

64515-8

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NO. 64373-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ODIS RUSSELL,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD EADIE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether appellant Odis Russell waived his claim that the "to convict" jury instruction should have identified the controlled substance at issue given that he did not object to the instruction below and has not shown how the asserted error had practical and identifiable consequences in the trial of the case.

2. Whether Russell has failed to show that the trial court erred by not identifying heroin as the controlled substance in the "to convict" instruction given that the jury was informed that Russell was charged with possession of heroin, that another instruction identified heroin as the only controlled substance at issue, and that heroin was the only drug proven at trial.

3. Whether any error in the "to convict" instruction was harmless.

B. STATEMENT OF THE CASE

On April 21, 2009, several individuals reported suspected narcotics activity on Aurora Avenue in Seattle to the police. RP 33-34. Shortly thereafter, Seattle Police Officer Douglas Beard arrived at the location and observed two men, later identified as Russell and Jeremy Young, hunched over a tin can and an open

flame. RP 35-39, 50. The officer observed Russell and Young filling needles with suspected narcotics. RP 36. After other officers arrived, the police arrested Russell and Young. RP 37-43.

The tin can contained suspected tar heroin. RP 43, 61-62. A forensic scientist later analyzed the substance in the can and confirmed that it contained heroin. RP 45, 69-70.

The State charged Russell with the crime of Violation of the Uniform Controlled Substances Act: possession of heroin. CP 1. The trial occurred in September 2009. Prior to hearing testimony, the court informed the jury that Russell "is charged by an information with the crime of Violation of the Uniform Controlled Substances Act in that it's alleged that on or about April 21, 2009, the defendant, Mr. Russell, unlawfully and feloniously possessed heroin, a controlled substance and narcotic drug." RP 28.

The "to convict" instruction provided:

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

- (1) That on or about April 21, 2009, the defendant possessed a controlled substance; and
- (2) That the acts occurred in the State of Washington.

CP 34. The next instruction provided: "Heroin is a controlled substance." CP 35.

Russell did not object or take exception to these instructions. RP 75.

A jury found Russell guilty as charged. CP 23. This appeal follows. CP 42.

C. ARGUMENT

1. THIS COURT SHOULD AFFIRM RUSSELL'S CONVICTION.

For the first time on appeal, Russell claims that the trial court erred by not identifying heroin as the controlled substance in the "to convict" instruction.¹ He argues that identity of the controlled substance is an essential element of the crime and the failure to include it in the "to convict" instruction constitutes reversible error. Brief of Appellant at 1. This Court should hold that Russell has waived this claim of error by failing to object to the "to convict" instruction below. In any event, after Russell filed his opening brief,

¹ In his brief, Russell occasionally refers to the controlled substance at issue as cocaine. See Brief of Appellant at 4. This appears to be an inadvertent error, given that the only controlled substance at issue in the trial was heroin, and elsewhere in his brief Russell correctly refers to the controlled substance as heroin.

the Washington Supreme Court rejected this identical argument in State v. Sibert, No. 79509-6, 2010 WL 653868 (Wash. Feb. 25, 2010). In light of Sibert, Russell's claim has no merit, and the Court should affirm his conviction.

a. Russell May Not Challenge The "To Convict" Instruction For The First Time On Appeal.

At the outset, Russell has waived his challenge to the "to convict" instruction by failing to raise this issue below. As a general rule, issues cannot be raised for the first time on appeal. RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). There is a limited exception where the issue being raised involves a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 684, 757 P.2d 492 (1988). "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). The defendant must make a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case. Id. Under RAP 2.5(a)(3), appellate courts have refused to consider a defendant's claim, made for the first time on appeal, that the "to convict" instruction was missing an element.

State v. Boss, 144 Wn. App. 878, 890-94, 184 P.3d 1264 (2008),
aff'd on other grounds, 167 Wn.2d 710, 223 P.3d 506 (2009); State
v. Phillips, 98 Wn. App. 936, 946, 991 P.2d 1195 (2000).

Here, Russell did not object to the "to convict" jury instruction, and he makes no attempt on appeal to show that the omission of the name of the controlled substance in the "to convict" instruction had practical and identifiable consequences in the trial of the case. The jury instruction defining the term "controlled substance" listed only heroin as a controlled substance. CP 35. Heroin was the only controlled substance discussed during the testimony, and the only controlled substance mentioned by either party during closing arguments. In fact, in closing argument, Russell's attorney asserted, "[t]he only thing that we know for certain is that the substance in this tin was heroin." RP 94. The jury could have considered only heroin when it found that Russell possessed a controlled substance. Given these facts, Russell has not shown that any error in failing to expressly include heroin in the "to convict" instructions had a practical and identifiable consequence at trial. This Court should hold that this issue is not properly preserved for appeal.

b. The Supreme Court's Recent Decision in State v. Sibert Establishes That Russell's Claim Has No Merit.

Even if Russell's claim is not waived, the Washington Supreme Court's recent decision in Sibert establishes that his claim has no merit. In Sibert, the defendant was convicted of three counts of delivery of a controlled substance (methamphetamine) and one count of possession of a controlled substance (methamphetamine) with intent to deliver. Sibert, 2008 WL 653868 at *1. The "to convict" jury instructions for the crimes did not identify the controlled substance. Id. On appeal, Sibert claimed that it was error "to fail to include the identity of the specific controlled substance in the 'to convict' jury instruction." Id.

The Supreme Court, noting that the maximum sentence for the crime varied depending upon the controlled substance at issue, agreed that the identity of the controlled substance was an essential element of the crimes. Id. at *2. However, the court explained that "not every omission of information from a 'to convict' jury instruction relieves the State of its burden of proof; only the total omission of essential elements can do so." Id. The Court held that in Sibert's case, it was not error to omit the name of the controlled substance from the "to convict" instruction, explaining:

The record establishes that both Sibert and the jury were on notice that the controlled substance crimes with which Sibert was charged involved only methamphetamine. The formal information charging Sibert repeatedly referred to the controlled substance at issue as "to-wit: Methamphetamine," which put Sibert on notice of the identity of the controlled substance that he was charged with delivering and possessing, as well as on notice of the maximum possible penalty for those crimes. Clerk's Papers (CP) at 12-14. Furthermore, each of the "to convict" jury instructions began by stating "[t]o convict the Defendant ... of the crime of Delivery of a Controlled Substance *as charged*...." CP at 40-42, 49 (emphasis added). This reference to the charging document impliedly incorporates the language "to-wit: Methamphetamine" into the "to convict" instructions.

Additionally, each "to convict" instruction listed the proper elements for the crime of unlawful possession of a controlled substance with intent to deliver: (1) unlawful possession, (2) with intent to deliver, (3) a controlled substance. [Citation and footnote omitted]. As a result, the jury convicted Sibert, as charged, of controlled substance violations involving methamphetamine. Sibert was aware of those charges and the attendant penalties. The jury properly found all the required elements. Accordingly, there was no error.

Common sense supports this conclusion. The jury considered only methamphetamine when it found that Sibert possessed and intended to deliver a controlled substance. Methamphetamine was the only controlled substance in the charging document, the only controlled substance defined in the jury instructions, CP at 44, and the only controlled substance the prosecution proved beyond a reasonable doubt through expert testimony. 3 Verbatim Report of Proceedings (Apr. 27, 2005) at 221-30. Methamphetamine was also the only

controlled substance mentioned by either party during closing arguments.

Id. at *2-3.

In light of Sibert, this Court must reject Russell's claim in this appeal. In Russell's case, the information identified the controlled substance as heroin and charged that he "unlawfully and feloniously did possess Heroin, a controlled substance and narcotic drug." CP 1. The jury instruction defining the term "controlled substance" listed only heroin as a controlled substance. CP 35. At trial, the evidence of a controlled substance was only heroin. While the "to convict" instructions in Russell's case did not include the "as charged" language that was in Sibert's instructions, the trial court read the charging language to the jury and informed them that Russell was charged with possession of heroin. RP 28. If the State had not proven that Russell possessed heroin, there would have been no conviction. Given that these facts are virtually identical to those in Sibert, this Court should reject Russell's claim of error and affirm his conviction.

c. Any Error In The "To Convict" Instruction Was Harmless.

Finally, even assuming that the trial court erred by omitting the name of the controlled substance from the "to convict" instruction, any error was harmless beyond a reasonable doubt. When an element is omitted from a jury instruction, the error is harmless if that element is supported by uncontroverted evidence. State v. Brown, 147 Wn.2d 330, 340-41, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). Here, the evidence was overwhelming and undisputed that the controlled substance at issue was heroin.

Russell argues that article I, section 21 of the Washington Constitution requires automatic reversal when the trial court omits an essential element from the "to convict" instruction. Russell primarily relies upon two recent Washington Supreme Court decisions for this claim. Neither case supports his argument.

In State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008), the Washington Supreme Court held that there was no error in the "to convict" instruction. The State charged Recuenco with a deadly weapon sentencing enhancement and the jury found that Recuenco was armed with a deadly weapon. Id. at 431-32.

However, the trial court imposed the longer firearm enhancement. Id. at 432. Recuenco then challenged this sentencing enhancement on appeal. In vacating the firearm enhancement, the court held that the harmless error analysis was not applicable because there was *no error* in the jury instructions. Id. at 441-42. Instead, the court characterized the error as occurring when the court imposed a sentence for “a crime not charged, not sought at trial, and not found by a jury.” Id. at 442.

Similarly, in the consolidated cases in State v. Williams-Walker, 167 Wn.2d 889, ___ P.3d ___, 2010 WL 118211 (2010), the court also concluded that there was no error in the “to convict” instructions. In Williams-Walker, the defendants were charged with firearm enhancements, but the juries were asked to find only whether the defendants were armed with deadly weapons. 2010 WL 118211 at *1-2. At sentencing, the trial courts imposed firearm enhancements. Id. The court held that the harmless error doctrine did not apply because the error occurred at sentencing, not at trial:

The trial court's error in Recuenco III-imposing the firearm enhancement without a special verdict to support it-occurred in the sentencing phase; no error occurred during trial. As in Recuenco III, the errors in the cases before us occurred during sentencing, not in the jury's determination of guilt. Thus, as in that case, because the trial courts' errors occurred after

the jury verdicts were reached, the harmless error doctrine does not apply.

2010 WL 118211 at *5.

Here, unlike the defendants in Recuenco and Williams-Walker, Russell does not claim that any error occurred at his sentencing. He does not seek to be re-sentenced. Instead, he claims that there was an error in the "to convict" instruction at trial and he asks this Court to reverse his conviction and remand for a new trial. This claim is subject to harmless error analysis.

D. CONCLUSION

For the reasons set forth above, the State respectfully requests that this Court affirm Russell's conviction and sentence.

DATED this 30th day of March, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Greg Link, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. ODIS RUSSELL, Cause No. 64373-8-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame
Name
Done in Seattle, Washington

3/30/10
Date