IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RICHARD EDWARD SIBERT, Petitioner.	)	No. 79509-6 En Banc Filed February 25, 2010

J.M. JOHNSON, J.—A jury convicted Richard Sibert of three counts of delivery of a controlled substance and one count of possession of a controlled substance with intent to deliver. He challenges his convictions, arguing that it was error to fail to include the identity of the specific controlled substance in the "to convict" jury instruction and that it was error to fail to require the State to prove the identity of the substance to a jury. He also disputes his sentence, arguing that under *Blakely*[1] the State must prove

beyond a reasonable doubt his prior convictions to a jury. Finally, Sibert challenges as erroneous the jury instruction with respect to "knowledge," which was given at trial.

We hold that it was not error to fail to include the specific identity of the controlled substance (methamphetamine) in the "to convict" jury instructions where, as here, those instructions incorporated the drug identity by reference to the charging document, which specified methamphetamine, and where that drug and only that drug was proven at trial. We also find Sibert's sentence to be appropriate, given that prior convictions need not be proven to a jury, and we reject his other claims. Accordingly, we affirm his convictions and sentence.

Facts and Procedural History

On three separate days during March 2004, an informant working with police officials purchased methamphetamine from Richard Sibert. The police subsequently obtained a warrant, searched Sibert's home, and found methamphetamine and other drug paraphernalia. The State charged Sibert with three counts of delivery of a controlled substance, two of which carried

[1] *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

school zone enhancements. The State also charged Sibert with one count of possession of a controlled substance with intent to deliver.[2]

A jury found Sibert guilty of all charges, including the school zone enhancements. At sentencing, the court calculated the standard range for Sibert's sentence (without enhancements) as 20 to 60 months, using the standard ranges under Drug Offense Seriousness Level II. The range was based on the court's finding that Sibert had a criminal history of convictions of possession of methamphetamine and possession of an explosive device. After taking into account the school zone enhancements, the trial court sentenced Sibert to 64 months of total confinement.

Sibert appealed his convictions, raising four distinct issues for review. In an unpublished opinion, Division Two of the Court of Appeals affirmed the trial court on each issue. *State v. Sibert*, noted at 135 Wn. App. 1025, 2006 WL 3026124. Sibert appealed and we granted review. *State v. Sibert*, 163 Wn.2d 1059, 187 P.3d 753 (2008). For the following reasons, which focus on the two most credible issues Sibert raises, we affirm the Court of Appeals decision upholding Sibert's convictions and sentence.

[2] These charges were for crimes in violation of former RCW 69.50.401(2)(b) (2003).

Issues

1) Did the trial court err by failing to include the identity of the controlled substance in the "to convict" jury instructions for delivery and possession with intent to deliver a controlled substance?

2) Did the trial court err by failing to require the State to prove beyond a reasonable doubt the identity of a controlled substance before imposing a sentence based on that identity?

3) Was the "knowledge" jury instruction appropriate?

Analysis

We review alleged error in jury instructions de novo. *State v. Becklin*, 163 Wn.2d 519, 525, 182 P.3d 944 (2008).

A. Identification of Controlled Substance

"The State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld." *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). Therefore, "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." *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)). We are not to look to other jury instructions to supply a missing element from a "to convict" jury instruction. *Id*. at 262-63.

The identity of a controlled substance is an essential element where it increases the maximum sentence. *State v. Goodman*, 150 Wn.2d 774, 785-86, 83 P.3d 410 (2004). Under former RCW 69.50.401(2)(b) (2003), a conviction for possession with intent to deliver methamphetamine carried a maximum sentence of 10 years.

A conviction based on a different controlled substance may have resulted in a maximum sentence of five years. Therefore, the identity of the controlled substance in this case determined the level of the crime and its penalty, rendering it an "essential element" under the reasoning set forth in *Goodman*, 150 Wn.2d at 785-86; *see also State v. Eaton,* 164 Wn.2d 461, 468-70, 191 P.3d 1270 (2008) (Johnson, J., concurring).

"An 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). However, 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*. Under this line of reasoning, and for the reasons discussed below, it was not error to omit the name of the controlled substance from the "to convict" instructions.

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.[3] *State v. Sims*, 119 Wn.2d 138, 141-42, 829 P.2d 1075 (1992) (citing former RCW 69.50.401(a) (1979)). 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 261, 269, 271.

If the prosecution had been unable to convince the jury that Sibert was in possession and intended to deliver methamphetamine, there could have

[3] The "to convict" jury instructions required that Sibert (1) possessed a controlled substance, (2) intended to deliver the controlled substance, and (3) the acts occurred in the State of Washington. CP at 12-14.

been no conviction. Thus, common sense as well as the incorporation by reference of the charging document into the "to convict" instructions supports Sibert's conviction of delivering and possessing the specific controlled substance at issue, methamphetamine. Consequently, there is no error in the "to convict" jury instructions that merits overturning Sibert's convictions and sentence.

B. Proof of Identity Beyond a Reasonable Doubt

Sibert also argues that his sentence was excessive because the jury did not find beyond a reasonable doubt that he delivered one of the controlled substances listed in former RCW 69.50.401 (2003). Pet'r's Suppl. Br. at 13-14. Sibert relies on *Blakely* and *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008) in making this claim.

Sibert's argument fails for the reasons already discussed. The jury found that Sibert delivered one of the controlled substances listed in former RCW 69.50.401 (2003): methamphetamine. In order to convict Sibert, the jury had to find that the State met its burden of proof in regards to the elements "as charged." CP at 40-42, 49. The charging document specified methamphetamine as the only controlled substance involved in the crimes and

accurately identified the maximum penalty associated with conviction of a methamphetamine violation. CP at 12-14. Furthermore, methamphetamine was the only controlled substance defined as such in the jury instructions, the only substance the State sought to prove through expert testimony, and the only controlled substance mentioned in closing arguments. There was thus no *Blakely* violation with respect to sentencing, after the jury found him guilty.

Sibert also argues that his prior convictions must be proven to a jury beyond a reasonable doubt before they could be used to enhance his sentence. He acknowledges that his attorney agreed with the prosecutor's statement of criminal history, but he contends that he did not actually waive his right to a jury trial on this issue. Pet'r's Suppl. Br. at 19 n.29. However, this argument is immaterial: prior convictions are an exception to the *Blakely* rule requiring that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *State v. Alvarado*, 164 Wn.2d 556, 563, 192 P.3d 345 (2008) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)).

Accordingly, the trial court appropriately sentenced Sibert to 64

months—within the standard range—based on his offender score, the seriousness level of the crimes, and the school zone enhancements.

C. Definition of Knowledge

Sibert next alleges that the jury instruction given at his trial defining "knowledge" (jury instruction 18) was inappropriate.[4] "Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law." *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996). Jury instructions must convey "that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt." *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). It is reversible error if the instructions relieve the State of this burden. *State v. Pirtle*, 127 Wn. 2d 628, 656, 904 P.2d 245 (1995).

Jury instruction 18, taken verbatim from 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 10.02, at 150 (2d ed. 1994) (WPIC), and based on former RCW 9A.08.010 (1975), reads:

> A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person

[4] He did not object at trial to this instruction.

> is aware that the fact, circumstance or result is a crime.
>
> If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.
>
> Acting knowingly or with knowledge also is established if a person acts intentionally.[5]

Sibert takes issue with the final sentence of instruction 18. He argues the sentence "requires the jury to conclude knowledge is established by proof of *any* intentional act, even if unrelated to the element for which knowledge is required." Pet'r's Suppl. Br. at 3.[6] He claims the language created "a conclusive presumption." *Id.*; *see State v. Deal*, 128 Wn.2d 693, 699, 911 P.2d 996 (1996) (mandatory presumptions "run afoul of a defendant's due process rights if they serve to relieve the State of its obligation to prove all of the elements of the crime charged"). However, the jury instructions at Sibert's trial, taken as a whole, accurately defined knowledge and did not create a mandatory presumption.

---

[5] According to the WPIC, the sentence at issue in the jury instruction is optional and can be included when appropriate. *State v. Goble*, 131 Wn. App. 194, 202 n.3, 126 P.3d 821 (2005).

[6] Sibert did not object to jury instruction 18 at trial and Division Two of the Court of Appeals declined to consider this issue. RAP 2.5(a) permits a party to raise a "manifest error affecting a constitutional right" for the first time on appeal, *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993), but Sibert fails to make this showing.

The language at issue ("[a]cting knowingly or with knowledge also is established if a person acts intentionally") is equivalent to RCW 9A.08.010(2) ("[w]hen acting knowingly suffices to establish an element, such element also is established if a person acts intentionally"). Additionally, jury instruction 23 defined "intentionally" as "acting with the objective or purpose to accomplish a result which constitutes a crime." CP at 52. Jury instruction 10 also informed the jury "[i]t is a crime for any person to deliver a controlled substance that the person *knows* to be a controlled substance." CP at 39 (emphasis added).

Contrary to Sibert's contentions, the only intentional act the jury could equate with knowledge was one for which the jury found Sibert acted "with the objective or purpose to accomplish a result which constitutes a crime." CP at 52. The jury instructions explained it was a crime "to deliver a controlled substance that the person *knows* to be a controlled substance." CP at 39 (emphasis added). The jury instructions required that the State prove Sibert knew he was delivering a controlled substance. Under a plain reading of the jury instructions, the State was not relieved of proving every element of the charged offense.[7]

The State was required to prove the "knowledge" element of the offense and it did so. The knowledge jury instruction was appropriate.

Conclusion

Given that the "to convict" jury instructions incorporated by reference the specific identity of the controlled substance charged ("to wit: methamphetamine"), as well as the fact that the State met its burden of proof with respect to establishing that Sibert committed crimes involving that substance, no error occurred to require reversal of either Sibert's convictions or his sentence. Sibert's other claims are meritless. We therefore affirm the

[7] Nevertheless, Sibert points to. *Goble* to support his argument that jury instruction 18 was confusing and inappropriate. In *Goble*, the trial court utilized the same "knowledge" jury instruction. The Court of Appeals found the instruction "confusing" because it allowed "the jury to convict without finding all the necessary elements required." *Goble*, 131 Wn. App. at 196. The court accordingly reversed the conviction and remanded for further proceedings. *Id*. However, the Court of Appeals later clarified *Goble* in *State v. Gerdts*, 136 Wn. App. 720, 150 P.3d 627 (2007). There, the court found the same jury instruction appropriate in the case before it and limited the holding in *Goble* to its particular facts. In *Gerdts*, the defendant was convicted of second degree malicious mischief after scraping the side of a van. *Gerdts*, 136 Wn. App. at 722-23. The court found the knowledge jury instructions adequate as "there was no second mens rea element to conflate." *Id*. at 728. The jury was able to find that the defendant knowingly scraped the side of the van if it also found that he did so intentionally. In the present case, the State was only required to prove Sibert's mental state with respect to one element—whether he knew that the substance he delivered was a controlled substance. Although Sibert conceivably could have delivered a controlled substance without knowing what it was, the jury instructions correctly limited the jury to finding knowledge based on an intentional act that constituted a crime. The jury instructions further explained, "[i]t is a crime for any person to deliver a controlled substance that the person *knows* to be a controlled substance." CP at 39 (Jury Instruction 10) (emphasis added). Therefore, the analysis in *Gerdts* is appropriate.

Court of Appeals decision upholding his convictions and sentence.

AUTHOR:
Justice James M. Johnson

WE CONCUR:
Chief Justice Barbara A. Madsen, result only
Justice Susan Owens
Justice Mary E. Fairhurst
Justice Tom Chambers