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Supreme Court No. 93866-1
Court of Appeals No. 32454-1-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Petitioner,

vs.

LISA MARIE MUMM,

Defendant/Respondent.

ANSWER TO STATE'S PETITION FOR REVIEW

DAVID N. GASCH
WSBA No. 18270
P. O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Defendant/Respondent

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I. IDENTITY OF RESPONDENT.

Respondent/appellant/defendant asks this Court to deny review of the Court of Appeals decision terminating review.

II. COURT OF APPEALS DECISION.

Petitioner seeks review of that portion of the Court of Appeals Opinion filed July 28, 2016, vacating three school zone enhancements.

III. ISSUE PRESENTED FOR REVIEW.

Was the evidence insufficient for any rational trier of fact to find an essential element of the special verdict regarding the school bus route stop enhancement, where there was no proof of the seating capacity of the school buses?

IV. STATEMENT OF THE CASE.

Lisa Mumm was convicted by a jury of three counts of delivery of a controlled substance. CP 22. The jury was asked to find by special verdict that all three deliveries occurred within 1000 feet of a "school bus route stop." CP 23-24. The jury was instructed in pertinent part regarding the special verdict that a "school bus" is defined as follows:

> "School bus" means a vehicle that meets the following requirements: One, has a seating capacity of more than ten persons including the driver; Two, is regularly used to transfer students to and from a school or in connection with school activities; and Three, is owned and operated by any school district or privately owned and operated under

> contract or otherwise with any school district for the transportation of students.

Instruction No. 19; RP 560.

The prosecution presented this “school bus” definition to the trial court and did not object to its content. RP 541. The jury answered “yes” to all three special verdicts. CP 23-24.

The Court of Appeals held since the State included a definitional instruction of a school bus, under the law of the case doctrine it was required to prove it and failed to do so. Slip Op. pp 22- 23

V. ARGUMENT WHY REVIEW SHOULD BE DENIED.

The considerations which govern the decision to grant review are set forth in RAP 13.4(b). Respondent believes that this court should deny review of this issue because the decision of the Court of Appeals is not in conflict with other decisions of this court and the Court of Appeals (RAP 13.4(b)(1) and (2)), is not a significant constitutional question of law (RAP 13.4(b)(3)), and does not involve an issue of substantial public interest (RAP 13.4(b)(4)).

<u>The evidence was insufficient for any rational trier of fact to find an essential element of the special verdict regarding the school bus route stop enhancement, where there was no proof of the seating capacity of the school buses</u>.

The State argues in its petition for review (PFR) that since the enhancement was not based on a violation occurring on a school bus, the State was not required to prove the seating capacity of a school bus to prove the deliveries took place within 1000 feet of a school bus stop. State's PFR pp 4-9. While this statement is true on its face, it ignores the central issue. Since the State *did* include a definitional instruction of a school bus, under the law of the case doctrine it was required to prove it and failed to do so. *State v. Hickman*, 135 Wn.2d 97, 101–02, 954 P.2d 900 (1998); *State v. Calvin*, 176 Wn. App. 1, 316 P.3d 496, 506 (2013).

Citing *Hickman* and *Calvin*, the State further argues it had no burden to prove the definitional instruction because it was not an added element and was not included in the "to convict" instruction. State's PFR pp 4-9. This assertion is incorrect and misconstrues the holdings in *Hickman* and *Calvin*.

It is true in criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements

are included without objection in the "to convict" instruction. *Hickman*, 135 Wn.2d at 102. However, the law of the case doctrine is not limited to that application:

> Although the State argues that the law of the case doctrine applies only when an element is added to a to-convict instruction, the doctrine is not limited to that application. It is a broad doctrine that has been applied to to-convict instructions and definitional instructions. See, e.g., *City of Spokane v. White*, 102 Wash.App. 955, 964–65, 10 P.3d 1095 (2000); *State v. Price*, 33 Wash.App. 472, 474–75, 655 P.2d 1191 (1982); *Englehart v. Gen. Elec. Co.*, 11 Wash.App. 922, 923, 527 P.2d 685 (1974) . . .The doctrine is based on the premise that whether the instruction in question was rightfully or wrongfully given, it was binding and conclusive upon the jury. *Hickman*, 135 Wash.2d at 101 n. 2, 954 P.2d 900.

Calvin, 176 Wn. App. 1, 316 P.3d at 506.

The State argues this quote from *Calvin* applying the doctrine to definitional instructions is dicta. State's PFR p 7. This is incorrect and can be easily substantiated by the internal citations in the above quote from *Calvin*. Moreover, the *Hickman* Court used similar language indicating the doctrine has broader application than the State suggests: "Added elements become the law of the case ... when they are included in instructions to the jury." *Hickman*, 135 Wn.2d at 102 (citing *State v. Lee*, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995)). "Although the charging statute ... did not require reference to [the added element], by including that reference in the information and in the instructions, it became the law

of the case and the State had the burden of proving it." *Id*. (*citing State v. Barringer*, 32 Wn. App. 882, 887-88, 650 P.2d 1129 (1982)). Neither of these quotations limits application of the law of the case doctrine to only when an element is added to a to-convict instruction.

The remainder of the State's argument reiterates that the definitional instruction regarding seating capacity of a school bus was unnecessary for the jury to find the enhancement. State's PFR pp 8-11. Again, this argument circumvents the issue. The State assumed the burden of proving this otherwise unnecessary element by including it without objection in the jury instructions. *Hickman*, 135 Wn.2d at 102. The enhancement was for deliveries occurring within 1000 feet of a "school bus" stop. By defining "school bus," the jury had to find "school buses" meeting that definition stopped at these locations in order for the stop to be a "school bus" stop. The State failed to present sufficient evidence to prove that definition. Therefore, the Court of Appeals properly vacated the enhancements as it has previously done under identical facts. *See State v. Boston*, 176 Wn. App. 1007 (August 22, 2013) (unpublished).[1]

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[1] Unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as non-binding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate. GR 14.1 (Effective September 1, 2016).

VI. CONCLUSION.

For the reasons stated herein, Defendant/Respondent respectfully asks this Court to deny the petition for review.

Respectfully submitted December 22, 2016,

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s/David N. Gasch
Attorney for Respondent
WSBA #18270

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on December 22, 2016, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the Answer to the State's Petition for Review:

Lisa M. Mumm
#302317
9601 Bujacich Rd. NW
Gig Harbor, WA 98332-8300

E-mail: laurachuang@gmail.com
Laura M. Chuang
Of Counsel, Nichols Law Firm PLLC

ksloan@co.okanogan.wa.us
Karl F. Sloan
Okanogan County Prosecutor

____

s/David N. Gasch, WSBA #18270
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com