No. 46329-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Kenneth Taylor,

Appellant.

Pacific County Superior Court Cause No. 14-1-00009-8

The Honorable Judge Michael J. Sullivan

Appellant's Opening Brief

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STATEMENT OF FACTS AND PRIOR PROCEEDINGS

B.W. was a 16 year old in foster care. She ran away from her placement, stayed for a while at her drug dealer's, and caught up with her old friend Miranda Tiekamp. RP (4/14/14) 54-56; RP (4/15/14) 13, 15, 18. They used methamphetamine together, and both were looking for a place to stay. RP (4/15/14) 20, 87, 89.

Tiekamp knew Kenneth Taylor had a house with an extra bedroom. RP (4/15/14) 22, 71. She asked Mr. Taylor if she and B.W. could stay with him. Tiekamp told him that she had recently been beaten up by her boyfriend and needed a safe place. Mr. Taylor agreed. RP (4/15/14) 71, 90, 271.

At some point, it became clear to Mr Taylor that Tiekamp had been dishonest in her claims to have been abused at the hands of her boyfriend. Taylor and Tiekamp argued, and he told her to leave. RP (4/14/14) 65; RP (4/15/14) 34, 104, 273-274. He also told B.W. to leave his home. RP (4/14/14) 65.

The girls left separately, and B.W. walked toward the home of another friend. RP (4/14/14) 66; RP (4/15/14) 38. Deputy Boggs saw her and arrested her on an outstanding warrant. RP (4/14/14) 67; RP (4/15/14) 18-19, 38, 124-126. B.W. was very high: she felt she could not see or

breathe, and asked for medical care. RP (4/14/14) 68; RP (4/15/14) 39-41, 51. Boggs could see that she was struggling: she was twitchy, had a hard time breathing, and suffered chest pain. RP (4/15/14) 126-128, 136, 142.

At this point, very high and arrested on a warrant, B.W. told Boggs, and Tully by phone, that she had been at Kenneth Taylor's and he had provided her with methamphetamine. RP (4/15/14) 44, 128-129, 179.

Tully sought a search warrant. In the application, Deputy Tully said that he used to be the community corrections officer who supervised Mr. Taylor. In fact, he was in an office of two officers at the time, and Mr. Taylor had been assigned to his partner. RP (4/4/14) 12-13.

When asked by the judge considering the warrant request, Tully said he knew Mr. Taylor to be a drug user without any reference to how long ago he obtained this information. RP (4/4/14) 17. Tully also relied on information from B.W., who was so obviously affected by substances that she was transported to the hospital. RP (4/4/14) 42, 46-47.

The state charged Mr. Taylor with possession of methamphetamine with intent to deliver, and delivery of a controlled substance to a person under 18. CP 29-30. Both charges carried school bus stop enhancements, but the Information did not specify the location of the alleged bus stops. CP 29-30.

The court held a *Franks* hearing, and denied the defense motion to suppress evidence. RP (4/4/14) 6-38. The court also denied the defense motion to suppress the fruits of the search based on the informant's unreliability. RP (4/4/14) 39-49.

At trial, the state offered the testimony of Timothy Triesch, the geographic analyst for the county, over the defendant's objections. RP (4/15/14) 212-215, 219-238. He had prepared a map, but some of the relevant streets were apparently mislabeled. RP (4/15/14) 222-223; RP (4/16/14) 48-49. Steve Jones, the transportation supervisor for Raymond schools, identified the school bus stop using the map. RP (4/15/14) 232-234.

Deputy Tully told the jury that he "measured" the distance between a location and Mr. Taylor's house. But he did not calibrate the tool he used for it, nor did he know when, if ever, the tool had been calibrated. RP (4/15/14) 241, 243. Further, Tully acknowledged that the location he measured from was not the same location that Jones had identified as a bus stop. RP (4/15/14) 241-245.

Mr. Taylor moved to dismiss the school bus stop enhancements, which the court denied. RP (4/15/14) 248-251. The prosecutor clarified that they were pursuing the stop that Jones testified was present, not the one from which Tully measured. RP (4/15/14) 252.

Mr. Taylor testified and admitted that he let the young women stay at his house. He acknowledged he was a drug user, but denied giving B.W. methamphetamine. RP (4/15/14) 269, 271-275, 280.

The trial judge gave the jury a standard instruction on reasonable doubt, calling it "a doubt for which a reason exists." CP 37.

After deliberating for some time, the jury apparently told the bailiff they had a verdict. RP (4/16/14) 97. They were brought into the courtroom and handed forward their verdict forms. RP (4/16/14) 97. The forms were signed, but the blank for "guilty" or "not guilty" was not filled in for any of the three offense forms. The special verdict forms were signed, with the blanks filled in with "yes." RP (4/16/14) 99. The court sent them back into the jury room while conferring with the attorneys. RP (4/16/14) 98-120.

Mr. Taylor moved for a mistrial, which the court denied. RP (4/16/14) 108-109.

Over defense objection, the judge brought the jurors back into open court and asked if they were "able to reach a verdict" as to each count. RP (4/16/14) 108-112, 116, 121-122. Upon receiving two affirmative answers, the court directed the jury to return to the jury room and complete the forms. RP (4/16/14) 122.

The jury again handed up their forms, this time with "guilty" filled in. RP (4/16/14) 124-126.

The defense asked the court to set aside the verdicts and dismiss the charges against Mr. Taylor. The court denied the motion. RP (5/9/14) 2-14.

At the sentencing hearing, the court ordered that the school zone enhancements be run consecutive to each other, and consecutive to the rest of the sentence. CP 84.

Mr. Taylor timely appealed. CP 94-95.

ARGUMENT

I. THE TRIAL JUDGE IMPROPERLY COERCED A VERDICT FROM THE JURY.

A judge presiding over a criminal trial may not interfere in the jury's deliberative process.[1] *State v. Boogaard*, 90 Wn.2d 733, 737, 585 P.2d 789 (1978). Here, the trial judge coerced the jury into returning a verdict.

Jury deliberations are not complete until the jury announces that it has reached a unanimous verdict. *State v. Ford*, 171 Wn.2d 185, 190, 250

[1] The right to a jury trial is protected by U.S. Const. Amends. VI, XIV, and by Wash. Const. art. I, §§21 and 22.

P.3d 97 (2011).[2] In this case, the judge instructed jurors to fill in their verdict forms without first determining whether or not they'd achieved unanimity. RP (4/16/14) 97-98, 121-123. This violated Mr. Taylor's state and federal constitutional right to a jury trial.

Although court reconvened with the understanding that the jury had reached a verdict, the trial judge never asked the presiding juror if the jury had reached a *unanimous* verdict. RP (4/16/14) 97-98, 121-123. Nor did the judge poll the individual jurors on the question of unanimity. RP (4/16/14) 97-98, 121-123. Instead, the court assumed that any decision was unanimous, and directed jurors to fill in the verdicts. RP (4/16/14) 97-98, 121-123.

When the judge announced that the jury had signed the verdict forms but left some of them blank, defense counsel argued that the jury was deadlocked. RP (4/16/14) 104. He expressed concern that questions "posed to the jury might now be seen by them as an instruction to now come up with a verdict even if they didn't before." RP (4/16/14) 108.

Despite this, the court failed to ask if jurors were unanimous. RP (4/16/14) 97-98, 121-123. Nor did the judge assume deadlock and exercise

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[2] *Ford* marked a departure: prior cases had suggested that deliberation continues until the verdict is filed and the jury discharged. *Ford*, 171 Wn.2d at 196-198 (Stephens, J., dissenting) (collecting cases).

the appropriate degree of caution. RP (4/16/14) 97-98, 121-123; *see, e.g., Boogaard,*90 Wn.2d at 736-740.

Because the court failed to ask whether the jury had reached a unanimous verdict, the jury was still engaged in deliberations. *Ford*, 171 Wn.2d at 190. The court should not have ordered jurors to complete the blank verdict forms. The court's directive violated Mr. Taylor's constitutional rights. *Boogaard*, 90 Wn.2d at 737.

The court also violated the superior court criminal rules, which provide as follows:

> After jury deliberations have begun, the court *shall not instruct the jury in such a way as to suggest the need for agreement*, the consequences of no agreement, or the length of time a jury will be required to deliberate.

CrR 6.15(f)(2). Jury deliberations had "begun" in this case; thus, the court should not have "instruct[ed] the jury in such a way as to suggest the need for agreement…" CrR 6.15(f)(2). By directing jurors to "return to the jury room and complete Verdict Form A and Verdict Form B," the court ordered them to come to agreement. RP (4/16/14) 123.

To prevail on a claim of judicial interference with a verdict, the defendant must show a reasonably substantial possibility that the verdict was improperly influenced by the judge's intervention. *Id.,* at 188-189.

Here, there is a reasonable possibility that the verdict was improperly influenced.

The judge told jurors that "[t]he Court is directing the jury to return to the jury room and complete Verdict Form A and Verdict Form B according to the answer given by the Presiding Juror that the jury was able to reach a verdict." RP (4/16/14) 123. Because the jury had not yet announced a *unanimous* verdict, this directive improperly influenced the jury's deliberations. *Id.*

Mr. Taylor's convictions must be reversed. *Id.* The case must be remanded for a new trial. *Id.*

II. THE COURT ADMITTED EVIDENCE UNLAWFULLY SEIZED IN VIOLATION OF THE FOURTH AMENDMENT AND WASH. CONST. ART. I § 7.

A. The affidavit did not establish probable cause: Deputy Tully "would not speculate" about why the "juvenile under the influence" accused Mr. Taylor of providing her drugs and could not overcome the judge's stated concern that B.W. was "not very reliable."

After hearing Deputy Tully's summary of B.W.'s accusation, the issuing judge said:

> [Y]ou have a juvenile under the influence and you got anything else? Cause that's not very reliable.
> Ex. C, p. 2., Supp. CP.

Tully did not have anything else; hence, the warrant was not supported by

probable cause.

Washington uses the two-pronged *Aguilar-Spinelli*[3] standard to evaluate an informant's allegations. *State v. Ollivier*, 178 Wn.2d 813, 850, 312 P.3d 1 (2013) *cert. denied,* 135 S.Ct. 72 (2014). A search warrant affidavit must allow the magistrate "to determine whether the informant has *truthfully* related the facts." *State v. Mejia*, 111 Wn.2d 892, 896, 766 P.2d 454 (1989) (emphasis in original).

The fact that an informant is named does not by itself establish reliability. *State v. Aase*, 121 Wn. App. 558, 568, 89 P.3d 721 (2004). The police must still ascertain background facts supporting a "reasonable inference" that the informant is "credible and without motive to falsify." *Id.*

In this case, Deputy Tully provided no "background facts" about his informant, B.W. Ex. C, pp. 2-7.[4] Indeed, when asked "why is she reliable?" Tully responded "well to be honest Your Honor I don't know [B.W.] very well." Ex. C, p. 4.

Tully went on to say that "she has been on the run for a couple months now…and had this juvenile warrant," that the warrant was for

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[3] *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

[4] Page numbers refer to those noted on the transcript itself. The exhibit also includes an unnumbered cover page.

"contempt court truancy [sic]," and that "she has been in and out of foster care and… just didn't want to be with foster care." Ex. C, p. 4. When asked about her possible motivation for providing information, Tully responded "I don't know her motivation" and "I would not speculate towards her motivation, Your Honor." Ex. C, pp. 5, 6.

Tully did not verify any of B.W.'s allegations through investigation.[5] Indeed, the only "corroboration" he presented was his claim that Mr. Taylor had drug involvement from three years prior.[6] Ex. C, pp. 3, 5.

The telephonic affidavit did not provide probable cause.[7] Tully produced no evidence of B.W.'s reliability, and no information corroborating B.W.'s accusation. Ex. C. The magistrate should not have issued the search warrant. Thus, the trial judge should have granted Mr. Taylor's motion and suppressed the evidence. *Ollivier*, 178 Wn.2d at 850.

Mr. Taylor's convictions must be reversed. *Id.* The evidence must be suppressed, and the case dismissed with prejudice. *Id.*

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[5] Furthermore, B.W. did not voluntarily come forward and provide Tully her name. Instead, she was arrested on a warrant, taken to the hospital by ambulance, and contacted there by Deputy Tully. RP (4/15/14) 124-129, 177-179; Ex. C.

[6] He also claimed that unnamed "informants" had "mentioned his name you know kind of in passing nothing nothing [sic] real definite but uh that he is involved in the use of drugs." Ex. C, p. 6.

[7] The validity of a search warrant is an issue of law reviewed *de novo*. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

B. Deputy Tully intentionally misrepresented facts to obtain the search warrant.

After hearing Deputy Tully's information, the issuing magistrate responded skeptically:

> [Y]ou have a juvenile under the influence and you got anything else? Cause that's not very reliable… [W]hy would we believe her?
> Ex. C, p. 2.

In response, Tully told the judge "I know Ken… quite well," and asserted that he'd been Mr. Taylor's DOC probation officer "approximately three years ago." Ex. C, p. 2.

In fact, Tully did not know Mr. Taylor "quite well." Ex. C, p. 2. As he later revealed at a *Franks* hearing, Tully only knew Mr. Taylor as an offender on his colleague's caseload. RP (4/4/14) 12-13, 28. Although the two officers shared supervision duties, Tully's acquaintance with Mr. Taylor consisted primarily of a single conversation that occurred when he transported him to the jail. RP (4/4/14) 14.

At the hearing Tully admitted that he "didn't have a great amount of dealings with him," and didn't "know him… in a personal capacity." RP (4/4/14) 28. Instead, he claimed that he meant to convey that he "[knew] his history quite well." RP (4/4/14) 28.

However, when Judge Goelz asked Tully about Mr. Taylor's history, Tully mistakenly asserted that Mr. Taylor had prior convictions

for dealing. Ex. C, p. 3. Tully then admitted that Mr. Taylor didn't even have "any particular drug *arrest* in our county," and that he "couldn't speak to" arrests anywhere else. Ex. C, p. 3 (emphasis added).

A search warrant may be invalidated if it is supported by an affidavit containing material misrepresentations made intentionally or with reckless disregard for the truth. *Ollivier*, 178 Wn.2d at 847. Here, Tully misrepresented the degree of his familiarity with Mr. Taylor. He did not know him "quite well" as he told the magistrate. At best, he knew him slightly: he'd shared supervision of Mr. Taylor three years earlier, and they'd shared only one memorable conversation. RP (4/4/14) 12-16.

Tully's assertion—that he'd supervised Mr. Taylor and knew him "quite well"—came as a direct response to the magistrate's comment that B.W. was "not very reliable" and his question "[W]hy would we believe her?" Ex. C, p. 2. Tully intentionally misrepresented the truth, exaggerating his familiarity with Mr. Taylor, in order to reassure the judge.

Material misrepresentations such as these may not be considered when an affidavit is assessed for probable cause. *Id.* When Tully's material misrepresentation is excised from the telephonic affidavit, the remainder fails to establish probable cause.

As the issuing judge noted, B.W. was "a juvenile under the influence," and was thus "not very reliable." Ex. C, p. 2. Tully wouldn't speculate as to her motivation for accusing Mr. Taylor. Ex. C, p. 6. Tully's other information consisted only of rumors from unnamed "informants" who'd "mentioned his name you know kind of in passing nothing nothing [sic] real definite but uh that he is involved in the use of drugs." Ex. C, p. 6.

Tully's misrepresentations should not have been considered. *Id.* Without them, the affidavit lacked probable cause, and the trial judge should have granted Mr. Taylor's motion to suppress. The convictions must be reversed, the evidence suppressed, and the case dismissed with prejudice. *Id.*

III. THE TRIAL COURT'S INSTRUCTIONS IMPROPERLY DIVERTED THE JURY'S ATTENTION AWAY FROM THE REASONABLENESS OF ANY DOUBT, AND ERRONEOUSLY FOCUSED IT ON WHETHER JURORS COULD PROVIDE A REASON FOR ANY DOUBTS.

A. Jurors need not articulate a reason for doubt in order to acquit.

Due process requires the state to prove each element of a charged offense beyond a reasonable doubt. U.S. Const. Amend. XIV; art. I, § 3; *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 2082, 124 L.Ed.2d 182 (1993); *State v. Hundley*, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). Jury instructions must clearly communicate this burden to the jury. *State*

v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007) (citing *Victor v. Nebraska*, 511 U.S. 1, 5-6, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994)).

Instructions that relieve the state of its burden violate due process and the Sixth Amendment right to trial by jury. U.S. Const. Amends.VI; XIV; *Sullivan*, 508 U.S. at 278-81; *Bennett*, 161 Wn.2d at 307. An instruction that misdirects the jury as to its duty "vitiates *all* the jury's findings." *Sullivan,* 508 U.S. at 279-281.

Jurors need not articulate a reason for their doubt before they can vote to acquit. *State v. Emery*, 174 Wn.2d 741, 759-60, 278 P.3d 653 (2012) (addressing prosecutorial misconduct). Language suggesting jurors must be able to articulate a reason for their doubt is "inappropriate" because it "subtly shifts the burden to the defense." *Emery*, 174 Wn.2d at 759-60.[8]

Requiring articulation "skews the deliberation process in favor of the state by suggesting that those with doubts must perform certain actions in the jury room—actions that many individuals find difficult or intimidating—before they may vote to acquit…" *Humphrey v. Cain*, 120 F.3d 526, 531 (5th Cir. 1997) *on reh'g en banc,* 138 F.3d 552 (5th Cir.

[8] *See also State v. Walker*, 164 Wn. App. 724, 731-732, 265 P.3d 191 (2011), *as amended* (Nov. 18, 2011), *review granted, cause remanded,* 175 Wn. 2d 1022, 295 P.3d 728 (2012); *State v. Johnson*, 158 Wn. App. 677, 684-86, 243 P.3d 936 (2010) *review denied,* 171 Wn.2d 1013, 249 P.3d 1029 (2011).

1998).[9] An instruction imposing an articulation requirement "creates a lower standard of proof than due process requires." *Id.,* at 534.[10]

B. The trial court erroneously told jurors to convict unless they had a doubt "for which a reason exists."

The trial court instructed jurors that "A reasonable doubt is one for which a reason exists." CP 37. This suggested to the jury that it could not acquit unless it could find a doubt "for which a reason exists." CP 37. This instruction – based on WPIC 4.01 – imposes an articulation requirement that violates the constitution.

A "reasonable doubt" is not the same as a reason to doubt. "Reasonable" means "being in agreement with right thinking or right judgment : not conflicting with reason : not absurd : not ridiculous . . . being or remaining within the bounds of reason… Rational." *Webster's Third New Int'l Dictionary* (Merriam-Webster, 1993). A reasonable doubt is thus one that is rational, is not absurd or ridiculous, is within the bounds of reason, and does not conflict with reason. *Accord Jackson v. Virginia,* 443 U.S. 307, 317, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) ("A 'reasonable doubt,' at a minimum, is one based upon 'reason.'"); *Johnson v.*

[9] The Fifth Circuit decided *Humphrey* before enactment of the AEDPA. Subsequent cases applied the AEDPA's strict procedural limitations to avoid the issue. *See, e.g., Williams v. Cain*, 229 F.3d 468, 476 (5th Cir. 2000).

Louisiana, 406 U.S. 356, 360, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972) (collecting cases defining reasonable doubt as one "'based on reason which arises from the evidence or lack of evidence'" (quoting *United States v. Johnson*, 343 F.2d 5, 6 n.1 (2d Cir. 1965)).

The "a" before "reason" in Instruction No. 3 inappropriately alters and augments the definition of reasonable doubt. CP 37. "[A] reason" is "an expression or statement offered as an explanation of a belief or assertion or as a justification." *Webster's Third New Int'l Dictionary.* The phrase "a reason" indicates that reasonable doubt must be capable of explanation or justification. In other words, WPIC 4.01 requires more than just a reasonable doubt; it requires an explainable, articulable doubt—one for which a reason exists, rather than one that is merely reasonable.

This language requires more than just a reasonable doubt to acquit. *Cf. In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt.") Jurors applying Instruction No. 3 could have a reasonable doubt but also have difficulty articulating or explaining why their doubt is

[10] In *Humphrey,* the court addressed an instruction containing numerous errors, including an articulation requirement. Specifically, the instruction defined reasonable doubt as "a serious doubt, for which you can give a good reason." *Humphrey,* 120 F.3d at 530.

reasonable.[11] For example, a case might present such voluminous and contradictory evidence that jurors with reasonable doubts would struggle putting their doubts into words or pointing to a specific, discrete reason for doubt. Despite reasonable doubt, acquittal would not be an option under Instruction No. 3. CP 37.

As a matter of law, the jury is "firmly presumed" to have followed the court's reasonable doubt instruction. *Diaz v. State*, 175 Wn.2d 457, 474-475, 285 P.3d 873 (2012). Jurors had no choice but to deliberate with the understanding that acquittal required a reason for any doubt.

The instruction "subtly shift[ed] the burden to the defense." *Emery*, 174 Wn.2d at 759-60. It also "create[d] a lower standard of proof than due process requires..." *Humphrey,* 120 F.3d at 534. By relieving the state of its constitutional burden of proof, the court's instruction violated Mr. Taylor's right to due process and his right to a jury trial. *Id.; Sullivan*, 508 U.S. at 278-81; *Bennett*, 161 Wn.2d at 307. Accordingly, his convictions must be reversed and the case remanded for a new trial with proper instructions. *Sullivan*, 508 U.S. at 278-82.

[11] See Steve Sheppard, The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence, 78 NOTRE DAME L. REV. 1165, 1213-14 (2003).

IV. THE SENTENCING COURT EXCEEDED ITS AUTHORITY BY IMPOSING CONSECUTIVE DRUG-ZONE ENHANCEMENTS.[12]

A. Standard of Review

Issues of statutory construction are reviewed *de novo*. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

B. The legislature used language differentiating drug-zone enhancements from other kinds of enhancements.

The legislature establishes the appropriate punishments for criminal activity. *State v. Benn*, 120 Wn. 2d 631, 670, 845 P.2d 289 (1993). In determining the legislature's intent, courts look first to the statutory text; if the statute is clear on its face, its meaning is to be derived from the language alone. *State v. Moeurn*, 170 Wn.2d 169, 174, 240 P.3d 1158 (2010). If the statute is susceptible to more than one reasonable interpretation, courts may "resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent." *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010) (internal citation omitted).

A statute must be read in its entirety; courts must "interpret the various provisions in light of one another." *In re the Postsentence Review of Charles*, 135 Wn.2d 239, 249, 955 P.2d 798 (1998). Where the

[12] This issue is pending before the Washington State Supreme Court. *State v. Conover,*

legislature uses certain statutory language in one provision, and different language in another, there is a difference in legislative intent. *State v. Roberts*, 117 Wn. 2d 576, 586, 817 P.2d 855 (1991). Furthermore, if a statute is ambiguous, the rule of lenity requires it be interpreted strictly against the State and in favor of the accused. *State v. Jacobs*, 154 Wn.2d 596, 603, 115 P.3d 281 (2005).

Judges have limited discretion in imposing sentences under the Sentencing Reform Act. RCW 9.94A.505. For most cases involving multiple convictions, sentences run concurrently rather than consecutively. RCW 9.94A.589. After a standard range is calculated based on criminal history, it may be further increased by certain offense-specific conduct. RCW 9.94A.533. For example, one provision imposes additional time for crimes committed with a firearm; another does the same for other deadly weapons; and a third deals with crimes committed in jail or prison. *See* RCW 9.94A.533(3), (4), (5). Other sections address enhancements for prior DUIs, for crimes committed with sexual motivation, and for offenders who involve minors in gang crimes. RCW 9.94A.533.

This case involves the drug-zone enhancement provision, which requires that "[a]n additional twenty-four months shall be added to the standard sentence range" for offenses committed within 1,000 feet of a

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Supreme Court No. 90782-0. Oral argument is scheduled for May 21, 2015.

school bus route stop. RCW 9.94A.533(6). Under the provision, all drug-zone enhancements must run consecutively to "all other sentencing provisions..."RCW 9.94A.533(6).

The Supreme Court has interpreted similar language to mean that the enhancement runs consecutive to the base sentence but concurrent with other enhancements. *Charles*, 135 Wn.2d at 253-54 (addressing former RCW 9.94A.310(3)(e) (2001)). At issue in *Charles* were firearm enhancements imposed under language providing that "any and all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall not run concurrently with *any other sentencing provisions*." *Id.,* at 247 (quoting former RCW 9.94A.310(3)(e)) (emphasis added).

The *Charles* court concluded that this language required enhancements to run concurrent with each other unless the sentencing court ordered the underlying sentences to run consecutively. *Id.,* at 254. According to the court, "[a]n enhancement is not a separate sentence; rather, it is a statutorily mandated increase to an offender's sentence range because of a specified factor in the commission of the offense." *Id.* at 253.

The legislature responded to *Charles* by amending the statute. Under the current statute, firearm enhancements, deadly weapon enhancements, and sexual motivation enhancements are treated specially:

> [A]ll firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, *including other firearm or deadly weapon enhancements*...
>
> [A]ll deadly weapon enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements...
>
> [A]ll sexual motivation enhancements under this subsection are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, *including other sexual motivation enhancements*...

RCW 9.94A.533(3), (4), (8). Under these provisions, the listed enhancements run consecutively to other enhancements of the same type. *State v. Mandanas*, 168 Wn.2d 84, 88, 228 P.3d 13 (2010) (Holding that firearm enhancements on two different counts ran consecutively to each other). The legislature thus distinguished these three kinds of enhancements from all the other enhancements outlined in RCW 9.94A.533.

The drug-zone enhancements here are based on a statute retaining the language similar to that addressed in *Charles*. *See* RCW 9.94A.533(6). The legislature has *not* decreed that drug-zone enhancements run "consecutively to all other sentencing provisions," including other drug-zone enhancements.

It is clear that the legislature knew how to make enhancements run consecutively to each other across counts; it did so in the firearm, deadly

weapon, and sexual motivation enhancement sections. RCW 9.94A.533(3), (4), (8). The fact that the legislature explicitly provided for consecutive enhancements in one section of the statute shows it did not intend for courts to impose consecutive enhancements for those sections from which it omitted such language. *See State v. Delgado*, 148 Wn.2d 723, 728, 63 P.3d 792 (2003) (giving effect to differences in language between two-strike statute and three-strike statute); *Charles*, 135 Wn.2d at 249 (provisions must be interpreted in light of one another); *Roberts*, 117 Wn. 2d at 586 ("Where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent").

Accordingly, the trial judge should not have sentenced Mr. Taylor to consecutive drug-zone enhancements. Instead, since the base sentences ran concurrently, the court should have imposed a total of 24 months in enhancements.

Mr. Taylor's 48-month sentence enhancement must be vacated, and the case remanded for resentencing with a 24-month enhancement. *Charles*, 135 Wn.2d at 253-54.

V. THE INFORMATION CHARGING THE DRUG-ZONE ENHANCEMENTS WAS CONSTITUTIONALLY DEFICIENT BECAUSE IT FAILED TO ALLEGE CRITICAL FACTS.

A. Standard of Review.

Challenges to the sufficiency of a charging document are reviewed *de novo*. *State v. Rivas*, 168 Wn. App. 882, 887, 278 P.3d 686 (2012) *review denied,* 176 Wn.2d 1007, 297 P.3d 68 (2013). Such challenges may be raised for the first time on appeal. *Id.*

Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Rivas*, 168 Wn. App. at 887. The test is whether the necessary facts appear or can be found by fair construction in the charging document. *Id.* If the Information is deficient, prejudice is presumed. *Id.*, at 888. The remedy for an insufficient charging document is reversal and dismissal without prejudice. *Id.*, at 893.

B. The document charging Mr. Taylor with drug-zone enhancements failed to allege sufficient facts to provide adequate notice and to allow him to argue an acquittal or conviction as a bar against a second prosecution.

The Sixth Amendment right "to be informed of the nature and cause of the accusation" and the federal guarantee of due process impose certain requirements on charging documents. U.S. Const. Amends. VI,

XIV.[13] A charging document "is only sufficient if it (1) contains the elements of the charged offense, (2) gives the defendant adequate notice of the charges, and (3) protects the defendant against double jeopardy." *Valentine v. Konteh*, 395 F.3d 626, 631 (6th Cir. 2005).[14] The charge must include more than "the elements of the offense intended to be charged." *Russell v. United States*, 369 U.S. 749, 763-64, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962) (citations and internal quotation marks omitted).

Any offense charged in the language of the statute "must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense." *Id.* (citations and internal quotation marks omitted). The charge must also be specific enough to allow the defendant to plead the former acquittal or conviction "in case any other proceedings are taken against him for a similar offense." *Id.*

Any "critical facts must be found within the four corners of the charging document." *City of Seattle v. Termain*, 124 Wn. App. 798, 803, 103 P.3d 209 (2004).[15]

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[13] Wash. Const. art. I, §§ 3 and 22 impose similar requirements.

[14] The Fifth Amendment, applicable through the Fourteenth, protects the accused person against double jeopardy. U.S. Const. Amends. V, XIV.

[15] Thus, for example, in theft cases, the Information must not only name the owner but must "clearly" charge the accused person with a crime relating to "specifically described property." *State v. Greathouse*, 113 Wn. App. 889, 903, 56 P.3d 569 (2002). When the charging document includes "not a single word to indicate the nature, character, or value of the property," the charge is "too vague and indefinite upon which to deprive one of his [or her] liberty." *Edwards v. United States*, 266 F. 848, 851 (4th Cir. 1920).

In this case, the Information passes only the first of these three requirements: it charges in the language of the statute, and thus "contains the elements of the offense intended to be charged." *Russell*, 369 U.S. at 763-64. It fails the other two requirements because it omits critical facts. In the absence of critical facts, the Information does not provide adequate notice of the charges, nor does it provide any protection against double jeopardy. *Id.; Valentine,* 395 F.3d at 631.

Here, the Information does not provide any allegations regarding the location of the school bus route stop. CP 29-31. The location of the stop is critical to a proper charge, because the enhancement required proof that Mr. Taylor's offense occurred within 1,000 feet of the spot. RCW 9.94A.533(6); RCW 69.50.435.

Because of this, the allegations are "too vague and indefinite upon which to deprive [Mr. Taylor] of his liberty." *Id.* The Information provides neither notice nor protection against double jeopardy. CP 29-31; *Russell*, 369 U.S. at 763-64; *Valentine,* 395 F.3d at 631. The critical facts in Mr. Taylor's cannot be found by any fair construction of the charging document. CP 29-31; *Rivas*, 168 Wn. App. at 887.

The Information is constitutionally deficient. Mr. Taylor's sentencing enhancements must be reversed and the case remanded for sentencing within the standard range. *Rivas*, 168 Wn. App. at 893.

CONCLUSION

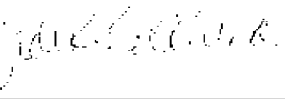
Mr. Taylor's convictions must be reversed and the case dismissed with prejudice. The trial judge should have granted his motion to suppress evidence seized pursuant to an invalid search warrant.

In the alternative, the case must be remanded for a new trial. The trial judge improperly coerced a verdict from the jury. Furthermore, the court's "reasonable doubt" instruction imposed an unconstitutional articulation requirement.

Finally, if the convictions are not reversed, the drug-zone enhancements must be vacated. The enhancements must either be dismissed without prejudice (because the Information failed to properly charge each enhancement) or imposed concurrently, in keeping with the legislative intent for drug-zone enhancements.

Respectfully submitted on April 14, 2015,

BACKLUND AND MISTRY



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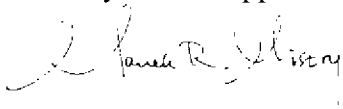

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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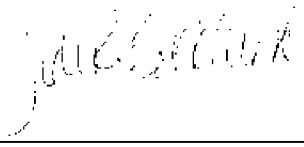
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 14, 2015.



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