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Division III
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NO. 354491-III

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

STATE OF WASHINGTON
PLAINTIFF/RESPONDENT,

V.

CARLOS NEGRETE, JR.
DEFENDANT/APPELLANT

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

STATEMENT OF THE CASE.....1

ARGUMENT.....2

 A. The State’s charging document contained all the elements of the
 crime of manufacture of marijuana..... 2

 B. The State need not negate statutory exemptions or exceptions
 under RCW 69.50 in the charging document or prove them at
 trial..... 6

CONCLUSION.....10

TABLE OF AUTHORITIES

Table of Cases

<i>Hagner v. United States</i> , 285 U.S. 427, 433, 52 S.Ct. 417 (1932)	4
<i>State v. Castillo</i> , 144 Wn. App. 584, 591, 183 P.3d 355 (Div. 3, 2008)	9
<i>State v. Delgado</i> , 148 Wn.2d 723, 727, 63 P.3d 792 (2002)	8
<i>State v. Grant</i> , 89 Wn.2d 678, 686, 575 P.2d 210 (1978)	3
<i>State v. J.P.</i> , 149 Wn.2d 444, 450, 69 P.3d 318 (2003)	8
<i>State v. Kjorsvik</i> , 117 Wn.2d 93, 97, 812 P.2d 86 (1991)	3, 4, 5
<i>State v. Merrill</i> , 23 Wn.App. 577, 580, 597 P.2d 446 (Div.3, 1979), review denied, 92 Wn.2d 1036	3
<i>State v. Noltie</i> , 116 Wn.2d 831, 840, 809 P.2d 190 (1991)	3

Additional Authority

Article 1, section 22, Washington State Constitution	3
RCW 69.50.204(c)(22)	5
RCW 69.50.360	6, 7, 9
RCW 69.50.363	6, 7, 9
RCW 69.50.366	6, 7, 9
RCW 69.50.401(1)	2, 5, 7, 9
RCW 69.50.401(3)	7, 9
RCW 69.50.506	7, 8, 9
WPIC 50.11	5

STATEMENT OF THE CASE

Appellant, Carlos Negrete, Jr., was charged in Okanogan County Superior Court with one count of Manufacture of Marijuana with a School Zone Enhancement under RCW 69.50.401(1) and RCW 69.50.435. [CP 25-26]. The State's charging document, the First Amended Information filed on June 6, 2017, read as follows:

On or about July 17, 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 one thousand feet of a school bus route stop 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 25-26]

The case proceeded to a jury trial on June 6, 2017. Jury Instructions were given, including Jury Instruction Number 8 which read as follows:

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 17, 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.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

[CP 14] The jury returned a verdict of guilty and found that Appellant committed the offense within one thousand feet of a school ground for purposes of the special verdict. [CP 1-2]

ARGUMENT

A. The State's charging document contained all the elements of the crime of manufacture of marijuana.

The State's First Amended Information included all of the elements of the crime of manufacture of marijuana under RCW 69.50.401(1); therefore, the defendant was properly informed of the nature and cause of the accusation against him and was able to prepare a proper defense.

A defendant has a constitutional right to be informed of the nature and cause of the accusation against him or her to enable the defense to

prepare his defense and to avoid a subsequent prosecution for the same crime. *State v. Noltie*, 116 Wn.2d 831, 840, 809 P.2d 190 (1991); Article 1, section 22 of the Washington State Constitution. The omission of any element of the charged crime, statutory or otherwise, renders the charging document constitutionally defective. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). The constitutional right of a criminal defendant to be apprised with reasonable certainty as to the charges against him is ordinarily satisfied by a charging document which charges a crime in the language of the statute, where the crime is defined with certainty within the statute. *State v. Merrill*, 23 Wn.App. 577, 580, 597 P.2d 446 (Div.3, 1979), review denied, 92 Wn.2d 1036; *State v. Grant*, 89 Wn.2d 678, 686, 575 P.2d 210 (1978).

Charging documents which are not challenged until after the verdict will be more liberally construed in favor of validity than those challenged before or during trial. *Kjorsvik*, 117 Wn.2d at 102. A different standard of review should be applied when no challenge to the charging document has been raised at or before trial because otherwise the defendant has no incentive to timely make such a challenge, since it might only result in an amendment or a dismissal potentially followed by a refile of the charge. *Id.* Applying a more liberal construction on appeal discourages “sandbagging.” *Id.* This is a potential defense practice

wherein the defendant recognizes a defect in the charging document but foregoes raising it before trial when a successful objection would usually result only in an amendment of the pleading. *Id.*

Washington has adopted the federal standard of review for challenges to charging documents laid out in *Hagner v. United States*, 285 U.S. 427, 433, 52 S.Ct. 417 (1932) with some additions. *Id.* at 104. The standard of review set out in *Hagner* was as follows- “Upon a proceeding after verdict at least, no prejudice being shown, it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment.” *Id.* at 104 citing *Hagner*, 285 U.S. at 433. *Kjorsvik* subsequently added an essential elements prong and an inquiry into whether there was actual prejudice. *Id.* at 105.

A two-prong test is to be applied when a charging document is challenged for the first time on appeal. *Id.* The first prong- the liberal construction of the charging document language- looks to the face of the document. *Id.* at 106. The construction is often asked as “do the necessary facts appear in any form, or by fair construction can they be found, in the charging document?” *Id.* at 105. The second prong looks beyond the charging document to determine if the accused actually received notice of the charges he or she must have been prepared to defend against. *Id.* Put another way, “can the defendant show that he or

she was nonetheless actually prejudiced by the inartful [*sic*] language which caused a lack of notice?” *Id.*

In this case, Appellant never challenged the charging document until this appeal. This Court must therefore construe the charging document liberally in favor of validity. *Kjorsvik*, 117 Wn.2d at 102.

Under RCW 69.50.401(1), “it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.” Marijuana is a controlled substance. RCW 69.50.204(c)(22).

The elements of the crime of manufacture of marijuana are also contained in the WPIC for the crime, WPIC 50.11. The elements are as follows:

- (1) That on or about(date), the defendant manufactured [a controlled substance] [(name of substance)];
- (2) That the defendant knew that the substance manufactured was [a controlled substance] [(name of substance)]; and
- (3) That this act occurred in the State of Washington.

WPIC 50.11. No special WPIC has been created for the crime of manufacture of marijuana in light of the statutory exceptions to the crime.

The jury was given this instruction at trial. [CP 14]

The State's First Amended Information charged Appellant as follows:

On or about July 17, 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)...

[CP 25] Therefore, the State's charging document contained the essential elements that the defendant (1) manufactured a controlled substance, being marijuana and (2) knew the substance was marijuana. The charging document was not constitutionally deficient as it contained the required statutory language and fully apprised Appellant of the nature and cause of the accusation against him.

B. The State need not negate statutory exemptions or exceptions under RCW 69.50 in the charging document or prove them at trial.

Appellant asserts that the State was required to include language in the charging document that alleges Appellant was not in compliance with RCW 69.50.360, RCW 69.50.363, and RCW 69.50.366 and further asserts that such a lack of compliance constitutes an essential element of the crime of manufacture of marijuana. [*Appellant's Brief* 6-8] However, compliance with RCW 69.50.360, RCW 69.50.363, or RCW 69.50.366 is an affirmative defense and lack of compliance with the statutes is not an essential element of the crime.

RCW 69.50.401(1) indicates that there are statutory exceptions to the crime of manufacture of marijuana. The statutory language in RCW 69.50.401(1) begins with the phrase “[e]xcept as authorized by this chapter....” This indicates that it is unlawful for any person to manufacture a controlled substance, subject to specifically listed exceptions.

RCW 69.50.401(3) provides that

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.

While Appellant is correct that RCW 69.50.401 does not include language that states “it is an affirmative defense to a violation of this subsection...,” RCW 69.50.506 specifies that *any exemption or exception* contained within RCW 69.50 is an affirmative defense. Under RCW 69.50.506(a),

¹ RCW 69.50.360 authorizes a validly licenses marijuana retailer or employee to purchase, possess, deliver, and sell designated amounts of marijuana and marijuana concentrate.

² RCW 69.50.363 authorizes a validly licenses marijuana processor or employee to purchase, possess, package, deliver, and sell designated amounts of marijuana and marijuana concentrates.

³ RCW 69.50.366 authorizes a validly licenses marijuana producer or employee to produce, possess, deliver, and sell designated amounts of marijuana and marijuana concentrates.

It is not necessary for the state to negate any exemption or exception in this chapter in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this chapter. The burden of proof of any exemption or exception is upon the person claiming it.

RCW 69.50.506(a).

The Court's primary duty in interpreting any statute is to discern and implement the intent of the Legislature. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). The starting point must always be the statute's plain language and ordinary meaning. *Id.* When the plain language is unambiguous- that is, when the statutory language admits of only one meaning- the legislative intent is apparent, and the court will not construe the statute otherwise. *Id.* The court may not add words or clauses to an unambiguous statute when the Legislature has chosen not to include that language. *Id.*

When the court interprets a criminal statute, it gives it a literal and strict interpretation. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2002). “[The court] cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.” *Id.* “[The court] assumes the legislature means exactly what it says.” *Id.* The court will not add or subtract from the clear language of a statute even if it believes the legislature intended something else but did not adequately

express it. *State v. Castillo*, 144 Wn. App. 584, 591, 183 P.3d 355 (Div. 3, 2008).

Following the principals of statutory construction, RCW 69.50.401(1) makes it a crime for anyone to manufacture a controlled substance, including marijuana, “except as authorized by [RCW 69.50].” RCW 69.50.401(3) then lists three statutes, RCW 69.50.360, RCW 69.50.363, and RCW 69.50.366, which authorize the production, manufacture, processing, packaging, delivery, distribution, sale, or possession of marijuana under certain circumstances. The statutory language makes clear that the manufacture, delivery, etc. authorized in these three statutes are an exception to the general law that manufacture, delivery, etc. constitute a crime under RCW 69.50.401(1).

Furthermore, following statutory construction, there is no ambiguity or question that under RCW 69.50.506, the State is not required to negate any exemption or exception under RCW 69.50 in any charging document. RCW 69.50.506 also makes clear that any exemption or exception under RCW 69.50 is an affirmative defense. RCW 69.50.506(1) (“The burden of proof of any exemption or exception is upon the person claiming it.”)

Therefore, the State’s charging document was not constitutionally deficient as the State is not required to allege non-compliance with RCW

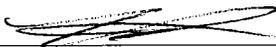
69.50.360, RCW 69.50.363, or RCW 69.50.366 as an element of the charge of manufacture of marijuana. Appellant's conviction should be affirmed.

CONCLUSION

All essential elements of the crime of manufacture of marijuana were included in the charging document. Compliance with statutory exceptions to the crime constitute an affirmative defense under RCW 69.50.506 and the State need not allege lack of compliance as an element of the crime. Appellant's conviction should be affirmed.

Dated this 15 day of November, 2017

Respectfully Submitted:


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PROOF OF SERVICE

I, Shauna Field, do hereby certify under penalty of perjury that on the 15th day of November, 2017, I provided email service to the following by prior agreement (as indicated), a true and correct copy of the Brief of Respondent:

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A handwritten signature in black ink, appearing to read "S Field", written over a horizontal line.

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