

**FILED
Court of Appeals
Division II
State of Washington
4/19/2018 3:34 PM**

NO. 50292-5-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DAVID LOREN WALDECK,

Appellant.

RESPONDENT'S BRIEF

**RYAN JURVAKAINEN
Prosecuting Attorney
SEAN BRITTAIN/WSBA 36804
Deputy Prosecuting Attorney
Representing Respondent**

**HALL OF JUSTICE
312 SW FIRST
KELSO, WA 98626
(360) 577-3080**

TABLE OF CONTENTS

	PAGE
I. ISSUE.....	1
II. SHORT ANSWER.....	1
III. FACTS	1
IV. ARGUMENT	1
A. THE TO-CONVICT INSTRUCTIONS FAILED TO IDENTIFY THE CONTROLLED SUBSTANCE AS HEROIN; HOWEVER, THE ERROR WAS HARMLESS.....	1
B. THE TRIAL COURT EXCEEDED ITS AUTHORITY WHEN IT IMPOSED THE APPELLANT’S SENTENCES.....	3
C. THE TRIAL COURT FAILED TO INQUIRE ABOUT THE APPELLANT’S ABILITY TO PAY BEFORE IMPOSING LEGAL FINANCIAL OBLIGATIONS....	3
D. THE STATE TAKES NO POSITION IN REGARDS TO APPELLATE COSTS.....	3
V. CONCLUSION	4

TABLE OF AUTHORITIES

Page

Cases

<i>State v. Brown</i> , 147 Wn.2d 330, 58 P.3d 889 (2002)	2
<i>State v. Clark-El</i> , 196 Wn. App. 614, 384 P.3d 627 (2016)	2, 3
<i>State v. Gonzales</i> , 2 Wn. App. 2d 96, 408 P.3d 743 (2018)	2, 3
<i>State v. Goodman</i> , 150 Wn.2d 774, 83 P.3d 410 (2004)	2

I. ISSUE

1. Did the trial court err in giving to-convict instructions that did not identify the controlled substance as heroin?
2. Did the trial court exceed its authority when it imposed the Appellant's sentences?
3. Did the trial court err when it imposed legal financial obligations?
4. Should this Court use its discretion in regards to the assessment of appellate costs?

II. SHORT ANSWER

1. Yes. The to-convict instructions failed to identify the controlled substance as heroin; however, the error was harmless.
2. Yes. The trial court exceeded its authority when it imposed the Appellant's sentences.
3. Yes. The trial court failed to inquire about the Appellant's ability to pay prior to imposing legal financial obligations.
4. The State defers to this Court.

III. FACTS

The State agrees with the Appellant's rendition of the procedural history and facts of the present matter.

IV. ARGUMENT

A. THE TO-CONVICT INSTRUCTIONS FAILED TO IDENTIFY THE CONTROLLED SUBSTANCE AS HEROIN; HOWEVER, THE ERROR WAS HARMLESS.

“Case law has long established that the identity of a controlled substance is an essential element when it increases a defendant's maximum

sentence.” *State v. Gonzales*, 2 Wn. App. 2d 96, 106, 408 P.3d 743 (2018) (citing *State v. Goodman*, 150 Wn.2d 774, 785-86, 83 P.3d 410 (2004)). “A jury instruction that omits an essential element is harmless if it appears beyond a reasonable doubt the error did not contribute to the verdict.” *State v. Clark-El*, 196 Wn. App. 614, 620, 384 P.3d 627 (2016) (citing *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)). “The omitted element must be supported by ‘uncontroverted evidence,’ and the reviewing court must be able to “ ‘conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.’ ” *Clark-El*, 196 Wn. App. at 620 (quoting *Brown*, 147 Wn.2d at 341).

The Appellant has argued that because the three to-convict instructions failed to identify the controlled substance as heroin, the Appellant’s convictions must be reversed and remanded for resentencing. The State concedes that the three to-convict instructions failed to identify the controlled substance as heroin. However, the error was harmless. The only evidence of a controlled substance presented to the jury, uncontroverted, was heroin. The only controlled substance referred to in the jury instructions was heroin. Each of the to-convict instructions referred to each of the corresponding counts in the charging information, which clearly identified the controlled substance as heroin. Thus,

the error in the to-convict instruction[s] was harmless beyond a reasonable doubt because the omitted element is supported by “uncontroverted evidence,” and we are able to conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error,

Gonzales, 2 Wn. App. 2d at 113.

Therefore, the State requests this court affirm the Appellant’s convictions.

B. THE TRIAL COURT EXCEEDED ITS AUTHORITY WHEN IT IMPOSED THE APPELLANT’S SENTENCES.

Based upon the holding in *Clark-El* and *Gonzales*, the State agrees with the Appellant that the trial court exceed its authority when it imposed the Appellant’s sentences. This matter should be remanded back to the trial court for resentencing.

C. THE TRIAL COURT FAILED TO INQUIRE ABOUT THE APPELLANT’S ABILITY TO PAY BEFORE IMPOSING LEGAL FINANCIAL OBLIGATIONS.

The record does not show that the trial court inquired about the Appellant’s ability to pay before it imposed both discretionary and non-discretionary legal financial obligations. The State agrees that this should be addressed during the Appellant’s resentencing.

D. THE STATE TAKES NO POSITION IN REGARDS TO APPELLATE COSTS.

The State defers to this court in regards to appellate costs.

V. CONCLUSION

The Appellant's convictions should be affirmed. The case should be remanded back to the trial court for resentencing. .

Respectfully submitted this 13 day of April, 2018.

RYAN P. JURVAKAINEN
Prosecuting Attorney

By 
SEAN M. BRITTAIN
WSBA #36804
Deputy Prosecuting Attorney
Representing Respondent

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Ms. Valerie Marushige
Attorney at Law
23619 55th Place South
Kent, WA 98032-3307
ddvburns@aol.com

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on April 19th, 2018.



Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

April 19, 2018 - 3:34 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50292-5
Appellate Court Case Title: State of Washington, Respondent v David Loren Waldeck, Appellant
Superior Court Case Number: 16-1-00494-3

The following documents have been uploaded:

- 502925_Briefs_20180419153309D2900079_0957.pdf
This File Contains:
Briefs - Respondents
The Original File Name was SKMBT_65418041915400.pdf

A copy of the uploaded files will be sent to:

- Jurvakainen.ryan@co.cowlitz.wa.us
- ddvburns@aol.com

Comments:

Sender Name: Michelle Sasser - Email: sasserm@co.cowlitz.wa.us

Filing on Behalf of: Sean M Brittain - Email: brittains@co.cowlitz.wa.us (Alternate Email: appeals@co.cowlitz.wa.us)

Address:

312 SW 1St Avenue

Kelso, WA, 98626

Phone: (360) 577-3080 EXT 2318

Note: The Filing Id is 20180419153309D2900079