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Division II
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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CARL LOUIS WARNER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan E. Chushcoff, Judge

No. 17-1-03492-6

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. DOES THE OMISSION OF THE IDENTITY OF A CONTROLLED SUBSTANCE IN A TO-CONVICT JURY INSTRUCTION IN A CASE WHERE THE IDENTITY OF THE SUBSTANCE INCREASES A DEFENDANT'S MAXIMUM SENTENCE REQUIRE REMAND FOR RESENTENCING?

B. STATEMENT OF THE CASE.

1. PROCEDURE

The State charged Carl Warner, hereinafter "defendant," with one count of Unlawful Delivery of a Controlled Substance, to-wit: Methamphetamine, classified under Schedule II of the Uniform Controlled Substance Act, contrary to RCW 69.50.401(1)(2)(b), a class B felony. CP 1, 30-32. A jury found defendant guilty "as charged in Count I." CP 29.

Defendant stipulated to an offender score of 9 at sentencing. CP 30-32. The court sentenced defendant to seventy-five (75) months, followed by twelve (12) months of community custody. CP 33-47. Defendant filed a timely appeal. CP 50-65.

2. FACTS

On September 13, 2017, Lakewood Police Department Officer Maxwell Criss organized a “bust/buy operation” where an informant was to engage in a “controlled narcotics buy.” 2RP 68-69.¹ The informant was searched before the operation to insure she did not possess any additional currency or controlled substances. 2RP 69. The informant was instructed to purchase an “eightball of methamphetamine” for eighty dollars. 2RP 75. The informant was given pre-recorded buy money after she was searched. 2RP 78. The buy was to take place at 84th Street and South Tacoma Way in the City of Lakewood, specifically in a Taco Bell parking lot. 2RP 76-77.

Lakewood Police Officer Sean Conlon was in the Taco Bell parking lot in an unmarked truck, observing the interaction from about 20-25 feet away. 2RP 152, 157. Officer Conlon witnessed defendant arrive at the Taco Bell parking lot and contact the informant. 2RP 158. Once he contacted the informant, defendant told her that he did not have the entire quantity of methamphetamine. 2RP 159. The informant would not leave the parking lot. 2RP 161. So, defendant made a phone call and asked the person on the other end to come to Taco Bell. *Id.* A white Lincoln Town Car arrived. 2RP 162. Defendant got into the passenger seat. *Id.* Defendant exited the car.

¹ The verbatim report of proceedings is contained in numbered and dated volumes. The volumes labeled by date will be referred to by date. The volumes labeled by volume number will be referred to by volume number.

2RP 163. He walked back to the informant, handed her a small plastic bag, and took the pre-recorded buy money. *Id.* This small plastic bag contained a crystalline substance. 2RP 95. The crystalline substance was consistent with Officer Criss' experience with methamphetamine. CP 63-64, Exh. 5²; 2RP 95. The crystalline substance later tested positive for methamphetamine. 2RP 200.

A third officer detained defendant after he walked away. 2RP 184. Defendant had a 20-dollar bill in his pocket, and three 20-dollar bills in his hand. 2RP 185. These bills' serial numbers matched the serial numbers on the pre-record buy money. 2RP 166. Defendant admitted he had been at the Taco Bell parking lot and that the money was from the informant, but explained that she was paying him back a debt. 2RP 185-186. Defendant also admitted contact with the Lincoln Town Car, but did not explain the nature of the contact. 2RP 186. Defendant did not admit involvement in a narcotics transaction. 2RP 188.

A jury heard the above testimony and found defendant guilty as charged. Even though methamphetamine was the only controlled substance mentioned in the trial and a jury instruction identified methamphetamine as a controlled substance, the "to-convict" jury instruction included the

² Clerks Papers numbered above No. 62 are a reflection of the State's estimate of how its supplemental designation will be numbered.

language “controlled substance” rather than specifying methamphetamine. CP 12-28, Instructions 9, 12. The jury’s verdict form included language that defendant is found guilty “as charged in Count I,” and Count I did identify the substance at issue as methamphetamine. CP 29.

C. ARGUMENT.

1. THE OMISSION OF THE IDENTITY OF A CONTROLLED SUBSTANCE IN A TO-CONVICT JURY INSTRUCTION IN A CASE WHERE THE TYPE OF SUBSTANCE INCREASES A DEFENDANT’S MAXIMUM SENTENCE REQUIRES REMAND FOR RESENTENCING.

A challenged “to-convict” instruction is reviewed de novo. *State v. Gonzalez*, 2 Wn. App. 2d 96, 105, 408 P.3d 743 (2018), *review denied* 190 Wn.2d 1021 (2018), (*citing State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005)). A to-convict jury instruction must include all essential elements of the crime charged. *State v. Clark-El*, 196 Wn. App. 614, 618, 384 P.3d 627 (2016). Reviewing courts may not rely on other instructions to supplement a missing element. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). When the identity of a controlled substance increases the statutory maximum sentence which the defendant may face upon conviction, that identity is an essential element. *Id.*, *citing State v. Goodman*, 150 Wn.2d 774, 778, 83 P.3d 410 (2004); *State v. Sibert*, 168 Wn.2d 306, 311-12, 230

P.3d 142 (2010) (plurality opinion). Crimes involving methamphetamine are class B felonies, punishable by up to 10 years, whereas crimes involving certain other controlled substances are class C felonies, punishable by up to 5 years. RCW 69.50.401(2)(b), (c); RCW 9A.20.021.

The challenged to-convict instruction was based on WPIC 50.06:

To convict the defendant of the crime of delivery 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 13th day of September 2017, the defendant delivered a controlled substance;
- (2) That the defendant knew that the substance delivered was a controlled substance; and
- (3) That this act occurred in the State of Washington. [...]

CP 12-28, Instruction 12.

This Court has already held in *State v. Gonzalez*, 2 Wn. App. 2d 96, 408 P.3d 743 (2018), that the omission of an essential element of a charged crime in a “to-convict” jury instruction is error, and the identity of a substance is an essential element where it increases the maximum sentence. *Id.* at 106. *Gonzalez* discusses these issues in the context of an unlawful possession charge, but does so by interpreting and ultimately adopting the reasoning in *State v. Clark-El*, 196 Wn. App. 614, 385 P.3d 627 (2016), which is a Division One unlawful delivery charge. Both cases discuss *State v. Sibert*, 168 Wn.2d 774 (2010), a plurality opinion, in which our Supreme Court similarly explored these issues.

In *Sibert*, the lead opinion recognized that the identity of a controlled substance is an essential element where it increases the maximum sentence, but the omission of such may not always be error. Particularly, the lead opinion held that the “to-convict” instruction incorporated the charging document by reference, the charging document specified methamphetamine, the State proved methamphetamine and only methamphetamine at trial, and it was the only controlled substance mentioned by either party during closing arguments. *Id.* at 310-11. However, only four justices agreed to this part of the opinion, and the four dissenting justices agreed the omission was error. *State v. Sibert*, 168 Wn.2d at 325-26 (Alexander, J., dissenting), 334 (Sanders, J., dissenting). The ninth justice concurred in the lead opinion’s result only. Thus, despite defendant’s case bearing all of the above facts the lead opinion relied on in *Sibert*, a plurality opinion does not create binding authority. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 302, 88 P.3d 390 (2004).

Recognizing that *Sibert* is not binding, this Court and Division One of the Court of Appeals held that an omission of the substance identity from the “to-convict” instruction is error. This error may be subject to a harmless error analysis as to a defendant’s conviction, but not to a defendant’s sentence. *State v. Clark-El*, 196 Wn. App. at 624; *State v. Gonzalez*, 2 Wn. App. 2d at 112.

A jury instruction that omits an essential element is harmless if it appears beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). Defendant acknowledges that the error was harmless as to his conviction. BOA, 7. The evidence tending to defendant's guilt was unsurmountable. An undercover officer witnessed defendant give the informant a baggy containing a crystalline substance. The informant gave defendant eighty dollars, which he was found with when he was detained. The serial numbers on the money matched the previously recorded serial numbers on the "buy money" given to the informant to purchase the methamphetamine. Officers testified the substance was consistent with their experience with methamphetamine. A forensic scientist found the substance to test positive for methamphetamine. No other controlled substance was mentioned at trial. Similarly, methamphetamine was the only substance mentioned in the jury instructions. There is no doubt that the jury, and defendant, knew the identity of the substance at issue. Accordingly, any error in the omission was harmless as to defendant's conviction.

However, as to defendant's sentence, the case law is clear: without a finding regarding the nature of the controlled substance, the jury's verdict did not provide a basis upon which the trial court could impose a sentence based on delivery of *methamphetamine*, because methamphetamine

increases the sentence to a Class C felony. *State v. Gonzalez*, 2 Wn. App. at 114, citing *State v. Clark-El*, 196 Wn. App. at 624. Because of the lack of specificity, only the lowest possible sentence for delivery of a controlled substance is authorized. *State v. Clark-El*, 196 Wn. App. at 624. If a court imposes a sentence that is not authorized by the jury's verdict, harmless error analysis does not apply to the sentence. Resentencing is required. *Id.* As such, the State acknowledges the error, and concedes that defendant need be resentenced under a class C felony.

D. CONCLUSION.

While the conclusion in our Washington Supreme Court remains unclear, this Court has decided that omission of the identity of a controlled substance from a "to-convict" jury instruction is error. The error was harmless in this case to defendant's conviction, because the jury could not have convicted defendant of delivering any other substance. Defendant's conviction for delivery of a controlled substance, to wit: methamphetamine, therefore stands. But because the "to-convict" jury instruction omitted the identity of the substance, case law requires defendant be resentenced to the

lowest possible sentence for the delivery of an unidentified controlled substance, which is a class B felony. Defendant should be resentenced accordingly.

DATED: October 5, 2018.

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Certificate of Service:

The undersigned certifies that on this day she delivered by ~~U.S. mail or~~ ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10.8.18 Therun Ka
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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