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STATE OF WASHINGTON
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NO. 98973-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

COURT OF APPEALS NO. 36330-9-III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

Mr. Brian Jeffrey Anderson,

Defendant/Petitioner

Respondent's Reply to Petitioner's Motion for Discretionary Review

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I. IDENTITY OF THE RESPONDENT

The State of Washington appears through the Kittitas County Prosecuting Attorney's Office.

II. DECISION OF THE COURT OF APPEALS

Appellant/Petitioner, Brian Jeffrey Anderson, petitions this Court to review *State v. Brian Jeffrey Anderson*, 36330-9-III, an unpublished decision issued on June 4, 2020, in which Division III of the Court of Appeals held that the State's inclusion of the definition of a "school bus" within the general jury instructions did not add an element to the "to-convict" school bus route stop enhancement; that Mr. Anderson's challenge to the major drug aggravator premised on the jury's finding of three or more transactions was moot as the Trial Court had not imposed any additional time for the aggravator; and that it was not an abuse of discretion for the Trial Court to have allowed the State, after having rested, to remove surplus language from the information regarding the school bus route stop enhancement in Count one.

Mr. Anderson's four convictions for Delivery of Methamphetamine, count one transpiring within a thousand feet of a school bus route stop designated by a school district

under RCW 69.50.435(1)(c), and all four counts constituting a major Violation of the Uniform Controlled Substances Act (VUCSA) under RCW 9.94A.535(3)(e)(i) were upheld by the Court. It was only the issue of whether the inclusion of the jury instruction defining “school bus,” added an element upon which each of the three judges wrote separately. (Fearing, J., dissenting).

III. ISSUES PRESENTED FOR REVIEW

Does Petitioner satisfy the requirements of RAP 13.4(b)(1-4) when the unpublished decision of the Court of Appeals is 1) not in conflict with a decision of the Supreme Court; 2) does not conflict with a published decision of the Court of Appeals; 3) is not a significant question of law under the Constitution of the State of Washington; and 4) does not involve any issue of substantial public interest that should be determined by the Supreme Court? Answer: No as explained in greater detail *infra*.

- A. Did the inclusion of a jury instruction defining “school bus” add that as an element when the verdict form for the enhancement asked the jury, “[d]id the defendant deliver a controlled substance to a person within a thousand feet of a school bus route stop designated by a school district?” and the Assistant Director of Transportation for the Ellensburg Transportation

Department testified that there were five active school bus routes within one thousand feet of the location of Mr. Anderson's delivery charged in count one?

Answer: No.

- B. Was there sufficient evidence in the finding of four separate delivery counts for the jury to conclude that "[t]he current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so," and thus find the aggravating factor that Mr. Anderson had committed a "major drug offense" under RCW 9.94A.535(3)(e)(i)? Answer: Yes.
- C. Was the Court of Appeals correct in holding that Mr. Anderson's argument regarding the aggravating factor that he had committed a "major drug offense" was moot because he had suffered no consequences from the finding? Answer: Yes.
- D. Was the Trial Court within its discretion in allowing the State to amend the information regarding the school bus route stop enhancement after having rested? Answer: Yes.

IV. STATEMENT OF THE CASE

The State relies upon the facts as stated in the unpublished decision of *State of Washington v. Brian Jeffrey Anderson*, No. 36330-9-III issued June 4, 2020, and attached to this response.

V. ARGUMENT

1. THE INCLUSION OF A SURPLUS JURY INSTRUCTION WHICH WAS NOT A NECESSARY ELEMENT, AND NOT INCLUDED IN THE TO-CONVICT INSTRUCTION, DOES NOT IMPLICATE THE LAW OF THE CASE DOCTRINE.

The Court of Appeals correctly concluded that although the State had included the definition of “school bus” within its proposed jury instructions, doing so did not add an element to the State’s burden of proof for the enhancement. As Judge Korsmo stated, “[d]efinitional instructions do not create new elements. *State v. France*, 180 Wn.2d 809, 816, 329 P.3d 864 (2014). That proposition remains true even if the definition is included in the elements instruction. *State v. Tyler*, 191 Wn.2d 205, 213, 422 P.3d 436 (2018). A definition of an element simply does not create a new element or supplant the statutory element. *Id.* at 215.

In the verdict form, the jury was specifically asked whether or not Mr. Anderson delivered a controlled substance to a person within a thousand feet of a school bus route stop designated by a school district? CP 66. Mr. John Landon, the Assistant Director of Transportation for the Ellensburg Transportation Department, testified that there were five active

school bus stops within one thousand feet of where the delivery in count one had taken place. RP 234- 238.

The definition of “school bus” given earlier in the jury instructions was superfluous, and unnecessary, and did not create a new element. It would have been necessary to have been proven if the defendant were charged with having delivered to someone on a school bus, see RCW 69.50.435(1)(b). However, it was not included in the to-convict instruction. As the Court held in *State v. France*, 180 Wn.2d at 816, “[a]ll of the elements of the charged crime must appear in the to-convict instruction ‘[b]ecause it serves as a yardstick by which the jury measures the evidence to determine guilt or innocence.’” *State v. Johnson*, 180 Wn.2d 295, 306, 325 P.3d 135 (2014) (internal quotation marks omitted) (quoting *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010)).

Where an erroneous to-convict instruction creates a new element of the crime, the instruction will become the law of the case, and the State will be required to prove that element. In *State v. Hickman*, 135 Wn.2d 97, 101, 954 P.2d 900 (1998), in which the issue of venue was erroneously included in the to-

convict instruction, the Court held that the State was required to prove the added “element” under the law of the case doctrine.

Although the law of the case doctrine is not limited to “to-convict” instructions, case law indicates that it is in that situation that the doctrine should be strictly construed, rather than in this case where the inclusion of the jury instruction within the general packet was both superfluous and innocuous.

The enhancement charged in count one was RCW 69.50.435(1)(c) “[w]ithin one thousand feet of a school bus route stop designated by the school district.” The verdict form correctly used this language, and there was testimony specific to this enhancement. Petitioner does not show that the Court of Appeals’ finding that the definition of “school bus” within the general jury instructions as being surplus conflicts with a decision of the Supreme Court; conflicts with a published decision of the Court of Appeals; or involves an issue of substantial public interest that should be determined by the Supreme Court.

2. PETITIONER'S ARGUMENT THAT THE AGGRAVATOR WAS IMPROPERLY APPLIED TO EACH OF THE CRIMES COMMITTED OVERLOOKS THAT IT IS NOT A STAND-ALONE CHARGE, AND TO AGGREGATE MULTIPLE DELIVERIES TO ADD THE AGGRAVATOR TO ONLY ONE COUNT WOULD EVISCERATE THE PURPOSE OF THE AGGRAVATOR.

Mr. Anderson's argument that the Major Drug Offense Aggravator of RCW 9.94A.535(3)(e)(i) was incorrectly applied ignores that it is an aggravator and not a stand-alone charge. The State correctly argued in Mr. Anderson's direct appeal that although charged on each of Mr. Anderson's deliveries, it should be applied only to the aggregate of Mr. Anderson's four deliveries. To apply it as Mr. Anderson argues to an aggregated single count would nullify all but one count in the charge, and thus eviscerate the purpose of the aggravator.

The aggravator on each of the four delivery counts was as follows:

AGGRAVATING CIRCUMSTANCES: The State of Washington further alleges that the current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so in violation of 9.94A.535(3)(e)(i).

3. SINCE MR. ANDERSON SUFFERED NO ADVERSE CONSEQUENCES FROM THE FINDING OF THE AGGRAVATOR, AND HIS ARGUMENT THAT IT AFFECTED THE TRIAL

COURT'S DENIAL OF A DRUG OFFENDER
SENTENCING ALTERNATIVE IN HIS CASE IS
SPECULATIVE AT BEST, HE CANNOT SHOW
THAT ANY OF THE PROVISIONS OF RAP
13.4(b)(1-4) APPLY.

Mr. Anderson also argues that although no additional time was imposed in his matter, he was prejudiced by the aggravator because it influenced the Trial Court to deny him a Drug Offender Sentencing Alternative (DOSA). This argument fails for several reasons. One, it is speculative at best. Two, the Trial Court was in the position to understand that there were not four aggravators, but four deliveries which combined, established the aggravator of a major economic crime of three or more VUCSA deliveries. Three, the Trial Court did authorize a DOSA pre-screen after Mr. Anderson's attorney made a motion for a prison based DOSA, and received both a report from the Department of Corrections, as well as a Pre-Sentence Investigation. CP 83-87, 88, 89-90, 91-93. The decision whether or not to impose a DOSA sentence is discretionary with the Trial Court, and a reading of the full record and the judge's comments during the sentencing hearing, reflect that he considered, and then denied, Mr. Anderson's requested DOSA request. RP 627-630.

Petitioner does not show that the Court of Appeals' failure to consider his argument regarding the application of the VUCSA aggravator under RCW 9.94A.535, when it noted that the Trial Court did not apply the VUCSA aggravator conflicts with a decision of the Supreme Court; conflicts with a published decision of the Court of Appeals; involves a significant question of law under the Constitution of the State of Washington or of the United States; or involves an issue of substantial public interest that should be determined by the Supreme Court.

4. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE STATE AFTER IT HAD RESTED, TO REMOVE SUPERFLUOUS LANGUAGE FROM THE INFORMATION WHEN THAT REMOVAL NEITHER CHARGED A DIFFERENT CRIME, NOR INCREASED THE PENALTY FOR THE CRIME CHARGED, AND THE DEFENDANT WAS ADMITTEDLY APPRISED OF THE NATURE AND CAUSE OF THE ACCUSATION AGAINST HIM.

Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). In short, discretion is abused

only where it can be said no reasonable man would take the view adopted by the trial court. *State v. Blight*, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977).

Allowing the State to amend after it had rested was not in conflict with existing case law. In *State v. Foster*, 91 Wn.2d 466, 589 P.2d 789 (1979), the Court held:

A criminal charge may not be amended after the State has rested its case-in-chief unless the amendment is to a lesser degree of the same charge or a lesser included offense. Anything else is a violation of the defendant's Article 1 §22 right to demand the nature and cause of the accusation against him or her.

State v. Pelkey, 109 Wn.2d 484, 745 P.2d 854 (1987), echoed this constitutional narrowing of the amendment provisions of CrR 2.1(d) which more broadly states that “[t]he court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.”

The *Pelkey* rule has been described as a bright line created “to resolve the tension between the court rule allowing liberal amendment and the constitutional imperative requiring the accused be adequately informed of the charge to

be met at trial.” *State v. Ziegler*, 138 Wn.App.804, 808, 158 P.3d 647 (2007).

But the *Pelkey* rule is not absolute. In *State v. DeBolt*, 61 Wn.App. 58, 62, 808 P.2d 794 (1991), for example, the Court stated that amendment of the charging date after the State rested its case in chief “is a matter of form rather than substance and should be allowed absent an alibi defense or a showing of other substantial prejudice to the defendant.”

In *State v. Vangerpen*, 125 Wn.2d 782, 888 P.2d 1177 (1995), our Supreme Court commented, “[c]onvictions based on charging documents which contain only technical defects (such as an error in the statutory citation number or the date of the crime or the specification of a different manner of committing the crime charged) usually need not be reversed.” *Vangerpen* 125 Wn.2d at 790. In *Vangerpen*, the amendment at issue violated the *Pelkey* rule because it changed the charged crime from second degree attempted murder to first degree attempted murder. *Vangerpen* 125 Wn.2d at 791. Citing *DeBolt* and *Vangerpen*, Division Two stated, “[t]rial courts may sometimes allow the State, after resting its case in chief, to amend an information to correct

technical defects caused by scrivener's error, such as dates, statutory citations, or specifying a different manner of committing a crime." Here, it is undisputed that the State merely sought to remove inapplicable surplus language. The *Pelkey* rule should not apply to this case.

Mr. Anderson was charged in count one with Delivery of Methamphetamine with an aggravator which alleged that the delivery had occurred within a thousand feet of a school bus route stop. The aggravator however added the language that the substance in question was a schedule I drug not to include Marijuana.¹

After the State had rested, counsel for Mr. Anderson moved to dismiss the aggravator as it included the incorrect language regarding schedule I and marijuana. The State moved at that time to amend. Relying on *State v. Tvedt*, 153 Wn.2d 705, 718, 107 P.3d 728 (2005), and *State v. Stritmatter*, 102 Wn.2d 516, 524, 688 P.2d 499 (1984), the Trial Court found that it made no difference whether the language regarding marijuana was in the charge or the aggravator, but noted that the aggravator included language

¹ Count One and its aggravator as presented in the State's Third Amended Information, and the State's Fourth Amended Information are provided *infra*.

that “the State of Washington further alleges...” which put the defendant on notice that the aggravator referred back to the charge, and made the language regarding marijuana surplus and unnecessary. (emphasis added). RP 487-490. The Trial Court then inquired whether or not the defendant could articulate prejudice, and Mr. Anderson’s counsel acknowledged that he could not. RP 490. In the Third Amended Information, the State charged that:

He, the said BRIAN JEFFREY ANDERSON, in the State of Washington, on or about August 20, 2015, did knowingly deliver a controlled substance, to wit: Methamphetamine, thereby committing the felony crime of DELIVERY OF A CONTROLLED SUBSTANCE; contrary to Revised Code of Washington 69.50.401(1) and (2)(b).

AGGRAVATING CIRCUMSTANCES: The State of Washington further alleges that the defendant did violate RCW 69.50.401 by manufacturing, selling, delivering, or possessing with the intent to manufacture, sell, or deliver a controlled substance listed under that subsection, ***by selling for profit any controlled substance or counterfeit substance classified in schedule I, RCW 69.50.204, except leaves and flowering tops of marijuana,*** to a person within one thousand feet of a school bus route stop designated by the school district in violation of 69.50.435. (emphasis added). CP 31-32.

By comparison, the Fourth Amended Information charged that:

He, the said BRIAN JEFFREY ANDERSON, in the State of Washington, on or about August 20, 2015, did knowingly deliver a controlled substance, to wit: Methamphetamine, thereby committing the felony crime of DELIVERY OF A CONTROLLED SUBSTANCE; contrary to Revised Code of Washington 69.50.401(1) and (2)(b).

AGGRAVATING CIRCUMSTANCES: The State of Washington further alleges that the defendant did violate RCW 69.50.401 by manufacturing, selling, delivering, or possessing with the intent to manufacture, sell, or deliver a controlled substance listed under that subsection, to a person within one thousand feet of a school bus route stop designated by the school district in violation of 69.50.435.² CP 33-34.

Petitioner does not show that the Court of Appeals' finding that the Trial Court acted within its discretion in allowing the State to strike superfluous language in the information either conflicts with a decision of the Supreme Court; or conflicts with a published decision of the Court of Appeals.

² The language of RCW 69.50.435(1) reads as follows: 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: (a-j are then listed).

VI. CONCLUSION

Because Petitioner fails to establish any of the four reasons for Discretionary Review as provided in RAP 13.4, his Motion for Discretionary Review should be denied.

Respectfully submitted this 28th day of September, 2020.



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PROOF OF SERVICE

I, Carole L. Highland, do hereby certify under penalty of perjury that on Monday, September 28, 2020, I provided e-mail service by prior agreement (as indicated), a true and correct copy of Respondent's Reply to Petitioner's Motion for Discretionary Review.

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NO. 98973-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

APPENDIX

State v. Anderson

Court of Appeals of Washington, Division Three

June 4, 2020, Filed

No. 36330-9-III

Reporter

2020 Wash. App. LEXIS 1555 *

THE STATE OF WASHINGTON, *Respondent*, v. BRIAN JEFFREY ANDERSON, *Appellant*.

Notice: RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Subsequent History: Reported at State v. Anderson, 2020 Wash. App. LEXIS 1648 (Wash. Ct. App., June 4, 2020)

Prior History: [*1] Appeal from Kittitas Superior Court. Docket No: 16-1-00070-2. Judge signing: Honorable Scott R. Sparks. Judgment or order under review. Date filed: 09/07/2018.

Core Terms

sentence, enhancement, route, transportation, buses, feet, seating, aggravating, to-convict, surplus, ineffective, prejudiced, sexual

Counsel: For Appellant: Kevin Andrew March, Nielsen Koch PLLC, Seattle, WA.

For Respondent: Gregory Lee Zempel, Kittitas Co Pros Attorney, Ellensburg, WA; Jodi Marie Hammond, Kittitas County Prosecuting Attorney, Ellensburg, WA.

Judges: Authored by Kevin Korsmo. Concurring: Robert Lawrence-Berrey, George Fearing.

Opinion by: Kevin Korsmo

Opinion

¶1 KORSMO, J. — Brian Anderson raises multiple challenges to his four convictions for delivery of a controlled substance. We affirm the convictions and sentence, but remand to strike certain financial aspects of the judgment.

FACTS

¶2 Mr. Anderson was charged in the Kittitas County Superior Court with the four noted offenses. The third amended information alleged that each count was subject to the aggravating factor that the offense was part of three or more separate drug transactions. That document also alleged that count one was subject to the aggravating factor that the offense occurred within 1,000 feet of a school bus route stop. Clerk's Papers (CP) at 31. The specific language of the charging document concerning the bus stop provided:

the defendant did [*2] violate RCW 69.50.401 by manufacturing, selling, delivering, or possessing with the intent to manufacture, sell, or deliver a

controlled substance listed under that subsection 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 within one thousand feet of a school bus route stop designated by the school district in violation of 69.50.435.

CP at 31.¹

¶3 The charges were based on drug purchases made by police informants from Mr. Anderson in 2015 and 2016. Charles Briet was identified as a defense witness. A member of the venire, former Kittitas Chief of Police Lail, stated during voir dire that he had previously arrested Briet and would not give any credibility to the man. Report of Proceedings (RP) at 46-47. The juror was excused. Defense counsel consulted with his client and decided to not request a mistrial, but did indicate he would seek a curative instruction and also indicated he would address the problem when questioning Briet. RP at 150. He subsequently deferred the curative instruction until the defense case. RP at 153.

¶4 The State presented trial testimony from a school district official that five school bus stops within 1,000 [*3] feet of the 2015 drug sale were actively used by summer school students at that time. The testimony did not discuss schools or school buses.

¶5 When the State had rested, defense counsel moved to dismiss the school bus stop aggravating factor due to lack of proof that methamphetamine was a schedule I drug. The State responded by seeking permission to amend the information to delete much of the previously quoted language from that allegation. Defense counsel objected, noting that his argument was a highly technical one and that an amendment was untimely. The court allowed the amendment on the basis of State v. Tvedt, 153 Wn.2d 705, 107 P.3d 728 (2005). Defense counsel advised the court that he knew what allegation the State had originally charged and that it would be "ridiculous" to claim prejudice from the amendment. RP at 490. A fourth amended information was filed.

¶6 During the defense case, counsel did not propose or request any curative instruction. On direct examination, counsel asked Briet about his most recent criminal conviction and sentence. Briet explained that he served

a 25 month drug offender sentencing alternative (DOSA) sentence for possessing firearms while a felon. Upon completing treatment, he had been drug free and "clean" for [*4] two years. He was quite knowledgeable about the Ellensburg drug world and testified about the behavior of one of the police informants, James Pearson, during the August 2015 drug buy. Both Briet and Ashley Hone testified that Pearson brought his own drugs and Anderson did not sell the drugs to Pearson.

¶7 On cross-examination, the prosecutor briefly asked Briet about the prison sentence and got him to confirm that it also included charges of harassment and aiming a firearm. He also admitted to having a 2006 conviction for second degree theft, but told the prosecutor that a later third degree theft count had been dismissed.

¶8 The jury was instructed on the elements of the four charges, along with the school bus stop enhancement and the major drug transaction aggravating factor. Included with the enhancement instruction were definitions of "school" and "school bus."

¶9 In closing, counsel argued that the police investigation was incomplete and "sloppy," and that the defense witnesses established that the informant, not Mr. Anderson, brought the drugs involved in count 1. With respect to the prosecutor's credibility arguments concerning the drug-using witnesses, defense counsel argued:

[Pearson] [*5] had the drugs when he walked in the house, okay. They're no cleaner than the State's witnesses, but Ms. Hammond cannot tell you they're not trustworthy, and at the same time say but my scummy drug addicts are. I'm sorry, it doesn't work that way.

RP at 584.

¶10 The jury found Mr. Anderson guilty as charged. It also determined that count I occurred within 1,000 feet of a school bus route stop and that all four drug sales were part of a series of transactions. As a result, Mr. Anderson faced a standard range of 20 to 60 months in prison on each charge, with count I carrying a 24 month enhancement due to the bus stop finding. The defense sought a prison-based DOSA sentence. The court rejected the request, stating that Mr. Anderson had not taken responsibility for his actions. The court was particularly concerned that count I had involved Mr. Anderson driving to Yakima to obtain the drugs that he brought into Ellensburg. The court imposed a 54 month sentence on count I due to the bus stop enhancement, and concurrent 30 month sentences on the other

¹This language tracks the introductory paragraph of RCW 69.50.435(1), combined with the specific allegation of 69.50.435(1)(c) that the offense was near a school bus route stop.

charges.

¶11 Mr. **Anderson** timely appealed to this court. A panel considered his appeal without hearing argument.

ANALYSIS

¶12 This appeal presents five arguments. In [*6] order, we consider contentions that: (1) counsel failed to provide effective assistance, (2) the court erred in amending the information, (3) no evidence supported the school bus instruction, (4) the evidence did not support the multiple transactions aggravating factor, and (5) error in imposing the legal financial obligations (LFOs). The latter two issues are discussed together.

Ineffective Assistance Argument

¶13 The first contention² is an argument that defense counsel rendered ineffective assistance by asking Briet a question that permitted the prosecutor to further inquire about Briet's prior convictions. This was clearly a reasonable tactic for counsel to pursue.

¶14 Appellate courts review ineffective assistance of counsel claims in accordance with well-settled standards of review. An attorney's failure to perform according to the standards of the profession will require a new trial when the client has been prejudiced by counsel's failure. *State v. McFarland*, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions and there is a strong presumption that counsel was effective. A strategic or tactical decision is not a basis for finding error. *Strickland v. Washington*, 466 U.S. 668, 689-691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under *Strickland*, courts [*7] evaluate counsel's performance using a two-prong test that requires courts to determine whether or not (1) counsel's performance failed to meet a standard of reasonableness, and (2) actual prejudice resulted from counsel's failures. *Id.* at 690-692. When a claim can be disposed of on one ground, a reviewing court need not consider both *Strickland* prongs. *Id.* at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

² Mr. **Anderson** filed a statement of additional grounds (SAG) that is related to this argument. He claims that trial counsel rendered ineffective assistance concerning the statement made by Mr. Lail in voir dire. Our discussion of the ineffective assistance claim adequately answers the SAG since the decision to address Lail's statement by establishing Briet's rehabilitation was clearly a tactical choice by counsel.

¶15 Defense counsel asked about the nature of the convictions that sent Briet to prison and the ensuing DOSA sentence that freed Briet from his drug problems. Briet's answer focused on the gun charges, leaving the prosecutor to ask about the harassment and drug charges that accompanied the gun offenses. The prosecutor also asked about the prior theft conviction, an offense that was admissible per *ER 609*. Mr. **Anderson** argues that the prosecutor's questions were prejudicial, making trial counsel's performance in raising the topic deficient. He is wrong on both counts.

¶16 This was a case based in large part on the testimony of two police informants who were members of Ellensburg's drug culture. The defense attacked the credibility of the informants by presenting its own members of that culture. The topic of drug use was unavoidable. Accordingly, defense counsel [*8] reasonably attempted to defend by presenting "better" drug user witnesses on behalf of the defense than the State was able to offer. The fact that Briet had served a significant, rehabilitative sentence and was now living a clean life allowed the defense to present a former member of the drug culture as a credible defense witness.³ The discussion also explained why Mr. Lail's voir dire commentary was not of concern—the person that Lail knew was not the person Briet now was.

¶17 The question about the DOSA sentence for gun possession was a very reasonable tactic for counsel to use. Under *Strickland*, there was no error. Moreover, Mr. **Anderson** was not prejudiced by Briet's admission that he had a prior drug conviction. Mr. Briet's bona fides as a member of the Ellensburg drug culture were essential to his testimony; the fact that he had a prior conviction was not harmful under these facts, and certainly was not harmful to Mr. **Anderson**. The theft conviction was per se admissible under *ER 609*, so defense counsel's questioning had nothing to do with the admission of that answer. It, too, did not prejudice the defense.

¶18 Mr. **Anderson** has not established either that his counsel erred or that he was prejudiced [*9] by the alleged error. Accordingly, he has not established that his counsel performed ineffectively.

Amendment of the Information

³ The witnesses also allowed Mr. **Anderson** to avoid testifying about the sales.

¶19 Mr. **Anderson** next argues that the trial court erred in allowing the fourth amended information. The court did not abuse its discretion by permitting the removal of surplus language from the charging document.

¶20 *CrR 2.1(d)* allows an amendment of the information “any time before verdict or finding if substantial rights of the defendant are not prejudiced.” This court reviews the decision on a motion to amend for abuse of discretion. *State v. Lamb*, 175 Wn.2d 121, 130, 285 P.3d 27 (2012). Discretion is abused when it exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

¶21 Although the rule would permit amendment prior to verdict, a substantive limit on that authority exists in our case law. “A criminal charge may not be amended after the State has rested its case-in-chief unless the amendment is to a lesser degree of the same charge or a lesser included offense.” *State v. Pelkey*, 109 Wn.2d 484, 491, 745 P.2d 854 (1987). This substantive limitation does not apply to amendments that do not change the crime in question. *State v. Brooks*, 195 Wn.2d 91, 98, 455 P.3d 1151 (2020) (permitting amendment that changed charging dates). As explained in *Brooks*, it is a change to the essential elements of the charged crime that presents the possibility [*10] of prejudicial error. *Id.* at 97.

¶22 Here, the parties agreed at trial that the challenged language from the third amended information was surplus language. It long has been the rule that “surplus language in a charging document may be disregarded.” *Tvedt*, 153 Wn.2d at 718. When surplus language “is included in an information, the surplus language is not an element of the crime that must be proved unless it is repeated in the jury instructions.” *Id.* The trial court cited to the *Tvedt* principle when it granted the motion to amend. While it was not necessary to amend the information in order that the surplus language be “disregarded,” *Tvedt* provided a tenable basis for granting the motion to amend.

¶23 On appeal, Mr. **Anderson** now argues that the amendment violated the *Pelkey* line of authority by changing the sentencing enhancement at issue. Even assuming that *Pelkey* could apply to an enhancement, it did not apply in this case. *RCW 69.50.435(1)* authorizes a sentencing enhancement whenever one commits a violation of *RCW 69.50.401* (generally prohibiting the production and distribution of drugs) or *RCW 69.50.410* (selling schedule I drugs for profit) near specified public

locations. Here, Mr. **Anderson** was charged with violating § 401 within 1,000 feet of a school bus route stop. [*11] *RCW 69.50.435(1)(c)*.

¶24 There was but a single enhancement for delivering methamphetamine in count one within 1,000 feet of a school bus route stop. While a person could commit a violation of § 401 or § 410 in multiple different ways, there was only a single § 435 protected location alleged in the aggravating factor. How the drug transaction was accomplished was the subject of the charging language in count I; the enhancement did not charge an additional offense. It only alleged that the charged offense occurred within a particular protected area. Whether *Pelkey* applies when an amendment changes the protected zone is a question we need not answer because the only enhancement charged here involved the school bus route stop. *RCW 69.50.435(1)(c)*. Eliminating one method of committing that single enhancement did not change the nature of the enhancement that was charged. *Pelkey* was inapplicable to this case.

¶25 Mr. **Anderson** could still prevail if he could show that he was prejudiced by the amendment. He does not make that argument here—instead relying on the per se standard of *Pelkey*—and agreed below that it would be “ridiculous” to allege prejudice under the circumstances. There is no allegation of prejudice, let alone a showing of it.

¶26 The trial court [*12] did not abuse its discretion by permitting the unnecessary amendment to the information.

School Bus Definition

¶27 Mr. **Anderson** next argues that the definition of “school bus” was not proved at trial, thus requiring the school bus stop enhancement to be struck. His argument attempts to expand the law of the case doctrine in a manner previously rejected by the case law.

¶28 Here, instruction 20 defined the term “school bus” for the jury:

“School bus” means a vehicle that meets the following requirements: (1) has a seating capacity of more than ten persons including the driver; (2) is regularly used to transport students to and from school or in connection with school activities; and (3) is owned and operated by any school district for

the transportation of students. The term does not include buses operated by common carriers in the urban transportation of students such as transportation of students through a municipal transportation system.

CP at 57.⁴

¶29 As has been often noted, the “term ‘law of the case’ means different things in different circumstances.” Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 113, 829 P.2d 746 (1992). In particular, it can refer (1) to the effect of an appellate court ruling on subsequent proceedings in the trial court, (2) to the effect of unchallenged jury instructions in setting forth the applicable law, and (3) to an appellate court’s refusal to reconsider the determinations made in a prior appeal. *Id.* The jury instruction aspect of the law of the case is at issue here.

¶30 That concept commonly has been explained:

Under the law of the case doctrine jury instructions not objected to become the law of the case. State v. Hickman, 135 Wn.2d 97, 101-102, 954 P.2d 900 (1998). Thus, when the State adds an unnecessary element to a to-convict instruction and the jury convicts the defendant, the unnecessary element must be supported by sufficient evidence. *Id.* at 105.

State v. Calvin, 176 Wn. App. 1, 21, 316 P.3d 496 (2013). The doctrine also can apply to definitional instructions. *Id.*; State v. France, 180 Wn.2d 809, 816, 329 P.3d 864 (2014). However, treatment of the two types of instructions varies significantly.

¶31 As noted from the *Hickman* citation [*14] in *Calvin*, the addition of an unnecessary element to a to-convict instruction requires proof of the unnecessary element. Hickman, 135 Wn.2d at 105; State v. Johnson, 188 Wn.2d 742, 756, 399 P.3d 507 (2017). The failure to

prove the unnecessary element will result in the reversal of a criminal conviction due to insufficient evidence. Hickman, 135 Wn.2d at 105-106.

¶32 In contrast, the existence of a definitional instruction normally does not itself raise a *Hickman*-type evidentiary sufficiency problem. Definitional instructions do not create new elements. France, 180 Wn.2d 816-819. That proposition remains true even if the definition is included in the elements instruction. State v. Tyler, 191 Wn.2d 205, 213, 422 P.3d 436 (2018). A definition of an element simply does not create a new element or supplant the statutory element. *Id.* at 215.

¶33 Mr. Anderson argues that the State presented no evidence that the Ellensburg school buses satisfied the definition of school bus found in Instruction 20 and that this “essential element” thus was unproved. There are a couple of answers to this argument. First, the special verdict form required the State to prove the existence of a bus stop rather than a school bus. The school district’s witness testified that five school bus stops were within 1,000 feet of the crime scene. The evidence justified finding that a bus stop existed near the crime scene.

¶34 Second, [*15] a “school bus” was not an “essential element” of the special verdict merely because a definitional instruction was provided to the jury. There are rare instances where a definitional instruction will become the subject of element-style proof because of statutory or constitutional concerns unrelated to the law of the case doctrine. *France* provides a discussion of some examples:

France is correct that under some circumstances, the State may be required to prove facts not specifically contained in the to-convict instruction, not as elements but because those facts serve some other function that requires the State to prove them, such as a “true threat” or “sexual gratification.”

180 Wn.2d at 817. For instance, because the element of “sexual contact” in an indecent liberties prosecution was defined by statute to require proof of “sexual gratification,” the State was required to prove “sexual gratification” even though it was not an element of the indecent liberties statute. *Id.* at 817-818 (discussing State v. Stevens, 158 Wn.2d 304, 143 P.3d 817 (2006)). Similarly, the State needed to prove in a harassment prosecution the existence of a “true threat,” a concept that is not an element of the crime, because otherwise the harassment statute could impinge on First Amendment protected rights. [*16] *Id.* at 818-819

⁴ The statutory definition is found in RCW 69.50.435(6)(b):

“School bus” means a school bus as defined by the superintendent of public instruction by rule which is owned and operated by any school district and all school buses which are privately owned and operated under contract or otherwise with any school district [*13] in the state for the transportation of students. The term does not include buses operated by common carriers in the urban transportation of students such as transportation of students through a municipal transportation system.

(discussing State v. Allen, 176 Wn.2d 611, 294 P.3d 679 (2013)).

¶35 At issue in each of these examples was a definitional instruction, not an element, and the *instruction* was needed in order that elements were properly defined for the jury—the “sub-element” of “sexual gratification” and the limiting definition of “true threat.” The law of the case doctrine did not require the State to provide evidence in support of the definitions—proof was required due to statutory and constitutional requirements. *France* used this understanding to reject the appellant’s argument that a definitional instruction created an element that the State needed to prove to the jury. 180 Wn.2d at 819.

¶36 *Calvin* presented a slightly different twist on the law of the case doctrine. There the trial court had given an assault definition that included the topic of lawful use of force, a subject not raised at trial. 176 Wn. App. at 20. When the jury inquired about the instruction, the court realized its error and, over defense objection, substituted a different instruction that deleted the topic. Id. at 20-21. While recognizing that the law of the case doctrine applied to all jury instructions, *Calvin* concluded that the issue was “not whether the law of the case doctrine bound the State to the ‘unlawful force’ language,” [*17] but the true issue was whether the trial court abused its discretion in substituting the other instruction. Id. at 22. Although the law of the case doctrine prevents a party from challenging on appeal an instruction that was not challenged at trial, since the defense had objected to the amended instruction, the issue was properly before the court. Id. Because Mr. Calvin did not show prejudice from the substitution, the court did not err. Id. at 22-24.

¶37 *France* and *Calvin* demonstrate the meaning of the law of the case doctrine as it concerns definitional instructions. The doctrine prohibits a party from challenging an instruction for the first time on appeal. Id. at 22; accord RAP 2.5(a); State v. Scott, 110 Wn.2d 682, 757 P.2d 492 (1988). A defendant can claim that the unchallenged instruction imposes an obligation of proof on the State a la *Hickman*, but this argument typically will fail unless the definitional instruction falls within one of the exceptions noted by *France*. 180 Wn.2d at 817.

¶38 *France* and *Tyler* control the outcome of this case. The school bus definition did not create a new element for the prosecutor to prove. Tyler, 191 Wn.2d at 213; France, 180 Wn.2d at 818. It is not one of the rare

definitional instructions identified by *France* that needed to be the subject of proof. While probably an unnecessary instruction, it also was not [*18] one that impacted the outcome of this case.

¶39 Mr. Anderson has not identified any error arising from the use of the school bus definition. His argument is without merit.

Sentencing Issues

¶40 The next assignment of error is an extended discussion of the “major violation” aggravating factor governing multiple drug sales. Because the trial court did not impose an exceptional sentence, this claim is moot.

¶41 An argument is moot when an appellate court cannot grant effective relief. In re Det. of LaBelle, 107 Wn.2d 196, 200, 728 P.2d 138 (1986). That is the situation here. The trial court imposed midrange sentences; it did not use the aggravating factor findings to direct an exceptional sentence. The sentence would not change even if we agree with Mr. Anderson’s position. This issue is moot.

¶42 Mr. Anderson also argues, and the State agrees, that the trial court erred by imposing the criminal filing fee and directing that interest run on the legal financial obligations. We remand to strike both of those provisions.

¶43 Affirmed and remanded.

¶44 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.

Concur by: Robert Lawrence-Berrey; George Fearing
(In Part)

Concur

¶45 FEARING, J. (concurring in part/dissenting in part) — I join the majority in all rulings except the affirmation of the school bus stop sentencing enhancement. I would

reverse the enhancement and remand for resentencing because of the lack of evidence as to the seating capacity of school buses that used the school bus stops near the scene of the one sale of controlled substances by Brian Anderson.

¶46 RCW 69.50.435 declares:

(1) 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, ... to a person:

...

(c) Within one thousand feet of a school bus route stop designated by the school district; ...

...

may be punished by a fine of up to twice the fine otherwise authorized by this chapter ... or by imprisonment of up to twice [*22] the imprisonment otherwise authorized by this chapter ... or by both such fine and imprisonment.

...

(6) As used in this section the following terms have the meanings indicated unless the context clearly requires otherwise:

...

(b) "School bus" means a school bus as defined by the superintendent of public instruction by rule which is owned and operated by any school district and all school buses which are privately owned and operated under contract or otherwise with any school district in the state for the transportation of students. ...

(c) "School bus route stop" means a school bus stop as designated by a school district;

¶47 In turn, the Washington State Superintendent of Public Instruction defines "school bus" as:

"School bus" means every vehicle with a seating capacity of more than ten persons including the driver regularly used to transport students to and from school or in connection with school activities.

WAC 392-143-010(1).

¶48 Under Washington statute and regulation, to find Brian Anderson guilty of the sentencing enhancement, the State needed to prove beyond a reasonable doubt that Anderson sold a controlled substance near a "school bus stop." The phrase "school bus stop" includes the term "school [*23] bus." Since the same statute includes definitions for both "school bus stop" and "school bus," logically the legislature expected a "school bus" as defined by the statute to stop at the stop. To prove that a "school bus" used a stop, the State needed to prove that a bus possessed the seating capacity of more than ten persons. If the jury instructions did not inform the jury of the need for the State to prove beyond a reasonable doubt that a bus had a minimum seating capacity, the instructions should have done so.

¶49 The concurring opinion author writes that no school bus needed to stop at a location as long as the school district designated the location as a school bus stop. Conceivably, under the concurrence's reasoning, in order to find an accused guilty of the sentencing enhancement, a school district need not operate any school buses as long as the district designates stops. Such reasoning leads to absurd results, and this court avoids absurd results when interpreting statutes. State v. Schwartz, 194 Wn.2d 432, 443, 450 P.3d 141 (2019).

¶50 In the alternative, under the concurrence, the jury could find the accused guilty of the sentencing enhancement if the school district only sends buses with seating capacities with less than eleven to the school [*24] bus stop. Such a result would conflict with the intent of the legislature. When the legislature created a sentencing enhancement for dealing drugs within one thousand feet of a school bus stop, the legislature assumed that a school bus, as defined by the superintendent of public instruction, would stop at the stop. Otherwise, placing the definition of a "school bus" in RCW 69.50.435 served no purpose. For that matter, having any definition of a "school bus" would serve no purpose.

¶51 John Landon, Ellensburg School District Assistant Director of Transportation, testified to five school bus stops within one thousand feet of the location of one of the Brian Anderson's sales. Landon did not describe any of the buses used by the school district. I do not know if I have ever seen a school bus, or any form of bus, that did not seat at least eleven people, but apparently such buses exist since the Superintendent of Public Instruction expressly requires that the bus seat more than ten in order to qualify under the law. I would

be speculating to conclude that the State showed that all Ellensburg School District buses accommodated at least eleven people by testimony that the school district operated buses.

¶52 Presumably [*25] because the existence of a school bus stop was not an element of a crime, but rather an element of an aggravating circumstance, the trial court did not give a to-convict instruction for the school bus stop enhancement. Instead, in Verdict Form A-1, the court asked the jury to answer a question:

We, the jury, answer the question submitted by the court as follows:

QUESTION: Did the defendant deliver a controlled substance to a person within one thousand feet of a school bus route stop designated by a school district?

ANSWER: _____ (write in "yes" or "no.")

Clerk's Papers (CP) at 66. A jury instruction informed the jury that it should not answer the question "yes" unless the jurors were unanimous beyond a reasonable doubt that "yes" was the correct answer.

¶53 The trial court also delivered a jury instruction that defined "school bus." Jury instruction 20 declared:

"School bus" means a vehicle that meets the following requirements: (1) *has a seating capacity of more than ten persons including the driver*; (2) is regularly used to transport students to and from school or in connection with school activities; and (3) is owned and operated by any school district for the transportation of students. The term does not include buses [*26] operated by common carriers in the urban transportation of students such as transportation of students through a municipal transportation system.

CP at 57 (emphasis added). The concurring author ignores the presence of jury instruction 20. The court delivered the instruction to inform the jury that it must find that buses with a seating capacity of more than ten persons used the school bus stop. Otherwise, jury instruction 20 served no purpose. To repeat, the State presented no evidence of a bus with a capacity of more than ten persons. Therefore, under the jury instructions delivered to the jury, in addition to the statute and administrative code, the State did not prove the school bus stop enhancement.

¶54 I am not convinced that this reviewing court must address the law of the case doctrine as formulated in *State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998).

The jury instructions at issue in *Brian Anderson's* trial merely restated the controlling law rather than adding any element to a crime. The doctrine applies when the jury instruction adds an element beyond the statutory elements. Assuming the law of the case doctrine applies, the doctrine bolsters the need to reverse the sentencing enhancement.

¶55 The lead opinion relies on *State v. Tyler*, 191 Wn.2d 205, 422 P.3d 436 (2018) and *State v. France*, 180 Wn.2d 809, 329 P.3d 864 (2014). Neither case [*27] applies to this appeal. *State v. Tyler* is a unique case because the to-convict instruction omitted an important conjunction, and the jury could not be sure, based on the to-convict instruction, whether the conjunction should be an "or" or an "and." A separate instruction used the word "or." The decision focused on whether the crime of possessing a stolen motor vehicle was an alternate means crime and the ramifications of the missing conjunction.

¶56 *State v. France* also focused on whether the charged crime was an alternate means crime. The case turned on whether an instruction containing one of many statutory definitions of the term "threat," at least one of which was contained in the to-convict instruction and that had a common meaning, created an additional fact the State was required to prove. *Brian Anderson's* appeal does not entail an alternate means crime nor was he charged with a crime or sentencing enhancement with alternate definitions for one of its elements.

¶57 [*19] LAWRENCE-BERREY, J. (concurring) — I write separately to explain my reason for affirming the enhanced sentence. I construe the special verdict form as asking whether the school district designated the stop a school bus route stop. For this reason, the jury was not required to apply the definition of "school bus" as given in the separate instruction.

¶58 The special verdict form asked the jury: "*Did the defendant deliver a controlled substance to a person within one thousand feet of a school bus route stop designated by a school district?*" Clerk's Papers at 66 (emphasis added). This question comes directly from the statutory language of *RCW 69.50.435 (1)(c)*, which imposes additional punishment for controlled substance violations that occur "[w]ithin one thousand feet of a school bus route stop designated by the school district."

¶59 Because the question in the special verdict form

comes directly from the statute, we must discern what the legislature, by enacting RCW 69.50.435(1)(c), intended the State to prove. More specifically, did the legislature intend for the State to prove only that a school district designated the stop a school bus route stop or did the legislature intend the State to prove more—that a school bus actually stopped at the school bus route stop? [*20]

¶60 When interpreting a statute, the court's fundamental objective is to ascertain and give effect to the legislature's intent. We begin with the plain meaning of the statute. In doing so, we consider the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole. If the meaning of the statute is plain on its face, then we must give effect to that meaning as an expression of legislative intent. Lenander v. Dep't of Retirement Sys., 186 Wn.2d 393, 405, 377 P.3d 199 (2016).

¶61 Here, it is plain what the legislature intended the State to prove by enacting RCW 69.50.435(1)(c). The legislature defined "school bus route stop" as "a school bus stop as designated by a school district." RCW 69.50.435(6)(c). Thus, the legislature intended the State to prove only that a school district had designated the stop a school bus route stop. The legislature did not intend the State to prove more—that a "school bus" actually stopped at the school bus route stop. For this reason, the special verdict question did not require the jury to apply the definition of "school bus" as given in the separate instruction.

¶62 The concurring/dissenting opinion finds it absurd the statute might be construed as not requiring [*21] proof that a "school bus" stops at a designated school bus route stop. It is not absurd, given that one might infer when a school district designates a school bus route stop, a school bus actually stops there.

Reconsideration denied July 30, 2020.

KITTITAS COUNTY PROSECUTOR'S OFFICE

September 28, 2020 - 12:24 PM

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