

No. 33373-2-II

COURT OF APPEALS, DIVISION II
IN AND FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

Vs.

Richard Sibert,

Appellant

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DIVISION II
STATE OF WASHINGTON

Appeal from the Superior Court of Washington, in and for Lewis County
Cause No. 04-8-00284-2
The Honorable H. John Hall, Judge

Respondent's Brief

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I. STATEMENT OF THE FACTS AND PRIOR PROCEEDINGS

The State accepts, as adequate, the Appellant's Statement of Facts and Prior Proceedings, with the following additions:

All of the verdict forms incorporated by reference the charging information.¹ The charging information clearly identified the illegal substance to be proved as methamphetamine.²

II. ARGUMENT

1. **The Appellant has cited no evidence the jury was misled by the Court's knowledge instruction.**

The burden is on the Appellant to show the jury was misled. He has provided nothing beyond his self serving assertion. No affidavit was produced from any of the jury members regarding their thought process, or whether or not they were confused by the language of the instruction.

Affidavits from jury members have been used to ascertain jury misconduct.³ No less should be require when an Appellant alleges the jury was confused. Without any evidence of jury

¹ CP 55-58

² CP 12-14

³ *State v. Balisok*, 123 Wn.2d 114, 120, 866 P.2d 301 (1994). While this case does not say "affidavits are required", an affidavit from the jury foreperson was used by the Supreme Court in its analysis.

confusion, the Appellant's assertion is nothing more than speculation.

2. WPIC 10.02 does not misstate the law.

Here are the two clauses the Appellant wishes the court to distinguish:

"...described by law as being a crime,..."⁴

"...described by statute defining an offense;..."⁵

This is a distinction without a difference. If the clauses are lined upon, one on top of the other as shown above, they are virtually identical. A "law" is a "statute." A "crime" is an "offense." All WPIC 10.02 does is simplify the statute into layman's terms.

Appellant argues WPIC 10.02 is "nonsensical". No authority is provided to support his position. No authority is provided by the Appellant to show the wording of a long standing, pattern, jury instruction should be rewritten. The Washington Supreme Court has consistently upheld the validity of the instruction.⁶ WPIC 10.02 was copied verbatim in Instruction No. 18.⁷

⁴ WPIC 10.02

⁵ RCW 9A.08.010(1)(b)(i)

⁶ *State v. Vanoli*, 86 Wn.App. 643, 647, 937 P.2d 1166 (1997), citing *State v. Johnson*, 119 Wn.2d 167, 174, 829 P.2d 1082 (1992); *MGinnis v. Blodgett*, 67 F.3d 307 (9th Cir. 1995), cert. denied, 516 U.S. 1160, 116 s. Ct. 1046 (1996); *State v. Leech*, 114 Wn.2d 700, 709-10, 790 P.2d 160 (1990).

⁷ CP 21

3. The definition of “controlled substance” is not an element of the crime of “delivery of a controlled substance.” The Appellant misapplied the holdings in *State v. Goodman* and *State v. Lorenz*.

State v. Goodman dealt with the charging document, not the “to convict” jury instruction.⁸ Sibert’s charging information did list methamphetamine as the controlled substance he delivered in all four counts.⁹ Sibert was therefore on notice not only that the controlled substance to be proved by the State was methamphetamine, but that if he was convicted he would receive a greater penalty than if he delivered another controlled substance.¹⁰

No evidence of any controlled substance other than methamphetamine was presented at trial. The evidence of methamphetamine was entered at trial without objection.¹¹

Likewise, Mr. Sibert has misapplied the holding in *State v. Lorenz*. The “to convict” jury instruction must contain all elements of the crime.¹² The elements of the crime “delivery of a controlled substance” are listed in RCW 69.50.410(1):

⁸ *State v. Goodman*, 150 Wn.2d 774, 787, 83 P.3d 410 (2004).

⁹ CP 15-18

¹⁰ CP 15-18

¹¹ RP (4-27-2005), page 224 through 230.

¹² *State v. Lorenz*, 152 Wn.2d 22, 31, 93 P.3d 133 (2004).

“Except as authorized by this chapter, it is unlawful for any person to manufacture, *deliver*, or possess with intent to manufacture or deliver, *a controlled substance*. (emphasis added).¹³

The statute does not require naming the exact “controlled substance” delivered. A separate instruction defines methamphetamine as a “controlled substance.”¹⁴ This is the same circumstance as the “to convict” instruction in *State v. Lorenz*, which is cited by the Appellant. The Court in *Lorenz* upheld placing the definition of an element in a separate instruction from the “to convict” Instruction.¹⁵

In *Lorenz*, the “to convict” instruction for Child Molestation in the First Degree required a finding of “sexual contact”. A definition of sexual contract was included in another instruction. Lorenz argued that the definition of sexual contract should have been included in the “to convict” instruction.¹⁶ The Court held the definition was not an essential element, but merely a clarified of an essential element.¹⁷ The Court based its decision on a number of arguments which apply to Mr. Sibert.

¹³ RCW 69.50.410(1)

¹⁴ CP 19, Instruction 15

¹⁵ *State v. Lorenz*, 152 Wn.2d at 38 (2004).

¹⁶ *State v. Lorenz*, 152 Wn.2d at 30 (2004).

¹⁷ *State v. Lorenz*, 152 Wn.2d at 36 (2004).

First, the plain meaning rule requires courts to derive the meaning of a statute from the wording of the statute itself.¹⁸ The legislature codified “sexual contact” as an essential element of the crime.¹⁹ Sexual gratification, however, is not an element of the crime, but rather is a definition used to clarify the meaning of sexual contact.²⁰

Likewise, the legislature codified “controlled substance” as an essential element of unlawful delivery of a controlled substance.²¹ But there are many different controlled substances. Methamphetamine is simply one controlled substance.

Secondly, definitions of terms used by one statute are typically placed by the State legislature in another statute.²² That is the case here. The offense statute (RCW 69.50.401(1)) makes it illegal to deliver a controlled substance. Substances that are controlled are listed in a completely different set of laws: RCW 69.50.203 through RCW 69.50.214.

¹⁸ *State v. Lorenz*, 152 Wn.2d at 34 (2004).

¹⁹ *State v. Lorenz*, 152 Wn.2d at 34 (2004).

²⁰ *State v. Lorenz*, 152 Wn.2d at 34 (2004).

²¹ RCW 60.50.401(1)

²² *State v. Lorenz*, 152 Wn.2d at 35 (2004).

Thirdly, Courts have never replaced an element in the “to convict” instruction with words defining the element.²³ For example, the definition of “bodily harm” is not in WPIC 35.15.²⁴ The definition of “threat” is not in WPIC 115.51.²⁵

Lastly, requiring definitions in the “to convict” instruction would be poor judicial policy because inclusion of the definitions would result in lengthy “to convict” instructions that could potentially confuse the jury.²⁶

4. Sibert did not receive an aggravated sentence. He was sentenced to the standard range.

“Statutory maximum” does not refer to the maximum sentence authorized by the legislature for a crime.²⁷ Instead, “statutory maximum” means the maximum sentence a trial judge is authorized to give without finding additional facts.²⁸ The Supreme Court held in *Blakely* that “[o]ther than the fact of a prior conviction, any fact which increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond

²³ *State v. Lorenz*, 152 Wn.2d at 35 (2004).

²⁴ *State v. Laico*, 97 Wn.app. 759, 764, 987 P.2d 638 (1999).

²⁵ *State v. Marko*, 107 Wn.App. 215, 219-20, 27 P.3d 228 (2001).

²⁶ *State v. Lorenz*, 152 Wn.2d at 35 (2004).

²⁷ *State v. Evans*, 154 Wn.2d 438, 441, 118 P.3rd 419 (2005), citing *State v. Blakely*, 542 U.S. 286, 124 S. Ct. 2531, 2538, 159 L. Ed. 403 (2004).

²⁸ *State v. Evans*, 154 Wn.2d at 442 (2005).

a reasonable doubt.”²⁹ Prior convictions that enhance a defendant’s sentence need not be proved under *Blakely*.³⁰ Specifically in Washington State, the maximum sentence a trial judge is allowed is the top of the standard sentencing range as stated in the Sentencing Reform Act (SRA), RCW 9.94A.³¹

Applying this standard to Mr. Sibert, the convictions were for possession of a controlled substance.³² A special finding was made by the jury for the school zone enhancement.³³ Mr. Sibert’s stipulated, criminal history consisted of two felonies, which resulted in an offender score of five (5).³⁴ The four jury verdict forms incorporated by reference the charging information.³⁵ The charging information identified the specific, illegal substance as methamphetamine.³⁶ For example, Jury Verdict Form C says:

“We, the jury, find the Defendant, Richard Edward Sibert, guilty of the crime of Delivery of a Controlled

²⁹ *Blakely v. Washington*, 542 U.S. 296, 301, 124 S.Ct. 2531, 159 L. Ed. 403 (2004).

³⁰ *State v. Hughes*, 154 Wn.2d 118, 137, 110 P.3d 192 (2005)

³¹ *State v. Evans*, 154 Wn.2d at 442 (2005).

³² CP 23-25

³³ CP 21-22

³⁴ Exhibit 1. The Stipulation of Prior Record was not included in the Appellant’s designation of Clerk Papers. The State has submitted with this brief a Designation of Clerk’s papers to include the Stipulation. A copy of the Stipulation is attached hereto as Exhibit 1 to accommodate the Court and Counsel.

³⁵ CP 23-26

³⁶ CP 12-14

Substance **as charged in Count III.** (Emphasis added).³⁷

The “as charged in Count III” means the jury found the controlled substance to be the controlled substance listed in count III of the information. Count III specifically names methamphetamine as the controlled substance to be proven.³⁸

The finding of Methamphetamine placed the seriousness level at II.³⁹ Therefore, the standard range sentencing range was correctly calculated at 20 to 60 months, with the 24 month school zone enhancement for counts I and III.⁴⁰

5. Sibert stipulated to his criminal history.

The Court did not “find” Mr. Sibert’s criminal history after a contested hearing. Instead, the parties stipulated to Sibert’s criminal history.⁴¹ The stipulation was signed by Sibert, personally.

Regardless, Sibert admitted on page five of his brief that the United States Supreme Court, in *Blakey*, still allows trial judges to find prior convictions, but then wrote the “continuing validly is in doubt.” Sibert’s doubt is not shared by the Washington Supreme

³⁷ CP 34

³⁸ CP 12-14

³⁹ RCW 9.94A.518

⁴⁰ RCW 9.94A.517; RCW 9.94A.530(6); RCW 69.50.435;

⁴¹ Exhibit 1, RP (05-25-2005) page 3

Court. They have continued to uphold the exception.⁴² Until the *Blakely* exception for criminal history is expressly overturned by the United States Supreme Court, it is still the law of the land. The exception should be upheld by this Court, especially when the defendant stipulated to his prior criminal record.

III. CONCLUSION

The Appellant has cited no evidence the jury was misled by the Court's knowledge instruction. No declarations from jury members were submitted to support Sibert's assertion.

WPIC 10.02 does not misstate the law. No legal authority was provided by Sibert to support his assertion.

The definition of a "controlled substance" is not an element of the crime of "delivery of a controlled substance." The Appellant misapplied the holdings in *State v. Goodman* and *State v. Lorenz*.

Sibert did not receive an aggravated sentence. He was sentenced to the standard range. The verdict form incorporated by reference the charging information, which identified the illegal substance Sibert delivered.

⁴² *State v. Hughes*, 154 Wn.2d at 137 (2005)

Trial judges still have the authority to make findings of prior criminal convictions, notwithstanding Sibert's doubt about the validity of that authority.

For these reasons, the Court should affirm the verdicts and sentence in all respects.

DATED this 11 day of May, 2006.

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CERTIFICATE OF MAILING

STATE OF WASHINGTON

BY JM

I, J. BRADLEY MEAGHER, declare under penalty of perjury of the laws of the State of Washington that the following is true and correct:

On this 11 day of May, 2006, I mailed a copy of the Brief of the Respondent, by depositing same in the United States Mail, postage pre-paid, to the following party at the address indicated:

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