

FILED

6-2-16

No. 73523-3-I

Court of Appeals  
Division I  
State of Washington

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

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STATE OF WASHINGTON,

Respondent,

v.

RANDOLPH CLARK-EL,

Appellant.

---

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

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APPELLANT'S REPLY BRIEF

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## **A. ARGUMENT**

### **1. The “to-convict” instruction omitted the essential element that the controlled substance delivered was methamphetamine.**

#### **a. The error is not waived and may be raised for the first time on appeal as manifest constitutional error.**

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). A “to-convict” instruction must contain all of the elements of the offense. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

Mr. Clark-El was charged with delivery of a controlled substance, specifically methamphetamine. CP 4. Delivery of methamphetamine is punished more harshly than delivery of some other controlled substances. Br. of App. at 8. The “to-convict” instruction, however, did not require the jury to find that the substance delivered was methamphetamine. It only required the jury to find that he delivered a controlled substance. CP 35. Accordingly, the “to-convict” instruction in Mr. Clark-El’s case was erroneous.

The State asserts that Mr. Clark-El waived the error by not objecting to the instruction and represents that he agreed that the

instruction was proper. Br. of Repls't at 8, 14. To the contrary, Mr. Clark-El did not affirmatively agree that the instruction was proper. He simply did not object. RP 171. Citing no authority in support its contention, the State implies that this means the error was invited. Br. of Resp't at 10. But the invited error doctrine applies when the defendant proposes the same instruction, not when he fails to object. State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999).

As argued, the error qualifies as manifest constitutional error, which may be raised for the first time on appeal. Br. of App. at 11; RAP 2.5(a)(3); State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). Hence, the State is incorrect in arguing the issue may not be properly addressed for the first time on appeal. Br. of Resp't at 9, 11.

**b. The identity of the controlled substance was not “embedded” into the “to-convict” instruction.**

Controlling authority notwithstanding, the State next contends that there was no error. Br. of Resp't at 11-12. The State represents that the identity of the controlled substance need only be included in the charging document to provide notice of the penalty. Br. of Resp't at 13. The State contends that the identity of the controlled substance was necessarily “embedded” into the “to-convict” instruction because a definitional

instruction defined controlled substance to include methamphetamine. Br. of Resp't at 14-15.

In support of its position, the State relies on State v. Sibert, 168 Wn.2d 306, 230 P.3d 142 (2010). The State fails to acknowledge that there was no majority opinion in Sibert. Id. at 317; Br. of App. at 9-10. There, a plurality reasoned that while the “to-convict” instruction did not explicitly state that the jury must find that the controlled substance was methamphetamine, the “as charged” language incorporated the allegation from the charging document that the substance was methamphetamine. Sibert, 168 Wn.2d at 312 (plurality).

This plurality opinion is not controlling. In re Isadore, 151 Wn.2d 294, 302, 88 P.3d 390 (2004); Br. of App. at 10. Moreover, the instruction in Sibert is materially distinguishable from the instruction in this case. Unlike the instruction in Sibert, the “to-convict” instruction does not have the “as charged” language. CP 35. Still, the State maintains that the definitional instruction incorporated the identity of the controlled substance by defining methamphetamine as a controlled substance. Br. of Resp't at 6, 14. Even the plurality in Sibert did not make this argument. Contrary to the State's arguments, other instructions may not be used to supply missing elements. Smith, 131 Wn.2d at 262-63.

The State makes an analogy to the law of self-defense, stating that the “absence of self-defense element is embedded within the ‘intent element’ of the charged assault.” Br. of Resp’t at 15. This analogy is flawed. Self-defense instructions do not have to be part of the “to-convict” instruction, which sets forth the elements of the crime. State v. Hoffman, 116 Wn.2d 51, 109, 804 P.2d 577 (1991). When the issue is properly raised, the State must prove the absence of self-defense, not because it is an essential element of the crime, but because it negates an essential element. State v. Acosta, 101 Wn.2d 612, 616-177, 683 P.2d 1069 (1984). In contrast, the identity of the substance is an essential element when it increases the punishment imposed upon a defendant. Goodman, 150 Wn.2d at 785-86. It is not “embedded” in any element.

This Court should hold that the identity of the substance that Mr. Clark-El was alleged to have delivered was an essential element and that this element was missing from the “to-convict” instruction.

**c. The State also bore the burden of proving the essential element that Mr. Clark-El knew the specific identity of the controlled substance delivered.**

As argued, the State must also prove that the defendant knew the specific identity of the controlled substance delivered. Br. of App. at 11-16. Mr. Clark-El recognizes that this position is contrary to State v. Nunez-Martinez, 90 Wn. App. 250, 253, 951 P.2d 823 (1998). However,

Nunez-Martinez overlooked the rule of lenity and also did not consider the argument that a knowledge requirement results in fairer punishment. Br. of Resp't at 12-15. The opinion also makes the erroneous assumption that people will be insulated from criminal liability if the person is ignorant or mistaken about the substance delivered. Nunez-Martinez, 90 Wn. App. at 254; Br. of App. at 13-15. Thus, the opinion should not be followed.

The State argues that Nunez-Martinez must be blindly followed even if it is wrong or did not consider the precise arguments made by Mr. Clark-El. The State is incorrect. Panels of the Court of Appeals are free to state holdings that are inconsistent with prior holdings in earlier Court of Appeals' decisions. Grisby v. Herzog, 190 Wn. App. 786, 811, 362 P.3d 763 (2015). It is for this reason that inconsistent opinions of the Court of Appeals may exist at the same time. Id. at 809. "The Supreme Court settles the law when Court of Appeals decisions are in conflict." Id.

**d. Omission of an essential element is never harmless under the Washington Constitution.**

The United States Supreme Court has held that a jury instruction that omits an element of offense is subject to harmless error analysis. Neder v. United States, 527 U.S. 1, 9-10, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). The Washington Supreme Court has followed this approach. State v. Brown, 147 Wn.2d 330, 340, 58 P.3d 889 (2002). But the

Supreme Court in Brown did not analyze whether the Neder holding is consistent with the Washington Constitution. Indeed, the majority opinion does not cite to or discuss the Washington Constitution. The opinion does not indicate that a Gunwall<sup>1</sup> analysis was presented by any of the parties.

In contrast, Mr. Clark-El has argued that omission of an essential element is never harmless under the Washington Constitution. Br. of App. at 19-15. He has provided Gunwall briefing.

Rather than address the issue on the merits, the State contends that this Court is bound to apply Brown. Br. of Resp't at 18. But because Brown did not apply or purport to interpret the Washington Constitution, it is not controlling on the question. See State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) (“once this court has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by this court.”) (emphasis added). The Neder and Brown courts were construing the federal constitution, not the Washington Constitution. Interpretation of the Washington Constitution is an issue of state law for Washington courts, not the United States Supreme Court.

By not addressing the issue on the merits, the State has impliedly conceded that the Washington Constitution provides greater protection and

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<sup>1</sup> State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

is inconsistent with Neder. If this Court is unsatisfied with the State's lack of a response, the Court should order the State to provide a response on the merits and to brief the Gunwall factors. RAP 10.1(h). Otherwise, the Court should accept the implied concession and reverse.

**2. The Court exceeded its authority by sentencing Mr. Clark-El for delivery of methamphetamine because the jury did not find that he delivered methamphetamine.**

The jury found that Mr. Clark-El delivered a controlled substance, not methamphetamine. The court, however, sentenced Mr. Clark-El as if the jury had found that the substance was methamphetamine. CP 41. Absent such a finding from the jury, the trial court's sentence was unlawful. Apprendi v. New Jersey, 530 U.S. 466, 494, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); Sibert, 168 Wn.2d at 324 (Alexander, J., dissenting). Because this type of error is never harmless, this Court should reverse and remand for resentencing. State v. Williams-Walker, 167 Wn.2d 889, 901-02, 225 P.3d 913 (2010) (jury finding that defendant was armed with a deadly weapon did not authorize firearm enhancement despite undisputed evidence that weapon was a firearm).

The State cursorily argues that there was no error, contending that the jury actually found that Mr. Clark-El delivered methamphetamine. Br. of Resp't at 20-21. The State relies on Sibert. Br. of Resp't at 21. Again, the State ignores that Sibert did not have a majority and that the "to-

convict” instruction in Sibert is materially distinguishable. Accordingly, the State’s reliance on Sibert is misplaced and should be rejected.

**3. Appellate costs should not be imposed.**

The State has failed to respond to Mr. Clark-El’s argument on costs. Thus, should Mr. Clark-El not prevail, the Court should direct that no costs will be imposed. State v. Sinclair, 192 Wn. App. 380, 391, 367 P.3d 612 (2016) (“The State has the opportunity in the brief of respondent to make counterarguments to preserve the opportunity to submit a cost bill.”).

**B. CONCLUSION**

Essential elements of the offense were omitted from the “to-convict” instruction. This error is never harmless under the Washington Constitution. Mr. Clark-El’s conviction should be reversed and the case remanded for a new trial. Alternatively, the case should be remanded for resentencing because the jury’s verdict did not authorize the court’s sentence.

DATED this 2nd day of June, 2016.

Respectfully submitted,

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Attorney for Appellant

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DIVISION ONE**

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

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2<sup>ND</sup> DAY OF JUNE, 2016, I CAUSED THE ORIGINAL **REPLY 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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| [X ] | RANDOLPH CLARK-EL<br>898313<br>COYOTE RIDGE CORRECTIONS CENTER<br>PO BOX 769<br>CONNELL, WA 99326  | (X)<br>( )<br>( )        | U.S. MAIL<br>HAND DELIVERY<br>_____                              |

**SIGNED** IN SEATTLE, WASHINGTON THIS 2<sup>ND</sup> DAY OF JUNE, 2016.

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