

No. 33821-5-III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

FILED  
June 7, 2016  
Court of Appeals  
Division III  
State of Washington

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

MICHAEL LOUIS VILLANUEVA,  
Defendant/Appellant.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT  
Honorable Michael McCarthy, Judge

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BRIEF OF APPELLANT

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**A. ASSIGNMENT OF ERROR**

The evidence was insufficient to prove appellant delivered a controlled substance within 1,000 feet of a school bus route stop.

*Issue Pertaining to Assignment of Error*

Was the evidence insufficient for any rational trier of fact to find an essential element of the special verdict regarding the school bus route stop enhancement, where there was no proof of the seating capacity of the school buses?

**B. STATEMENT OF THE CASE**

In May 2014 police conducted two controlled buys of methamphetamine at 9-1/2 South D Street, Toppenish, Washington. RP 72–93, 132–39. 52-year-old appellant Michael Louis Villanueva had moved alone to the studio apartment in December 2013 and was thereafter joined by his girlfriend Vera Salinas. RP 176, 178–79, 184–85. In the first buy, the confidential informant (CI) approached Mr. Villanueva as he sat in a van parked outside and was directed to the apartment where Ms. Salinas was present. RP 133–34. In the second buy, the CI again approached Mr. Villanueva as he sat in a van parked outside and was directed to the fenced yard where Ms. Salinas was standing. RP 136–39.

In July 2014 police obtained and executed a search warrant at the residence. Mr. Villanueva, who was sitting in a van parked outside, and Ms. Salinas, who was inside, were both detained. In the apartment police found a small baggie containing methamphetamine under the pillow on the bed, two pipes used to smoke meth, and dominion and control paperwork for both suspects. RP 95–105, 118. Mr. Villanueva was charged with delivery of a controlled substance based on the second buy and possession of a controlled substance stemming from the search. CP 10; RP 7–8.

Following a jury trial in Yakima County Superior Court, Mr. Villanueva was convicted of one count of delivering methamphetamine within 1,000 feet of a school bus route stop and one count of possessing a controlled substance—methamphetamine. CP 75–77, 176.

To prove the deliveries occurred within 1,000 feet of a school bus route stop the state offered the testimony of Blaine Thorington, transportation director for the Toppenish School District, and Mike Martian, Geographic Information Systems (GIS) manager for Yakima County. RP 165–68, 169–72.

The special verdict relied upon for the school bus stop enhancement asked in relevant part whether Mr. Villanueva delivered a

controlled substance “within one thousand feet of a school bus route stop designated by a school district.” CP 77.

The jury was given the following instructions to guide them in answering the special verdict form:

#### INSTRUCTION NO. 20

... You will-also be given one special verdict form for the crime charged in Count 1. If you find the defendant not guilty of this crime, do not use the .special verdict form. If you find the defendant guilty of this crime, you will then use the special verdict form and fill in the blank[] with the answer “yes" or "no" according to the decision you reach. 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 agree that the answer to the question is “no,” you must fill in the blank with the answer “no.” If after full and fair consideration of the evidence you are not in agreement as to the answer, then do not fill in the blank for that question.

CP 73.

#### INSTRUCTION NO. 19

For the purpose of the Special Verdict Form, the following definitions apply.

The term “school” means a school or institution of learning having a curriculum below the college or university level as established by law and maintained at public expense.

The term "school" also means a school maintained at public expense in a school district and carrying on a program from kindergarten through the twelfth grade or any part thereof, including vocational education courses.

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

owned and operated by any school district or privately owned and operated under contract or otherwise with any school district for the transportation of students. The term does not include buses operated by common carriers in the urban transportation of students such as transportation of students through a municipal transportation system.

CP 71.

Mr. Villanueva had no felony criminal history. The court imposed a base sentence of 13 months on count 1 and a concurrent sentence of 6 months on count 2, for a total sentence of 37 months that included the 24 month special verdict enhancement on count 1. RP 80–81.

Mr. Villanueva timely appealed. CP 94.

## C. ARGUMENT

**1. The evidence was insufficient for any rational trier of fact to find an essential element of the special verdict regarding the school bus route stop enhancement, where there was no proof of the seating capacity of the school buses.**

Due process requires the state to prove every element of an offense beyond a reasonable doubt. U. S. Const. amend. XIV; *In re Matter of Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A conviction must be reversed for insufficient evidence where no reasonable fact finder would have found all the elements of the offense proven

beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed 2d 560 (1979); *State v. C.G.*, 150 Wn.2d 604, 610, 80 P. 3d 594 (2003). The same is true of enhancements. *Blakely v. Washington*, 542 U.S. 296, 124 S Ct. 2531, 2538, 159 L Ed.2d 403 (2004).

The state must prove each element of the enhancement beyond a reasonable doubt. *State v. Hennessey*, 80 Wn. App. 190, 194, 907 P.2d 331 (1995). On review, the evidence is viewed in the light most favorable to the state, *id.*, drawing all reasonable inferences in favor of the state. *State v. Salinas*, 119 Wn.2d 192, 201–02, 829 P.2d 1068 (1992).

Under RCW 9. 94A.533(6):

(6) An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69. 50 RCW if the offense was also a violation of RCW 69. 50.435 or 9. 94A.B27. All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

RCW 69.50.435(1)(c) orders an enhanced penalty for persons selling drugs “within 1,000 feet of a school bus route stop designated by the school district.”

RCW 69.50.435(6)(c) defines "school bus route stop" as any stop designated by a school district. In addition, the jury was instructed in pertinent part that “school bus” means:

a vehicle that meets the following requirements: (1) has a seating capacity of more than ten persons including the driver ...

Instruction No. 19, at CP 71. Instruction 19 was based on Washington pattern jury instruction 50.63. *See* 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 50.63, at 1000 (3d ed.2008). The instruction combines the statutory definition of “school bus” with a definition contained in administrative regulations published by the superintendent of public instruction. *Id.*

The law of the case doctrine is not limited in its application to elements instructions. It provides more generally (and has, since 1896) that “whether the instruction in question was rightfully or wrongfully given, it was binding and conclusive upon the jury, and constitutes upon this hearing the law of the case.” *Pepperall v. City Park Transit Co.*, 15 Wash. 176, 180, 45 P. 743, 46 P. 407 (1896), *overruled in part on other grounds by Thornton v. Dow*, 60 Wn.2d 622, 111 P. 899 (1910). The doctrine extends to definition instructions. *See Scoccolo Constr., Inc. v. City of Renton*, 158 Wn.2d 506, 522–23, 145 P.3d 371 (2006) (Madsen, J., concurring) (narrow and debatable definition of “acting for” accepted in instructions was law of the case); *Englehart v. Gen. Elec. Co.*, 11 Wn. App. 922, 923, 527 P.2d 685 (1974) (definition of accidental death was law of the case, no error having been assigned). If insufficient evidence is

introduced at trial to prove the added element, reversal is required. *State v. Lee*, 128 Wn.2d 151, 164, 904 P.2d 1143 (1995).

The jury was instructed that a “school bus” as used in the instructions must have a seating capacity of more than 10 persons including the driver. Instruction 19 was the only substantive instruction given to the jury to guide its determination whether the state met its burden of proof, beyond a reasonable doubt, that Mr. Villanueva delivered a controlled substance within the required proximity of a designated “school bus” stop. The state raised no objection to the instruction, which thereby became the law of the case. No evidence was presented regarding the seating capacity of buses stopping within 1,000 feet of the delivery transaction. Reversal of the school bus stop enhancement is required. Retrial following reversal for insufficient evidence is “unequivocally prohibited” and dismissal is the remedy. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

## **2. Appeal costs should not be imposed.**

Mr. Villanueva was sentenced to 37 months of confinement inclusive of the protected zone enhancement. CP 80–81. The evidence showed he was 52 years old, had prior construction jobs but was currently

unemployed. RP 178. For purposes of defending against this prosecution, Mr. Villanueva qualified for and was given a court-appointed attorney. CP 3. The trial court found Mr. Villanueva continued to be indigent, and was unable to pay for the expenses of appellate review and entitled to appointment of appellate counsel at public expense. CP 91–93. If Mr. Villanueva does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. *See State v. Sinclair*, \_\_ P.3d \_\_, 2016 WL 393719 (Wash. Ct. App. Jan. 27, 2016 (instructing defendants on appeal to make this argument in their opening briefs), petition for review filed February 18, 2016 (No. 92796-1)).

RCW 10.73.160(1) states the “court of appeals ... may require an adult ... to pay appellate costs.” (Emphasis added) “[T]he word ‘may’ has a permissive or discretionary meaning.” *Staats v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the state’s request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose LFOs. *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a “case-by-case” analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” *Id.* Accordingly, Mr. Villanueva’s

ability to pay must be determined before discretionary costs of appeal are imposed. The trial court found an ability to pay “some of the costs” when imposing legal financial obligations, yet found continued indigency warranted authorizing Mr. Villanueva to seek review wholly at public expense. RP 275–76; CP 91–93. Without a basis to determine Mr. Villanueva has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

**D. CONCLUSION**

For the reasons stated, the special verdict should be stricken and the sentence reduced accordingly. If Mr. Villanueva is not deemed the substantially prevailing party on appeal, this Court should decline to assess appeal costs should the state ask for them.

Respectfully submitted on June 7, 2016.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on June 7, 2016, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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