

No. 43695-7-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JAMES ROBINSON,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Did the court's instructions to the jury omit an essential element of the crime in the to-convict instruction for the possession of a controlled substance charge and if so does the error require automatic reversal?

II. STATEMENT OF THE CASE

On April 2, 2011 Centralia Police Officer Corey Butcher was investigating a shoplifting call at Famous Footwear in Centralia, Washington. RP 26-27. Robinson was identified as a suspect in the shoplifting and contacted by Officer John Panco. RP 21, 27-28. Officer Butcher responded to Officer Panco's location and contacted Robinson. RP 28. Officer Butcher placed Robinson in handcuffs and performed a pat down search for weapons. RP 28-29. Officer Butcher located a glass pipe in Robinson's right front jacket pocket. RP 29-30. Robinson told Officer Butcher, "I admit you found me with a crack pipe." RP 38. Robinson denied shoplifting. RP 38. The pipe was sent to the Washington State Crime Laboratory for testing. RP 40. The pipe was described by Officer Butcher as a glass pipe with steel wool and white residue. RP 45. Forensic Scientist Jason Dunn tested the glass tube and found it contained cocaine. RP 62, 70.

The State charged Robinson with one count of Possession of a Controlled Substance, to-wit: Cocaine. CP 1. The State filed an

amended information charging Count I, Possession of a Controlled Substance, to-wit: Cocaine, and Count II, Bail Jumping. CP 4-5. In regards to Count II, the State alleged that Robinson after being released by order of the court and with knowledge that he must personally appear, had failed to appear at a subsequent court appearance. CP 5.

Robinson exercised his right to a trial by jury. RP. The to-convict jury instruction for possession of a controlled substance, Instruction Six, did not contain the name of the substance, cocaine. CP 17. Robinson's trial counsel objected to Instruction 6 due to its failure to specify the controlled substance. RP 84. Robinson was convicted on both counts as charged in the amended information. CP 4-6, 27, 28. Robinson timely appeals his conviction. CP 54-64.

The State will supplement the facts as necessary throughout the argument below.

III. ARGUMENT

A. JURY INSTRUCTION NUMBER SIX, THE TO-CONVICT INSTRUCTION FOR POSSESSION OF A CONTROLLED SUBSTANCE, DID NOT OMIT AN ESSENTIAL ELEMENT OF THE CRIME.

Robinson contends that the to-convict instruction for the possession of a controlled substance charge, Instruction Six, omitted an essential element of the crime charged, the name of the

particular substance. Brief of Appellant 5-12. The name of the controlled substance, in Robinson's case cocaine, is not an essential element of the crime charged because it does not increase the penalty for the crime. Instruction six was an adequate statement of the law, containing the essential elements of the crime charged, and his conviction should be affirmed.

1. Standard Of Review

Challenged jury instructions are reviewed de novo and evaluated in the context of the instructions as a whole. *State v. McCreven*, 170 Wn. App. 444, 461-62, 284 P.3d 793 (2012). Constitutional violations are reviewed de novo. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011).

2. The Identity Of The Controlled Substance Is Not An Essential Element For Prosecution Of Unlawful Possession Of A Controlled Substance.

The State is required to prove, beyond a reasonable doubt, every essential element of the crime charged for a conviction to be upheld. *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010) (citation omitted). The to-convict instruction stands on its own and the Court may not look to other jury instructions to supply an element missing from the instruction. *Sibert*, 168 Wn.2d at 311. The to-convict "instruction must contain all of the elements of the crime

because it serves as a ‘yardstick’ by which the jury measures the evidence to determine guilt or innocence.” *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997), *citing State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953).

“The identity of a controlled substance is an essential element where it increases the maximum sentence. *Sibert*, 168 Wn.2d at 311-12, *citing State v. Goodman*, 150 Wn.2d 774, 785-86, 83 P.3d 410 (2004). The right of a criminal defendant to have a trial by a jury of his or her peers extends to any fact, other than a prior conviction, that increases the penalty of a crime beyond the statutory maximum. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000). The United States Supreme Court also determined that the statutory maximum sentences it referred to in *Apprendi* “is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004) (citations omitted, italics original). The Supreme Court found that in a state such as Washington, where the legislature has enacted the Sentencing Reform Act, the maximum sentence would be a

sentence within the standard range not the statutory maximum.

Blakely, 542 U.S. at 303-04.

Robinson was charged with possession of a controlled substance under RCW 69.50.4013. CP 1, 4.

(1) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

(2) Except as provided in RCW 69.50.4014, any person who violates this section is guilty of a class C felony punishable under chapter 9A.20 RCW.

RCW 69.50.4013.¹ A class C felony is punishable by a maximum sentence of five years imprisonment and not more than a 10 thousand dollar fine. RCW 9A.20.020(c). The only exception to the maximum punishment for possession of a controlled substance is for the separate crime of possession of forty grams or less of marihuana, which is a misdemeanor. RCW 69.50.4014.²

Robinson argues to this Court that the identity of the controlled substance is an essential element of possession of a controlled substance because the identity of the controlled

¹ Former RCW 69.50.4013 as it appeared in April 2011. Any future references to RCW 69.50.4013 will be to the statute as it was codified in April 2011.

² Former 69.50.4014 as it appeared in April 2011. Any future references to RCW 69.50.4014 will be to the statute as it was codified in April 2011.

substance can increase the penalty of the crime. Brief of Appellant 5-6. Robinson uses possession of under 40 grams of marijuana as an example of how the identity of the controlled substance will affect the penalty for committing the crime. Brief of Appellant 5-6. Robinson's assertion is incorrect and distorts the law. Possession of a controlled substance is always a class C felony. RCW 69.50.4013(2). The only time possession of a controlled substance becomes anything less than a class C felony is when the person possesses under 40 grams of marijuana. RCW 69.50.4013; RCW 69.50.4014. The crime of possession of under 40 grams of marijuana is codified in a different statute than possession of a controlled substance. RCW 69.50.4013; RCW 69.50.4014. Further, for the crime to be a misdemeanor it is the amount that is in controversy, not the substance. RCW 69.50.4014.

Similarly unpersuasive is the *Evans* case Robinson cites to for his assertion that the identity of the substance changes the standard range. Brief of Appellant 6-7, *citing Sate v. Evans*, 129 Wn. App. 211, 118 P.3d 419 (2005), *reversed on other grounds*, 159 Wn.2d 402, 150 P.3d 105 (2007). *Evans* was charged with manufacturing methamphetamine and unlawful possession of methamphetamine with the intent to deliver. *Evans*, 129 Wn. App.

at 214. Evans argued that the controlled substance that he possessed with the intent to deliver was not identified by the jury. *Id.* at 227. Therefore when the trial court sentenced Evans under former RCW 69.50.401(a)(1)(ii) it violated *Blakely* because the maximum sentence under that subsection was 10 years but required the substance to be methamphetamine or amphetamine. *Id.* Former RCW 69.50.401(a)(1)(iii) stated that any other controlled substance would yield a maximum penalty of not more than five years imprisonment. *Id.* 227-29. It was not clear if the jury convicted Evans based upon methamphetamine base or methamphetamine hydrochloride. *Id.* at 229. The trial court sentenced Evans as if he had been convicted of manufacturing and unlawfully possessing methamphetamine base with the intent to deliver. *Id.* This distinction was not made by the jury and by finding it was methamphetamine base the trial court imposed a greater sentence, which violated *Blakely*. *Id.*

Evans is distinguishable from Robinson's case because the within the single statute, former RCW 69.50.401, there were different punishments for different controlled substances. Whereas in the case before this Court the only punishment available for the crime of possession of a controlled substance is up to five years

imprisonment and up to a 10,000 dollar fine. RCW 69.50.4013. This is because all substances are treated equal and are a class C felony. RCW 69.50.4013. The crime of misdemeanor of possession of under 40 grams of marijuana requires additional findings that the amount of the controlled substance was under 40 grams and it is found in a different statute. RCW 69.50.4014. Therefore, in a possession of a controlled substance case the identity of the controlled substance is not an essential element of the crime.

3. In The Context Of Robinson's Case, Failure To Name The Controlled Substance In Instruction 6 Was Not A Structural Error Requiring Automatic Reversal.

While the State maintains the identity of the controlled substance is not an essential element, *arguendo*, the absence of the name of the controlled substance in the to-convict jury instruction for possession of a controlled substance did not render the trial unreliable or fundamentally unfair and the error is therefore not a structural error.³ *See State v. Momah*, 167 Wn.2d 140, 149, 217 P.3d 321 (2009). A structural error requires automatic reversal and is not subject to a harmless error analysis. *State v. Mosteller*, 162 Wn. App. 418, 429-30, 254 P.3d 201 (2011), *review denied*

³ The State maintains throughout its briefing that the omission of the identity of the controlled substance was not an error and makes the other arguments in the alternative.

172 Wn.2d 1025 (2011). Structural errors only occur in a limited number of cases and most constitutional errors can be subject to a harmless error analysis. *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999). “Constitutional violations that defy harmless-error review “contain a ‘defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.’” *Mosteller*, 162 Wn. App at 430, *citing Neder*, 527 U.S. at 8.

The Supreme Court has previously held that failure to include an essential element in the to-convict instruction produces a “fatal error” and is automatic reversible error. *Smith*, 131 Wn.2d at 265. The reasoning for this holding was that the omission of an essential element “relieves the State of its burden of proving every essential element beyond a reasonable doubt.” *Id.* at 265. In *Smith* the crime charged was conspiracy to commit first degree murder. *Id.* at 260. The to-convict instruction stated, “agreed with Marjorie Franklin and James Jeffers to engage in ... the performance of the conduct constituting the crime of Conspiracy to Commit Murder in the First Degree, the Defendant made the agreement with the intent that such conduct be performed ...” *Id.* at 260-61 (italics and internal quotations omitted). The correct jury instruction would have

read agreed to engage in ... the performance of conduct constituting the crime of Murder in the First Degree. *Id.* at 262. Therefore, Smith could have been convicted of conspiracy to commit conspiracy to commit murder. *Id.* at 262-65.

The facts and circumstances in Robinson's case are distinctly different from *Smith*. The omission in this case of the identity of the controlled substance did not affect the framework within which the trial proceeded. *Mosteller*, 162 Wn. App at 430. The omission did not make the trial unreliable or fundamentally unfair. The only controlled substance mentioned throughout the trial was cocaine or crack cocaine. *See* RP. The jury verdict form for Count I stated, "We, the jury, find the defendant, James Robinson, Guilty of the crime of **Possession of a Controlled Substance-Cocaine**, as charged in Count I." CP 27 (bold original).

The erroneous instruction in this case is not structural is therefore subject to the harmless error test.

4. If Instruction Six Was Erroneous The Error Was Harmless.

Not every misstatement in a jury instruction will relieve the State of its burden. *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). However, "a conviction cannot stand if the jury was instructed in a manner that would relieve the State of this burden."

Brown, 147 Wn.2d at 339 (citations and internal quotations omitted). A jury instruction that misstates the law is subject to a harmless error analysis. *State v. Hayward*, 152 Wn. App. 632, 646, 217 P.3d 354 (2009) (citations and internal quotations omitted). “In order to hold the error harmless, we [the reviewing court,] must conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.” *Brown*, 147 Wn.2d at 341 (citations and internal quotations omitted).

In the present case the instruction did not affect the jury verdict. The only controlled substance testified about, mentioned in any jury instruction, or spoken about by the attorneys was cocaine (sometimes referred to as crack or crack cocaine). See RP, CP-26. Robinson even admitted to the officer that he was in possession of the pipe, stating, “I admit you found me with a crack pipe.” RP 38. The verdict form clearly stated that the crime for which the jury was convicting Robinson of was Possession of a Controlled Substance-Cocaine. CP 27. The overwhelming evidence was that Robinson was in possession of a pipe used for smoking rock cocaine, commonly referred to as crack, and that pipe contained residue of the cocaine. Any error in the to-convict instruction for the

possession of a controlled substance charge is harmless beyond a reasonable doubt.

IV. CONCLUSION

There was no error in the to-convict instruction because cocaine was not an essential element of the crime charged. In the alternative, the omission of the identity of the controlled substance was not a structural error and was harmless beyond a reasonable doubt. For the foregoing reasons, this court should affirm Robinson's conviction.

RESPECTFULLY submitted this 22nd day of January, 2013.

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