Supreme Court No. _____
COA No. 86184-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JASON MICHAEL JENSEN,

Petitioner.

PETITION FOR REVIEW

ON APPEAL FROM THE SUPERIOR COURT
FOR LEWIS COUNTY

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A. IDENTITY OF PETITIONER

Jason Jensen was the defendant in Lewis County no. 21-1-00032-1 and the appellant in Court of Appeals No. 57634-1-II, and is the petitioner herein.

B. COURT OF APPEALS DECISION

Jason Jensen seeks Supreme Court review of the decision in Lewis County no. 21-1-00032-1, issued April 22, 2024, upholding his convictions for delivery of fentanyl and possession with intent to deliver, where he had no knowledge that the pills he sold were actually composed of fentanyl powder, molded into pills marked "M 30" for a common prescription medication.

C. ISSUES PRESENTED ON REVIEW

1. Is review warranted under RAP 13.4(b)(3) where Mr. Jensen's convictions violated the Due Process requirement for sufficient evidence of knowledge that the pills were actually fentanyl and under RAP 13.4(b)(1) and (2) where the Court of

Appeals decision conflicts with decisions of this Court and the Court of Appeals?

2. Is review warranted under RAP 13.4(b)(1) and (2) where the Court of Appeals' decision regarding sufficiency of proof of knowledge is contrary to decisions of this Court and the Court of Appeals, affecting the verdict?

3. Is review warranted under RAP 13.4(b)(1) and (2) where the trial court refused Mr. Jensen's proposed jury instruction language making cogent the pattern definition of knowledge, which would have prevented the jury from convicting Mr. Jensen in the absence of actual knowledge, and the pattern instruction on knowledge was error, in so far it included language allowing conviction on less than actual knowledge which defense counsel also sought to excise, in the circumstances of this case?

4. Is review warranted under RAP 13.4(b)(1) and (2) where the prosecutor committed incurable misconduct by misstating the knowledge standard in closing argument?

D. STATEMENT OF THE CASE

1. Facts.

Lewis County drug task force officers negotiated with a criminal informant who stated that he could purchase fentanyl. RP 112. On the late night of January 10 and morning of January 11, 2021, officers equipped the informant with a digital recording device that was later admitted as an exhibit. RP 113; State's exhibit 14. The device recorded the officer-informant conversations about setting up a fentanyl "deal." RP 115.

After conducting a transaction with Mr. Jensen in the parking lot of a gas station, the informant provided police with pills he obtained. RP 135. Mr. Jensen drove away, and police stopped his car a short distance up the road and arrested him. RP 168-69. He was charged with delivery of fentanyl, and possession of fentanyl with intent to deliver. CP 6-7, 28-30. But the pills that the State recovered were stamped with "M" and "30" as Percocet prescription medication. RP 135. Percocet is not fentanyl.

2. <u>Convictions</u>.

At trial, the jury instructions required the State to prove that Mr. Jensen delivered fentanyl to the informant and "knew that the substance delivered was a controlled substance, to wit: Fentanyl." CP 53 (count 1). For count 2, the State was required to prove that Mr. Jensen "possessed the substance with the intent to deliver a controlled substance, to wit: Fentanyl." CP 56 (count 2).

A forensic chemist testified that the pills, contrary to their labeling, were fashioned from fentanyl. RP 247-48. The jury convicted Mr. Jensen as charged. CP 65-66. He was sentenced to standard range terms of incarceration. RP 171-79.

D. ARGUMENT.

Looking to the entire case, review is warranted under RAP 13.4(b)(3) where Mr. Jensen's convictions violated the Due Process requirement for sufficient evidence and under RAP 13.4(b)(1) and (2) where the Court of Appeals' decision regarding the definition of knowledge is contrary to decisions

of this Court and the Court of Appeals, affecting the verdict and resulting in misconduct by the prosecutor in closing argument.

1. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN EITHER CONVICTION BECAUSE KNOWLEDGE WAS NOT PROVED.

a. Review is warranted under RAP 13.4(b)(3) where Mr. Jensen's convictions violated the Due Process requirement for sufficient evidence, imposed by the Fourteenth Amendment and under RAP 13.4(b)(1) and (2) where the decision is contrary to decisions of this Court and the Court of Appeals.

Review is warranted under RAP 13.4(b)(3) where Mr. Jensen's convictions violated the Due Process requirement for sufficient evidence. Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt - any lesser standard violates due process. Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980); U.S. Const. amend. XIV.

Review is also warranted under RAP 13.4(b)(1) and (2) where the decision is contrary to decisions of this Court and the Court of Appeals. In this case, there was insufficient evidence to support either count - neither delivery of fentanyl, nor possession with intent to deliver fentanyl, were proved.

b. Evidence is insufficient to prove delivery or possession with intent to deliver "to-wit: Fentanyl" if a defendant had no knowledge the controlled substance was fentanyl.

Centralia Police Department detective Adam Haggerty stated that the informant he employed in this case told him that he would try to buy fentanyl from Mr. Jensen. But nothing in the recording of the transaction or anywhere else in the case indicates that Mr. Jensen knew anything other than what he was delivering to the informant were pills marked as prescription M 30 narcotics. One cannot deliver a named controlled substance, or possess a named controlled substance with intent to deliver it, if one does not know that the substance is of that nature. See State v. Sims, 119 Wn.2d 138, 142, 829 P.2d 1075 (1992).

Where the jury is charged with determining if a fentanyl offens, involved delivery or intent to deliver, the defendant must be shown to have known that the substance in question was fentanyl. See, e.g., State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992).

c. Mr. Jensen was not proved to have knowledge or intent - the Court of Appeals ignored the argument that this case contained no police testimony regarding the slang, parlance and knowledge of street-level drug sellers and buyers.

Numerous cases involve pills labeled "M 30" or a variation thereof such as M-30, or M/30, being the most common. See, e.g., State v. Purves, No. 56600-1-II, 2023 WL 2263293, at *2 (Wash. Ct. App. Feb. 28, 2023) (unpublished decision, cited pursuant to GR 14.1(a) only) ("blue M-Box pills" were identified as fentanyl); see Fincen Asks Institutions For Help Flagging Online Opioid Trafficking Activity, Fed. Bank. L. Rep. P 156-302.

The Court of Appeals decision ignored the fact and failed to address that, in attempting to prove knowledge, law

enforcement witnesses expounded at length regarding their own knowledge that fentanyl pills that are often in counterfeit form as marked “M30” or the like - but utterly failed to produce testimony regarding the common knowledge, parlance and slang amongst drug dealers and buyers on the street to support the notion that drug-involved persons follow a lingua franca in which M 30 pills are, by shared street level knowledge, pills that appear as such but are known to be fentanyl.

Such testimony is frequently and aggressively proffered where the prosecution has witnesses who have such knowledge and officers, especially but not necessarily only if the State is able to qualify them as experts in the milieu of street-level drug deals and drug dealing, have testified as to how certain substances are bargained for and sold. See, e.g., State v. Anderson, 12 Wash. App. 2d 1043 (2020) (Court of Appeals of Washington, Division 1) (March 9, 2020, at *1-2, 4-5) (unpublished decision, cited pursuant to GR 14.1(a) only) (Officer Kravchun testified as to the particular negotiating of

drug transactions involving different drugs) (citing State v. Cruz, 77 Wn. App. 811, 813-14, 894 P.2d 573 (1995) (officer testified about street level transactions including how certain drugs are presented and what they may look like, and what if any typical transactional communications may occur)); State v. Avendano-Lopez, 79 Wn. App. 706, 711, 904 P.2d 324 (1995) (testimony about unfamiliar drug transaction practices).

In this case, if the police witnesses had such testimony available to them, they would have provided it at trial, but they did not. This case included no such evidence - officers testified about what they believed they knew as to whether the pills were fentanyl, rather than establishing knowledge by Mr. Jensen. No knowledge of street-level understanding is shown by a police witness who says that in "our drug world right now" these pills are not Percocet. RP 135. No knowledge of street-level understanding is shown by Detective Haggerty testifying that if people "Google it," they would see M 30 pills can be fentanyl ecven though labeled as "Percocet 30's" or similar. RP 144.

And a police officer's testimony that these fake M 30 pills are produced in another country and are involved in "copyright infringement" in that they are what "Mexican cartels are doing to fit in in America" does not show actual knowledge by Mr. Jensen that these M 30 pills that looked like and were marked as common prescription pain pills were actually molded from fentanyl powder. RP 144.

Finally, the Court thoroughly misapplied State v. Hudlow, a case the Respondent cited. There, it was held that circumstantial evidence showed Hudlow knew he delivered "methamphetamine" because the price that Hudlow accepted matched what Detective Carlson "testified methamphetamine typically sells for [i.e.] $10 per decigram." State v. Hudlow, 182 Wn. App. 266, 288, 331 P.3d 90 (2014).

The opposite was true here, where heroin and M 30 pills (albeit molded and falsely marked) were sold, and there was no mention of any specific price being utilized by street dealers as that generally paid for fentanyl, so the most the prosecutor

could state in closing argument in attempting to meet the defense argument was, "He pays the money, a price, and what's he receive in return? Fentanyl." RP 292.

The Court of Appeals addressed Hudlow in a manner that indicated that Mr. Jensen's application of the case to the present case had dispositive merit, yet then purported to distinguish this case's facts by stating the various procedures the State follows in a controlled buy case to ensure the exchange of drugs for money by an informant follows a chain of custody. This is immaterial. The Court's reasoning is lengthy and is not quoted in full here, but the Court stated in part:

> But even without testimony about a unit price for fentanyl, here, as in Hudlow, the informant and his car were searched before the controlled buy. The confidential informant was given an amount of money with instructions to buy a particular amount of drugs: $1,500 in prerecorded buy money for "between 50 and 60 pills and then as much heroin as we could." The informant went to the planned buy location, an Arco AM/PM. . . . The informant drove away from the transaction without an opportunity to obtain the drugs from any source other than defendant, as in Hudlow. 182

> Wn. App. at 289 ("confidential informant had no opportunity to obtain the methamphetamine from any other source than Hudlow"). After the transaction, the informant handed over to Haggerty 54 blue pills and heroin. Officers followed Jensen from the transaction onto the freeway and then to a parking lot, where he and his car were searched. When the police arrested Jensen, they found money in his pocket that matched the prerecorded buy money given to the informant and more of the same blue pills.

Decision, at p. 12. This does not even address the question of knowledge that these were fake M 30's, molded from fentanyl.

Notably, the only testimony that was relevant and material to show what a person encountering the pills in question might believe was provided by Olivia Ross of the Washington State Patrol Crime Laboratory. RP 216-18. The pills were marked "M" and "30" like prescription oxycodone or oxycodone hydrochloride pills and Ross, a forensic chemist, stated that she could not discern from looking at them that they were not, in fact, 30 milligram prescription pills made by the manufacturer, Merck. RP 247-48.

Forensic chemist Ross was the only witness in the trial who had anything to say that might bear on the question of knowledge, and it demonstrated Mr. Jensen's innocence. The State failed to prove that Mr. Jensen knowingly delivered "to wit: Fentanyl," or possessed the same with intent to deliver it. The convictions should be reversed, and the charges dismissed with prejudice. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). This Court should grant review and reverse Mr. Jensen's convictions.

2. THE TRIAL COURT COMMITTED TWIN INSTRUCTIONAL ERRORS ON THE KNOWLEDGE ISSUE CENTRAL TO BOTH COUNTS.

a. This case must be the vehicle by which the Court crafts a tenable jury instruction regarding knowledge, and review is warranted under RAP 13.4(b)(1) and (2) where the cases explaining the meaning of that *mens rea* have never been cogently applied to the pattern jury instruction.

Not a single sentence in this case written by the parties or the court claim that the proposed language that defense counsel proffered – to ensure that Jason Jensen was not convicted based

on an inadequate knowledge standard – was an incorrect statement of the law. It would have done nothing but helped the lay jury.

Below, the trial court refused the defense proposed instruction, and Mr. Jensen took exception to the ruling. RP 266-70; 273; CP 19 (Jason Jensen Defense Proposed Instruction 7) (modifying WPIC 10.02 to add the language, "However, the jury should not find knowledge if it finds the person did not actually know a fact, circumstance, or result, even if the jury also finds the person should have known the fact, circumstance, or result."). The jury was thus instructed solely according to the standard WPIC, 10.02. CP 75 (court's instruction 19). The court also refused the defense alternative argument to excise the confusing language in WPIC 10.02. RP 267-69.

Mr. Jensen's proposed language would have protected against the error created by the instruction employed in the circumstances of this case. For a defendant to have knowledge under the criminal code, he must be proved to have actual,

subjective knowledge of the fact in question. State v. Allen, 182 Wn.2d 364, 374, 341 P.3d 268 (2015), State v. Shipp, 93 Wn.2d 510, 516, 610 P.2d 1322 (1980). Knowledge may not be redefined as less than actual knowledge. Shipp, 93 Wn.2d at 516. In Allen, the court recognized it would be unconstitutional to permit a finding of knowledge merely because the person should have known. Id. In this case, the instructional errors allowed the jury to find Mr. Jensen guilty of delivery and the subsequent intent to deliver based on a belief that he somehow should have known the M 30's were fentanyl.

The pattern instruction remains confusing, needlessly so. It undermines and confuses the actual knowledge requirement and permits the jury to misapply the law by finding knowledge even where evidence of actual knowledge is absent. This violates due process. U.S. Const. amend XIV. The problem is not about permitting, versus requiring, the jury to acquit if it does not find actual knowledge. The instructions must make clear that actual knowledge is not established by a failure to

know an ultimate fact that a reasonable person would. In this case the jury instruction allowed that, it was misleading, and did not properly inform the trier of fact of the applicable law in an area of the law where jury confusion is recognized as dangerously, highly, likely. See Bodin v. City of Stanwood, 130 Wn.2d 726, 732, 927 P.2d 240 (1996) (instructions must not allow the jury to be misled).

b. The instructional error requires reversal.

An error in jury instructions is presumed prejudicial unless it affirmatively appears to be harmless. State v. Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002). Reversal is required unless the instructional error is "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome." State v. Espinosa, 8 Wn. App.2d 353, 363-64, 438 P.3d 582 (2019) (quoting State v. Townsend, 142 Wn.2d 838, 848, 15 P.3d 145 (2001)).

In thi case, instructional error in either failing to clarify the confusing law in this area with additional language, or the improper instruction given, without modification, requires reversal. Instructional error going to the disputed issue is not academic error. State v. Woods, 138 Wn. App. 191, 202, 156 P.3d 309 (2007). The question of knowledge of the nature of the pills ("to-wit, fentanyl") was the issue in Mr. Jensen's case and the resolution of that question dictated the case's outcome on two serious charges. State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977) (instructional error requires reversal unless it "in no way affected the final outcome of the case."). The instruction has been criticized. Judge Alan R. Hancock, True Belief: an Analysis of the Definition of "Knowledge" in the Washington Criminal Code, 91 Wash. L. Rev. Online 177 (2016). This Court should accept review and reverse.

c. The error must also be addressed as constitutional.

The proposed modification to WPIC 10.02 would have fixed the misstatement, but it was refused, and in turn, an

erroneous instruction was given. When the instructions misstate an element the State must prove, it will be deemed harmless only if the reviewing court can conclude beyond a reasonable doubt that the element is supported by uncontroverted evidence. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002); U.S. Const. amend. XIV.

The State cannot make the necessary showing here. As defense counsel argued, there was no knowledge. RP 304-05. The defense case focused on that sole theory, and it was sharply disputed, because the pills were recognized to be counterfeit by the task force and the crime laboratory, and no statements showed knowledge, or intent which requires knowledge under Sims. As counsel argued in closing argument,

> The State has to prove Mr. Jensen knew these (indicating) pills and these (indicating) pills were fentanyl, and you just don't have any evidence of that. Ms. Ross testified you can't tell by looking at them.

(Emphasis added.). RP 304-05. The key issue in the case was sharply controverted. Controversion requires reversal. Neder

v. United States, 527 U.S. 1, 18, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1995)). This Court should reverse.

3. THE PROSECUTOR COMMITTED INCURABLE MISCONDUCT.

Review is warranted under RAP 13.4(b)(1) and (2) where the prosecutor committed incurable misconduct by misstating the knowledge standard in closing argument. As Division Three of the Court of Appeals recently noted in describing the state of affairs engendered by WPIC 10.02 and the opportunity it provides for juries finding themselves misled, "confusingly[,] a jury cannot convict based on constructive knowledge, but may determine constructive knowledge to be evidence of subjective knowledge." State v. Jones, 13 Wn. App. 2d 386, 405, 463 P.3d 738 (2020). Here, the prosecutor argued:

> There's been some discussion about the markings on the tablets. They're meaningless. The tablets are not Oxycontin. You heard that from the crime lab analyst. The tablets are fentanyl. This is a controlled buy of illegal narcotics, okay? So that means it's not done at a pharmacy. It's not done from a pharmaceutical rep. This is a baggy of

> blue pills that were purchased in the public area of a gas station. All of the circumstances pointed towards the purchase of a controlled substance, **to wit, fentanyl**. The buyer knew it was fentanyl. The detective knew it was fentanyl. And because of that, the person selling it knew it was fentanyl. He received money for fentanyl.

(Emphasis added.) RP 293. Prosecutors are required to be careful when arguing knowledge to a lay jury. State v. Jones, 13 Wn. App.2d at 405. Such jurors - unaware of the subtleties in the law that were understood, albeit not easily, *sub rosa* byeven the attorneys - would take this argument to mean that Mr. Jensen should have known that the M 30 pills were counterfeit, molded of fentanyl.

When a prosecutor leans on WPIC 10.02's interpretations' nice distinctions, of which attorneys and courts can differ as to the legal impropriety but which lay jurors cannot discern, the State commits misconduct. State v. Allen, 182 Wn.2d at 374-75. The prosecutor committed misconduct here. See Jones, 13 Wn. App.2d at 406-07 (the "prosecuting

attorney should have carefully followed the strictures of Allen and expressly told the jury not to convict on constructive knowledge."); cf. State v. Lorrigan, Court of Appeals of Washington, Division 3 (April 7, 2020) (at * 3-4) (unpublished decision, cited pursuant to GR 14.1(a) only) (prosecutor's partially correct and partially incorrect statements of knowledge standard in closing argument did not establish appealable misconduct in the absence of objection).

In Jones, the trial court could not have cured the prejudice resulting from the State's attorney's closing argument because "[t]he court . . . would only repeat the previously delivered instruction." Jones, 13 Wn. App.2d at 407. In Allen, 182 Wn.2d at 381-82, the Supreme Court also held that a curative instruction would not remedy the prejudice caused by the improper comments by the prosecuting attorney about convicting on constructive knowledge. Here, the trial court would merely have given the same instruction, not a curative instruction, and thus would have overruled a defense objection

based on its previous reasoning that the language of WPIC 10.02 was "sound." RP 269-70. Reversal is required.

F. CONCLUSION

For the above stated reasons, Mr. Jensen asks the Supreme Court to accept review, and to reverse his convictions.

This brief is composed in font Times New Roman size 14 and contains 3,681words.

Dated this 22nd day of May, 2024.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JASON MICHAEL JENSEN, Appellant.	No. 86184-1-I DIVISION ONE UNPUBLISHED OPINION

CHUNG, J. — A jury convicted Jason Jensen of one count of delivery of a controlled substance and one count of possession of a controlled substance with intent to deliver, both involving fentanyl. On appeal, he challenges the sufficiency of evidence on both counts, contending that he did not know the pills he sold to a confidential informant contained fentanyl. He also challenges the court's use of a pattern jury instruction regarding knowledge rather than his proposed modifications. We conclude the court did not err in giving the pattern instruction. We also conclude the evidence is sufficient to support his convictions. Therefore, we affirm.

FACTS

On January 11, 2021, Detective Adam Haggerty set up a controlled buy from Jensen using a confidential informant. The informant and his car were

searched before the buy began. Haggerty got $1,500 of prerecorded[1] buy funds from Detective Sergeant Tracy Murphy "to purchase 50 counterfeit Percocet pills suspected to contain fentanyl and some heroin." Haggerty gave the money to the informant to buy "between 50 and 60 pills and then as much heroin as we could." Haggerty equipped the informant with a cell phone with a hidden application to record his interactions with Jensen during the buy.

The informant drove his car to an AM/PM minimart in Chehalis, Washington. A surveillance team was already in place. Jensen told the informant to cross the street to a Chevron station. The informant told Jensen he wanted "90 and a ball"[2] for his $1,500.

After the transaction, Haggerty watched the informant return to him, and the informant handed him "54 blue pills stamped with 'M' on one side and '30' on the other" and four grams of heroin. Haggerty later testified that the pills, "at face value, appeared to be Percocet 30s; but in our drug world right now, they're almost all 100% laced with fentanyl."

After leaving the Chevron, Jensen was followed and stopped by several police cars. Murphy searched him and found $1,685 in Jensen's pocket. That money included all the prerecorded buy funds. Another member of the task force searched Jensen's car. He found a fanny pack, inside of which he found a digital

[1] Prerecorded means a currency counter has taken pictures of the serial numbers of the bills involved.

[2] Haggerty testified that he did not understand this jargon used by the informant.

scale with heroin residue on it. The fanny pack also contained heroin, plastic baggies, and more suspected fentanyl pills.[3]

Haggerty had the pills tested at the Washington State Patrol's crime lab in Vancouver, Washington. The analyst randomly selected one of the 54 pills for testing, and it was found to contain fentanyl. One of the 15 pills recovered from Jensen's car was also tested and similarly found to contain fentanyl. The pills did not contain any of the 30 milligrams of oxycodone that their markings suggested each should contain.

In October 2022, Jensen was charged with one count of delivery of a controlled substance "to-wit: Fentanyl" (count 1) and one count of possession of a controlled substance with intent to deliver, "to-wit: Fentanyl" (count 2). At trial, Haggerty, Murphy, and the analyst all testified.

After both sides rested, the court heard argument regarding proposed jury instructions. Jensen proposed deleting a one-sentence paragraph from Washington Pattern Jury Instruction (WPIC) 10.02 regarding the legal definition of "knowledge" or, alternatively, adding a second sentence to the paragraph to address the concern that the jury might incorrectly infer that the standard was "should have known." The State opposed the motion, and the court denied it.

The jury returned guilty verdicts on both counts. Jensen timely appeals.

[3] These 15 pills became item number 3 for evidence and testing purposes.

DISCUSSION

Jensen challenges the sufficiency of the State's evidence to prove that he knew the substance he delivered was fentanyl and that he possessed fentanyl with the intent to deliver the same. He also challenges the court's refusal to give the modified instruction he proposed to clarify the definition of "knowledge" and claims the prosecutor misstated the knowledge standard in closing argument. In a separate statement of additional grounds, Jensen likewise contends that he did not know that the pills he sold to the State's confidential informant "were in fact counterfeit Percocet M30 pills containing fentanyl."

I. Jury Instruction on Knowledge

Jensen argues "the [court's] refusal to instruct the jury as [he] requested" with his proposed instruction modifying the standard WPIC 10.02 instruction on knowledge was error and the instruction the court gave instead was improper. We disagree.

We review de novo a trial court's refusal to provide a requested jury instruction where the refusal is based on a ruling of law. State v. Arbogast, 199 Wn.2d 356, 365, 506 P.3d 1238 (2022). Each challenged instruction is evaluated in the context of the instructions as a whole. State v. Brett, 126 Wn.2d 136, 171, 892 P.2d 29 (1995). Assuming evidence sufficient to support it, each party is "entitled to instructions that, when taken as a whole, properly instruct the jury on the applicable law, are not misleading, and allow each party the opportunity to

argue their theory of the case." State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003).

Knowledge is an element of count 1, delivery of a controlled substance. State v. Boyer, 91 Wn.2d 342, 344, 588 P.2d 1151 (1979) ("we find . . . that guilty knowledge is intrinsic to the definition" of delivery under RCW 69.50.401). By contrast, count 2, possession of a controlled substance with intent to deliver, does not require an additional "guilty knowledge" element. State v. Sims, 119 Wn.2d 138, 142, 829 P.2d 1075 (1992).

RCW 9A.08.010(1)(b) defines "knowledge" as follows:

> (b) KNOWLEDGE. A person knows or acts knowingly or with knowledge when:
> (i) He or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or
> (ii) He or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.

In State v. Shipp, the Washington Supreme Court considered a jury instruction that defined knowledge using this statutory language. 93 Wn.2d 510, 514, 610 P.2d 1322 (1980). The court held "the statute must be interpreted as only permitting, rather than directing, the jury to find that the defendant had knowledge if it finds that the ordinary person would have had knowledge under the circumstances." Id. at 516. In other words, "the statute merely allows the inference that a defendant has knowledge in situations where a reasonable person would have knowledge," rather than creating a mandatory presumption of knowledge in such a situation. Id. at 512. Because an instruction using the

statutory language could be interpreted as a mandatory presumption or to redefine knowledge to mean negligent ignorance, such interpretations were unconstitutional and violated due process. Id. at 515, 516. See also State v. Leech, 114 Wn.2d 700, 710, 790 P.2d 160 (1990), abrogated on other grounds by In re the Pers. Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002) ("Shipp concluded that use of this statutory language in the knowledge instruction violated due process because it could be interpreted by the jury as creating a mandatory inference of knowledge, while only a permissive inference is constitutionally permissible.").

In the present case, jury instruction 13 on knowledge is the language from WPIC 10.02:

> A person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he is aware of that fact, circumstance or result. It is not necessary that the person know that the fact, circumstance or result is defined by law as being unlawful or an element of a crime.
>
> 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 acted with knowledge of that fact.
>
> When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

The same pattern jury instruction used here was approved in State v. Leech, 114 Wn.2d at 710. Specifically, regarding the language that "a jury is permitted but not required to find that a person acted with knowledge if that person has information that would lead a reasonable person to believe that facts exist that

constitute a crime," the Leech court noted, "The constitutionality of this revised language has been upheld repeatedly." Id.

Jensen proposed adding a second sentence at the end of the second paragraph: "However, the jury should not find knowledge if it finds the person did not actually know a fact, circumstance, or result, even if the jury also finds the person should have known the fact, circumstance, or result." Alternatively, Jensen proposed to omit the second paragraph entirely. He argues that the instruction the court gave "undermines and confuses the actual knowledge requirement and permits the jury to misapply the law," and his "proposed language would have protected against the error created by the instruction employed."

Jensen contends that State v. Allen "illustrates the problem" with the pattern instruction without his additional proposed language. In Allen, the court warned that "[a]lthough subtle, the distinction between finding actual knowledge through circumstantial evidence and finding knowledge because the defendant 'should have known' is critical." State v. Allen, 182 Wn.2d 364, 374, 341 P.3d 268 (2015). Rather than constructive knowledge, "the jury must find actual knowledge but may make such a finding with circumstantial evidence." Id. But in Allen, there was no challenge to the instruction. Rather, the court held it was reversible error when the prosecutor "repeatedly misstated that the jury could convict Allen if it found that he *should have known."* Id. at 374.

Jury instructions cannot misstate the law. See State v. Hoffman, 116 Wn.2d 51, 110-11, 804 P.2d 577 (1991) ("A trial court is not required to give an instruction which is erroneous in any respect"). However, WPIC 10.02 is a correct statement of the law, Leech, 114 Wn.2d at 710, so the additional sentence Jensen proposed was not necessary. The sentence Jensen proposed to delete from the pattern jury instruction would have the effect of ignoring RCW 9A.08.010(b)(ii) and, thus, would have misstated the law.

Instruction 13 was a correct statement of the law. It did not prevent Jensen from arguing his theory of the case, and he does not argue the instructions as a whole were inadequate. We thus agree with the State that the court did not err by denying Jensen's motion either to delete a sentence from the pattern instruction or add a sentence to it.[4]

II. Sufficiency of the evidence

Jensen argues the State's evidence is insufficient to support either his conviction for possession with intent to deliver or for delivery of a controlled substance because he thought the pills were Percocet and he did not know they contained fentanyl. We disagree.

[4] Jensen also argues the prosecutor committed misconduct in closing argument. The relevant section of his opening brief, however, does not cite any statement by the prosecutor. RAP 10.3 requires argument that cites to the relevant parts of the record. While Jensen's reply brief does cite to the record, it argues the prosecutor committed misconduct "for the same reasons it was reversible instructional error." As we conclude the court properly instructed the jury, we need not separately address the prosecutorial misconduct argument. Moreover, we note that unlike the prosecutor in Allen, the prosecutor here did not incorrectly state the knowledge standard as "should have known." See Allen, 182 Wn.2d at 374. Rather, the prosecutor here said the evidence showed Jensen "knew," i.e., had actual knowledge: "The buyer knew it was fentanyl. The detective knew it was fentanyl. And because of that, the person selling it knew it was fentanyl."

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). That is, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Id. at 781 (quoting Salinas, 119 Wn.2d at 201). Circumstantial evidence and direct evidence carry equal weight when determining the sufficiency of the evidence. Id. (citing State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)).

A. Delivery of a Controlled Substance

To prove the crime of delivery of a controlled substance, the State must prove that the defendant (1) delivered a controlled substance, and (2) knew the delivered substance was controlled. State v. Martinez, 123 Wn. App. 841, 846, 99 P.3d 418 (2004). Proof of "guilty knowledge" means "an understanding of the identity of the product being delivered." Boyer, 91 Wn.2d at 344. See also State v. Valdobinos, 122 Wn.2d 270, 283-84, 858 P.2d 199 (1993) (quoting Boyer, 91 Wn.2d at 344) (Boyer held that guilty knowledge is "an essential element of the crime of *delivery* of a controlled substance. That is, the defendant must have been aware of the nature of the substance being delivered.").

For example, in Boyer, the defendant sold five pounds of LSD-laced mushrooms to an undercover agent. 91 Wn.2d at 343. The defendant's argument at trial was that he did not know the mushrooms contained LSD. Id. The jury convicted the defendant for the delivery of a controlled substance, and our Supreme Court affirmed, rejecting the Court of Appeals's suggestion that no mental state need be proven regarding the crime at all.[5] Id. at 344.

As noted above, "a jury is permitted but not required to find that a person acted with knowledge if that person has information that would lead a reasonable person to believe that facts exist that constitute a crime." Leech, 114 Wn.2d at 710. "[T]he State need not present direct evidence" of the defendant's guilty knowledge to prove delivery of a controlled substance. State v. Hudlow, 182 Wn. App. 266, 288, 331 P.3d 90 (2014). "The elements of a crime may be established by either direct or circumstantial evidence, and one type of evidence is no more or less trustworthy than the other." Id. (quoting State v. Rangel-Reyes, 119 Wn. App. 494, 499, 81 P.3d 157 (2003). Thus, while "the jury must find actual knowledge . . . [it] may make such a finding with circumstantial evidence." Allen, 182 Wn.2d at 374.

Jensen argues the State has "no proof of knowledge *by the defendant."* He argues that the State did not present any law enforcement officers' testimony about how drugs are bargained for and sold, but rather, what "they believed or

[5] In Boyer, the Supreme Court rejected the defendant's challenge to a jury instruction permitting the jury to infer guilty knowledge from the act of delivery on the ground that the defendant himself had proposed the instruction. Id. at 343-44.

knew as to whether the pills were fentanyl." Jensen's explanation for his interaction with the State's confidential informant is that the informant said he had cancer and had run out of Percocet for pain. Jensen claims that at the time, he "was a heavy user of Percocet M30 pills and had enough to sell [the informant] what he requested without jeopardizing my ability to sustain my addiction" so he "gave [the informant] a quantity of my own supply of Percocet M30 pills." He alleges that "the first time [he] became aware [he] was using and had sold fentanyl" was after he was arrested.[6]

Jensen attempts to distinguish this case from Hudlow. In Hudlow, the court stated, "The strongest evidence of knowledge is the price Thomas Hudlow accepted in exchange for the small package." 182 Wn. App. at 288. Along with testimony that methamphetamine typically sells for $10 per decigram (0.1 grams) and for $110 Hudlow sold the informant 1.28 grams, Hudlow and the informant also "shook hands indicating agreement." Id. at 288-89. Thus, the court reasoned, "[b]ased on Hudlow accepting a price suitable for the amount of methamphetamine sold, the jury could reasonably infer that Hudlow knew the substance delivered was methamphetamine."[7] Id. at 289.

Jensen argues that the facts of his transaction are different from Hudlow "because the price that Hudlow accepted matched" the price testified to by

[6] Jensen did not testify to, and the trial record does not contain evidence of, this account described in Jensen's SAG.

[7] In Hudlow, the court also held that testimony was admitted in violation of the confrontation clause, so it reversed Hudlow's conviction. 182 Wn. App. at 287, 290. However, because the State's evidence was sufficient, the court remanded for a new trial. Id. at 290.

detectives. Reply Brief of Appellant 7 (citing Hudlow, 182 Wn. App. at 288). But even without testimony about a unit price for fentanyl, here, as in Hudlow, the informant and his car were searched before the controlled buy. The confidential informant was given an amount of money with instructions to buy a particular amount of drugs: $1,500 in prerecorded buy money for "between 50 and 60 pills and then as much heroin as we could." The informant went to the planned buy location, an Arco AM/PM. Jensen told the informant to come to the Chevron station across the street instead, and they completed their deal there. The informant carried a hidden recording device during the entire transaction. As in Hudlow, Jensen and the informant came to an agreement based on the amount of money exchanged for the amount and type of drugs Jensen delivered in exchange.

The informant drove away from the transaction without an opportunity to obtain the drugs from any source other than defendant, as in Hudlow. 182 Wn. App. at 289 ("confidential informant had no opportunity to obtain the methamphetamine from any other source than Hudlow"). After the transaction, the informant handed over to Haggerty 54 blue pills and heroin. Officers followed Jensen from the transaction onto the freeway and then to a parking lot, where he and his car were searched. When the police arrested Jensen, they found money in his pocket that matched the prerecorded buy money given to the informant and more of the same blue pills.

Haggerty had the pills tested. He testified that, while the pills "at face value, appeared to be Percocet 30s . . . in our drug world right now, they're almost all 100% laced with fentanyl." The State's forensic scientist, who tested the pills, confirmed that both the pills sold to the informant and the pills found in Jensen's car were fentanyl pills.

We conclude that based on the evidence, any rational trier of fact could find, beyond a reasonable doubt, that Jensen had actual knowledge that the pills he delivered to the confidential informant were fentanyl. As the evidence also establishes the other elements of the charged crime of delivery of a controlled substance, there was sufficient evidence to convict Jensen on count 1.

B. Possession of a Controlled Substance with Intent to Deliver

In contrast to the crime of *delivery* of a controlled substance, the crime of possession of a controlled substance *with intent to deliver* does not require an additional "guilty knowledge" element. Sims, 119 Wn.2d at 142; This is because "[t]he statutory elements of the crime of unlawful possession of a controlled substance with intent to manufacture or deliver include the requisite mental state, *i.e.,* the *intent* to manufacture or deliver a controlled substance." Id.; see also Valdobinos, 122 Wn.2d at 284 ("the very crime of intent to deliver includes [the] mens rea component" for possession with the intent to deliver). Thus, to prove the crime charged in count 2, the State was required to prove (1) unlawful possession (2) with intent to manufacture or deliver (3) a controlled substance. Sims, 119 Wn.2d at 141 (citing RCW 69.50.401(a)).

" ' [The] specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability.' " Goodman, 150 Wn.2d at 781 (quoting Delmarter, 94 Wn.2d at 638). The evidence shows that the informant arranged a transaction with Jensen to exchange money for controlled substances, fentanyl and heroin. After the transaction, the informant gave Haggerty heroin and 54 blue pills that were later confirmed to contain fentanyl, a controlled substance. Jensen was arrested with the prerecorded buy money in his pocket. When detectives searched his car, they found a digital scale with heroin residue, and, inside a fanny pack, more of the same blue pills that testing showed to be fentanyl. We conclude any rational trier of fact could infer from Jensen's conduct and the other evidence described above that, beyond a reasonable doubt, Jensen possessed a controlled substance with the intent to deliver it.

CONCLUSION

The trial court did not err in rejecting Jensen's proposed modifications to jury instruction 13 and by giving the pattern jury instruction on knowledge, WPIC 10.02. We further conclude that the evidence was sufficient to prove both the crimes for which Jensen was convicted.

Affirmed.

Chung, J.

WE CONCUR:

Birk, J.

Mann, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached was filed in the **Court of Appeals** under **Case No. 86184-1-I** and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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TREVOR O'HARA, Legal Assistant
Washington Appellate Project

Date: May 22, 2024

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