State v. Sibert (Richard E.)
Dissent by Alexander, J.

No. 79509-6

ALEXANDER, J. (dissenting)—I dissent because, in my view, it was error for the trial court to (1) omit the identity of the controlled substance in the "to convict" jury instructions and (2) impose a sentence that was not authorized by the jury's verdict. As the harmless error doctrine does not apply to the second error, I would vacate Richard Sibert's sentence and remand for resentencing.

The Instructional Error

The majority correctly sets forth the relevant controlling precedent concerning "to convict" jury instructions. *See* majority at 4-5. In that regard, it rightly notes that "'[t]he State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld'" and that "[t]he identity of a controlled substance is an essential element where it increases the maximum sentence." *Id.* at 4 (quoting *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995)), 5 (citing *State v. Goodman*, 150 Wn.2d 774, 785-86, 83 P.3d 410 (2004)). The majority also properly holds that here the identity of the controlled substance is an "essential element" because it "determined

the level of the crime and its penalty." *Id.* at 5 (citing *Goodman*, 150 Wn.2d at 785-86; *State v. Eaton*, 164 Wn.2d 461, 473-76, 191 P.3d 1270 (2008) (Sanders, J., dissenting)). The majority further acknowledges that "'a "to convict" [jury] instruction *must* contain all of the elements of the crime because it serves as a "yardstick" by which the jury measures the evidence to determine guilt or innocence.'" *Id.* at 4 (emphasis added) (alteration in original) (quoting *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997) (quoting *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)).

However, in seeming contradiction of the above rules and its conclusion that the identity of the controlled substance is an "essential element," the majority determines that it was not error for the trial court to omit the identity of the controlled substance from the "to convict" instructions given in this case.[1] *Id.* at 6. This conclusion is, in my view, inexplicable because the "to convict" instructions did not specify the controlled

[1]The "to convict" jury instructions for the three counts of delivery of a controlled substance required that to convict Sibert of the crimes as charged, "each of the following elements of the crime must be proved beyond a reasonable doubt:

"(1) That . . . 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." Clerk's Papers (CP) at 40, 41, 42.

The "to convict" instructions for the count of possession of a controlled substance with intent to deliver required that to convict Sibert of the crime as charged, "each of the following elements of the crime must be proved beyond a reasonable doubt:

"(1) That . . . the Defendant possessed a controlled substance;

"(2) That the Defendant possessed the substance with the intent to deliver the controlled substance; and

"(3) That the acts occurred in the State of Washington." CP at 49.

substance Sibert allegedly delivered and possessed with intent to deliver. It was error, therefore, for the trial court to give the jury "to convict" instructions that failed to inform the jury that the State must prove the identity of the controlled substance in addition to the other essential elements of the crimes charged. *Cf. State v. DeRyke*, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003) (holding "it was error to give the jury a 'to convict' instruction for the charge of attempted first degree rape which did not specify the degree of the rape allegedly committed"). The majority errs in holding otherwise. Moreover, to the extent the majority's analysis relies on the fact that "[m]ethamphetamine was the only controlled substance . . . defined in the jury instructions,"[2] majority at 7 (citing Clerk's Papers (CP) at 44), it violates the rule that "a reviewing court may not rely on other instructions to supply the element missing from the 'to convict' instruction." *DeRyke*, 149 Wn.2d at 910 (citing *Smith*, 131 Wn.2d at 262-63).

Because I would hold that the "to convict" instructions were deficient, I must express my view on the question of whether Sibert is entitled to automatic reversal of his convictions or whether his claim is subject to harmless error analysis. As a general principle, an erroneous jury instruction is ordinarily subject to harmless error analysis. *Id.* at 912. Automatic reversal of a conviction is, however, required "when an 'omission or misstatement in a jury instruction relieves the State of its burden' of proving every essential element of the crime." *Id.* (quoting *State v. Brown*, 147 Wn.2d 330, 339, 58

[2]Instruction 15 provided: "Methamphetamine is a controlled substance." CP at 44.

P.3d 889 (2002)). Sibert, thus, would be entitled to an automatic reversal of his convictions only if the trial court failed to instruct the jurors on all the elements of delivery of a controlled substance and possession of a controlled substance with intent to deliver. *See id.* As the "to convict" instructions included some elements of the crimes charged, automatic reversal is not required. *See Goodman*, 150 Wn.2d at 782 (listing "statutory elements" of possession of a controlled substance with intent to deliver); *State v. DeVries*, 149 Wn.2d 842, 849-50, 72 P.3d 748 (2003) (setting forth "necessary elements" of delivering a controlled substance). Consequently, the trial court's error is subject to harmless error analysis.

Under harmless error analysis, "[a]n instructional error is presumed to [be] prejudicial unless it affirmatively appears that it was harmless." *Smith*, 131 Wn.2d at 263-64 (citing *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)). "As applied to omissions or misstatements of elements in jury instructions, 'the error is harmless if that element is supported by uncontroverted evidence.'" *State v. Thomas*, 150 Wn.2d 821, 845, 83 P.3d 970 (2004) (quoting *Brown*, 147 Wn.2d at 341 (citing *Neder v. United States*, 527 U.S. 1, 18, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999))), *abrogated in part on other grounds, Crawford v. Washington,* 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Restated, "[i]n order to hold the error harmless, we must 'conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.'" *Brown*, 147 Wn.2d at 341 (quoting *Neder*, 527 U.S. at 19).

It is my judgment that the instructional error in this case was harmless. I reach

this conclusion for two of the reasons the majority relies on to hold, albeit incorrectly, that the instructions were not erroneous. First, methamphetamine was the only controlled substance the prosecution proved through expert testimony. 3 Verbatim Report of Proceedings (VRP) at 221-30. Second, methamphetamine was the only controlled substance mentioned in closing arguments: it was referenced three times by the prosecutor in his closing argument. 3 VRP at 261, 269, 271. The references in the amended information to the controlled substance as "to-wit: Methamphetamine," CP at 12, 13, 14, do not support the conclusion that the instructional error was harmless because there is no evidence in the record that the jury was given the amended information as an exhibit or was told what the amended information charged.[3] Nevertheless, these reasons are sufficient to support a conclusion that the identity of the controlled substance was supported by uncontroverted evidence and it is beyond a reasonable doubt that the jury verdict would have been the same absent the instructional error. I would thus hold that the error in omitting the identity of the controlled substance in the "to convict" instructions was harmless.

Accordingly, despite my disagreement with the majority's conclusion that it was not error for the trial court to give the "to convict" instructions that it did, I agree with its conclusion that reversal of Sibert's convictions is not warranted for the instructional

[3]At oral argument, the State conceded that the jury was not given a copy of the amended information as an exhibit and the trial court did not tell the jury what the amended information charged. Wash. Supreme Court oral argument, *State v. Sibert*, No. 79509-6 (Feb. 10, 2009) at 23 min., 10-30 sec., *audio recording by TVW*, Washington State's Public Affairs Network, *available at* http://www.tvw.org.

error. Majority at 8.

The Sentencing Error

Relying on our decision in *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008), Sibert asks us to hold that the sentence imposed by the trial court in this case violates article I, section 21 of our state constitution. That provision states that "[t]he right of trial by jury shall remain inviolate." Const. art. I, § 21. In upholding the sentence, the majority does not discuss *Recuenco* or the jury trial right.[4]

In *Recuenco*, a jury found that the defendant, Arturo Recuenco, was armed with a deadly weapon during the commission of the underlying offense, second degree assault. Despite the verdict, the trial court imposed a 36-month firearm enhancement, rather than a 12-month deadly weapon enhancement. We held that in doing so the trial court violated article I, section 21 because the jury's verdict did not authorize the court "to sentence [the defendant] for the additional two years that correspond with the greater enhancement." *Recuenco*, 163 Wn.2d at 440.

Here, a jury found Sibert guilty of three counts of delivery of "a Controlled Substance" and one count of possession with intent to deliver "a Controlled

[4]With regard to Sibert's contention that the sentence imposed by the trial court was excessive because the "to convict" instructions omitted the identity of the controlled substance, the majority merely holds that there was "no *Blakely* [*v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)] violation with respect to sentencing." Majority at 9. I express no view as to this conclusion of the majority because I would have us decide the propriety of the sentence imposed here under the independent and adequate state grounds of article I, section 21. *See, e.g., State v. Patton*, 167 Wn.2d 379, 396 n.9, 219 P.3d 651 (2009); *Dreiling v. Jain*, 151 Wn.2d 900, 915 n.6, 93 P.3d 861 (2004); *City of Seattle v. McCready*, 123 Wn.2d 260, 281-82, 868 P.2d 134 (1994). We need not decide whether the sentence imposed violated *Blakely*.

Substance." CP at 23-26. It also found that two of the counts occurred within 1,000 feet of a school bus stop. In determining the standard sentence ranges for Sibert's offenses, the trial court calculated that Sibert had an offender score of five and that the offenses had seriousness levels of II, yielding standard sentence ranges (without enhancements) of 20-60 months. For the two counts found by the jury to have occurred within 1,000 feet of a school bus stop, the trial court determined that the mandatory 24-month school bus zone enhancement increased the standard sentence ranges to 44-84 months. The trial court then sentenced Sibert to confinement as follows: 64 months on count I (delivery), 60 months on count II (delivery), 64 months on count III (delivery), and 60 months on count IV (possession with intent to deliver). Because the sentences were ordered to be served concurrently, the actual number of months of total confinement ordered was 64 months.

Sibert argues, in part, that he should not have received a sentence "enhanced above 6-18 months" because the jury did not make a finding regarding the identity of the controlled substance. Pet'r's Suppl. Br. at 14. If Sibert is correct, then the alleged error cannot be harmless. That conclusion follows from *Recuenco*, where we held that the harmless error doctrine did not apply to the aforementioned violation of article I, section 21 in that case. *Recuenco*, 163 Wn.2d at 440-41. Likewise, in *State v. Williams-Walker*, 167 Wn.2d 889, ___ P.3d ___ (2010), we recently held that where a sentencing court violates article I, section 21 by imposing a sentence enhancement that is not authorized by the jury, "error occurs that can never be harmless." *Id*. at 902

(holding harmless error doctrine did not apply to violations of jury trial right where sentencing courts imposed firearm enhancements after juries found defendants were armed with deadly weapons).

Recuenco and *Williams-Walker* are consistent with our prior determination that the Washington Constitution provides greater protection for jury trials than is provided in the federal constitution. *See Recuenco*, 163 Wn.2d at 440 (citing *State v. Smith*, 150 Wn.2d 135, 151, 75 P.3d 934 (2003) and quoting *City of Pasco v. Mace*, 98 Wn.2d 87, 99, 653 P.2d 618 (1982)); *see also State v. Hicks*, 163 Wn.2d 477, 492, 181 P.3d 831 (2008) (citing *Mace*, 98 Wn.2d at 99). In interpreting the "inviolate" nature of the right to a jury trial under article I, section 21, we have relied on *Webster's* definition: "'"free from change or blemish **:** pure, unbroken . . . free from assault or trespass **:** untouched, intact."'" *Hicks*, 163 Wn.2d at 492 (alteration in original) (quoting *Smith*, 150 Wn.2d at 150 (quoting Webster's Third New International Dictionary 1190 (1993))). The increased protection of the jury trial right supports the view that harmless error analysis does not apply when a trial court imposes a sentence that exceeds the authority granted by the jury's verdict. *Cf. id.* (holding increased protection of jury trial right supported affording trial judge discretion to find discrimination in jury selection).

Here the sentence imposed was invalid because it was in excess of the trial court's authority. Sibert correctly claims that the identity of the controlled substance affected the applicable seriousness level and, consequently, the standard sentence ranges for his offenses. Under RCW 9.94A.518, Sibert's convictions did not have a

seriousness level of II with respect to all controlled substances to which former RCW 69.50.401(a)(1) (1998) applied. Rather, they were seriousness level I offenses if the controlled substance was marijuana. RCW 9.94A.518 (seriousness level I applies to delivery of or possession with intent to deliver marijuana); RCW 69.50.204(c)(14) (marijuana listed in schedule I); former RCW 69.50.401(a)(1)(iii) (RCW 69.50.401(a)(1) applies to controlled substances classified in schedule I). Thus, given Sibert's offender score, the standard sentence ranges (without enhancements) for delivery of and possession with intent to deliver "a Controlled Substance" would be 6-18 months. *See* RCW 9.94A.517. The school bus zone enhancement does, however, increase the standard sentence ranges to 20-42 months for the two counts found by the jury to have occurred within 1,000 feet of a school bus stop. RCW 9.94A.533(6) (school bus zone enhancement); *State v. Silva-Baltazar*, 125 Wn.2d 472, 478, 886 P.2d 138 (1994) (interpreting the interplay between the school bus zone enhancement, former RCW 9.94A.310(5) (1994), which is now RCW 9.94A.533(6), and RCW 69.50.435); *State v. Pierce*, 78 Wn. App. 1, 4, 895 P.2d 25 (1995) (holding the enhancement provisions of former RCW 69.50.435(a) (1991) apply to marijuana offenses that violate RCW 69.50.401).

Because the jury found Sibert guilty of delivering and possessing with intent to deliver an unidentified "Controlled Substance," the trial court was not authorized to impose a sentence beyond the enhanced standard sentence range for *any* controlled substance under former RCW 69.50.401(a)(1). Stated differently, "[w]ithout a jury

determination that [Sibert delivered or possessed with intent to deliver methamphetamine], the trial court lacked authority to sentence [him for more than 42 months for delivering or possessing with intent to deliver "a Controlled Substance" in a school bus zone]." *Recuenco*, 163 Wn.2d at 440. Thus, the 64-month sentence imposed by the trial court exceeded the enhanced standard range as authorized by the jury.

Sibert also correctly asserts that the identity of the controlled substance affected the statutory maximum sentence for the offenses. Pet'r's Suppl. Br. at 14. Under former RCW 69.50.401(a)(1), four types of controlled substances identified in the statute, including methamphetamine, carried a maximum sentence of 10 years. Former RCW 69.50.401(a)(1)(i)-(ii). The maximum sentence for all other controlled substances was five years. Former RCW 69.50.401(a)(1)(iii)-(v). Here, the school bus zone enhancement doubled the statutory maximum sentence to 10 years for the two counts to which it applied. *See Silva-Baltazar*, 125 Wn.2d at 476. Consequently, "[w]ithout a jury determination that he [delivered or possessed with intent to deliver methamphetamine], the trial court lacked authority to sentence [Sibert for more than 10 years for delivery or possession with intent to deliver "a Controlled Substance" in a school bus zone]." *Recuenco*, 163 Wn.2d at 440. Therefore, the sentence imposed was below the authorized statutory maximum as enhanced.

In sum, although the 64-month sentence was properly below the enhanced statutory maximum, it was invalid because it exceeded the enhanced standard range

authorized by the jury's verdict. Because this violated Sibert's article I, section 21 jury trial right and such errors cannot be harmless, I would accordingly vacate his sentence and remand for resentencing.

AUTHOR:
Justice Gerry L. Alexander

WE CONCUR:

Justice Charles W. Johnson

Justice Debra L. Stephens