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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 354491-III

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

STATE OF WASHINGTON,

Respondent,

v.

CARLOS NEGRETE JR.

Appellant.

BRIEF OF APPELLANT

Submitted by:

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I. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED

A. ASSIGNMENTS OF ERROR

1. The information was defective when it did not allege that Mr. Negrete's actions were not in compliance with RCW 69.50.360, RCW 69.50.363, and RCW 69.50.366.

B. ISSUES PRESENTED

1. Is an Information charging Manufacturing of Marijuana insufficient when it does not allege non-compliance with RCW 69.50.360, RCW 69.50.363, and RCW 69.50.366.

II. STATEMENT OF THE CASE

A. History

Mr. Negrete was charged with one count of Manufacture of Marijuana with a School Zone Enhancement in violation of RCW 69.50.401(1) and RCW 69.50.435 on July 19th, 2016. CP at 29-30. Subsequently, the State filed an Amended Information on June 6th, 2017 alleging that Mr. Negrete was guilty of Manufacture of Marijuana with a School Zone Enhancement in violation of RCW 69.50.401(1) and RCW 69.50.435. CP at 25-6.

Consequently, this matter proceeded to trial. The Court's Instructions to the Jury were filed June 6th, 2017. CP at 3-24.

Ultimately, Mr. Negrete was convicted of one count of Manufacture of a Controlled Substance with a special finding that the offense occurred in a School Zone. CP 1-2. This appeal followed.

III. DISCUSSION

- A. The information was defective when it did not allege Mr. Negrete's actions were not in compliance with RCW 69.50.360, RCW 69.50.363, and RCW 69.50.366.**

Mr. Negrete's conviction should be reversed without prejudice because the information charging Mr. Negrete with Manufacture of Marijuana was defective because the State failed to allege that Mr. Negrete's manufacturing of marijuana was not in compliance with RCW 69.50.360, RCW 69.50.363, and RCW 69.50.366.

RAP 2.5(a) states, in relevant part, "a party may raise the following claimed errors for the first time in the appellate court:

. . . (3) manifest error affecting a constitutional right."

Additionally, the Sixth Amendment to the United States Constitution provides in part, "In all . . . prosecutions, the accused shall . . . be informed of the nature and cause of the accusation." Furthermore, the Washington State Constitution,

Article I, section 22 states, in part, "In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him."

As it relates to the constitutional requirements of the charging document, "a charging document is constitutionally adequate *only* if all essential elements of a crime, statutory and nonstatutory, are included in the document so as to apprise the accused of the charges against him or her and to allow the defendant to prepare a defense." *State v. Peterson*, 145 Wn. App. 672, 675, 186 P. 3d 1179, 1180 (2008)(citing *State v. Vangerpen*, 125 Wn. 2d 782, 787, 888 P. 2d 1177 (1995)).

Specifically,

[t]he elements of a crime are those facts 'that the prosecution must prove to sustain a conviction.' Since it is the legislature that defines crimes, we first look to the relevant statute to determine the elements of a crime. The purpose of looking to the statute is to determine the legislature's intent in defining the elements of a crime. Where plain words of a statute are unambiguous, we do not construe the statute.

State v. Gonzalez-Lopez, 132 Wn. App. 622, 626, 132 P. 3d 1128, 1130-1 (2006)(quoting *State v. Miller*, 156 Wn.2d 23, 27, 123 P.3d 827 (2005)).

Additionally, "[w]here, as here, the defendant challenges the sufficiency of an information for the first time on appeal,

the court construes the document liberally in favor of validity." *State v. Brown*, 169 Wn. 2d 195, 197, 234 P. 3d 212, 213-14 (2010). In making this determination, "the court asks (1) whether the essential elements appear in any form, or can be found by any fair construction, in the information, and, if so, (2) whether the defendant nonetheless was actually prejudiced by the unartful language." *Id.* at 198.

i. The essential elements of RCW 69.50.401 do not appear in any form in the Information.

"All of the essential elements of a crime must be alleged in the information." *State v. Brown*, 169 Wn. 2d 195, 197, 234 P. 3d 212, 213 (2010)(citing *State v. Kjorsvik*, 117 Wn. 2d 93, 97, 812 P. 2d 86 (1991)(citing also CrR 2.1(a)(1))).

To illustrate, in *Brown*, "Brown argued for the first time that the information was defective in failing to allege that he acted *knowingly*, an essential element of the crime of escape." 169 Wn. 2d 195, 197, 234 P. 3d 212, 214 (2010). The court found that the charging document, even after construing the information liberally, "did not allege *knowledge* in the information by any fair construction." *Id.* at 198 (emphasis added). Consequently, "[b]ecause the information did not

adequately apprise Brown of the elements of the crime, the charge must be dismissed without prejudice." *Id.*

In this instance, Mr. Negrete was charged with one count of Manufacturing of Marijuana in violation of RCW 69.50.401(1). Specifically, the State alleged:

On or about July 17th, 2016 in the County of Okanogan, State of Washington, the above named Defendant, as principal or accomplice, did knowingly manufacture a controlled substance, to-wit: marijuana; contrary to Revised Code of Washington 69.50.401(1) and furthermore, the commission of said crime took place (1) in a school; and/or (2) on a school bus; and/or (3) within a thousand feet of a school bus route designated by the school district; and/or (4) within one thousand feet of the perimeter of the school grounds; contrary to Revised Code of Washington 69.50.435.

CP at 25. Furthermore, at the conclusion of the trial, the jury was instructed:

To convict the defendant of the crime of Manufacture of a Controlled Substance, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about July 17th, 2016, the defendant, or one with whom he was an accomplice, manufactured a controlled substance, to wit: marijuana;
- (2) That the defendant knew that the substance manufactured was a controlled substance, to wit: marijuana; and
- (3) That this act occurred in the State of Washington. . . .

CP at 14.

On its face, the Amended Information filed on June 6th, 2017, is defective because it did not allege that Mr. Negrete's manufacturing of marijuana was not in compliance with RCW 69.50.360, RCW 69.50.363, and RCW 69.50.366.

Specifically, RCW 69.50.401 states in relevant part:

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

...

(3) The production, manufacture, processing, packaging, delivery, distribution, sale, or possession of marijuana in compliance with the terms set forth in RCW 69.50.360¹, 69.50.363², or 69.50.366³ shall not constitute a violation of this section, this chapter, or any other provision of Washington State law.

(Footnotes added).

Clearly, the State did not allege in its Amended Information nor was the jury instructed that Mr. Negrete was alleged to not be in compliance with RCW 69.50.360, RCW 69.50.363, and RCW 69.50.366. Omitting this element denied

¹ Marijuana retailers, employees of retail outlets - Certain acts not

² Marijuana processors, employees - Certain acts not criminal or civil offenses.

³ Marijuana producers, employees - Certain acts not criminal or civil offenses.

Mr. Negrete the opportunity to properly prepare a defense since "a charging document is constitutionally adequate *only* if all essential elements of a crime, statutory and nonstatutory, are included in the document so as to apprise the accused of the charges against him or her and to allow the defendant to prepare a defense." *State v. Peterson*, 145 Wn. App. 672, 675, 186 P. 3d 1179, 1180 (2008)(citing *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995)).

Now, the State may argue that subsection (3) of RCW 69.50.501 is merely an affirmative defense and therefore the defendant has the burden of proving the presence of an affirmative defense. However, such an argument would be misplaced.

For purposes of comparison, consider the statutory language of Physical Control of Vehicle While Under the Influence⁴. Under subsection (3), the legislature states "[i]t is an affirmative defense to a violation of subsection (1) . . ."

RCW 46.61.504(3)(a),(b). It is clear that the legislature intended to provide an *affirmative defense* to the charge of Physical control. Consequently, we do not see the same

⁴ RCW 46.61.504.

language in the statute prohibiting the manufacturing of marijuana. Rather, the language is clear that in order to pursue a conviction for manufacturing of marijuana that the State needs to prove that the defendant was not in compliance with RCW 69.50.360, RCW 69.50.363, and RCW 69.50.366. Namely:

[t]he elements of a crime are those facts 'that the prosecution must prove to sustain a conviction.' Since it is the legislature that defines crimes, we first look to the relevant statute to determine the elements of a crime. The purpose of looking to the statute is to determine the legislature's intent in defining the elements of a crime. Where plain words of a statute are unambiguous, we do not construe the statute.

State v. Gonzalez-Lopez, 132 Wn. App. 622, 626, 132 P. 3d 1128, 1130-1 (2006)(quoting *State v. Miller*, 156 Wn.2d 23, 27, 123 P.3d 827 (2005)).

In the current case, the State did not allege all the elements needed to ensure the constitutional adequacy of the information when it charged Mr. Negrete. As such, Mr. Negrete's conviction should be reversed.

ii. The appellant does not need to establish prejudice when the information is constitutionally deficient.

In determining whether a charging document is insufficient "the court asks (1) whether the essential elements appear in any form, or can be found by any fair construction, in

the information, and if so, (2) whether the defendant nonetheless was actually prejudiced by the unartful language used." *State v. Brown*, 169 Wn. 2d 195, 198, 234 P. 3d 212, 214 (2010).

In this instance, the information was constitutionally deficient because it did not, in any manner of speaking, allege that Mr. Negrete was not in compliance with RCW 69.50.360, RCW 69.50.363, and RCW 69.50.366. *See supra*.

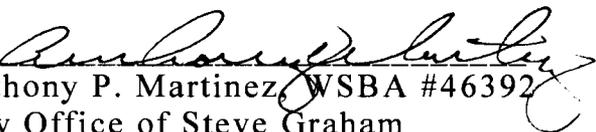
Consequently, due to this deficiency, Mr. Negrete "need not show prejudice if the information cannot be saved even by a liberal reading." *State v. Marcum*, 116 Wn. App. 526, 536, 66 P. 3d 690 (2003).

Ultimately, so long as the court finds that the charging instrument was deficient in listing the requisite elements, the court should not consider whether Mr. Negrete was prejudiced by this omission and Mr. Negrete's conviction should be reversed without prejudice. *See Id.*

IV. Conclusion.

For the reasons stated above, Mr. Negrete's conviction should be reversed because the State failed to allege in the information all of the essential elements of the crime charged.

DATED this 27th day of September, 2017.

By 
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**NO. 354491
IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III**

STATE OF WASHINGTON,

Plaintiff,

vs.

No.: 16-1-00302-6

CARLOS NEGRETE,

Defendant.

AFFIDAVIT OF SERVICE

I, Anthony Martinez, do hereby certify under penalty of perjury that on September 26th, 2017, I hand delivered a true and correct copy of the foregoing Appellant's Brief to:

Washington Court of Appeals, Division III
500 N. Cedar St.
Spokane, WA 99201

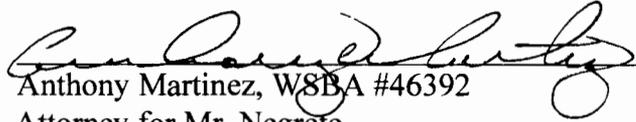
I also mailed via USPA, on September 27th, 2017, a true and correct copy of the foregoing Appellant's Brief to:

Mr. Branden Platter
Okanogan County Prosecutor's Office
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Mr. Carlos Negrete Jr.
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1 I certify under penalty of perjury under the laws of the State of Washington that the
2 foregoing is true and correct.

3 Dated this 27th day of September, 2017.

4 
5 Anthony Martinez, WSBA #46392
6 Attorney for Mr. Negrete