

FILED
Court of Appeals
Division III
State of Washington
8/16/2018 10:48 AM

NO. 35428-8-III

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JAMIE HUGDAHL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITTITAS COUNTY

The Honorable Scott R. Sparks, Judge

AMENDED BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court did not err by giving Instruction 9 as it was patterned after an approved Washington Pattern Jury Instruction (WPIC) and was a correct statement of the law. CP 23 (to-convict instruction for delivery of heroin).
2. The trial court did not err by giving Instruction 10 as it was patterned after an approved WPIC and was a correct statement of the law. CP 24 (to-convict instruction for delivery of methamphetamine).
3. The trial court did not err by giving Instruction 11 as it was patterned after an approved WPIC and was a correct statement of the law. CP 25 (to-convict instruction for delivery of Alprazolam).
4. The trial court did not err by giving Instruction 12 as it was patterned after an approved WPIC and was a correct statement of the law. CP 26 (to-convict instruction for delivery of MDA)

5. The trial court did not err by giving Instruction 20 the approved WPIC for the entrapment defense as it was a correct statement of the law, although the trial court could have refused to so instruct given the lack of evidence to support the defense presented by Hugdahl. CP 33 (entrapment defense).
6. Because the trial court instructed the jury on the defense of entrapment using the approved WPIC for such defense, and because the Appellant was allowed to present her theory of the case, she was not deprived of her right to present, and to have jurors consider, her entrapment defense.
7. Appellant was not deprived of her right to effective assistance of counsel based upon a failure to object to the jury instructions in this case. Because the jury instructions were properly given, there was nothing to object to.
8. Because the charging documents in this case were complete and included the necessary elements to apprise the Appellant of the charges against her to

allow her to prepare a defense, the Appellant was not deprived of her constitutional right to adequate notice of the criminal allegations against her.

Response to Issues Pertaining to Assignments of Error

Appellant was tried on four unlawful drug delivery charges, one each for heroin, methamphetamine, Alprazolam and MDA. Appellant testified, admitting she delivered the drugs, but claimed she was entrapped by law enforcement into doing so. A jury found Appellant guilty.

1. Appellant was not deprived of her constitutional right to present and have jurors consider her entrapment defense to negate the evidence and charges brought by the state. The jury was instructed on said defense and it was argued by both parties with agreement as to the correct statement of the law.
2. Appellant was not deprived of her constitutional right to present and have jurors consider her entrapment defense - the jury was instructed on said defense and it was argued by both counsel. The trial court

provided a standard to convict WPIC instruction as to each count, which included standard language on their duty to convict if all elements were proved beyond a reasonable doubt, which instruction also included language that if after weighing all of the evidence there was a reasonable doubt it would be their duty to return a verdict of not guilty. This was a correct statement of the law. The court also instructed on the entrapment defense using an approved WPIC, and this also was a correct statement of the law. Appellant's apparent position that the "To Convict" standard WPICs should have been modified to include language that there was no duty to convict the appellant if they agreed with her proposed entrapment defense is not supported by the law. Instruction 20, the entrapment defense instruction indicated that: "If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty."

3. Because there was no instructional error, Appellant's assertion that counsel should have objected to the

instructions is misplaced. Because there was no basis for objecting to the proposed instructions, there can be no deficient performance and no finding of ineffective assistance of counsel. The only possible error observed as to instructing the jury is that the Court erred on the side of caution in even giving the entrapment defense based upon the facts of this case.

4. The Appellant was not deprived of her constitutional right to adequate notice of the criminal allegations against her based upon a scrivener's error that was not caught and corrected. Appellant's assertion as to why no defense to the aggravator was mounted is unpersuasive given the context of the case. Appellant did not seek a Bill of Particulars from the state at a time when such could have been addressed; did not move for dismissal at a time when the error could have been corrected; and counsel's cross examination of the defense witness indicated that sufficient notice had been presented by the charging documents.

B. STATEMENT OF THE CASE:

1. Procedural Facts:

Appellant's statement of procedural facts is mostly sufficient, but is in need of some augmentation.

Respondent has reviewed the Court file and has located no document or court notation indicating that the Appellant ever requested a Bill of Particulars in this matter. Appellant did file an additional Demand for Discovery on June 8, 2017 CP 26 but that related to obtaining information concerning the confidential informant. Respondent has reviewed the Court file and has located no document or court notation indicating that the Appellant ever moved to dismiss the charging for school bus route stop enhancements based upon defective charging, missing elements, or lack of notice of the charges levelled.

2. Substantive Facts:

Appellant's statement of Substantive Facts is mostly sufficient, and mostly accurate, although some facts are incorrectly stated. In Appellant's statement of facts, on page 6, it is stated that Litzenberg (confidential informant Steven Litzenberg) got out and returned to Bean and Callier (EPD Detectives),

and Hugdahl and the other man drove away. RP 63-64, 158. (emphasis and clarification of parties added).

A review of the report of proceedings indicates that there was no testimony concerning Hugdahl and the other man driving away by any witness, and certainly not located on RP 63-64 or 158. (Litzenberg is the confidential informant whose first name is Steven. Bean and Callier are Ellensburg Police Department Detectives, with first names John and Klifford, respectively).

The Confidential Informant's credibility, mental capabilities, and motive were challenged consistently through the trial by defense counsel (and to an extent by the deputy prosecutor's questions as well), including a focus upon his alleged violent temperament that fit with the argument counsel was building for entrapment.

Relevant to the time when the drug deals were going down, Detective Bean oversaw/ overheard communications between Litzenberg and Appellant to set up a drug transaction and never heard Litzenberg

threaten Appellant. RP 54-55. And Litzenberg although acknowledging some resentment and anger over treatment of him by some of Appellant's family and Appellant herself, indicated that he thought their relationship at the time was good; that he never threatened her or promised her or coerced her, and believes that this was a correct understanding reflected by fact that they hung out on January 20, 2017. RP 115 – 117. Litzenberg also discussed that fact that he and Appellant shared a fairly lengthy history together of being friends, sharing drugs together and trading and selling drugs back and forth. RP 101-102.

The jury also had information that Litzenberg might not be the only person that Appellant was selling drugs to during this time frame, which would detract from her entrapment defense. The testimony indicated that Appellant preferred to conduct her drug deals at Safeway and that during the first sale to Litzenberg, another individual was present in the car, and that it appeared he has been summoned/motioned

over by appellant. RP 103, 140 – 141; 153-158.

Litzenberg testified that he believed the guy was there to buy drugs, and that he saw evidence of Appellant having items indicative of drug dealing. RP 108 – 109.

And while Appellant testified that she was scared of Litzenberg and what he might do, we also had the very bizarre cat and mouse chase where Appellant arrived at Safeway, Litzenberg got in her car, and then she proceeded to take over and drive through a residential neighborhood, making various different turns and twists, and then return to Safeway where the transaction was completed. RP 85-87, 165-168. Was she scared or concerned about the CI Litzenberg, or someone/something else?

C. ARGUMENTS:

1. **Appellant was not deprived of her constitutional right to present and have jurors consider her entrapment defense to negate the evidence and charges brought by the state. The jury was instructed on said defense and it was argued by both parties with agreement as to the correct statement of the law.**

The appellant has succeeded in crafting an argument that causes one to pause, to scratch their head, and read lots of cases to see if any of the cases cited support the contention levelled. Having read all of the cases cited by counsel, there is not a single case supporting her claim that the trial court was under an obligation to re-write the Washington Pattern Criminal Jury Instructions (WPICs) in the fashion requested on appeal. If appellant's assertions are to stand as valid, there would never be stand-alone to-convict instructions. In every case involving a defense, per the argument made, a proper, approved WPIC to-convict instruction would have to be re-written, to eliminate the language as to their duty to convict, replacing it with the applicable defense within the body of the to-convict instruction. This is simply not the law in our state and it is why counsel can point to no case reaching such a decision.

This commonsense understanding is demonstrated throughout the entirety of the pattern jury instructions. For each crime there are

definitional instructions that are to be given, there are instructions on the elements, and there are instructions about what must be proven to convict. These instructions are combined with concluding instructions that change depending upon numbers of counts, verdict forms and special verdict forms. And, if a defendant supports a specific defense in a particular case there are pattern jury instructions for most every type of defense.

All of these instructions provide guidance through notes on their usage. Thus, if a defense is available, such as the negation of an enhancement under the drug statutes that provides a defense if the delivery took place in a private residence, with no one under age 18 and there was no profit, there are notes explaining which verdict forms to use, what defense forms to use, etc. This is a common practice in every setting, but in none of the notes is it suggested that you combine language from one WPIC with another WPIC, or that you would add the language from a defense to the language of a to-convict instruction.

It is also true that the WPICs are replete with directives concerning the fact that all instructions are important, that all must be considered. In this case the standard WPIC 1.02 was given, indicating that:

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

The jurors were also instructed to carefully review the evidence and instructions in Instruction 21 which also comes from a WPIC.

The trial court provided a standard to convict WPIC instruction as to each count, which included standard language on their duty to convict if all elements were proved beyond a reasonable doubt, which instruction also included language that if after weighing all of the evidence **there was a reasonable doubt** it would be their duty to return a verdict of not guilty. This was a correct statement of the law.

The court also instructed on the entrapment defense, Instruction 20, using the approved language

from WPIC 18.05, and this also was a correct statement of the law. Instruction 20, the entrapment defense instruction indicated that: “If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.” The telling part about the Entrapment Defense is that it comes into play only if the jury finds that the crime has been committed. The Defense is a negation of the crime, or stated differently, an excuse for committing the crime, and the burden of proving the defense lies with the defendant.

The following is a listing of the jury instructions given, their corresponding WPIC number and Clerk Paper number should the Court desire to review the interplay of these and for a comparison of notes and interactions of the WPICs to one another:

Instruction 7; WPIC 50.05 Delivery of a Controlled Substance – Definition; CP;
Instructions 9 - 12: WPIC 50.06 Delivery of Controlled Substance – Elements/To convict; CP 23 -26
Instruction 13; WPIC 50.07 Deliver – Definition; CP 27;
Instructions 14 – 17; WPIC 50.50 Controlled Substance – Definition; CP 28 - 31;

Instruction 18; WPIC 10.02 Knowledge –
Knowingly – Definition; CP 32;
Instruction 19; WPIC 50.62 School –
Definition; CP 33;
Instruction 20; WPIC 18.05 Entrapment
Defense; CP 34;
Instruction 21; WPIC 151.00 Basic
Concluding Instruction; CP 35;
Instruction 22; WPIC 50.60 Enhanced
Sentence – Controlled Substance Violations
Under RCW 69.50.435 – No Statutory
Defense - Concluding Instruction; CP 36;
Verdict Form A; WPIC 180.01 Verdict Form
A – General; CP 37;
Verdict Form A-1; WPIC 50.61 Enhanced
Sentence – Controlled Substance Violations
Under RCW 69.50.435 – No Statutory
Defense – Special verdict; CP 38;
Verdict Form B; WPIC 180.01 Verdict Form
A – General; CP 39;
Verdict Form B-1; WPIC 50.61 Enhanced
Sentence – Controlled Substance Violations
Under RCW 69.50.435 – No Statutory
Defense – Special verdict; CP 40;
Verdict Form C; WPIC 180.01 Verdict Form
A – General; CP 41;
Verdict Form C-1; WPIC 50.61 Enhanced
Sentence – Controlled Substance Violations
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Defense – Special verdict; CP 42;
Verdict Form D; WPIC 180.01 Verdict Form
A – General; CP 43; and
Verdict Form D-1; WPIC 50.61 Enhanced
Sentence – Controlled Substance Violations
Under RCW 69.50.435 – No Statutory
Defense – Special verdict; CP 44.

Due process requires that jury instructions (1)
allow the parties to argue all theories of their

respective cases supported by sufficient evidence, (2) fully instruct the jury on the defense theory, (3) inform the jury of the applicable law, and (4) give the jury discretion to decide questions of fact. State v. Koch, 157 Wn. App. 20, 33, 237 P.3d 287 (2010). Instructions are sufficient when, read as a whole, they accurately state the law, are not misleading, and permit counsel to argue the case satisfactorily to the jury. State v. Mark, 94 Wn.2d 520, 526, 618 P.2d 73 (1980); State v. Ortiz, 52 Wn. App. 523, 530 762 P.2d 12 (1988); State v. Teal, 152 Wn.2d 333, 339, 96 P.3d 974 (2004). Juries are presumed to follow the instructions provided by the court. State v. Allen, 182 Wn.2d 364, 380 341 P.3d 28 (2015). Jury instructions must be considered in their entirety to determine if there is reversible error in a specific instruction. State v. Schulze, 116 Wn.2d 154, 167, 804 P.2d 566 (1991). There is no error if the instructions, when viewed as a whole, adequately explain the law and enable the parties to argue their theories of the case. Schulze, 116 Wn.2d at 168.

Appellant requested and received a proper instruction on the Entrapment Defense. It is possible that had counsel for the Respondent argued the evidence a bit more stridently, that the trial court would have been justified in exercising their discretion to disallow the defense. I say this based upon the evidence of deliveries outside of the controlled buys, including testimony by the C.I. to buys made before the controlled buys, as well as the testimony of the officers and the C.I. that an additional drug transaction was completed by the Appellant in the Safeway parking lot when an individual from a different car got in with the C.I. and appeared to also purchase drugs. However, then we would have been arguing about not giving the instruction.

The Appellant with instruction in hand was given free reign to question witnesses to set up the testimony to argue the Entrapment Defense and did in fact argue the defense. The instructions fully instructed the jury on the defense theory, informed

the jury of the applicable law, and gave the jury discretion to decide questions of fact. The instructions, when read as a whole accurately stated the law, were not misleading, and permitted counsel to argue Appellant's case satisfactorily to the jury.

Counsel appears to claim that the instructions were erroneous because they were inconsistent. A trial court's instructions to the jury should not contradict each other. State v. Walden, 131 Wn.2d 469, 478, 932 P.2d 1237 (1997). Appellant cites to other cases for the proposition that inconsistent decisional standards require reversal, and that such errors cannot be cured with instruction that all instructions are to be considered as a whole. *Citations Omitted*. Appellant then extrapolates to another degree to indicate that because of these inconsistencies, the instructions are erroneous and rise to the level of constitutional error.

The problem is that in the cases cited by Appellant, the statements of law found in the instructions were incorrect, either as written/drafted,

or in the aggregate of their use. That is not the case presently before the court. Here, Appellant claims that giving a proper to-convict instruction from the WPICs with its to convict language conflicts with the defense instruction, also properly taken from the WPICs that requires the jury to return a verdict of not guilty if they find the defense was established.

This is not the type of inconsistency referred to in the case law. This is the type of inconsistency that exists every time a defense is raised in a criminal prosecution. In this case, the jury was accurately instructed on the elements of the crime that the state had to prove in order to convict the Appellant. The jury was also properly instructed that if the Appellant carried her burden and proved the defense that they were to return a verdict of not guilty. If this were a homicide case, that jury would have to properly be instructed on the elements of the crime to convict for that crime, but if a defense of justifiable homicide were put forward, and they found the defendant met their burden, they would have to return a verdict of

not guilty. There will always be this type of inconsistency in a case where the defendant attempts to plead and prove a defense.

The jury was properly instructed on the correct and applicable law in this case. Both sides requested and received jury instructions that allowed them to argue their respective cases. There is no legal support for the position advocated by the Appellant. The Appellant cannot point to any specific instruction that was not based upon an approved WPIC. Appellant has advocated for a novel reading of the case law to request this court to create a new responsibility upon defense counsel to anticipate the need to re-write approved WPICs any time they desire to present evidence and request a jury finding on a proposed defense. This is not supported by the law and this court should not entertain extending the law in this direction. If the law was to be extended in this direction, and a clever attorney on appeal can come up with an argument on how proposed instructions should have been written, then we have opened

Pandora's box, as defense counsel will have to anticipate the possible appellate arguments and seek to craft new untested, unvetted instructions in every future case.

2. **Because there was no instructional error, Appellant's assertion that counsel should have objected to the instructions is misplaced. Because there was no basis for objecting to the proposed instructions, there can be no deficient performance and no finding of ineffective assistance of counsel.**

The expansion of the proposed request for clairvoyance on the part of trial counsel continues with this alleged error. It flows as follows:

Defense counsel should have known from the ether of the blowing winds of Ellensburg that the WPICs were flawed and that he should object to the giving of the to-convict instructions that did not combine the Entrapment Defense Instruction;

Had defense counsel made such an objection, he could have retained the Entrapment Defense, but by not objecting he gave up the ability to argue the Entrapment Defense;

There was no tactical reason to not object to the proposed instructions and therefore counsel's performance was ineffective;

Because counsel was ineffective and did not object, this court may decide that the issue of instructions may not be properly raised on appeal, which further shows the ineffectiveness of counsel;

Because there is an argument that the error was not preserved for appellate review because it was not raised by counsel, we are raising ineffective assistance of counsel because that is an issue of constitutional magnitude that may be considered on appeal for the first time.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to effective assistance of counsel. State v. Estes, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). We review ineffective assistance of counsel claims de novo. Estes, 188 Wn.2d at 457. To prevail on an ineffective assistance claim, the defendant must show both that (1) defense counsel's representation was deficient and (2) the deficient representation prejudiced him or her. *Id.* At 457-458.

Representation is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. Estes, 188 Wn.2d at 458. Prejudice exists if there is a reasonable probability that, except for counsel's errors, the result

of the proceeding would have been different. *Id.* It is not enough that ineffective assistance conceivably impacted the case's outcome; the defendant must affirmatively show prejudice. *Id.* We begin our analysis with a strong presumption that counsel's performance was effective. *Id.* To rebut this presumption, the defendant must establish the absence of any "conceivable legitimate tactic explaining counsel's performance." State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). If defense counsel's conduct can be considered to be a legitimate trial strategy or tactic, counsel's performance is not deficient. Estes, 188 Wn.2d at 458.

The issue boils down to whether defense counsel was ineffective in not objecting to properly worded statements of the law as embodied in the WPICs. Appellant cannot point to any case in which the WPICs that were used have been ruled incorrect statements of law. Appellant cannot point to any case in which a court has said that the to-convict

instruction must be coupled with the Entrapment Defense instruction. Appellant cannot point to any case in which a court has said that the to-convict instruction should have the language relative to the duty to convict removed if a defense instruction is given.

And yet, Appellant contends that it was ineffective assistance of counsel to not object to the to-convict instructions as drafted, based upon the WPICs. In this case, there were twenty-two (22) Jury Instructions and eight (8) verdict forms provided to the jury. All of these were discussed by counsel and the court and ultimately approved by the court. Under the theory put forward, was it ineffective assistance of counsel to not object to each and every instruction and verdict form to preserve the right on appeal argue some error with an instruction? This is what is suggested by the argument made in Appellant's brief.

Defense counsel, per the theory, should object to every instruction in order to preserve the right on

appeal to fashion a new and novel argument by appellate counsel. By objecting to all instructions, all of the instructions are thus open to appellate review. If trial counsel does not object to every instruction, then counsel has been ineffective because counsel has not preserved the ability to raise the issue at the appellate court level. Does this argument make sense? Is this where this court should take the direction of trial court practice?

Defense counsel was not ineffective in not objecting to the instructions complained of by Appellant. The instructions were proper and allowed Appellant to argue her theory of the case. There was absolutely no indication that any court had a concern with the WPICs used or how they were used that would have put counsel on notice of a duty to object. This court should not find ineffective assistance in this case.

3. **The Appellant was not deprived of her constitutional right to adequate notice of the criminal allegations against her based upon a scrivener's error that was not caught and corrected. Appellant did not seek a Bill of Particulars from the state at a time when such could have been addressed;**

did not move for dismissal at a time when the error could have been corrected; and counsel's cross examination of the defense witness indicated that sufficient notice had been presented by the charging documents.

A defendant who is charged with a violation of RCW 69.50.401 is eligible to have their sentence enhanced if the violation occurs in or on certain public places or facilities as enumerated in RCW 69.50.435(1).

RCW 69.50.435 says:

Violations committed in or on certain public places or facilities—Additional penalty—Defenses—Construction—Definitions.

(1) Any person who violates RCW 69.50.401 by manufacturing, selling, **delivering**, or possessing with the intent to manufacture, sell, or deliver a controlled substance listed under RCW 69.50.401 or who violates RCW 69.50.410 by selling for profit any controlled substance or counterfeit substance classified in schedule I, RCW 69.50.204, except leaves and flowering tops of marijuana to a person:

- (a) In a school;
- (b) On a school bus;
- (c) Within one thousand feet of a school bus route stop designated by the school district;**
- (d) Within one thousand feet of the perimeter of the school grounds;

RCW 69.50.435(6) provides definitions for “School”;

“School bus”; and “School bus route stop”.

(6) As used in this section the following terms have the meanings indicated unless the context clearly requires otherwise:

(c) "School bus route stop" means a school bus stop as designated by a school district;

The original Information in this case was filed on March 16, 2017. CP 1-2 At that time appellant was charged with 4 counts of Delivery of a Controlled Substance in Violation of RCW 69.50.401(1) and (2)(d). As to each count, the state alleged an aggravating circumstance, using the following language:

AGGRAVATING CIRCUMSTANCES: The State of Washington further alleges that the defendant did violate RCW 69.50.401 by manufacturing, selling, delivering, or possessing with the intent to manufacture, sell, or deliver a controlled substance listed under that subsection by selling for profit any controlled substance or counterfeit substance classified in schedule I, RCW 69.50.204, except leaves and flowering tops of marihuana, to a person within one thousand feet of a **school bus route** designated by the school district in violation of 69.50.435.

An Amended Information was filed on June 26, 2017. CP 5-6. The differences between the information was that there were changes to the dates of offenses and changes to the specific drugs referenced. The Aggravating Circumstances language remained the same. A Second

Amended Information was filed on June 28, 2018. CP 45 – 46. The difference between the Amended and Second Amended Information was some additional changing of what drugs were being charged and in the Second Amended information there was no Aggravating Circumstances charged. The Second Amended Information was filed after the State orally moved to amend the information to comport with the evidence presented, and before resting. The filed Second Amended Information did not contain the Aggravating Circumstances, which was not part of the oral amendment at trial, so a Third Amended Information was filed on June 30, 2017 to correctly reflect the oral amendment. CP 58-59. The difference between the Second Amended Information and the Third Amended Information is that the Aggravating circumstances were added back in. In all of the charging documents, the word **stop** was omitted from the sentence.

Appellant argues that the information in this case was constitutionally insufficient because the state failed to catch an omission: Instead of a providing the complete statement for the aggravated sentence, within one thousand feet of a

school bus route stop designated by the school district, the various informations omitted the word “stop”. Appellant claims that this omission deprived her of constitutionally required notice of the elements of the crime, and therefore, she had no reason to defend against that allegation (and presumably implies did not?). Appellant also contends under the liberal standard that is applicable, that the “stop” element cannot be reasonably implied from any of the charging language.

What is being addressed in this argument, and what the case law has long focused upon, is whether or not the charging language used sufficiently apprises an accused, with reasonable certainty, the nature of the accusation against that person, to the end that the accused may prepare a defense. State v. Leach, 113 Wn.2d 679, 688, 782 P.2d 552 (1989). The State does not disagree with the legal standards as put forth by Appellant.

The State does, however, disagree with the conclusions reached by the Appellant, in that it is the state’s position that all of the essential elements of the crime were included within the charging document, either explicitly or

implicitly. The State disagrees that the Appellant was not placed on notice by the charging document of the crimes and enhancements that were being alleged. Appellant is asking this court to overturn the jury's verdict finding the aggravating circumstances to be present because of the logic that the omission of one word, from an entire phrase that otherwise apprised the Appellant of the element to be proven and charged, was missing.

The parties are in agreement that the case law requires a liberal interpretation of the charging document as no objection was raised to the wording until appeal. State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). Under a liberal standard of review, the appellate court undertakes a two-pronged inquiry: “(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 105-106. This test was adopted to address the challenges to the administration of justice that might occur from waiting until after a verdict was rendered, while

providing defendants with ample protections even when raising the challenge for the first time on appeal. Kjorsvik, 117 Wn.2d at 104-106. This impetus for a liberal interpretation was stated somewhat differently in State v. Nonog, 169 Wn.2d 220, 226-227, 237 P.3d 250 (2010):

“Liberal construction balances the defendant’s right to notice against the risk of what Professor Wayne R. LaFave termed ‘sandbagging’ – that is, that a defendant might keep quiet about defects in the information only to challenge them after the State has rested and can no longer amend it. (citations omitted) When a defendant challenges the information for the first time on appeal, we determine if the elements “appear in any form, or by fair construction can they be found, in the charging document.” (citations omitted) We read the information as a whole, according to common sense and including facts that are implied, to see if it “reasonably apprise[s] an accused of the elements of the crime charged.” (citations omitted) If it does, the defendant may prevail only if he can show that the unartful charging language actually prejudiced him.

Under the Kjorsvik test, however, if the necessary elements are not found or fairly implied, prejudice is presumed and the case is reversed without reaching the question of prejudice found in the second prong. State v. McCarty, 140 Wn.2d 420, 426, 998 P.2d 296 (2000). As it relates to the prejudice prong, not only is the entire document available for review, but the court is not limited in

determining prejudice or lack of prejudice from the document. A court is allowed to look outside the information to determine whether a defendant suffered actual prejudice, noting that other circumstances of the charging process can reasonably inform the defendant in a timely manner of the nature of the charges. State v. Williams, 162 Wn.2d 177, 186, 170 P.3d 30 (2007).

Because Appellant has cited several cases in support of her position, it is worth discussing at least briefly what the errors were in some of those cases, and the conclusions reached by the Courts.

State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991) (Argued information constitutionally insufficient in charging first degree robbery with deadly weapon enhancement because omitted common law intent element of robbery – held that the information, although missing the nonstatutory element of intent to steal, did sufficiently inform defendant of all of the elements of robbery and no prejudice.);

State v. Leach, 113 Wn.2d 679, 782 P.2d 552 (1989) (This was a consolidation of two cases: one case brought by a convicted defendant and one case brought by the state following dismissal of case. The Court found the one case properly dismissed because the charging instrument did not specify the time, place, person, or property involved. The Court upheld the conviction in the other case despite an improper/incorrect code citation [11560201c versus 11.56.020(A)(1)(c) (correct code)] and use of “DWI”

instead of correct statutory verbiage Driving While Under the Influence of Intoxicating Liquor and/or Drugs);

State v. McCarty, 140 Wn.2d 420, 426, 998 P.2d 296 (2000) (Information charging conspiracy to deliver a controlled substance failed to set forth essential common law element of third person outside agreement to deliver drugs, prejudice presumed, reversed);

State v. Nonog, 169 Wn.2d 220, 237 P.3d 250 (2010) (Argued information constitutionally defective because the information did not specify the underlying domestic violence crime the victim attempted to report – The information as a whole reasonably apprised the defendant of the underlying crime because of a reference to other charged crimes in information [reference to “ a crime of the same or similar character and based on the same conduct as another crime charged herein];

State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008) (Held to be a sentencing error not a charging error. State alleged armed with a deadly weapon, jury instructions/ special verdict asked for finding as to deadly weapon; trial court sentenced based upon evidence of firearm to firearm enhancement period as opposed to deadly weapon enhancement period – 1 year versus 3 years. Was considered in terms of notice, in that defendant was never put on notice facing a firearm enhancement).

State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (1995) (State failed to include element of premeditation from attempted murder charge and allowed to amend information after closing – Dismissal without prejudice because violated defendants constitutional right to be informed of the nature of the offense charged.); and

State v. Williams, 162 Wn.2d 177, 170 P.3d 30 (2007) (Argued that information not sufficient for not

alleging underlying crime for bail jumping, which impacts sentencing. Court held information put the defendant on notice that he faced a charge of felony bail jumping and because information accompanied by statement of probable cause, he had not been actually prejudiced).

The liberal construction standard applies in this case, because there was no challenge to the information until after conviction. In this case, the information contains the necessary facts in some form, or by fair construction, to put the defendant on notice of the allegation of an aggravating circumstance. Stated, differently, this Court in reading the information as a whole, and applying common sense and including facts that are implied, should determine that the information reasonably apprised the appellant of the necessary elements of the aggravating circumstance alleged and proven at the trial court.

The language used in the charging language was statutorily correct, but for the omission of one word from the sentence providing the element. It is clear from the language that we were discussing a violation of RCW 69.50.401 because each aggravating circumstance was tied to a specific allegation of that RCW. And each discussed the factual basis

of an intentional delivery of a particular controlled substance. And the language used the proper citation to the aggravating circumstance, RCW 69.50.435, the proper distance, one thousand feet, and whom must designate the school bus route stop. The only omission is the scrivener's error of not including the word stop.

However, when we are discussing notice, and apprising a defendant of what they are to defend against, there is sufficient information to conclude, explicitly or implicitly, that the charging document provided constitutionally sufficient notice. A defendant, or an attorney for the defendant, who had handled many cases as a defense attorney and deputy prosecutor could surely make the connection that there was an aggravating circumstance alleged by the language. The attorney with such experience most likely was aware of the "stop" requirement as most assuredly was the deputy prosecutor who prepared correct jury instructions. But for the sake of argument, let's say that we are dealing with an unrepresented defendant or novice attorney. What were they put on notice of by the information? That they were charged with the crime of

unlawful delivery of a controlled substance, and that the state was alleging an aggravating factor that the deliveries occurred within 1,000 feet of a school bus route.

Appellant alleges that there is no such aggravating factor, so there was no notice as to the need to defend against such a charge. However, Appellant only knows that by looking at the language, taking the statutory citation that is provided, and reviewing the statute to determine if such an aggravating factor exists or does not exist. In this sense, there is sufficient information contained within the actual charging language provided (almost complete sentence and reference to correct statutory citation) to find that the necessary elements were explicitly found within the charging language.

At a minimum, given the liberal standard and the types of decisions reached in the cases cited, this Court should find that the necessary elements were implicitly contained within the information. There was a correct connection to the underlying offense and conduct. There was a correct reference to statutory authority putting the appellant on notice, and but for the omission of one word, it was a

completely correct statement of the statutory aggravating factor. To argue that all of the necessary elements were not implied by the present language would require this Court to view the findings in prior cases, with greater omissions, to be meaningless.

Appellant did not spend much time on the issue of prejudice, except to imply that because of the deficiency of one word, she could not have known she was supposed to defend against the aggravating factor. This argument ignores common sense, and the facts of this case. First, it can be assumed that an information does not contain surplus language, and that if an information contains, directly under a crime charged, in bold and capitalized letters **AGGRAVATING CIRCUMSTANCES**, and then spells forth language that puts you on notice that it relates to dealing drugs in an area related to schools and directs you to an RCW for more specifics, that one should be on notice to take a look. The witness lists in this case contained school district employees on the various witness lists. The examination and cross examination of the school district employee by counsel suggests that he was familiar with, and

had perhaps if not cross examined the witness previously, at least interviewed him before questioning in court. VRP 200-201 (cross examination of John Landon).

The other fallacy, as it relates to prejudice, is the ultimate defense of entrapment, which is an affirmative defense requiring capitulation to a crime having occurred, but arguing that the person's will not to commit a crime was overcome by law enforcement. If one is proposing and arguing that a crime took place, but that they would not have committed the crime but for the wrongdoing of law enforcement, what prejudice can be shown by the inartful language issue raised in this appeal? The defense was not that it did or did not occur within 1,000 feet of a school bus route or school bus route stop, rather, it was that the defendant should not be held accountable because they would not have committed the crime but for the acts of law enforcement. The Appellant was not prejudiced in any fashion and any evidence of such prejudice has not been demonstrated.

D. CONCLUSION:

The Appellant was not denied her constitutional right to present a defense in this case – the defense was presented and the jury did not accept it, choosing instead to convict the Appellant. Appellant’s linguistic gymnastics, as it relates to a unique proposal to change the approach to jury instructions was creative, it is not supported by any case law. Because defense counsel had no case law pointing to issues with the proposed jury instructions patterned after approved WPICs, there was no possibility of considering the changes and/or objections suggested by Appellant on appeal. Because no case or commentary has concluded that the WPICs should be re-arranged in the fashion desired, there can be no ineffective assistance of counsel.

The Appellant is entitled to a constitutionally sufficient charging document, and the Appellant had a constitutionally sufficient charging document and was properly put on notice on what she was charged with by the state. It is true that the representatives of the state who worked on the various charging documents never caught the omission of a single word. But it is also clear that within the explicit language of the charging document the necessary

elements were satisfactorily put forth. And, should the court find that the necessary elements were not explicitly provided because of the scrivener's error, then the Court should still uphold the sufficiency of the charging document given the liberal interpretation required because the issue was not raised below in a time and manner that would have allowed for correction.

This Court should uphold the convictions and aggravated sentences imposed by a jury and trial judge upon the Appellant. There were many eyes that looked at the charging document and did not catch the omission of the single word. But all were on the same page as to what the charges and aggravators were, as well as the defense, and they all asked witnesses questions that comported with the phrase school bus route "stop" and properly instructed the jury. It is clear from the totality of the circumstances that the Appellant was given proper constitutional notice of the accusations levelled by the state.

Dated this 16th day of August, 2018,

Gregory L. Zempel
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PROOF OF SERVICE

I, Gregory L. Zempel, do hereby certify under penalty of perjury that on 16th day of August, 2018, 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 Amended Respondent's Brief:

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August 16, 2018 - 10:48 AM

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Appellate Court Case Number: 35428-8
Appellate Court Case Title: State of Washington v. Jamie Lynne Hugdahl
Superior Court Case Number: 17-1-00069-7

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