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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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NO. 38909-6-II  
Cowlitz Co. Cause NO. 08-1-01035-7

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

STATE OF WASHINGTON,

Respondent,

v.

PINO JACOBO IBARRA,

Appellant.

**BRIEF OF RESPONDENT**

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*F.M. 11-16-2009*

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## **I. ANSWER TO ASSIGNMENT OF ERROR**

1. There is no error when the record definitively sets forth that although an alternate juror was sent out with the jury to deliberate, that oversight was caught immediately by the bailiff and corrected prior to the beginning of the deliberations.
2. Where the record shows that a qualified witness testified to the location of the school bus stop and another qualified witness set forth clearly for the jury, the defense and counsel, using a visual aid, exactly how and where the measurements were taken, there is substantial evidence for the jury to conclude that the drug sale took place within 1000 feet of the school bus stop.

## **II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. Does a trial court violate Washington Constitution, Article 1, Section 21, United States Constitution, Sixth Amendment, and CrR 6.5 if the court mistakenly sends out an alternate juror with the jury to deliberate and the mistake is immediately corrected prior to jury deliberations?
2. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, Section 3, and United States Constitution, Fourteenth Amendment, if it imposes a sentencing enhancement of dealing drugs within 1000 feet of a school bus stop supported by testimony of two witnesses, pointing to a map, to explain the location of the bus stop and how the measurement was taken?

## **III. STATEMENT OF THE CASE**

### ***Factual History***

For purposes of this appeal only, respondent accepts the appellant's rendition of the facts with the following exceptions.

The confidential informant, Mr. Santos-Reyes, testified that he began working for law enforcement as a confidential informant to avoid deportation and separation from his children. RP 112, RP154-55. The appellant states that the contract between the confidential informant, Mr. Santos-Reyes, and the Wahkiakum County Drug Task Force obligated him to make “multiple drug purchases with four different people.” See Brief of Appellant, p. 3. In fact, he was required to make as many contacts as necessary so that the Task Force has sufficient evidence to bring solid cases against four individuals. RP 34. It is unknown from the record how many contacts Mr. Santos-Reyes actually made during his tenure as a confidential informant.

The first contact that Mr. Santos-Reyes made with the defendant was on June 5, 2008, Mr. Santos-Reyes was carrying an audio and video device as appellant states. See Brief of Appellant, p. 4. However, the next two contacts occurring on June 13 and June 20, 2008, he only carried an audio device, not a video device as appellant states. RP 52 and 61.

In appellant’s Factual History, he states that “none of the task force officers doing surveillance was able to verify that the defendant or his brother were present on any of these occasions [the contacts with the confidential informant underlying this case].” Brief of Appellant, p. 5

(citing RP 76-91, 194-96, 203, and 212). This is an inaccurate statement of the facts.

Detective Hammer testifies to seeing the confidential informant follow a Hispanic male into 1262 - 12<sup>th</sup> Avenue. RP 44. Although he could not positively identify the male as the appellant, his testimony supported the confidential informant's testimony that the appellant met the defendant in the parking lot and he followed him into the apartment complex to purchase the drugs. RP 119 and 144. Further, Detective Watson did identify the defendant and his brother and placed them at the location of the contact on June 13, 2008. RP 193. Sergeant Tate also identified the defendant as present at the location on June 20<sup>th</sup>. RP 209:

SERGEANT TATE: "I had to shut the camera off briefly and then there was movement so I turned the camera on. You see the subject that is coming across the street wearing a white tank top and baseball cap. He is going to the Jeep. He is the subject of our case."

The Sergeant videotaped the defendant directly after the controlled buy operation. RP 210.

Contrary to Appellant's assertion that "none of the Task Force Officers saw either the defendant or his brother at 1262 12<sup>th</sup> Avenue on June 5<sup>th</sup>, June 13<sup>th</sup>, and June 20<sup>th</sup>, 2008" (Brief of Appellant, p. 5), they

actually did see one or both and were able to place the defendant at the scene.

When the defendant made the phone calls to the appellant or his brother, he showed the Task Force officers the phone number he was calling (RP 118, 142), and he put the conversation on the speaker so the officers could listen to it (RP 149). He did not know if the Task Force officers understood or spoke Spanish. RP 149. The phone conversations were recorded. RP 157.

Again, for purposes of this appeal only, the state will accept appellant's version of the facts with the above exceptions.

### ***Procedural History***

The procedural history of this matter is pivotal to this appeal. For purposes of this appeal, the state relies on the appellant's procedural history except with regard to the following portions of the record.

The state does not agree with appellant's summary of the testimony of the Longview School District Employee or Task Force Officer Hammer. The state sets the record forth below verbatim as to these individuals' testimony.

The Longview School District employee, Transportation Manager, Rick Lecker, testified to the location of the school bus stop as follows using a visual aid:

MS. HALLIN-WHITMIRE: And, are you familiar with the bus routes as part of your profession?

MR. LECKER: Yes, I am.

MS. HALLIN-WHITMIRE: And, why is that?

MR. LECKER: Part of that is for the safety of the kids, would be a large part. We do rider-ship, efficiency, all different types of aspects that would be into transporting the students.

MS. HALLIN-WHITMIRE: Okay. And, I take it then that you are familiar with the location of your bus routes and stops?

MR. LECKER: Yes, I am.

MS. HALLIN-WHITMIRE: Okay. Is there a bus stop – a school bus stop near the Community House on Broadway.

MR. LECKER: Yes, there is.

MS. HALLIN-WHITMIRE: And, where precisely is that located?

MR. LECKER: It is located at the corner of 11<sup>th</sup> and Broadway.

MS. HALLIN-WHITMIRE: And, if I were to show you this overview here – do you want to step down? If this were 12<sup>th</sup> Avenue, this is Broadway. Could you show us approximately where the bus – school bus stop would be?

MR. LECKER: The bus stop is approximately right there on the corner of 11<sup>th</sup> and Broadway near the stop sign ... on the east side of the road facing north.

MS. HALLIN-WHITMIRE: Okay. If you could resume the stand? So, that would be on the same side of the road as the Community House?

MR. LECKER: Yes, it would.

RP 162-63. As set forth above, the prosecutor showed the witness “an overview.” As he testified, he pointed to the overview. Later, during Task Force Officer Hammer’s testimony, it becomes clear that the overview is a map.

Detective Jason Hammer testified with regard to the measurement he took from the apartment building where the drug dealing was taking place to the approximate location of the school bus stop:

MS. HALLIN-WHITMIRE: Did you have occasion to take a measurement between the 12<sup>th</sup> Street apartment that we have talked about and the bus stop near the Community House?

DETECTIVE HAMMER: Yes, I did.

MS. HALLIN-WHITMIRE: And, how did you go about doing that?

DETECTIVE HAMMER: I used the wheel. That’s a wheel used by the Task Force. And, I used that wheel. I started in the northwest corner of 1262 - 12<sup>th</sup> Avenue, the building that houses the apartments up above the driving school. If I could use the map to point out –

MS. HALLIN-WHITMIRE: Yes. Just hold on a moment. We are getting this marked so that we can refer to it... I’m going to mark this for identification purposes as Number 11... If you could come down here to the map? And, if you could show us the route that you took during your measurement process.

DETECTIVE HAMMER: On the map here, 1262 – I started in the northwest corner on the sidewalk, down 12<sup>th</sup> with the measuring wheel. Over to the door just east of the main entrance to Community House, which is right here. Approximately right in this area. I did not go all the way to 11<sup>th</sup>.

MS. HALLIN-WHITMIRE: You stopped about between those two trees that we can see?

DETECTIVE HAMMER: Yes. But, approximately right over here. There is a main entrance to Community House and I went past that to a door just east of that. My impression is that the bus stop was right at Community House. I was not aware that it was actually a little bit more east.

MS. HALLIN-WHITMIRE: Do you know if you were in front of or behind the stop sign there?

DETECTIVE HAMMER: There is a stop sign right here. I was on this side of it.

MS. HALLIN-WHITMIRE: Okay.

RP 165-67. Defense Counsel cross-examined Detective Hammer:

MR. DAN MORGAN: So, you did not actually start [measuring] where the apartment was located, correct?

DETECTIVE HAMMER: I did not start upstairs. No. And, actually from the outside, I don't know exactly where within the apartment, you know, 14 is at. I don't know exactly where that is at so I just – I took what would be basically the middle of it between the two doors, the northeast corner, and I started from there.

MR. DAN MORGAN: And you walked up 12<sup>th</sup> Avenue?

DETECTIVE HAMMER: I walked straight up 12<sup>th</sup> Avenue to Hemlock. I took a right on Hemlock and went to the door just east of the main entrance of the Community House.

MR. DAN MORGAN: But, you did not actually go to where the bus stop was, correct?

DETECTIVE HAMMER: No, I did not continue all the way up there. I was of the assumption it was right where the little – I guess they are smoking areas, they are like actual bus stops. I assumed that that was where it was at. And, I went beyond that to be safe but apparently, I didn't go all the way to the intersection of 11<sup>th</sup> and

Hemlock, I guess – or, excuse me,  
Broadway.

RP 167-69. It is clear at the end of the cross-examination that the witness was mistakenly referring to Broadway Avenue as “Hemlock.” However, even though he misnamed the street, he is pointing to the map, clarifying his testimony to the jury.

Detective Hammers testified on re-direct that the total distance he measured from the apartment to the Community House was 723 feet. RP 170. He testified that he stopped short of the bus stop by one quarter of a block. RP 170.

The state also does not agree with appellant’s rendition of what occurred when the court recessed, and sets forth the record verbatim as well on this point.

After the parties rested and made their closing, the record shows that court recessed at 11:57:13 AM on January 29, 2009. On January 30, 2009 at 10:34:25 AM the court reconvened. The Commissioner addressed the court:

COMMISSIONER TABBUT: The first is through my own oversight, I let the alternate juror walk into the jury room when the – when we sent the jury originally back to deliberate. My bailiff, Diane, caught that immediately. And, we had the alternate juror step out before

deliberations – well, before  
deliberations began.

RP 259 [omitting record transcription showing when the interpreter translates]. It is clear from the record that the oversight of sending the alternate back with the jury to deliberate was caught immediately prior to any error occurring in the proceedings. Defense counsel at this point did not object to the court’s record of what happened, did not make a motion for mistrial, or in any way contradict the record established by the court. RP 259-271.

Other than the above, the state relies on appellant’s recitation of the procedural history of the case.

#### IV. ARGUMENT

##### I. THE TRIAL COURT COMMITTED NO ERROR IN SENDING THE ALTERNATE JUROR OUT WITH THE JURY BECAUSE THIS OVERSIGHT WAS CAUGHT IMMEDIATELY; *DE MINIMIS NON CURAT LEX*.

The trial court did not violate the defendant’s constitutional rights and commit reversible error in mistakenly sending the alternate juror out with the jury to deliberate. The state takes issue with appellant’s rendition of the procedural history. The record is clear that the oversight of sending the alternate juror out with the jury was corrected “immediately” per the court’s description of what happened. The Commissioner clarified for the

record that the bailiff immediately caught the court's oversight and took steps to correct it.

Appellant takes a position that necessarily requires this court to presume the trial court Commissioner misrepresented the facts and that defense counsel did not think to object or move for mistrial. Appellant goes further, alleging without any basis in the record, that "the record is clear that the alternate went into the jury room for deliberation, and that the court remained in the courtroom with the prosecutor and the defense attorney for a number of minutes before adjourning. Thus, there was at least this amount of time during which the alternate juror participated in the deliberations." Brief of Appellant, p. 11.

However, the record is clear on this point. The bailiff immediately realized there was a problem and took steps to correct it. The court immediately corrected the problem once it was brought to the court's attention. From the record, it is obvious that the alternate did not participate in the deliberations.

However, assuming *arguendo* the alternate juror was present in the jury room for "a number of minutes" as appellant describes, this error is *de minimus* and did not prejudice the process. In the case cited by appellant involving this error, where an alternate is mistakenly sent out to deliberate

with the jury, the alternate is there for hours, in fact for the duration of deliberation. *State v. Cuzick*, 85 Wn.2d 146, 150, 530 P.2d 288, 290 (1975). The court in *Cuzick* did not find prejudice to the defendant based on the fact that there were more jurors than the statute authorized, especially where there was no evidence that the alternate participated in the deliberations in any meaningful way. *Id.* at 149, 530 P.2d at 289. The court held that there is a presumption of prejudice where there is “a substantial intrusion of an unauthorized person into the jury room unless ‘it affirmatively appears that there was not and could not have been any prejudice.’” *Id.* at 150, 530 P.2d at 290 [citations omitted]. It concluded that the “visible presence of a nonjuror for the full length of deliberations,” *Id.*, causes prejudice.

In the case at bar, assuming a worst case scenario, the alternate was sent back with the jury at most “a number of minutes.” There is no evidence that the alternate was present during the deliberations. Certainly, when the court Commissioner set forth on the record that the error was noticed immediately and corrected immediately, the defense did not disagree. “A party seeking review has the burden of perfecting the record so that the appellate court has before it all the evidence relevant to the issue.” *State v. Garcia*, 45 Wn.App. 132, 140, 724 P.2d 412 (1986).

This court has addressed this issue previously and found no reversible error where the alternates did not participate in deliberations, although the alternates had been sent back with the jury prior to the reading of the verdict. *State v. Elmore*, 139 Wn.2d 250, 299, 530 P.2d 289, 318 (1999)

Finally, again assuming *arguendo* the worst case scenario, the question is whether, per *Cuzick*, what happened in the case at bar, amounts to a “substantial intrusion of an unauthorized person into the jury room” and “that there was not and could not have been any prejudice.” *See supra*. Sending an alternate back with the jury for “a number of minutes” does not constitute a “substantial intrusion,” especially where the bailiff immediately takes action to remedy the error. *Cuzick* is distinguishable from the case at bar as it involves an alternate participating for hours through the entire deliberation process. *Id.*

Again, in this case, the oversight of sending the alternate back with the jury was immediately rectified and certainly does not constitute a “substantial intrusion.” Based on the record, the defendant suffered no prejudice, and no violation of his constitutional rights. The error that occurred was *de minimus*.

**II. THERE WAS SUBSTANTIAL EVIDENCE FOR A JURY TO FIND THAT THE SENTENCING ENHANCEMENT APPLIES.**

The appellant is correct that the state's charges included a sentencing enhancement based upon RCW 69.50.435(1)(c) and RCW 9.94A.535(6), for selling or delivering a controlled substance within one thousand feet of a school bus route. The jury did find the enhancement proven beyond a reasonable doubt after hearing the testimony of the Longview School District Transportation Manager and the Drug Task Force Detective Hammer. Appellant now challenges the jury's verdict based upon an argument that substantial evidence does not support the sentencing enhancement. Based upon the record before the court, there was clearly adequate evidence for a jury to conclude beyond a reasonable doubt that the sentencing enhancement applied.

"The standard for reviewing the sufficiency of evidence in a criminal case is well settled. That standard is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt." *State v. Gentry*, 125 Wash.2d 570, 597, 888 P.2d 1105, 1123 (1995); *State v. Ortiz*, 119 Wash.2d 294, 311-12, 831 P.2d 1060 (1992); *State v. Lord*, 117 Wash.2d 829, 822 P.2d 177 (1991), cert. denied, 506

U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992); *State v. Hoffman*, 116 Wash.2d at 82, 804 P.2d 577; *State v. Jeffries*, 105 Wash.2d 398, 407, 717 P.2d 722, cert. denied, 479 U.S. 922, 107 S.Ct. 328, 93 L.Ed.2d 301 (1986); *State v. Green*, 94 Wash.2d 216, 616 P.2d 628 (1980); *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

When a Defendant challenges the sufficiency of the evidence, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the Defendant. *State v. Gentry*, 125 Wash.2d 570, 597, 888 P.2d 1105, 1123 (1995); *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992); *State v. Ashcraft*, 71 Wash.App. 444, 454, 859 P.2d 60 (1993).

Further, a Defendant who claims insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn from that evidence. *State v. Gentry*, 125 Wash.2d 570, 597, 888 P.2d 1105, 1123 (1995); *Salinas*, 119 Wash.2d at 201, 829 P.2d 1068; *Ashcraft*, 71 Wash.App. at 454, 859 P.2d 60.

Thus, in the case at bar, in determining if the circumstantial or direct evidence suffices for the sentencing enhancement based upon committing a drug crime within 1,000 feet of a school bus stop, the state's evidence must be presumed true, all reasonable inferences from that

evidence apply, and the evidence must be viewed in the light most favorable to the prosecution. The penultimate question is whether any rational trier of fact could have concluded that the sentencing enhancement applies. Based upon the foregoing, the defendant's constitutional rights clearly were not violated by the application of the enhancement.

Appellant limits this challenge to the evidence to two aspects of Detective Hammer's testimony: the determination that the drug deal took place within 1,000 feet of the school bus stop because the detective's measurement was one quarter of a block short of the bus stop, and the fact that the detective mistakenly referred to Broadway Avenue as "Hemlock."

However, there is ample evidence from which a reasonable trier of fact could have concluded the drug deal took place within 1,000 feet of the school bus stop at the corner of 11<sup>th</sup> and Broadway. Appellant fails to mention a critical fact in taking issue with Officer Hammer's measurement and testimony. The officer was pointing to a map throughout his testimony, in describing how he measured the 723 feet. The map was marked for identification purposes as Number 11 and not offered into evidence. RP 165. As the detective testifies, he points to the map to describe where and how he took the measurement. RP 165-66.

"On the map here, 1262 – I started in the northwest corner on the sidewalk, down 12<sup>th</sup> with the measuring wheel. Over to the door

just east of the main entrance of Community House, which is right here. Approximately right in this area. I did not go all the way to 11<sup>th</sup>.”

RP 166. It is obvious that the detective is drawing his measuring route with his finger along the map as he is speaking, clarifying his testimony by using the map to show exactly where he measured, including the route and the start and stop point. On redirect, the detective further clarified that he stopped short of 11<sup>th</sup> Avenue with “maybe a quarter of a block to go.” RP 170. A reasonable and rational trier of fact could conclude that one quarter of a city block is less than the 277 feet remaining after the detective’s 723-foot measurement, thus, making the drug deal within 1,000 feet of the bus stop.

The role of the map is critical because during cross-examination, it becomes clear that the Detective was mistakenly referring to Broadway as “Hemlock.” RP 169, lines 1-2. However, it is clear what road he is talking about due to his pointing to the route he measured on the map as he testified on direct, his testifying to and pointing out the location of the Community House on the map, and his reference to the Community House during cross-examination.<sup>1</sup> On cross-examination the detective testified

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<sup>1</sup>The location of the Community House on Broadway was also testified to by Transportation Manager Rick Lecker (RP 162-63) and also pointed out on the map by Mr. Lecker.

that he walked straight up 12<sup>th</sup> Avenue to “Hemlock,” took a right at “Hemlock,” and went to the door just east of the main entrance of the Community House. RP 168. He continued again erroneously referring to Broadway as “Hemlock,” but then realized what he had been doing and corrected himself. RP 168-69:

“No, I did not continue all the way up there [to the bus stop]. I was of the assumption [the bus stop] was right where the little – I guess they are smoking areas, they are like actual bus stops. I assumed that that was where it was at. And, I went beyond that to be safe but apparently, I didn’t go all the way to the intersection of 11<sup>th</sup> and Hemlock, I guess – or, excuse me, Broadway.”

A reasonable and rational trier of fact could infer that the detective was mistakenly referring to Broadway Avenue as Hemlock, not only from his prior testimony and the use of the map, but also from his own express self-correction on the record.

Granting the state all reasonable inferences from that evidence, and viewing the evidence in the light most favorable to the prosecution, it is clear from the record that substantial evidence existed to apply the sentencing enhancement and there was no violation of the appellant’s constitutional rights.

## V. CONCLUSION

This court should deny the defendant’s appeal because no error occurred involving the alternate juror. The court’s oversight was

immediately caught and corrected. Alternatively, any error involving the alternate juror was *de minimus*, harmless, and not prejudicial to the defendant. Further, appellant did not meet his burden to show that substantial evidence did not exist for the sentencing enhancement.

Granting the state all presumptions according to the proper standard of review, the record demonstrates ample evidence from which the jury could find beyond a reasonable doubt that the drug deal occurred within 1,000 feet of a school bus stop. The defendant's constitutional rights were not violated and his conviction and sentence should stand.

Respectively submitted this 16<sup>th</sup> day of November, 2009.

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