

68369-1

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No. 68369-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

JEFFREY T. HUYNH,

Appellant.

---

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

The Honorable Susan K. Cook

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REPLY BRIEF OF APPELLANT

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SARAH M. HROBSKY  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

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A. ARGUMENT

**In the absence of substantial evidence that Mr. Huynh intended to “manufacture” cocaine, an alternative means of committing the offenses of possession with intent to manufacture or deliver cocaine and of conspiracy to possess with intent to manufacture or deliver cocaine, Mr. Huynh’s convictions must be reversed.**

1. Possession with intent to manufacture or deliver a controlled substance is an alternative means offense.

An alternative means offense is one where the criminal statute sets forth several different ways to commit one crime. State v. Crane, 116 Wn.2d 315, 326, 804 P.2d 10 (1991). Intent to “manufacture” or “deliver” are alternative means of committing the offense of possession with intent to manufacture or deliver a controlled substance and of committing the offense of conspiracy to possess with intent to manufacture or deliver a controlled substance. RCW 69.50.401(1) codifies three separate crimes, the third being an alternative means offense, and provides, “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.” Because “manufacture” and “deliver” are separate crimes and are separately defined, it follows that the Legislature intended the offense of possession with intent to commit either of those crimes to be an alternative means offense.

Without analysis, the State asserts the “Arndt factors” weigh against finding the offense is an alternative means offense. Br. of Resp. at 26. This is incorrect. The Arndt factors are four possible factors, among many, that a court might consider when determining whether a statute describes an alternative means offense.

[I]n determining the question there may be many factors that will aid the court, such as the title of the act; whether there is a readily perceivable connection between the various acts set forth; whether the acts are consistent with and not repugnant to each other; and whether the acts may inhere in the same transaction.

State v. Kosanke, 23 Wn.2d 211, 213, 160 P.2d 541 (1945), quoted with approval in State v. Arndt, 87 Wn.2d 374, 379, 663 P.2d 1328 (1976) and State v. Jeffries, 110 Wn.2d 326, 336, 752 P.2d 1338 (1988).

An analysis of these factors indicates that possession with intent to manufacture or deliver is an alternative means offense. First, the title of the act, “Prohibits Acts: A-Penalties,” is in the plural. Second, there is no connection between manufacture and delivery other than both involve illegal drug activity. Third, manufacture and delivery are neither consistent with nor repugnant to each other. Fourth, manufacture and delivery are two separate acts and, therefore, they do not inhere in the same transaction. Not uncommonly, in fact, defendants are charged and convicted of possession with intent to deliver only. See, e.g., State v.

Chetty, 167 Wn. App. 432, 433, 272 P.3d 918 (2012) (defendant charged and convicted of possession of cocaine with intent to deliver); State v. McCabe, 161 Wn. App. 781, 784, 251 P.3d 264 (2011) (defendant charged and convicted of possession of heroin with intent to deliver).

The State relies heavily on State v. Smith, in which the Court considered whether the uncodified common law definition of assault created alternative means of committing assault, in addition to the codified alternative means, where the common law definition was phrased in the disjunctive. 159 Wn.2d 778, 784-88, 154 P.3d 873 (2007). The Court ruled that definitional instructions do not create alternative means but merely define an element of the offense. Id. Because the Court addressed definitional instructions only, rather than the statute setting out the substantive offense, as at issue here, the State's reliance on Smith is inapt.

A statute that sets forth an alternative mean offense does not necessarily include subsections. For example, RCW 69.50.402, the statute immediately following the statute at issue, is comprised of numerous subsections, including:

- (1) It is unlawful for any person:
  - (f) Knowingly to keep or maintain any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place, which is resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances, or which is used for keeping or selling them in violation of this chapter.

Although subsection (1)(f) itself does not include additional subsections, it has been construed as setting forth two alternative means of operating a drug house. See State v. Fernandez, 89 Wn. App. 292, 299, 948 P.2d 872 (1997). See also State v. Strohm, 75 Wn. App. 301, 305, 879 P.2d 962 (1994) (RCW 9A.82.060(1)(a) sets forth alternative means of leading organized crime without subsections; RCW 9A.82.050(1) sets forth alternative means of trafficking in stolen property without subsections). The State’s argument that an alternative means offense is indicated only by subsections is unsupported by case law and should be rejected.

2. No substantial evidence was presented to prove Mr. Huynh intended to “manufacture” cocaine.

“In an alternative means case, where a single offense may be committed in more than one way, there must be jury unanimity as to guilt for the single crime charged. Unanimity is not required, however, as to the means by which the crime was committed so long as substantial evidence supports each alternative means.” State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988) (emphasis in original). Absent substantial evidence to support each alternative means, the conviction must be reversed unless the jury returns a statement of unanimity in the form of a special verdict. State v. Ortega-Martinez, 124 Wn.2d 702, 708, 881 P.2d 231 (1994).

Here, the State did not present substantial evidence to establish the alternative means of possession with intent to “manufacture.” Agent DeLaCruz consistently characterized Mr. Huynh simply as a broker who “always” mentioned his fee, and whose “entire motive” was to earn a fee for producing a buyer. 5RP 61, 81, 110, 168, 174. Mr. Huynh and Mr. Mak arrived in separate cars and Mr. Mak took the cocaine with him when he drove from the restaurant. 6RP 144, 162. Mr. Huynh clearly had no further interest in the cocaine after he received his fee. Significantly, no repackaging material or other evidence of “manufacture” was found either in Mr. Huynh’s car or in Mr. Mak’s car.

The State argues Mr. Mak must have intended to manufacture the cocaine because “pretty much” everyone would do so. Br. of Resp. at 32 (quoting testimony of Detective DeLaCruz). However, a conviction based on generalizations, rather than on actual facts, cannot stand. In fact, generalizations about the behavior of suspected drug dealers do not even support probable cause to issue a search warrant. In State v. Thein, 138 Wn.2d 133, 147-48, 977 P.2d 582 (1999), the Washington Supreme Court ruled generalized evidence that a person suspected of dealing drugs likely had contraband in his home was insufficient to provide probable cause for a search warrant. Also, in State v. Bluehorse, 159 Wn. App. 410, 429-31, 248 P.3d 537 (2011), the court vacated a gang aggravator for a drive-by

shooting involving rival gang members, where the State presented only generalized evidence of territorial conflicts between the gangs.

The State argues Mr. Mak must have intended to repackage the cocaine simply because “profit is achieved by maximizing the quantity and price of the drugs.” Br. of Resp. at 31. However, Agent DeLaCruz testified he understood the drugs were going to Canada. 6RP 110.

Detective John Belanger testified a kilogram of cocaine generally sold for \$30,000 to \$45,000 in Canada. 6RP 25. Therefore, Mr. Mak could earn a significant profit simply by reselling the cocaine without “manufacturing” it. It may be noted, the kilograms of cocaine used as bait in the instant transaction were found abandoned near the United States-Canada border by the Border Patrol. The State’s argument that Mr. Mak must have intended to repackage the cocaine into smaller quantities, rather than smuggle the kilograms as packaged, across the border, is unsupported by any evidence specific to this particular transaction.

3. The proper remedy is reversal.

Reversal is required in the absence of either substantial evidence to support each alternative means of committing an alternative means offense or a special verdict form indicating jury unanimity as to which means formed the basis of the verdict. Ortega-Martinez, 124 Wn.2d at 708. Here, the State did not present substantial evidence to support

“manufacture,” an alternative means of committing the offense of possession with intent to manufacture or deliver cocaine. Therefore, Mr. Huynh’s constitutional right to jury unanimity was violated and reversal is required.

B. CONCLUSION

For the foregoing reasons and for the reasons set forth in the Brief of Appellant, Mr. Huynh respectfully requests this Court reverse his convictions for possession with intent to manufacture or deliver cocaine and for conspiracy to possess with intent to manufacture or deliver cocaine.

DATED this 22<sup>nd</sup> day of February 2013.

Respectfully submitted,

  
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SARAH M. HROBSKY (12352)  
Washington Appellate Project (91052)  
Attorneys for Appellant

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JEFFREY HUYNH,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22<sup>ND</sup> DAY OF FEBRUARY, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ERIK PEDERSEN, DPA  
SKAGIT COUNTY PROSECUTOR'S OFFICE  
COURTHOUSE ANNEX  
605 S THIRD ST.  
MOUNT VERNON, WA 98273

(X) U.S. MAIL  
( ) HAND DELIVERY  
( ) \_\_\_\_\_

[X] JEFFREY HUYNH  
355898  
LARCH CORRECTIONS CENTER  
15314 DOLE VALLEY RD  
YACOLT, WA 98675-9531

(X) U.S. MAIL  
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x \_\_\_\_\_ *grm*

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
☎(206) 587-2711