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Court of Appeals
Division I
State of Washington

No. 73523-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

RANDOLPH CLARK-EL,

Appellant.

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

APPELLANT'S OPENING BRIEF

RICHARD W. LECHICH
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. INTRODUCTION

When the State charges a person with delivering methamphetamine, the State must prove both that the substance delivered was methamphetamine and that the person knew the substance was methamphetamine, not merely that it was a controlled substance. In this prosecution for delivery of methamphetamine, the jury instructions relieved the State of its burden to prove these two elements. These errors were not harmless and can never be harmless under the Washington Constitution, requiring reversal and a new trial. Even if the errors could be deemed harmless, the jury did not find that the defendant delivered methamphetamine. Thus, the court exceeded its authority by sentencing the defendant for delivery of methamphetamine, requiring remand and resentencing.

B. ASSIGNMENTS OF ERROR

1. In violation of constitutional due process and the right to a jury trial, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 3, 21, and 22 of the Washington Constitution, the jury instructions omitted the requirement that the State prove that the substance delivered was methamphetamine, an essential element of the offense.

2. In violation of constitutional due process and the right to a jury trial, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 3, 21, and 22 of the Washington Constitution, the jury instructions omitted the requirement that the State prove that the defendant knew the identity of the substance delivered, an essential element of the offense.

3. In violation of the right to a jury trial, as guaranteed by article I, sections 21 and 22 of the Washington Constitution, the court exceeded its authority by sentencing Mr. Clark-El for delivery of methamphetamine.

C. ISSUES

1. The identity of a controlled substance is an element of the offense where it increases the maximum sentence. A finding that the defendant delivered methamphetamine increases the maximum sentence for delivery of a controlled substance. Jury instructions must include all the elements of the offense. Did the trial court err in not instructing the jury that it had to find that the substance delivered was methamphetamine?

2. The offense of delivery of a controlled substance requires proof that the defendant knew the identity of the substance delivered. The jury instructions omitted this essential element. Did the trial court err in not instructing the jury that it had to find that the defendant knew the substance delivered was methamphetamine?

3. Under the federal constitution, the omission of an essential element from the jury instructions may be harmless error. The right to a jury trial under the Washington constitution, however, is “inviolable” and has been construed to be more protective than under the federal constitution. Historically, the omission of an element from the jury instructions always required reversal because the jury did not make a necessary finding. Other states have interpreted their state constitutions as requiring automatic reversal when an element is omitted from the jury instructions. Under the Washington Constitution, does omission of an element in the jury instructions always require reversal?

4. A sentencing court exceeds its authority when it imposes a sentence not authorized by the jury’s findings. This error is never harmless under the Washington Constitution. A defendant’s sentence is enhanced if the jury finds that the defendant delivered methamphetamine, as opposed to any controlled substance. Here, the jury only found that the defendant delivered a controlled substance. Did the trial court exceed its authority by imposing an enhanced sentence for the substance being methamphetamine when the jury did not make this finding?

D. STATEMENT OF THE CASE

On October 30, 2014, Sergeant Keith Johnson, Detective Chris Johnston, and Detective Joshua Danke of the Bellingham Police

Department were conducting undercover drug law enforcement in the Samish Way area of Bellingham. RP 68-70, 105-06, 126. Both Sergeant Johnson and Detective Johnston were looking to buy drugs. RP 73. Detective Danke was serving as their surveillance. RP 73. The officers were wearing street clothes. RP 72, 106, 127.

Sometime after 8:00 p.m., while it was dark out, Sergeant Johnson and Detective Johnston were in an unmarked vehicle together. RP 74-75, 86, 108. After parking, Sergeant Johnson got out and approached a man on the sidewalk, to “hit him up for drugs.” RP 74-75, 86. The man, who Sergeant Johnson did not know, was wearing dark clothing including a baseball hat. RP 76, 86-87. He asked the man for “clear,” which, according to Sergeant Johnson, is street slang for methamphetamine. RP 76. Sergeant Johnson said he was looking for “forty,” which mean \$40 worth. RP 76. The man responded that he only had a “dub,” which means \$20 worth. RP 77. The man also said he had \$10 worth of “dark,” meaning heroin. RP 77. Sergeant Johnson said he would buy the “dub.” RP 77. After more conversation, the two walked to a darkened area nearby, where Sergeant Johnson exchanged \$20 for a small bag of what appeared to be methamphetamine. RP 76-77, 88. Sergeant Johnson did not get the man’s name or phone number. RP 78, 87. He did not arrest him. RP 88.

Detective Johnston, who watched Sergeant Johnson and the man walk to the darkened area off of Samish Way, claimed to have recognized the man as Randolph Clark-El, also known as “Ace.” RP 113. Detective Danke, who watched in a different unmarked vehicle, also claimed to recognize the person as Mr. Clark-El, or “Ace.” RP 109, 127, 129-130. Later that night, Sergeant Johnson looked at photos of Mr. Clark-El and identified him as the man who sold him the drugs. RP 81.

Months later, on the evening of January 13, 2015, Officer Jacob Esparza saw Mr. Clark-El at a gas station in the vicinity of Samish Way and arrested him. RP 140-41. Mr. Clark-El was not doing anything criminal when arrested and Officer Esparza found no drugs on Mr. Clark-El. RP 142.

On January 16, 2015, the State charged Mr. Clark-El with delivery of a controlled substance. CP 4. The State alleged that Mr. Clark-El, on or about October 30, 2014, “did knowingly deliver a controlled substance, to-wit: Methamphetamine, in violation of RCW 69.50.401(1) and 69.50.401(2)(b).” CP 4. At trial, Mr. Clark-El’s primary defense was that the officers identified the wrong person. RP 196. The jury instructions did not require the jury to find that the substance delivered was methamphetamine. CP 20-36. The jury found that the State had proved that Mr. Clark-El delivered a controlled substance. CP 35, 37. The court

imposed a drug offender sentencing alternative, sentencing Mr. Clark-El to 45 months of total confinement and 45 months of community custody. CP 43.

E. ARGUMENT

1. Unconstitutionally relieving the State of its burden of proof, the jury instructions only required proof that Mr. Clark-El knowingly delivered a “controlled substance.” The instructions should have required proof that Mr. Clark-El delivered methamphetamine and that he knew it was methamphetamine.

a. The identity of a controlled substance is an element of the offense where it increases the maximum sentence.

Under the controlled substances act, not all substances are treated equally. For example, delivery of methamphetamine is a class B felony carrying a maximum sentence of ten years. RCW 69.50.401(1),(2)(b). In contrast, delivery of some other controlled substances are class C felonies subject to a maximum sentence of five years. RCW 69.50.401(1), (2)(c)-(e); RCW 9A.20.021(1)(c). Additionally, drug offenses have different seriousness levels. RCW 9.94A.518. This affects the sentencing range of a person convicted of a drug offense. RCW 9.94A.517.

Here, the State charged Mr. Clark-El with delivery of a controlled substance, specifically methamphetamine. The information alleged that Mr. Clark-El “did knowingly deliver a controlled substance, to-wit:

Methamphetamine, in violation of RCW 69.50.401(1) and 69.50.401(2)(b).” CP 4. At trial, however, the “to convict” instruction only required proof that Mr. Clark-El “delivered a controlled substance” and that he “knew the substance delivered was a controlled substance.” CP 35.

This watering down of the State’s burden was improper. The “identity of the controlled substance is an element of the offense where it aggravates the maximum sentence with which the court may sentence a defendant.” State v. Goodman, 150 Wn.2d 774, 785-86, 83 P.3d 410 (2004); accord State v. Zillyette, 178 Wn.2d 153, 161, 307 P.3d 712 (2013). This is because “any fact that ‘expose[s] the defendant to a greater punishment than that authorized by the jury’s guilty verdict’ is an ‘element’ that must be submitted to a jury.” Hurst v. Florida, No. 14-7505, 2016 WL 112683, at *5 (U.S. Jan. 12, 2016) (quoting Apprendi v. New Jersey, 530 U.S. 466, 494, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). Thus, in Goodman, “the prosecution was obligated to allege and prove the substance Goodman possessed was methamphetamine” because the offense of possession with intent to deliver methamphetamine exposed him to greater punishment. Goodman, 150 Wn.2d at 786.

b. The identity of the substance, methamphetamine, was an essential element of the offense. Its omission from the jury instructions was error.

Like in Goodman, the identity of the substance that Mr. Clark-El was alleged to deliver, methamphetamine, was an essential element because it exposed him to greater punishment. Delivery of methamphetamine is a class B felony with a seriousness level of two. RCW 69.50.401(1),(2)(b); 9.94A.518. But delivery of some other substances is only a class C felony. RCW 69.50.401(1), (2)(c)-(e); RCW 9A.20.021(1)(c). Further, delivery of marijuana only carries a seriousness level of one. RCW 9.94A.518. Hence, the “to convict” instruction, which required proof only that Mr. Clark-El delivered a controlled substance, was erroneous. CP 35.¹

¹ In its entirety, this instruction reads:

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

- (1) That on or about the 30th day of October, 2014, the defendant delivered a controlled substance;
- (2) That the defendant knew that the substance delivered was a controlled substance; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

A “‘to convict’ instruction must contain all of the elements of the crime because it serves as a ‘yardstick’ by which the jury measures the evidence to determine guilt or innocence.” State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). The “to convict” instruction must be a complete statement of the law and other instructions may not be used to supply missing elements. Id. at 262-63. Thus, that another instruction stated that methamphetamine is a controlled substance does not cure the error. CP 33.

In a fractured decision, our Supreme Court addressed this issue. State v. Sibert, 168 Wn.2d 306, 230 P.3d 142 (2010). There, the defendant was convicted of multiple counts of delivery of a controlled substance, methamphetamine. Id. at 309 (plurality opinion). The “to convict” instructions for delivery were substantially the same as the one used in Mr. Clark-El’s case, except for that they each included “as charged” language: “[t]o convict the Defendant . . . of the crime of Delivery of a Controlled Substance *as charged* . . .” Id. at 312. The charging document referred to the controlled substance as “to-wit: Methamphetamine.” Id.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 35.

A four-justice plurality reasoned that the “as charged” language incorporated the “to-wit: Methamphetamine” language into the “to convict” instructions. Id. Based on this, the plurality reasoned there was no error. Id. at 312-15. Justice Madsen added her name to the four-justice plurality, but stated that she “concur[s] in result only.” Id. at 148. The four remaining justices dissented, reasoning that the instructions had improperly omitted the identity of the controlled substance in the “to convict” instructions. Id. at 318 (Alexander, J., dissenting); id. at 327 (Sanders, J., dissenting).

“A plurality opinion has limited precedential value and is not binding on the courts.” In re Isadore, 151 Wn.2d 294, 302, 88 P.3d 390 (2004). “[I]t is not possible to assess the correct holding of an opinion signed by four justices ‘with the fifth vote, concurring in the result only, being unaccompanied by an opinion.’” Kailin v. Clallam County, 152 Wn. App. 974, 985, 220 P.3d 222 (2009) (quoting Wolfe v. Legg, 60 Wn. App. 245, 249 n. 2, 803 P.2d 804 (1991)). Thus, the plurality opinion in Sibert is not controlling.

In any event, the plurality’s analysis does not apply in this case because the “to convict” instruction does not have the “as charged” language. CP 35. Thus, there is no incorporation by reference. Moreover, the jury was instructed that the “instructions are complete and

until a verdict has been reached you are not permitted to go beyond these instructions to discover new definitions, meanings or information.” CP 24. Hence, even if it were proper to look beyond the jury instructions in some circumstances, these circumstances are not present here.

The failure to instruct the jury on every element is manifest constitutional error that may be raised for the time on appeal. RAP 2.5(a)(3); State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). As explained, the omission of the identity of the controlled substance in the “to convict” instruction was error. See also, Sibert, 168 Wn.2d at 318 (Alexander, J. dissenting); Sibert, 168 Wn.2d at 334 (Sanders, J., dissenting). The Court should so hold.

c. The State must also prove that the defendant knew the identity of the controlled substance delivered. The omission of this element was also error.

Although the statutory language does not contain the word “knowledge” or “knowingly,” delivery of controlled substance requires proof of “guilty knowledge.” State v. Boyer, 91 Wn.2d 342, 344, 588 P.2d 1151 (1979). Otherwise, “a postal carrier would be guilty of the crime were he innocently to deliver a package which in fact contained a forbidden narcotic. Such a result is not intended by the legislature.” Id. This accords with the general rule that, “wrongdoing must be conscious to be criminal.” Morissette v. United States, 342 U.S. 246, 252, 72 S. Ct.

240, 96 L. Ed. 288 (1952); see generally Elonis v. United States, ___ U.S. ___, 135 S. Ct. 2001, 2009, 192 L. Ed. 2d 1 (2015).

The Washington Supreme Court has not resolved whether this “guilty knowledge” requirement also means that the State must prove that the defendant knew the specific identity of the controlled substance. See Goodman, 150 Wn.2d at 786-87. The issue is one of statutory interpretation. Questions of statutory interpretation are reviewed *de novo*. State v. Conover, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015). The primary purpose is to effectuate the intent of the lawmaker. Id. Intent is determined from the statute’s plain language, which considers the text, context of the statute, related provisions, amendments, and the whole statutory scheme. Id. If the statute can be reasonably interpreted in more than one way, it is ambiguous. Id. at 711-12. In criminal cases, the rule of lenity requires that ambiguous statutes be interpreted in the defendant’s favor. Id. at 712.

Here, the statutory language is silent on the issue. RCW 69.50.401(1). The statutory scheme, however, indicates that knowledge of the specific substance (as opposed to mere knowledge that substance is a controlled substance) is required. It punishes delivery of a controlled substance differently depending on the substance. RCW 69.50.401(2). For example, a person who knowingly delivers “pyrovalerone,” a

substance classified in schedule V as a controlled substance,² is guilty of a class C felony. RCW 69.50.401(2)(e). In contrast, a person who knowingly delivers cocaine, a narcotic drug classified in schedule II as a controlled substance,³ is guilty of a class B felony. RCW 69.50.401(2)(a). But with no requirement that the defendant know the specific substance delivered, a person who knowingly believes he is delivering pyrovalerone, when in fact he is mistakenly delivering cocaine, is punished the same as a person who delivers cocaine knowing it is cocaine.

The person in this hypothetical would still be committing a crime. Specifically, the person would be guilty of an attempted delivery of pyrovalerone. RCW 9A.28.020(1) (“A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.”).

Thus, it is reasonable to interpret the statute as requiring the State to prove that the defendant knew the specific identity of the controlled substance.

This Court reached a different conclusion in State v. Nunez-Martinez, 90 Wn. App. 250, 253, 951 P.2d 823 (1998). There, this Court

² RCW 69.50.212(6)(c).

³ RCW 69.50.206(4); RCW 69.50.101(dd).

held that the State was not required to allege or prove that the defendant knew he was delivering amphetamine. Nunez-Martinez, 90 Wn. App. at 255-56. In reaching this conclusion, the Court reasoned that “there would seem to be little public purpose in ‘insulating from criminal liability those defendants who knowingly deal in prohibited controlled substances, but are ignorant, mistaken, or willing to misrepresent the exact nature or chemical name of the substance which they traffic.’” Nunez-Martinez, 90 Wn. App. at 254 (quoting State v. Sartin, 200 Wis. 2d 47, 64, 546 N.W.2d 449, 456 (1996)). But this view is incorrect. People who are mistaken as to the identity of the controlled substance they deliver (because they think it is a different controlled substance) would be guilty of an attempted delivery.⁴ As for those who misrepresent the controlled substance they deliver, these people would have guilty knowledge of the substance they delivered and therefore would not escape criminal liability.⁵ Thus, this Court should not follow Nunez-Martinez.

⁴ As for those who are truly ignorant of what they are delivering, this is a valid defense because the statute requires, at the least, guilty knowledge that the substance is a controlled substance. Boyer, 91 Wn.2d at 344.

⁵ If the person knowingly delivered a counterfeit substance or a substance in lieu of a controlled a substance, the person would also have committed a crime. RCW 69.50.4011 (crime to deliver a “counterfeit substance”), .4012 (crime to deliver a substance in lieu of a controlled substance).

Moreover, the Nunez-Martinez Court does not appear to have considered the rule of lenity. As our Supreme Court recognized post-Nunez-Martinez, there remains a “statutory ambiguity of whether the defendant must know the specific identity of the controlled substance in order to be convicted under RCW 69.50.401(a).” Goodman, 150 Wn.2d at 787 n.8.⁶ Given this ambiguity, the rule of lenity requires the Court to adopt the more defendant friendly interpretation. Conover, 183 Wn.2d at 712.

“An opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court by which the opinion was rendered.” Cont’l Mut. Sav. Bank v. Elliott, 166 Wash. 283, 300, 6 P.2d 638 (1932). “Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive . . .” ETCO, Inc. v. Dep’t of Labor & Indus., 66 Wn. App. 302, 307, 831 P.2d 1133 (1992). Hence, because the foregoing arguments were not considered by the Nunez-Martinez Court in its opinion, its holding does not dictate the result in this case.

⁶ Nunez-Martinez notwithstanding, the Washington Pattern Jury Instructions recognize that the issue is unsettled. See 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 50.06 (3d Ed).

In sum, to prove delivery of a controlled substance, the State must prove that defendant knew the specific identity of the controlled substance delivered. The rules of statutory interpretation support this conclusion. The omission of this element from the “to convict” instruction was error.

d. These omissions are not harmless beyond a reasonable doubt, requiring reversal and a new trial.

In sum, there were two errors in the “to convict” instructions. First, the instruction improperly omitted the identity of the controlled substance delivered, methamphetamine. Second, the instruction improperly omitted the requirement that the State prove that Mr. Clark-El knew the substance delivered was methamphetamine.

A jury instruction that incorrectly omits an essential element of the offense may be harmless. Neder v. United States, 527 U.S. 1, 9-10, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); State v. Brown, 147 Wn.2d 330, 340, 58 P.3d 889 (2002). The court must be able to conclude beyond a reasonable doubt that the error did not contribute to the verdict. Neder, 527 U.S. at 15; Brown, 147 Wn.2d at 341. In other words, the court must be able to conclude beyond a reasonable doubt that the verdict would have been the same without the error. Neder, 527 U.S. at 19; Brown, 147 Wn.2d at 341. If the missing element is supported by uncontroverted

evidence, this standard may be satisfied. Neder, 527 U.S. at 18; Brown, 147 Wn.2d at 341.

Concerning the first error, proof that the substance delivered was actually methamphetamine, the error was not harmless beyond a reasonable doubt. While expert testimony identified the tested substance as containing methamphetamine, RP 156-57, the jury might have entertained a reasonable doubt as to the validity of the testing. See Melendez-Diaz v. Massachusetts, 557 U.S. 305, 320, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) (explaining that errors may occur in laboratory analyses of drugs). Moreover, the jury might have entertained a reasonable doubt as to whether Sergeant Johnson correctly impounded what was sold to him. Sergeant Johnson testified that “we do multiple buys over the course of a shift” and that he had placed the bag he had purchased in his left sock to help him remember where it came from. RP 79. The jury, however, heard testimony that Sergeant’s Johnson report was inaccurate, demonstrating carelessness on his part. RP 134 (report had incorrect date of incident). The jury might have reasonably concluded that Sergeant Johnson was also not careful when he submitted the evidence.

The second error, omission of the requirement that the State prove Mr. Clark-El knew he was delivering methamphetamine, is also not

harmless. Sergeant Johnson, the undercover buyer, testified that he asked for “clear,” which Sergeant Johnson believed meant methamphetamine. RP 76. However, he did not testify that the seller understood that this meant methamphetamine.

Further, the prosecutor did not argue during closing that the State had proved the seller knew the substance was methamphetamine. Rather, the prosecutor argued simply that the evidence established that the seller knew the substance was a controlled substance based on the language used during the transaction. RP 188-89 (“it would appear given the language used also during the transaction, it’s ‘clear,’ ‘dark,’ and the amount ‘dub,’ or ‘40,’ that that [sic] person would know what that person meant. When asked about that, that person came up with drugs, so there isn’t really an argument or issue as to that.”).

Given the lack of evidence showing the seller knew the substance was methamphetamine and prosecutor’s argument to the jury that the seller knew he was delivering some kind of controlled substance, the error cannot be deemed harmless beyond a reasonable doubt. See State v. Ong, 88 Wn. App. 572, 577-78, 945 P.2d 749 (1997) (insufficient evidence that defendant knew that pills he delivered were morphine rather than any other controlled substance); State v. Hudlow, 182 Wn. App. 266, 286-87, 331 P.3d 90 (2014) (admission of testimonial hearsay about drug

transaction not harmless beyond a reasonable doubt where evidence only showed that defendant intentionally sold methamphetamine, not that he knew the substance was methamphetamine).

Because neither omission is harmless beyond a reasonable doubt, this Court should reverse.

e. Under the Washington Constitution, omission of an essential element from a “to convict” instruction is never harmless.

Regardless of the foregoing analysis, article I, sections 21 and 22 of the Washington Constitution mandate reversal whenever an element is omitted from a “to convict” instruction.

Under our state constitution, the “right of trial by jury shall remain inviolate” Const. art. I, § 21. It also provides that criminal defendants have a right to an “impartial jury. Const. art. I, § 22. The term “inviolable” in article I, § 22, “connotes [meaning] deserving of the highest protection” and, to remain true to this meaning, “must not diminish over time and must be protected from all assaults to its essential guarantees.” Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989).

In 1999, the United States Supreme Court held that a jury instruction that omits an element of offense is subject to harmless error analysis. Neder, 527 U.S. at 9-10. In 2002, the Washington Supreme Court found “no compelling reason” to not to follow Neder’s holding.

Brown, 147 Wn.2d at 340. The Court did not discuss whether this holding was consistent with the jury trial guarantee under the Washington Constitution.

It is “well established that state courts have the power to interpret their state constitutional provisions as more protective of individual rights than the parallel provisions of the United States Constitution.” State v. Simpson, 95 Wn.2d 170, 177, 622 P.2d 1199 (1980). Doing so “is particularly appropriate when the language of the state provision differs from the federal, and the legislative history of the state constitution reveals that this difference was intended by the framers.” Id.

Our Supreme Court articulated standards to decide when and how Washington’s constitution provides different protection of rights than the United States Constitution in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). The court examines six nonexclusive criteria: (1) the text of the state constitutional provision, (2) the differences in the texts of the parallel state and federal provisions, (3) state constitutional history, (4) pre-existing state law, (5) structural differences between the state and federal constitutions, and (6) matters of particular state interest and local concern. Gunwall, 106 Wn.2d at 61-62. However, when it has already been determined that our state constitution provides greater protection than the federal constitution, no Gunwall analysis is required for the court

to apply the state constitution. State v. Williams-Walker, 167 Wn.2d 889, 896 n.2, 225 P.3d 913 (2010).

The Washington Supreme Court has already determined that the right to trial by jury under our state Constitution provides greater protection than under the United States Constitution. Id. at 895-96; State v. Recuenco, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008); State v. Smith, 150 Wn.2d 135, 156, 75 P.3d 934 (2003) (“Gunwall analysis indicates that the Washington Constitution generally offers broader protection of the jury trial right than does the federal constitution.”); City of Pasco v. Mace, 98 Wn.2d 87, 99, 653 P.2d 618 (1982) (“the right to trial by jury which was kept ‘inviolable’ by our state constitution was more extensive than that which was protected by the federal constitution when it was adopted in 1789.”). Thus, the question is the scope of that right, not whether the provision mandates greater protection. See Smith, 150 Wn.2d at 151.

To determine the scope of the jury trial right under the Washington Constitution, examination of Washington law as it existed at the time of the adoption of our constitution is appropriate. Smith, 150 Wn.2d at 153. In 1890, during our first year of statehood, the Supreme Court held that the omission of an element from what we would now call the “to convict” instruction required reversal. McClaine v. Territory, 1 Wash. 345, 25 P. 453 (1890). The court reasoned that the omission of an element from the

“to convict” instruction required reversal, regardless of how much evidence was presented on that element or whether the outcome would have been the same with the proper instruction. Id. at 354-55.

Consistent with this understanding, Washington precedent recognized that the failure to instruct on an element of an offense requires automatic reversal. Smith, 131 Wn.2d at 265 (recognizing prior cases holding that “failure to instruct on an element of an offense is automatic reversible error”); State v. Eastmond, 129 Wn.2d 497, 502, 919 P.2d 577 (1996) (“By omitting an element of the crime of assault, the trial court here committed an error of constitutional magnitude.”); State v. Byrd, 125 W.2d 707, 713-14, 887 P.2d 396 (1995) (“The State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld. It is reversible error to instruct the jury in a manner that would relieve the State of this burden.”) (citations omitted); State v. Pope, 100 Wn. App. 624, 630, 999 P.2d 51 (2000) (“A harmless error analysis is never applicable to the omission of an essential element of the crime in the ‘to convict’ instruction. Reversal is required.”). To conclude otherwise would be “equivalent to directing the jury that it is not necessary for the state to prove any elements of the offense except those included in the definition given by the court.” State v. Emmanuel, 42 Wn.2d 799, 821, 259 P.2d 845 (1953) (quoting Croft v. State, 117 Fla. 832, 158 So. 454,

455 (1935)). Thus, the history and prior interpretation of the state constitutional right to a jury trial supports adoption of the automatic reversal rule.

Other states have rejected Neder under their state constitutions. One state is New Hampshire. State v. Kousounadis, 159 N.H. 413, 429, 986 A.2d 603, 616 (2009). In doing so, the New Hampshire Supreme Court explained that Neder had been “widely criticized” and noted the reasoning of one commentator in rejecting the rule:

Harmless error analysis depends upon the existence of a verdict of guilty beyond a reasonable doubt on the elements of the crime. The appellate court must assess the possibility that the error affected the jury’s verdict. If there is no verdict on an element of the crime, it is not possible to conclude that the error did not affect the verdict.

Id. at 616 (quoting Linda E. Carter, The Sporting Approach to Harmless Error in Criminal Cases: The Supreme Court’s “No Harm, No Foul” Debacle in Neder v. United States, 28 Am. J. Crim. L. 229, 232 (2001)).

The court also found Justice Scalia’s dissent in Neder persuasive on the logic of the jury trial right and what it requires. Id. As Justice Scalia explained, “Harmless-error review applies only when the jury *actually renders* a verdict—that is, when it has found the defendant guilty of all the elements of the crime.” Neder, 527 U.S. at 38 (Scalia, J., dissenting).

Mississippi reached the same result under its state constitution and overruled prior precedent that had relied on Neder. Harrell v. State, 134 So. 3d 266, 275 (Miss. 2014). The court emphasized the strong language used in its state constitution, which states the “right of trial by jury *shall remain inviolate.*” Id. at 271 (Miss. 2014) (quoting Miss. Const. art. 3, § 31). The court also explained that the “idea that an accused’s right to a trial by jury is less than absolute is relatively new” and that decisions prior to Neder recognized that a harmless error analysis was inappropriate when a jury fails to decide an essential element. Id.; see e.g., Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) (“to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.”). Like the New Hampshire Supreme Court, the court also found Justice Scalia’s dissent in Neder persuasive, which recognized the historical importance of the jury trial right to American democracy. Harrell, 134 So. 3d at 274. The court concluded that given the “stronger wording” of its state constitution and the “strong historical precedent that directs against . . . allowing judges—rather than juries—to determine guilt under the rubric of harmless error,” automatic reversal is required when the jury is not instructed as to an element of the charged crime. Id. at 271. To allow otherwise “impairs,

infringes upon, violates, and renders broken the right to a jury trial.” Id. at 274.

This Court should follow New Hampshire’s and Mississippi’s lead. Historical precedent favors rejecting the Neder rule. And, as in Mississippi’s constitution, the right to trial by jury in Washington’s constitution is “inviolable.” As Justice Sanders recognized in Sibert, the rule requiring automatic reversal is consistent with this language:

Automatic reversal is consistent with our state constitution's command that the right to a jury trial remain inviolable. *See* Const. art. I, § 21. As the dissent by Alexander, J., at 150-51, points out, we have previously relied on *Webster's Dictionary* when interpreting “inviolable”: “‘free from change or blemish: PURE, UNBROKEN . . . free from assault or trespass: UNTOUCHES, INTACT.’” *Smith*, 150 Wash.2d at 150, 75 P.3d 934 (alteration in original) (quoting Webster's Third New International Dictionary 1190 (1993)). Anything less cannot be said to leave our jury trial right “free from blemish,” “unbroken,” and “intact.”

Sibert, 168 Wn.2d at 330-31 (Sanders, J., dissenting).

Because the “to convict” instruction in this case omitted an essential element and this kind of error is never harmless, this Court should reverse Mr. Clark-El’s conviction.

2. The court exceeded its authority by sentencing Mr. Clark-El for delivery of methamphetamine. The jury only found that Mr. Clark-El delivered a controlled substance.

a. Imposition of a sentence not authorized by the jury's findings is never harmless under the Washington Constitution.

Under the United States Constitution, the failure to submit an element or sentencing element to the jury is subject to harmless error analysis. Washington v. Recuenco, 548 U.S. 212, 222, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). The result, however, is different under our state constitution.

As explained by the Washington Supreme Court, under article I, sections 21 and 22, defendants have the right to have a jury determine all the facts which subject them to greater punishment. Williams-Walker, 167 Wn.2d at 900; Recuenco, 163 Wn.2d at 440. When a sentencing judge punishes a defendant based on facts not found by the jury, the sentencing judge, not the jury, has erred. Williams-Walker, 167 Wn.2d at 901; Recuenco, 163 Wn.2d at 441-42. When the jury makes a finding, “the sentencing judge is bound by that finding. Where the judge exceeds that authority, error occurs that can never be harmless.” Williams-Walker, 167 Wn.2d at 902.

b. The jury did not find that the substance delivered was methamphetamine. The court exceeded its authority by sentencing Mr. Clark-El for delivery of methamphetamine, requiring resentencing.

Here, the sentence imposed on Mr. Clark-El was invalid because it exceeded the trial court's authority. The jury only found that Mr. Clark-El delivered a controlled substance, not methamphetamine. The judge, however, sentenced Mr. Clark-El as if the jury had found that the substance was methamphetamine. CP 41.

The consequences of this were significant. Delivery of methamphetamine is a class B felony with a seriousness level of two. RCW 69.50.401(1),(2)(b); 9.94A.518. This offense carries a greater standard range sentence than drug offense that have a seriousness level of one, such as delivery of marijuana. RCW 9.94A.517, 518. As a class B felony, it also carries a maximum sentence of ten years. This is double that of class C felonies, which carry a maximum sentence of five years. RCW 9A.20.021(1)(c). Delivery of some other controlled substances are class C felonies. RCW 69.50.401(1), (2)(c)-(e).

Here, due to Mr. Clark-El's offender score, sentencing on delivery of methamphetamine made his standard range 60 to 120 months. RCW 9.94A.517. If he had been sentenced on a drug offense with a seriousness level of one, the standard range would have been 12 to 24 months. RCW

9.94A.517. Further, if Mr. Clark-El had been sentenced on a class C felony, rather than a class B, his sentence could not have exceeded five years. Here, his sentence of 90 months (45 months of confinement and 45 months of community custody) exceeded that. CP 43. Thus, for the court to properly impose its enhanced sentence upon Mr. Clark-El, the jury first had to make the requisite finding that the substance was methamphetamine.

Sibert presented the same issue. There, however, the plurality reasoned there was no error because the jury had actually found that the substance delivered was methamphetamine. Sibert, 168 Wn.2d at 314 (plurality opinion). The dissent authored by Justice Alexander, joined by two other justices disagreed. He reasoned that the judge's sentence, which was premised on the jury finding that the defendant had delivered methamphetamine (rather than just a controlled substance), was invalid because it exceeded the trial court's authority. Sibert, 168 Wn.2d at 324 (Alexander, J., dissenting). Accordingly, because this violated the Washington Constitution and this kind of violation of the jury trial right is never harmless, he would have vacated the defendant's sentence and remanded for resentencing. Id. at 325.

The same analysis applies here. This Court should accordingly reverse and remand for resentencing.

3. This Court should direct that no costs will be awarded to the State for this appeal.

If Mr. Clark-El does not substantially prevail in this appeal, the State may request appellate costs. RCW 10.73.160(1) (“The court of appeals, supreme court, and superior courts may require an adult offender convicted of an offense to pay appellate costs.”); RAP 14.2 (“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.”). This Court has discretion under RAP 14.2 to decline an award of costs. State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); State v. Sinclair, No. 72102-0-I, slip op. at 8 (January 27, 2016). This means “making an individualized inquiry.” Sinclair, slip. op at 12 (citing State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015)). A person’s ability to pay is an important factor. Id. at 9.

At sentencing, after a brief inquiry into Mr. Clark-El’s ability to pay, the trial court waived discretionary legal financial obligations. 5/11/15RP 223-24; CP 45. The court only imposed mandatory legal obligations of \$600. 5/11/15RP 223-24; CP 45. Later, Mr. Clark-El was found to be indigent. Supp. CP __ (sub. no. 49). This presumption of indigency continues on appeal. RAP 15.2(f); Sinclair, slip. op. at 13.

Given this record, the Court should exercise its discretion and direct that no costs will be awarded. Cf. Sinclair, slip. op. at 12-14 (declining State's request for costs in light of defendant's indigency and lack of evidence or findings showing that defendant's financial situation would improve).

F. CONCLUSION

The "to convict" instruction omitted essential elements of the offense of delivery of a controlled substance, methamphetamine. Because these errors were not harmless and omission of an essential element is never harmless under the Washington Constitution, this Court should reverse and remand for a new trial. Alternatively, because the jury did not find that the substance delivered was methamphetamine, the trial court exceeded its authority by sentencing Mr. Clark for delivery of methamphetamine, requiring reversal and remand for resentencing.

DATED this 4th day of February, 2016.

Respectfully submitted,

/s Richard W. Lechich
Richard W. Lechich – WSBA #43296
Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 73523-3-I
)	
RANDOLPH CLARK-EL,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF FEBRUARY, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/>	RANDOLPH CLARK-EL 898313 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 4TH DAY OF FEBRUARY, 2016.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711