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NO. 65702-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

HOLLIS SIMMONS,

Appellant.

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King County Prosecutor
Appellate Unit

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

The Honorable Michael Heavey, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove every element of the charge beyond a reasonable doubt because the law of the case doctrine required the state to prove there was a transfer of a controlled substance.¹

2. The trial court erred when it failed to enter findings of fact and conclusions of law following a CrR 3.6 hearing.

Issues Pertaining to Assignments of Error

1. The state charged the appellant with delivery of an uncontrolled substance in lieu of a controlled substance. But according to the law of the case, "deliver" or "delivery" meant "the actual transfer of a controlled substance." CP 17. By proving the appellant transferred an uncontrolled substance, did the state fail to prove "delivery" according to the law of the case?

2. Does the trial court's failure to enter written findings of fact and conclusions of law following a hearing on appellant's motion to suppress evidence require dismissal of appellant's conviction or at a minimum remand with an order to enter writing findings of fact and conclusions of law?

¹ A defendant may assign error to elements added under the law of the case doctrine. The assignment of error may include a challenge to the sufficiency of evidence of the added element. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998).

B. STATEMENT OF THE CASE

1. Procedural Facts

Hollis Simmons was charged with delivery of a substance in lieu of cocaine. CP 1-4.² Prior to trial Simmons moved to exclude evidence of his arrest and the money found following his arrest. RP 66-67. A CrR 3.6 hearing was held on the motion. RP 16-73. The motion was denied. RP 73.³ The court did not enter any written findings or conclusions of law following the motion.

Simmons was found guilty as charged. CP 5. He was sentenced under the Special Drug Offender Sentencing Alternative to 45 months in prison and 45 months of community custody. CP 24-33.

2. Substantive Facts

On August 9, 2010, the Seattle police set up an undercover narcotics "buy/bust" operation. RP 94-97. Officer John Kallis was the designated "buyer" in the operation. RP 97. As Kallis walked down the street he made eye contact with Simmons and asked Simmons if he had

² RCW 69.50.4012(1) provides:

It is unlawful, except as authorized in this chapter and chapter 69.41 RCW, for any person to offer, arrange, or negotiate for the sale, gift, delivery, dispensing, distribution, or administration of a controlled substance to any person and then sell, give, deliver, dispense, distribute, or administer to that person any other liquid, substance, or material in lieu of such controlled substance.

³ RP refers to the sequentially numbered verbatim report of proceedings. The citation to

“any”, referring to drugs. RP 98-100. Simmons said “yeah” and asked Kallis how much he wanted. RP 100, 114. Kallis told Simmons he wanted “40” and Simmons asked if Kallis had everything “ready.” Id.

After walking a short distance, Simmons handed Kallis a small baggie containing a white object. RP 101. Kallis asked Simmons if it was “good” and Simmons told him it was. Id. Kallis gave Simmons \$40 of prerecorded buy money and signaled to other officers that he made a purchase. Id. The object Simmons gave Kallis was aspirin. RP 178.

The signal was relayed by an officer trialing Kallis to an arrest team. RP 125,133-134. Officer Terry Bailey, a member of the arrest team, saw a black male wearing a black jacket and black pants, which matched the only description he was given. RP 148-149,157. The man was Simmons.

Bailey was riding a bicycle. When he approached Simmons and dismounted his bicycle, he tripped into Simmons and they both fell to the ground. RP 151. When Bailey and Simmons got up off the ground Bailey saw the prerecorded buy money near where Simmons had fallen. RP 152, 155.

The trial court gave the jury two instructions pertinent to Simmons’ appeal. The first defined the terms “deliver” or “delivery:”

any other verbatim report of proceeding is RP followed by the date of the proceeding.

Deliver or delivery means the actual transfer of *a controlled substance* from one person to another.

CP 17 (instruction 8, emphasis added). The second was the "to-convict" instruction, which in pertinent part required the state to prove the following three elements beyond a reasonable doubt:

(1) That . . . the defendant knowingly offered, arranged, or negotiated for the delivery, sale, distribution or dispensing of a controlled substance;

(2) That the defendant delivered *an uncontrolled substance* in lieu of the controlled substance; and

(3) That the acts occurred in the State of Washington.

CP 20 (instruction 11, emphasis added).

C. ARGUMENTS

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE APPELLANT DELIVERED A CONTROLLED SUBSTANCE.

Jury instructions not objected to become the law of the case. State v. Hickman, 135 Wn.2d at 102. This rule applies to all instructions, including those that define elements. See, e.g., State v. Braun, 11 Wn. App. 882, 884, 526 P.2d 1230 (1974), review denied, 85 Wn.2d 1001 (1975) (instruction defining "deadly weapon" became law of the case).

Here the trial court gave the jury an instruction defining "deliver" or "delivery" as the transfer of a controlled substance.⁴ No one objected to the instruction. This definition of "deliver" or "delivery," which required the transfer of a controlled substance, thus became the law of the case.

Jurors are presumed to give meaning to and follow every instruction given. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001); State v. Hutchinson, 135 Wn.2d 863, 885, 959 P.2d 1061 (1998), cert. denied, 525 U.S. 1157 (1999). This court must assume the jury followed both instruction 8 and instruction 11. But the instructions are internally inconsistent as to the material element of "deliver:" instruction 8 required transfer of a controlled substance, while instruction 11 required transfer of an uncontrolled substance.

In other contexts, Washington courts have found that inconsistent instructions are prejudicial. For example, it is well established instructions that provide inconsistent decisional standards are erroneous and require reversal. Dever v. Fowler, 63 Wn. App. 35, 42, 816 P.2d 1237, 824 P.2d 1237 (1991), review denied, 118 Wn.2d 1028 (1992); Renner v. Nestor, 33 Wn. App. 546, 550, 656 P.2d 533 (1983). Stated another way, our Supreme Court has held that instructions that are inconsistent or

⁴ WPIC 50.07 is identical.

contradictory on a material point are prejudicial because "it is impossible to know what effect they may have on the verdict." Hall v. Corporation of Catholic Archbishop of Seattle, 80 Wn.2d 797, 804, 498 P.2d 844 (1972); accord, State v. Studd, 87 Wn. App. 385, 389, 942 P.2d 985 (1997), reversed on other grounds, 137 Wn.2d 533, 973 P.2d 1049 (1999).

Under this rule, Simmons' case should be reversed. Instruction 11, the "to-convict" instruction, uses the terms "delivery" and "delivered" in two of the three elements of the offense. The first element required proof that Simmons "knowingly offered, arranged, or negotiated for the *delivery*, sale, distribution or dispensing of a controlled substance[.]" This use of the term in the "to-convict" instruction is not inconsistent with the definition of "delivery" in instruction 8 because the "to-convict" element went to the "inducement" element of the offense; i.e., the representation that the bargained for substance is controlled. This is so because if a seller offers, arranges, or negotiates for the delivery of an uncontrolled substance and then delivers same, he has not committed a crime. State v. Lauterbach, 33 Wn. App. 161, 165, 653 P.2d 1320 (1982), review denied, 98 Wn.2d 1013 (1983).

The second element, however, uses "delivered" in the following manner: "That the defendant delivered an uncontrolled substance in lieu

of a controlled substance[.]” Herein lies the inconsistency: If “deliver” means “the actual transfer of a controlled substance,” how can a jury that gives equal weight to every instruction have found that Simmons “delivered,” i.e., “transferred” an uncontrolled substance?

A court may not presume the jury ignored an instruction because this would indicate a belief “the jury is wayward and unintelligent [which] casts our entire system of justice into doubt.” Adkins v. Aluminum Co. of America, 110 Wn.2d 128, 157, 750 P.2d 1257, 756 P.2d 142 (1988). As our Supreme Court observed long ago:

[W]e must indulge some presumptions in favor of the integrity of the jury. It is a branch of the judiciary, and, if we assume that jurors are so quickly forgetful of the duties of citizenship as to stand continually ready to violate their oath on the slightest provocation, we must inevitably conclude that a trial by jury is a farce and our government a failure.

State v. Pepoon, 62 Wash. 635, 644, 114 P. 449 (1911).

This Court must give meaning to each instruction. Under the instructions, “deliver” means the transfer of a controlled substance. Because this definition became the law of the case, it became necessary for the state to prove there was such a delivery. But the state did not prove Simmons delivered a controlled substance. As a result, the state did not sustain its burden of proof. This Court should therefore reverse Simmons’

judgment and remand for dismissal with prejudice. State v. Nam, 136 Wn. App. 698, 707, 150 P.3d 617 (2007).

2. THE TRIAL COURT'S FAILURE TO FOLLOW CrR 3.6(b) WARRANTS A REMAND FOR DISMISSAL WITH PREJUDICE OR ENTRY OF PROPER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW.

A trial court must enter written findings of fact and conclusions of law after a hearing on a motion to suppress evidence. CrR 3.6(b); State v. Tagas, 121 Wn. App. 872, 875, 90 P.3d 1088 (2004). The trial court and the prevailing party share the responsibility to see that appropriate findings and conclusions are entered. State v. Vailencour, 81 Wn. App. 372, 378, 914 P.2d 767 (1996).

The purpose of written findings and conclusions is to promote efficient and precise appellate review. State v. Cannon, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996); see State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998) ("A prosecuting attorney required to prepare findings and conclusions will necessarily need to focus attention on the evidence supporting each element of the charged crime, as will the trial court. That focus will simplify and expedite appellate review.").

The absence of written findings and conclusions in Simmons' case prohibits effective appellate review. And although the trial court entered

oral findings, those findings are not a suitable substitute. See RP 71-73. "A court's oral opinion is not a finding of fact." State v. Hescocock, 98 Wn. App. 600, 605-06, 989 P.2d 1251 (1999). Rather, a court's oral opinion is merely an expression of the court's informal opinion when rendered. Head, 136 Wn.2d at 622. An oral opinion is not binding unless it is formally incorporated in the written findings, conclusions and judgment. Id. (citing State v. Mallory, 69 Wn.2d 532, 533, 419 P.2d 324 (1966)).

When the trial court fails to enter written findings and conclusions as required by CrR 3.6, "there will be a strong presumption that dismissal is the appropriate remedy." State v. Cruz, 88 Wn. App. 905, 909, 946 P.2d 1229 (1997) (quoting State v. Smith, 68 Wn. App. 201, 211, 842 P.2d 494 (1992); cf. Head, 136 Wn.2d at 624 (trial court's failure to enter written findings and conclusions under CrR 6.1(d) required remand for entry of written findings and conclusions).

This Court should employ the strong presumption and dismiss Simmons' conviction or, at minimum, remand with an order directing the state and trial court to follow CrR 3.6(b).

D. CONCLUSION

The state failed to prove each element of the charge beyond a reasonable doubt because it did not prove Simmons delivered a controlled substance. This Court should reverse Simmons' conviction and remand for dismissal with prejudice. Alternatively, the trial court should dismiss Simmons' conviction or remand with an order directing the entry of written findings of fact and conclusions of law.

DATED this 2 day of September, 2010.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
Respondent,)	
v.)	COA NO. 65702-0-1
HOLLIS SIMMONS,)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 21ST DAY OF SEPTEMBER, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] HOLLIS SIMMONS
DOC NO. 97262
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANITNE WAY
ABERDEEN, WA 98

SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF SEPTEMBER, 2010.

x *Patrick Mayovsky*