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No. 35184-0-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

Chelan County Superior Court
Cause No. 16-1-00286-3

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

BOGAR RIVERA-ZAMORA,
Defendant/Appellant.

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

On December 18, 2015, Detective Aaron Seabright of the Chelan County Sheriff's Office, assigned to the Columbia River Drug Task Force, was working in an undercover capacity in a drug enforcement operation, along with several other detectives. In his undercover role, he went to an apartment building at 114 Saunders Street in Chelan, Washington. (RP 94-95). Seabright went to Apartment 13 and knocked on the door. When he was knocking, a door to his right was opened by the defendant, Mr. Rivera. (RP 97). Seabright did not know Rivera, nor had there been any contact with him prior to that day. (RP 95).

Rivera asked Seabright what he was doing; so, Seabright walked over to Rivera and told him he was looking for Chone or Chong. (RP 97). Rivera responded by saying Chone was either in California or Mexico. (RP 97). Seabright told Rivera that he was there to buy cocaine or coke, slang for cocaine. Rivera said he didn't have any coke. (RP 97). However, Rivera then asked Seabright if he wanted crystal, which is slang for methamphetamine. (RP 97). Seabright told him yes. (RP 97). Rivera told Seabright he would

need to buy at least a “teener” of methamphetamine, and that he would need to come back in 30 minutes. (RP 97-98). Seabright then left the apartment building.

Approximately 30 minutes later, Seabright returned to the apartment building and knocked on Rivera’s door. (RP 99). Rivera stepped out into the hallway and told Seabright it would be \$60, a common price for a teener. (RP 99). Seabright then gave Rivera \$60 and Rivera told him to wait in the hallway. (RP 99). Rivera then went down the stairs in the apartment building, returning several minutes later. (RP 99). When Rivera reached the top of the stairs, in his hand he had a small baggie of the kind normally used to contain methamphetamine. (RP 99-100). Seabright then stuck his hand out for the baggie; however, Rivera placed the baggie on an easel, which was in the hallway, and then pointed to the baggie. (RP 100). Seabright then asked Rivera if he could come back later and get some more. (RP 100). Rivera replied by saying that he didn’t have any, and that he would have to find some more. (RP 100-101).

On February 2, 2016, Seabright returned to Rivera’s apartment again as part of an undercover drug enforcement

operation. (RP 102). He knocked on the door, the defendant opened the door, and Seabright asked him if he had any crystal. (RP 102). Seabright told him he had \$60 to spend. (RP 102). Rivera asked Seabright for the \$60 and Seabright gave him the money. (RP 103). Rivera told Seabright to come back in about 20 minutes and that he would put the drugs on top of the door frame or casing. (RP 104). Seabright returned in about 20 minutes and obtained the baggie of methamphetamine from on top of the door casing. (RP 104). Seabright then left without seeing or speaking to Rivera. (RP 105).

On February 11, 2016, Seabright again went to Rivera's apartment in an attempt to purchase methamphetamine as part of an undercover drug operation. (RP 106). In addition, law enforcement had obtained a search warrant for Rivera's residence and the operational plan was to serve the search warrant and arrest the defendant on that day regardless of whether any methamphetamine was purchased. (RP 106).

When Seabright arrived at the apartment that day, he knocked and Rivera answered the door. (RP 106). Seabright asked for clear, another slang term for methamphetamine. (RP 106). Rivera said he

was out and told Seabright to come back in about an hour. (RP 106). Seabright left and other law enforcement officers served the search warrant and arrested the defendant a short time later. (RP 106).

During the search of Rivera's residence, law enforcement found 11.7 grams of methamphetamine in a bag which was inside a glove concealed in a cereal box located in Rivera's kitchen. (RP 121, 135-36). Two digital scales were also found in the residence. (RP 126-28). Cash in the amount of \$1,765.00 was found in Rivera's pockets. (RP 120, 124-126).

Following Rivera's arrest, he admitted to Detectives Giacomazzi and Rodriguez that he sold methamphetamine to 5 to 7 people daily while at his apartment. (RP 203-204). Rivera also told the detectives that \$700.00 of the money found in his possession was earned from selling drugs. (RP 148, 205).

The investigation and evidence at trial established that Rivera's apartment was located within 1000 feet of a school and a school bus stop. (RP 160-162, 172-174).

The jury convicted Rivera as charged, including the school and school bus stop enhancements. (CP 54-63). Rivera was

sentenced to a prison-based drug offender sentencing alternative of 32 months in prison and 32 months on community custody. (CP 64-77). He then timely filed his notice of appeal. (CP 78-79).

II. ARGUMENT

A. THE FAILURE TO IDENTIFY IN THE TO-CONVICT INSTRUCTION THE SUBSTANCE RIVERA POSSESSED WITH INTENT TO DELIVER IS HARMLESS ERROR BEYOND A REASONABLE DOUBT.

To-convict instructions must include each essential element of the crimes charged. State v. Clark-El, 196 Wn. App. 614, 618, 384 P.3d 627 (2016) (citing State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997)). Where the identity of a controlled substance increases the statutory maximum sentence, the identity of the substance is an essential element. State v. Goodman, 150 Wn.2d 774, 785, 83 P.3d 410 (2004) (citing Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000)). Omission of an essential element in a to-convict instruction is subject to harmless error analysis. Clark-El, 196 Wn. Ap. At 620-21 (citing State v. Brown, 147 Wn.2d 330, 332, 58 P.3d 889 (2002)).

The right to a jury trial requires that the sentence imposed be authorized by the jury's verdict. State v. Williams-Walker, 167 Wn.2d 889, 896, 225 P.3d 913 (2010). Where the court imposes a sentence that is not supported by the jury's verdict, the sentence must be reversed and resentencing is required. Clark-El, 196 Wn. App. at 624 (citing Williams-Walker, 167 Wn.2d at 900-01). Conversely, the court's reasoning in Clark-El would suggest, if not compel, the conclusion that when the jury verdict *does* support the sentence imposed by the court, the failure to identify the substance in the to-convict instruction would be harmless error beyond a reasonable doubt.

Consistent with this analysis, Division One recently held in an unpublished decision that if the jury verdict form indicates the substance at issue, even when missing from the to-convict instruction, the sentence based on that substance is authorized because the verdict supports the sentence. *See, State v. Soto-Viera*, ___ Wn. App. ___ (2018 WL 500148 (January 22, 2018)).¹ Division

¹ The State cites this unpublished decision under GR 14.1(a) for whatever persuasive value this court deems appropriate, not as binding precedent.

One's decision is well-reasoned and consistent with its decision in Clark-El and should be adopted by this court.

In the instant case, the jury's verdict expressly found Rivera guilty of the crime of possession of a controlled substance with intent to deliver-methamphetamine. (CP 60). Furthermore, the jury's verdict for count III, which clearly identifies the substance involved as methamphetamine, is echoed two more times in the jury's two special verdict forms for count III. (CP 61-62). Therefore, the instructional error as to the to-convict instruction for count III is obviously harmless beyond a reasonable doubt because the jury's verdict for count III, as well as the special verdicts for count III, support the sentence imposed for a class B felony.

B. THE TRIAL COURT DID NOT ERR WHEN IT REFUSED RIVERA'S ENTRAPMENT INSTRUCTION.

Both by statute and case law, the entrapment defense focuses on "the intent or predisposition of the defendant to commit the crime." State v. Smith, 101 Wn.2d 36, 42, 677 P.2d 100 (1984). Entrapment only occurs when the criminal design originated in the mind of the police officer and the defendant is lured or induced into

committing a crime he had no intention of committing. Smith, 101 Wn.2d at 42-43; State v. Trujillo, 75 Wn. App. 913, 917-918, 883 P.2d 329 (1994), *review denied*, 126 Wn.2d 1008, 892 P.2d 1088 (1995). A normal amount of persuasion or deception to overcome a defendant's expected resistance to sell drugs will not justify an entrapment instruction. Smith, 101 Wn.2d at 42-43; Trujillo, 75 Wn. App. at 918. The police may use deception, trickery, or artifice in affording a suspect the opportunity to commit a crime. Smith, 101 Wn.2d at 43.

In this case, the idea of delivering methamphetamine to Seabright originated with Rivera. On December 18, 2015, Detective Seabright went to the apartment building in an attempt to purchase cocaine from Chone. Nevertheless, when Seabright knocked on Chone's door, Rivera opened his door and asked Seabright what he was doing. According to Seabright's testimony, he had never before had contact with Rivera. (RP 95). Seabright told Rivera he was there looking for Chone in order to buy some cocaine. Rivera said he didn't have any cocaine; however, Rivera then asked Seabright if he wanted crystal, a slang term for methamphetamine. (RP 97).

Seabright replied yes. Rivera then told Seabright he would have to buy at least a teener of methamphetamine and come back in 30 minutes. (RP 97-98). Thus, it was Rivera who initiated the topic of a methamphetamine delivery, and it was Rivera who set the minimum amount of methamphetamine required for the methamphetamine transaction to occur. (RP 97-98). Rivera was also the one who told Seabright to come back in 30 minutes in order for Rivera to obtain the methamphetamine from his source.

Furthermore, the testimony of Detective Seabright as to how the December 18, 2015, methamphetamine delivery went down and Rivera's initiation of and willingness to deliver methamphetamine is corroborated by the evidence presented at trial by the State as to Rivera's delivery of methamphetamine on February 2, 2016, his agreement to delivery methamphetamine on February 11, 2016, and his possession of 11.7 grams of methamphetamine with intent to deliver on February 11, 2016. Rivera's willingness to deliver methamphetamine on December 18, 2015, is likewise corroborated by the evidence of Rivera's confession to both Detectives Seabright and Rodriguez that he sold methamphetamine to 5 to 7 people daily

while at his apartment, and that \$700 of the cash found on his person when arrested was from selling methamphetamine. Consequently, the trial court did not err in refusing to give Rivera's proposed entrapment instruction.

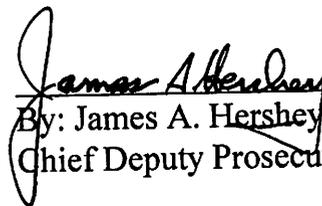
III. CONCLUSION

For the reasons set forth above, this court should affirm Rivera's conviction on count I and his sentence as a class B felony on count III.

DATED this 23rd day of May, 2018.

Respectfully submitted,

Douglas J. Shae
Chelan County Prosecuting Attorney


By: James A. Hershey WSBA #16531
Chief Deputy Prosecuting Attorney

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

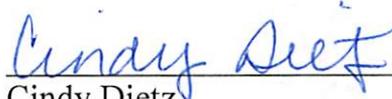
STATE OF WASHINGTON,)	No. 35184-0-III
Plaintiff/Respondent,)	Chelan Co. Superior Court No. 16-1-00286-3
vs.)	DECLARATION OF SERVICE
BOGAR RIVERA-ZAMORA,)	
Defendant/Appellant.)	

I, Cindy Dietz, under penalty of perjury under the laws of the State of Washington, declare that on the 23rd day of May, 2018, I caused the original BRIEF OF RESPONDENT to be filed via electronic transmission with the Court of Appeals, Division III, and a true and correct copy of the same to be served on the following in the manner indicated below:

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Signed at Wenatchee, Washington, this 23rd day of May, 2018.



Cindy Dietz
Legal Administrative Supervisor
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CHELAN COUNTY PROSECUTING ATTORNEY

May 23, 2018 - 1:59 PM

Transmittal Information

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