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NO. 65702-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

HOLLIS SIMMONS,

Appellant.

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COURT OF APPEALS DIVISION I
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HEAVEY

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. "To convict" instructions establish what the State must prove at trial. Definitional instructions are intended to assist the jury and do not alter the "law of the case." Here, the court provided an inapplicable definition of "delivery" to the jury. Did the flawed definition alter the elements the State was required to prove?

2. Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if, under the facts of the case, there is no appearance of unfairness and the defendant is not prejudiced. Here, the findings of fact were entered by the trial court shortly after the appeal was filed and are consistent with the trial court's oral ruling. Has the trial court properly submitted written findings in this case?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Hollis Simmons was charged by information with Violation of the Uniform Controlled Substances Act ("VUCSA"); specifically, the State alleged that Simmons delivered an uncontrolled substance in lieu of cocaine on August 9, 2009. CP 1.

Trial occurred in May of 2010. A jury found Simmons guilty as charged. CP 5. The court granted Simmons' request for a prison-based Drug Offender Sentencing Alternative ("DOSA"). CP 24-33.

2. SUBSTANTIVE FACTS.

On August 9, 2009, Seattle Police Department officers conducted an undercover "buy-bust" operation in downtown Seattle. RP¹ 94-97. During this particular operation, Officer John Kallis was working as the undercover buyer. RP 97. Officer Jason Diamond was the undercover observation officer and was responsible for maintaining Kallis' safety and communicating his observations back to the uniformed arrest team. RP 128. Officer Terry Bailey was a member of the uniformed arrest team; his job was to detain any suspect once there was probable cause to believe the suspect had committed a crime. RP 147-48.

Prior to going out in the field, the participating officers attended a briefing where they discussed protocol, including the "good buy sign" to be used by the undercover buyer. The buyer

¹ The verbatim report of proceedings consists of two volumes, which are consecutively numbered, and will be referred to simply as "RP."

was provided with "buy money," and each member of the team was given photocopies of the buy money so that at the time of an arrest they could compare the serial numbers to any money found on a suspect. RP 97.

Shortly after 11:00 pm, Kallis encountered Simmons as he was walking northbound on Third Avenue. RP 100. Kallis made eye contact with Simmons and asked "do you have any," which is slang for "do you have any narcotics?" RP 100. Simmons asked Kallis if he had "everything ready," which Kallis interpreted to mean whether he had the money. After Kallis assured him that he did have the money, Simmons handed Kallis a white object tightly wrapped in plastic, which appeared to be cocaine. RP 100-01. Kallis asked if it was good and Simmons responded, "Come on, I don't play that. It's good." RP 101. Kallis paid him \$40 from the prerecorded buy money and gave the "good buy" signal as he was walking away. RP 101.

As the undercover observation officer, Diamond watched the encounter between Kallis and Simmons and periodically updated the arrest team using a hidden radio. RP 128-29. Once he saw Kallis give the "good buy" sign, Diamond instructed the arrest team that there had been a good buy and provided a description of

Simmons. RP 134. Bailey, who was on a bicycle that night, rode up behind Simmons. RP 151. Bailey dismounted his bike with a little too much momentum, causing him to lose his balance. Both Bailey and Simmons fell to the ground. RP 151. After Bailey handcuffed Simmons and helped him up off the ground, he found the \$40 that Kallis had paid Simmons on the ground underneath where Simmons had fallen. RP 152-53.

Lab tests revealed that the white substance Simmons sold to Kallis was actually aspirin. RP 178.

C. ARGUMENT

1. THE STATE WAS NOT REQUIRED TO PROVE THAT SIMMONS DELIVERED A CONTROLLED SUBSTANCE.

Simmons was charged with delivering an uncontrolled substance in lieu of cocaine. Because the court instructed the jury that the definition of "delivery" involved the transfer of a controlled substance, Simmons contends that the State was required to prove that he delivered a controlled substance. Contrary to Simmons' argument, the flawed definition of delivery did not change the State's burden or the elements the State had to prove. Any

instructional error was harmless because there was overwhelming evidence of Simmons' guilt.

a. Relevant Facts.

The court provided three instructions relevant to the issue raised on appeal. First, the court defined the underlying crime in Jury Instruction 7, telling the jury that:

A person commits the crime of delivery of a material in lieu of a controlled substance if that person knowingly offers, arranges or negotiates for the sale or delivery of a controlled substance to any person and then sells, gives, delivers, dispenses or distributes to that person any other substance or material in lieu of such controlled substance.

CP 16. This instruction is identical to WPIC 50.20.

The "to convict" instruction, patterned after WPIC 50.21, read in part:

To convict the defendant of the crime of Violation of the Uniform Controlled Substances Act- Delivery of a Material in Lieu of a Controlled Substance, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 9th of August 2009, the defendant knowingly offered, arranged or negotiated for the delivery, sale, distribution or dispensing of a controlled substance;

(2) That the defendant delivered an uncontrolled substance in lieu of the controlled substance; and

(3) That the acts occurred in the State of Washington.

CP 20 (Instruction 11).

Finally, using WPIC 50.07, the court defined "delivery" as "the actual transfer of a controlled substance from one person to another." CP 17 (Instruction 8).²

Simmons did not provide the court with a packet of proposed jury instructions. RP 183. Rather, Simmons indicated that he had no objections to the instructions proposed by the State. RP 183. Ultimately, neither party objected to the court's final proposed jury instructions. RP 185.

In closing arguments, both the State and Simmons discussed the "to convict" instruction, but neither party addressed Instructions 7 or 8. RP 186-205.

² It is interesting to note that the comments to WPIC 50.21 (the "to convict" instruction at issue), recommend that one use the definition of "deliver" – WPIC 50.07 – with this instruction. However, it appears that following the guidelines set forth by the WPIC committee in fact creates the situation that arose in this case. WPIC 50.07 does not contain the bracketed/optional term of "uncontrolled substance." 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 50.07 (3d Ed).

b. A Jury Instruction Defining A Term Does Not Add An Element To The Offense.

Simmons claims that the definition of "deliver" that was provided to the jury resulted in the State assuming the burden of proving that he delivered a controlled substance. However, a jury instruction that defines a term does not add an element to the offense that the State must prove. Here, the definition of "deliver" was provided to the jurors in an effort to provide clarity and meaning to the charge. It was not contained in an instruction outlining the crime or the elements of the charged offense. While the instruction may have been erroneous, it did not create an element of the offense that the State was required to prove.

In a criminal prosecution the State bears the burden of proving all of the elements of the crime charged. The State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the "to convict" instruction. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). However, an instruction defining a term does not create an element of the offense, but is included in order to help the jurors understand the particular term. See State v. Lorenz, 152 Wn.2d 22, 93 P.3d 133 (2004) ("sexual

gratification" is not an essential element of the crime of first degree child molestation but a definitional term that clarifies the meaning of the essential element, "sexual contact"); State v. Laico, 97 Wn. App. 759, 764, 987 P.2d 638 (1999) (definition of "great bodily harm" does not add an element to the assault statute, rather it is intended to provide understanding); State v. Marko, 107 Wn. App. 215, 219-20, 27 P.3d 228 (2001) (definition of "threat" does not create additional element but merely defines an element); State v. Strohm, 75 Wn. App. 301, 308-09, 879 P.2d 962 (1994) (definitional term does not add elements to the criminal statute); and State v. Daniels, 87 Wn. App. 149, 156, 940 P.2d 690 (1997) (definition of battery is not an element of assault).

Simmons relies on State v. Braun, 11 Wn. App. 882, 526 P.2d 1230 (1974), for the proposition that a jury instruction that is not objected to becomes the "law of the case" and thus adds an element that the State has to prove. However, in Braun the jury instruction at issue was the definition of "deadly weapon" for purposes of a sentencing enhancement special verdict. Braun, at 884. The deadly weapon instruction in Braun did not merely define a term used in the "to convict" instruction, but was more akin to an instruction outlining elements the State needed to prove in

order for the jury to answer "yes" to the special verdict. See State v. Cook, 69 Wn. App. 412, 417, 848 P.2d 1325 (1993) (special verdict instruction lays out required elements of deadly weapon finding). Aside from his misplaced reliance on Braun, Simmons provides no authority to support his contention that the State assumed the burden of proving that he delivered a controlled substance.

The erroneous jury instruction at issue here defined the term "deliver," and was not included in the "to convict" instruction itself. It was merely intended to provide additional clarity for the jury. While jurors are presumed to follow the instructions, and to consider the instructions as a whole, jurors are also presumed to be thoughtful and to use their common sense. State v. Brown, 139 Wn.2d 20, 24, 983 P.2d 608, 611 (1999). Here, any inconsistency did not cause confusion on the part of the jury, as evidenced by the fact that there was no jury question asking the court for further guidance on the issue.

c. The Instructional Error Is Harmless.

Any perceived error caused by instruction 8 was harmless, as the evidence against Simmons was overwhelming.

"An instructional error is presumed to have been prejudicial unless it affirmatively appears that it was harmless." State v. Smith, 131 Wn.2d 258, 264, 930 P.2d 917 (1997) (citing State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)). A harmless error is an error that is trivial, or formal, or merely academic, and in no way affected the final outcome of the case. Wanrow, 88 Wn.2d at 237. It is the State's burden to show that the error was harmless. Smith, at 258; State v. Burri, 87 Wn.2d 175, 182, 550 P.2d 507 (1976). An instruction that contains an erroneous statement of the applicable law is reversible error where it prejudices a party. Cox v. Spangler, 141 Wn.2d 431, 442, 5 P.3d 1265 (2000).

There is no evidence that inclusion of this instruction prejudiced Simmons in any way. In fact, the evidence against him was overwhelming, and the erroneous jury instruction could not possibly have affected the verdict. See State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986) (even a constitutional error does not require reversal if the untainted evidence is so overwhelming that a reasonable jury would have reached the same result in the absence of the error).

Here, an undercover police officer arranged to buy narcotics from Simmons on the street. RP 100-01. Simmons delivered to

the undercover officer what later turned out to be an uncontrolled substance. RP 100-01, 178. The prerecorded buy money was found under Simmons' person at the time he was arrested. RP 152-53. Another police officer witnessed the entire transaction. RP 128-29. Even without the instruction defining "deliver," the jury would have reached the same result. The evidence of guilt was overwhelming, and the error was harmless.

2. THERE WAS NO PREJUDICE IN THE TRIAL COURT'S DELAYED CrR 3.6(b) FINDINGS.

Simmons asserts that the trial court failed to enter Findings of Fact and Conclusions of Law as required by CrR 3.6(b). On September 27, 2010, the trial court entered the required written findings. CP 46-49.

Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if, under the facts of the case, there is no appearance of unfairness and the defendant is not prejudiced thereby. State v. Hillman, 66 Wn. App. 770, 774, 832 P.2d 1369 (1992); State v. McGary, 37 Wn. App. 856, 861, 683 P.2d 1125 (1984).

The jury convicted Simmons on May 5, 2010. RP 209-10.

The proposed written findings were submitted to the trial court on or before September 17, 2010. CP 50-51. Simmons filed his appeal on September 21, 2010. The trial court issued its written findings of fact related to this conviction on September 27, 2010. CP 46-49.

The delay in the entry of the findings does not in and of itself establish a valid claim of prejudice. In State v. Smith, this Court held that the State's request at oral argument for a remand to enter the findings would have caused unnecessary delay and was thus prejudicial. 68 Wn. App. 201, 208-09, 842 P.2d 494 (1992). However, unlike Smith, here the court entered findings that have not delayed resolution of Simmons' appeal. There is no resulting prejudice. Hillman, 66 Wn. App. at 774; McGary, 37 Wn. App. at 861.

Simmons cannot establish unfairness or prejudice resulting from the delayed entry of these findings. A review of the findings illustrates that the State did not tailor them to address the defendant's claims on appeal. CP 46-49. The language of the findings is consistent with the trial court's oral ruling. RP 71-73. Moreover, the trial prosecutor who drafted the findings of fact had no knowledge of the issues in this appeal. CP 50-51.

In light of the above, Simmons cannot demonstrate an appearance of unfairness or prejudice. The trial court's CrR 3.6(b) findings of fact and conclusions of law are properly before this Court.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Simmons' conviction.

DATED this 18 day of November, 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 Eric J. Nielsen, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. HOLLIS SIMMONS, Cause No. 65702-0-I, 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.



Bora Ly
Done in Seattle, Washington

11-19-10
Date