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Court of Appeals  
Division I  
State of Washington

No. 73523-3-I

**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE**

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**STATE OF WASHINGTON, Respondent,**

**v.**

**RANDOLPH CLARK-EL, Appellant.**

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**BRIEF OF RESPONDENT**

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**DAVID S. McEACHRAN,  
Whatcom County Prosecuting Attorney  
By KIMBERLY THULIN  
Appellate Deputy Prosecutor  
Attorney for Respondent  
WSBA #21210 / ADMIN. #91075**

**Whatcom County Prosecutor's Office  
311 Grand Avenue, Second Floor  
Bellingham, WA 98225  
(360) 676-6784**

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**A. ASSIGNMENTS OF ERROR**

None.

**B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

1. Whether Clark-El can assert for the first time on appeal, the jury instructions he agreed to were erroneous when he cannot demonstrate the 'to convict' instruction omitted any essential elements where the 'controlled substance' element was defined for the jury as methamphetamine?
2. Whether Clark-El can assert for the first time on appeal that the jury instructions erroneously failed to require the jury find Clark-El *knew* he was delivering methamphetamine, when Clark-El agreed below that the jury did not need to find he knew the *identity* of the controlled substance he delivered, only that he was delivering a 'controlled substance'?
3. Whether the jury instructions erroneously omitted an essential element when the identity of the drug Clark-El delivered was embedded the 'to convict' instruction because the jury was instructed methamphetamine, the only drug presented, tested and argued below, was a controlled substance.
4. Whether the alleged jury instruction errors are harmless beyond a reasonable doubt because the identity of the controlled substance was embedded in the 'to convict' instruction and methamphetamine was the only drug alleged, tested and argued below.

## **C. FACTS**

### **1. Procedural Facts**

Clark-El was charged with delivery of a controlled substance, methamphetamine. CP 4. At trial, Clark-El argued officers identified and arrested the wrong person. RP 196. Prior to instructing the jury, Clark-El agreed the ‘to convict’ and remaining jury instructions proposed for the jury were appropriate and legally sufficient. RP 165-171. Now, for the first time on appeal, Clark-El argues the instructions he agreed to were constitutionally deficient even though the ‘to convict’ instruction listed all of the statutory elements, incorporated the identity of the controlled substance at issue by defining methamphetamine as a controlled substance and the instructions required the jury to find the substance delivered was ‘controlled.’ Br. of App. at 2-3. Clark-El’s arguments should be rejected.

### **2. Substantive Facts**

On October 30<sup>th</sup> 2014, Detective Johnson of the Bellingham Police Department and his colleague, Sergeant Keith Johnson were working undercover in the special investigations unit looking for persons willing to sell them drugs. RP 105-106. While undercover, Sergeant Johnson approached a person, whom Detective Johnson, from his surveillance

position, immediately recognized as Clark-El and hit him up for drugs. RP 108, 110, 74-75, 86. Sergeant Johnson told Clark-El he was looking for “forty” “clear” which according to Johnson’s training, is a street term for forty dollars’ worth methamphetamine. RP 76. Clark-El responded he only had a “dub” which means twenty dollars’ worth of methamphetamine but that he also had ten dollars’ worth of ‘dark’. RP 77. According to officers, ‘dark’ is slang for heroin. RP 77. Sergeant Johnson told Clark-El he would buy the ‘dub’ of methamphetamine. RP 77.

After walking to a darkened area, Clark-El delivered a small bag of what appeared to be methamphetamine to Sergeant Johnson in exchange for \$20. RP 76-77, 88. Testing later confirmed the controlled substance Clark-El delivered to Sergeant Johnson was methamphetamine. RP 156-57. Once back at the police station, Sergeant Johnson reviewed photographs and was able to identify the person who delivered the ‘dub’ of methamphetamine to him earlier that evening, as Clark-El. RP 112.

Clark-El was arrested for this offense on January 13<sup>th</sup> 2015 and subsequently convicted as charged. RP 140-1, CP 35, 37. Officers did not immediately arrest Clark-El following his sale of methamphetamine to Sergeant Johnson because the special investigations unit wanted to continue with the on-going long-term undercover drug investigation in the area. RP 112.

**D. ARGUMENT**

**1. Clark-El waived his right to assert jury instruction error for the first time on appeal by agreeing below that the proposed jury instructions were sufficient.**

For the first time on appeal, Clark-El claims the jury instructions he affirmatively agreed to, failed to state the essential elements of delivery of a controlled substance because the ‘to convict’ instruction did not specifically *identify* the controlled substance at issue and failed to require the jury to find Clark-El *knew* of the identity of the controlled substance he was charged with delivering was methamphetamine. Br. of App. at 6.

Clark-El waived these issue by not objecting and instead agreeing below, that the ‘to convict’ instruction sufficiently set forth the essential elements of the charge, delivery of a controlled substance, methamphetamine. Moreover, Clark-El cannot establish this alleged error constitutes a manifest constitutional error that resulted in any identifiable prejudice because the *identity* of the controlled substance was necessarily embedded in the ‘controlled substance’ element of the ‘to convict’ instruction because methamphetamine was defined as a controlled substance; the only controlled substance presented, tested or argued at trial. Consequently, a conviction based on the instructions given in this case

necessarily required the jury to find Clark-El knowingly delivered methamphetamine to the undercover officer in October of 2014. RP 171.

RAP 2.5(a) precludes defendants from asserting error for the first time on appeal unless the issue raised involves a “manifest error affecting a constitutional right.” RAP 2.5(a)(3), State v. Scott, 110 Wn.2d 682, 684, 757 P.2d 492 (1988). A manifest error requires a showing of actual prejudice. In other words, the error alleged must have practical and identifiable consequences in the trial. State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). Even if an error is determined to be manifest, it may still be subject to harmless error analysis. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995).

Clark-El did not object to the jury instructions he now challenges on appeal. Instead, Clark-El repeatedly stated he not have any objection to the ‘to convict,’ definition of ‘knowing,’ or instruction defining a controlled substance as methamphetamine when trial court methodically went through each proposed jury instruction. Clark-El affirmatively advised the trial court these proposed instructions were acceptable. RP 171.

THE COURT: State’s 14 then is the elements instruction. Any objection to that?

MS.KOROMA: No.

THE COURT: Okay, Next is definition of knowing, knowingly or knowledge, any objection to that? That is necessary, is it not?

THE STATE: It is.

THE COURT: Because they have to know that it's a controlled substance. Is that acceptable?

MS.KOROMO: It is.

THE COURT: okay, and then we have 1.51 which I moved from the front to the back. It looks a little short but maybe that's a computer thing. It could be formatting. I guess it's just the formatting. It looks like it's all there. Any objection to that instruction?

MS.KOROMA: No.

RP 171, CP 20-36.

This colloquy demonstrates Clark-El materially contributed to the alleged error he now complains of. Clark-El understandably agreed to these instructions because failing to identify the controlled substance in the 'to convict' instruction has been held to not relieve the state of its burden of proof or amount to omitting an essential element of the charge. State v. Sibert, 168 Wn.2d 306, 230 P.3d 142 (2010), *as corrected* (Apr. 1, 2010).

The 'controlled substance' element was set forth in the 'to convict' instruction in this case, consistent with the statutory language of the charged offense. Embedded in this essential element was the definition instruction that further explained methamphetamine is a controlled substance. CP 33. Contrary to Clark-El's argument then, the 'to convict' instructions did not omit an essential element sufficient to warrant raising

this issue for the first time on appeal. Particularly, where only one controlled substance, methamphetamine, was charged, presented, tested and argued below.

In light of Clark-El's failure to object below and his inability to demonstrate the instructional errors alleged constitute a manifest constitutional error that results in any practical or identifiable prejudice, this Court should hold review of this issue is barred by RAP 2.5.

**2. The jury instructions, taken as a whole, set forth the essential elements of the charged offense, delivery of a controlled substance, methamphetamine.**

Even if not waived pursuant to RAP 2.5, Clark-El cannot demonstrate the 'to convict' instruction in this case omitted an essential element of the crime such that reversal is warranted where the jury instructions required the jury to find Clark-El knowingly possessed with intent to deliver, a controlled substance and the only drug at issue below, methamphetamine, was further defined for the jury as a controlled substance.

Jury instruction challenges are reviewed in the context of the instructions as a whole. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). "Jury instructions, taken in their entirety, must inform the jury that

the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt.” Id. Trial courts have considerable discretion in wording jury instructions. State v. Brown, 132 Wn.2d 529, 618, 940 P.2d 546 (1997), as amended (Aug. 13, 1997).

It is reversible error for the court’s instructions to relieve the state of its burden of proof. State v. Byrd, 125 Wash. 2d 707, 887 P.2d 396 (1995). The sufficiency of a challenged to the “to convict” instruction is reviewed on appeal de novo. State v. Mills, 154 Wash. 2d 1, 7, 109 P.3d 415 (2005).

Clark-El was charged and convicted of delivery of a controlled substance, methamphetamine pursuant to former RCW § 69.50.410(1)(2014). The applicable RCW § 69.50.410(1)(2014) provides, “except as authorized by this chapter, it is unlawful for any person to manufacture or deliver a controlled substance.” The express statutory elements as set forth in the plain language of the statute are (1) unlawful possession of (2) a controlled substance with (3) intent to deliver. State v. Goodman, 150 Wn.2d 774, 83 P.3d 410 (2004). The plain language of the statute does not *identify* the controlled substance prohibited, only that a person is prohibited from possessing and causing the delivery of a controlled substance. The legislature set the penalty separately based on the classification of the controlled substance. Former RCW § 69.50.410(2)(b)(2014).

In State v. Goodman, 150 Wn.2d 774, 83 P.3d 410 (2004), the court held the identity of the controlled substance was an essential element that must be included in the *charging* document because the identity of the controlled substance was essential to placing the defendant on notice of the penalty that could be imposed. Then, in State v. Sibert, 168 Wn.2d 306, 230 P.3d 142 (2010), as corrected (Apr. 1, 2010), our State Supreme Court acknowledging Goodman, held that while the *identity* of the controlled substance was an essential element of the crime because the maximum sentence for the crime depends on the identity of the controlled substance, its omission from the ‘to convict’ instruction was not a *complete omission* of this essential element such that it relieved the state of its burden of proof and warranted reversal of a conviction. The Court reasoned the ‘to convict’ instruction given in that case, sufficiently laid out the express essential elements because it referenced the ‘controlled substance, as charged’ which specifically corresponded to the identity of the controlled substance stated in the information, methamphetamine; the only drug charged, presented or argued at trial.

Here, as in Sibert, omitting the *identity* of the controlled substance, methamphetamine, from the ‘to convict’ instruction did not relieve the state of proving the essential ‘controlled substance’ element of the charge beyond a reasonable doubt because the *identity* the controlled substance

element was defined to the jury as methamphetamine. Thus, the *identity* of the controlled substance at issue was imbedded within the essential ‘controlled substance’ element set forth in the ‘to convict’ instruction. The jury instructions therefore, when viewed as a whole and reasonable manner, required the jury to find Clark-El possessed with intent to deliver, methamphetamine, the only controlled substance found, tested, presented and argued below.

This explains why Clark-El’s trial attorney agreed when questioned by the trial judge, that the proposed jury instructions that referenced a ‘controlled substance’ in the ‘to convict’ jury instruction and further identified the nature of the controlled substance as methamphetamine in a separate definition instruction, were sufficient. RP 171.

Clark-El argues nonetheless, that jurors should not be required to supply an omitted element by referring to another jury instruction. See, Br. of App. at 9, 22, *citing* State v. Smith, 131 Wn.2d 258, 930 P.2d 917, 1199 (1997). Smith, upon which Clark-El relies is inapposite. The ‘to convict’ instruction at issue in Smith misstated the wrong underlying crime for which the conspirators were alleged to have agreed to carryout. Thus, the entire essential element, the correct underlying crime, was completely missing from the instruction. No such error is alleged to have occurred here. Instead, all of the essential elements were accurately set forth in the

‘to convict’ instruction and the identity of the controlled substance was accurately defined and embedded in the controlled substance language/element within the ‘to convict’ instruction. Therefore, there was no omission or misstatement of this essential element as there was in Smith. Clark-El’s argument is without merit.

This is no different than self-defense cases where the absence of self-defense element is embedded within the ‘intent’ element of the charged assault. Here, the *identity* of the controlled substance, where it is further defined accurately in another instruction is inherently embedded within the controlled substance element set forth in the ‘to convict’ instruction. See, State v. Hoffman, 116 Wn.2d 51, 109, 804 P.2d 577 (1991). An appellate court will “review the instructions in the same manner as a reasonable juror.” State v. Hanna, 123 Wn.2d 704, 719, 871 P.2d 135 (1994).

Reviewing these instructions as a whole and in the same manner as a reasonable juror, this court should hold the ‘to convict’ instruction did not omit or misstate an essential element of the crime and that, the controlled substance element set forth in the ‘to convict’ instruction appropriately incorporated the definition provided to the jury defining methamphetamine as a controlled substance. These instructions ensured the jury could only

convict Clark-El if they determined he possessed with intent to deliver, methamphetamine. Clark-El's argument should be rejected.

Clark-El also similarly asserts for the first time on appeal, that the jury instructions constitutionally deficient because they did not require the jury find Clark-El *knew* the *identity* of the specific controlled substance he was charged with delivering, requiring only a finding that Clark-El *knew* he was delivering a controlled substance.

The elements of a crime are those facts “that the prosecution must prove to sustain a conviction.” State v. Miller, 156Wn.2d 23, 123P.3d 827 (2005). In determining the express essential elements of a crime, the plain language of the statute, if unambiguous, controls. *Id.* The statutory elements of possession of a controlled substance with intent to deliver are (1) Unlawful possession, (2) of a controlled substance with (3) intent to deliver. RCW 69. 50.401, State v. Nunez-Martinez, 90 Wn. App. 250, 951 P.2d 823 (1998). Additionally, the state must prove ‘guilty knowledge’ that the delivered substance was controlled. State v. Boyer, 91 Wn.2d 342, 588 P.2d 1151 (1979), State v. Martinez, 123 Wn. App. 841, 844, 846, 99 P.3d 418 (2004).

The Boyer court imposed a ‘guilty knowledge’ element to this offense after determining the plain language of the intent element set forth in the statute was ambiguous because the language addressed only whether

or not there is an ‘intent to manufacture or deliver’ not whether or not the defendant had any understanding of the nature of the product being delivered. By construing the statute to require ‘guilty knowledge’ the Boyer court intended to protect innocent parties whom could unknowingly deliver a package that contained prohibited controlled substances by ensuring the state had the burden of proving ‘guilty knowledge.’ Id.

Relying on the analysis in Boyer, the court in Nunez-Martinez, 90 Wn. App. 250, held the ‘guilty knowledge’ requirement only requires the state prove the defendant know the substance being delivered is a controlled substance. As noted in Nunez- Martinez, “there would seem to be little public purpose in “insulating from criminal liability those defendants who knowingly deal in prohibited controlled substances, but are ignorant, mistaken or willing or misrepresent the exact nature or chemical name of the substance which they traffic. Nunez-Martinez, 90 Wn. App. 250 *citing*, State v. Sartin, 200 Wis. 2d 47, 546 N.W.2d 449, 446 (1996). Nunez-Martinez requires this Court to reject Clark-El’s assertion that the jury should have been required to find he knew he was delivering methamphetamine when he sold methamphetamine to the undercover officer.

Clark-El agreed this is the state of the law, when he agreed below the ‘to convict,’ definition of a “controlled substance” and “knowing” jury

instructions jury instructions were appropriate and legally sufficient. RP 171. Clark El's argument should be precluded by RAP 2.5 or rejected on its merits.

- 3. The instructional errors Clark-El alleges are harmless beyond a reasonable doubt where the jury was instructed methamphetamine is a controlled substance, where the record reflects Clark-El intended to sell methamphetamine and methamphetamine was the only controlled substance was presented, tested and argued to the jury below.**

Even if error, the failure to identify the controlled substance charged in the 'to convict' jury instruction or failure to require the jury find Clark-El *knowingly* delivered methamphetamine, these errors are harmless beyond a reasonable doubt and don't warrant reversal. State v. Brown, 147 Wn.2d 330, 340-41, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).

Clark-El argues nonetheless, the Washington State Constitution affords greater protection than the United States Constitution and this Court should therefore reject the Neder analysis. See, Br. of App. at 19. Our State Supreme Court previously adopted the Neder analysis in State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002). This court is bound to apply Washington law as interpreted by the Washington State Supreme Court. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 277 (1984). So long as this

Court can determine beyond a reasonable doubt that the complained of error did not contribute to the verdict obtained, the conviction may be upheld. *Id.*, State v. Brown, 147 Wn.2d at 330.

Here, Clark-El argued the jury instructions relieved the state of its burden of proving the identity of the controlled substance delivered or that Clark-El *knew* he was delivering methamphetamine. The ‘to convict’ instruction however, did not omit an essential element of the charged crime as previously explained. The ‘to convict’ instruction referenced the controlled substance element and separately defined that element for the jury as methamphetamine. In doing so, the instructions incorporated the applicable *identity* of the controlled substance at issue into the ‘to convict’ instruction.

Moreover, as in Sibert, the state only alleged Clark-El delivered one type of controlled substance, methamphetamine. Thus, the jury instructions given necessarily required the jury to find Clark-El unlawfully delivered methamphetamine to the undercover officers and that Clark-El intended to sell and understood he was selling methamphetamine, when he exchanged the ‘dub’ of ‘clear’ to Sergeant Johnson. These same facts and instructions demonstrate overwhelmingly that Clark-El knew and intended to deliverer methamphetamine at the time of the drug sale. Under these circumstances,

the jury instruction errors Clark-El alleges are harmless beyond a reasonable doubt and do not warrant reversal.

- 4. The sentencing court did not exceed its authority by sentencing Clark-El for delivery of a controlled substance, methamphetamine because the instructions and facts necessarily required the jury to find Clark-El knowingly delivered methamphetamine, in order to convict Clark-El as charged.**

Finally, Clark-El complains the sentencing court lacked authority to impose a sentence predicated on the delivery of methamphetamine because he alleges, the instructions only required the jury to find Clark-El knowingly possessed with intent to deliver a controlled substance. Br. of App. at 26. Clark-El additionally argues, based on section 21, 22 of our State Constitution, this error is not subject to harmless error analysis. *Id.*

As previously discussed however, the jury instructions did not omit the identity of the controlled substance charged. Moreover, the instructions when read as a whole and in context to the evidence presented below, necessarily required the jury to find Clark-El knowingly delivered methamphetamine since the ‘controlled substance’ element was defined as methamphetamine, the only controlled substance alleged to have been delivered by Clark-El to the undercover officer. Therefore, in order to convict Clark-El, the jury had to find Clark-El knowingly delivered

methamphetamine to the undercover officer. The sentencing court therefore had the authority to sentence Clark-El for unlawful delivery of methamphetamine. As in State v. Sibert, 168 Wn.2d at 314, Clark-El's argument is without merit and should be rejected.

**E. CONCLUSION**

The State respectfully requests this Court affirm Clark-El's conviction for one count of delivery of a controlled substance, methamphetamine.

Respectfully submitted this 5 day of May, 2016.

  
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KIMBERLY THULIN, WSBA #21210  
Appellate Deputy Prosecutor  
Attorney for Respondent  
Admin. No. 91075

CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, Richard Lechich, addressed as follows:

Washington Appellate Project  
1511 Third Avenue  
Suite 701  
Seattle, Wa 98101  
Wapofficemail@washapp.org

*Therese E. Zemel*

\_\_\_\_\_  
Legal Assistant

May 5, 2016

\_\_\_\_\_  
Date