No. 46329-6-II

THE COURT OF APPEALS, DIVISION TWO
OFTHE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KENNETH TAYLOR

Appellant.

BRIEF OF RESPONDENT

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RESPONSE TO PETITIONER'S ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court did not violate Mr. Taylor's right to a jury trial when it instructed the jury to return to memorize their verdict on the jury forms.

2. The trial court did not violate Mr. Taylor's right to a jury trial.

3. The jury was not coerced into a verdict.

4. The trial court properly directed the jury to return to memorialize their unanimous verdicts.

5. There was no violation of CrR 6.15(f)(2) when it directed they return to fill in the blank to memorialize their verdict.

6. There was no error in refusing to set aside the verdicts.

7. The trial court properly denied Mr. Taylor's motion to suppress.

8. The trial court properly admitted evidence seized under a lawfully issued warrant.

9. The magistrate issuing the search warrant was in the best position to judge the credibility and reliability of B.W. and properly issued the warrant.

10. Deputy Tully did not make a material misrepresentation and the trial court properly issued the warrant.

11. There was no error in adoption of Finding of Fact 12.

12. There was no error in adoption of Finding of Fact 13.

13. There was no error in adoption of Findings of Fact 14.

14. There was no error in adoption of Findings of Fact 17.

15. There was no error in adoption of Conclusion of Law 2.

16. There was no error in adoption of Conclusion of Law 3.

17. There was no error in adoption of Conclusion of Law 4.

18. There was no error in adoption of Conclusion of Law 6.

19. There was no error in adoption of Conclusion of Law 7.

20. There was no error in adoption of Conclusion of Law 8.

21. The trial court properly gave instruction 3.

22. The trial court burden of proof instruction, WPIC 4.01, did not violate Mr. Taylor's due process right.

23. The trial court burden of proof instruction, WPIC 4.01, did not violate Mr. Taylor's jury trial right.

24. The trial court burden of proof instruction, WPIC 4.01, did not violate Mr. Taylor's jury trial right.

25. The trial court burden of proof instruction, WPIC 4.01, did not shift the burden of proof or undermine Mr. Taylor's presumption of innocence.

26. The drug-zone enhancement did not violate Mr. Taylor's Sixth or Fourteenth Amendment right.

27. The information was not defective and adequately informed Mr. Taylor of the school bus stop enhancement.

28. The information sufficiently informed Mr. Taylor.

29. The trial court properly sentenced Mr. Taylor.

I. STATEMENT OF THE CASE

The Bailiff informed the Court that the jury had reached a verdict. RP (4/16/14) 97. The Jury was returning to the courtroom and asked if they had reached a verdict and the Presiding Juror indicated that the Jury had, in fact, reached a verdict. RP (4/16/14) 102. The Presiding Juror had signed verdict forms A and B without writing in the words guilty or not guilty; however, the Presiding Juror had written "yes" in the special verdict form 1, indicating that Mr. Taylor had distributed a controlled substance to a person under 18 within 1,000 feet of a school bus route stop. RP (4/16/14) 99. Further, the Presiding Juror likewise signed special verdict form 2 and answered "yes," that the Defendant had possessed a controlled substance with the intent to deliver within 1,000 feet of a school bus route stop. RP (4/16/14) 99-100. The jury was returned to the jury room with the instruction not to speculate as to why they were being returned and to not discuss any aspect of the case in any way. RP (4/16/14) 98. After much discussion, and with an abundance of caution, the trial judge determined he would ask the Presiding Juror if the jury has reached a verdict. RP (4/16/14) 99-121. There was no objection, but instead a request from the Defense for a mistrial based only on the notion that the words guilty or not guilty were not included

on the signed verdicts, and some vague unconnected statement about double jeopardy. RP (4/16/14) 108-109. The request for a mistrial was denied. RP (4/16/14) 111. With the jury back in court, the Presiding Juror was asked, "was the jury able to reach a verdict on verdict form A?" The lone answer was "yes" that the jury had returned a verdict. The same question was asked of verdict form B and, likewise, the Presiding Juror indicated "yes," the jury had reached a verdict. RP (4/16/14) 122. The court directed the jury to return and complete the verdict forms according to the answer given and specifically indicated to the jury, "the Court is not suggesting indirectly or directly anything about what any verdict was or what any verdict should be put in any blank." RP (4/16/14) 122. While it is not entirely clear how long the jury was out following the Court's instruction, they were called back into Court at 2:50 PM, had the above-exchange with the Court, and were returned to the jury room to complete the verdict forms. Court was reconvened at 3:05PM with the court announcing he had received a call from the Bailiff approximately three minutes before they were in the record that the jury had completed the verdict forms. RP (4/16/14)120, 123. The jury convicted on all counts and was polled, indicating that these

were the verdicts of the jury and their individual verdicts. RP (4/16/14) 124-125.

On January 8, 2014, Raymond Police Officer Arlie Boggs summoned Pacific County Sheriff's Deputy Ryan Tully to the Willapa Harbor Hospital. Deputy Tully was the narcotics officer for the county. RP (4/15/14) 178. There, he spoke with a 16-year-old girl, B.W., who was under the influence of methamphetamine. RP (4/15/14) 179. B.W. told Dep. Tully that 51-year-old Kenneth Taylor supplied her with the methamphetamine for which she was then currently hospitalized. B.W. told Dep. Tully that he had been providing her with methamphetamine for about two months at his residence, 602 Plum Street in Raymond, WA. She said that she last used with him at that residence between 2 and 3 hours prior. Ex. C, p. 2. Based on this information, Dep. Tully sought and received a telephonic search warrant to look for methamphetamine, paraphernalia, and B.W.'s personal property at Mr. Taylor's house.

Prior to the trial, the Court held a *Franks*[1] hearing. Though Mr. Taylor did not file a written motion, he did file a declaration in which he alleges that Deputy Tully lied when seeking the search warrant: that Dep. Tully did not know him well, was not his

[1] *Franks v. Delaware*, 438 U.S. 154 (1978)

Community Corrections Officer (CCO) and could not have known him as a drug user.

At this hearing, Deputy Tully testified that during his prior employment as a CCO, he thought of himself as Mr. Taylor's probation officer even though Mr. Taylor was on CCO Linda Tolliver's caseload. Dep. Tully believed this because: 1) it was a two-person office and one CCO would cover for the other routinely; 2) Dep. Tully did about 25 percent of the work on Mr. Taylor's case; and 3) Dep. Tully routinely reviewed the file of everyone under supervision of their office. Dep. Tully testified that he thought that he knew Mr. Taylor "well" because of the aforementioned, because Mr. Taylor disclosed his personal history during an hour-long ride to the Lewis County jail, and because Dep. Tully's drug task force contacts mentioned Mr. Taylor. Please see attached Appendix A, from Ex. C, for portions of the transcript of the search warrant application and citation to the record for Dep. Tully's *Franks* hearing testimony.

The defense had no objections or exceptions to the proposed jury instructions, including WPIC 4.01. RP (4/16/14)[2] 297, PR (4/16/14) 2-3.

[2] It appears this was likely on the 15th, but the hand written date on volume 3 of 4 indicates the 16th.

II. ARGUMENT

1. THE TRIAL JUDGE DID NOT COERCE A VERDICT FROM THE JURY.

To prevail on a claim of improper judicial interference with the verdict, a defendant must establish actual conduct by the trial judge during jury deliberations that could influence the jury's decision. *State v. Ford*, 171 Wash.2d 185, 250 P.3d 97 (2011).[3]

> A Defendant must first make a threshold showing that the jury was still within its deliberative process. Second, though related, the defendant must affirmatively show that the jury was at that point still undecided. Third, the defendant must show judicial action designed to force or compel a decision, and fourth, the impropriety of that conduct. Finally, if raised for the first time on appeal, a defendant must show that such interference rises to the level of manifest error, such that it actually prejudiced the constitutional right to a fair trial.

Id., 171 Wash. 2d at 193.

While it is evident that the Appellant is aware of the *Ford* decision— and fails to point out that the jury had found, unanimously, that Mr. Taylor's offenses were committed within 1000 feet of a school bus stop— this matter rests squarely within the holding of

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[3] *State v. Ford* represents an identical issue as to the issue presented in this case. Further, that the provisions of CrR 6.15(f)(2) "has no application" in this type of situation and upheld the trial court's instruction to fill out the form with the jury verdict.

Ford and the Appellant has made no assertion that *Ford* should be overturned or was wrongly decided. Consequently, he is aware that he must affirmatively demonstrate the verdict was improperly influenced, something that cannot be based on mere speculation and with consideration of the totality of circumstances regarding the trial court's intervention into the jury's deliberations. *Ford*, 171 Wash.2d at 189, citing *State v. Watkins*, 99 Wash.2d 166, 177–178, 660 P.2d 1117 (1983), and *State v. Boogaard*, 90 Wash.2d 733, 739–40, 585 P.2d 789 (1978). However, the Appellant must make a threshold showing that the jury was still in its deliberative process. *Ford* ,171 Wash. 2d at 189.

Here, the jury had announced it had reached a verdict and filled out a portion of the verdict forms indicating exactly they unanimously found Mr. Taylor distributed a controlled substance to a person under 18 within 1,000 feet of a school bus route stop and on a separate day possessed with the intent to deliver a controlled substance within 1000 feet of a school bus stop. RP (4/16/14) 97, 98, 99, 100, 102. When asked if the jury had reach a verdict, the Presiding Juror indicated they had. RP (4/16/14) 122.

It is evident that the jury was not in its deliberative process, but instead had reached a verdict. Consequently the Appellant

cannot pass the threshold requirement and the Court should not disturb the jury's unanimous, and polled, verdicts. RP (4/16/14) 124-125.

In the event this Court concludes the jury was in the deliberative process, Mr. Taylor must nevertheless affirmatively show the jury was still undecided. Given the special verdict indicating Mr. Taylor had delivered a controlled substance to a minor, and done so within a school bus stop zone, his assertion fails. Moreover, he must show some judicial action forcing a verdict. No such showing can be had, nor has one been offered in Mr. Taylor's brief. Consequently, error on this issue cannot be shown and the jury's verdict should stand.

III. EVIDENCE ADMITTED IN THIS CASE WAS LAWFULLY SEIZED PURSUANT TO A SEARCH WARRANT

1. Standard of Review.

A judge's determination that probable cause exists to issue a search warrant is granted great deference on appeal and doubts are resolved in favor of the warrant's validity. *State v. Klinger*, 96 Wash. App. 619, 980 P.2d 282 (1999), citing *State v. J–R Distributors*, Inc., 111 Wash.2d 764, 774, 765 P.2d 281 (1988); *State v. Jackson*, 102 Wash.2d 432, 442, 688 P.2d 136 (1984). Search warrants are

interpreted in a commonsense, practical way, not in a hypertechnical manner. *Klinger* (citations omitted), citing *State v. Perrone*, 119 Wash.2d 538, 549–51, 834 P.2d 611 (1992). A judge's finding that probable cause exists is reviewed under an abuse of discretion standard. *State v. Remboldt*, 64 Wash.App. 505, 509, 827 P.2d 282, review denied, 119 Wash.2d 1005, 832 P.2d 488 (1992).

In reviewing a magistrate's probable cause determination, appellate courts engage in a two-part inquiry. First, for abuse of discretion the magistrate's findings of the historical facts. This factual determination receives the deferential abuse of discretion standard of review. *In re Det. of Petersen*, 145 Wn.2d 789, 799–800, 42 P.3d 952 (2002). Both the trial court and on appeal, the magistrate's findings are given great deference. *State v. Freeman*, 47 Wn.App. 870, 873, 737 P.2d 704 (1987). All doubts are reviewed in favor of the warrant's validity. *State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981). When an appellant challenges a trial court's denial of a motion to suppress, the reviewing court determines whether there is substantial evidence to support the challenged findings of fact and whether those findings support the trial court's conclusions of law. *State v. Campbell*, 166 Wn. App. 464, 469, 272 P.3d 859 (2011). Findings of fact entered by a trial court after a suppression hearing

will be reviewed by the appellate court only if the appellant has assigned error to the fact. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Findings of fact not assigned error are considered verities on appeal. *State v. Stevenson,* 128 Wn. App. 179, 193, 114 P.3d 699 (2005). Mr. Taylor assigns error to finding of fact 12, 13, 14, 17, and conclusion of law 2, 3, 4, 6, 7, and 8; the other findings of fact and conclusions of law, therefore, are verities on appeal.

A trial court's conclusions of law are reviewed *de novo*, with deference to the trial court on issues of weight and credibility. *State v. Sadler*, 147 Wn. App. 97, 123, 193 P.3d 1108 (2008); *State v. Swan*, 114 Wash.2d 613, 790 P.2d 610 (1990) (credibility or the weight given to evidence is left to the trial court). In evaluating the magistrate's probable cause determination, commonsense is the ultimate standard. *State v. Patterson*, 83 Wn .2d 49, 55, 515 P.2d 496 (1973) (citing *United States v. Harris*, 403 U.S. 573, 582, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971)).

Probable cause requires more than suspicion or conjecture, but it does not require certainty. *State v. Chenoweth*, 160 Wash.2d 454, 158 P.3d 595 (2007). "Good reason for the issuance of a search warrant does not necessarily mean proof of criminal activity but merely probable cause to believe it may have occurred.' *Id.* citing

State v. Gunwall, 106 Wash.2d 54, 73, 720 P.2d 808 (quoting *Patterson*, 83 Wn.2d at 52. The decision to issue a search warrant is highly discretionary. *Chenoweth*, 160 Wash.2d at 607, citing *State v. Cole*, 128 Wash.2d 262, 286, 906 P.2d 925 (1995). Great deference is given to the magistrate's determination of probable cause and view the supporting affidavit for a search warrant in a commonsensical manner rather than hypertechnically. *Id.* citing *State v. Young*, 123 Wash.2d 173, 195, 867 P.2d 593 (1994).

A. The affidavit established probable cause.

Probable cause for a search warrant may be based on information from an informant. *State v. Gaddy*, 152 Wn.2d 64, 71, 93 P.3d 872 (2004). For an informant's tip to create probable cause requires two conditions:

> "(1) the officer's affidavit must set forth some of the underlying circumstances from which the informant drew his conclusion so that a magistrate can independently evaluate the reliability of the manner in which the informant acquired his information; and (2) the affidavit must set forth some of the underlying circumstances from which the officer concluded that the informant was credible or his information reliable."

State v. Jackson, *op. cit.* 435 (citing *Aguilar v. Texas*, 378 U.S. 108, 114, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and *Spinelli v. United States*, 393 U.S. 410, 413, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969))

This two-part test encompasses a "basis of knowledge" prong and a "veracity" prong, respectively. *Jackson*, 102 Wn.2d at 437.

The basis of knowledge prong is satisfied by information that the informant personally saw the facts asserted and is passing on first-hand information. *State v. McCord*, 125 Wn.App. 888, 893, 106 P.3d 832 (2005). Here, the informant, B.W., demonstrated a basis of knowledge of methamphetamine. She was then being hospitalized for it. She had first-hand knowledge that Mr. Taylor had supplied her this methamphetamine within two to three hours of her report.

The veracity test differs depending on the informant's status. *State v. Ibarra*, 61 Wn.App. 695, 699, 812 P.2d 114 (1991). The courts distinguish between professional informants and citizen informants, and whether the informant's identity is known to the police. *Ibarra*, 61 Wn.App. at 699. Citizen informants are subject to a less stringent test for veracity. *Ibarra*, 61 Wn.App. at 699.

When the informant is an ordinary citizen, as opposed to the criminal or professional informant, and her identity is revealed to the issuing magistrate, intrinsic indicia of the informant's reliability may be found in her detailed description of the underlying circumstances of the crime observed or about which she had knowledge. *State v. Northness*, 20 Wn.App. 551, 557, 582 P.2d 546 (1978). Not only was

B.W.'s description of the circumstances sufficiently detailed, she was demonstrating details of the circumstances by the fact of her methamphetamine use.

Though she herself possessed the methamphetamine for the brief period between Mr. Taylor's delivery and her ingestion, her criminal activity does not cause her to be viewed by this Court as a "criminal informant." "[T]he fact that an identified eyewitness informant may also be under suspicion in this case because of her initial contact has been held not to vitiate the inference of reliability raised by the detailed nature of the information and the disclosure of the informant's identity." *Northness*, 20 Wn.App. at 558, cited with approval in *Chenoweth*, 122 Wn.App. at 454. Because an informant admits criminal activity to police, these statements support an inference of reliability because they are "not often made lightly." *State v. O'Connor*, 39 Wn.App. 113, 122-23, 692 P.2d 208 (1984).

Here, B.W. described in detail the container in which Mr. Taylor stored his methamphetamine, and the places where he hid the container. She described snorting the methamphetamine, and said that there was more there. She said that he buys about a gram of methamphetamine a day, and provides it to her through the day. She said that they smoke it and snort it, and had done both that day.

She said that he had been providing her methamphetamine on and off for about two months at his residence, the place to be searched. (Exhibit C, p. 2, 4 - 5)

As discussed above and below, Mr. White's information was supplemented and confirmed by Dep. Tully's knowledge of Mr. Taylor and his history of drug use.

"Probable Cause is established in an affidavit supporting a search warrant by setting forth facts sufficient for a reasonable person to conclude the defendant probably is involved in criminal activity." *State v. Huft*, 106 Wn.2d 206, 209, 720 P.2d 838 (1986).

Here, a reasonable magistrate could conclude from B.W's and Dep. Tully's information that Mr. Taylor probably had methamphetamine, drug paraphernalia, and B.W.'s personal property at his residence. The evidence was not suppressed at the trial level and should not be suppressed now.

B. THE TRIAL COURT PROPERLY DENIED MR. TAYLOR'S *FRANKS* MOTION

This Court shall begin with the presumption that the affidavit supporting a search warrant is valid. *State v. Atchley*, 142 Wn.App. 147, 157, 172 P.3d 323 (2007).

Contrary to Mr. Taylor's accusation, Dep. Tully spoke truthfully and accurately to the best of his ability in securing the search warrant. He testified that during his previous employment as a Community Corrections Officer (CCO) in 2011, Mr. Taylor was on probation. Though Mr. Taylor was on CCO Linda Tolliver's caseload, there were only two CCOs in the Pacific County office. If CCO Tolliver was unavailable, Dep. Tully supervised her clients. As such, he arrested Mr. Taylor, transporting him to the Lewis County jail. RP (2/21/2014) 12 – 13 It did not matter who was the assigned CCO in the office, as he would deal with her clients as much as she was dealing with his. RP (2/21/2014) 14. During CCO Tolliver's absences, he had as much authority to supervise Mr. Taylor as she did. RP (2/21/2014) 19. Dep. Tully testified that he was responsible for 25 percent of the work supervising Mr. Taylor during his time with the Department of Corrections as a Community Corrections Officer. RP (2/21/2014) 21

Dep. Tully acquired knowledge about Mr. Taylor from CCO Tolliver. Dep. Tully transported Mr. Taylor to the Lewis County jail, and during that hour or so trip, Mr. Taylor "talked about his drug use history, his alcohol history, his family history, so I got to know him, you know, fairly well in what you can do in an hour." RP (2/21/2014)

14. Dep. Tully also researched the criminal history, the police reports and prior history of clients that were assigned either to him or CCO Tolliver. RP (2/21/2014) 22)

Mr. Taylor states that "when Judge Goelz asked Tully about Mr. Taylor's history, Tully mistakenly asserted that Mr. Taylor had prior convictions for dealing. . . 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." (Petitioner's brief, p. 14 – 15). This misrepresents the record:

> Judge: has he been convicted of drug dealing before?
>
> Tully: um I believe he has um and I can tell you in just a moment, give me just a moment your honor, but he has admitted to me in the past that he is a drug user
>
> Judge: what's that again?
>
> Tully: he has admitted to me in the past that he is a drug user
>
> Judge: he is a user but has he admitted to be a drug provider?
>
> Tully: um he has not, not to me
>
> Judge: oh he has some connection to drugs?
>
> Tully: he does
>
> Judge: and that connection is that he admitted to you but you don't have his record there now?
>
> Tully: um I don't see any any drug. . . . any particular drug arrest in our county um

Judge: how about elsewhere?

Tully: um I can't speak to that your honor

Exhibit C, p. 2 – 3

An omission or false statement made in an affidavit in support of a search warrant may invalidate the warrant if it was (1) material and (2) made intentionally or with reckless disregard for the truth. *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); *State v. Cord*, 103 Wn.2d, 361, 366-67, 103 Wash.2d 361 (1985). If a defendant establishes his allegations at a *Franks* hearing, the material misrepresentations will be stricken from the affidavit and the material omissions added. *Franks*, 438 U.S. at 155-56; *Cord*, 103 Wn.2d at 366-67. If the modified affidavit then fails to support a finding of probable cause, the warrant is invalid and the evidence obtained shall be excluded. *Franks*, 438 U.S. at 155-56; *Cord*, 103 Wn.2d at 367.

Allegations of negligence or innocent mistake are insufficient. *Franks*, 438 U.S. at 171; *State v. Seagull*, 95 Wn.2d at 908.

> Scrutinizing a warrant affidavit for evidence of negligent omissions or misstatements is also inconsistent with our State's established jurisprudence governing search warrant challenges. A search warrant is entitled to a presumption of validity. The decision to issue a search warrant is highly discretionary. We generally give great deference to the magistrate's determination of probable cause and view

> the supporting affidavit for a search warrant in a commonsensical manner rather than hypertechnically. Accordingly, we generally resolve doubts concerning the existence of probable cause in favor of the validity of the search warrant. Shifting focus from the reasonableness of the magistrate's probable cause determination to the reasonableness of the affiant's investigation would permit an end run around the deliberately deferential standard of review that a reviewing court applies to search warrants.
>
> *State v. Chenoweth*, 160 Wn.2d at 477 (Internal citations omitted)

The defendant must produce evidence of intent or recklessness. A reckless disregard for the truth may be shown where the affiant, "'in fact entertained serious doubts as to the truth' of facts or statements in the affidavit." *State v. Clark*, 143 Wn.2d 731, 751, 24 P.3d 1006 (2001). This Court should not infer intent or recklessness from the importance of the misrepresentations or omissions. *State v. Garrison*, 118 Wn.2d 870, 873, 827 P.2d 1388 (1992).

Here, the court found that no material misrepresentations, intentional misrepresentations, or false statements were made to the magistrate at the time the warrant was issued.

The appellant argues that Deputy Tully's statement that he knew Mr. Taylor "quite well" was an intentional misrepresentation, but points to no evidence supporting their accusation of Deputy

Tully's willful deceit. The transcripts of both the telephonic application for a search warrant and the *Franks* hearing amply demonstrate Deputy Tully's attempts to speak fully and fairly from his memory. (See Appendix). Having no evidence, the Appellant's conclusory allegation is without merit.

The Appellant has not met his burden.

IV. THE ISSUE WAS INVITED AND THEREFORE NOT AVAILABLE FOR REVIEW; REGARDLESS, THE JURY WAS PROPERLY INSTRUCTED PURSUANT TO WPIC 4.01

Mr. Taylor complains, for the first time on appeal[4], that the "reasonable doubt" instruction, WPIC 4.01, relieved the state from its burden, "subtly" shifted the burden, created a lower standard of proof, and imposed an articulation requirement that violated the constitution. Appellant's Brief 16-18. Mr. Taylor invited this issue and he is therefore precluded from asserting this issue on appeal.

1. Mr. Taylor invited any error

Without conceding that the jury was improperly instructed, Mr. Taylor made no objection to the proposed jury instructions, including WPIC 4.01, about which he now complains. The appellate court may

[4] There was no objection or exceptions from Mr. Taylor to the proposed jury instructions at the trial level. RP (4/16/14) 297, PR (4/16/14) 2-3.

revise to review any claim of error which was not raised in the trial court. RAP 2.5(a).

A party may not request an instruction and later complain on appeal that the requested instruction was given. *City of Seattle v. Patu*, 147 Wash.2d 717, 58 P.3d 273 (2002), citing *State v. Studd*, 137 Wash.2d 533, 973 P.2d 1049 (1999); see also *State v. Henderson*, 114 Wash.2d 867, 870, 792 P.2d 514 (1990); see also *State v. Boyer*, 91 Wash.2d 342, 345, 588 P.2d 1151 (1979).

Accordingly, Mr. Taylor's claim that WPIC 4.01 is improper is barred on appeal.

2. WPIC 4.01 was properly given and is an appropriate statement of the law.

Challenged jury instructions are reviewed *de novo* and evaluated in the context of the instructions as a whole. *State v. McCreven*, 170 Wn. App. 444, 461-62, 284 P.3d 793 (2012). Constitutional violations are reviewed *de novo*. *State v. Irby,* 170 Wn.2d 874, 880, 246 P.3d 796 (2011). Instructions must convey to the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. *State v. Bennett*, 161 Wash.2d 303, 165 P.3d 1241 (2007)(The Supreme Court, in exercising its supervisory powers over State's Courts,

mandated the use of WPIC 4.01)[5], citing *Victor v. Nebraska*, 511 U.S. 1, 5-6, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994)(upholding the "abiding-belief" instruction), see also *State v. Pirtle*, 127 Wash.2d 628, 656-659, 904 P.2d 245 (1995). Instructions must properly inform the jury of the applicable law, not mislead the jury, and permit each party to argue its theory of the case. *Bennett*, *supra*, citing *State v. LeFaber*, 128 Wash.2d 896, 903, 913 P.2d 369 (1996). It is reversible error to instruct the jury in a manner relieving the State of its burden to prove every element of a crime beyond a reasonable doubt. *Bennett*, (citation omitted) citing, *Sullivan v. Louisiana*, 508 U.S. 275, 280–81, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). However, as a result of *Bennett* it would have been error not to instruct the jury utilizing WPIC 4.01. This instruction has been upheld and nothing within appellant's brief provides a basis to set it aside.

V. THE SENTENCING ENHANCEMENTS WERE PROPER

Mr. Taylor contends that RCW 9.94A.533(6) does not authorize a sentencing court to apply the school bus stop enhancements consecutively to one another. Specifically, Mr. Taylor argues that the legislature intended these specific sentencing

[5] This issue was asserted by appellant's counsel in *Bennett* and also cited as authority in appellant's brief at p. 17.

enhancements to run concurrently because, unlike other statutory provisions that specify when multiple enhancements of the same category run consecutively to each other, the school bus stop enhancement provision does not.

The legislature has plenary authority over sentencing. *State v. Jones*, 182 Wn.2d 1, 6, 338 P.3d 278 (2014). Under this authority, it passed the Sentencing Reform Act of 1981 (SRA), 9.94A RCW, which guides sentencing discretion through the SRA's detailed statutory procedures. *Jones*, 182 Wn.2d at 6. Although sentencing courts generally enjoy discretion in tailoring sentences, for the most part that discretion does not extend to deciding whether to apply sentences concurrently or consecutively. *State v. Jacobs*, 154 Wn.2d 596, 602, 115 P.3d 281 (2005). It is also within the purview of the legislature to amend these procedures in response to judicial interpretation. *Jones*, 182 Wn.2d at 6.

In construing a statute, the court's objective is to determine the legislature's intent. *Jacobs*, 154 Wn.2d at 600. "'[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.'" *Jacobs*, 154 Wn.2d at 600 (alteration in original) (quoting *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The

"plain meaning" of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. *Jacobs*, 54 Wn.2d at 600. If a statute is susceptible to more than one reasonable interpretation, it is ambiguous and we may resort to legislative history for guidance in discerning legislative intent. *State v. Larson*, 185 Wn. App. 903, 909, 344 P.3d 244 (2015). RCW 9.94A.533 (6) governs the category of sentencing enhancements at issue here. It provides,

> An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.827. *All enhancements under this subsection shall run consecutively to all other sentencing provisions*, for all offenses sentenced under this chapter.

(Emphasis added.) And RCW 69.50.435(1) provides, in pertinent part,

> Any person who violates RCW 69.50.401 by manufacturing, selling, delivering, or possessing with the intent to manufacture, sell, or deliver a controlled substance listed under RCW 69.50.401 or who violates RCW 69.50.410 by selling for profit any controlled substance or counterfeit substance classified in schedule I, RCW 69.50.204, except leaves and flowering tops of marihuana to a person:
>
> (c) Within one thousand feet of a school bus route stop designated by the school district.

Importantly, the legislature had amended RCW 9.94A.533(6) in 2006 in light of our Supreme Court's decision in *Jacobs*. LAWS OF 2006, ch. 339, § 301. There, the Supreme Court, construing former RCW 9.94A.533(6) (2002),[6] ruled that the provision was ambiguous as to whether the enhancements should be applied concurrently or consecutively. *Jacobs*, 154 Wn.2d at 599. Consequently, the court applied the rule of lenity and remanded the case to the sentencing court with instructions to impose the two enhancements concurrently rather than consecutively. *Jacobs*, 154 Wn.2d at 604.

After *Jacobs*, the legislature amended RCW 9.94A.533 (6), adding the second sentence to specify that courts are to impose drug zone enhancements "consecutively to all other sentencing provisions." RCW 9.94A.533 (6); H.B. REP. ON ENGROSSED SECOND SUBSTITUTE H.B. 6239, 59th Leg., Reg. Sess., at 7 (Wash. 2006). The legislature summarized this portion of the amendment by stating that "[s]tatutory language is clarified to specify that all sentence enhancements relating to violations of the [Uniform

[6] Former RCW 9.94A.533(6) read, "'[T]wenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW ... if the offense was also a violation of RCW 69.50.435 or 9.94A.605.'" Jacobs, 154 Wn.2d at 601 (footnotes omitted). One of the two sentencing enhancements at issue there was also a school bus stop enhancement.

Controlled Substances Act, ch. 69.50 RCW,] in drug-free zones are to be run consecutively to all other sentencing provisions for all sentences under the [SRA]." H.B. REP. ON ENGROSSED SECOND SUBSTITUTE H.B. 6239, 59th Leg., Reg. Sess., at 12 (Wash. 2006).

Additionally, the House Bill Analysis also states that the intent of the amendment is in part to "[c]larif[y] that all sentence enhancements relating to violations of the Uniform Controlled Substance Act in drug-free zones are to be run consecutively (*instead of concurrently*) to all other sentencing provisions." HOUSE CRIMINAL JUSTICE & CORRECTIONS COMM. H.B. ANALYSIS ON ENGROSSED SECOND SUBSTITUTE H.B. 6239, at 2, 59th Leg., Reg. Sess. (Wash. 2006) (emphasis added). Courts have recognized that "[t]he acknowledged purpose of the amendment was to overturn the decision in [*Jacobs*]." *Gutierrez v. Dep't of Corr.*, 146 Wn. App. 151, 155-56, 188 P.3d 546 (2008).

Taylor contends that despite the statute's amended language, the sentencing court nevertheless erred by imposing the two school bus stop enhancements consecutively because RCW 9.94A.533(6) does not specifically say that school bus stop enhancements run consecutively to other school bus stop

enhancements. To support his position, Taylor cites the statutory provision which governs firearm enhancements and states specifically that all firearm enhancements run consecutively to all other sentencing provisions, "including other firearm or deadly weapon enhancements." RCW 9.94A (533)(3)(e). Taylor urges this Court to conclude that the absence of similar language in the school bus stop enhancement provision evinces a different legislative intent.

Taylor's argument fails to consider the legislative history underlying the 2006 amendment which establishes that the trial court did not err by applying the enhancements consecutively. While Taylor may be correct that the provisions governing other categories of sentencing enhancements do use more specific language, he nevertheless fails to demonstrate how RCW 9.94A.533(6) does not require a sentencing court to apply multiple enhancements consecutively to one another. The statute directs courts to impose enhancements to run consecutively "to all other sentencing provisions." RCW 9.94A.533 (6). Taylor does not contend that the school bus stop enhancements do not constitute "other sentencing provisions."[7] Indeed, the language of the related provisions suggests

[7] Taylor also does not contend that "other" provisions refers to all sentencing provisions excluding the same category of enhancement.

otherwise. As mentioned, RCW 9.94A.533 (3) (e) states that firearm enhancements run consecutively to all other sentencing provisions, including other firearm enhancements. And while Taylor is correct that a different legislative intent is presumed where the legislature uses certain language in one instance but different or dissimilar language in another, *State v. Scherz*, 107 Wn. App. 427, 435, 27 P.3d 252 (2001), there is evidence here to suggest that there was no different intent. To the extent that the statute is ambiguous, the relevant legislative history establishes that the legislature intended multiple school bus stop enhancements to run consecutively to the underlying offense and to each other. As mentioned, the legislature specifically stated that its purpose in amending RCW 9.94A.533(6) was to clarify that the enhancements are to run consecutively. H.B. REP. ON ENGROSSED SECOND SUBSTITUTE H.B. 6239, 59th Leg., Reg. Sess., at 12 (Wash. 2006). The legislature specifically sought to avoid the result in *Jacobs*. *Gutierrez*, 146 Wn. App. at 155-56. If the legislature intended multiple enhancements to run concurrently, there would have been no reason for the Supreme Court's holding in *Jacobs*.

As a result, the trial court properly applied the enhancements and the sentence should not be vacated.

VI. THE INFORMATION WAS CONSTITUTIONALLY SUFFICIENT AS IT CONTAINED ALL OF THE ESSENTIAL ELEMENTS OF THE CHARGED OFFENSES.

Mr. Taylor argues that the Information was constitutionally insufficient (and that he thus received inadequate notice of the charge) because the information did not contain critical facts and therefore did not provide adequate notice and did not protect against double jeopardy. Appellant's Brief 26. In short, Mr. Taylor asserts the lack of an address of the location of the school bus stop enhancement was a critical fact. This claim is without merit because the information contained all of the essential elements of the charged offense.

1. Standard of Review.

Sufficiency of a charging document is reviewed *de novo*. *State v. Williams*, 162 Wn.2d 177, 182, 170 P.3d 30 (2007). The correct standard of review is determined by the sufficiency challenge is made. *City of Bothell v. Kaiser*, 152 Wn. App. 466, 471, 217 P.3d 339 (2009). A charging document challenged for the first time on appeal is "liberally construed in favor of validity." *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). Mr. Taylor made no

objection below to the information and review should be liberally construed in favor of a valid charging document.

2. Liberally Construed, The Fourth Amended Information Contained All The Essential Elements Of The Crimes Charged.

Under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution, a charging document must include all essential elements of a crime to inform a defendant of the charges against him and to allow preparation for the defense. *State v. Phillips*, 98 Wn. App. 936, 939, 991 P.2d 1195 (2000), *citing Kjorsvik*, 117 Wn.2d at 101–02. A charging document is constitutionally sufficient if the information states each statutory element of the crime, even if it is vague as to some other matter significant to the defense. *State v. Holt*, 104 Wn.2d 315, 320, 704 P.2d 1189 (1985). "An essential element is one whose specification is necessary to establish the very illegality of the behavior charged." *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013) (citations and quotations omitted). The primary reasons for the essential elements rule is it requires the State to give notice of the nature of the crime the defendant is accused of committing and it allows a defendant to adequately prepare his or her case. *Zillyette*, 178 Wn.2d at 158-59 (citations and quotations omitted).

When a defendant challenges the sufficiency of a charging document, the standard of review depends on the timing of the challenge. *State v. Ralph*, 85 Wn. App. 82, 84, 930 P.2d 1235 (1997). If a defendant challenges the sufficiency of the information "at or before trial," the court is to construe the information strictly. *Phillips*, 98 Wn. App. at 940, *quoting State v. Vangerpen*, 125 Wn.2d 782, 788, 888 P.2d 1177 (1995). Under this strict construction standard, if a defendant challenges the sufficiency of the information before the State rests and the information omits an essential element of the crime, the court must dismiss the case "without prejudice to the State's ability to re-file the charges." *Phillips*, 98 Wn. App. at 940, *quoting Ralph*, 85 Wn. App. at 86.

If, however, a defendant moves to dismiss an allegedly insufficient charging document after a point when the State can no longer amend the information, such as when the State has rested its case, the court is to construe the information liberally in favor of validity. *Phillips*, 98 Wn. App. at 942–43. As this Court has noted, these differing standards illustrate the balance between giving defendants sufficient notice to prepare a defense and "discouraging defendants' 'sandbagging,' the potential practice of remaining silent in the face of a constitutionally defective charging document (in lieu

of a timely challenge or request for a bill of particulars, which could result in the State's amending the information to cure the defect such that the trial could proceed)." *State v. Kiliona-Garramone*, 166 Wn. App. 16, 23 n.7, 267 P.3d 426 (2011), *citing Kjorsvik*, 117 Wn.2d at 103; *Phillips*, 98 Wn. App. at 940 (*citing* 2 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 19.2, at 442 n. 36 (1984)).

In the present case, Mr. Taylor did not challenge the sufficiency of the information below, nor did he request a Bill of Particulars. *See* RP, CP. Therefore, Mr. Taylor has raised the sufficiency of the charging document for the first time on appeal. Because Mr. Taylor did not object to the Information's sufficiency below, this Court is to apply the liberal standard set forth in *Kjorsvik* and construe the information in favor of its validity. *Kiliona-Garramone*, 166 Wn. App. at 24; *Phillips*, 98 Wn. App. at 942–43. Under this liberal standard of review, the court must decide whether (1) the necessary facts appear in any form, or by fair construction are found, in the charging document; and if so, (2) whether the defendant can show that he or she was nonetheless actually prejudiced by the inartful or vague language that he alleges caused a lack of notice. *Phillips*, 98 Wn. App. at 940, *citing Kjorsvik*, 117 Wn.2d at 105–06. Prejudice is not presumed and a defendant must make an actual

showing of prejudice when the defendant had failed to object to the information below. *Kjorsvik*, 117 Wn.2d at 106-07; *Kiliona-Garramone*, 166 Wn. App. at 24; *Phillips*, 98 Wn. App. at 940.

Mr. Taylor argues now that the Information, while containing the elements of the offense intended to be charged, omits critical facts and therefore does not give adequate notice to the defendant nor does it provide protection against double jeopardy, specifically that the location of the school bus stop was not specifically stated in the information. Appellant's Brief 28. Mr. Taylor was informed that the two crimes he committed were committed within 1000 feet of a school bus stop. Without indicating what would be better notice, he now asserts this to not be sufficient to place him on notice of the charge. A charging document, however, is constitutionally sufficient even if it is vague as to some other matter significant to the defense.[8] *Holt*, 104 Wn.2d at 320. Washington courts distinguish between charging documents that are constitutionally deficient because of the State's failure to allege each essential element of the crime charged and charging documents that are factually vague as to some other significant matter. *State v. Winings*, 126 Wn. App. 75, 84, 107 P.3d

[8] The State is not admitting the charging document is vague, but for the sake of argument is explaining why vagueness is not a fatal flaw in an information.

141 (2005). The State may correct a vague charging document with a bill of particulars. *State v. Leach*, 113 Wn.2d 679, 686–87, 782 P.2d 552 (1989). As stated above, Mr. Taylor failed to request a bill of particulars, thus, he waived any vagueness challenge. *Leach*, 113 Wn.2d at 687.

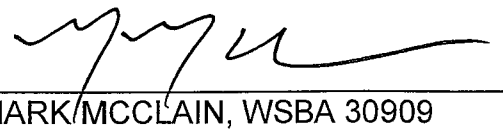
Finally, even if this Court were to assume arguendo that there was some minor deficiency with the information, Mr. Taylor's claim still fails because he cannot show prejudice as required. Consequently, Mr. Taylor's assertion should be rejected.

VII. CONCLUSION

Mr. Taylor was properly charged, and the jury, after evaluating the evidence reached a unanimous decision, followed by the trial court's proper exercise of its authority granted by the legislature. The search warrant had sufficient probable cause, so the motion to suppress was properly denied. The affiant for the search warrant spoke truthfully and completely, so the *Franks* motion was properly denied. Accordingly, the jury's verdict and the sentence imposed should be honored.

RESPECTFULLY submitted this 7th day of July, 2015.

MARK MCCLAIN
Pacific County Prosecuting Attorney

by: 
MARK MCCLAIN, WSBA 30909
Attorney for the Respondent.

APPENDIX:

Exhibit C: transcript of telephonic application for search warrant. *Franks* Hearing, State's Exhibit B: pages 2 and 3:

Judge: Why would we believe her?
Tully: Um well I I believe that just based uh I know Ken to be a drug user uh
Judge: Unintelligible
Tully: In the past I was Ken's probation officer with the Department of Corrections um approximately three years ago.
Judge: You were?
Tully: I was.
Judge: oh
Tully: so I know Ken uh quite well um
Judge: has he been convicted of drug dealing before?
Tully: um I believe he has um and I can tell you in just a moment, give me just a moment your honor, but he has admitted to me in the past that he is a drug user
Judge: what's that again?
Tully: he has admitted to me in the past that he is a drug user
Judge: he is a user but has he admitted to be a drug provider?
Tully: um he has not, not to me
Judge: oh he has some connection to drugs?
Tully: he does
Judge: and that connection is that he admitted to you but you don't have his record there now?
Tully: um I don't see any any drug. . . . any particular drug arrest in our county um
Judge: how about elsewhere?
Tully: um I can't speak to that your honor

Transcript of telephonic application for search warrant, page 6:

Judge: hmm maybe she's a helpful character um and how long ago did you know him to be using drugs?
Tully: um well I I dealt with with Kenneth uh I would say approximately three years ago
Judge: three years ago
Tully: um and that he uh was using drugs at that time um you know from that time until now other than um you know just information you know from informants or or you know in the community uh I can't speak much of that until
Judge: well you have some informants who have mentioned him?

Tully: um just that have mentioned his name you know kind of in passing nothing nothing real definite but uh that he is involved in the use of drugs.

RP: Volume 1, page 12, line 11 – page 13, line 6:

Burke. . . . What other contacts have you had with Mr. Taylor?
Tully. I knew Mr. Taylor when he was on probation with the Department of Corrections in 2011.
Q. Okay. What was your contact then with Mr. Taylor when he was on –
A. Um well, he was on supervision so I was dealing with him doing UAs and I had even arrested him at one point.
Q. Um, the contention that the Defense has made is that you were not his probation officer. Could you address that?
A. Correct. I believe that he was on Linda Tolliver's caseload at the time but in the office that I worked in it was just the two of us so, you know, if she was not in the office, then I was the one dealing with all of her clients so I was the supervising officer at that point if she was not available. In the particular case where I arrested him, she was out of the office that day so I was the one that made the arrest and transported him to jail.

RP: V 1, p. 13, l. 18 – p. 14, l. 25:

Q. It [the transcript of the application for search warrant] says, "In the past I was Ken's probation officer with the Department of Corrections, um, approximately three years ago." Why did you indicate that language that you were his probation officer?
A. Um I use that language for anyone that was on the probation during the time that I was working in that office.
Q. Okay. And in terms of the function of the office did it really matter whether your name was associated with someone you were supervising or whether Linda's name was?
A. It did not.
Q. Tolliver's?
A. Like I mentioned before, I was dealing with her clients just as much as she was dealing with mine.
Q. Okay. And you also indicated that you had other – in this affidavit, or in your decla- -- I guess affidavit. You were – you were under oath with Judge Goelz – that you had known Mr. Taylor. I want you to just go through what your contacts with Mr. Taylor in the past have been.

A. Well, even before he was on probation, while I was working in the office I was aware of Mr. Taylor's history or some of his history based on things that CCO Tolliver had told me. And then once he was in the office, like I said, I arrested him at one time. I had to drive him to Lewis County to take him to jail and during that hour or so trip, I talked to him basically the whole trip. He talked about his drug use history, his alcohol history, his family history, so I got to know him, you know, fairly well in what you can do in an hour.

RP: V. 1, p. 15, l. 14 – p. 16, l. 15:

Q. Okay. Was there any intention on your part to deceive Judge Goelz in any way?
A. Absolutely not.
Q. Did you try to answer his questions as straightforward and appropriately as you could, to give as much information as you could?
A. I did.
Q. Okay. And the information that is in the transcript, is that an accurate – I know you haven't read it but you remember what you said to Judge Goelz – was that an accurate assessment of the information that you had –
A. It was.
Q. – to provide Judge Goelz?
A. Yes.
Q. Was there any relevant information that you failed to provide to Judge Goelz that you knew of at the time?
A. Not that I'm aware of.
Q. Okay. In any way did you try to only put in information that would help your case rather than information that would harm it?
A. I did not.
Q. Okay. So this is your best effort in terms of asking, or responding to Judge Goelz's questions as to what you knew about Mr. Taylor and why you thought a warrant was appropriate?
A. Yes.

PACIFIC COUNTY PROSECUTOR

July 08, 2015 - 9:24 AM

Transmittal Letter

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