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No. 35696-5-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON,

Respondent

v.

ENRIQUE MURILLO, JR.,

Appellant

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

NO. 17-1-00987-7

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BRIEF OF RESPONDENT

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## I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The trial court did not err when it denied the defendant's motion to suppress.
- B. The jury's verdict does support a sentence for possession of methamphetamine.
- C. The Judgment and Sentence contains two errors that should be corrected.
- D. The State does not seek appellate costs.

## II. STATEMENT OF FACTS

On August 24, 2017, multiple officers of the Kennewick Police Department investigated a white Mitsubishi parked in the area of 4412 W. 7<sup>th</sup>, in Kennewick, Washington. CP 105-06. The vehicle was reported as stolen, and it appeared to have had many parts removed from it as it sat in the street. *Id.* The officers were able to identify a trail of oil leading from the white Mitsubishi to a nearby address, 723 S. Volland St. CP 106. Outside of this residence was a Toyota truck, reported as stolen, and the plates on the vehicle were also reported as stolen. *Id.* In a dumpster near the residence, officers were able to plainly see a vehicle license plate. *Id.* Officers contacted individuals at the Volland address; they interviewed Jenna Ross and James Whitney separately. *Id.* Neither Ms. Ross nor Mr. Whitney had ever been law enforcement informants in the past. CP 108. Ms. Ross denied knowing that the vehicles were stolen. CP 106. Ross

identified an individual named “Cousins” as who had brought the white vehicle to the Volland address. *Id.* While Mr. Whitney initially gave a false name, which was discovered after this initial questioning, he denied stealing the vehicles but did admit to working on them. *Id.*

Mr. Whitney also identified a Hispanic male named Cousins who had worked on the white vehicle with Mr. Whitney and had removed parts from the white vehicle. *Id.* Mr. Whitney further described “Cousins” with the following: that he had a spider web tattoo on his elbow, that he drove a green Kia, that he lived in an apartment on Hood Avenue, and that “Cousins” real name began with the letter E. CP 107. Additionally, Mr. Whitney stated that the apartment complex name contained the word “Sage.” *Id.* At Sage Creek Apartments on Hood Avenue in Kennewick, officers located a blue Kia Optima, and texted a photograph of this vehicle to the officer interviewing Mr. Whitney, and Mr. Whitney identified it as the vehicle he saw “Cousins” driving. *Id.* The registered owner of the vehicle was the defendant. *Id.* A photo montage was conducted with Mr. Whitney, who positively identified the defendant from the line-up as the individual who brought the white Mitsubishi to the Volland address and helped remove parts from it. *Id.*

The defendant was stopped in his vehicle and arrested; a search of his person discovered a small baggie containing a white powder.

2RP<sup>1</sup> at 15-17. This powder was tested, and positively identified as methamphetamine. 2RP at 51.

The defendant was charged with one count of possession of a controlled substance, in violation of RCW 69.50.4013(1). CP 1.

Prior to opening statements, the jury was informed of the nature of the charge, namely, that the defendant was charged with “unlawful possession of a controlled substance, methamphetamine.” 1RP at 5. Following the presentation of evidence, the jury was instructed on the following: that methamphetamine is a controlled substance, the definition of possession, and the definition of unwitting possession. CP 90-93. The “to-convict” instruction did not identify a specific controlled substance. CP 89. Following trial, the defendant was found guilty. CP 112.

### III. ARGUMENT

**A. There was sufficient probable cause to arrest the defendant, and therefore suppression of the evidence obtained in that arrest was not warranted.**

Under the Washington State Constitution, searches and seizures must be under authority of a warrant issued by neutral and disinterested magistrate and are presumed unreasonable without that warrant. WASH. CONST., art. I, § 7. However, an individual who is subject to a lawful

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<sup>1</sup> The verbatim report of proceedings for the jury trial consists of two volumes: 1RP – 10/30/17 Voir Dire and Opening Statements and 2RP – 10/30-10/31/2017

custodial arrest may be searched incident to the arrest. *State v. Gaddy*, 152 Wn.2d 64, 70, 93 P.3d 872 (2004).

A police officer shall have the authority to arrest a person absent a warrant when there is probable cause to believe that a person has committed or is committing a crime. RCW 10.31.100. "Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed." *State v. Terrovona*, 105 Wn.2d 632, 643, 716 P.2d 295 (1986). Officers may base this on information from informants, however, in evaluating informants for probable cause determinations, there must be (1) a showing that the informant has a sufficient basis of knowledge, and (2) a showing of the veracity of the informant. *State v. Smith*, 102 Wn.2d 449, 455, 688 P.2d 146 (1984); *see also Aguilar v. State of Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

"[I]f nothing is known about the informant, the facts and circumstances under which the information was furnished may reasonably support an inference that the informant is telling the truth." *State v. Chamberlin*, 161 Wn.2d 30, 41-42, 162 P.3d 389 (2007). Statements that

potentially subject an unproven informant to criminal sanction can satisfy the veracity requirement. *State v. Jackson*, 102 Wn.2d 432, 437, 688 P.2d 136 (1984).

Here, in stating that he had helped the defendant remove parts from a stolen vehicle, Mr. Whitney had made statements that could have subjected him to further criminal investigation, if not ultimately a conviction. Furthermore, in identifying another potential witness to these acts (i.e., the defendant), Mr. Whitney continued to make statements that could subject him to criminal sanction.

The fact that Mr. Whitney's motivation could be to mitigate any potential charges does not undermine the veracity of these statements, and in fact, likely substantiates their veracity further; "the reliability attached to admissions against penal interest may be greater in post arrest situations because the arrestee admitting the crime risks disfavor with the prosecution if he lies." *State v. O'Connor*, 39 Wn. App. 113, 121, 692 P.2d 208 (1984); *see also Craig v. Singletary*, 127 F.3d 1030, 1045 (11<sup>th</sup> Cir. 1997) ("[E]ven when a co-defendant's confession seeks to shift some of the blame to another, the co-defendant's admission of guilt to the core crime is enough indication of 'reasonably trustworthy information' to satisfy probable cause.") That Mr. Whitney identified that the defendant was the individual who brought the stolen vehicles to the Volland address

does not negate the core fact that Mr. Whitney helped in dismantling the vehicles. Such a statement against his penal interest adds veracity to Mr. Whitney's statements. Additionally, Mr. Whitney's account of the transaction with the defendant was corroborated by another witness, Ms. Ross, who herself was in a position to provide what she knew in order to seek leniency. That the two independently gave similar accounts of who worked on the stolen vehicles, and who brought the vehicle to the Volland address only adds to the veracity of their respective accounts.

The trial court correctly concluded that the statements provided to law enforcement, though from unproven sources, were nonetheless reliable due to the potential of criminal liability taken on by the informants. Given that their basis of knowledge is clear, and stands unchallenged, then officers acted upon information reliable enough to provide probable cause to arrest the defendant. The trial court should be affirmed in this regard.

**B. The jury returned a finding of guilt to Count I and a sentence consistent with that finding was authorized by the jury.**

The State must prove beyond a reasonable doubt the identity of a controlled substance for a jury to make an adequate finding of guilt under RCW 69.50.4013. *State v. Goodman*, 150 Wn.2d 774, 83 P.3d 410 (2004). “[I]t is unconstitutional for a legislature to remove from the jury the

assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.” *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), citing *Jones v. United States*, 526 U.S. 227, 252-53, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999). In Washington State, “the jury has the right . . . to regard the ‘to convict’ instruction as a complete statement of the law; when that instruction fails to state the law completely and correctly, a conviction based upon it cannot stand.” *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917, 65 U.S.L.W. 2567 (1997).

“However, not every omission of information from a ‘to convict’ jury instruction relieves the State of its burden of proof; only the total omission of essential elements can do so.” *State v. Sibert*, 168 Wn.2d 306, 312, 230 P.3d 142 (2010), citing *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). “Concededly, as a general legal principle all the pertinent law need not be incorporated in one instruction.” *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953).

**1. There was no error.**

A plurality opinion of the Washington Supreme Court believes that the omission of the name of a controlled substance from the “to-convict” instruction was not error. *Sibert*, 168 Wn.2d at 312 (plurality).

The Court of Appeals in *Clark-El* framed the plurality reasoning in

*Sibert* as being based upon incorporation of the drug identity by external reference and held that this violated the longstanding *Emmanuel* rule of a comprehensive statement of the law in jury instruction that presents itself as a stand-alone statement controlling the case.<sup>2</sup> *State v. Clark-El*, 196 Wn. App. 614, 619, 384 P.3d 627 (2016).

However, this abbreviated summary of the analysis of *Sibert* underserves the rationale the *Sibert* plurality saw undergirding that decision. *See generally Sibert*, 168 Wn.2d. The *Sibert* plurality pointedly remarked on the common-sense approach to the facts in that case, adding significantly to the rationale for that decision. *Id.* at 311-13. Namely, *Sibert* identified the following: that methamphetamine was the only controlled substance mentioned at trial, the only controlled substance named in the charging document, the only controlled substance defined by the jury instructions, and the only controlled substance referred to by the expert witnesses who analyzed and identified the evidence. *Id.* at 312. It was clear that the only controlled substance considered by the jury was methamphetamine. *Id.* at 313. The ultimate result of the logic in *Sibert* is

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<sup>2</sup> The State is of the position that the *Emmanuel* “rule” is a strong statement of best-practices but is not meant to be the bright-line that it has become. Instead, that all “pertinent” law be incorporated into a single instruction for the guidance and direction of the jury’s deliberation is all that is required, which so often is manifestly apparent by the instructions given as a whole, and the state of the evidence before the jury.

the same in the present case: if the State had failed to prove to the jury beyond a reasonable doubt that the defendant had possessed methamphetamine, then there would have been no conviction. *Id.*

**2. If there was an omission, it is harmless error as to the conviction.**

A jury instruction that omits an essential element may nevertheless be subject to harmless error analysis. *Neder v. United States*, 527 U.S. 1, 4, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). Such an erroneous instruction will be harmless if it is shown beyond a reasonable doubt that the error did not contribute to the finding of guilt. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). Such a showing must be supported by uncontroverted evidence such that a reviewing court may “conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.” *Id.*

Here, the only controlled substance proven beyond a reasonable doubt—indeed the only controlled substance at issue—was methamphetamine. At the very outset of the trial, the Court advised the jury that the defendant was charged with unlawful possession of a controlled substance, methamphetamine. 1RP at 5. Further, methamphetamine was the only controlled substance referred to by the expert witness who tested the evidence (2RP at 44-56); the only controlled substance named within the jury instructions (CP 77-96); the only

controlled substance defined by those instructions (CP 92); the only controlled substance identified in the Information (CP 1); the only controlled substance referred to in the verdict form returned as guilty (CP 97); and the only controlled substance mentioned in the closing arguments of both parties. 2RP at 92, 94 (as stated by defense counsel in closing: “Most of the facts are not in dispute. . . . and there is no question within that baggy was a very small quantity of methamphetamine.”) The defense did not include any other possible controlled substance, and instead presented testimony by the defendant who identified the single baggie that was tested as being in the shorts he was wearing. 2RP at 71-75.

Realistically, the only issue in contention for the jury was knowing possession, and specific instructions on what is defined as possession were provided for the jury. CP at 90-91, 93.<sup>3</sup>

To conclude that it is possible that a jury considered any other controlled substance in this trial relies upon the presumption that the natural state of Washington jurors is that of befuddlement, and therefore a finding of guilt is inherently flawed without a to-convict instruction that

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<sup>3</sup> As generally accepted practice, the much more complex definition of “possession” is not provided in the “to-convict” instruction, but the jury may decide upon this material element by reference to these other jury instructions. See WPIC 50.03; see also *State v. Amezola*, 49 Wn. App. 78, 87-88, 741 P.2d 1024 (1987), *abrogated on other grounds by State v. McDonald*, 138 Wn.2d 680, 981 P.2d 443 (1999). Importantly, the consequences of the jury’s decision on the element of possession have much greater bearing upon the defendant; it results in either a verdict of guilty or not guilty, versus mere degrees of sanctioning after that finding of guilt.

includes the name of the only controlled substance effectively mentioned during the trial.<sup>4</sup> Should the “to-convict” instruction be deficient in any way, then upon appeal the jury is presumed to have been confused on the issues despite how clear the evidence may have been at trial, or how clear the instructions were as a whole. Furthermore, any “to-convict” instruction does not, after the fact, limit the evidence that was introduced at trial and, more importantly, it is not signed by the foreperson or any juror representing their decision and resultant authorization for sentencing. It is an instruction from the trial court, and like all others, is presumed to have been read and followed by the jury. *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).

**3. The holdings as to whether to apply harmless error analysis to conviction and to sentence in *Clark-El* are self-contradictory.**

The Court of Appeals in *Clark-El* concluded that the sentence was not authorized by the jury because the verdict did not identify the controlled substance specifically, and therefore the jury’s finding of guilt did not include a finding that Mr. Clark-El had delivered methamphetamine. *State v. Clark-El*, 196 Wn. App. 614, 624, 384 P.3d 627 (2016). The difference between the sentence for delivery of

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<sup>4</sup> There is one other substance name mentioned in the trial transcript: fentanyl. This was a reference to an officer’s training and background with “fentanyl and its superiors.” 2RP at 13.

methamphetamine versus the lesser sentence of delivery of a controlled substance meant that such an error was not harmless. *Id.*

Incongruously, the rationale supporting the conviction in *Clark-El* was because there was uncontroverted evidence that Mr. Clark-El had delivered methamphetamine, and therefore it appeared beyond a reasonable doubt that the jury verdict would have been the same had the instructions specified methamphetamine as the controlled substance at issue. *Id.* at 620. Therefore, the difference between the proper “to-convict” instruction and the instruction given was harmless, and the jury’s determination of guilty on the charge delivery of methamphetamine would not have been impacted. *Id.*

If it is harmless as to whether the jury required of the evidence a showing beyond a reasonable doubt that Mr. Clark-El delivered methamphetamine in order to convict, then a sentence that is wholly consistent with that finding must be authorized by the jury. *Cf. State v. Williams-Walker*, 167 Wn.2d 889, 898-99, 225 P.3d 913 (2010) (rejecting the idea that general findings of guilt support imposition of sentence enhancements when specific verdict findings are required by statute); *see also* RCW 9.94A.825, *et. seq.* (listing special allegations requiring special verdict findings.)

**4. The “to-convict” instruction was not representative of the jury’s verdict.**

Again, assuming without conceding that there was an omission of an essential element in the “to-convict” instruction, the verdict still authorized a sentence to the crime of unlawful possession of methamphetamine. The right to a jury trial requires that the sentence be authorized by the jury’s verdict. *Williams-Walker*, 167 Wn.2d at 896; WASH. CONST. art. I, §§ 21, 22. Rather than any instruction, it is the signed verdict form, given in open court and accepted by the presiding trial judge, that represents the findings of a jury. CrR 6.16(a)(2); *State v. Robinson*, 84 Wn.2d 42, 46, 523 P.2d 1192 (1974); *State v. Bockman*, 37 Wn. App. 474, 493, 682 P.2d 925 (1984). Harmless error doctrine does not apply where “no error occurred in the jury’s determination of guilt.” *State v. Recuenco*, 163 Wn.2d 428, 441, 180 P.3d 1276 (2008).

Here, the verdict form as signed by the foreman and received in open court indicated that the defendant was guilty “as charged in Count I.” CP 97. Count I, the sole charge, was a charge of unlawful possession of controlled substances, “to wit: methamphetamine.” CP 1. At orientation, this charge was read to the jury upon commencement of the trial. 1RP at 5. The finding of guilt, as represented by the signed verdict form, was properly accepted by the trial court and authorized the sentence issued by

the trial court. CP 97. There was no error in the verdict as returned, and there is no doubt based in reason that the jury did not understand methamphetamine possession to be the issue in this trial.

**C. Sections 5.5 and 5.6b of the Judgment and Sentence should be stricken.**

The State concedes that the Judgment and Sentence contained two errors and should be remanded for the errors to be stricken. Specifically, sections 5.5 and 5.6b contained language that was not applicable to this particular matter, and as such should be removed.

**D. The State does not seek appellate costs.**

Pursuant to the defendant's continued indigency, the State neither seeks nor request appellate costs should the State be the substantially prevailing party.

#### **IV. CONCLUSION**

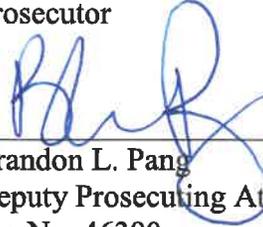
The State respectfully requests that this Court affirm the ruling of the trial court in regard to the suppression of evidence that resulted from the arrest of the defendant. Further, the State respectfully requests that this Court affirm the finding of guilt by the jury and affirm the sentence as having been authorized by the jury consistent with that finding of guilt.

The State concedes that the matter should be remanded to the trial court for the sole purpose of striking inapplicable language from the Judgment and Sentence. Lastly, because the defendant continues to be

indigent, the State does not request appellate cost, should the State be the substantially prevailing party.

**RESPECTFULLY SUBMITTED** on October 8, 2018.

**ANDY MILLER**  
Prosecutor



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Brandon L. Pang  
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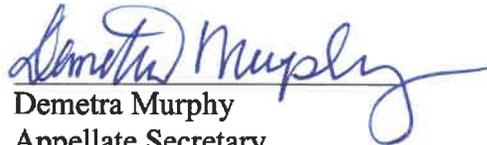
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I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on October 8, 2018.

  
Demetra Murphy  
Appellate Secretary

**BENTON COUNTY PROSECUTOR'S OFFICE**

**October 08, 2018 - 11:33 AM**

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