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Court of Appeals
Division I

No. 75052-6-I

State of Washington
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

AUTUMN SINRUD,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

The Washington Constitution forbids trial judges from commenting on the evidence. At Autumn Sinrud’s trial for possession with intent to deliver a controlled substance, the court instructed the jury that to find intent, mere possession was inadequate and that “The law requires at least one additional corroborating factor.” Because this improperly implied that evidence of a single “corroborating factor” resulted in the intent element being met, this was a comment on the evidence. Because the State cannot meet its burden to affirmatively show that no prejudice could have resulted to Ms. Sinrud, this Court should reverse her conviction for possession with intent to deliver. Additionally, this conviction and the remaining conviction for simple possession should be reversed and dismissed with prejudice under the law of the case doctrine. The State did not prove beyond a reasonable doubt that Ms. Sinrud knew the identity of the substances that the State accused her of possessing, a requirement under the “to-convict” instructions.

B. ASSIGNMENTS OF ERROR

1. In violation of article IV, § 16 of the Washington Constitution, the trial court commented on the evidence by instructing the jury that “The law requires at least one additional corroborating factor” to prove intent to deliver a controlled substance. CP 69 (instruction 18).

2. The trial court erred in overruling Ms. Sinrud's objection to instruction number 18. CP 69.

3. Under the law of the case doctrine, the State failed to prove by sufficient evidence that Ms. Sinrud knew the identity of the substances the State alleged she possessed, proof of which was necessary under the jury instructions (counts one and two).

4. In violation of the prohibition against double jeopardy under the Fifth Amendment and article I, § 9 of the Washington Constitution, the trial court erred in entering the conviction for possession of a controlled substance (count one).

C. ISSUES

1. Judges may not comment on the evidence. A jury instruction comments on the evidence when it essentially resolves a factual issue. A jury instruction told the jury that possession alone was inadequate to prove intent to deliver, but went on to say that intent required evidence of at least one additional corroborating factor. By implying that evidence of a single corroborating factor resulted in the State meeting its burden to prove intent beyond a reasonable doubt, did this instruction comment on the evidence?

2. The law of the case doctrine requires the State to prove any added requirements in a "to-convict" instruction. The "to-convict" instructions for possession of a controlled substance (methamphetamine or

heroin) and possession with intent to deliver (methamphetamine) both required proof that Ms. Sinrud knew the specific identity of the substances alleged to have been possessed by her. Should the two convictions be reversed because the evidence did not prove that Ms. Sinrud possessed these substances knowing they were methamphetamine and heroin?

3. Double jeopardy is violated when convictions are entered for the same offense. An offense is the same when it is the same in fact and in law as another offense. Ms. Sinrud was convicted of possession of a controlled substance (methamphetamine or heroin) and possession of a controlled substance with intent to deliver (methamphetamine). The State conceded that the two convictions may be premised on the same fact (possessing methamphetamine). Possessing methamphetamine is the same “in law” as possessing methamphetamine with intent to deliver it. Given the double jeopardy violation, should the conviction for possession be vacated and all reference to it deleted from the judgment and sentence?

D. STATEMENT OF THE CASE

Based on substances discovered not in her own room, but found in a communal bathroom and a room adjacent to the bathroom occupied by two drug addicts, the State charged Autumn Sinrud with (1) possession of a controlled substance, methamphetamine or heroin, and (2) possession of

a controlled substance, methamphetamine, with intent to deliver. CP 84, 93-94, 175; RP 225, 292, 363-65.

Trial occurred in March 2016. The evidence at trial established that, in March 2014, Ms. Sinrud lived with her mother, Cheryl Opsal, along with Samantha Smith-Thomas and Bert Bostwick. RP 291. Their home had three bedrooms upstairs. Ex. 54. Ms. Sinrud and Ms. Opsal resided in their own rooms while Ms. Smith-Thomas and Mr. Bostwick shared a room. RP 298, 311-12, 346.

Law enforcement officers testified they executed a search warrant on the home on March 5, 2014.¹ RP 211-13. Ms. Opsal answered the door. RP 218-19. Deeming her uncooperative, two officers detained her outside of the home. RP 219, 306, 315, 326, 346; Ex. 66. The officers proceeded to clear the home. When the officers got to the stairwell leading upstairs, one officer saw Ms. Sinrud at the top of the stairs. RP 221. The officer also saw Mr. Bostwick looking down at him. RP 221. Ms. Smith-Thomas emerged and an officer told all three people to come downstairs. RP 330. They complied. RP 330. Mr. Bostwick and Ms. Smith-Thomas looked like they had just woken up, though it was light

¹ Though it was not admitted into evidence and there was no testimony on the matter, an officer's report states that the warrant was executed at 3:30 p.m. Ex. 60.

outside. RP 224-25; Ex. 67-68. They both appeared to be under the influence of narcotics. 3/17/16RP 31.

Law enforcement labeled the three bedrooms by letter. Ms. Opsal's was room "P," Ms. Sinrud's was room "N," and Mr. Bostwick's and Ms. Smith-Thomas's was room "M." Ex. 56; RP 223. Ms. Smith-Thomas referred to her room as the "flower room" because it had fake plastic flowers and flowers on the wall. RP 297-98. There was a shared bathroom outside in the hallway near room M. RP 225; 3/17/16RP 30. The other bathroom in the house was in Ms. Opsal's room, which was the master bedroom. 3/17/16RP 31.

In room P, Ms. Opsal's room, officers found white crystalline material weighing 2.07 grams, later determined to contain methamphetamine. RP 332-33, 348; CP 85. There were also straws. RP 331. Officers also found many small unused clear plastic bags. RP 333.

In room M or the flower room, where Mr. Bostwick and Ms. Smith-Thomas resided, officers found two bags containing methamphetamine under a desk drawer. RP 363-65; Ex. 72. One bag weighed 86.25 grams while the other weighed 372.77 grams. RP 366; CP 84. On top of the desk was a pipe, a lighter, Mr. Bostwick's driver's license, and other items owned by Mr. Bostwick. RP 362, 370; 3/17/16RP 97; Ex. 73-74, 81. A marijuana plant was found in the closet. RP 393-94;

Ex. 70-72. Ms. Smith-Thomas's purse was on the bed and found to contain methamphetamine. RP 364; 3/17/16RP 75; Ex. 69.

In the nearby communal bathroom, officers found a small plastic bag containing a blackish-brown substance in the toilet. RP 225; CP 84. The substance contained heroin and, including the bag, weighed 49.2 grams. CP 84; RP 375. Near the toilet, officers found a small black lockbox. RP 226. Inside was a small plastic bag containing a white crystalline substance. RP 234-35, 366. The white crystalline substance contained methamphetamine and weighed 12.52 grams. CP 84. The box contained other items, including a small digital scale, latex gloves, alcohol wipes, rubber tubing, a lighter, pipes, a spoon, and cotton balls. RP 267-70, 273.

In room N, Ms. Sinrud's room, no drugs were found. RP 249. No scales or drug ledgers were found. RP 250, 257. No drug paraphernalia was found. RP 249-53, 279, 322. The officers found some small, unused, clear plastic bags in the room, which were legal to possess. RP 253-55, 282. The bag found in the bathroom containing the heroin was different from these bags. RP 283. The officers found \$1,100 in cash in a closet drawer. RP 312; Ex. 99. Inside a small lockbox near the drawer, officers found \$2,700 after breaking it open. RP 312; Ex. 100.

Two detectives testified as to the value of the drugs and how many doses the drugs would provide. The methamphetamine in the bathroom was worth about \$500 and could provide about six doses. 3/17/16RP 18-19; RP 374-75. The heroin was worth about \$2,400 and could provide about 32 doses. 3/17/16RP 19; RP 375. Together, the two bags of methamphetamine found under the desk in Mr. Bostwick's and Ms. Smith-Thomas's room was worth around \$12,000 to \$15,000 and could provide about 229 doses. 3/17/16RP 18-19; RP 376.

Mr. Bostwick did not testify. However, his wife, Ms. Smith-Thomas, testified. RP 290. Ms. Smith-Thomas had pleaded guilty to possession of methamphetamine and her plea agreement required her to testify. 3/17/16RP 90. Ms. Smith-Thomas believed that her guilty plea was premised on the methamphetamine found in her purse. 3/17/16RP 94.

Ms. Smith-Thomas testified she moved into the home about a month before the raid. RP 295. She had known Ms. Sinrud for about six months. 3/17/16RP 113. She and Mr. Bostwick had slept in the "flower room" for a month. 3/17/16RP 95; RP 297. They used the communal bathroom next to their room. RP 299.

Both Ms. Smith-Thomas and Mr. Bostwick smoked methamphetamine. RP 292. Ms. Smith-Thomas used methamphetamine often, typically smoking a few grams a day. RP 300; 3/17/16RP 88. She

denied using heroin. RP 292. Ms. Smith-Thomas was about eight months pregnant in March 2014. RP 295. Ms. Smith-Thomas testified everyone in the home used drugs. RP 293-94. She recalled smoking methamphetamine and marijuana with Ms. Sinrud. RP 294. Ms. Smith-Thomas did not know where the methamphetamine came from, “it was just always there.” RP 294, 300. She remembered that people often came over to the house. RP 299.

Ms. Smith-Thomas claimed that neither she nor Mr. Bostwick sold methamphetamine or heroin. RP 297. She admitted that the methamphetamine found in her purse belonged to her, but claimed not to have known about the methamphetamine found under the desk in her room. 3/17/16RP 75-76, 101-02. She also denied owning the marijuana plant, stating that a “friend” had brought it over and told her to hold on to it. 3/17/16RP 76. While she could not speak for Mr. Bostwick, she had not provided Ms. Opsal drugs in exchange for permission to stay. 3/17/16RP 104.

Ms. Smith-Thomas and Ms. Sinrud were friends. 3/17/16RP 113. Though no scale was found in Ms. Sinrud’s room, Ms. Smith-Thomas recalled seeing a large scale in Ms. Sinrud’s room. 3/17/16RP 84. She testified that Ms. Sinrud made crafts, such as jewelry and necklaces. 3/17/16RP 105. Ms. Smith-Thomas testified that she drove Ms. Sinrud

around three to five times while living at the house. 3/17/16RP 78, 82. They would sometimes go to a restaurant and Ms. Smith-Thomas would wait there for about 15 to 20 minutes while Ms. Sinrud did something else. 3/17/16RP 81-82.

Ms. Smith-Thomas testified that she was half asleep when the officers entered the home and that she had walked out of her room with her hands up. 3/17/16RP 87. She thought Mr. Bostwick was just waking up too. 3/17/16RP 88. She believed that she had heard Ms. Sinrud cursing in the area near the bathroom. 3/17/16RP 87.

The jury convicted Ms. Sinrud as charged. 3/21/16RP 2. At sentencing, Ms. Sinrud maintained her innocence of the charged crimes and expressed that she had likely hurt herself by not testifying at trial. 4/11/16RP 521. The court sentenced Ms. Sinrud to 16 months of confinement. 4/11/16RP 522. Noting that Ms. Sinrud had been out of custody and had appeared regularly for court, the trial court granted her request to stay the sentence pending appeal. 4/11/16RP 523.

E. ARGUMENT

1. The jury instruction stating that evidence of at least one corroborating factor in addition to possession was necessary to prove intent to deliver constituted a judicial comment on the evidence in violation of the Washington Constitution.

a. The Washington Constitution forbids judicial comments on the evidence.

“Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” Const. art. IV, § 16. “A judge is prohibited by article IV, section 16 from ‘conveying to the jury his or her personal attitudes toward the merits of the case’ or instructing a jury that ‘matters of fact have been established as a matter of law.’” State v. Jackman, 156 Wn.2d 736, 743-44, 132 P.3d 136 (2006) (quoting State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)).

“[A]ny remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as judicial comment.” State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Similarly, an instruction in a criminal case that “essentially resolve[s] a contested factual issue” constitutes a judicial comment on the evidence and effectively relieves the State of its burden of proof. State v. Brush, 183 Wn.2d 550, 557, 353 P.3d 213 (2015).

b. By instructing the jury that one additional corroborating factor was necessary to prove intent, the court commented on the evidence, essentially resolving a key factual issue for the jury.

The court instructed the jury on the issue of intent, telling the jury that in addition to possession, the “law requires at least one additional corroborating factor”:

Mere possession of a controlled substance does not allow you to infer an intent to deliver a controlled substance. The law requires substantial corroborating evidence of intent to deliver in addition to the mere fact of possession. *The law requires at least one additional corroborating factor.*

CP 69 (emphasis added). The emphasized language was added to the instruction over Ms. Sinrud’s objection. RP 420-21.

This is not a pattern instruction. The instruction is premised on language from caselaw analyzing the legal sufficiency of the evidence on the element of intent. For example, in a case involving a challenge to the sufficiency of the evidence on a conviction for possession with intent to deliver, this Court wrote, “Convictions for possession with intent to deliver are highly fact specific and require substantial corroborating evidence in addition to the mere fact of possession.” State v. Brown, 68 Wn. App. 480, 485, 843 P.2d 1098 (1993). The Court further stated, “Washington cases where intent to deliver was inferred from the possession of a quantity of narcotics all involved at least one additional

factor.” Id. at 484. Other cases are in accord. See, e.g., State v. Goodman, 150 Wn.2d 774, 783, 83 P.3d 410 (2004); State v. Darden, 145 Wn.2d 612, 624-25, 41 P.3d 1189 (2002).

In analyzing this instruction, our Supreme Court’s decision in Brush is helpful. There, our Supreme Court reviewed an instruction defining the term “prolonged period of time.” Id. at 555. This term is used in a statute providing that a crime is aggravated if “the offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time.” RCW 9.94A.535(3)(h)(i). The trial court in Brush instructed the jury that the term “‘prolonged period of time’ means more than a few weeks.” Brush, 183 Wn.2d at 555.

The Brush Court held that this “instruction constituted an improper comment on the evidence because it resolved a contested factual issue for the jury.” Id. at 559. The court reasoned that the “instruction essentially stated that if the abuse occurred over a time period that was longer than a few weeks, it met the definition of a ‘prolonged period of time.’” Id.

In reaching this conclusion, the court noted that the instruction was premised on a Court of Appeals case, which had held that two weeks is not a “prolonged period of time.” Id. at 557 (discussing State v. Barnett, 104 Wn. App. 191, 203, 16 P.3d 74 (2001)). Recognizing that a jury

instruction which accurately states the law does not constitute a comment on the evidence, the court reasoned that the instruction misinterpreted the holding of the appellate case because the instruction improperly implied any abuse occurring for more than few weeks qualified. Id. at 557-558. The court further reasoned that it was not appropriate to define the term “prolonged period of time” based on a case discussing the legal sufficiency of the evidence. Id. at 588. The court clarified “that legal definitions should not be fashioned out of courts’ findings regarding legal sufficiency.” Id.

The analysis in this case is analogous to Brush. Like the language in Brush, which implied the aggravator was met if the abuse occurred over a period longer than a few weeks, the language here implied that the element of intent was established if there was evidence of a single “corroborating factor.” But each case is “highly fact specific.” Brown, 68 Wn. App. at 485. The instruction here essentially told the jury that evidence of a single “corroborating factor” is enough evidence to find intent. The jury, not the court, makes this determination. See Goodman, 150 Wn.2d at 783 (“it is the duty of the fact finder, not the appellate court, to weigh the evidence.”). The instruction here also conflicts with the Brush court’s warning that jury instructions should not be based on caselaw analyzing whether specific evidence in a particular case was

sufficient to satisfy the State’s burden of proof. Brush, 183 Wn.2d at 558.

The language at issue does exactly that. Applying Brush, this Court should hold that the trial court’s instruction commented on the evidence.

c. The State cannot meet its burden to affirmatively prove that the judicial comment did not prejudice Ms. Sinrud.

Judicial comments are presumed to be prejudicial and the State bears the burden to prove that the defendant was not prejudiced. Levy, 156 Wn.2d at 723. To affirm, the “record must affirmatively show that no prejudice *could* have resulted.” Jackman, 156 Wn.2d at 745 (emphasis added). This standard is unique and is distinct from the constitutional harmless error test applied to trial-type errors. Levy, 156 Wn.2d at 725.

Properly applying this heightened standard, the Brush court reversed an exceptional sentence involving a similar error. Brush, 183 Wn.2d at 559-60. In Brush, the defendant murdered his ex-fiancée. Id. at 552. There was evidence of incidents of abuse in the two-month period before the murder. Id. at 559. In reversing, our Supreme Court reasoned that a “straightforward application of the jury instruction would likely lead a jury to conclude that the abuse in this case met the given definition of ‘prolonged period of time’” and that the State “[m]ost certainly” failed to “meet the high burden of showing from the record that ‘no prejudice could have resulted.’” Id. at 559-60.

Likewise, here the jury may have concluded that there was evidence of one “corroborating factor” and, instead of weighing this evidence, mechanically applied the instruction to find guilt. For example, the jury might have reasoned that because there was evidence of money or small clear plastic bags in Ms. Sinrud’s room, the State necessarily proved beyond a reasonable doubt that she intended to deliver methamphetamine. Moreover, the prosecutor emphasized the judicial comment during closing argument, representing that the requirement that “there must be substantial corroborating evidence of intent to deliver in addition to possession” “means there must be at least one additional corroborating factor.” RP 433. Thus, absent the judicial comment, the jury might have entertained a reasonable doubt on the element of intent.

The State cannot meet its extraordinary burden to affirmatively prove that no prejudice could have resulted. This Court should reverse the conviction for possession with intent to deliver a controlled substance, and remand for a new trial.

2. The jury instructions required the State to prove that Ms. Sinrud knew the identity of the substances she was alleged to possess. Applying the law of the case doctrine, the State did not meet its burden to prove this added requirement.

a. The law of the case doctrine remains good law. Under this doctrine, the State bears the burden of proving all the elements in a “to-convict” instruction beyond a reasonable doubt.

The State bears the burden to prove all the elements of an offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 361, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. const. amend. XIV; Const. art. I, § 3. Under the law of the case doctrine, jury instructions not objected to became the law of the case. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). The State assumes the burden of proving all the elements in a “to-convict” instruction, including any added requirements. Id. “The law of the case is an established doctrine with roots reaching back to the earliest days of statehood.” Id. at 101.

Despite its longstanding roots in Washington law, a panel of this Court recently concluded that the law of the case doctrine no longer exists in Washington. State v. Tyler, 195 Wn. App. 385, ___ P.3d ___ (2016) (petition for review filed October 25, 2016). The basis for this conclusion is a United States Supreme Court case. Musacchio v. United States, 577 U.S. ___, 136 S. Ct. 709, 193 L. Ed. 2d 639 (2016). In Musacchio, the court held that a challenge to the sufficiency of the evidence under due

process “should be assessed against the elements of the charged crime, not against the erroneously heightened command in the jury instruction.”

Musacchio, 136 S. Ct. at 715. Because the court was reviewing a federal criminal case, the Court was necessarily construing the due process clause of the Fifth Amendment (which constrains the federal government), not the due process clause of the Fourteenth Amendment (which constrains the states). Id. at 716.

This holding does not overrule Hickman or abrogate long-standing Washington precedent on the law of the case doctrine. Contrary to Tyler, the law of the case doctrine in Washington is not premised on the due process clause of the Fourteenth Amendment. Rather, it is premised on the Washington Constitution and the rules of appellate review as crafted by Washington courts since the birth of this state. See Hickman, 135 Wn.2d at 101-02 (collecting cases). As the Washington Supreme Court has explained, the law of the case doctrine arises “from the nature and exigencies of appellate review,” not simply from the constitutional principle that the State must prove every element of the crime beyond a reasonable doubt:

This case is framed by *two* fundamental principles of law: the first constitutional, *the second arising from the nature and exigencies of appellate review*. The first principle is that constitutional due process requires that the State prove every element of the crime beyond a reasonable

doubt. The second principle is that “jury instructions not objected to become the law of the case.” If the jury is instructed (without objection) that to convict the defendant, it must be persuaded beyond a reasonable doubt of some element that is not contained in the definition of the crime, the State must present sufficient evidence to persuade a reasonable jury of that element regardless of the fact that the additional element is not otherwise an element of the crime.

State v. France, 180 Wn.2d 809, 814, 329 P.3d 864 (2014) (emphasis added) (citations omitted).

Explored more thoroughly, the law of the case doctrine in Washington is premised on Washington common law and article IV, § 16, which provides that judges “shall declare the law.” Const. art. IV, § 16. Thus, in 1896, our Supreme Court described the law of the case doctrine as a “general rule,” and noted that it had special support in article IV, § 16. Pepperall v. City Park Transit Co., 15 Wash. 176, 183, 45 P. 743 (1896). Neither Pepperall nor Hickman cite to the Fourteenth Amendment or use the phrase “due process” in expounding on the law of the case doctrine.

The standard used to evaluate the sufficiency of evidence in criminal cases can be traced to Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) and In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Winship held that the due process clause of the Fourteenth Amendment requires the State to prove every element of a criminal offense beyond a reasonable doubt. Winship,

397 U.S. at 364. Jackson held that in evaluating whether the State has met this burden, the Court should view the evidence in the light most favorable to the prosecution and analyze whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Virginia, 443 U.S. at 319. Shortly after Jackson, the Washington Supreme Court adopted this standard in evaluating the sufficiency of the evidence. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980).

The Washington Supreme Court also adopted the same standard in reviewing whether the State has met its burden to prove an added requirement in a jury instruction. Hickman, 135 Wn.2d at 103. But it does not therefore follow that the law of the case doctrine is dependent on the due process clause of the Fourteenth Amendment, as construed by the United States Supreme Court. The law of the case doctrine was applied in criminal cases predating Winship, Jackson, and Green. See, e.g., State v. Hames, 74 Wn.2d 721, 724-25, 446 P.2d 344 (1968); State v. Hall, 41 Wn.2d 446, 451, 249 P.2d 769 (1952).

Accordingly, Tyler incorrectly concluded that Musacchio overruled Hickman. Because the issue is not a matter of federal constitutional law, states throughout the union remain free to continue use the jury instructions as the yardstick in deciding whether parties—including the government, have met their burden. See Michigan v. Long,

463 U.S. 1032, 1040, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983) (Supreme Court will not review judgments of state courts that rest on adequate and independent state grounds). This panel (or even the same panel) need not perpetuate the error. Grisby v. Herzog, 190 Wn. App. 786, 809-10, 362 P.3d 763 (2015); (“two inconsistent opinions of the Court of Appeals may exist at the same time.”); see, e.g., State v. Morgan, 163 Wn. App. 341, 351, 261 P.3d 167 (2011) (reaching different result than previous panel on identical issue). Hickman remains good law and must be followed.

b. The State assumed the burden of proving that Ms. Sinrud knew the specific identity of the controlled substances that the State alleged she possessed.

Ordinarily, to prove a person guilty of possession or delivery of a controlled substance, the State need not prove that the defendant knew the identity of the substance. As interpreted, to be guilty of delivery, the person need only know that the substance was a controlled substance. State v. Nunez–Martinez, 90 Wn. App. 250, 255-56, 951 P.2d 823 (1998). And for possession, the State need not even prove the person had knowledge of the possession itself. State v. Cleppe, 96 Wn.2d 373, 380, 635 P.2d 435 (1981).

Under the jury instructions, the State was required to prove that Ms. Sinrud knew the specific identity of the substances alleged to have

been possessed. The “to-convict” instruction on possession (count one) required the State to prove:

(1) That on or about the 5th day of March, 2014, the Defendant *knowingly* possessed a controlled substance:

(a) methamphetamine

or

(b) heroin

and

(2) That this act occurred in the State of Washington.

CP 64 (instruction 13) (emphasis added). Similarly, the “to-convict” instruction on possession with intent to deliver a controlled substance (count two) provided:

(1) That on or about the 5th day of March, 2014, the defendant *knowingly* possessed a controlled substance methamphetamine;

(2) That the defendant possessed the methamphetamine with the intent to deliver it; and

(3) That this act occurred in the State of Washington.

CP 66 (emphasis added). The State proposed these instructions and did not object. 3/17/16RP 51-52; RP 418. The pattern instructions do not contain the “knowingly” language. 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 50.02; 50.14 (4th Ed).

Under these two instructions, because the State did not object, the State bore the burden of proving that Ms. Sinrud knew that the substances were methamphetamine and heroin. See State v. Hudlow, 182 Wn. App. 266, 286, 331 P.3d 90 (2014) (State assumed burden where to-convict instruction required proof “the defendant knew that the substance delivered was a controlled substance methamphetamine.”); State v. Ong, 88 Wn. App. 572, 577, 945 P.2d 749 (1997) (State assumed burden under instructions to prove that substance was morphine); Hall, 41 Wn.2d at 450-51 (State assumed burden under instructions to prove defendant knew substance was marijuana).

c. The evidence did not prove beyond a reasonable doubt that Ms. Sinrud had knowledge of the identity of the substances that the State alleged she possessed.

When reviewing whether the State has met its burden to prove a requirement in a to-convict instruction, the court uses the familiar sufficiency of the evidence standard. Hickman, 135 Wn.2d at 103. The court inquires whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the requirements beyond a reasonable doubt. Id. While inferences are drawn in the State’s favor, these inferences must be reasonable and cannot be based on speculation or conjecture. State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

“A person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he or she is aware of that fact, circumstance or result.” CP 68; accord RCW 9A.08.010(1)(b)(i). “If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.” CP 68; accord RCW 9A.08.010(1)(b)(ii).

The State failed to prove that Ms. Sinrud knew the substances were methamphetamine and heroin. There was no statement from Ms. Sinrud admitted at trial stating that she knew the substances found in the house were methamphetamine and heroin. As for circumstantial evidence, Ms. Smith-Thomas testified that the only drugs she used were methamphetamine and marijuana, and that she had used these two drugs with Ms. Sinrud. RP 292-94. But this does not prove that Ms. Sinrud knew the substances later found in the house were methamphetamine or heroin. It only proves that Ms. Sinrud used controlled substances with Ms. Smith-Thomas. Similarly, while there was evidence suggestive of drug use and drug sales, at most this proves only that Ms. Sinrud knew that the substances were controlled substances, not that they were heroin or methamphetamine.

Precedent supports this analysis. For example, in Ong, this Court held that the State had failed to prove that the defendant knew the substance alleged to be possessed was morphine. Ong, 88 Wn. App. at 577-78. This Court reasoned that while the defendant possessed drug paraphernalia and had testified he knew the substance was pain medication, neither this nor other evidence pointed “to knowledge that the substance was morphine rather than any other controlled substance.” Id.

By contrast, in Hudlow, this Court held there was sufficient evidence proving that the defendant knew he delivered methamphetamine. Hudlow, 182 Wn. App. at 288-89. Testimony established the price of methamphetamine and evidence showed that the defendant, in a controlled-buy, had accepted a price suitable for the amount of methamphetamine sold. Id. Based on this circumstantial evidence, the jury could infer that the defendant knew the substance was methamphetamine. Id. at 289.

This case is more like Ong than Hudlow. There was no evidence comparable to that in Hudlow. While currency was found in Ms. Sinrud’s room, there was no drug ledger, which might tend to show knowledge. RP 250. No drugs or drug paraphernalia were found in Ms. Sinrud’s room either, only small plastic bags, which were legal to possess and had many uses. RP 249-50, 253-55. While some drug paraphernalia was found in a

box in the bathroom close to the heroin and methamphetamine, RP 267-71, as in Ong, this does not prove that Ms. Sinrud knew the substances were heroin and methamphetamine.

d. Both convictions should be reversed and dismissed with prejudice. Alternatively, if the evidence was insufficient to prove knowledge as to just one of the two substances on the possession charge, that conviction should be reversed and a new trial ordered.

Because the State failed to prove that Ms. Sinrud knew the substances forming the possession with intent to deliver charge (count two) were methamphetamine, that conviction should be reversed and dismissed with prejudice. Hickman, 135 Wn.2d at 99, 106. For the same reason, because the State did not prove that Ms. Sinrud knew the substances forming the possession charge (count one) were methamphetamine or heroin, that charge should also be reversed and dismissed with prejudice. Id.

Concerning the possession charge, the jury was instructed that it need not be unanimous as to whether Ms. Sinrud knowingly possessed methamphetamine or heroin, so long as each juror found that at least one of these two alternatives were proved beyond a reasonable doubt. CP 64. Thus, if this Court concludes there was sufficient evidence for the jury to find that Ms. Sinrud had knowledge as to one substance (e.g.,

methamphetamine), but not the other (e.g., heroin), the verdict may not be unanimous. Criminal defendants in Washington have a right to a unanimous jury verdict. Const. art. I, § 21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). Thus, if the evidence is insufficient to prove one of the alternative means of possession, the conviction must be reversed because it cannot be determined that the jury was unanimous as to the means for which there was sufficient evidence. Ortega-Martinez, 124 Wn.2d at 708. In this event, the Court should remand for a new trial solely on the alternative for which there was sufficient evidence. See, e.g., State v. Joy, 121 Wn.2d 333, 345-46, 851 P.2d 654 (1993).

3. The conviction for possession violates the prohibition against double jeopardy. The conviction should be vacated and all reference to it removed from the judgment and sentence.

If the Court disagrees with the foregoing arguments, the Court should order the possession conviction vacated under double jeopardy principles.

Under the Washington and federal constitutions, double jeopardy prohibits multiple punishments for the same offense. State v. Kier, 164 Wn.2d 798, 803, 194 P.3d 212 (2008); Const. art. I, § 9; U.S. const.

amend. V. Under the “same elements” or Blockburger² test, the court examines whether two offenses are the same in fact and the same in law. Kier, 164 Wn.2d at 804. The elements of the crimes are to be viewed “as charged and proved, not merely as the level of an abstract articulation of the elements.” State v. Freeman, 153 Wn.2d 765, 777, 108 P.3d 753 (2005). Double jeopardy is violated “where the evidence required to support a conviction upon one of the charged crimes would have been sufficient to warrant a conviction upon the other.” In re Pers. Restraint of Orange, 152 Wn.2d 795, 820, 100 P.3d 291 (2004) (internal citations and quotations omitted). If the information, instructions, testimony, and argument do not clearly demonstrate that the State was not seeking to impose multiple punishments for the same offense, then there is a double jeopardy violation. State v. Mutch, 171 Wn.2d 646, 664, 254 P.3d 803 (2011). This Court’s review is de novo. Id. at 662.

It is impossible to commit the offense of possession of a controlled substance with intent to deliver without possessing the substance. Thus, possession of methamphetamine is the same offense as possession of methamphetamine with intent to deliver. See State v. Rodriguez, 48 Wn.

² Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

App. 815, 816-17, 740 P.2d 904 (1987) (possession of marijuana with intent to deliver is a lesser included offense of delivery of marijuana).

The State represented that the conviction for possession (count one) should “merge” with the conviction for possession with intent to deliver (count two). CP 2. This was because it was possible that the jury found both convictions to be premised on the same act of possessing the methamphetamine in the bathroom. CP 2. The State had elected the possession charge as being premised on the methamphetamine and heroin found in the bathroom. RP 430. As for the charge of possession with intent to deliver methamphetamine, the State did not make an election, arguing that it could be premised on the methamphetamine found in the bathroom or in the “flower room,” so long as the jury was unanimous. RP 432. Because only general verdict forms were used, it is possible that the convictions for possession of methamphetamine and possession of methamphetamine with intent to deliver are based on the same act.

At sentencing, the court accepted the State’s position, finding that the counts merged. RP 522. Still, the judgment and sentence recounts that Ms. Sinrud was convicted of possession of a controlled substance (count one). CP 17. This was error. See State v. Garcia, 65 Wn. App. 681, 691, 829 P.2d 241 (1992) (conviction for possession with intent to deliver could not stand because defendant’s conviction for delivery of a controlled

substance may have been premised on same act). While the court did not count the offense against Ms. Sinrud in calculating her offender score, the proper remedy is vacation of the conviction. State v. Womac, 160 Wn.2d 643, 658-60, 160 P.3d 40 (2007). This Court should remand with instruction that all reference to Ms. Sinrud being convicted of possession (count one) be erased from the judgment and sentence.

Additionally, the judgment and sentence erroneously states that 16 months of confinement was imposed on count 1 (possession), rather than count 2 (possession with intent to deliver). CP 9. This error should also be corrected on remand.

4. No costs should be awarded for this appeal.

If Ms. Sinrud does not prevail in this appeal, the State may request appellate costs. RCW 10.73.160(1); RAP 14.2. 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, 192 Wn. App. 380, 388, 367 P.3d 612 (2016). This means “making an individualized inquiry.” Sinclair, 192 Wn. App. at 391 (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 389.

The trial court found Ms. Sinrud indigent and waived all discretionary legal financial obligations. 4/11/16RP 522-23; Supp. CP __

(sub. no 85). This creates a presumption of indigency that continues on appeal. RAP 15.2(f); Sinclair, 192 Wn. App. at 393. Given Ms. Sinrud's indigent status, this Court should exercise its discretion and rule that no costs will be awarded. Cf. Sinclair, 192 Wn. App. at 392-93 (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 State did not prove beyond a reasonable doubt that Ms. Sinrud knew the identity of the substances alleged to have been possessed. Her convictions should be reversed and dismissed with prejudice. If not, the judicial comment on the evidence requires reversal of the conviction for possession with intent to deliver and remand for a new trial. Alternatively, the possession conviction should be ordered vacated because it violates the prohibition against double jeopardy.

DATED this 4th day of November, 2016.

Respectfully submitted,

/s Richard W. Lechich
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Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 75052-6-I
)	
AUTUMN SINRUD,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF NOVEMBER, 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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SIGNED IN SEATTLE, WASHINGTON, THIS 4TH DAY OF NOVEMBER, 2016.



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