

63078-4

63078-4

NO. 63084-I

78-4

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,
v.
PAUL A. PELTS,
Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE JEFFREY M. RAMSDELL

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Did Pelts invite error by proposing the jury instruction defining “deliver”?

2. Did the jury instruction defining “deliver” create an element of the offense that the State was required to prove?

3. Was the inclusion of the erroneous instruction defining “deliver” harmless error given the overwhelming evidence against Pelts?

2. Did the sentencing court properly impose a \$100 DNA collection fee?

B. STATEMENT OF THE CASE

The State agrees with the statement of the case supplied by Pelts. In addition, Pelts proffered instructions 9 and 11 in the same form that the court ultimately submitted to the jury. CP 20, 23.

Pelts did not object to the court giving both instructions 9 and 11, and in fact, proposed them himself. 3 RP 17; CP 20, 23.

Additional facts to supplement the State’s arguments will be presented as needed.

C. ARGUMENT

1. PELTS INVITED ANY ERROR BY PROPOSING THE JURY INSTRUCTION DEFINING "DELIVER".

Because the court instructed the jury that the definition of "delivery" involved the transfer of a controlled substance, Pelts contends that the State was required to prove that he delivered a controlled substance. He further contends that instructions 9 and 11, are internally inconsistent and therefore prejudicial. However, Pelts invited any error in the jury instructions, and in fact set up any confusion that they generated. Under the invited error doctrine, he cannot now complain.

The doctrine of invited error precludes a party from requesting an instruction at trial and then seeking reversal on the basis of claimed error in the requested instructions. State v. Henderson, 114 Wn.2d 867, 868-71, 792 P.2d 514 (1990); State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), overruled on other grounds in State v. Olson, 126 Wn.2d 315, 893 P.2d 629 (1995); State v. Boyer, 91 Wn.2d 342, 344-45, 588 P.2d 1151 (1979). The doctrine applies even where the defendant contends on appeal that the instructions are constitutionally infirm. Henderson, 114 Wn.2d at 870; Boyer, 91 Wn.2d at 345.

In this case, Pelts himself proposed the instructions that he now claims caused confusion and that he claims resulted in the State assuming the additional burden of proving that he delivered a controlled substance. CP 23, 20, 41, 43. Accordingly, Pelts is precluded from challenging instructions 9 and 11. State v. Ahlquist, 67 Wn. App. 442, 447-48, 837 P.2d 628 (1992), overruled on other grounds by State v. Hammond, 121 Wn.2d 787, 854 P.2d 637 (1993) (defendant may not complain on appeal of “to convict” instruction that was virtually identical to defendant's proposed instruction).

In addition, any conflict between instructions 9 and 11 resulted from Pelts' conduct. In closing argument, Pelts vigorously argued as his “best point” that the court's instructions required the State to prove that Pelts delivered a controlled substance and that there was no such evidence. 3 RP 28-29. Clearly, Pelts made the strategic decision to include this instruction so he could argue that the State had not proven its case. Counsel cannot set up an error at trial and then complain of it on appeal. In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995). The court will deem an error invited if the party asserting the error materially contributed to it. In re K.R., at 147. Pelts invited any conflict in the

instructions and cannot now complain. “To hold otherwise would put a premium on defendants misleading trial courts.” Henderson, 114 Wn.2d at 868.

2. EVEN IF THE COURT FINDS NO INVITED ERROR, A JURY INSTRUCTION DEFINING A TERM DOES NOT ADD AN ELEMENT OF THE OFFENSE.

Pelts claims that the definition of "deliver" that was provided to the jury resulted in the State assuming the burden of proving that he delivered a controlled substance. However, a jury instruction that defines a term does not add an element to the offense that the State must prove. Here, the definition of “deliver” was provided to the jurors in an effort to provide clarity and meaning to the charge. It was not contained in an instruction outlining the crime or the elements of the charged offense. While the instruction may have been erroneous, it did not create an element of the offense that the State was required to prove.

In a criminal prosecution the State bears the burden of proving all of the elements of the crime charged. In criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the “to convict” instruction. State v. Hickman,

135 Wn.2d 97,102, 954 P.2d 900 (1998). However, an instruction defining a term does not create an element of the offense, but is included in order to help the jurors understand. See, e.g., State v. Lorenz, 152 Wn.2d 22, 93 P.3d 133 (2004) (“sexual gratification” is not an essential element to the crime of first degree child molestation but a definitional term that clarifies the meaning of the essential element, “sexual contact”); State v. Laico, 97 Wn. App. 759, 764, 987 P.2d 638 (1999) (definition of “great bodily harm” does not add an element to the assault statute, rather it is intended to provide understanding); State v. Marko, 107 Wn. App. 215, 219-20, 27 P.3d 228 (2001) (definition of “threat” does not create additional element but merely defines an element); State v. Strohm, 75 Wn. App. 301, 308-09, 879 P.2d 962 (1994) (definitional term does not add elements to the criminal statute); State v. Daniels, 87 Wn. App. 149, 156, 940 P.2d 690 (1997) (definition of battery is not an element of assault).

Pelts relies on State v. Braun, 11 Wn. App 882, 526 P.2d 1230 (1974), for the proposition that a jury instruction that is not objected to becomes the “law of the case” and thus adds an element that the State has to prove. Appellant’s Brief at 5. However, in Braun the jury instruction at issue was the definition of

“deadly weapon” for purposes of a sentencing enhancement special verdict. Braun, at 884. The deadly weapon instruction in Braun did not merely define a term used in the “to convict” instruction, but was more akin to an instruction outlining elements the State needed to prove in order to answer “yes” to the special verdict. See State v. Cook, 69 Wn. App. 412, 417, 848 P.2d 1325 (1993) (special verdict instruction lays out required elements of deadly weapon finding).

The erroneous jury instruction at issue here defined the term “deliver”, and was not included in the “to convict” instruction itself. It was merely intended to provide additional clarity for the jury. While jurors are presumed to have followed the instructions, and considered the instructions as a whole, jurors are also presumed to be thoughtful and of at least ordinary intelligence. Here, any perceived inconsistency did not cause confusion on the part of the jury, as evidenced by the fact that there was no jury question asking the court for further guidance on the issue.

3. THE INSTRUCTIONAL ERROR IS HARMLESS.

Any perceived error caused by instruction 9 was harmless, as the evidence against Pelts was overwhelming.

“An instructional error is presumed to have been prejudicial unless it affirmatively appears that it was harmless.” State v. Smith, 131 Wn.2d 258, 264, 930 P.2d 917 (1997) (citing State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)). A harmless error is an error that is trivial, or formal, or merely academic, and in no way affected the final outcome of the case. Wanrow, 88 Wn.2d at 237. It is the State's burden to show that the error was harmless. Smith, at 258; State v. Burri, 87 Wn.2d 175, 182, 550 P.2d 507 (1976). An instruction that contains an erroneous statement of the applicable law is reversible error where it prejudices a party. Cox v. Spangler, 141 Wn.2d 431, 442, 5 P.3d 1265 (2000).

Instruction 9 appears to be an erroneous statement of the applicable law, as it does not apply to this case in its current form.¹ However, there is no evidence that inclusion of this instruction prejudiced Pelts in any way. To the contrary, he used instruction 9 to his perceived advantage during closing argument. Thus, inclusion of this instruction did not prejudice Pelts, but actually

¹ It is interesting to note that the comments to WPIC 50.21 (the “to convict” instruction at issue), recommend that one use the definition of “deliver” – WPIC 50.07 – with this instruction. However, it appears that following the guidelines set forth by the WPIC committee in fact creates the situation that arose in this case. WPIC 50.07 does not contain the bracketed/optional term of “uncontrolled substance.” 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 50.07 (3d Ed).

assisted him in his defense. Just because the jury rejected this argument and found Pelts guilty, does not mean there was prejudice.

In fact, the evidence against the defendant was overwhelming, and prejudice, if there was any, could not possibly have affected the verdict. See State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986) (even a constitutional error does not require reversal if the untainted evidence is so overwhelming that a reasonable jury would have reached the same result in the absence of the error).

Here, an undercover police officer arranged for the sale of narcotics from Pelts on the street. 2 RP 28-30. Pelts delivered to the undercover officer what later turned out to be an uncontrolled substance. 2 RP 77. The prerecorded buy money was found on Pelts' person at the time he was arrested. 2 RP 55-56. Another police officer witnessed the entire transaction. 2 RP 6. Even without the misleading instruction defining "deliver", the jury would have reached the same result. The evidence of guilt was overwhelming, and error, if there was any, was harmless.

4. THE SENTENCING COURT WAS REQUIRED TO IMPOSE A \$100 DNA COLLECTION FEE.

The defendant contends that the \$100 DNA collection fee is not mandatory, and therefore either the trial court improperly sentenced the defendant believing the fee was mandatory,² or his trial counsel was ineffective for failing to argue the fee was not mandatory. The defendant's arguments rest on his belief that the DNA collection fee is permissive, it is not. RCW 43.43.7541 requires the court impose the fee for all sentences occurring after enactment of the statute, regardless of the date of offense or conviction. The statute violates neither the savings clause nor *ex post facto* clause.

The statute under which the DNA collection fee was imposed is RCW 43.43.7541. In pertinent part the statute reads:

Every sentence imposed under chapter 9.94A RCW for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars.

RCW 43.43.7541 (emphasis added). This version of the statute took affect on June 12, 2008. See RCW 43.43.7541 (2008 c 97 §

² There was a discussion between counsel and the judge about whether the DNA sample was mandatory, not the \$100 DNA fee. Appellant agreed that the fee was mandatory. 5 RP 13-14.

3, eff. June 12, 2008). The defendant was convicted on September 23, 2008, and sentenced on February 11, 2009.

The defendant asserts that because he committed his criminal act in May of 2008, a former version of RCW 43.43.7541 is applicable, a version of the statute that made the imposition of the DNA fee permissive rather than mandatory.³ The defendant's two arguments, based on the savings clause and the *ex post facto* clause, are not persuasive.

a. The Savings Clause.

In pertinent part, the savings clause reads as follows:

No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, but the same shall

³ The former version reads in pertinent part:

Every sentence imposed under chapter 9.94A RCW, for a felony specified in RCW 43.43.754 that is committed on or after July 1, 2002, must include a fee of one hundred dollars for collection of a biological sample as required under RCW 43.43.754, unless the court finds that imposing the fee would result in undue hardship on the offender.

Former RCW 43.43.7541 (2002 c 289 § 4).

proceed in all respects, as if such provision had not been repealed, unless a contrary intention is expressly declared in the repealing act. Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein.

RCW 10.01.040.

In short, the savings clause provides that a criminal or penal statute in effect on the date a crime is committed controls unless the amended or new statute declares otherwise. See State v. Kane, 101 Wn. App. 607, 612-613, 5 P.3d 741 (2000). In applying RCW 10.01.040, the Supreme Court does "not insist that a legislative intent to affect pending litigation be declared in express terms in a new statute;" rather, such intent need only be expressed in "words that fairly convey that intention." Kane, 101 Wn. App. at 612 (citing State v. Zornes, 78 Wn.2d 9, 13, 475 P.2d 109 (1970), overruled on other grounds, United States v. Batchelder, 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979)); see also, State v. Grant, 89 Wn.2d 678, 683, 575 P.2d 210 (1978).

In Zornes, the Supreme Court held that a newly enacted drug law controlled cases pending at the time of the enactment of the statute even though the law was not in affect at the time of the commission of the crime. The Zornes, a husband and wife, were convicted under a drug statute pertaining to "narcotic drugs," for their possession of marijuana. The particular amendment to the drug statute enacted while the Zornes' case was pending, stated that "the provisions of this chapter [the narcotic drug statute] shall not ever be applicable to any form of cannabis." Zornes, 78 Wn.2d at 11. The Court found it could be reasonably inferred that the legislature intended the amendment, by use of this language, to apply to pending cases as well as those arising in the future. Zornes, at 13-14, 26.

In Grant, a new statute provided that "intoxicated persons may not be subjected to criminal prosecution solely because of their consumption of alcoholic beverages." Grant, 89 Wn.2d at 682. The policy behind the statute was that alcoholics and intoxicated persons should receive treatment rather than punishment. Grant was convicted of being intoxicated on a public highway. The Supreme Court held that this new statute applied to Grant's case that was pending at the time of the enactment of the statute. The

Court found that the language of the statute (cited above) fairly expressed the legislative intent to avoid the savings statute default rule. Grant, at 684.

Here, the statutory language clearly shows the legislature intended RCW 43.43.7541 to apply to "every sentence" imposed after the effective date of the statute, regardless of the date the offense was committed. In the original version of RCW 43.43.7541, the legislature put in specific language that indicated that the statute applied only to crimes "committed on or after July 1, 2002." In amending the statute, the legislature removed any reference to when the crime was committed. This in itself indicates that the legislature did not intend the date a crime is committed to be a limiting factor. See In re Personal Restraint of Sietz, 124 Wn.2d 645, 651, 880 P.2d 34 (1994) (if the legislature uses specific language in one instance and dissimilar language in another, a difference in legislative intent may be inferred); Millay v. Cam, 135 Wn.2d 193, 202, 955 P.2d 791 (1998) (if the legislature thought such a provision necessary it would have included it within the statute's text).

In addition, the statute specifically says it applies to "[e]very sentence" imposed under the sentencing reform act. The term "every" means "all." See State v. Smith, 117 Wn.2d 263, 271, 814

P.2d 652 (1991); State v. Harris, 39 Wn. App. 460, 463, 693 P.2d 750, rev. denied, 103 Wn.2d 1027 (1985).⁴

Finally, the amendment to the statute pertaining to the DNA collection fee is consistent with, was done in conjunction with, and refers directly to, the amendment to RCW 43.43.754, the statutory provision regarding the actual collection of DNA samples. Under RCW 43.43.7541, the DNA collection fee is mandatory for crimes specified in RCW 43.43.754. The 2008 amendment to RCW 43.43.754 expanded the crimes for which a DNA sample is required to be taken. See RCW 43.43.754 (2008 c 97 § 2, eff. June 12, 2008). The legislature stated, in pertinent part, that [t]his section applies to. . .[a]ll adults and juveniles to whom this section applied prior to June 12, 2008." RCW 43.43.754(6)(a). The former version of RCW 43.43.754 referred to by the 2008 amendment applied to "[e]very adult or juvenile individual convicted of a felony." Former RCW 43.43.754(1) (2002 c 289 § 2). Thus, the legislature made it clear that RCW 43.43.7541 and RCW 43.43.754 applied to crimes

⁴ See also In re Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999) ("*Expressio unius est exclusio alterius*, 'specific inclusions exclude implication.' In other words, where a statute specifically designates the things upon which it operates, there is an inference that the Legislature intended all omissions").

committed both before and after June 12, 2008. The trial court here properly imposed the mandatory DNA collection fee.

b. The *Ex Post Facto* Clause.

The *ex post facto* clause of the federal and state constitutions⁵ forbids the State from enacting a law that imposes a punishment for an act that was not punishable when the crime was committed, or that increases the quantum of punishment for the crime beyond that which could have been imposed when the crime was committed. State v. Ward, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994). Not every sanction or term of a criminal sentence constitutes a criminal penalty or punishment, and if a sanction or term is not a penalty or punishment, the *ex post facto* clause does not apply. Ward, 123 Wn.2d at 498-99; Johnson v. Morris, 87 Wn.2d 922, 928, 557 P.2d 1299 (1976); In re Young, 122 Wn.2d 1, 857 P.2d 989 (1993).

For example, the legislature's increase of the mandatory victim penalty assessment from \$100 to \$500 was held not to constitute punishment, and thus, imposition of the \$500 amount for

⁵ U.S. Const. Art 1, § 10, cl. 1; WA Const. Art. 1 § 23.

crimes committed before the increase in the amount was not a violation of the *ex post facto* clause. State v. Humphrey, 91 Wn. App. 677, 959 P.2d 681 (1998), reversed on other ground, 139 Wn.2d 53, 62, 62 n.1, 983 P.2d 1118 (1999) (the Supreme Court stating that the assessment was not a "penalty" and "would not, therefore, constitute punishment for the purposes of an *ex post facto* determination").⁶

In determining if a term of sentence imposes a "punishment," courts look first for legislative intent. If the legislature intended the sanction as punishment, then the inquiry stops and the *ex post facto* clause applies. Metcalf, 92 Wn. App. at 178. The defendant cannot show a punitive effect here because the legislature clearly did not intend either the collection of the DNA sample, or the imposition of the \$100 collection fee, to be a criminal penalty. As

⁶ See also State v. Blank, 80 Wn. App. 638, 640-42, 910 P.2d 545 (1996) (law requiring convicted indigent defendants to pay appellate costs not punishment and did not violate *ex post facto* provisions), cited with approval in, State v. Blank, 131 Wn.2d 230, 250 n. 8, 930 P.2d 1213 (1997); Ward, 123 Wn.2d at 488 (law requiring sex offenders to register was not punishment and did not violate *ex post facto* provisions); In re Metcalf, 92 Wn. App. 165, 963 P.2d 911 (1998) (law requiring deductions from prisoner's wages and funds to pay for cost of incarcerations not punishment and did not violate *ex post facto* provisions); State v. Catlett, 133 Wn.2d 355, 945 P.2d 700 (1997) (law authorizing civil forfeiture of property used to facilitate drug offenses not punishment and did not violate *ex post facto* provisions).

the 2SHB 2713 Final Bill Report states, the purpose of the creation of a DNA database is to "help with criminal investigations and to identify human remains or missing persons." The fee is simply intended to fund the creation and maintenance of the database. See 2SHB 2713 Final Bill Report; RCW 43.43.7541.

If the legislature did not intend a term to be punitive, courts still examine the effects of the legislation to make sure the effects are not so burdensome as to transform the term into a criminal penalty. Metcalfe, at 180; Ward, at 499. The courts will consider seven factors: (1) whether the sanction involves an affirmative restraint on the defendant; (2) whether the term has historically been considered a criminal punishment; (3) whether its enforcement depends on a finding of scienter; (4) whether its imposition promotes the traditional aims of punishment (deterrence and retribution); (5) whether it applies to behavior that is already a crime; (6) whether it is rationally related to a purpose other than punishment; and (7) whether it appears excessive in relation to this other purpose. Metcalfe, at 180 (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963)). In order to override a non-punitive legislative intent, the factors

"must on balance demonstrate a punitive effect by the clearest proof." Metcalf, at 180-81.

Application of these factors shows that the legislation here does not have the effect of imposing a criminal punishment. It is no different than the victim penalty assessment, found not to be punishment in violation of the *ex post facto* clause. See Humphrey, supra.

First, a sanction "involves an affirmative restraint" only when it approaches the "infamous punishment of imprisonment." Metcalf, at 181. The imposition of a \$100 fee is certainly not analogous to imprisonment.

Second, monetary fees and assessments have historically not been regarded as criminal penalties within the meaning of the second factor. Metcalf at 181.

Third, the imposition of the DNA fee can be imposed only after a person has been convicted, but the fee itself is not triggered by any particular finding of scienter and, thus, it does not violate the third factor. See Metcalf, at 181-82.

Fourth, the imposition of the fee does not have the primary effect of promoting the traditional aims of punishment (deterrence and retribution). Metcalf, at 182; Ward, at 508. It would be difficult

to argue the nominal \$100 fee is retributive or could act as a deterrent. Rather, the purpose of the fee is to reimburse the agency responsible for the collection of DNA samples and to pay to maintain the State database. RCW 43.43.7541.

Fifth, whether the fee applies to behavior that is already a crime depends upon whether it applies specifically to the felony for which the defendant is convicted instead of to the status of having been convicted of a felony. In Metcalf, the Court reviewed a retroactively applied statutory change that required the deduction of funds received by inmates to pay for costs of incarceration. The Court found that this sanction was not "applied to behavior that is already a crime" within the meaning of this factor, because it was triggered by the status of having been convicted of a felony rather than by commission of the felony itself. Metcalf, at 182. Similarly, here the DNA fee is triggered by the status of having been convicted of a felony rather than by anything specific to the behavior that constituted the crime.

The sixth and seventh factors examine whether the sanction has a rational non-punitive purpose and whether the sanction is excessive in relation to that purpose. In the context of fines, courts draw a line between fees or assessments that are primarily

intended to reimburse the State and those primarily intended to impose criminal punishment for the purposes of public justice. Metcalf, at 177-78. Here, the fee is the former. It has the rational non-punitive purpose of reimbursing the State for the costs of collecting the DNA sample and maintaining the database. A nominal fee of \$100 appears proportionate to that purpose.

Based on the above, the \$100 DNA collection fee does not constitute a criminal penalty or punishment. Therefore, imposition of the fee does not violate the *ex post facto* clause.⁷

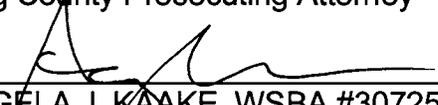
D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's sentence.

DATED this 21st day of October, 2009.

Respectfully submitted,

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⁷ The State will not address the defendant's ineffective assistance of counsel claim. In the event this Court finds the DNA fee is not mandatory, the case should be remanded for the sentencing court to exercise its discretion. It is clear here, the sentencing court believed as the State does, that the fee is mandatory.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Andrew P. Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. PAUL A. PELTS, Cause No. 630~~94~~-I, in the Court of Appeals, Division I, for the State of Washington. 78-4

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

Sandra Atkinson
Name
Done in Seattle, Washington

October 21, 2009
Date

FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
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