controlled Substances Act. (CP 73; RP 163-164). Because a finding that the crime was "one which is more onerous than the typical offense of its statutory definition" is a factual determination that must be made by a jury, Jury Instruction Number 6 was constitutionally deficient because it relieved the State of its burden to prove all of the elements of the aggravating circumstance beyond a reasonable doubt. *Flores*, 164 Wn.2d at 22; *see also* 11A Washington *Practice: Washington Pattern Jury Instructions: Criminal* (WPIC) 300.14 (3d ed.2008) (noting this possible construction of the statute).

Constitutional error, including the omission of an element from a "to convict" jury instruction, is harmless if it is clear beyond a reasonable doubt that the error did not contribute to the verdict. *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1829, 144 L. Ed. 2d 35 (1999) (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). "A misstatement of the law in a jury instruction is harmless if the element is supported by uncontroverted evidence." *State v. Peters*, 163 Wn. App. 836, 850, 261 P.3d 199 (2011) (citing *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)). It is the State's burden to prove the

omission was harmless beyond a reasonable doubt. *State v. Kirwin*, 166 Wn. App. 659, 669, 271 P.3d 310 (2012).

The omission of the element that the crime was "one which is more onerous than the typical offense of its statutory definition" in Jury Instruction Number Six was not harmless beyond a reasonable doubt. Detective Aase testified he had not seen a larger single purchase of methamphetamine and Detective Jonathan Coe testified he had not seen a single delivery case involving more methamphetamine. (RP 89-90, 99-100, 104, 135, 149). This testimony supported the factor of "[w]hether the current offense involved an attempted or actual sale or transfer of controlled substances in quantities larger than for personal use[.]" (CP 73, 76; RP 163-164); *see also* RCW 9.94A.535(3)(e)(ii). There was no evidence presented regarding what a "typical" offense of delivery of methamphetamine involves as defined by statute, in order for the jury to compare the crime here to a "typical" offense and make the factual determination that Mr. Sanchez's crime was "more onerous than the typical offense." *See* RCW 9.94A.535(3)(e); *Flores*, 164 Wn.2d at 22.

The case should be reversed and remanded for a new jury trial on the exceptional sentence, because Jury Instruction Number 6 relieved the State of its burden to prove all of the elements of the aggravating circumstance beyond a reasonable doubt, and the error was not harmless

beyond a reasonable doubt. *See, e.g., Peters*, 163 Wn. App. at 851-52 (setting forth this remedy for an erroneous to-convict jury instruction).

Issue 3: The trial court abused its discretion by imposing a $3,000 "Mandatory 'Methamphetamine Clean Up' Assessment."

A sentencing court's decision must be reversed if the trial court abuses its discretion or misapplies the law. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). "A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds; this standard is also violated when a trial court makes a reasonable decision but applies the wrong legal standard or bases its ruling on an erroneous view of the law." *State v. Corona*, 164 Wn. App. 76, 78-79, 261 P.3d 680 (2011) (citing *State v. Dixon*, 159 Wn.2d 65, 76, 147 P.3d 991 (2006)).

Underlying questions of law are reviewed de novo. *State v. Lord*, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007). If a statute's meaning is plain on its face, the court must follow that plain meaning. *See State v. Graham*, 337 P.3d 319, 321 (Wash. 2014).

RCW 69.50.401 sets forth the permissible sentence for the crime of delivery of methamphetamine. RCW 69.50.401(2)(b). The statute provides, in relevant part:

> (2) Any person who violates this section with respect to:
>
> b) . . . methamphetamine, including its salts, isomers, and salts of isomers, is guilty of a class B felony and upon conviction *may be* imprisoned for not more than ten years,

> *or* (i) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, *or* both such imprisonment and fine. . . . Three thousand dollars of the fine may not be suspended. As collected, the first three thousand dollars of the fine must be deposited with the law enforcement agency having responsibility for cleanup of laboratories, sites, or substances used in the manufacture of the methamphetamine, including its salts, isomers, and salts of isomers. The fine moneys deposited with that law enforcement agency must be used for such clean-up cost[.]

RCW 69.50.401(2)(b) (emphasis added).

In *State v. Wood*, the court interpreted an earlier version of this statute "to mean that a person . . . who has been convicted of a crime involving methamphetamine, may be punished by imprisonment, or a fine, or both." *State v. Wood*, 117 Wn. App. 207, 212, 70 P.3d 151 (2003). The court further found that "*[i]f* a fine is imposed, the first $3,000 collected must go to the drug site cleanup fund." *Id*. The court then held "the statute authorizing a contribution to the drug cleanup fund is discretionary with the trial court." *Id*.

Here, the trial court imposed a $3,000.00 "Mandatory 'Methamphetamine Clean Up' Assessment" under RCW 69.50.401 over the objection of Mr. Sanchez, based upon the trial court's determination that the fine was mandatory. (CP 93; RP 201, 203-204). Because the fine was discretionary, the imposition of this fine was based on an erroneous view of the law, and therefore, the trial court abused its discretion by

imposing it. *See Corona*, 164 Wn. App. at 78-80; *see also Woods*, 117 Wn. App. at 212. The case should be reversed and remanded for resentencing. *See Corona*, 164 Wn. App. at 80 (authorizing this remedy).

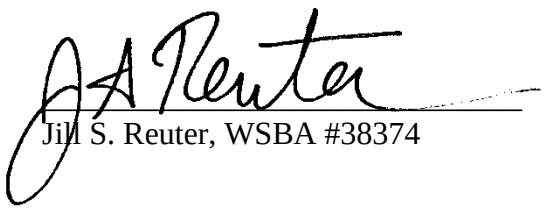
F. CONCLUSION

Because the State gave insufficient notice of its intent to seek an exceptional sentence, the case should be reversed and remanded for resentencing within the standard range before a different judge.

In the alternative, the case should be reversed and remanded for a new jury trial on the exceptional sentence, because Jury Instruction Number 6 relieved the State of its burden to prove all of the elements of the aggravating circumstance beyond a reasonable doubt, and the error was not harmless.

At a minimum, the case should be reversed and remanded for resentencing because the trial court abused its discretion by imposing a $3,000.00 "Mandatory 'Methamphetamine Clean Up' Assessment" under RCW 69.50.401.

Respectfully submitted this 19th day of December, 2014.



Jill S. Reuter, WSBA #38374

/s/ *Kristina M. Nichols*
Kristina M. Nichols, WSBA #35918
Attorney for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Plaintiff/Respondent vs. RIGOBERTO G. SANCHEZ Defendant/Appellant	)	COA No. 32637-3-III PROOF OF SERVICE

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on December 19, 2014, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Rigoberto G. Sanchez #377069
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

Having obtained prior permission from the Asotin County Prosecutor's Office, I also served Benjamin Nichols at bnichols@co.asotin.wa.us using Division III's e-service feature.

Dated this 19th day of December, 2014.

/s/ Kristina M. Nichols
Kristina M. Nichols, WSBA #35918
Nichols Law Firm, PLLC
PO Box 19203
Spokane, WA 99219
Phone: (509) 731-3279
Wa.Appeals@gmail.com