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DIVISION II

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STATE OF WASHINGTON
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NO. 37766-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

NATHAN D. GONCALVES,

Appellant.

BRIEF OF APPELLANT

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ORIGINAL

TABLE OF CONTENTS

Page

A. TABLE OF AUTHORITIES iv

B. ASSIGNMENT OF ERROR

1. Assignment of Error 1

2. Issue Pertaining to Assignment of Error 2

C. STATEMENT OF THE CASE

1. Factual History 3

2. Procedural History 6

D. ARGUMENT

I. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ENTERED JUDGEMENT AGAINST HIM FOR A CRIME UNSUPPORTED BY SUBSTANTIAL EVIDENCE 11

II. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO NOTICE UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT, WHEN IT ENTERED JUDGEMENT AGAINST HIM FOR AN UNCHARGED OFFENSE 15

III. CONSISTENT WITH THE PROHIBITION AGAINST DOUBLE JEOPARDY FOUND IN WASHINGTON CONSTITUTION, ARTICLE 1, § 9, AND UNITED STATES CONSTITUTION, FIFTH AMENDMENT, THE PROPER REMEDY IN THIS CASE IS DISMISSAL WITH PREJUDICE, NOT DISMISSAL WITHOUT PREJUDICE ... 20

E. CONCLUSION 27

F. APPENDIX

1. Washington Constitution, Article 1, § 3 28

2. Washington Constitution, Article 1, § 9 28

3. Washington Constitution, Article 1, § 22 28

4. United States Constitution, Sixth Amendment 29

5. United States Constitution, Fourteenth Amendment 29

6. RCW 10.61.010 29

TABLE OF AUTHORITIES

Page

Federal Cases

In re Winship,
397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 11

Jackson v. Virginia,
443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) 12

North Carolina v. Pearce,
395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969) 22

United States v. Halper,
490 U.S. 435, 104 L.Ed.2d 487, 109 S.Ct. 1892 (1989) 22

State Cases

State v. Robinson, 2008 WL 3950815 (Wn.App. Div. II 2008) . 22-24, 26

State v. Baeza, 100 Wn.2d 487, 670 P.2d 646 (1983) 11

State v. Holt, 104 Wn.2d 315, 704 P.2d 1189 (1985) 16-18, 20

State v. Johnson, 12 Wn.App. 40, 527 P.2d 1324 (1974) 12

State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991) 15, 18-21

State v. Mace, 97 Wn.2d 840, 650 P.2d 217 (1982) 12, 13

State v. Moore, 7 Wn.App. 1, 499 P.2d 16 (1972) 11

State v. Pelkey, 109 Wn.2d 484, 745 P.2d 854 (1987) 15

State v. Taplin, 9 Wn.App. 545, 513 P.2d 549 (1973) 12

State v. Taylor, 90 Wn.App. 312, 950 P.2d 526 (1998) 15, 16

Constitutional Provisions

Washington Constitution, Article 1, § 3 11

Washington Constitution, Article 1, § 9 . . . . . 22, 23, 26

Washington Constitution, Article 1, § 22 . . . . . 15, 16, 20, 21

United States Constitution, Fifth Amendment 22, 23, 26

United States Constitution, Sixth Amendment 15, 20, 21

United States Constitution, Fourteenth Amendment 11

Statutes and Court Rules

RCW 10.61.010 . . . . . 16, 21

Other Authorities

Black's Law Dictionary, page 903 (Fifth Edition 1979) 25

ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it entered judgement against him for a crime unsupported by substantial evidence.

2. The trial court violated the defendant's due process right to notice of the charges brought against him under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when it entered judgement against him for a crime the jury did not find proven.

3. Consistent with the prohibition against double jeopardy found in Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, the proper remedy in this case is dismissal with prejudice, not dismissal without prejudice.

Issues Pertaining to Assignment of Error

1. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it enters judgement against him for a crime unsupported by substantial evidence?

2. Does a trial court violate a defendant's right to notice of the charges brought against him under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when it enters judgement against him for a crime the state did not charge and the jury did not find proven?

3. If the court discharges a jury without manifest necessity before it renders a verdict on the charges the state has filed, does double jeopardy under Washington Constitution, Article 1, § 9, and United States Constitution, Sixth Amendment, prohibit a new trial on the same charge?

STATEMENT OF THE CASE

Factual History

On December 12, 2007, Skamania County Sheriff's Deputy Tracy Wyckoff met with an informant in order to prepare a controlled purchase of methamphetamine. RP 54-55.[1] During their meeting, Deputy Wyckoff searched the informant's person and clothing and verified that the informant did not have any drugs on him. *Id.* Deputy Wyckoff then gave the informant $50.00 in pre-recorded "buy" money. RP 55-56. While he was doing this, Deputy Sheriff Tim Garrity searched the informant's vehicle and found no drugs or money. RP 76-78. Deputy Garrity then drove to a location where he could see a portion of the residence and driveway at the target location, which was 597 Maple Way. RP 79-80. As he did, the informant got into his vehicle, drove to 597 Maple Way, and pulled in the driveway. *Id.* Deputy Wyckoff followed in his own car and positioned himself so he could see the vehicle in the driveway. RP 56-57.

At 10:38 a.m., Deputy Garrity saw the informant pull into the driveway at 597 Maple Way. RP 79-80. At 10:44 a.m., he saw a red Taurus pull into the driveway. *Id.* However, because of his location, he could not

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[1]The record in this case includes one volume of continuously numbered verbatim reports of the hearings held on 2/29/08, 3/13/08, 3/27/08, 4/17/08, and the jury trial held on 5/12/08 and 6/12/08. It is referred to herein as "RP [page #]".

see either the informant's vehicle or the red Taurus stop, and could not see what happened after these two vehicles entered the driveway. RP 85-89. By contrast, Deputy Wyckoff had a better vantage point and did see the informant pull his vehicle into the driveway, stop, get out, and walk toward the front of the residence. RP 70-72. However, even from his better vantage point, he could not see the front door of the house. *Id.*

At 10:48 a.m., Deputy Garrity saw the informant pull his vehicle away from the residence and drive to a location where the informant met with Deputy Wyckoff. RP 57. Because of his somewhat better vantage point, Deputy Wyckoff saw the informant walk back toward his vehicle from the direction of the front door, get in the vehicle, and drive to a prearranged location. *Id.* Once at that location, the informant told Deputy Wyckoff that he had to drive back to the house at 597 Maple Way. *Id.* At this point, Deputy Wyckoff did not again search the informant or his vehicle. *Id.*

After the brief meeting, both Deputy Wyckoff and Deputy Garrity watched as the informant drove back to the target location, arriving at 10:59 a.m. RP 58-59, 79-80. Once back at the house, Deputy Garrity again saw the informant pull into the driveway but lost sight of the vehicle as it stopped. RP 79-80. Deputy Wyckoff again saw the informant stop the vehicle, get out, and walk toward the front of the house. RP 58-59. A few minutes later at 11:04 a.m., Deputy Wyckoff saw the informant walk back to his vehicle with

a second person the deputy was later able to identify as the defendant. *Id.* The informant and the defendant then got into the informant's vehicle, drove away, and stopped at a store in Stevenson. RP 59-62. As the informant drove his vehicle to the store, Deputies Wyckoff and Garrity drove to nearby locations where they could see what was happening. RP 59-62, 79-81. When they stopped, they saw the defendant get out of the informant's vehicle, and walk off in the direction of a trailer park. *Id.* Both officers lost sight of the defendant at 11:09 a.m. *Id.* At 11:33 a.m., the deputies saw the defendant walk back up to the informant's vehicle and get in. *Id.* When he did, the informant drove the two of them back to 597 Maple Way and pulled into the driveway, arriving at 11:38 a.m. RP 73, 82-83. Ten minutes later, Deputies Wyckoff and Garrity saw the informant drive away from the house alone. *Id.* Neither deputy could see what happened during these ten minutes. RP 73, 88-89.

After the informant left the house at 597 Maple Way for the third time, he drove to a pre-arranged location and met with the two deputies. RP 63-64. Once at this location, the informant handed Deputy Wyckoff two baggies of white crystalline substance that later tested positive for methamphetamine. RP 63-64, 92. The deputies again searched the informant and his vehicle, finding no drugs and not finding the buy money that Deputy Wyckoff had given the informant. RP 63-64.

Procedural History

By information filed February 29, 2008, the Skamania County Prosecutor charged the defendant Nathan D. Goncalves with one count of delivery of methamphetamine. CP 1-2. The language of the information made the following allegation:

> That he, NATHAN D. GONCALVES, in the County of Skamania, State of Washington, on or about 12/12/2007, did knowingly deliver a controlled substance, to-wit: METHAMPHETAMINE; contrary to Revised Code of Washington 69.50.401(1).

CP 1 (capitals and underlining in original).

On February 29, 2008, the defendant made his first appearance in court on this charge, during which time the court appointed attorney Christopher Lanz to represent him. RP 1, 5. Thirteen days later, on March 13, 2008, the defendant appeared with his appointed counsel and entered a plea of "not guilty" to the charge. RP 12. At that time, the court refused to reduce bail, and set a 3/27/08 omnibus hearing, a 5/1/08 status hearing, and a 5/12/08 trial. RP 12-13. Subsequently, at the omnibus, the defendant moved for disclosure of the name of the informant to whom the state alleged the defendant had delivered methamphetamine and for a hearing under CrR 3.5. RP 13-14. At that time, the state represented that it did not intend to endorse the informant as a witness. *Id.* The court put the matter over for a joint hearing on the defendant's motion for disclosure and for the CrR 3.5

hearing. *Id.*

On the day scheduled for the CrR 3.5 hearing and the motion to disclose the identity of the informant, the defendant's appointed attorney made a motion to withdraw, stating that he had accepted an offer of employment with the prosecutor's office, which created a conflict of interest. RP 13. When queried by the court, the defendant responded that he did not oppose withdrawal by his current attorney and the appointment of a new attorney, provided these actions did not prejudice his right to a speedy trial. RP 15-17. The court then allowed Mr. Lanz to withdraw, and indicated that it would appoint a new attorney for the defendant. *Id.* During this hearing, the state informed the court that a CrR 3.5 hearing was unnecessary as the state did not intend to introduce any statements of the defendant into evidence during the trial. RP 15.

Finally, on May 12, 2008, the defendant appeared before the court with new counsel for trial. RP 18. At that time, the defendant filed his own handwritten motions to dismiss and motion to suppress. RP 29-34, 35-45. Although defendant's counsel did not argue these motions to the court, she did move at the beginning of trial to exclude the informant as a witness, exclude the crime lab report, disqualify the prosecutor's office from trying the case, and dismiss. RP 18-29. In support of these motions, the defendant's attorney argued the following: (1) the informant should be excluded as a

witness because the state had never endorsed him as a witness and had only produced him for an interview the previous Friday (four days prior to trial), (2) that the lab report should be excluded because the state had just handed the defense the lab report, (3) that the prosecutor's office should be disqualified because the defendant's first appointed attorney was currently working at the prosecutor's office, and (4) that if the prosecutor was disqualified, the case could not proceed, and should be dismissed on a speedy trial violation. *Id.*

The state responded that it had endorsed the informant last Friday, that it had just received the lab report itself, and that for the purposes of this case he had kept a complete separation between himself and the defendant's prior attorney, included keeping the file in this case locked in his office, and never engaging in any sort of conversation with the defendant's previous attorney about the case. RP 22-24. After hearing these arguments, the court granted the motion to exclude the informant as a witness, granted the motion to exclude the lab report, but denied the motion to disqualify and to dismiss. RP 29-31, 39-40.

Following the pretrial motions, the state called three witnesses: Detective Tracy Wyckoff, Detective Tim Garrity, and Forensic Scientist Katherine Dunn. RP 52-76, 76-90, and 90-103. These witnesses testified to the facts set out in the preceding factual history. *See Factual History.* The

state then rested its case. RP 103. In response, the defense immediately rested its case without calling any witnesses. *Id.* At this point, the court instructed the jury on the sole charge of delivery of methamphetamine, including using the following "to convict" instruction.

INSTRUCTION NO. 8

> To convict the defendant of the crime of delivery of a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 12th day of December, 2007, the defendant delivered a controlled substance;
>
> (2) That the defendant knew that the substance delivered was a controlled substance, methamphetamine;
>
> (3) That the acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 81

Following instruction, counsel presented closing argument, and the jury retired for deliberation. RP 116-126, 126-147. After deliberation, the jury returned a verdict of "guilty." CP 86; RP 152-153. However, the jury did not return a verdict of guilty to the crime charged: delivery of methamphetamine. *Id.* Rather, the jury returned a verdict of guilty to an

uncharged crime: possession of methamphetamine with intent to deliver. *Id.* For some inexplicable reason, the court, without objection from the state, gave the jury a verdict form on the wrong charge. *Id.* This verdict form, as returned by the jury, read by the clerk, and accepted by the court, read as follows:

> We, the jury, find the defendant, NATHAN D. GONCALVES, Guilty of the crime of Possession of Methamphetamine with Intent to Deliver as charged.

CP 86 (underlining and capitals in original).

Following the clerk's reading of the verdict, the court polled the jury. RP 153. The court then accepted the verdict and discharged the jury. RP 153. The court later sentenced the defendant to the standard range on the charge of delivery of methamphetamine after denying a motion for arrest of judgment and for a new trial. CP 94-105, 106. The defendant thereafter filed timely notice of appeal. CP 106.

ARGUMENT

I. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ENTERED JUDGEMENT AGAINST HIM FOR A CRIME UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: "[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence.

State v. Aten, 130 Wn.2d 640, 927 P.2d 210 (1996).

"Substantial evidence" in the context of a criminal case means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence "that the defendant was the one who perpetrated the crime." *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether "after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

For example, in *State. v. Mace*, 97 Wn.2d 840, 650 P.2d 217 (1982), the defendant was charged and convicted of burglary. At trial, the state presented the following evidence: (1) during the evening in question, someone entered the victims' home in Richland without permission and took a purse, which contained a wallet and a bank access card, (2) that the card was used in a cash machine in Kennewick (an adjoining city), at 4:30 that same morning, (3) that the victim's wallet was found in a bag next to the cash machine, (4) that the bag had the defendant's fingerprints on it, and (5) that

the defendant's fingerprints were also found on a piece of paper located by a second cash machine where the card was used.

Following conviction, the defendant appealed, arguing that the state had failed to present substantial evidence to support the burglary conviction. The Court of Appeals disagreed, and affirmed. The defendant then sought and obtained review by the Washington Supreme Court, which reversed, stating as follows.

> Second degree burglary is defined as follows:
>
> A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle.
>
> RCW 9A.52.030(1). We agree with petitioner that the State failed to sustain its burden of proof. The State's evidence proved only that petitioner may have possessed the recently stolen bank cards in Kennewick. ***There was no direct evidence, only inferences***, that he had committed second degree burglary by entering the premises in Richland.

State v. Mace, 97 Wn.2d at 842 (emphasis added).

In the case at bar, the state charged the defendant with delivery of methamphetamine under RCW 69.50.401(1). This statute provides as follows:

> (1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

RCW 69.40.401(a).

The gravamen of this offense, as charged against the defendant, is to deliver methamphetamine to another person. As the following explains, the evidence presented at trial, even when seen in the light most favorable to the state, does not constitute substantial evidence that anyone delivered methamphetamine to the police informant on February 29, 2008, much less that the defendant delivered methamphetamine to the informant. First and foremost, two facts about this case should be noted: (1) that no witness saw the defendant possess or deliver methamphetamine or even exchange anything with the police informant, and (2) the informant was out of the sight of the two deputies for significant periods of time on three separate occasions.

Under these two critical facts, there were many sources for the methamphetamine the informant gave to the deputy. For example, the methamphetamine could have come from the person who drove up in the red Taurus after the informant drove to the target location the first time. Similarly, it could have come from some person inside the house that the informant apparently twice entered. Third, it could have previously been secreted inside the house by the informant in a plan to falsify evidence against the defendant and at the same time garner the approbation of the police. While one may conclude that the methamphetamine did not come from the informant's person or vehicle, given the deputies' testimony

concerning their search of the defendant and his vehicle, the deputies' failure to keep the informant within their view at all times creates a situation in which the police only suspected that the defendant was the source of the methamphetamine. As the decision in *Mace* explains, evidence that only gives rise to suspicion or speculation does not constitute substantial evidence sufficient to meet the requirements of due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. As a result, this court should reverse the defendant's conviction and remand with instructions to dismiss.

II. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO NOTICE OF THE CHARGES BROUGHT AGAINST HIM UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT, WHEN IT ENTERED JUDGEMENT AGAINST HIM FOR A CRIME THE JURY DID NOT FIND PROVEN.

Under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, a defendant has the right to notice of the charges the state alleges the defendant committed. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). In addition, under these provisions, a defendant may only be convicted of the crimes charged. *Id.* The only exception is for lesser included offenses, which the state implicitly charges with a greater alleged offense. *State v. Pelkey*, 109 Wn.2d 484, 745 P.2d 854 (1987); *State v. Taylor*, 90 WnApp. 312, 950 P.2d 526 (1998). As this

Division of the Court of Appeals has previously stated:

> Generally, the State must give the accused notice of the charge he will face at trial. An accused cannot be convicted of an uncharged or inadequately charged offense. A jury may, however, find an accused guilty of a lesser degree offense when the State charges the accused with a higher degree of a multiple degree offense. In such instances, the State does not have to notify the defendant that he may be convicted of the lesser included offense.

State v. Taylor, 90 Wn.App. at 322 (citations omitted).

This legislature adopted this constitutional principle as a matter of statutory law through RCW 10.61.010, which states as follows:

> Upon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime. Whenever the jury shall find a verdict of guilty against a person so charged, they shall in their verdict specify the degree or attempt of which the accused is guilty.

RCW 10.61.010.

For example, in *State v. Holt*, 104 Wn.2d 315, 704 P.2d 1189 (1985) (citing *Seattle v. Jordan*, 134 Wash. 30, 235 P. 6 (1925)), the defendant was charged with selling child pornography and convicted of the lesser included offense of selling obscene material. He appealed, arguing that the information charging child pornography failed to allege two essential elements of that crime, thereby violating his right to notice under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. The state responded with two arguments: (1) that the

defendant had failed to preserve the error for appeal, and (2) that even though the information did fail to allege two of the statutory elements, the error was cured by the use of a "to convict" jury instruction that included the missing elements.

The Washington Supreme Court rejected both of the state's arguments, reversed the conviction, and remanded with instructions to dismiss without prejudice. In its decision, the court first noted the general rule that "[t]he omission of *any* statutory element of a crime in the charging document is a *constitutional* defect which may result in dismissal of the criminal charges." *Holt* 104 Wn.2d at 320 (italics in original). It then went on to note that the error could have been eliminated by an amendment to the information. On this point the court stated:

> CrR 2.1(defendant) allows the State to move to amend the information at any time prior to the final verdict, if substantial rights of the defendant are not prejudiced by the amendment. That court rule provides the proper procedure in a case such as this where the information fails to charge any crime at all. Notably, the State in the present case was allowed to amend the information twice, but still did not include the necessary statutory elements of the crime.

State v. Holt, 104 Wn.2d at 321.

Since, in fact, the state failed to amend the information and include the omitted elements, dismissal was required.

> The information failed to state these elements, making the information constitutionally defective. That defect cannot be

> cured by proper jury instructions. Further, [the defendant] was not required to request a bill of particulars, nor to take any other action to preserve his right to challenge the constitutionality of the information on appeal. Accordingly, on these grounds we reverse the Court of Appeals and order the charges against [Defendant] dismissed.

State v. Holt, 104 Wn.2d at 322-23.

Similarly, in *State v. Kjorsvik*, *supra*, the Washington State Supreme Court refined the rule in *Holt*, and explained that if the defense objects pretrial, the court must strictly construe the information against the state. Whereas, if the defense first objects post-trial, the court will liberally construe the information to the benefit of the state.

In *Kjorsvik,* the defendant was convicted of first degree robbery under an information that alleged that he "did unlawfully take personal property..." *Kjorsvik*, 117 Wn.2d at 96. For the first time on appeal, the defendant argued that his conviction should be reversed because the information failed to allege the court-created "essential" element of intent (*e.g.,* that he "intentionally" took personal property as opposed to "unlawfully" taking personal property). In its opinion, the court specifically adopted the rule that an information is defective unless it alleges all of the "essential" elements of the crime, regardless whether the elements were statutorily or judicially created. The court went on to note that in determining whether or not the essential elements are alleged, it will employ a liberal interpretation of the information

if the issue is raised for the first time on appeal, and a strict interpretation of the information if the issue was raised pretrial.

In *Kjorsvik*, the court noted:

> The State argues that the word "unlawfully" sufficiently alleges the intent to steal element of the crime of robbery. Authority is divided on whether the allegation that an act was done ***feloniously*** or ***unlawfully*** is a sufficient allegation of criminal intent. This inquiry turns on the element of the particular crime charged and the meaning to be derived from the language of the charging document.
>
> . . .
>
> In *State v. Hicks*, 102 Wn.2d 182, 683 P.2d 186 (1984), this court found that intent to steal was an essential element of the crime of robbery and if the defendant thought (as was the explanation of the defendant in that case) that he was merely retrieving his own property, that would have constituted a defense to the robbery charge. Under the facts of *Hicks*, the property taken by the defendant might have been his own property, hence the taking was arguably a lawful taking. Accordingly, this court reversed the conviction for failure of the information to include the "intent to steal" element of robbery and because of a refusal by the trial judge to instruct on this element.
>
> In the present case, however, the information charged that the defendant unlawfully, with force, and against the shopkeeper's, took the money while armed with a deadly weapon. It is hard to perceive how the defendant in this case could have unlawfully taken the money from the cash register, against the will of the shopkeeper, by use (or threatened use) of force, violence and fear while displaying a deadly weapon and yet not have intended to steal the money. The case before us is thus clearly distinguishable from *Hicks*. Giving the information charging this defendant a liberal construction in favor of its validity, reading it as a whole and in a common sense manner, we conclude that it did inform the defendant of

all the elements of robbery.

State v. Kjorsvik, 117 Wn.2d at 109-111 (footnotes omitted, emphasis in original).

The decisions in *Holt* and *Kjorsvik* stand for the principle that under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, a defendant may only be convicted of the offense alleged or a lesser included offense. In the context of the case at bar, this rule means that since the state only charged delivery of methamphetamine, this court can only sustain a conviction for that offense or a lesser included offense. This court cannot sustain a conviction for any other offense, such as possession of methamphetamine with intent to deliver, because the state did not charge this offense. Thus, consistent with the decisions in *Holt* and *Kjorsvik*, and consistent with the notice requirements included within Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, this court should reverse the defendant's conviction for possession of methamphetamine with intent to deliver.

III. CONSISTENT WITH THE PROHIBITION AGAINST DOUBLE JEOPARDY FOUND IN WASHINGTON CONSTITUTION, ARTICLE 1, § 9, AND UNITED STATES CONSTITUTION, FIFTH AMENDMENT, THE PROPER REMEDY IN THIS CASE IS DISMISSAL WITH PREJUDICE, NOT DISMISSAL WITHOUT PREJUDICE

While the decisions in *Holt* and *Kjorsvik* find application to the case

at bar through the general constitutional principle requiring notice of charges, these two cases are dissimilar to the case at bar in one important application. That application is the remedy that should apply following vacation of the defendant's conviction. In *Holt* and *Kjorsvik,* the courts held that the reason the informations violated the notice requirements of Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, was that they failed to include essential elements of the crimes the state was attempting to charge. Thus, in both cases, the informations alleged no offense at all. Under these circumstances, the court found no double jeopardy violation in dismissing the charges without prejudice and allowing the state to refile the same charge without all of the essential elements correctly alleged.

By contrast, in the case at bar, the information the state filed against the defendant was not defective at all. It included each and every element of the offense the state alleged. Consequently, the state's prosecution of the defendant under this information did not violate the defendant's right to notice under either Washington Constitution, Article 1, § 22, United States Constitution, Sixth Amendment, or under RCW 10.61.010. Rather, the violation of the defendant's right to notice under these constitutional and statutory provisions arose when the court accepted the jury's verdict of conviction against the defendant for an offense the state did not allege.

Under these facts, a new prosecution against the defendant would violate the defendant's right to be free from double jeopardy under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment. The following presents this argument.

The double jeopardy prohibitions found in both Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969); *United States v. Halper*, 490 U.S. 435, 104 L.Ed.2d 487, 109 S.Ct. 1892 (1989). By contrast, the retrial of a defendant on the same charge following a mistrial does not violate double jeopardy if (1) the defendant requested the mistrial, or (2) a mistrial was supported by a manifest necessity. *State v. Melton*, 97 Wn.App. 327, 331-32, 983 P.2d 699 (1999).

For example, in *State v. Robinson*, 2008 WL 3950815 (Wn.App. Div. II 2008), the state charged the defendant with second degree burglary, first degree theft, and trafficking in stolen property, alleging that the defendant had stolen and sold over $1,500.00 in lumber from the defendant's shed. During trial, the owner of the lumber testified that following discovery of the theft, he had distributed flyers asking if anyone had any information about his

stolen property. Sometime after his testimony, the bailiff reported to the prosecutor that the jury wanted to see the flyer. The prosecutor immediately reported this comment to defense counsel and the court. The prosecutor then moved for a mistrial based upon juror misconduct. The defendant opposed the motion for a mistrial.

Without holding any evidentiary hearing, the court granted the state's motion, finding that the jurors had failed to heed the instruction to refrain from discussing the case prior to deliberations. The state later retried the defendant and obtained a conviction. On appeal, the defendant argued that his retrial on the same charges violated his right to be free from double jeopardy under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment.

In addressing the defendant's claims, the court first noted the following general principles concerning double jeopardy:

> Generally, the double jeopardy prohibition guards against government oppression. Specifically, the prohibition protects defendants from running the same "gauntlet" more than once. It also prohibits the State from having more than one opportunity to convict a defendant for the same crime. And, most relevant here, the double jeopardy prohibition protects the defendant's "valued right to have his trial completed by a particular tribunal."
>
> Once a jury has been empaneled and sworn, jeopardy attaches. Once jeopardy has attached, the court must determine whether a retrial is barred.

State v. Robinson, at 2 (citations omitted).

The court then went on to note a dichotomy between retrials occurring after mistrials requested by the defendant on the one hand, and retrials occurring after all other mistrial. Under the former, double jeopardy does not prohibit a second trial unless the prosecutor's outrageous misconduct provoked the defense into requesting a mistrial. By contrast, for all other mistrials, double jeopardy does prohibit a second trial unless the court finds that there was a "manifest necessity" for ordering a mistrial. The court held:

> In contrast, a mistrial without the defendant's consent must be based on "manifest necessity" in order to circumvent the double jeopardy prohibition. When the State seeks a mistrial over the defendant's objection, "'extraordinary and striking circumstances' must exist before the judge's discretion can come into play." The trial court must "engage in a scrupulous exercise of judicial discretion before foreclosing a defendant's valued right to have his trial completed by a particular tribunal." "In evaluating the manner in which the trial court exercised its discretion, the fundamental question is whether it acted in a precipitate or unreasoning fashion."

State v. Robinson, at 2 (citations omitted)

Applying this rule, the court of appeals found that the trial court had abused its discretion when it granted the state's motion for a mistrial because it did not hold an evidentiary hearing sufficient to determine exactly what had happened factually, and it did not determine whether or not there was a "manifest necessity" for discharging the jury. Thus, the court found the second trial barred by double jeopardy, reversed the defendant's conviction, and remanded with instructions to dismiss the charges with prejudice.

In the case at bar, the trial court's decision to discharge the jury after it had been sworn, after it heard all of the evidence, after it received instructions from the court, after it heard closing argument, and before it rendered a verdict on the charge brought against the defendant constituted a mistrial. Although the term "mistrial" does not appear to be defined in our case law, Black's Law Dictionary gives the following definition:

> **Mistrial.** An erroneous, invalid, or nugatory trial. A trial of an action which cannot stand in law because of want of jurisdiction, or a wrong drawing of jurors, or disregard of some other fundamental requisite before or during trial. Trial which has been terminated prior to its normal conclusion. The judge may declare a mistrial because of some extraordinary event (*e.g.* death of juror, or attorney), for prejudicial error that cannot be corrected at trial, or because of a deadlocked jury.

Black's Law Dictionary, page 903 (Fifth Edition 1979).

In one sense, every criminal trial in Washington state, once commenced, must terminate in one of only four ways: (1) by the defendant's plea to the charge or charges prior to the return of a verdict, (2) by the defendant's plea to an amended charge under an agreement with the prosecutor prior to the return of the verdict, (3) by the return of the verdict or verdicts and acceptance of them by the court, and (4) by a mistrial. In the case at bar, the defendant did not enter a guilty plea and the jury did not return a verdict of the charges the state brought against the defendant. Thus, when the court excused the jury, it necessarily terminated the proceeding by

a mistrial, whether is said so or not. Consequently, in the case at bar, the case terminated by a mistrial.

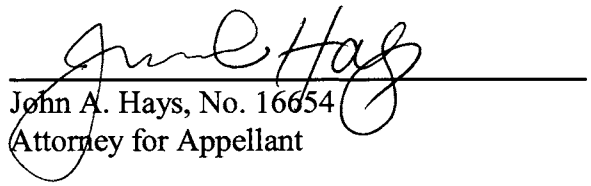
In the case at bar, as in *Robinson*, there was no manifest necessity for terminating the trial short of a verdict. The jury had not declared itself to be deadlocked on the charge to which it was deliberating, and there was no disability of a party, an attorney, or the court. Neither had there occurred any error in the trial requiring a termination of the case short of verdict. Thus, the trial court terminated the case by a mistrial without a manifest necessity. Consequently, as the court notes in *Robinson,* the double jeopardy provisions of Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, prohibit a new prosecution of the defendant. As a result, this court should reverse the defendant's conviction and remand with instructions to dismiss with prejudice.

CONCLUSION

This court should vacate the defendant's conviction and remand the case with instructions to dismiss with prejudice.

DATED this 11th day of December, 2008.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

WASHINGTON CONSTITUTION
ARTICLE 1, § 9

No person shall be compelled in any criminal, case to give evidence against himself, or be twice put in jeopardy for the same offense.

WASHINGTON CONSTITUTION
ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

RCW 10.61.010

Upon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime. Whenever the jury shall find a verdict of guilty against a person so charged, they shall in their verdict specify the degree or attempt of which the accused is guilty.

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY CM
DEPUTY

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

STATE OF WASHINGTON, **Respondent,** **vs.** **GONCALVES, NATHAN D.,** **Appellant,**	**SKAMANIA CO. NO. 08-1-00040-9** **APPEAL NO: 37766-7-II** **AFFIDAVIT OF MAILING**

STATE OF WASHINGTON)
COUNTY OF SKAMANIA) **vs.**

CATHY RUSSELL, being duly sworn on oath, states that on the **11th day of DECEMBER 2008**, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

PETER BANKS SKAMANIA COUNTY PROS ATTY P.O. BOX 790 STEVENSON, WA 98648	NATHAN D. GONCALVES - DOC#770022 WASHINGTON STATE PENITENTIARY 8 - B - 11 1313 N. 13th Ave. WALLA WALLA, WA. 99362

and that said envelope contained the following:

1. BRIEF OF APPELLANT
2. AFFIDAVIT OF MAILING

DATED this 11TH day of DECEMBER, 2008.

Cathy Russell
CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this 11TH DECEMBER, 2008.

HEATHER CHITTOCK
MY COMMISSION EXPIRES
NOVEMBER 4 2009
STATE OF WASHINGTON
NOTARY PUBLIC

Heather Chittock
NOTARY PUBLIC in and for the
State of Washington,
Residing at: KELSO/LONGVIEW
Commission expires: 11-04-2009

John A. Hays
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