IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 65702-0-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
HOLLIS JAY SIMMONS,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: July 25, 2011
	)	
	)	

Cox, J. – Hollis Simmons appeals his conviction for delivery of an uncontrolled substance in lieu of a controlled substance. When unnecessary elements are included in the "to convict" jury instruction, the State assumes the burden of proving those elements.[1] The "to convict" instruction here did not contain any unnecessary elements, and the instruction defining "delivery" did not create any such element. The State proved beyond a reasonable doubt every element of the charged crime. The entry of findings of fact and conclusions of law for a suppression hearing following the notice of appeal created no prejudice. There was no abuse of discretion by the trial court for the alleged failure to give a curative instruction, as Simmons claims in his statement of additional authority. We affirm.

The State charged Simmons with one count of Violation of the Uniform

[1] State v. Hickman, 135 Wn.2d 97, 104, 954 P.2d 900 (1998).

Controlled Substances Act (VUCSA). Specifically, the State alleged that Simmons delivered an uncontrolled substance in lieu of cocaine.

There were no exceptions to the jury instructions that the court gave during trial. During closing, the parties referred to these instructions.

A jury convicted Simmons as charged. Simmons appeals.

SUFFICIENCY OF EVIDENCE

Simmons argues that the State did not prove beyond a reasonable doubt every element of the crime charged. He bases this argument on the claim that it did not prove "delivery" as that term was defined in instruction 8. We disagree.

Essentially, Simmons is challenging the sufficiency of the evidence. In reviewing such a claim, we ask whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt.[2]

Simmons is correct that the State must prove all of the elements of the crime charged. Moreover, the State must also prove any otherwise unnecessary elements if they are included without objection in the "to convict" instruction.[3]

Simmons asks us to extend this reasoning beyond the "to convict" instruction, alleging that the law of the case doctrine applies to all instructions. But, he cites no authority to support his argument that an instruction defining terms in the "to convict" instruction creates an additional element that the State

[2] State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980).

[3] Hickman, 135 Wn.2d at 105.

must prove.

Rather, Simmons relies on State v. Braun,[4] which involved the definition of a deadly weapon for purposes of a special verdict.[5] That case contains no discussion of unnecessary elements.

Here, the court's instructions to the jury included the following:

Instruction 7

> A person commits the crime of delivery of a material in lieu of a controlled substance if that person knowingly offers, arranges or negotiates for the sale or delivery of a controlled substance to any person and then sells, gives, delivers, dispenses or distributes to that person any other substance or material in lieu of such controlled substance.[6]

Instruction 8

> Deliver or delivery means the actual transfer of a controlled substance from one person to another.[7]

Instruction 11

> To convict the defendant of the crime of Violation of the Uniform Controlled Substances Act—Delivery of a Material in Lieu of a Controlled Substance, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 9th of August 2009, the defendant knowingly offered, arranged or negotiated for the delivery, sale, distribution or dispensing of a controlled substance;
>
> (2) That the defendant delivered an uncontrolled substance in lieu of the controlled substance; and

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[4] 11 Wn. App. 882, 526 P.2d 1230 (1974).

[5] Id. at 884-85.

[6] Clerk's Papers at 16.

[7] Id. at 17.

(3) That the acts occurred in the State of Washington.[8]

Neither Simmons nor the State excepted to these instructions.

In closing argument, both Simmons and the State discussed instruction 11, the "to convict" instruction. Neither party discussed instruction 7 or instruction 8.

Instruction 8 was intended to assist the jurors in understanding the "to convict" instruction.[9] The note on use following Washington Pattern Jury Instruction (WPIC) 50.21, the pattern "to convict" instruction for "Delivery of a Material in Lieu of a Controlled Substance," recommends that it be accompanied by WPIC 50.07, which defines delivery.[10] Here, instruction 8 is plainly modeled on WPIC 50.07.[11]

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[8] Id. at 20.

[9] See, e.g., State v. Marko, 107 Wn. App. 215, 219-20, 27 P.3d 228 (2001) (statutory definition of "threat" does not create additional elements of the crime of intimidating a witness and a jury unanimity instruction was not required); State v. Laico, 97 Wn. App. 759, 764, 987 P.2d 638 (1999) (statutory definition of "great bodily harm" does not add an element to the assault statute, rather it is intended to provide understanding); State v. Daniels, 87 Wn. App. 149, 156, 940 P.2d 690 (1997) (WPIC definition of "battery" not an element of assault by actual battery and the "to convict" instruction not deficient for not including it); State v. Strohm, 75 Wn. App. 301, 308-09, 879 P.2d 962 (1994) (statutory definition of "traffic" does not create additional alternative means of committing the crime of trafficking in stolen property and juror unanimity is not required on the alternative means).

[10] 11 Washington Pattern Jury Instructions: Criminal 50.21, at 975 (3d ed. 2008).

[11] "Deliver or delivery means the [actual] [or] [constructive] [or] [attempted] transfer of a [controlled substance] [legend drug] from one person to another." 11 Washington Pattern Jury Instructions: Criminal 50.07, at 960 (3d ed. 2008).

Simmons was charged with delivery of a substitute for a controlled substance, and defining delivery in the standard way did nothing to alter the State's proof requirements.

Simmons argues that because jurors are presumed to give meaning to and follow every instruction given, we must assume that the jury followed both instruction 8 and instruction11. He claims that because these instructions are internally inconsistent, he was prejudiced. This argument fails.

When jury instructions are inconsistent, we must determine whether the jury was misled as to its functions and responsibilities under the law.[12] "'[W]here such an inconsistency is the result of a clear misstatement of the law, the misstatement must be presumed to have misled the jury in a manner prejudicial to the defendant.'"[13] Challenges to jury instructions must be reviewed in the context of the instructions as a whole.[14]

Here, instruction 11, the "to convict" instruction, did not misstate the law. Delivery of an uncontrolled substance in lieu of a controlled substance requires proof of two things. First, the defendant must arrange for the delivery of a controlled substance. Second, the State must prove he delivered an uncontrolled substance in lieu of the controlled substance. The crux of the definition of "delivery" given by the court is the word transfer. "Deliver or

[12] State v. Irons, 101 Wn. App. 544, 559, 4 P.3d 174 (2000).

[13] State v. Walden, 131 Wn.2d 469, 478, 932 P.2d 1237 (1997) (citing State v. Wanrow, 88 Wn.2d 221, 239, 559 P.2d 548 (1977)).

[14] State v. Jackman, 156 Wn.2d 736, 743, 132 P.3d 136 (2006).

delivery means the actual ***transfer*** of a controlled substance from one person to another."[15]

The object of the transfer necessarily differs between the first requirement and the second. In the context of the first requirement, delivery is correctly defined. With respect to the second requirement, the object to be transferred differs, but the essence of the definition is unchanged. The defendant must ***transfer*** the object ***from one person to another***.

In the context of the evidence and the instructions as a whole, instruction 8 was not misleading. Nor did the inclusion of instruction 8 mislead the jury as to its function and responsibilities under the law.[16] Simmons's argument to the contrary is unpersuasive.

SUPPRESSION HEARING FINDINGS AND CONCLUSIONS

Simmons claims that the trial court's failure to enter written findings of fact and conclusions of law following his Criminal Rule (CrR) 3.6 suppression hearing requires reversal or remand. Because he can show no prejudice due to the entry of the findings and conclusions shortly after his notice of appeal, we disagree.

CrR 3.6(b) provides that "If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law."

The trial court held a CrR 3.6 hearing on Simmons's motion to suppress

[15] Clerk's Papers at 17 (emphasis added).

[16] Wanrow, 88 Wn.2d at 239.

certain evidence on May 3, 2010. Simmons filed his notice of appeal on July 9, 2010. The trial court belatedly entered its written finds of fact and conclusions of law on September 27, 2010, before the State filed its response brief.

We will not reverse a conviction for the late entry of findings and conclusions unless the delay prejudiced the defendant or the findings and conclusions were tailored to address the issues raised in the defendant's appellate brief.[17] Here, Simmons has not alleged any error, and we see none in our independent review of the record. Reversal is therefore not warranted.[18]

STATEMENT OF ADDITIONAL GROUNDS

In his statement of additional grounds for review, Simmons claims that he was deprived of a fair trial because the trial court failed to give a "curative instruction." This claim has no merit.

Here, Simmons argues that the trial court declined to give a "curative instruction" for testimony his own attorney elicited during cross examination of a police officer. Given that his own attorney sought this testimony and no one objected, it is not surprising that there was no request for a curative instruction, which would ordinarily follow a timely objection.

Simmons cites to the record where neither side excepted to the trial court's proposed jury instructions. He appears to argue that Seattle Police Officer John Kallis improperly testified as to the legal definition of a crime based

[17] State v. Cannon, 130 Wn.2d 313, 329-30, 922 P.2d 1293 (1996).

[18] Id. at 330.

on the following questions and answers:

> [Defense Attorney]: You have training on what the drug laws are in the State of Washington?
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> [Officer Kallis]: That's correct.
>
> [Defense Attorney]: Is it illegal to possess fake cocaine?
>
> [Officer Kallis]: I'm not aware—it's illegal to sell fake cocaine.
>
> [Defense Attorney]: But could you arrest someone for just having it?
>
> [Officer Kallis]: Yes.
>
> [Defense Attorney]: For having fake cocaine?
>
> [Officer Kallis]: That's correct.
>
> [Defense Attorney]: You believe that's illegal?
>
> [Officer Kallis]: I believe that's illegal.[19]

As we just observed, this testimony was elicited by Simmons's attorney during the cross-examination of Officer Kallis.

If any error occurred, it was invited and cannot be a basis for reversal. A party who sets up an error at trial cannot claim it as an error on appeal.[20]

In any event, it does not appear that Officer Kallis either gave an opinion as to any crime at issue in this case, or voiced his opinion as to Simmons's guilt or innocence. Therefore, even if an error occurred, the improper testimony would be harmless because Simmons cannot show that any prejudice

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[19] Report of Proceedings (May 4, 2010) at 115.

[20] State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

[21] Everett v. Diamond, 30 Wn. App. 787, 792, 638 P.2d 605 (1981)

occurred.[21]

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Spearman, J.

Ellington, J.

(holding witness improperly testified to conclusions of law, but any error was harmless because the testimony was not prejudicial).