ORIGINAL

NO. 35270-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

ADA MOORE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 06-1-00730-0

BRIEF OF RESPONDENT

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SERVICE		
	Lise Ellner P.O. Box 2711 Vashon, WA 98070	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED March 26, 2007, Port Orchard, WA **Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.**

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Moore has failed to meet her burden of showing Prosecutorial Misconduct when the prosecutor did not express a personal opinion on Moore's guilt and Moore has failed to show that the prosecutor's arguments were improper in any other respect?

2. Whether Moore has failed to show any error with respect to a unanimity instruction when the jury was given a special verdict form that was functionally the same as a Petrich instruction and the special verdict form ensured that the jury was unanimous as to which act or incident constituted the crime?

3. Whether the charging document was constitutionally adequate when it contained all of the elements of crime so as to apprise defendant of charges against her and allowed her to prepare her defense, and whether any potential issues concerning vagueness of the information were waived when Moore failed to request a bill of particulars below?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Ada Moore was charged by information filed in Kitsap County Superior Court with one count of possession of a controlled substance. CP 1. The information stated that on May 10, 2006, the defendant did possess a

controlled substance, to wit: Methamphetamine. CP 1. The police report attached to the information stated that a black plastic scale was found in her residence next to paperwork belonging to Moore, and that the "bowl" of the scale contained a substance that tested positive for methamphetamine. CP 5. In addition, the report described that during a search of Moore at the jail, a green plastic baggie containing methamphetamine was found in Moore's pants, and a second baggie containing methamphetamine was discovered during a subsequent strip search. CP 5.

B. FACTS

On May 10, 2006. Scott Eberhard of the Kitsap County Sheriff's Office, along with another officer, went to Moore's house and conducted a search. RP 7-9. A scale and what appeared to be "crystal meth" were found on a bookshelf next to paperwork bearing Moore's name. RP 9-10. The plastic scale had a bowl, and the methamphetamine was found inside this bowl. RP 11. The scale and its contents were admitted as Exhibit 3. RP 10-11, 27.

After the scale was found, Moore was arrested, advised of her rights, and transported to the Kitsap County jail. RP 11-12. After the intake procedure, the jail staff performed a search of Moore. RP 12. Melanie Pate, a corrections officer at the jail, searched Moore and found a small baggie with a white powdery substance in the small coin pocket of her pants. RP 12,

16-18. This baggie was admitted as Exhibit 1. RP 12-13, 25.

As the officers felt that Moore was possibly carrying additional drugs, Officer Pate conducted a more thorough search, and had Moore remove her pants and underwear. RP 19. When Moore did so, Office Pate noticed an additional baggie that fell out of Moore's underwear. RP 19. Officer Pate asked Moore to pick up the baggie and hand it to her, and Moore complied. RP 20. Moore began sobbing as soon as Officer Pate noticed the baggie falling out. RP 20. The baggie that was recovered was admitted as Exhibit 2. RP 19, 26.

Cynthia Graff of the Washington State Patrol Crime Laboratory in Seattle tested exhibits one, two and three, and found that each contained methamphetamine. RP 22-27.

Moore testified at trial and claimed that the items found in her house were not hers, that some other individuals had been in the room where the items were found, and that the drug related items had not been present when she had last been in the room. RP 31-32. Moore also claimed that the pants she was wearing belonged to someone else, that the baggie found in those jeans did not belong to her, and that she was unaware that the baggie was in her pocket. RP 33-34. With respect to the baggie that Officer Pate said fell out of her underwear, Moore claimed that this also did not belong to her. RP

34. When asked if she had any idea how it got there, Moore stated, "No I don't. And I know that sounds crazy but, no, I don't." RP 34.

At the conclusion of the evidence, the court went through the State's proposed jury instructions, and Moore indicated that she had no exceptions to any of the instructions. RP 40.

In closing argument, defense counsel essentially argued only that the State had failed to present evidence on several points. RP 49-51. Defense argued that there was no evidence that a drug dog had alerted, there was no testimony from another officer who was present at Moore's home, and that the State had not provided a videotape of the events at the jail. RP 49-51. Defense counsel argued that Moore disputed what happened, and that if the State had provided the jury with these missing pieces of evidence then "we would know conclusively who got it right and who got it wrong, but you don't have that evidence here." RP 51.

In rebuttal, the State argued, inter alia,

> When you are caught with meth in your house, when you are caught with meth in your pants, and when you are caught with meth in your underwear, you are guilty of the crime of possession of a controlled substance. It's the end of the ball game. The score is over.
>
> Now, the defense has raised several points in their argument. There is a drug dog that apparently – we don't know anything about the training of the dog. There is videotape. Officer Valley wasn't there. I'm really harping on

> these points, and I would suggest to you that they're red herrings and that the idea is to get you to avoid looking at the big picture in this case, trying to get you to stare at a couple of trees and miss the forest. It's the oldest trick in the book.

RP 52.

Sometime after closing arguments were completed and while the jury was deliberating, the State indicated that there had been an oversight, and that the jury should be a special verdict form and an accompanying instruction if the jury found Moore guilty. RP 57. Moore agreed that this was an appropriate procedure and stated that the proposed forms were appropriate. RP 58. The special verdict form asked the jury if they had found that the defendant had possessed exhibits 1, 2, and 3, or whether the jury had no unanimous agreement concerning those three items. CP 22. The accompanying instruction simply informed the jury that to answer a question on the special verdict form with a "yes," the jury had to unanimously find that the State had proven that this was the correct answer beyond a reasonable doubt. CP TBD (State's Supplemental Designation of Clerk's Papers).

After the jury returned with a guilty verdict, the trial court informed the jury it was going to read the one final instruction to them and also give them one additional verdict form. RP 60, 62. After being so instructed, the jury returned to the jury room. RP 62. Eventually the jury returned after completing the special verdict form, and found that Moore had possessed

Exhibit 2, but indicated that there was no unanimous agreement regarding Exhibit 1 or Exhibit 3. RP 63-64.

III. ARGUMENT

A. MOORE HAS FAILED TO MEET HER BURDEN OF SHOWING PROSECUTORIAL MISCONDUCT BECAUSE THE PROSECUTOR DID NOT EXPRESS A PERSONAL OPINION ON MOORE'S GUILT AND MOORE HAS FAILED TO SHOW THAT THE PROSECUTOR'S ARGUMENTS WERE IMPROPER IN ANY OTHER RESPECT.

Moore argues that the State committed prosecutorial misconduct by expressing a personal opinion as to Moore's guilt. This claim is without merit because Moore has failed to meet her burden of showing that the prosecutor expressed a personal opinion or that the prosecutor's arguments were improper.

Prosecutorial misconduct requires a showing that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (*citing State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)). The defendant bears the burden of proving improper conduct and prejudice. *Hughes*, 118 Wn. App. at 727. Furthermore, a prosecuting attorney has wide latitude in closing argument to draw reasonable inferences from the evidence. *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986).

On appeal, a court is to view the allegedly improper statements within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Prejudice is established if there is a substantial likelihood that the misconduct affected the verdict, thereby denying the defendant a fair trial. *State v. Evans*, 96 Wn.2d 1, 5, 633 P.2d 83 (1981). In general, a reviewing court is to presume that juries follow instructions to disregard improper evidence. *State v. Russell*, 125 Wn.2d 24, 84, 882 P.2d 747 (1994). If the defendant timely objects, reversal is required only if there is a substantial likelihood that the argument affected the jury's verdict. *State v. Negrete*, 72 Wn. App. 62, 67, 863 P.2d 137 (1993). In addition, where the defendant objects to alleged prosecutorial misconduct, a reviewing court is to give deference to the trial court's ruling on the matter. *State v. Luvene*, 127 Wn.2d 690, 701, 903 P.2d 960 (1995).

In *State v McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006), the Washington Supreme Court explained that it has long recognized that a prosecutor may not properly express an independent, personal opinion as to the defendant's guilt. The Court noted, however, that,

> While it is improper for a prosecuting attorney, in argument, to express his individual opinion that the accused is guilty, independent of the testimony in the case, he may nevertheless argue from the testimony that the accused is guilty, and that the testimony convinces him of that fact.

> In other words, there is a distinction between the individual opinion of the prosecuting attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case.

McKenzie, 157 Wn.2d at 53, *citing State v. Armstrong*, 37 Wash. 51, 54-55, 79 P. 490 (1905). The Court then went on to explain that to determine whether the prosecutor is expressing a personal opinion of the defendant's guilt, independent of the evidence, a reviewing court views the challenged comments in context, and noted that,

> It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court's instructions, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. Prejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.

McKenzie, 157 Wn.2d at 53-54, *citing State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59, *review denied*, 100 Wn.2d 1003 (1983).

The Court in *McKenzie* went on to give an example of such a "clear and unmistakable" expression of a personal opinion, and cited to *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956), where the prosecutor made a personal appeal to the jury and explicitly acknowledged that he was offering his own opinion, stating, "I mean, that is my opinion about what this evidence

shows and how clearly this evidence indicates that this girl has been violated." *McKenzie*, 157 Wn.2d at 54, *citing Case*, 49 Wn.2d. at 68.

In *McKenzie*, one of the defendant's arguments was that the prosecutor expressed his personal opinion by using the word "guilty four times in his rebuttal argument. *McKenzie*, 157 Wn.2d at 54. The court, however, disagreed, and held that the four instances in which the prosecutor used the word "guilty" in rebuttal closing argument were not expressions of the prosecutor's personal, independent opinion as to the defendant's guilt, but were simply responses to defense counsel's closing argument and an interpretation of the evidence. *McKenzie*, 157 Wn.2d at 54.

In the present case, Moore argues that prosecutor expressed his personal opinion as to Moore's guilt when he argued, "there is no issue as to the defendant's guilt. The defendant's guilt could not be more clear." App.'s Br. at 7, citing RP 52. The prosecutor in the present case, however, never said this was his personal opinion, or that he personally believed the defendant to be guilty.[1] Rather, viewed in context, the statements at issue were appropriate argument based on the evidence.

Just as the Court held in *McKenzie*, Moore cannot meet her burden of

[1] Another example of an argument that could actually be considered an improper expression of a personal opinion came at the conclusion of the defense attorney's closing argument below where counsel stated, "It is my belief that the State has not met its burden of proof, and that it will be your obligation to return a verdict of not guilty. Thank You." RP 51.

showing that the prosecutor's use of the word "guilty" in rebuttal closing argument constituted a "clear and unmistakable" expression of the prosecutor's personal opinion, divorced from the evidence. *McKenzie*, 157 Wn.2d at 56-57, *citing Papadopoulos*, 34 Wn. App. at 400. For this reason, Moore's argument must fail.

In addition, as in *McKenzie*, the jury in the present case was also instructed that they were the sole judges of credibility and that the lawyer's statements were not evidence and could be disregarded if not supported by the evidence. CP 9, *McKenzie*, 157 Wn.2d at 57, n. 3. Thus, even if this court were to consider the prosecutor's use of the word "guilty" improper, when placed in the context of the whole argument, and the court's prior instructions to the jury, the challenged comments do not rise to the level of prejudice required for a new trial. *McKenzie*, 157 Wn.2d at 57.

Moore also argues that the prosecutor's rebuttal was improper because it characterized the defense argument concerning missing evidence as "the oldest trick in the book" because it amounted to a number of "red herrings" used to attempt to get the jury to focus on a "couple of trees and miss the forest." App.'s Br. at 4,8, RP 52. In a previous Washington decision involving similar facts, however, the court found no error.

In *State v. Guizzotti*, 60 Wn. App. 289, 803 P.2d 808 (1991), the

defendant was charged with second degree rape, and the victim testified that the defendant invited her to go on a boat ride with him, and she agreed. *Guizzotti*, 60 Wn. App. 291. After the boat ride, the defendant raped the victim and made threatening statements to her. *Guizzotti*, 60 Wn. App. 291-92. The victim eventually got dressed, ran up a gangplank and into the boatyard, where she hid under a tarp. *Guizzotti*, 60 Wn. App. 292. The victim also said that the defendant had followed her into the boat yard, called out her name, and she heard someone walking around the boatyard. The victim stayed under the tarp in the boatyard until daybreak, when she ran into an open building in the boatyard and called 911. *Guizzotti*, 60 Wn. App. 292.

On appeal, the defendant argued that the prosecutor made improper statements in closing argument when the prosecutor characterized the defense attorney's argument as "smoke" and argued that it was an attempt to confuse the evidence. *Guizzotti*, 60 Wn. App. at 297-98. The appellate court found that there was no error. *Guizzotti*, 60 Wn. App. at 298. Rather, the court said,

> The prosecutor was rebutting defense counsel's own argument that the victim had not reported the rape to any harbor police or security patrol. The prosecutor's point was that the evidence failed to show that any harbor police or security officers were present to take a report, so the defense argument was unfounded. In the circumstances, the remark was not improper.

Guizzotti, 60 Wn. App. 298.

In the present case. Moore argued almost exclusively in her closing that: (1) there was no evidence that a drug dog had alerted on Moore; (2) there was no testimony from the second officer present at Moore's residence; and, (3) that there was no videotape from the jail offered at trial. RP 49-51. These arguments were specious. First, there was no evidence that the dog in question was even trained in drug detection or capable of alerting given the situation, and Moore did not even contend that there were no drugs in her pants, rather she simply claimed that the pants and the drugs did not belong to her. Second, although the second officer did not testify, there was, again, no contention by Moore that the drugs were not found in the house, rather, the defense claim was that Moore was unaware of the items and that two other men must have left the drugs in the house. Third, although there was, at least potentially, a videotape of the first search at the jail, Moore did not contest the fact that drugs were found in the jeans, rather she claimed that jeans did not belong to her. The strip search (which was the only search about which there was any contention), however, was not taped. RP 21-22. The defense arguments, therefore, had little or nothing to do with the facts at issue.

Just as in *Guizzotti*, the defense arguments were unfounded, and it was proper for the prosecutor to make this point. In addition, the prosecutor's arguments in the present case are indistinguishable from the

arguments in *Guizzotti* where the prosecutor characterized the defense arguments as "smoke" and said they were an attempt to confuse the evidence. In addition, in both *Guizzotti* and the present case, the State did not suggest that defense counsel were not to be trusted, did not attack defense counsel's ethics, and did not malign the role of defense counsel. Rather, in both instances the prosecutor accurately rebutted remarks made in the defense closing that were unfounded. For these reasons, Moore's claim of prosecutorial misconduct must fail.

Finally, even if this court were to assume that the prosecutor's characterization of the defense argument as a "trick" was improper, reversal would not be warranted because other courts have held in similar cases that reversal is not warranted. *See State v. Crews*, 923 S.W.2d 477 (Mo.App.1996)(remark that defense counsel acted like a "magician" and distracted the jury did not "rise to the level of impropriety warranting a reversal ...."); *Lindgren v. Lane*, 925 F.2d 198 (7th Cir.1991)(a single reference to defense counsel's closing being the "tricks" and "illusions" of a "magician" was not so egregious as to warrant reversal); *Commonwealth v. Smith*, 321 Pa.Super. 170, 467 A.2d 1307 (1983)(prosecutor's statements "Don't be fooled by the smokescreen defense .... Look at all the evidence. Don't be fooled" did not warrant reversal).

B. MOORE HAS FAILED TO SHOW ANY ERROR WITH RESPECT TO A UNANIMITY INSTRUCTION BECAUSE THE JURY WAS GIVEN A SPECIAL VERDICT FORM THAT WAS FUNCTIONALLY THE SAME AS A PETRICH INSTRUCTION AND THE SPECIAL VERDICT FORM ENSURED THAT THE JURY WAS UNANIMOUS AS TO WHICH ACT OR INCIDENT CONSTITUTED THE CRIME.

Moore next claims that the trial court erred in failing to give a unanimity instruction. This claim is without merit because the jury was given a special verdict form that was functionally the same as a Petrich instruction, as the special verdict form ensured that the jury was unanimous as to which act or incident constituted the crime.

A jury may convict a defendant only if it is unanimous in finding that the defendant committed the act charged in the information. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). 'If several acts are alleged, any one of which could constitute the crime charged, the jury must be unanimous as to which act or incident constituted the crime.' *State v. Shouse*, 119 Wn. App. 793, 797, 83 P.3d 453 (2004). A multiple acts case requires that the jury be unanimous on which act or incident constituted the crime. *State v. Beasley*, 126 Wn. App. 670, 682, 109 P.3d 849 (2005), *citing Kitchen*, 110 Wn.2d at 411. If the State does not make an election and no unanimity instruction is used, there can be error because of the possibility that some jurors relied on one act or incident and some relied on another, resulting in a

lack of unanimity on all of the elements necessary for a valid conviction. *See*, *State v. Kitchen*, 110 Wn.2d 403, 411-12, 756 P.2d 105 (1988); *State v. Coleman*, 159 Wn.2d 509, 150 P.3d 1126 (2007).

In the present case, however, the special verdict form used below shows that the jury unanimously agreed that Moore possessed the methamphetamine found in her underwear. There was no error, therefore, as the special verdict form ensured that the jury was unanimous as to which act or incident constituted the crime. *See, for instance, State v. Lord*, 117 Wn.2d 829, 879-80, 822 P.2d 177 (1991)(any error in one instruction which did not require jury to unanimously agree which underlying crime was committed was cured by additional instruction and jury's findings on verdict form which showed jury found defendant had committed both rape and kidnapping).

Even if the format and timing of the instructions in the present case was not optimal, any potential error was harmless, as the jury indicated that they unanimously found that Moore has possessed the methamphetamine found in her underwear. When a court reviews a multiple acts case where there was no election by the State or unanimity instruction by the trial court, it must determine if the error was harmless. *Kitchen*, 110 Wn.2d at 411. Normally, harmless error is demonstrated by a showing that no rational juror could have a reasonable doubt as to any of the incidents alleged. *Kitchen*, 110 Wn.2d at 411-12, 756 P.2d 105. Given the jury's specific finding on the

special verdict form, and error in the present case was harmless as the jury's verdict forms, when read together, ensured that the jury was unanimous as to which act or incident constituted the crime.

C. THE CHARGING DOCUMENT WAS CONSTITUTIONALLY ADEQUATE BECAUSE IT CONTAINED ALL OF THE ELEMENTS OF CRIME SO AS TO APPRISE DEFENDANT OF CHARGES AGAINST HER AND ALLOWED HER TO PREPARE HER DEFENSE, AND ANY POTENTIAL ISSUES CONCERNING VAGUENESS OF THE INFORMATION WERE WAIVED WHEN MOORE FAILED TO REQUEST A BILL OF PARTICULARS BELOW.

Moore next claims that the information filed in the present case was insufficient. App.'s Br. at 15. This claim is without merit because the information contained all essential elements of crime so as to apprise defendant of charges against him and allow him to prepare his defense.

A charging document is constitutionally adequate only if all essential elements of crime, statutory and nonstatutory, are included in the document so as to apprise defendant of charges against her and allow her to prepare her defense. *State v. Simon*, 120 Wn.2d 196, 198, 840 P.2d 172 (1992). This constitutional right of a criminal defendant to be appraised with reasonable certainty as to the charges against him is ordinarily satisfied by a charging document which charges a crime in the language of the statute, where the

crime is defined with certainty within the statute. State v. Merrill, 23 Wn. App. 577, 580, 597 P.2d 446, review denied, 92 Wn.2d 1036 (Div. 3 1979); State v. Grant, 89 Wn.2d 678, 686, 575 P.2d 210 (1978). Furthermore, Washington courts have repeatedly distinguished informations which are constitutionally deficient and those which are merely vague. *State v. Noltie,* 116 Wn.2d 831, 843, 809 P.2d 190 (1991), *citing State v. Holt*, 104 Wn.2d 315, 320, 704 P.2d 1189 (1985); *State v. Leach*, 113 Wn.2d 679, 687, 782 P.2d 552 (1989); *State v. Bonds*, 98 Wn.2d 1, 17, 653 P.2d 1024 (1982), *cert. denied*, 464 U.S. 831, 104 S. Ct. 111, 78 L. Ed. 2d 112 (1983); *State v. Thomas*, 73 Wn.2d 729, 731, 440 P.2d 488 (1968); *State v. Hawthorne*, 48 Wn. App. 23, 28, 737 P.2d 717 (1987).

If an information states each statutory element of a crime but is vague as to some other matter significant to the defense other than the elements of the crime, a bill of particulars can correct the defect. *Noltie*, 116 Wn.2d at 843, *citing State v. Bergeron*, 105 Wn.2d 1, 18, 711 P.2d 1000 (1985). However, a defendant who fails to timely request a bill of particulars below is not entitled to challenge the information as vague on appeal. *Noltie*, 116 Wn.2d at 843-44, *citing Holt*, 104 Wn.2d at 320; *Leach*, 113 Wn.2d at 687; Bonds, 98 Wn.2d at 17. *See also, State v. Hayes*, 81 Wn. App. 425, 440, 914 P.2d 788, *review denied*, 130 Wn.2d 1013 (1996); *State v. Russell*, 69 Wn. App. 237, 248, 848 P.2d 743, *review denied* , 122 Wn.2d 1003 (1993)

(declining to consider challenge on appeal that information lacked sufficient specificity to allow defendant to adequately prepare his defense against charge of homicide by abuse, as proper remedy was to seek a bill of particulars); *City of Seattle v. Koh*, 26 Wn. App. 708, 614 P.2d 665 (1980) (motion to make criminal complaint more definite must be made before trial in order to be timely); *State v. Grant*, 89 Wn.2d 678, 575 P.2d 210 (1978) (objection to information not made until day of trial was untimely and deemed waived).

A bill of particulars is not necessary when the means of obtaining the facts are readily accessible to the defense or the facts are already known to him or her. *Grant*, 89 Wn.2d at 686-687 (court denied motion for bill of particulars stating "the officer's report is about as much as the court could compel the prosecutor to furnish (the defendant)"). *See also, State v. Merrill*, 23 Wn. App. 577, 580, 597 P.2d 446, *review denied*, 92 Wn.2d 1036 (Div. 3 1979) (court denied motion for bill of particulars where the defendant was made aware through discovery of all the information available to the prosecutor for proving the offense); *State v. Dictado*, 102 Wn.2d 277, 286, 687 P.2d 172 (1984) (court denied motion for bill of particulars stating "nothing in the record indicates what information, beyond that already provided, the State could have furnished to give additional notice of the charges"); *State v. Paschall*, 197 Wash. 582, 588, 85 P.2d 1046 (1939)

(holding that it was not prejudicial error to deny a motion for a bill of particulars when the state's attorney had disclosed to the defendant's attorney practically all of the facts concerning which evidence the government intended to use at trial); *United States v. Kaplan*, 470 F.2d 100 (7th Cir. 1972), *cert. denied*, 410 U.S. 966, 35 L. Ed. 2d 701, 93 S. Ct. 1443 (1973).

In the present case, the information stated that on May 10, 2006, the defendant did possess a controlled substance, to wit: Methamphetamine. CP 1. In addition, the brief police report attached to the information stated that a black plastic scale was found in her residence next to paperwork belonging to Moore, and that the bowl of the scale contained a substance that tested positive for methamphetamine. CP 5. In addition during a search of Moore at the jail, a green plastic baggie containing methamphetamine was found in Moor's pants, and a second baggie containing methamphetamine was found when it came out during a strip search. CP 5.

As the information included all of the essential elements of crime, it was constitutionally adequate as it apprised Moore of the charges against her and allowed her to prepare her defense. *Simon*, 120 Wn.2d at 198. In addition, the police report attached to the information outlined that the scale found in the residence contained methamphetamine, and that the two baggies found on Moore at the jail also contained methamphetamine. Moore, therefore, was adequately apprised of the charges against her and was advised

of the factual basis for these charges. Any challenge as to the vagueness of the information was waived when Moore failed to bring a motion for a bill of particulars.

Moore cites *State v Leach*, 113 Wn.2d 679, 782 P.2d 552 (1989) and *State v. Royse*, 66 Wn.2d 552, 557, 403 P.2d 838 (1965) as support for her claim, these cases are distinguishable. Moore's argument and citations to *Leach* and *Royse* mirror the claims made by the defendant in the more recent case of *State v. Winnings*, 126 Wn. App. 75, 107 P.3d 141 (2005). In winnings, the defendant was charged with second degree assault while armed with a deadly weapon, and the information stated:

> In the County of Clallam, State of Washington, on or about the 24th day of March, 2003, the Defendant did assault another with a deadly weapon; in violation of RCW 9A.36.021, a Class B felony.

Winnings, 126 Wn. App. at 81. The defendant argued that the information was factually deficient because it failed to identify the victim, the weapon used, or the circumstances that made the "weapon deadly." *Winnings*, 126 Wn.App at 84. The court, however, noted that information included each essential legal element of the charge of second degree assault while armed with a deadly weapon. *Winnings*, 126 Wn. App at 85. Winnings argued, however, that *Leach* required more: specifically, that a defendant must be notified of the essential facts supporting the legal elements, and that because

the information does not state the victim, the weapon used, or the manner in which Winings used the weapon, the information failed to allege all of the essential facts supporting every element of second degree assault and was thereby defective. *Winnings*, 126 Wn.App at 85. The court, however, disagreed, stating,

> *Leach* requires only that the charging instrument allege "sufficient facts to support every element of the crime charged"--it does not impose any additional requirement that the State allege facts beyond those that sufficiently support the elements of the crime charged or that the State describe the facts with great specificity. *Leach*, 113 Wn.2d at 688, 782 P.2d 552. Construed liberally, the information sufficiently lists facts supporting each element of second degree assault with a deadly weapon. It alleges that Winings assaulted another with a deadly weapon, that his actions violated RCW 9A.36.021 and constituted a class B felony, and that the incident occurred on or about March 24, 2003, in Clallam County. The information is not constitutionally deficient. And although it may be vague, Winings failed to request a bill of particulars and may not now raise this issue on appeal.

Winnings, 126 Wn.App at 85-86. In addition, the court in *Winnings* found that *Royse* did not support the defendant's claim because in Royse the court found "the charging instrument constitutionally deficient because it failed to allege an essential element of the crime charged--not because the instrument was otherwise factually deficient as Winings asserts." *Winnings*, 126 Wn. App. at 85 n.3.

As in *Winnings*, the information in the present case contained all of the elements of the charged crime, and was, therefore, constitutionally

sufficient. Any potential issues concerning vagueness of the information were waived when Moore failed to request a bill of particulars and Moore may not now raise this issue on appeal.

For all of these reasons, Moore's arguments concerning the information must fail.

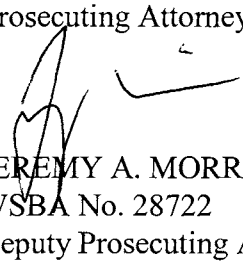
IV. CONCLUSION

For the foregoing reasons, Moore's conviction and sentence should be affirmed.

DATED March 26, 2007.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney



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