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COURT OF APPEALS
DIVISION II

NO. 39831-1-II

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COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON
BY [Signature]
DEPUTY

STATE OF WASHINGTON,

Respondent,

vs.

THOMAS E. MORGAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COURT
The Honorable Carol Murphy, Judge
Cause No. 09-1-00886-1

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in not taking count II, conspiracy to intimidate a witness, from the jury for lack of sufficiency of the information to allege all of the elements of the offense.
02. The trial court erred in instructing the jury that it must be unanimous before returning a verdict on the special verdict form finding that Morgan delivered a controlled substance to a person within one thousand feet of a school bus route designated by a school district.
03. The trial court erred in permitting Morgan to be represented by counsel who provided ineffective assistance by failing to object to the court's instruction 25 that it must be unanimous before returning a verdict on the special verdict form and by failing to propose an accurate instruction and special verdict form.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether a conviction for conspiracy to intimidate a witness pursuant to an information that fails to allege all of the elements of the offense must be reversed and dismissed?
[Assignment of Error No. 1].
02. Whether the trial court erred in instructing the jury that it must be unanimous before returning a verdict on the special verdict form finding that Morgan delivered a controlled substance to a person within one thousand feet of a school bus route designated by a school district?
[Assignment of Error No. 2].
03. Whether the trial court erred in permitting Morgan to be represented by counsel who provided

ineffective assistance by failing to object to the court's instruction 25 that it must be unanimous before returning a verdict on the special verdict form and by failing to propose an accurate instruction and special verdict form? [Assignment of Error No. 3].

C. STATEMENT OF THE CASE

01. Procedural Facts

Thomas E. Morgan (Morgan) was charged by second amended information filed in Thurston County Superior Court on June 29, 2009, with delivery of methamphetamine within 1,000 feet of a school bus route stop, count I, and conspiracy to intimidate a witness, count II, contrary to RCWs 69.50.401(2)(b), 69.50.435(1), 9A.72.110(1)(a) and 9A.28.040. [CP 8].

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. Trial to a jury commenced on August 12, the Honorable Carol A. Murphy presiding. Neither exceptions nor objections were taken to the jury instructions. [RP 273].¹

The jury returned verdicts of guilty as charged, including enhancement, Morgan was sentenced within his standard range and timely notice of this appeal followed. [CP 48-50, 75-85].

¹ All references to the Report of Proceedings are to the transcripts entitled Jury Trial Volumes I-III.

02. Substantive Facts

02.1 Count I: Delivery Methamphetamine

On May 13, 2009, the police employed a confidential source, Sheri Harrington, to conduct a controlled buy² of methamphetamine [RP 59] from Morgan [RP 19-23, 28, 31-33, 83-84, 90, 94, 97-99, 102-04, 136, 207-08], which occurred within 1,000 feet of a school bus route stop designated by a school district. [RP 173-76, 205]. While the police observed the transaction, they were not close enough to see exactly what was exchanged between Morgan and Harrington. [RP 138, 179, 181, 218-19]. Morgan was arrested five days later. [RP 147, 149, 244].

02.2 Count II: Conspiracy to Intimidate a Witness

While in custody pending trial, Morgan engaged in a series of telephone calls in which he had discussions about finding the confidential source, who was a prospective witness, stressing how important it was that she be contacted, at one point saying he didn't care if someone has to "fuck her down." [RP 162, 165, 169].

² In a "controlled buy," an informant is given marked money, searched for drugs, and observed while sent into the specified location. If the informant "goes in empty and comes out full," his or her assertion that drugs were available is proven, and his or her reliability confirmed. State v. Lane, 56 Wn. App. 286, 293, 786 P.2d 277 (1989) (citing 1 W. LaFave, Search and Seizure SS 3.3(b), at 512 (1978)).

D. ARGUMENT

01. A CONVICTION FOR CONSPIRACY
TO INTIMIDATE A WITNESS PURSUANT TO
AN INFORMATION THAT FAILS TO ALLEGE
ALL OF THE ELEMENTS OF THE OFFENSE
MUST BE REVERSED AND DISMISSED.

The constitutional right of a person to be informed of the nature and cause of the accusation against him or her requires that every material element of the offense be charged with definiteness and certainty. 2 C. Torcia, Wharton on Criminal Procedure Section 238, at 69 (13th ed. 1990). In Washington, the information must include the essential common law elements, as well as the statutory elements, of the crime charged in order to appraise the accused of the nature of the charge. Sixth Amendment; Const. art. 1, Section 22 (amend. 10); CrR 2.1(b); State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991). Charging documents that fail to set forth the essential elements of a crime are constitutionally defective and require dismissal, regardless of whether the defendant has shown prejudice. State v. Hopper, 118 Wn.2d 151, 155, 822 P.2d 775 (1992). If, as here, the sufficiency of the information is not challenged until after the verdict, the information “will be more liberally construed in favor of validity....” Kjorsvik, 117 Wn.2d at 102. The test for the sufficiency of charging documents challenged for the first time on appeal is as follows:

- (1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was

nonetheless actually prejudiced by the inartful language which caused a lack of notice?

Kjorsvik, 117 Wn.2d at 105-06.

It is not fatal to an information that the exact words of the statute are not used; it is instead sufficient “to use words conveying the same meaning and import as the statutory language.” State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). The information must, however, “state the acts constituting the offense in ordinary and concise language....” State v. Royse, 66 Wn.2d 552, 557, 403 P.2d 838 (1965). The question “is whether the words would reasonably appraise an accused of the elements of the crime charged.” Kjorsvik, 117 Wn.2d at 109.

The primary purpose (of a charging document) is to give notice to an accused so a defense can be prepared. (citation omitted) There are two aspects of this notice function involved in a charging document: (1) the description (elements) of the crime charged; and (2) a description of the specific conduct of the defendant which allegedly constituted the crime.

Auburn v. Brooke, 119 Wn.2d 623, 629-30, 836 P.2d 212 (1992).

RCW 9A.28.040(1) provides:

A person is guilty of criminal conspiracy when, with the intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.

Morgan was charged with conspiracy to intimidate a witness in the second amended as follows:

In that the defendant, THOMAS EUGENE MORGAN, in the State of Washington, on or between May 18, 2009 and June 16, 2009, did conspire by use of a threat directed against a current or prospective witness, attempted to influence the testimony of that person, and took a substantial step toward commission of this crime.

[CP 8].

This information failed to appraise Morgan of all of the elements of conspiracy to intimidate a witness. The information did not alleged that Morgan acted with the “intent that conduct constituting a crime be performed” or that “he ... agree(d) with one or more persons to engage in or cause the performance of such conduct...” “(S)ince both charging documents and jury instructions must identify the essential elements of the crime for which the defendant is charged [information] and tried [jury instructions](,)” State v. McCarty, 140 Wn.2d 420, 426 n.1, 998 P.2d 296 (2000), the information is defective, and the conviction obtained on this charge must be reversed and dismissed. State v. Kitchen, 61 Wn. App. 911, 812 P.2d 888 (1991). Morgan need not show prejudice, since Kjorsvik calls for a review of prejudice only if the “liberal interpretation” upholds the validity of the information, which it does not in this case. See State v. Kjorsvik, 117 Wn.2d at 105-06.

02. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT IT MUST BE UNANIMOUS BEFORE RETURNING A VERDICT ON THE SPECIAL VERDICT FORM FINDING THAT MORGAN DELIVERED A CONTROLLED SUBSTANCE TO A PERSON WITHIN ONE THOUSAND FEET OF A SCHOOL BUS ROUTE STOP DESIGNATED BY A SCHOOL DISTRICT.

As instructed in Court's Instruction 25, the jury was told that it had to be unanimous to return a verdict on the special verdict form.

All twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

[CP 46-47].

But this is incorrect. As explained in State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), where, as here, the trial court had instructed the jury that unanimity was required to answer "no" on the special verdict, our Supreme Court vacated two school zone drug offense sentencing enhancements. Bashaw is directly on point, with the result that the 24-month enhancement must be vacated in this case and the matter remanded for resentencing.

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03. MORGAN WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO OBJECT TO THE COURT'S INSTRUCTION 25 THAT IT MUST BE UNANIMOUS BEFORE RETURNING A VERDICT ON THE SPECIAL VERDICT FORM AND BY FAILING TO PROPOSE AN ACCURATE INSTRUCTION AND SPECIAL VERDICT FORM.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, See State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)).

Should this court find that trial counsel waived the issue set forth in the preceding section of this brief relating to the trial court instructing the jury that it must be unanimous before returning a verdict on the special verdict form, then both elements of ineffective assistance of counsel have been established.

First, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to object to Court's Instruction 25 and the accompanying special verdict form for the reasons set forth in the preceding section.

Second, the prejudice is self-evident. Again, as set forth in the preceding section, had counsel properly objected and/or proposed an accurate instruction and special verdict form, there is every likelihood that the court would have upheld the objection and the jury would have been correctly instructed and would have issued a verdict on the special verdict form that would not be subject to speculation, for "when unanimity is

required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result.” State v. Bashaw, 169 Wn.2d at 148.

E. CONCLUSION

Based on the above, Morgan respectfully requests this court to reverse convictions consistent with the argument presented herein.

DATED this 29th day of October 2010.

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STATE OF WASHINGTON
BY _____
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CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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DATED this 29th day of October 2010

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