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Division III
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NO. 35184-0-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

BOGAR RIVERA-ZAMORA,

Appellant.

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

The Honorable T.W. Small, Judge

BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. Because the to-convict instruction did not identify the controlled substance appellant allegedly possessed with intent to deliver, his case must be remanded for sentencing on a class C offense.

2. The trial court denied appellant his constitutional right to present a defense when it refused to instruct jurors on the defense of entrapment.

Issues Pertaining to Assignments of Error

1. The to-convict instruction must include all essential elements of proof and, where the defendant is charged with possessing a controlled substance with intent to deliver, must identify the substance involved. Otherwise, the defendant may be wrongfully convicted of a class B felony rather than a class C felony. Where the to-convict in appellant's case did not identify the substance for the charge in count 3, is remand for sentencing on a class C felony required?

2. For the delivery charge in count 1, appellant attempted to raise an entrapment defense. Describing the issue as a "tough call," the trial judge ultimately declined to instruct jurors on the defense. In the light most favorable to appellant, however, jurors

could have found the defense established. Should appellant's conviction and sentence on count 1 be reversed?

B. STATEMENT OF THE CASE

The Asotin County Prosecutor's Office charged Bogar Rivera-Zamora with four criminal offenses: (count 1) Unlawful Delivery of a Controlled Substance (methamphetamine); (count 2) Unlawful Delivery of Controlled Substance (methamphetamine); (count 3) Unlawful Possession of a Controlled Substance with Intent to Deliver; and (count 4) Maintaining a Drug Property. CP 21-23. Counts 1-3 included an allegation that the offenses occurred within 1,000 feet of school grounds and/or a school bus stop. CP 22-23.

Evidence at trial revealed that, in December 2015, members of the Columbia River Drug Task Force targeted a suspected drug dealer by the name of "Chone" or "Chong," who lived in a downtown Chelan apartment building. RP[1] 91, 95. Posing as a prospective drug buyer, Chelan County Sheriff's Detective Aaron Seabright knocked on the door to apartment 13, where the individual lived. RP 91, 95-96. It appeared no one was home and that the apartment possibly had been vacated. RP 96.

[1] "RP" refers to the verbatim report of proceedings labeled Volumes I and II (283 total pages).

What happened next was disputed at trial. According to Detective Seabright, as he knocked at apartment 13, the door to a nearby apartment opened, Mr. Rivera appeared in the doorway, and he asked Seabright what he was doing. RP 96-97. The two spoke for a bit, and Rivera told Seabright the man he was looking for was now either in California or Mexico. RP 97. According to Seabright, when he indicated he was there to buy cocaine, Rivera said he didn't have any but asked if Seabright was interested in "crystal," meaning methamphetamine. Seabright said he wanted a "teener," which is about 1.77 grams, and Rivera told him to come back in 30 minutes. RP 93, 97-98.

After driving away and updating the lead officer -- Detective Grant Giacomazzi – Detective Seabright returned, knocked on the door to Rivera's apartment, and the two spoke again out in the hallway. RP 96, 98-99. According to Seabright, Rivera said it would be $60, Seabright gave him that sum, and Rivera told him to wait there before Rivera headed down an internal stairwell to the floor below. RP 99. According to Seabright, Rivera returned shortly thereafter and placed a small baggy (a portion of a grocery bag tied at the top) on what appeared to be a music stand or easel near the stairs, pointing to the baggy as he headed back toward his apartment.

RP 99-100. When Seabright asked if he could come back later for more, Rivera said he did not have more and would have to find some. RP 100-101. The contents of the baggy, which weighted 1.54 grams, later tested positive for the presence of methamphetamine. RP 101, 130-134.

Detective Seabright made another appearance in his role as a prospective buyer on February 2, 2016. RP 102. According to Seabright, he knocked on the door to Rivera's apartment, Rivera opened the door, and Seabright asked if he had any "crystal." RP 102. Rivera seemed hesitant and told Seabright he should go see "Frank." RP 102. Seabright responded he did not know Frank and had $60 to spend. RP 102. Rivera took the money, told Seabright to come back in 20 minutes, and indicated he would find the drugs at the top of his doorframe, in a space between the door casing and where the drywall began. RP 103-104. According to Seabright, 20 minutes later he returned to find a small baggy in that location. RP 104. Like the first baggy, the contents of this one, which weighed 1.72 grams, also testified positive for the presence of methamphetamine. RP 105, 134-135.

Detective Seabright returned on February 11, 2016, and this time his team had obtained a warrant to search Rivera's apartment.

RP 105-106. Before executing the warrant, however, Seabright tried again to make a purchase. Seabright knocked on Rivera's door, Rivera answered, and Seabright asked for "clear," another slang term for methamphetamine. RP 106. According to Seabright, Rivera said he was out and asked him to return in an hour. RP 106. Instead, officers executed the search warrant. RP 106, 114-115.

During the subsequent search, deputies found a total of $1,765.00 in Rivera's pockets, RP 120, 124-126, and two digital scales. RP 126-128. Rivera told them where they would find a bag of methamphetamine, which he kept inside a plastic glove within a cereal box in his kitchen. RP 121, 149, 170, 187, 195. The crystalline material inside weighed 11.7 grams and tested positive for the presence of methamphetamine. RP 121, 135-136.

Following his arrest, Rivera spoke to Detective Giacomazzi and Detective Carlos Rodriguez. RP 146. The conversation was not, however, recorded. RP 152, 203. According to Giacomazzi, Rivera said $700 of the money found in his possession was earned selling drugs and the rest was from a settlement for a work-related injury. RP 148, 205. Moreover, according to both detectives, Rivera said he used methamphetamine and "sold to a few people" (around five to seven daily) to sustain his personal use. RP 169-170, 203.

The prosecution also presented evidence establishing that Rivera's apartment was located within 1,000 feet of a school and a school bus stop. RP 160-162, 172-174.

Rivera took the stand in his own defense and disputed several critical aspects of the testimony against him. RP 175. Regarding the events of December 2015, Rivera testified that, on December 17, Detective Seabright first knocked on his neighbor's door before knocking on Rivera's. RP 175-176, 178. When Rivera answered, Seabright asked, "Where's Chong or Chone?" RP 176. Rivera said he was in California, and Seabright asked if anyone else could sell him some cocaine. RP 176. Rivera said he did not know of anyone, and asked Seabright who sent him to the building. RP 176. Seabright mentioned the names of two individuals who no longer lived in the building. RP 176-177. He then continued to press Rivera, asking him at least three of four times if he could help. RP 177-178. Rivera replied that he was an addict himself and did not have anything. RP 177.

According to Rivera, Seabright returned the next day, December 18, and knocked loudly on his door. RP 178-179. Seabright again asked Rivera for drugs and Rivera again indicated that he was an addict and did not have anything to give him. RP 179.

Detective Seabright then promised, if Rivera gave him something, he would not return. RP 179. Seabright is a large man and Rivera became afraid. He also believed Seabright would continue to bother him.[2] RP 192.

Rivera finally agreed to help, telling Seabright he did not want him to come back and would try to locate a friend who might have what he was looking for. RP 179, 192. He then took $60 from Seabright and told him to return in an hour. RP 179. Rivera spoke to a friend who lived downstairs, and that friend placed the drugs on top of the door to an apartment near Rivera's. RP 180-181. When Seabright returned, Rivera directed him to that spot. RP 181. Rivera did not, however, receive any money from the transaction. RP 189-191, 198.

Rivera denied having subsequent contact with Detective Seabright on February 2 and denied selling him drugs that day. RP 181-182, 198. Seabright did return to the apartment building once in early January, however, and Rivera told him to leave because he had promised not to return. RP 181.

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[2] In the State's rebuttal case, Detective Seabright denied that he badgered Rivera into helping him obtain methamphetamine. RP 212. He conceded, however, that he had initiated the conversation about drugs. RP 213.

According to Rivera, on the day deputies searched his apartment, they knocked on his door, had him step out, and arrested him before searching his apartment. RP 182-185. Rivera testified that all the money he was carrying that day was from L&I checks, and he intended to use it for rent, bills, food, and clothing. RP 185-186, 193-194. He admitted to possessing the methamphetamine in the cereal box and told deputies they would find it there. RP 187, 195. He testified it was solely for personal use; he denied ever selling drugs from his apartment or indicating during his interview with detectives that he sold drugs to make money. RP 187-188, 193.

At the close of evidence, defense counsel requested an instruction on entrapment, arguing it was warranted based on Rivera's description of Detective Seabright's badgering behavior while attempting to convince Rivera to find him some methamphetamine. RP 215-218; CP 24. The prosecution objected and argued it was not supported by the evidence. RP 216, 218-219. Describing it as a "tough call," the Honorable T.W. Small refused the instruction. RP 220-223.

The jury convicted Rivera as charged and found the school and bus stop enhancements established. CP 54-63. Rivera received a prison-based Drug Offender Sentencing Alternative (32 months in

prison followed by 32 months' community custody), and timely filed his Notice of Appeal. CP 67, 78-79.

C. ARGUMENT

1. THE FAILURE TO IDENTIFY IN THE TO-CONVICT INSTRUCTION THE SUBSTANCE RIVERA POSSESSED WITH INTENT TO DISTRIBUTE REQUIRES REMAND FOR IMPOSITION OF A CLASS C FELONY.

A to-convict instruction must contain all essential elements of the charged crime, and reviewing courts may not rely on other instructions to supply a missing element. State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). "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." State v. Clark-El, 196 Wn. App. 614, 618, 384 P.3d 627 (2016) (citing State v. Goodman, 150 Wn.2d 774, 778, 83 P.3d 410 (2004); State v. Sibert, 168 Wn.2d 306, 311-312, 230 P.3d 142 (2010) (plurality opinion)). Moreover, omission of this element from the to-convict can be raised for the first time on appeal. Id. at 619.

In Clark-El, the defendant was charged and convicted of delivering methamphetamine, although the to-convict instruction

simply required proof that he "delivered a controlled substance" without identifying that substance. Id. at 618-619. This Court held:

> When a defendant is charged with delivering a controlled substance, the identity of the substance is an essential element that must be stated in the to-convict instruction if it increases the maximum sentence the defendant will face upon conviction. In such a case, omission of the essential element is subject to harmless error analysis as to the conviction but not as to the sentence.

Id. at 617. Because methamphetamine was the only controlled substance proved, jurors could only have based their verdict on that substance, and the failure to identify it in the to-convict was deemed harmless as to Clark-El's conviction. Id. at 620. However, delivery of a substance other than methamphetamine could result in conviction for a class C felony (rather than the class B for delivering methamphetamine), and because the jury's verdict did not authorize the sentence imposed, the error was not harmless as to sentencing, and the case was remanded for resentencing on a class C felony. Id. at 624-625.

The same outcome is appropriate here. For count 3, the to-convict instruction used at Rivera's trial provides:

> To convict the defendant of the crime of possession with intent to deliver a controlled substance as charged in count III of the Information, each of the

> following elements of the crime must be proven beyond a reasonable doubt:
>
> (1) That on or about the 11th day of February, 2016, the defendant possessed a controlled substance; and
> (2) That the defendant possessed the substance with the intent to deliver a controlled substance; and
> (3) That the acts occurred in the State of Washington.

CP 40. Additional instructions indicated it is a crime to possess with intent to deliver a controlled substance and methamphetamine is a controlled substance. CP 35, 39.

In contrast to the to-convict instructions for counts 1 and 2, the to-convict instruction for count 3 did not require jurors to find, beyond a reasonable doubt, that the substance involved was methamphetamine. Compare CP 33, 38 (requiring proof "that the substance delivered was a controlled substance, methamphetamine"). This is a critical omission because, like the crime of delivering a controlled substance discussed in Clark-El, the maximum authorized punishment for the crime of possession with intent to deliver turns on the identify of the substance involved. Under RCW 69.50.401(2)(c), possession with intent to deliver a controlled substance other than methamphetamine could result in conviction for a class C felony (rather than a class B felony mandated under RCW

69.50.401(2)(b) for possessing methamphetamine with that intent).[3] See RCW 69.50.401(2)(b), (c); Clarke-El, 196 Wn. App. at 618.

Because there was no dispute that the substance Rivera possessed for count 3 was methamphetamine, the failure to identify the substance in the to-convict was harmless as to the conviction on that count. Clarke-El, 196 Wn. App. at 620. However, as to sentencing, because the court imposed a sentence as if the jury had found all elements for a class B felony, the error is not harmless and Rivera must be resentenced for a class C felony and its lower maximum sentence. Id. at 624-625; RCW 9A.20.021(1)(c) (maximum authorized sentence for class C felony is five years).

Recently, in an unpublished decision, Division One held that so long as the jury verdict form indicates the substance at issue (even when missing from the to-convict instruction), a sentence based on that substance is authorized. See State v. Soto-Viera, ___ Wn. App. ___, 2018 WL 500148 (January 22, 2018).[4] The verdict form at Rivera's trial lists the substance for count 3 as methamphetamine.

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[3] The information charging Rivera in count 3 does allege the substance involved is methamphetamine. Confusingly, however, the information then cites RCW 69.50.401**(2)(c),** suggesting Rivera was charged merely with a class C felony. See CP 23.

[4] Rivera does not cite this unpublished decision as binding precedent. Rather, he cites it under GR 14.1(a) for whatever persuasive value this Court deems appropriate.

CP 60. Nonetheless, Division One's reasoning is flawed and should not be adopted.

All essential elements must be included in the to-convict; otherwise, jurors might assume an element need not be proved. DeRyke, 149 Wn.2d at 910; State v. Smith, 131 Wn.2d 258, 262-263, 930 P.2d 917 (1997) (citing State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)). Jurors rightfully regard the to-convict as a complete statement of the law, and reviewing courts should not provide missing elements by examining other instructions. Id. Thus, the verdict form's reference to methamphetamine in Rivera's case does not repair the deficient to-convict and does not authorize sentencing for a class B felony.

Resentencing on count 3 is necessary.

2. THE TRIAL COURT ERRED WHEN IT REFUSED RIVERA'S ENTRAPMENT INSTRUCTION.

"'In the trial of a criminal case, the court must instruct the jury on the law as to any legitimate defense advanced by the defendant when there is evidence to support that theory.'" State v. Keller, 30 Wn. App. 644, 649, 637 P.2d 985 (1981) (quoting State v. Kerr, 14 Wn. App. 584, 587, 544 P.2d 38 (1975)), review denied, 100 Wn.2d

1023 (1983). The failure to instruct on entrapment, when warranted by the evidence, is reversible error. Id.

To obtain an entrapment instruction, a defendant must present evidence sufficient to "permit a reasonable juror to conclude that the defendant has established the defense by a preponderance of the evidence." State v. Trujillo, 75 Wn. App. 913, 917, 883 P.2d 329 (1994), review denied, 126 Wn.2d 1008, 892 P.2d 1088 (1995). And when determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court must view the evidence in the light most favorable to the party requesting the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-456, 6 P.3d 1150 (2000).

Entrapment is a statutory defense. RCW 9A.16.070 provides:

> (1) In any prosecution for a crime, it is a defense that:
>
> (a) The criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and
>
> (b) The actor was lured or induced to commit a crime which the actor had not otherwise intended to commit.
>
> (2) The defense of entrapment is not established by a showing only that law enforcement merely afforded the actor an opportunity to commit a crime.

Police may use a "normal" amount of persuasion or deception to overcome a defendant's resistance to sell drugs. State v. Smith, 101 Wn.2d 36, 42-43, 677 P.2d 100 (1984); Trujillo, 75 Wn. App. at 918. And the defendant must show more than mere reluctance to violate the law. Trujillo, 75 Wn. App. at 918. The relevant inquiry is whether a trier of fact could find that, more likely than not, the defendant had no prior intent to deliver drugs, the idea originated in the mind of law enforcement, and the defendant was induced to do so through fundamentally unfair police efforts. Smith, 101 Wn.2d at 42-43; Trujillo, 75 Wn. App. at 917-918; State v. Enriquez, 45 Wn. App. 580, 585, 725 P.2d 1384 (1986), review denied, 107 Wn.2d 1020 (1987).

This standard is met in Rivera's case as to the delivery charge in count 1.[5]

Rivera testified that the drugs found in his apartment were solely for personal use; he denied ever selling drugs from his apartment or telling detectives that he had done so. RP 187-188, 193. According to Rivera, on December 17, 2015, Detective

[5] Rivera denied any participation in the sale of methamphetamine after December 18, 2015. RP 181-182, 198. Therefore, entrapment was not an available defense on count 2. See State v. Hansen, 69 Wn. App. 750, 765, 850 P.2d 571 ("a defendant cannot be entrapped into committing a crime with which he denies any connection"), review granted in part, 122 Wn.2d 1016, 863 P.2d 1352 (1993), reversed on other grounds, 124 Wn.2d 719, 881 P.2d 979 (1994).

Seabright initiated contact by knocking on his apartment door. RP 175-176. Rivera told Seabright the person he sought ("Chong" or "Chone") was in California. RP 178. But Seabright did not leave. Instead, he raised the subject of drugs with Rivera. RP 213. He asked if anyone else could sell him cocaine, and Rivera said he did not know of anyone. RP 176. Rather than take no for an answer, Detective Seabright pressed Rivera – asking him three or four times – if he had anything or could do anything to help. RP 177. Rivera replied that he was an addict himself and did not have anything. RP 177.

Seabright heeded Rivera's demand that he leave, but he returned the next day and knocked loudly on Rivera's door. RP 177-179. Seabright again asked Rivera for drugs and Rivera again indicated that he was a drug addict and did not have anything to give him. RP 179. Detective Seabright then said that, if Rivera gave him something, he promised not to return. RP 179. Seabright is a large man and Rivera became afraid. He also believed Seabright would continue to bother him. RP 192. Fearful and seeking to avoid a return visit by Seabright, Rivera finally agreed to help and located a friend to supply methamphetamine to Seabright. RP 179, 192.

Rivera did not, however, earn any money from the transaction. RP 189-191, 198.

In the light most favorable to Rivera, a reasonable jury could find entrapment established by a preponderance of the evidence. Rivera's testimony that he never sold drugs revealed that he had no prior intent to do so. That Detective Seabright initiated the conversation about drugs revealed that the idea originated in the mind of law enforcement. And Seabright's tactics (intimidating, repeated requests, promise to leave Rivera alone *if* he provided drugs) go well beyond "normal" persuasion. This was inducement through fundamentally unfair police efforts.

In making the "tough call" in favor of the prosecution, Judge Small seemed to place significant weight on the fact Trujillo also involved repeated requests ("pestering") by a state agent encouraging the defendant's participation. See RP 222-223. In Trujillo, a paid informant asked the defendant several times over the course of several days about the possibility of getting cocaine. Trujillo, 75 Wn. App. at 915. At trial, the defendant testified he finally delivered cocaine because he figured this was the sole means to rid himself of the informant. Id. at 916. On appeal, the decision not to instruct jurors on entrapment was affirmed. Id. at 919.

There are significant differences, however, between Rivera's circumstances and those of the defendant in Trujillo.

First, the defendant in Trujillo never refused to obtain drugs for the informant. Trujillo, 75 Wn. App. at 919. Rivera repeatedly declined to provide Detective Seabright with drugs and told him to leave. See RP 177, 179.

Second, the informant and defendant in Trujillo worked together and all their interactions occurred at work or public places. Trujillo, 75 Wn. App. at 915-916. Rivera was targeted at his own home and would continue to deal with a narcotics buyer at that most private of locations until he could find a way to make the buyer go away. See Keller, 30 Wn. App. at 645-646 (defendant badgered at home by officer and informant entitled to instruction).

Third, while the defendant in Trujillo testified that he "figured" the way to get rid of the buyer was just to get him the drugs, id. at 916, Detective Seabright expressly *stated* this was the way to make him go away, implying any other course of action would not produce that result. See RP 179.

Fourth, while nothing in Trujillo indicates that intimidation played a role in the defendant's decision making, Rivera testified that

Seabright's imposing size and conduct scared him, adding an additional element of unfair inducement. See RP 192.

This Court should vacate Rivera's conviction and sentence on count 1 and remand for a new trial, where jurors can properly consider his entrapment defense.

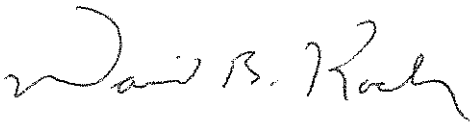
D. CONCLUSION

This Court should vacate the conviction and sentence on count 1 and remand for sentencing on a class C felony on count 3.

DATED this 22nd day of February, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorneys for Appellant

NIELSEN, BROMAN & KOCH P.L.L.C.

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