SUPREME COURT NO. 97148-0

NO. 35428-8-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMIE HUGDAHL,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITTITAS COUNTY

.

The Honorable Scott R. Sparks, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner Jamie Hugdahl, appellant below, ,asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Hugdahl seeks review of the Court of Appeals majority decision in State v. Hugdahl, No. 35428-8-III (Slip Op. filed April 2, 2019), attached as an appendix.

C. ISSUE PRESENTED FOR REVIEW

Whether Hugdahl was deprived of her constitutional right to adequate notice of the criminal allegations against her when they included an aggravating circumstance for each charge that she delivered a controlled substance within 1,000 feet of a "school bus route," when the statutorily authorized aggravating circumstance requires proof that the delivery occurred within 1,000 feet of a "school bus route stop," not just a "school bus route."

D. STATEMENT OF THE CASE

1. Procedural Facts

The Kittitas County Prosecutor charged appellant Jamie Hugdahl with four unlawful drug delivery charges, one each for heroin, methamphetamine, Alprazolam and MDA. CP 58-59. The prosecution alleged that on January 19, 2017, Hugdahl delivered heroin, and that on

January 20, 2017, Hugdahl delivered methamphetamine, Alprazolam and MDA. Id. The prosecution also alleged that all four deliveries occurred within 1,000 feet of a "school bus route designated by the school district in violation of [RCW] 69.50.435." CP 1-2, 5-6, 58-59.[1]

A jury trial was held June 27-28, 2017, before the Honorable Scott R. Sparks. RP[2] 1-327. The jury found Hugdahl guilty as charged, including that each delivery occurred "within one thousand feet of a school bus route stop designated by a school district." CP 50-57.

Hugdahl was sentenced to 64 months of incarceration. CP 61-73. Hugdahl appealed and her judgment and sentence was affirmed in a 2-1 Court of Appeals decision. CP 74; Appendix.

2. Substantive Facts

Steven Litzenberg was released from prison on January 8, 2017. RP 92. Litzenberg, a methamphetamine and heroin user since the age of 12, and known by Ellensburg police for violent encounters with them, thereafter approached the Ellensburg police about being a confidential

[1] The prosecution amended the charging language three times after the initial charges were filed March 16, 2017. CP 1-2. The original information, and the first and third amended information included the language quoted above for each charge. The "Second Amended Information," however, did not allege any aggravating circumstances. CP 45-46.

[2] The two consecutively paginated volumes of verbatim report of proceedings cited in this petition are referenced as "RP."

informant (CI) in the hope, he claimed, of garnering their favor to help get his young daughter out of the care of her mother, Emily Chaney, who Litzenberg claimed had relapsed on drugs following his daughter's birth. RP 47, 74, 92, 121. According to Litzenberg, Chaney and his daughter were living with Jamie Hugdahl's brother, Jake, and was allowing wanted felons to be around her, which he did not approve of. RP 119-20.

The officers Litzenberg contacted, Detective Clifford Caillier and Detective John Bean, recalled that in addition to wanting help with his daughter's placement, Litzenberg also wanted help getting his driving privileges restored and claimed he also wanted to help rid Ellensburg of its drug problem. RP 47, 77, 185, 216. They negotiated to pay Litzenberg $125 for each drug purchase he could make under their watch. RP 49-50.

According to Bean, when the Ellensburg police employs CIs for drug transaction, they have them pick the target for the transaction. RP 50-52. According to Litzenberg, he named two failed targets before he identified Jamie Hugdahl as a potential target, who he claimed to have "probably" bought both heroin and methamphetamine from "like way a long time ago." RP 102-03. At least one of the prior named targets allegedly refused to engage Litzenberg in the drug transaction because Litzenberg was now "clean." RP 103. Caillier agreed that Hugdahl was the third target named by Litzenberg. RP 211.

On January 19, 2017, Bean and Caillier were authorized to use Litzenberg to try to purchase $20 of heroin from Hugdahl midday on January 19, 2017, at the Safeway in Ellensburg. RP 53-57. Surveillance officers were deployed in advance to various vantage point to witness the anticipated transaction. RP 57-58. Before deploying Litzenberg, police strip searched him to ensure he had no contraband. RP 59-61. They then gave him a $20 bill that had been photocopied in advance, and sent him on a predetermined path to meet with Hugdahl in the Safeway parking lot. RP 61-62, 201-02, 320.

Surveillance officers who were positioned in a car in the Safeway parking lot on January 19, 2017, testified seeing Hugdahl pull in and park behind and to the left of the space they had backed into. RP 140, 155-56. They watched through the car mirrors as a man, Demarco Covey, got in the front passenger seat of Hugdahl's car before Litzenberg showed up and got into the driver's side back passenger seat. RP 140-44, 156-57. They watched what appeared to be a brief discussion between Hugdahl and Litzenberg before Hugdahl turned toward the back seat and seemed to hand something to Litzenberg. RP 142-44, 158. Litzenberg got out and returned to Bean and Caillier, and Hugdahl and the other man drove away. RP 63-64, 158 When Litzenberg returned to Bean and Caillier, he handed them a baggy containing a substance that latter tested positive for heroin.

RP 64, 202-03. Litzenberg also informed them that he had arranged to purchase methamphetamine from Hugdahl the following day, January 20th, once again at the Safeway parking lot. RP 67-68.

Bean, Caillier, Litzenberg and the other officers prepared for the second transaction as before, except this time they gave him $100 for the purchase, asked him to complain about the quality of the heroin she sold him the day before, and also equipped him with a recording device so they could capture the conversation between Hugdahl and Litzenberg during their meeting.[3] RP 68-70, 190. When Hugdahl arrived at the Safeway parking lot on January 20th, she was by herself. RP 168. After Litzenberg got in, Hugdahl pulled the out of the lot and drove around, so officers followed until Litzenberg was dropped off. RP 167-68. When Litzenberg returned to Bean and Caillier, he gave them a baggy containing

[3] The recording resulting from the recording device was played for the jury at trial and transcribed into the verbatim report of proceedings. RP 192-95. Most of the comments attributed to Hugdahl by the transcriber are listed as "UNINTELLIGIBLE." Id. Those that are not are without substance. Comments attributed to Litzenberg indicate he may have corrected Hugdahl about what substance it was she was selling him ("No, this is Ecstasy." RP 193), was surprised to learn a woman named Rachel Hunter had pistol whipped Hugdahl (id.), complained about the quality of the heroin from the day before and asked her to provide better quality next time (id.), was in disbelief when Hugdahl apparently told her she found a bag of drugs in the back of a patrol car (RP 194), asked about someone named "Marshall," and then told Hugdahl as he was leaving that she might see him later (id.).

methamphetamine, and two pills, one containing MDA and the other containing Alprazolam. RP 71, 205-06.

Litzenberg testified at Hugdahl's trial. RP 91-132. Litzenberg recalled meeting Hugdahl at an NA meeting, after which they both relapsed and then "used together." RP 92. Litzenberg claimed he was not using drugs after he got out, at least not until later in January, when he found out one of his sons died in a car accident. RP 96.

Litzenberg admitted contacting Ellensburg police about working as a CI, hoping they could help him get his daughter away from her mother. RP 96-97. He recalled police paid him "a little bit," but claimed his motive was not the money. RP 98. He recalled providing two other targets to police before he targeted Hugdahl. RP 102.

Although he claimed not to remember much from the January 19th transaction, Litzenberg recalled he "threw a fit" at Hugdahl during the transaction for having someone else in the car with her, claiming at trial he "was playing the role like I didn't want people to know that I was using and stuff, so." RP 106, 109-10. He nonetheless testified he gave Hugdahl the $20 bill provided by police and she gave him a bag of heroin. Id. Litzenberg said he believed the other man in the car was also buying drugs from Hugdahl and witnessed an exchange between them. RP 107-08. Litzenberg also recalled that during the January 19th transaction he was

distracted by the bruise on Hugdahl's face, which she allegedly told him was from being "pistol-whipped" by someone. RP 107. Litzenberg said the transaction took between 10 and 15 minutes, claiming he drew the encounter out a bit to make it seem like a "normal" drug purchase. RP 110-11.

Litzenberg recalled that when he met up with Hugdahl on January 20th, she was "sketchy," appeared to have been awake for a long time and drove them around with her music up load. RP 112. Litzenberg recalled complaining to Hugdahl about the heroin she sold him the day before, to which she allegedly replied that she had warned him of that when he bought it. RP 112-13. When Hugdahl handed him the methamphetamine, he told her it was not enough, so she gave him two pills, "Ecstasy and Xanax." RP 113.

Litzenberg testified that after the transaction on January 20th, he and Hugdahl met up and got a motel room where they spent the night together. RP 116. It was then Litzenberg claims he learned one of his sons had died. Id. Litzenberg admitted he relapsed on drugs that evening. RP 129.

Litzenberg denied ever making threats towards Hugdahl during either transaction. RP 116. He admitted, however, that he was upset with Hugdahl and others about how they treated him the previous year, and he

also admitted being upset that Hugdahl's brother was dating Chaney, and acknowledged sending her brother a threatening note about what he would do if his daughter was harmed. RP 119.

Hugdahl testified in her defense. RP 238-269. Hugdahl met Litzenberg in 2012, and she described him as a "violent" man, who had threatened her and others, once strangled a cat, had been involved in numerous fights, and carried guns. RP 243-45. Hugdahl recalled a specific instance when Litzenberg threatened her by asking if she wanted to "meet the Kenwoods," referring to the speakers he kept in the trunk of his car, implying he would put her in the trunk. RP 244. Hugdahl said Litzenberg was known in some circles for his violence as "Light'em Up, Litzenberg." RP 243.

Hugdahl said she normally only purchases enough drugs for herself, and only gave drugs to Litzenberg out of fear. RP 261. She also admitted she owed him drugs from earlier in the month, so part of it was for pay back. RP 265-67. Hugdahl also recalled that Litzenberg gave her no money during the first transaction and demanded the $100 back from the second transaction when they met up later that evening. RP 261, 266. Hugdahl said Litzenberg was trying to control her during the month of January, and that she supplied him with drugs to appease him and for her own personal safety. RP 311-14.

In closing argument, Hugdahl's counsel did not contest that she had delivered the drugs to Litzenberg as the prosecution claimed. Instead, her counsel's entire closing argument focused on her entrapment defense, arguing she had no criminal intent when she gave him the drugs, and instead did so out of fear that if she refused, Litzenberg would harm her. RP 346-55. The jury was instructed on the defense of "entrapment." CP 36 (Instruction 20).

3. Court of Appeals Decision

Hugdahl's appeal included a challenge to the adequacy of the charging language for the "school bus route stop" sentencing enhancement allegation, noting that the prosecutor charged her with committing all four deliveries within 1,000 feet of a "school bus route designated by the school district in violation of [RCW] 69.50.435," CP 1-2, 5-6, 58-59. Brief of Appellant (BOA) at 1-2, 18-23. Hugdahl argued the language failed to adequately advise her of the elements of the "school bus route ***stop***" sentence enhancement allegation because it alleged she made the drug deliveries within 1,000 feet of a "school bus ***route***." Id.

Judges Korsmo and Pennell rejected this challenge, concluding;

> The numerous informations repeatedly advised Ms. Hugdahl that she was alleged to have committed the four deliveries within 1,000 feet of a school bus route in violation of RCW 69.50.435. Bus routes have bus stops; a bus stop is part of a bus route. Advising a defendant that

> the crimes were committed within 1,000 feet of a bus route necessarily included any bus stops along that route. Liberally construed, a bus route includes a bus stop.

Appendix, Majority at 6.

Judge Lawrence-Berrey, however, dissented, noting:

> Here, the charging document alleged that all four controlled substance deliveries committed by Ms. Hugdahl occurred "within one thousand feet of a school bus route designated by the school district in violation of [RCW] 69.50.435[(l)(c)]." Clerk's Papers at 58-59. But a person who delivers controlled substances within 1,000 feet of a designated school bus route does not violate the statutory aggravator. Instead, the statutory aggravator is violated when a person delivers controlled substances within 1,000 feet of a designated school bus route stop. The majority commits a logical fallacy by equating a bus route with a bus route stop. A bus route is not a bus route stop. A person can be within 1,000 feet of a bus route and still be one mile from a bus route stop. Because a bus route is not a bus route stop, I dissent.

Appendix, Dissent at 1-2.

E. ARGUMENT ON WHY REVIEW IS WARRANTED

THIS COURT SHOULD GRANT REVIEW BECAUSE THE MAJORITY DECISION BY THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S PRIOR DECISIONS AND RAISES SIGNFICANT QUESTIONS OF CONSTITUTIONAL LAW.

This Court should grant review because majority decision by the Court of Appeals conflicts with this Court decision in State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991), and its progeny. RAP 13.4(b(1). This Court should also grant review because the same decision involves a

significant question of law under the State and federal constitutions. RAP 13.4(b)(3).

The charging document here is deficient because it fails to include a necessary fact in charging the sentence enhancement: that the delivery occurred within 1,000 feet of a "school bus route stop." RCW 69.50.435(1)(c) (emphasis added). Instead, the document only alleged that the delivery occurred within 1,000 feet of a "school bus route." CP 1-2, 5-6, 58-59. This violated Hugdahl's constitutional right to be adequately informed of the charges against her.

A charging document is constitutionally defective if it fails to include all "essential elements" of the crime. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995); Hamling v. United States, 418 U.S. 87, 117, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974); U.S. Const. Amend. VI; Wash. Const. Art. I, § 22. "More than merely listing the elements, the information must allege the particular facts supporting them." State v. Nonog, 169 Wn.2d 220, 226, 237 P.3d 250 (2010) (citing State v. Leach, 113 Wn.2d 679, 688, 782 P.2d 552 (1989)). This is a requirement of the essential elements rule. State v. Simms, 171 Wn.2d 244, 250, 250 P.3d 107 (2011). "Failure to provide the facts 'necessary to a plain, concise and definite statement' of the offense renders the

information deficient." Nonog, 169 Wn.2d at 626 (citing Leach, 113 Wn.2d at 690 (quoting JCrR 2.04(a)).

That an unlawful drug delivery occurred within 1,000 feet of a "school bus route stop" is just as important and essential as the other requirements of the information for a delivery charge because it increased the sentence beyond the statutory maximum sentence for the underlying offense. State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008).[4]

A challenge to the sufficiency of a charging document is reviewed de novo. State v. Williams, 162 Wn.2d 177, 182, 170 P.3d 30 (2007). Where, as here, a charging document is challenged for the first time on

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[4] The Recuenco Court stated:

> Sentencing enhancements, such as a deadly weapon allegation, must be included in the information. In re Pers. Restraint of Bush, 95 Wn.2d 551, 554, 627 P.2d 953 (1981). When the term "'sentence enhancement'" describes an increase beyond the maximum authorized statutory sentence, it becomes the equivalent of an "'element'" of a greater offense than the one covered by the jury's guilty verdict. Apprendi [v. New Jersey], 530 U.S. [466], 494 n.19[, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)]. Contrary to the dissent's assertions, Washington law requires the State to allege in the information the crime which it seeks to establish. This includes sentencing enhancements. See State v. Crawford, 159 Wn.2d 86, 94, 147 P.3d 1288 (2006) (stating that prosecutors must set forth their intent to seek enhanced penalties for the underlying crime in the information).

Recuenco, 163 Wn.2d at 435-45 (footnote omitted).

appeal, it is to be "liberally construed in favor of validity." Kjorsvik, 117 Wn.2d at 102. Under a liberal standard of review, the appellate court undertakes a two-pronged inquiry: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" Kjorsvik, 117 Wn.2d at 105-06.

Under the first prong of the Kjorsvik test, the court looks at the face of the document only. Id. at 106. If a necessary element is neither found nor fairly implied in the charging document under the first prong, the reviewing court must presume prejudice and reverse. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000); State v. Brown, 169 Wn.2d 195, 198, 234 P.3d 212 (2010).

In Recuenco, the information alleged the defendant assaulted his spouse with a “deadly weapon,” and the jury returned a special verdict finding the defendant was armed with a deadly weapon. Recuenco, 163 Wn.2d at 431–32. The Court held that the defendant was entitled to have the jury determine “if he was guilty of the crime and sentencing enhancement charged.” Recuenco, 163 Wn.2d at 440. Because the jury did not find the defendant was armed with a “firearm” during the commission of the charged offense, the court concluded the sentencing

court erred by imposing the firearm enhancement. Recuenco, 163 Wn.2d at 439.

Here the problem is the allegations in the information fail to match what the jury was asked to find. The information alleged Hugdahl made the deliveries within 1,000 feet of a "school bus route," but jurors were asked to determine if they were made within 1,000 feet of a "school bus route stop." Compare CP 58-59 (Third Amended Information) and CP 51, 53, 55, 57 (verdict forms for sentence enhancements). The body of the information affirmatively and specifically accuses Hugdahl of making the unlawful drug deliveries within 1,000 feet of a "school bus route." But there is no sentence enhancement consequence for making an unlawful drug delivery within 1,000 feet of a "school bus route." See RCW 69.50.435.[5] There being no adverse consequence for making deliveries

[5] RCW 69.50.435(1) provides for a sentence enhancement if an unlawful drug delivery is made:

> (a) In a school;
> (b) On a school bus;
> (c) Within one thousand feet of a school bus route stop designated by the school district;
> (d) Within one thousand feet of the perimeter of the school grounds;
> (e) In a public park;
> (f) In a public housing project designated by a local governing authority as a drug-free zone;
> (g) On a public transit vehicle;
> (h) In a public transit stop shelter;

within 1,000 feet of a "school bus route," Hugdahl had no reason to defend against that allegation.

None of the charging documents filed provided Hugdahl notice that the prosecution was accusing her of making the deliveries within 1,000 feet of a "school bus route stop," which if proved, could lead to adverse consequences in the form of a longer sentence. CP 1-2, 5-6, 45-46, 58-59; RCW 69.50.435(1)(c). The prosecution repeatedly failed to include the essential element that the delivery occurred within 1,000 feet of a "school bus route stop." Nor can the "stop" element be reasonably implied from any of the charging language employed by the prosecution. As such, the prosecution's charging language fails to pass the first prong of the Kjorsvik inquiry. 117 Wn.2d at 105-06. The remedy for a

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> (i) At a civic center designated as a drug-free zone by the local governing authority; or
> (j) Within one thousand feet of the perimeter of a facility designated under (i) of this subsection, if the local governing authority specifically designates the one thousand foot perimeter may be punished by a fine of up to twice the fine otherwise authorized by this chapter, but not including twice the fine authorized by RCW 69.50.406, or by imprisonment of up to twice the imprisonment otherwise authorized by this chapter, but not including twice the imprisonment authorized by RCW 69.50.406, or by both such fine and imprisonment. The provisions of this section shall not operate to more than double the fine or imprisonment otherwise authorized by this chapter for an offense.

defective charging document under these circumstances is dismissal without prejudice. Brown, 169 Wn.2d at 198.

The Court of Appeals majority decision reasons, "Bus routes have bus stops; a bus stop is part of a bus route. Advising a defendant that the crimes were committed within 1,000 feet of a bus route necessarily included any bus stops along that route. Liberally construed, a bus route includes a bus stop." Appendix, Majority at 6. But the dissent correctly notes the "logical fallacy" employed by the majority of "equating a bus route with a bus route stop," because one can "be within 1,000 feet of a bus route and still be one mile from a bus route stop." Appendix, Dissent at 2.

The Majority decision here conflicts with this Court's decision in Kjorsvik and its progeny because it employed not a "liberal" interpretation, but instead an *unreasonably* liberal interpretation in order to conclude Hugdahl received adequate notice of the nature of the sentence enhancing allegation against her. Simply put, it was unreasonable to equate '1,000 feet from a school bus route" with '1,000 feet from a school bus route ***stop***.' They may be related concepts, but they are not the same because one refers the entire "route" and the other only the stops on the route. When properly analyzed in the manner employed by the dissent, it is clear Hugdahl was not adequately advised because she was never on

notice that she had to defend against an allegation she conducted the deliveries within 1,000 feet of a school bus route ***stop***. Therefore, this Court should grant review under RAP 13.4(b)(1) & (3).

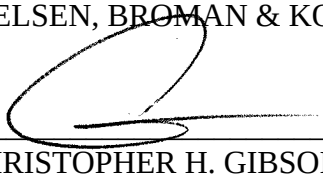
F. CONCLUSION

For the reasons stated, this Court should grant review.

DATED this 2nd day of May, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX

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CASE # 354288
State of Washington v. Jamie Lynne Hugdahl
KITTITAS COUNTY SUPERIOR COURT No. 171000697

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley
Clerk/Administrator

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FILED
APRIL 2, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. JAMIE LYNNE HUGDAHL, Appellant.	)))))))))	No. 35428-8-III UNPUBLISHED OPINION

KORSMO, J. — Jamie Hugdahl appeals from jury verdicts determining that she delivered controlled substances on four occasions while within 1,000 feet of a school bus stop. Concluding that the jury instructions were proper and that the charging documents, liberally construed, provided adequate notice of the school bus stop enhancement, we affirm.

FACTS

The multiple charging documents filed against Ms. Hugdahl consistently alleged that she committed the four drug deliveries within 1,000 feet of a "school bus route." Clerk's Papers (CP) at 58-59. She never challenged any of the charging documents, but did assert a defense of entrapment. CP at 32. The court instructed the jury on the

defense; the instruction told jurors that they must find the defendant not guilty if she established the existence of entrapment by a preponderance of the evidence. CP at 34.

Consistent with the pattern jury instructions, each of the four elements instructions told jurors that if they found the respective elements proved beyond a reasonable doubt, "it will be your duty to return a verdict of guilty." CP at 23-26. The four special verdict forms directed the jury to answer yes or no whether the drug deliveries occurred within 1,000 feet of a "school bus route stop." CP at 51, 53, 55, 57.

The jury convicted Ms. Hugdahl as charged and answered "yes" on each of the four special verdicts. CP at 51-57. The court imposed standard range sentences of 64 months that included a 24 month enhancement due to the special verdicts. Ms. Hugdahl timely appealed to this court. A panel considered her appeal without hearing argument.

ANALYSIS

Ms. Hugdahl contends that the elements instructions were flawed by failure to cross-reference the entrapment instruction, that her counsel was ineffective for not challenging the elements instructions, and that the charging document did not inform her that the enhancement applied only to a school bus route "stop." Treating the first two issues as one contention, we first address the elements instruction before turning to the challenge of the charging document.

Elements Instruction

Ms. Hugdahl argues that because the standard elements instructions did not mention her affirmative defense, they conflicted with the entrapment instruction and were invalid. She also argues that her attorney performed deficiently by failing to challenge the instruction.

This challenge was waived by failure to present it to the trial court. RAP 2.5(a); *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). RAP 2.5(a)(3) permits a party to raise initially on appeal a claim of "manifest error affecting a constitutional right." This authority is permissive; an appellate court will refuse to consider such issues if the record is not sufficient to permit review of the claim. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995). If the record is not adequate to review the claim, it is not "manifest" within the meaning of the rule. *Id*. at 333.

The failure to challenge a jury instruction is a classic instance of waiver. *Scott*, 110 Wn.2d at 689-691. Due process requires only that the jury properly be instructed on the elements of the offense and on the State's burden to prove the case beyond a reasonable doubt. *Id*. at 690. That was done here. The allegation that the separate entrapment instruction conflicted with the elements instructions is not preserved for review.

Anticipating this result, Ms. Hugdahl contends that her counsel performed deficiently by not objecting to the instructions. To prevail on such a claim, she would

have to show both that her attorney erred so significantly that he failed to live up to the standards of the profession and that the error prejudiced her. *Strickland v. Washington*, 466 U.S. 668, 688-692, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *McFarland*, 127 Wn.2d at 334-335. The entrapment instruction informed the jury on what it must do if it determined that Ms. Hugdahl was entrapped into committing the offenses, while the elements instructions told the jurors what to do if the State proved its case beyond a reasonable doubt or if it failed to do so. They did not conflict. Although it may have been simpler to combine some aspects of the instructions into one instruction, no authority requires such action. Ms. Hugdahl has not established that her attorney erred.

She also has not established that she was prejudiced from this alleged error. The jury was instructed on her defense and told to return not guilty verdicts if it found that she had been entrapped. She was able to argue her theory of the case. The jury could easily harmonize the entrapment and elements instructions. There has been no demonstration of harm.

Ms. Hugdahl failed to establish that her counsel performed deficiently.

Charging of Enhancements

Ms. Hugdahl also argues that the charging documents were defective by incorrectly stating the enhancement applicable to her charges. The deficiency in the charging document actually gave her more notice than was necessary. Liberally construed, the final amended information did provide constitutionally adequate notice.

RCW 69.50.435(1)(c) provides a sentence enhancement for drug delivery offenses committed within 1,000 feet of a school bus route stop.[1] The charging documents, however, consistently alleged that Ms. Hugdahl committed the four offenses within 1,000 feet of a school bus route and made no mention of the bus stop. The jury was properly instructed that it needed to determine if the offenses occurred within 1,000 feet of a bus route stop.

Ms. Hugdahl did not challenge the enhancement until this appeal. In that circumstance, well settled standards govern our review. "All essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him." *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). When challenged for the first time after a verdict has been returned, courts will liberally construe the document to see if the necessary facts can be found. If not, the charge will be dismissed without prejudice. Even if the charge is stated, a defendant who shows prejudice from "inartful" pleading also receives a dismissal of charges without prejudice. *Id*. at 105-106. The initial question to be answered is whether "the necessary facts appear in any form, or by fair construction can they be found, in the charging document." *Id*. at 105. The liberal

[1] This enhancement adds 24 months to the offender's sentence range. RCW 9.94A.533(6).

construction standard for belated challenges is designed to discourage "sandbagging" by withholding a challenge that could otherwise be timely remedied. *Id*. at 103.

We believe that the necessary facts are found in the charging document if we liberally construe that document.[2] The numerous informations repeatedly advised Ms. Hugdahl that she was alleged to have committed the four deliveries within 1,000 feet of a school bus route in violation of RCW 69.50.435. Bus routes have bus stops; a bus stop is part of a bus route. Advising a defendant that the crimes were committed within 1,000 feet of a bus route necessarily included any bus stops along that route. Liberally construed, a bus route includes a bus stop.

The record also does not disclose any prejudice to Ms. Hugdahl from the inartful language. The relationship between the location of the drug deliveries and the bus stop was not at issue in the case. The entirety of the defense closing argument related to the entrapment defense. No issues were raised about what the defendant was alleged to have done or where she did it, nor were any concerns argued about the State's case. There is no suggestion she did not understand about the enhancement or its application to the case. The issue simply was not a concern for the defense at trial.

[2] We have reached the same result with related charging document challenges to the school bus route stop enhancement in a series of unpublished cases. *E.g.*, *State v. Moore*, noted at 145 Wn. App. 1038 (2008); *State v. Hopwood*, noted at 138 Wn. App. 1009 (2007); *State v. Jones*, noted at 117 Wn. App. 1016 (2003); *see* GR 14.1.

The error in omitting the word "stop" from the charging document was not of such significance that it deprived Ms. Hugdahl of notice of the enhancement the prosecutor was seeking, nor has she demonstrated that she was prejudiced by the error. For both reasons, her belated challenge to the charging document is without merit.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

I CONCUR:

Pennell, J.

No. 35428-8-III

LAWRENCE-BERREY, C.J. (dissenting) — The majority errs by rejecting Jamie Hugdahl's postverdict challenge to the charging document. Because the necessary facts do not appear by fair construction in the charging document, I dissent.

"All essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him." *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). The majority correctly notes, when a defendant's first challenge to the charging document is postverdict, courts liberally construe the document to see if the necessary facts can be found or fairly implied. And if not, the charges—or in this case the enhancements—will be dismissed without prejudice. Dismissal is required, and the defendant is not required to additionally establish prejudice. This is because prejudice is presumed when the necessary facts cannot be found or fairly implied in the charging document. *State v. McCarty*, 140 Wn.2d 420, 425-26, 998 P.2d 296 (2000) (citing *Kjorsvik*, 117 Wn.2d at 105-06).

Here, the charging document alleged that all four controlled substance deliveries committed by Ms. Hugdahl occurred "within one thousand feet of a school bus route designated by the school district in violation of [RCW] 69.50.435[(1)(c)]." Clerk's

Papers at 58-59. But a person who delivers controlled substances within 1,000 feet of a designated school bus route does not violate the statutory aggravator. Instead, the statutory aggravator is violated when a person delivers controlled substances within 1,000 feet of a designated school bus route *stop*. The majority commits a logical fallacy by equating a bus route with a bus route stop. A bus route is not a bus route stop. A person can be within 1,000 feet of a bus route and still be one mile from a bus route stop. Because a bus route is not a bus route stop, I dissent.

Lawrence-Berrey, C.J.

NIELSEN, BROMAN & KOCH P.L.L.C.

May 02, 2019 - 2:59 PM

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Appellate Court Case Title:	State of Washington v. Jamie Lynne Hugdahl
Superior Court Case Number:	17-1-00069-7

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