

63098-9

63098-9

NO. 63098-9-1

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

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STATE OF WASHINGTON,

Respondent,

v.

DARRYL WILLIAMS,

Appellant.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2009 OCT 20 PM 4:13

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

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to prove Mr. Williams delivered cocaine.

2. The trial court violated Mr. Williams' right to due process by omitting the name of the drug from the to-convict jury instruction for delivery of a controlled substance.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In this case the State sought to convict Mr. Williams of delivery of a controlled substance by constructive transfer – not by actual transfer, and not as an accomplice. A person is guilty of delivery of a controlled substance by constructive transfer if the State proves the transfer of a controlled substance either belonging to the defendant or under his direct or indirect control, by some other person at the instance or direction of the defendant. Where the evidence showed Mr. Williams found a dealer for undercover officers who were seeking to buy cocaine, but Mr. Williams was never in possession of drugs or money and there was no evidence that he had any authority over either the drugs or the dealer, did the State fail to prove delivery of cocaine by constructive transfer?

2. When the identity of a controlled substance increases the maximum sentence which the defendant may face upon conviction,

that identity is an essential element of the crime that must be submitted to the jury in a to-convict instruction. Mr. Williams' conviction for delivery of cocaine, as opposed to some other controlled substance, increased his standard range from 12-14 months to 60-120 months, and his maximum sentence from 5 years to 10 years. Did the absence of "cocaine" from the to-convict instruction violate Mr. Williams' right to due process?

C. STATEMENT OF THE CASE

On March 12, 2008, appellant Darryl Williams was standing outside the Air Lane Motel on East Marginal Way, when two women approached him. 12/15/08 RP 23. Unbeknownst to Mr. Williams, the women were undercover police officers Marie Gochnour and Susanna Guyer Monroe. One of the women asked Mr. Williams if he could help them out. 12/15/08 RP 24. Mr. Williams asked them what they wanted, and they said "cream." 12/11/08 RP 82; 12/15/08 RP 24. Mr. Williams asked them how much they were looking for, and Officer Guyer Monroe responded that they wanted 40 dollars' worth. 12/11/08 RP 84; 12/15/08 RP 25.

Mr. Williams offered to drive the women somewhere in his car, but they refused. Mr. Williams then made a telephone call to a

dealer he knew, and told the women the dealer would arrive in approximately 10 minutes. 12/11/08 RP 89.

Between 10 and 15 minutes later, the dealer, Bruce Watson, arrived in a black Monte Carlo. 12/11/08 RP 92-93. Mr. Williams told the women to meet the dealer at his car, but the women refused. Mr. Williams said, "Well, he's not going to do the deal with you otherwise." 12/11/08 RP 94.

But the dealer eventually drove slowly by the women and stopped when the women called out to him. 12/11/08 RP 95; 12/15/08 RP 32. According to one of the women, Officer Guyer Monroe, the dealer "proceeded to do the narcotics transaction with me right there in the street with his window down into his car." At trial, the prosecutor asked Officer Guyer Monroe, "Who was this individual who actually sold to you?" The officer responded, "Bruce Watson was his name." 12/11/08 RP 95.

The prosecutor asked, "How exactly did the drug transaction between you and Mr. Watson and the Monte Carlo happen?" Officer Guyer Monroe responded, "He showed me – well, after me insisting he should show me the crack cocaine, I showed him the money that I had, and then we did an exchange." 12/11/08 RP 96. Officer Gochnour confirmed, "Officer Guyer made the deal with the

driver, Watson.” 12/15/08 RP 33. Then “Mr. Watson drove off in his vehicle.” 12/11/08 RP 97.

After the transaction was completed, Mr. Williams asked the women to give him a piece of the crack cocaine they had just purchased. 12/11/08 RP 97. They refused, and Mr. Williams was upset. 12/11/08 RP 98. The women left the area, and Mr. Williams went back to the Air Lane Motel, where he was staying. 12/11/09 RP 99.

The undercover officers then alerted their colleagues to the “good buy,” and their colleagues immediately pulled Mr. Watson over and arrested him. During a search incident to arrest, the officers recovered the pre-marked buy money from Watson. 12/11/08 RP 23. The car Watson was driving was not registered to Darryl Williams. 12/11/08 RP 31.

Officers later arrested Mr. Williams after luring him out of the Air Lane Motel with the promise of drugs. Arresting officers found a pipe on Mr. Williams, but no drugs or money. 12/11/08 RP 56-58.

The State charged both Bruce Watson and Mr. Williams with delivery of cocaine, in violation of RCW 69.50.401(1) and (2)(a). CP 1. The dealer, Watson, pled guilty and did not go to trial with Mr. Williams.

At trial, the undercover officers testified about the buy-bust operation, and a forensic chemist verified that the product Bruce Watson sold to the undercover officers was cocaine. 12/11/08 RP 137.

At the end of trial, the jury was provided with the following to-convict instruction:

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 March 12, 2008, 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.

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 22 (Instruction 8). The jury was also instructed, "Deliver or delivery means the actual or constructive transfer of a controlled substance from one person to another." CP 23 (Instruction 9).

There was no instruction on accomplice liability, and the prosecutor did not argue that Mr. Williams was guilty as an accomplice to Mr. Watson's dealing. CP 12-27; 12/15/08 RP 54-69. Instead, the prosecutor argued that Mr. Williams effected a "constructive transfer." 12/15/08 RP 66.

After deliberating for a while, the jury inquired, "May we have a legal definition of 'constructive transfer'?" CP 28. The court responded, "No. Please refer to your jury instructions." CP 29.

The jury found Mr. Williams guilty, and the court sentenced him to a DOSA (drug offender sentencing alternative) with 45 months of confinement and 45 months of community custody. The sentence was based on an offender score of 7, a standard range of 60-120 months, and a maximum of 20 years. CP 36-45. The standard range and maximum were based on convictions for delivery of cocaine. CP 36-45.

Mr. Williams appeals. CP 34-35.

D. ARGUMENT

1. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. WILLIAMS OF DELIVERY OF COCAINE.

a. Due Process requires the State to prove each element of the offense charged beyond a reasonable doubt. The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. Id.; U.S. Const. amend. XIV; Const. art. I, § 3; City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

b. The State failed to prove that Mr. Williams effected a constructive transfer. The Uniform Controlled Substances Act, as adopted in Washington, provides that “it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.” RCW 69.50.401(1). The Act defines “deliver” or “delivery” as “the actual or constructive transfer from one person to another of a substance, whether or not there is an agency relationship.” RCW 69.50.101(f).

“Transfer” means “to cause to pass from one person or thing to another,” or “to carry or take from one person or place to another.” State v. Campbell, 59 Wn. App. 61, 64, 795 P.2d 750 (1990). “Constructive transfer” is “the transfer of a controlled substance either belonging to the defendant or under his direct or indirect control, by some other person or manner at the instance or direction of the defendant.” Id. at 63 (quoting Davila v. State, 664 S.W.2d 722, 724 (Tex. Crim. App. 1984)).

Here, the State argued that Mr. Williams was guilty of “constructive transfer,” but there was no evidence that the cocaine belonged to Mr. Williams or that it was under his control. Nor was there evidence that Mr. Williams directed Mr. Watson to deliver cocaine to the women. Rather, Mr. Williams was a “cluck” – a

person who connects buyers with dealers in hopes of obtaining drugs for himself. 2/27/09 RP 4.<sup>1</sup>

The facts of this case are unlike those of Washington's published case on constructive transfer, State v. Campbell, 59 Wn. App. 61. In Campbell, the defendant placed a controlled substance on a car seat and directed another person to hand it to the buyer. Id. at 62. This Court held that such a delivery through an intermediary is a constructive transfer. Id. at 64 n.1.

But here, Mr. Williams did not deliver drugs at all – either directly or through an intermediary. Unlike the defendant in Campbell, Mr. Williams was never in possession of either drugs or money. Although Mr. Williams observed the transaction, he did not touch the cocaine or the cash, and did not talk during the transaction. He requested cocaine from the buyers afterward, because he did not have any. The State presented no evidence that Mr. Williams owned the drugs that Watson sold or exerted control over either the drugs or Watson.

This case is like Davila, 664 S.W.2d 722 (cited in Campbell, 59 Wn. App. at 63). There, as here, the evidence showed that the defendant relayed a buyer's offer to a seller, who then handled the

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<sup>1</sup> See <http://www.urbandictionary.com/define.php?term=cluck> (last viewed 10/19/09).

transaction himself. Davila, 664 S.W.2d at 724. The Texas Court of Criminal Appeals, applying the same statutory language as Washington's, held the State failed to prove constructive transfer:

[A]ppellant's act in merely relaying an offer from buyer to seller is not sufficient to prove that the seller acted at the "instance or direction" of the appellant. There is no proof that appellant had any control over [the seller's] actions.

Id. at 725.

A Pennsylvania case is also on point. Commonwealth v. Murphy, 795 A.2d 1025 (Pa. Super. Ct. 2002). In Murphy, an undercover officer asked the defendant if he knew where he could "score some dope." Id. at 1028. The defendant called out to another man, Jose Rivas, and asked him to come over. Id. After asking the buyer how much he wanted, Rivas went to obtain drugs, returned, dropped two bags of heroin on the ground and told the buyer to drop the money. Rivas then picked up the money. The defendant then asked the buyer if he could have some heroin, but the buyer said "no" and gave him five dollars instead. Id. at 1029.

Citing both Campbell and Davila, the Pennsylvania court held that the State failed to prove constructive transfer. Id. at 1032-33. The court noted:

In the case sub judice, the Commonwealth's evidence did not establish that Appellant either had a proprietary interest in the heroin or had dominion and control over it. Neither does the evidence establish that the Appellant in any way directed or controlled the actions of Rivas. Once Appellant introduced the trooper to Rivas, it was Rivas who exclusively controlled the conduct of the transaction with the trooper and the actual manner of the physical transfer of heroin. ... The trooper and other officers who were participating in the buy operation at no time observed Rivas and Appellant exchanging any drugs or money, and the marked money used in the transaction was later found on Rivas's person, not on Appellant's.

Id. at 1033.

The same is true here. The State's evidence did not establish that Mr. Williams either had a proprietary interest in the cocaine or had dominion and control over it. Once Mr. Williams introduced the undercover officers to Watson, it was Watson who exclusively controlled the conduct of the transaction and the actual manner of the physical transfer of cocaine. The officers at no time observed Watson and Mr. Williams exchanging any drugs or money, and the marked money used in the transaction was found on Watson's person, not on Mr. Williams. Thus, as in Murphy, the evidence did not demonstrate that appellant constructively transferred a controlled substance to the undercover officers or any other person. Murphy, 795 A.2d at 1033.

The State did not argue that Mr. Williams was liable as an accomplice and the jury did not receive an instruction on accomplice liability. Thus, the conviction cannot be affirmed on an accomplice liability theory. See State v. Davenport, 100 Wn.2d 757, 764-65, 675 P.2d 1213 (1984) (“While it is not unconstitutional to charge a person as a principal and convict him as an accomplice, the court must instruct the jury on accomplice liability).

The State argued only that Mr. Williams was guilty of constructive transfer. But the jury was clearly confused about the meaning of “constructive transfer,” as evidenced by their request for a definition – a request which was denied. It is impossible to know on what basis the jury found Mr. Williams guilty, but the verdict was not based on sufficient evidence of either actual or constructive transfer.

c. Reversal and dismissal is the appropriate remedy. In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt Mr. Williams committed the offense for which he was convicted, the judgment may not stand. State v. Spruell, 57 Wn. App. 383, 389, 788 P.2d 21 (1990). The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits a second prosecution for the same offense

after a reversal for lack of sufficient evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969)). The appropriate remedy for the error in this case is dismissal of the conviction based upon the State's failure to prove actual or constructive transfer.

The Court need not reach the alternative argument below.

2. THE TO-CONVICT INSTRUCTION OMITTED AN ESSENTIAL ELEMENT OF THE CRIME.

a. A to-convict instruction violates due process if it omits an element of the crime charged. The "to convict" instruction must contain all of the elements of the crime because it serves as the 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 failure to instruct the jury as to every element of the crime charged is constitutional error, because it relieves the State of its burden under the due process clause to prove each element beyond a reasonable doubt. State v. Aumick, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995); see Winship, 397 U.S. at 364. Jurors must not be required to supply an element omitted from the to-convict instruction by referring to other jury instructions. Smith,

131 Wn.2d at 262-63. “It cannot be said that a defendant has had a fair trial if the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved.” Smith, 131 Wn.2d at 263.

Because the failure to instruct the jury on every element of the crime charged is an error of constitutional magnitude, it may be raised for the first time on appeal. State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). Omission of an element from the to-convict instruction “obviously affect[s] a defendant's constitutional rights by violating an explicit constitutional provision or denying the defendant a fair trial through a complete verdict.” State v. O’Hara, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2009 WL 3152161 at 5 (No. 81062-1, filed 10/1/09). This Court reviews a challenged jury instruction de novo. State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

b. The to-convict instruction in this case violated Mr. Williams’ right to due process because it omitted the element of cocaine. The court in this case imposed a 90-month sentence for delivery of cocaine. CP 36-45. But the to-convict instruction allowed the jury to find Mr. Williams guilty if it determined he delivered any controlled substance; the to-convict instruction did

not mention the specific drug at all. CP 22. The to-convict instruction was constitutionally deficient, because cocaine is an element of the crime. See State v. Goodman, 150 Wn.2d 774, 778, 83 P.3d 410 (2004).

In Goodman, the Court held, “When the identity of the controlled substance increases the statutory maximum sentence ... which the defendant may face upon conviction, that identity is an essential element of the crime.” Id. This is because “any fact [other than a prior conviction] that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.” Id. at 785 (quoting Apprendi, 530 U.S. at 490). For instance, methamphetamine is an element of the crime of possession of methamphetamine with intent to deliver, because a conviction for that offense carries a maximum penalty of 10 years, whereas a conviction for intent to deliver some controlled substances carries a maximum of only five years. Id. at 786. Accordingly, cocaine is an element of the crime of delivery of cocaine, because a conviction for that offense carries a maximum

penalty of 10 years, whereas the maximum sentence for delivery of some other controlled substances is 5 years. RCW 69.50.401(2).<sup>2</sup>

Furthermore, this Court in State v. Evans recognized that if the identity of the substance changes the standard range to which the defendant is subjected, the identity of the drug is an element that must be submitted to the jury. State v. Evans, 129 Wn. App. 211, 229 n.15, 118 P.3d 419 (2005), rev'd on other grounds, 159 Wn.2d 402, 150 P.3d 105 (2007). The judge in Evans sentenced the defendant to 60 months' confinement based on a finding that a particular drug was involved, but it was not clear that the jury premised its convictions on such a finding. Id. at 229. Accordingly, the jury verdict supported a standard range of 12 to 14 months, and the imposition of a 60-month sentence violated the defendant's Sixth Amendment right to a jury trial. Id. at 229 n.15. Similarly here, the to-convict instruction supported only a sentence range of 12-14 months, because that is the penalty for delivery of marijuana if the defendant has an offender score of six or higher. RCW 9.94A.517; RCW 9.94A.518.

In sum, the to-convict instruction here was constitutionally deficient because it omitted the identity of the controlled substance.

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<sup>2</sup> For any drug, the maximum is doubled for prior offenses under the Uniform Controlled Substances Act. RCW 69.50.408.

c. Reversal is required. The United States Supreme Court has held that under the federal constitution, harmless error analysis applies where the trial court omits an element from the to-convict instruction. Neder v. United States, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). But our state constitutional right to a jury trial is stronger, requiring automatic reversal where the court omits an element from the to-convict instruction.

Article I, section 21 provides that “[t]he right of trial by jury shall remain inviolate.” Const. art. I, § 21. There is no equivalent federal provision, and therefore our supreme court has repeatedly held that the state constitution provides a stronger right to a jury trial than the United States Constitution. E.g. State v. Recuenco, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008); Sofie v. Fibreboard, 112 Wn.2d 636, 771 P.2d 711 (1989); Pasco v. Mace, 98 Wn.2d 87, 653 P.2d 618 (1982).

Furthermore, in looking to the law regarding the specific issue raised here, our state courts have required automatic reversal for this type of error for over 100 years. In 1890, during our first year of statehood, the supreme court held in McClaine v. Territory, 1 Wash. 345, 25 P. 453 (1890), that the omission of an element from what we would now call the to-convict instruction required

reversal. The court noted that a problem with a definitional instruction could possibly be considered harmless in light of other instructions, but that the omission of an element from the “to convict” instruction required reversal, without any reference to 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.

Many cases over the next century reaffirmed the rule that automatic reversal is required where the to-convict instruction omits an element. The supreme court so held in the 1953 case of State v. Emmanuel, 42 Wn.2d 799, 259 P.2d 845 (1953), as well as much later cases like Smith, 131 Wn.2d at 265 (“Failure to instruct on an element of an offense is automatic reversible error”). And this Court as recently as the year 2000 stated, “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.” State v. Pope, 100 Wash. App. 624, 630, 999 P.2d 51 (2000).

Although our supreme court has acknowledged Neder as the federal standard, its decisions in Brown and Recuenco indicate that it will not follow that standard under the Washington Constitution. In 2002 the Brown court recognized Neder and applied it in that

case, but it did not perform an independent state constitutional analysis and it continued to cite prior Washington cases for the proposition that “[a]n instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal.” State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002).

More recently in the Recuenco series of cases, the United States Supreme Court held that a Neder harmless error standard must be applied to Blakely<sup>3</sup> errors because the failure to instruct on an element is indistinguishable from a failure to instruct on a sentence enhancement. Washington v. Recuenco, 548 U.S. 212, 222, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). But on remand, our supreme court held that automatic reversal was required under Washington law, because the sentence imposed was not supported by the jury’s actual verdict, notwithstanding what a jury might have found if properly instructed. State v. Recuenco, 163 Wn.2d at 441-42. The Court cited article I, section 21 of our state constitution, reiterated that it provides stronger protection than the federal constitution, and stated “our right to a jury trial is no mere procedural formality, but a fundamental reservation of power in our

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<sup>3</sup> Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

constitutional structure.” Id. at 435. Accordingly, automatic reversal was required.

Similarly here, this Court should hold that automatic reversal is required because the to-convict instruction omitted an essential element of the crime.

E. CONCLUSION

For the reasons above this Court should reverse Mr. Williams’ conviction and dismiss the charge with prejudice because the State presented insufficient evidence of constructive transfer. In the alternative, the Court should reverse and remand for a new trial because the court omitted an element from the to-convict instruction.

DATED this 20<sup>th</sup> day of October, 2009.

Respectfully submitted,

  
Lila J. Silverstein – WSBA 38394  
Washington Appellate Project  
Attorneys for Appellant

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

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STATE OF WASHINGTON	)	
Respondent	)	CoA No. 63098-9
	)	
v.	)	
	)	
DARRYL WILLIAMS,	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

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

1. THAT ON THE 20TH DAY OF OCTOBER, 2009, A COPY OF **APPELLANT'S OPENING BRIEF** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL ADDRESSED AS FOLLOWS:

[X] Prosecuting Atty King County  
King Co Pros/App Unit Supervisor  
W554 King County Courthouse  
516 Third Avenue  
Seattle WA 98104

[X] Darryl Williams  
993723  
Larch Corrections Center  
15314 Dole Valley Road  
Yacolt, WA 98675-9531

**SIGNED** IN SEATTLE, WASHINGTON, THIS 20TH DAY OCTOBER, 2009

x Ann Joyce