

FILED
Court of Appeals
Division III
State of Washington
11/17/2017 10:46 AM

No. 35208-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

AMY N. MELAND,

Appellant.

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

The Honorable Timothy B. Fennessy

BRIEF OF APPELLANT

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A. INTRODUCTION

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendment and article I, section 22 of the Washington Constitution. *In re Personal Restraint of Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). Accordingly, jury instructions must be manifestly clear because the court instructs the jury that the “law is contained in my instructions to you.” When the jury is uncertain about the law because of an ambiguous instruction, the accused is denied a fair trial. The jury instruction in this case defining manufacture is ambiguous and the ambiguity was compounded by the prosecutor’s misstatement of the law. Consequently, Amie Meland’s conviction for manufacturing a controlled substance must be reversed.

B. ASSIGNMENTS OF ERROR

1. The ambiguity of the jury instruction defining manufacture compounded by the prosecutor’s misstatement of the law denied Meland her constitutional right to a fair trial.

2. In the event the State substantially prevails on appeal this Court should deny any request for costs.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERRORS

1. Jury Instruction No. 7 states, “Manufacture means the direct or indirect production, preparation, propagation or processing of any

controlled substance.” In referring to the instruction during closing argument, the prosecutor misstated the law. Is reversal required because the ambiguity of the instruction compounded by the prosecutor’s misstatement of the law denied Meland her constitutional right to a fair trial?

2. If the State substantially prevails on appeal, should this Court exercise its discretion and deny costs because Meland is presumably still indigent where there has been no evidence provided to this Court, and there is no reason to believe, that Meland’s financial condition has improved or is likely to improve?

D. STATEMENT OF THE CASE¹

1. Procedure

On September 29, 2015, the State charged appellant, Amie Nicole Meland,² with one count of manufacture of a controlled substance: marijuana. CP 1; RCW 69.50.401.³ Following pretrial hearings, the case proceeded to trial before the Honorable James M. Triplet on March 6, 2017. 03/06/17 RP 6. On March 8, 2017, a jury found Meland guilty as charged. 03/07/17 RP 231-33; CP 86. On March 28, 2017, the court sentenced

¹ The verbatim report of proceedings are referenced by date.

² Appellant’s legal last name is Meland. She should therefore be referred to as Amie Meland, not Amie Braunstein. 10/13/16 RP 3.

³ “Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.”

Meland to one day in confinement with credit for time served and imposed legal financial obligations. 03/28/17 RP 245; CP 92-103. Meland filed a timely notice of appeal. CP 104-05.

2. Facts

a. The Investigation

On September 21, 2015, the Spokane Police Department received a complaint of an assault. The complainant also reported that there was a marijuana grow in the back yard of a home at 3117 East Carlisle. A record check confirmed that the address matched Meland's address and showed a warrant for her arrest for driving while license was suspended. 03/06/17 RP 67-68, 89-91. Officers went to the house to investigate allegations of the assault and marijuana grow and to follow up on the warrant. When they knocked on the front door, no one answered. As an officer walked along a driveway to a door on the side of the house, he saw a marijuana grow in the back yard in open view. 03/06/17 RP 54-56, 69-70, 92-94.

Another officer spoke with Meland when she came to the side door. He asked her about an altercation earlier that day and she explained what happened. The officer determined he could not establish probable cause for an assault, but he advised Meland of the warrant, placed her under arrest, and transported her to jail. 03/06/16 RP 70-71.

After obtaining a warrant, officers went through the back yard, cut the plants and bagged them. They searched the house and collected evidence, including what appeared to be marijuana. 03/06/17 RP 71-80. The Washington State Patrol Crime Lab analyzed the material and concluded it was marijuana. 03/06/17 RP 119-21.

b. House at 3117 East Carlisle

Meland's former mother-in-law, Christina Rosman, owns the house located at 3117 East Carlisle. 03/06/17 RP 48-49. In September 2015, Meland lived at the house with her three children. Other people had lived there over the course of time. Rosman and Meland did not have a written agreement and Meland did not need her consent to allow others to live at the house. 03/06/17 RP 49-51.

Meland testified that in September 2015, she was living at the house with her boyfriend Devon Porter, his brother Darrell Porter, and her two younger children. Devon Porter and his brother moved into the house in January 2013. 03/07/17 RP 176-77.

The Sunday before September 21, 2015, Meland had a "football party" at the house with friends until 11 o'clock that night. 03/07/17 RP 178. They consumed marijuana legally purchased from a store using marijuana smoking devices, leaving the house pretty messy the next day.

The marijuana was used in the bedrooms downstairs where the children are not allowed. 03/07/17 RP 178-79, 181, 185-86.

Meland knew her boyfriend had a marijuana grow in the back yard, but she was not involved with the grow and told him to get rid of it. She told him and not to bring the marijuana into the house to protect her children. He would not listen to her but she did not tell him to move out because she loved him. 03/07/17 RP 179-80, 184-87.

During the time that Meland lived at the house, she and Rosman did not have a written agreement. Rosman permitted Meland to have other people live at the house and she met Devin and Darrell Porter and had several conversations with them. 03/07/17 RP 182-84.

Officer Daniel Strassenberg testified that evidence discovered during a search of the house revealed that Meland, Devin Porter, and Darrell Porter lived there. 03/06/17 RP 81-82. Officers found documents in the home that confirm “that Devon Porter is a primary resident” along with Meland. 03/06/17 RP 97-101.

c. Marijuana Grow

Officers collected 27 marijuana plants from the back yard. 03/06/17 RP 86-87. While searching the house, they uncovered marijuana laying next to a Crock-Pot, dried marijuana in various places, scissors with green

smudging or residue on the blades, and several glass pipes. 03/06/17 RP 75-80.

Detective John Willard, who obtained the search warrant, testified that he named Amie Meland and Devon Porter as residents of the house at 3117 East Carlisle. 03/07/17 RP 144-46. Willard included in his affidavit that Porter was convicted in 2010 for possessing, manufacturing, and delivering a controlled substance, cocaine and arrested in 2014 for possession of a controlled substance, methamphetamine. He did not note any criminal history for Meland. There was no evidence of Meland being involved with growing marijuana other than living at the house. 03/07/17 RP 162-64. Willard checked the electric company records which named Meland as the subscriber, but the power usage did not indicate that marijuana was grown in the house. 03/07/17 RP 161-62, 167.

d. Jury Instructions

During a discussion of the jury instructions, defense counsel objected to using “direct or indirect” in the definition of manufacturing. He pointed out that the words “direct or indirect” are bracketed in WPIC 50.12 and therefore optional. Defense counsel argued that the words are vague and misleading and “could cause the jury to view just my client’s knowledge or presence to be enough to indicate a connection to this act.” 03/07/17 RP 131-33.

The prosecutor contended that the words are part of the WPIC and certainly applied most strongly in a case like this. He argued that Meland was for all intents and purposes the owner of the house and in charge of the house. “She’s the landlady, and that makes her support indirect by providing a place and allowing the activity to go on in her house in common areas.” 03/07/17 RP 132.

The trial court ruled that it would include the bracketed words because based on the evidence, Meland was living in the house with the consent of the landlord and “she was the one person in charge of this house and she had it under her dominion and control.” 03/07/17 RP 133-35. The court instructed that jury that “[m]anufacture means the direct or indirect production, preparation, propagation or processing of any controlled substance.” CP 78. During deliberations, the jury submitted two questions asking for a definition of “indirect.” The court responded, “Please review the jury instructions previously provided.” CP 84, 85.

e. State’s Closing Argument

Referring to Jury Instruction Number 7, the prosecutor argued:

Now, this is very important. Manufacture means the direct or indirect production, preparation, propagation or processing of any controlled substance. This is important because of the defendant’s status in that house. That was her house. People who were in that house were there with her consent and by permitting the activity in the house, she directly or indirectly produced the marijuana. And remember she said -- I asked her if after she said she didn’t like it,

she wanted her boyfriend to stop it, and I said, Couldn't you have asked him to leave? And she said yes. And I said, Did you ask him to leave? No, because I was in love with him. And she got sort of emotional, and that's tough.

. . . . Again, her house, and she was the only person who had permission from the owner of the house to be there. Everyone else was there at her consent, by her leave. She had the control. We heard the terms "dominion and control." She was the one with dominion and control. That was for all intents and purposes her house.

03/07/17 RP 211-12.

E. ARGUMENT

1. REVERSAL IS REQUIRED BECAUSE THE AMBIGUITY OF THE JURY INSTRUCTION DEFINING MANUFACTURE COMPOUNDED BY THE PROSECUTOR'S MISSTATEMENT OF THE LAW DENIED MELAND HER CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Appellate courts review jury instructions de novo. *State v. Johnson*, 180 Wn.2d 295, 301, 325 P.3d 135 (2014)(citing *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006)). The standard for clarity in a jury instruction, which is higher than for a statute, requires a "manifestly clear instruction." *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996), *abrogated on other grounds* by *State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009)(quoting *State v. Allery*, 101 Wn.2d 591, 595, 682 P.2d 312 (1984)). The instructions read as a whole must make the relevant legal standard "manifestly apparent to the average juror." *LeFaber*, 128 Wn.2d at 902 (citing *Allery*, 101 Wn.2d at 595).

Jury instructions are sufficient when they allow the parties to argue their theory of the case, do not mislead the jury, and properly state the applicable law. *State v. Tili*, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). Before addressing whether an instruction sufficed to allow a party to argue its theory of the case, the court must first decide the instruction accurately stated the law without misleading the jury.” *LeFaber*, 128 Wn.2d at 903 (citing *State v. Acosta*, 101 Wn.2d 612, 619-20, 683 P.2d 1069 (1984), *State v. Wanrow*, 88 Wn.2d 221, 235-36, 559 P.2d 548 (1977)).

WPIC 50.12 provides in relevant part:

Manufacture means the [direct or indirect] [production] [preparation] [propagation] [compounding] [conversion] [or] [processing] of any controlled substance.

The Note On Use states, “Use bracketed material as applicable.”

During a discussion of the jury instructions, defense counsel objected to using the term “direct or indirect,” pointing out that the term is bracketed and therefore optional. He argued that the term is vague and misleading and consequently the jury could find that Meland manufactured the marijuana based merely on evidence of her knowledge and presence. 03/07/17 RP 131-33. Defense counsel proposed a jury instruction omitting the term, citing WPIC 50.12. CP 66.

The trial court ruled that use of the term “direct or indirect” is appropriate in this case and gave the following jury instructions in relevant part:

To convict the defendant of the crime of manufacture of a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about September 21, 2015, the defendant manufactured a controlled substance; marijuana.
- (2) That the defendant knew that the substance manufactured was marijuana; and
- (3) That this act occurred in the State of Washington.

CP 75 (Instruction No. 4).

A person knows or acts knowingly or with knowledge with respect to a fact when he or she is aware of that fact.

CP 76. (Instruction No. 5).

It is a crime for any person to manufacture a controlled substance that the person knows to be a controlled substance.

CP 77 (Instruction No. 6).

Manufacture means the direct or indirect production, preparation, propagation or processing of any controlled substance.

CP 78 (Instruction No. 7).

The record substantiates that the term “direct or indirect” is ambiguous and fails to meet the standard that jury instructions must be manifestly clear. During deliberations, the jury submitted two inquires. The jury stated, “Define ‘indirect’ processing, preparation or production.”

CP 84. The jury again stated, “We would like the definition of indirect.”

CP 85. For both inquiries, the court responded, “Please review the jury instructions previously provided.” CP 84, 85. The jury was clearly uncertain as to the meaning of “indirect.”

The jury’s uncertainty is understandable where even the prosecutor and trial court misinterpreted the meaning of “indirect.” The prosecutor argued, “She’s the landlady, and that makes her support indirect by providing a place and allowing the activity to go on in her house in common areas.” 03/07/17 RP 132. In ruling that the term applied, the court determined that Meland “was the one person in charge of this house and she had it under her dominion and control.” 03/07/17 RP 134. Both the prosecutor and the court likened Meland to a landlord and misconstrued the law. Under *State v. Roberts*, 80 Wn. App. 342, 345, 908 P.2d 892 (1996), “[a] landlord, knowing that a tenant possesses control over the contraband but failing to evict the tenant, does not, by that failure, exercise dominion and control over the contraband.” In *Roberts*, the Court concluded that the landlord’s ability to evict a tenant does not hold him criminally liable for the marijuana grow if the grow belonged solely to the tenant. 80 Wn. App. at 353-54. Accordingly, where an actual landlord does not exercise dominion and control over a marijuana grow, Meland does not exercise dominion and control over the marijuana grow by residing at the house and not telling Porter to move out.

The jury's questions and the prosecutor's and court's misapprehension of the meaning of indirect illustrate the ambiguity of the term "direct or indirect" as used in the instruction. The jury instruction is therefore misleading.

Furthermore, the prosecutor misstated the law during closing in arguing that Meland directly or indirectly manufactured the marijuana because she had dominion and control of the house:

Manufacturing means the direct or indirect production, preparation, propagation or processing of any controlled substance. *This is important because of the defendant's status in that house. That was her house. People who were in that house were there with her consent and by permitting the activity in the house, she directly or indirectly produced the marijuana. . . .* Again, her house, and she was the only person who had permission from the owner of the house to be there. Everyone else was there at her consent, by her leave. She had the control. *We heard the terms "dominion and control." She was the one with dominion and control. That was for all intents and purposes her house.*

03/07/17 RP 211-12 (emphasis added).

Contrary to the prosecutor's argument, dominion and control over the premises does not establish dominion and control over the contraband as a matter of law. *Roberts*, 80 Wn. App. at 345.

Moreover, under *State v. Keena*, 121 Wn. App. 143, 148, 87 P.3d 1197 (2004), a person who knowingly plays even a limited role in the manufacturing process is guilty of manufacturing by engaging "indirectly" in the production of the controlled substance. However, presence and assent

to illegal activity is not a crime. *See State v. Renneberg*, 83 Wn.2d 735, 750, 522 P.2d 835 (1974). Meland testified that she knew her boyfriend had a marijuana grow in the back yard, but she was not involved at all with the grow and she told him to get rid of it. 03/07/17 RP 179-80, 184-87. Detective Willard testified that there was no evidence of Meland being involved with growing marijuana other than living at the house. 03/07/17 RP 162-64. There was no evidence that Meland had any role whatsoever in the production, preparation, propagation or processing of the marijuana.

The term “direct or indirect” is ambiguous because the term alone does not make it manifestly clear that a person does not indirectly manufacture a controlled substance by presence and assent to the manufacturing process. The jury’s questions substantiate that the jurors were uncertain about the meaning of “indirect.” CP 84, 85. Consequently, the jury could have found that Meland manufactured the marijuana because she lived at the house and allowed Porter to continue living there and grow the marijuana in the back yard. When jury instructions are ambiguous, the reviewing court cannot assume that the jury followed the legally valid interpretation. *See State v. McLoyd*, 87 Wn. App. 66, 71, 939 P.2d 1255 (1997).

Reversal is required because the ambiguity of the jury instruction compounded by the prosecutor's misstatement of the law denied Meland her constitutional right to a fair trial.

2. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD EXERCISE ITS DISCRETION AND NOT AWARD COSTS BECAUSE MELAND REMAINS INDIGENT.

Under RCW 10.73.160 and RAP Title 14, this Court may award costs to a substantially prevailing party on appeal. RAP 14.2 (amended effective January 31, 2017) provides in relevant part:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs. When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.

National organizations have chronicled problems associated with legal financial obligations (LFOs) imposed against indigent defendants. These problems include increased difficulty in reentering into society, the doubtful recoupment of money by the government, and inequity in administration. *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015)(citing, et al., AM. CIVIL LIBERTIES UNION, IN FOR A PENNY:

THE RISE OF AMERICA'S NEW DEBTOR'S PRISONS (2010)). In 2008, The Washington State Minority and Justice Commission issued a report that assessed the problems with the LFO system in Washington. The report points out that many indigent defendants cannot afford to pay their LFOs and therefore the courts retain jurisdiction over impoverished offenders long after they are released. Legal or background checks show an active court record for those who have not paid their LFOs, which can have negative consequences on employment, on housing, and on finances. *Blazina*, 182 Wn.2d at 836-37.

In *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000), the Washington Supreme Court concluded that an award of costs “is a matter of discretion for the appellate court, consistent with the appellate court’s authority under RAP 14.2 to decline to award costs at all.” The Court emphasized that the authority “is permissive” as RCW 10.73.160 specifically indicates. *Nolan*, 141 Wn.2d at 628. The statute provides that the “court of appeals, supreme court, and superior courts *may* require an adult offender convicted of an offense to pay appellate costs.” RCW 10.73.160(1)(emphasis added).

In the event the State substantially prevails on appeal, this Court should exercise its discretion and not award costs where the trial court determined that Meland is indigent. The trial court found that Meland is

entitled to appellate review at public expense due to her indigency and entered an Order of Indigency. CP 110-11. This Court should therefore presume that Meland remains indigent because the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

Continued Indigency Presumed. A party and counsel for the party who has been granted an order of indigency must bring to the attention of the appellate court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefit of an order of indigency throughout the review unless the appellate court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

There has been no evidence provided to this Court, and there is no reason to believe, that Meland's financial condition has improved or is likely to improve. Meland is therefore presumably still indigent and this Court should exercise its discretion to not award costs.

F. CONCLUSION

For the reasons stated, this Court should reverse Meland's conviction because affirming a conviction based on an ambiguous and misleading jury instruction would not serve the ends of justice.

If the State substantially prevails on appeal, this Court should deny appellate costs.

DATED this 17th day of November, 2017.

Respectfully submitted,

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DECLARATION OF SERVICE

On this day, the undersigned sent by email, a copy of the document to which this declaration is attached to the Spokane County Prosecutor's Office at SCPAAppeals@spokanecounty.org by agreement of the parties and to Amie Meland at 717 East Walton Avenue, Spokane, Washington 99207-3064.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 17th day of November, 2017.

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November 17, 2017 - 10:46 AM

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Superior Court Case Number: 15-1-03619-1

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