

63098-9

63098-9

NO. 63098-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

DARRYL WILLIAMS,

Appellant.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2010 JAN 21 PM 3:14

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE STEVEN GONZÁLEZ

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**BRIEF OF RESPONDENT**

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A. ISSUES

1. Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. To deliver cocaine by constructive transfer, a defendant must transfer the cocaine under his direct or indirect control by some other person or manner at the instance or direction of the defendant. Here, Williams initiated contact with the undercover officers, pursued their business when they refused his initial terms, arranged for the dealer to bring the crack to their location, spoke to the dealer more than once after he arrived, and stood next to the officer and the dealer while the exchange occurred. Is there substantial evidence in the record to support Williams's conviction?

2. A "to convict" instruction must contain all elements of the charged crime. The type of drug is not an essential element of the crime unless it aggravates the statutory maximum sentence. Additionally, omission of an essential element is not reversible error where the State is not relieved of its burden of proving each element. Here, Williams was charged with delivery of a controlled substance under a statute that prescribed the same maximum penalty regardless of the drug delivered. Should this Court affirm

Williams's conviction because the type of drug was not a required element in the "to convict" instructions? In the alternative, was the omission of the type of drug from the "to convict" instruction harmless?

B. STATEMENT OF FACTS

1. PROCEDURAL FACTS

Darryl Williams was charged with a Violation of the Uniform Controlled Substances Act—Delivery of a Controlled Substance after he arranged for the sale of crack cocaine to two undercover police officers on March 12, 2008. CP 1-6. Williams was convicted by a jury as charged. CP 11. The court granted Williams's request for a DOSA,<sup>1</sup> which resulted in 45 months of confinement, followed by 45 months of community custody. CP 39; 5RP 7-10.<sup>2</sup>

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<sup>1</sup> Drug Offender Sentencing Alternative.

<sup>2</sup> The Verbatim Report of Proceedings consists of five volumes that are not consecutively paginated. The State has adopted the following reference system: 1RP (12/10/08), 2RP (12/11/08), 3RP (12/15/08), 4RP (01/23/09), and 5RP (02/27/09).

## 2. SUBSTANTIVE FACTS

The Anti-Crime Team unit from the southwest precinct of the Seattle Police Department conducted a “buy-bust” operation in the 7000 block of East Marginal Way on the evening of March 12, 2008. 2RP 79; 3RP 23. This “buy-bust” operation involved undercover officers attempting to buy drugs while other officers watched nearby. 2RP 18. A “buy-bust” team has five components: undercover buyer(s), trailers to follow the undercover buyer(s), observation officers, an arrest team, and a supervising officer. 2RP 11, 43, 79; 3RP 7.

Undercover Officers Susanna Guyer<sup>3</sup> and Marie Gochnour were walking along East Marginal Way near the Airline Motel when Williams called out to them to get their attention. 2RP 79, 82; 3RP 24. Guyer told Williams that they were looking for some “cream,” a slang term for crack cocaine. 2RP 82; 3RP 24. Williams asked how much the officers wanted, and Guyer said that she wanted \$40 worth. 2RP 84; 3RP 25. Williams asked Guyer and Gochnour if they were the police, which Guyer denied. 2RP 84. Williams then asked Guyer and Gochnour to follow him to his car,

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<sup>3</sup> Officer Guyer testified at trial that she had changed her last name to Monroe; however, because the other witnesses referred to her as Guyer, the State does so for clarity. 2RP 77.

which was parked on the north side of the Airplane Motel.

2RP 85-86; 3RP 25. The officers walked with Williams about 20 feet, but refused to go any further since it was dark where Williams's car was and out of the view of their fellow observing officers. 2RP 86, 88, 91, 116; 3RP 26. Williams, upset that they would not get in his car, told Guyer and Gochnour that if they did not come with him, he would not get the crack for them. 2RP 86; 3RP 26. Guyer said they would not buy from him, and the two women walked with Gochnour back southbound on East Marginal Way. 2RP 86; 3RP 27.

After a few minutes, Williams yelled to the undercover officers again as he was talking on his cell phone. 2RP 89; 3RP 27. When Guyer and Gochnour walked toward him, Williams told them that he had made a phone call and that the dealer, later identified as Bruce Watson, would bring the crack to them. 2RP 23, 89; 3RP 27. Guyer asked how long it would take; Williams replied that it would be about 10 minutes. 2RP 89; 3RP 27-28. Guyer agreed to wait at the nearby bus stop for the dealer. 2RP 89-90. When Watson did not arrive within the 10 minutes, Williams walked over to the officers at the bus shelter and assured Guyer that he has spoken with Watson a couple of times on the phone and that

Watson would be there soon. 2RP 90-91, 93. Guyer asked if she could buy from him again and asked for Williams's cell number. 2RP 90; 3RP 28. Williams gave her his number, said that his name was "D," and that he had a room over at the Airline Motel. 2RP 90. While they were waiting, another man joined them who was waiting to buy \$10 worth of crack. 2RP 92.

Soon after, a black Chevrolet Monte Carlo pulled up mid-block on Flora Avenue South. 2RP 92; 3RP 29-30. Williams walked over to the car, talked to Watson, who was driving, and beckoned Guyer and Gochnour to walk down to the car as well. 2RP 92-93, 95; 3RP 30. The officers refused, telling Williams that they were afraid of being ripped off by strangers. 2RP 92, 116; 3RP 30-31. Williams became agitated and told Guyer that Watson was not going to drive up to where they were to finish the sale. 2RP 92. When Guyer and Gochnour did not move, Williams walked back to the Monte Carlo and talked to Watson again. 2RP 95. The Monte Carlo moved toward the officers very slowly, but stopped before completely passing them. 2RP 94; 3RP 32. Watson had his window down so Guyer said to him, "Are you going to do this or not?" 2RP 94. Watson angrily asked Guyer why she

did not come down to his car, but indicated that he was still willing to conduct the deal. 2RP 94.

Watson showed Guyer the crack at her insistence; she then showed him the pre-recorded "buy money." 2RP 95-96; 3RP 33. Guyer handed Watson the \$40 through the driver's window and he gave Guyer the crack in exchange. 2RP 96. Watson also conducted a deal with the man who had been waiting with them at the bus shelter. 2RP 96. After the exchanges, Watson drove off but was stopped a few blocks away by uniformed officers. 2RP 19-21. During the search incident to his arrest, officers found the "buy money" in Watson's front pocket and a cell phone in the front seat. 2RP 23, 25-26. No drugs were found in the car or on Watson's person. 2RP 23, 27.

Williams, who had been standing next to Guyer on the driver's side of the Monte Carlo during the entire deal, walked with Guyer and Gochnour back toward the Airline Motel. 2RP 97-99, 118; 3RP 32, 34. Williams asked Guyer several times for a piece of the crack that she had purchased from Watson as payment for brokering the deal, and was angry when Guyer refused. 2RP 97-98; 3RP 34. Guyer eventually told Williams that she would call him and try to do another buy with him later on. 2RP 98; 3RP 35.

Guyer and Gochnour then returned to their car as Williams went into the Airplane Motel. 2RP 99; 3RP 36.

Guyer and Gochnour waited with the arrest team for Williams to come out of his motel room for about an hour. 2RP 54, 102. Guyer then called the number Williams had given her and invited him to come over to a room at a nearby motel. 2RP 102, 119; 3RP 37-38. After Guyer confirmed that she and Gochnour still had some crack, Williams came out of his motel room and was arrested. 2RP 54, 102-03, 119; 3RP 37-38. Williams had a glass crack pipe on his person. 2RP 56-58.

Once Guyer returned to the precinct, she looked at the call log on the cell phone retrieved from Watson's car and saw Williams's cell phone number listed more than once during the time that she and Williams were making arrangements for the deal. 2RP 107-08.

At trial, in addition to the officers involved with the "buy-bust" operation, the State presented testimony from Martin McDermot, a forensic scientist from the Washington State Patrol Crime Lab. 2RP 125-38. McDermot testified that based on his training and the chemical analysis of substance sold to Officer Guyer, the substance contained cocaine. 2RP 137. Williams did not object to

this testimony and did not conduct a cross-examination.

2RP 125-38. The crack cocaine and crack pipe were later admitted without objection. 3RP 12. Williams did not present any evidence.

C. ARGUMENT

1. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT WILLIAMS'S CONVICTION FOR DELIVERY OF COCAINE.

Williams asserts that the State did not prove that Williams constructively transferred the cocaine to the undercover officers because there was no evidence that the cocaine belonged to him, that it was under his control, or that it was delivered to the officers by Watson at his direction. This argument should be rejected because there was sufficient evidence from which a rational jury could find that Williams had constructively transferred the crack when he solicited the officers, arranged for Watson to bring the crack, and repeatedly acted as a mediator between the officers and Watson to broker the deal.

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 a light most favorable to the State, it permits any

rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“A claim of insufficiency admits the truth of the State’s evidence and all reasonable inferences that reasonably can be drawn therefrom.” Id. at 201. Circumstantial and direct evidence are equally reliable. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000). A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Id. at 719. The reviewing court need not be convinced of the defendant’s guilt beyond a reasonable doubt, but only that there is substantial evidence in the record to support the conviction. Id. at 718.

A person is guilty of delivery of a controlled substance if he delivers a controlled substance to another knowing that the substance was a controlled substance. RCW 69.50.401(1), (2)(a). Cocaine is a controlled substance. RCW 69.50.206(4). Delivery means the actual or constructive transfer from one person to another of a substance, whether or not there is an agency relationship. RCW 69.50.101(f). The definition of the term “deliver” criminalizes participation in the transfer of unlawful drugs,

regardless of whether the participation benefitted the buyer or the seller. State v. Ramirez, 62 Wn. App. 301, 308, 814 P.2d 227, 231 (1991), rev. denied, sub nom., State v. Barrerra, 118 Wn.2d 1010 (1992) (citing State v. Hecht, 342 N.W.2d 721, 725-28 (1984)). Thus, when the legislature defined a delivery as a “transfer,” it necessarily included as “deliverers” any persons who intentionally participated in bringing about the drug transaction. Ramirez, 62 Wn. App. at 309.

Although neither “transfer” nor “constructive transfer” is defined by the act, both are defined by case law. Transfer means “to cause to pass from one person or thing to another,” as well as “to carry or take from one person or place to another.” Id. at 308-09 (citing State v. Campbell, 59 Wn. App. 61, 64, 795 P.2d 750 (1990)). Constructive transfer is defined as “the transfer of a controlled substance either belonging to the defendant or under his direct or indirect control by some other person or manner at the instance or direction of the defendant.” Campbell, 59 Wn. App. at 63.

Williams relies on Davila v. State, 664 S.W.2d 722, 724 (Tex. Crim. App. 1984), and Commonwealth v. Murphy, 795 A.2d 1025 (Pa. Super. Ct. 2002) in support of his argument that the

State's evidence was insufficient to show constructive transfer, and instead merely established that he was the middleman in the drug transaction. In Murphy, an undercover state trooper approached Murphy and asked him if he knew where the trooper could buy some "dope" (heroin). 795 A.2d at 1028. Murphy called over to another man, Jose Rivas, and asked him to come over. Id. Rivas and the trooper negotiated the quantity and price for the sale. Id. Rivas directed the trooper to wait while he walked a short distance away. Id. Rivas returned and told the trooper to follow him. Id. About a half-block down the street, Rivas dropped two bags of heroin on the ground and told the trooper to drop the money. Id. at 1029. The trooper complied by dropping the two marked bills. Id. The trooper picked up the heroin and walked back to his car as Rivas picked up the money. Id. Murphy persistently asked the trooper for some of the heroin as they walked, but the trooper refused, eventually giving Murphy money instead. Id. The Murphy court held that, under these facts, there was insufficient evidence that Murphy had either a proprietary interest in the heroin or dominion and control over it. Id. at 1033.

Likewise in Davila, an undercover DEA<sup>4</sup> agent went to a residence with a confidential informant to purchase heroin. 664 S.W.2d at 723-24. The agent entered the house and told Davila simply that he wanted “four.” Id. at 723. Davila went outside to speak to her husband and then returned. Id. Shortly thereafter the husband entered the house with four party balloons and left. Id. at 724. The court held that the evidence presented failed to show that Davila had direct or indirect control over the heroin prior to the delivery, but rather that Davila conveyed the agent’s purchase offer to her husband who then negotiated the quantity and price directly with the agent. Id.

In a subsequent case, Swinney v. State, 828 S.W.2d 254, 256 (Tex.App, 1992, no pet.), an undercover officer drove past Swinney and three other males who were standing on the side of the road and making head and hand gestures toward him that the officer recognized from previous experience as an offer to sell drugs. At Swinney’s direction, the officers pulled his car up to the group and Swinney asked the officer what he needed. Id. at 256. When the officer said that he needed \$20 worth of crack, Swinney went back to the group and spoke with one of the young men. Id.

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<sup>4</sup> Drug Enforcement Administration.

Afterward, Swinney and the young man went back to the officer's car and the juvenile got into the passenger side of the undercover officer's car. Id. Swinney stood immediately outside the car while the undercover officer and the young man negotiated the terms of the deal and conducted the hand-to-hand exchange. Id. The Swinney court held that this evidence was legally sufficient to establish Swinney's indirect control over the drugs and constructive transfer of the crack to the undercover officer. Id. at 257-58.

The instant case is closer to Swinney than Davila and Murphy. Williams was not a passive bystander, but an active participant, like Swinney, who orchestrated the entire deal. Williams initiated the contact with the female officers by calling to them on the street, and asked them what they were "looking for." 2RP 82. Williams first attempted to conduct the deal by trying to convince Officers Guyer and Gochnour to get into his car, but they refused and walked away. 2RP 86; 3RP 25-27. Williams pursued the officers, telling them that he had made arrangements for the dealer to come to meet them. 2RP 89. When the officers had to wait longer than expected, Williams reassured them that the dealer would be there any minute. 2RP 89-90. Once the dealer arrived and Williams spoke with him, he motioned for Guyer and Gochnour

to walk down to where Watson's car was. 2RP 92. Concerned for their safety, the officers again refused to walk down a dark side street to conduct the deal. 2RP 92; 3RP 31. Watson eventually drove to where the officers were waiting and conducted the sale. 2RP 95-96. Again, as in Swinney, Williams remained next to Guyer and Watson throughout the exchange. 2RP 98. Afterward, Williams pressed Guyer for a piece of the crack as payment for his services. 2RP 98. Additionally, Guyer and Williams discussed conducting another deal later that night. 2RP 90, 98-99.

Officers Guyer and Gochnour had no knowledge of Watson's identity or how to contact him, and would not have purchased cocaine from him but for Williams's persistence. This evidence, along with the phone calls from Williams logged on Watson's cell phone during the time the deal took place, when viewed in a light most favorable to the State, was sufficient for a rational jury to find Williams constructively transferred the crack to Guyer. Williams's conviction should be affirmed.

2. THE TYPE OF DRUG IS NOT AN ELEMENT OF THE OFFENSE OF DELIVERY OF A CONTROLLED SUBSTANCE.

Williams asserts that the type of controlled substance is an essential element for the crime of delivery and that its omission from the "to convict" instruction relieved the State of proving every element of the crime to the jury. Williams further asserts that this alleged error was not harmless and warrants automatic reversal under the state constitution. Williams's arguments must be rejected for several reasons. First, the type of drug is not an essential element of delivery of a controlled substance unless it increases the penalty for the crime. Second, even if the omission of "cocaine" from the "to convict" instruction was error, it was harmless.

**a. The Jury Was Properly Instructed.**

The information charged Williams with delivery of a controlled substance, "to wit: cocaine, contrary to RCW 69.50.401(1), (2)(a)." CP 1. The State proposed and the court adopted a set of jury instructions that included a definition that "Cocaine is a controlled substance." CP 24 (Instruction 10); 3RP 142-43. The "to convict" instructions stated:

To convict the defendant of the crime of delivery of a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about March 12, 2008, the defendant delivered a controlled substance;
- (2) That the defendant knew that the substance delivered was a controlled substance;
- (3) That the acts occurred in the State of Washington.

CP 22 (Instruction 8); 3RP 142-43. Defense counsel took no exceptions to those instructions and accepted them as proposed.

3RP 143. The only testimony at trial concerning controlled substances came from McDermot, who testified that the substance Watson sold to Guyer contained cocaine. 2RP 137.

In closing argument, the prosecutor stated several times that Williams delivered *cocaine* and, when referencing the "to convict" instruction, told the jury that "you have to find that the defendant delivered [a] controlled substance. I'm just going to put 'crack.' You have to find that the defendant knew the substance was crack." 3RP 64-65. In closing, defense counsel never challenged the evidence establishing that the drug at issue was cocaine, nor did he argue that there was evidence to suggest that another controlled substance had been delivered. 3RP 70-78.

**b. Cocaine Is Not An Essential Element Of The Crime.**

The sufficiency of a "to convict" instruction is reviewed de novo. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). The court reviews jury instructions "in the context of the instructions as a whole." State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). However, a "to convict" instruction must contain all elements of the crime, even if other instructions supply a missing element. State v. Smith, 131 Wn.2d 258, 262-63, 930 P.2d 917 (1997). The State must prove every essential element of a crime beyond a reasonable doubt. It is reversible error to instruct the jury in a manner that would relieve the State of this burden. State v. Byrd, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995); State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). Omission of an element of the crime charged from the jury instructions constitutes a manifest constitutional error that can be raised for the first time on appeal. State v. O'Hara, \_\_\_ Wn.2d \_\_\_, 217 P.3d 756, 762 (2009).

The issue before this Court is whether the type of drug, cocaine in this instance, is an essential element in the crime of delivery of a controlled substance, such that its omission in the

"to convict" instruction relieved the State of its burden of proof. See RCW 69.50.401(1).

As discussed above, the elements of delivery are (1) delivery, and (2) "guilty knowledge" that the substance delivered is a controlled substance, but that it is irrelevant whether the defendant knew what controlled substance he delivered. See State v. Nunez-Martinez, 90 Wn. App. 250, 253, 951 P.2d 823 (1998). The Washington Supreme Court has held that the information charging intent to deliver must specify the controlled substance only where the intent to deliver statute prescribes different punishments for different substances. State v. Goodman, 150 Wn.2d 774, 779, 83 P.3d 410 (2004). In Goodman, the information charged the defendant with possessing with intent to deliver "meth" instead of methamphetamine. Id. at 778. The statute that Goodman was charged, former RCW 69.50.401(a) (2002), prescribed a higher maximum sentence for delivery of methamphetamine than for other drugs. Id. at 786. The court held that any fact increasing the statutory maximum sentence must be alleged and proved to a jury. Id. at 775. Nonetheless, the court held that the information provided sufficient notice, and affirmed the conviction. Id. at 790.

In State v. Williams, 162 Wn.2d 177, 190, 170 P.3d 30 (2007) the court held that Goodman also applies to "to convict" instructions. 162 Wn.2d 177, 190, 170 P.3d 30 (2007) (citing Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). Williams was convicted of possession of cocaine and bail jumping. 162 Wn.2d 180. He claimed that the classification of the drug possession charge was a necessary element of the bail jumping charge because of the availability of a misdemeanor possession of marijuana under former RCW 69.50.401(e) (2002). Williams, 162 Wn.2d at 190. The court disagreed, noting that unlawful possession of any controlled substance (except marijuana) in Washington is a felony. Id. at 190-91. Because the information charging the underlying crime for which Williams failed to appear, alleged felony possession of cocaine, misdemeanor marijuana possession was not at issue and only one penalty section could apply. Id. Thus, the issue in Goodman was not present because felony possession of any drug would have resulted in the same sentence on the bail jumping. Id. at 191.

Accordingly, under Williams and Goodman, the type of drug is an element only if it affects the penalty. See State v. Eaton,

164 Wn.2d 461, 469, 191 P.3d 1270 (2008) (J. Johnson, J., concurrence) (if a crime can be committed in one of several ways, the State need prove the specific way it was committed only where it affects the penalty facing the defendant). Here, as in Williams, only one penalty section could apply. Darryl Williams was charged with delivery of a controlled substance under RCW 69.50.401(1), (2)(a),<sup>5</sup> which states that delivery of any Schedule I and II narcotic drug is a class B felony.<sup>6</sup> CP 1. Although "cocaine" describes the controlled substance, it is not itself a required element. See Eaton, 164 Wn.2d at 469-70 (type of substance is not element of possession statute; defendant was never charged with misdemeanor possession so type of drug did not affect penalty).<sup>7</sup>

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<sup>5</sup> (1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

(2) Any person who violates this section with respect to:

(a) A controlled substance classified in Schedule I or II which is a narcotic drug or flunitrazepam, including its salts, isomers, and salts of isomers, classified in Schedule IV, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years[.]

<sup>6</sup> Cocaine is a Schedule II narcotic drug. See RCW 69.50.206(4); 69.50.101(r)(5), (6).

<sup>7</sup> See also State v. Miller, 71 Wn.2d 143, 426 P.2d 986 (1967) (type of gun was a surplus fact that did not need to be proved for assault with a deadly weapon); State v. Lorenz, 152 Wn.2d 22, 35, 93 P.3d 133 (2004) ("sexual gratification" clarifies the meaning of the essential element "sexual contact" but is not itself an essential element of child molestation).

The statute under which Williams was charged provides for the same penalties for all substances delivered under that section. See RCW 69.50.401(1), (2)(a). Thus, the type of drug delivered did not increase Williams's statutory maximum sentence and was not an element required in the "to convict" instruction.

In addition to Goodman, Williams relies on State v. Evans, 129 Wn. App. 211, 118 P.3d 419 (2005), rev'd on other grounds, 159 Wn.2d 402 (2007). In Evans, the Court of Appeals remanded for resentencing because it was unclear whether the jury premised the convictions on methamphetamine base, which was a crime, or methamphetamine hydrochloride, which was not, or both substances, under former RCW 69.50.401(a)(1)(ii) (2002). Id. at 229. Evans is distinguishable because, as in Goodman, Evans was charged under the former version of RCW 69.50.401. Because the statute under which Williams was charged did not prescribe a higher penalty for delivery of cocaine than any other narcotic drug in Schedules I and II, the State only had to prove that Williams delivered a controlled substance under that section.

The State presented sufficient evidence that Williams delivered the controlled substance of cocaine to Guyer by constructive transfer. The State met its burden to prove every

element of the offense; Williams's arguments to the contrary should be rejected.

**c. Article I, Section 21 Does Not Require Automatic Reversal Of Williams's Conviction Because Any Error In The "To Convict" Instruction Was Harmless.**

Assuming that the identity of the substance as cocaine is an essential element of the crime, Williams claims that article I, section 21 of the Washington Constitution affords greater trial rights than the United States Constitution; and therefore, where a court omits an essential element from the "to convict" instruction, harmless error does not apply and automatic reversal is required. This argument should be rejected for two reasons. First, art. I, § 21 pertains to the right to a jury trial on "offenses," nothing in the plain language of that section requires automatic reversal where an essential element is omitted from the "to convict" instruction. Second, Washington applies the harmless error standard to alleged errors in jury instructions and automatic reversal does not apply when the error may be harmless.

By its plain language, art. I, § 21 pertains to the right to have a jury trial.<sup>8</sup> See State v. Smith, 150 Wn.2d 135, 151, 75 P.3d 934 (2003) (acknowledging that art. I, § 21 may provide greater rights, but holding that such rights do not extend to sentencing); State v. Hobbie, 126 Wn.2d 283, 892 P.2d 85 (1995) (art. I, § 21 does not require jury trials for contempt proceedings); City of Pasco v. Mace, 98 Wn.2d 87, 653 P.2d 618 (1982) (right to jury trial applies to misdemeanors in courts of limited jurisdiction); State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997) (protections under art. I, § 21 do not extend to death-qualifying juries); State v. Schaff, 109 Wn.2d 1, 743 P.2d 240 (1987) (protections under art. I, § 21 does not create jury right for juveniles); State v. Stegall, 124 Wn.2d 719, 723, 881 P.2d 979 (1994) (defendant may waive jury of 12). The right to a jury trial under art. I, § 21 is "inviolable" only as it pertains to

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<sup>8</sup> "The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto." Const. art. I, § 21.

providing jury trials on "offenses" as stated in article I, section 22.<sup>9</sup> Smith, 150 Wn.2d at 150. Thus, there is no authority for Williams's claim that the "inviolable" right in art. I, § 21 heightens the protection of trial rights generally and requires automatic reversal for instructional error as to an essential element of the crime. Moreover, automatic reversal is required only when a constitutional error can be characterized as a "structural defect." State v. Watt, 160 Wn.2d 626, 632, 160 P.3d 640, 643 (2007). "Structural defects" defy harmless error analysis because they undermine the framework of the trial process itself, their effect cannot be ascertained without resort to speculation, or the question of harmless error is irrelevant based on the nature of the right involved. Id. at 632. Hence, "structural" errors generally do not include errors in the trial process. See United States v. Neder, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

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<sup>9</sup> "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases[.]... In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed." Const. art. I, § 22.

Williams nevertheless relies on State v. Recuenco (Recuenco III), 163 Wn.2d 428, 180 P.3d 1276 (2008) in support of his argument that automatic reversal is required. App. Br. at 19-20. Williams asserts that the Recuenco III court essentially rejected the harmless error analysis under the state constitution in favor of automatic reversal where “the sentence imposed was not supported by the jury’s actual verdict...” App. Br. at 19. In fact, in Recuenco III, the court did not rule out harmless error analysis when an essential element is missing from the “to convict” instruction.

The State charged Recuenco with a sentencing enhancement that alleged he was armed with “a deadly weapon, to wit: a handgun.” A jury found Recuenco guilty of three crimes and found that he was armed with a deadly weapon. 163 Wn.2d at 431. The trial court imposed a firearm sentencing enhancement rather than a deadly weapon enhancement based on the evidence presented. Id. at 432. Recuenco appealed.

On remand from the United States Supreme Court, the Recuenco III court concluded that the harmless error analysis was not applicable because there was no error in the jury instructions. Id. at 441-42. Instead, the court characterized the error as

occurring when the court imposed a sentence for “a crime not charged, not sought at trial, and not found by a jury.” Id.; see also State v. Williams-Walker, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2010 WL 118211 at ¶ 25 (Jan. 14, 2010). Recuenco III does not stand for the proposition that harmless error analysis is unavailable under the state constitution.

Contrary to Williams’s assertion, Washington courts have long applied harmless error analysis to jury instructions that misdefine or omit an element of the offense.<sup>10</sup> See State v. Brown, 147 Wn.2d 330, 340, 58 P.3d 889 (2002) (adopting analysis in Neder, 527 U.S. 1, because it was consistent with Washington law); State v. Wren, 115 Wn. App. 922, 65 P.3d 335 (2003) (accomplice instruction harmless); State v. Courtemarshe, 11 Wash. 446, 39 P. 955 (1895) (improper presumption instruction). Omission of an essential element of the crime charged does not result in automatic reversible error if the State has not been relieved of its burden of

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<sup>10</sup> The United States Supreme Court has also routinely applied harmless error analysis to a wide variety of constitutional instructional errors, including the failure to instruct on an element of the crime. United States v. Neder, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (holding explicitly that the failure to instruct on an element of the crime can be harmless error); see, e.g., California v. Roy, 519 U.S. 2, 4-6, 117 S. Ct. 337, 136 L. Ed. 2d 266 (1996) (error in jury instructions defining element of crime); Pope v. Illinois, 481 U.S. 497, 501-04, 107 S. Ct. 1918, 95 L. Ed. 2d 439 (1987) (jury instruction misstating an element of the offense).

proving each element beyond a reasonable doubt. Brown, 147 Wn.2d at 339-40; see also State v. DeRyke, 149 Wn.2d 906, 911-12, 73 P.2d 1000 (2003) (citing Brown) (automatic reversal is required only where the trial court fails to instruct the jury on all elements of the crime). "When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence." Brown, 147 Wn.2d at 341 (quoting Neder, 527 U.S. at 18).<sup>11</sup>

Here, Williams never disputed that the drug at issue was cocaine and the State did not present evidence of delivery of any drug other than cocaine. A new trial with a "to convict" instruction that referenced cocaine would not change the outcome. Thus, even if cocaine was an element of the crime of delivery, that element was supported by uncontraverted evidence that Williams delivered cocaine and any error was harmless. Williams's convictions should be affirmed.

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<sup>11</sup> Williams is correct that under State v. Davenport, 100 Wn.2d 757, 764-65, 675 P.2d 1213 (1984), the State is precluded from arguing harmless error on the basis of accomplice liability when the jury was not instructed as to accomplice liability.

D. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm Williams's conviction for delivery of cocaine.

DATED this 21<sup>st</sup> day of January, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Lila Silverstein, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. DARRYL WILLIAMS, Cause No. 63098-9-1, 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.

W Brame  
Name Wynne Brame  
Done in Seattle, Washington

1/21/10  
Date