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NO. 36330-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

BRIAN ANDERSON,

Appellant.

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

The Honorable Scott R. Sparks, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. DEFENSE COUNSEL CANNOT STRATEGICALLY “DRAW THE STING” OF A DEFENSE WITNESS’S CRIMINAL HISTORY WHERE THERE IS NO VALID BASIS TO ADMIT THE CRIMINAL HISTORY IN THE FIRST PLACE

The State claims that defense counsel’s decision to ask its witness the questions, “So do you have a criminal record?” and “What was your most recent criminal offense and incarceration?” was reasonable strategy. This is so, according to the State, because defense counsel was “drawing the sting” to try to make this witness seem more credible by acknowledging his criminal history upfront. Br. of Resp’t at 15-17.

Anderson agrees that eliciting a witness’s actually admissible criminal history might be a reasonable strategy to “draw the sting” as the State argues, but that is not what happened here. Only convictions that are probative of truthfulness are admissible under ER 609(a); State v. Hardy, 133 Wn.2d 701, 707-08, 946 P.2d 1175 (1997). Firearm-related convictions are not probative of truthfulness and therefore are inadmissible under ER 609. Hardy, 133 Wn.2d at 708. Accordingly, there would be no reasonable defense strategy in eliciting a witness’s *inadmissible* prior firearm possession conviction or for eliciting testimony that the witness is not permitted to possess firearms because he is a convicted felon. As Anderson pointed out in his opening brief, the only effect of doing so is opening the door to the introduction of the

witness's entire criminal history, which is precisely what happened here. Br. of Appellant at 11-12; RP 516-17.

Anderson's defense counsel unreasonably asked what Charles Briet's most recent criminal offense and incarceration was, which Briet stated were unlawful possession of firearm. Counsel continued to establish that Briet was a convicted felon, which is why he was convicted of unlawful possession of a firearm. RP 509-10. This opened the door to Briet's entire criminal history, which otherwise would have been inadmissible. This qualified as deficient performance.

The State claims that the attorney "did a smart thing to attempt to bolster credibility by addressing the conviction first." Br. of Resp't at 17. The State also claims there was no deficient performance because the witness "underplayed his conviction which opened him up to extensive cross examination – behavior that cannot be attributed to the defense attorney." Br. of Resp't at 17. These claims should be rejected because they incorrectly assume the firearm conviction was admissible, which it was not. There was no legitimate strategy in introducing inadmissible criminal history. Had counsel not done so, there would be no conviction for Briet to "underplay" and therefore no door would open to allow the State to recite Briet's more extensive criminal history.

The State also suggests that defense counsel could have been attempting to elicit testimony about Briet's 2017 theft conviction, rather than the 2016 firearm charges. Br. of Resp't at 17-18. But the record indicates there was no 2017 theft conviction, only a charge that had been dismissed. RP 517. If the issue is that defense counsel "misread" a criminal history report, as the State speculates, it still led to the State's elicitation of Briet's entire criminal history and constituted deficient performance for the same reasons discussed here and in Anderson's opening brief.

As for prejudice, the State claims Anderson cannot establish prejudice because Briet's testimony only pertained to Count 1 and the jury also convicted the defendant of three other counts. Br. of Resp't at 18. The State's seems to argue that a defendant cannot be prejudiced by ineffective assistance pertaining only to a single count. The State cites no authority for this proposition. Understandably so, because it should go without saying that an attorney's deficient performance can prejudice the outcome of one count but not others. See, e.g., State v. Classen, 4 Wn. App. 2d 520, 543-44, 422 P.3d 489 (2018) ("We reverse Classen's conviction for second degree assault in count IV due to his counsel's ineffective assistance and remand to the trial court for further proceedings."). The State's all-or-nothing approach to ineffective assistance claims is meritless.

In any event, Anderson did specifically limit his prejudice argument to Count 1 only. Br. of Appellant at 12-13 (arguing prejudice solely with respect to Count 1). Because everything pertaining to Count 1 came down to a credibility contest between Briet and confidential informant James Pearson, defense counsel's actions permitted the State to introduce Briet's entire criminal history, which otherwise would have been inadmissible. Given the centrality of witness credibility, the admission of Briet's entire criminal history caused by counsel's deficient performance prejudiced the outcome of Count 1 within a reasonable probability. The State fails to address the specific prejudice with respect to Count I, which thereby "concedes the issue." State v. E.A.J., 116 Wn. App. 777, 789, 67 P.3d 518 (2003); accord State v. Ward, 125 Wn. App. 138, 144, 104 P.3d 61 (2005) ("The State does not respond and thus, concedes this point."). Count I should accordingly be reversed.

2. THE INFORMATION REQUIRED THE STATE TO PROVE THE SALE OF A SCHEDULE I DRUG AND IT WAS ERROR TO ALLOW THIS LANGUAGE TO BE DELETED IN AN AMENDED INFORMATION AFTER THE STATE RESTED

The State correctly points out the two ways a school bus route stop aggravator can be charged under RCW 69.50.435: either by (1) delivering, manufacturing, selling, or possessing any controlled substance or by (2) selling for profit any Schedule I drug. Br. of Resp't at 21-22; see also Br. of Appellant at 17-18 & n.18. The State also correctly points out that there was

no “or” between these provisions in the charging document. Br. of Resp’t at 18. Without the “or,” there was only one singular allegation pertaining to the school bus route stop aggravator. Without the “or,” the third amended information alleged that Anderson manufactured, sold, delivered, or possessed with intent to manufacture, sell, or deliver “*by selling for profit any controlled substance or counterfeit substance classified in schedule I*” CP 31 (emphasis added). This charge could not be clearer: as worded, the State alleged the school bus route stop aggravator based solely on Anderson’s sale of a schedule I substance.

If the State intended not to make this specific allegation, it should not have charged it in the third amended information. Had the State realized the purported oversight before it rested, then Anderson would have to demonstrate prejudice. However, the State sought to amend its charging document after resting, which was erroneously granted. No showing of prejudice is required in these circumstances; allowing the State to amend the information after the it rests its case in chief is per se prejudicial and requires reversal. State v. Pelkey, 109 Wn.2d 484, 491, 745 P.2d 854 (1987).

3. THE STATE CANNOT NOW AVOID THE DEFINITIONS
IT CHOSE TO PROVIDE TO THE JURY

By specifically defining “school bus” in the jury instructions, the State took on the burden of meeting this definition. State v. Hickman, 135 Wn.2d

97, 101-02, 954 P.2d 900 (1998). Indeed, “the law of the case doctrine applies to *all unchallenged instructions*, not just the to-convict instruction.” State v. France, 180 Wn.2d 809, 816, 329 P.3d 864 (2014) (emphasis added). As argued in the opening brief, the State was required to prove the “school bus” route stops involved vehicles with a seating capacity of more than 10 persons that are owned or operated by school districts as opposed to a municipal transportation system. CP 57. The State did not.

The State does not respond to Anderson’s law of the case argument in any respect, which this court should take as a concession Anderson is correct. Ward, 125 Wn. App. at 144. The State claims that any juror “knows what the director was referring to when he referred to ‘busses[,]’ ‘bus stops’ and students riding busses” Br. of Resp’t at 24. But this argument improperly frees the State from its due process burden of proving every element of the school bus route stop enhancement per the jury instructions. Certainly, we all have general ideas about what school buses are. Given the jury instructions, however, ideas aren’t enough: the State has to prove that the school buses at issue meet the definition that was provided to the jury. It failed to do so and does not make any argument to the contrary in this appeal.

The State also takes issue with Anderson’s argument that John Landon appeared to be a municipal employee rather than a school district employee, because he “was introduced to the jury as working for the Ellensburg School

District” and the trial judge told the jury during voir dire “he worked for the school district.” Br. of Resp’t at 24-25; see also RP 44, 233 (introductions by trial court and prosecutor, respectively). But the trial court’s and prosecutor’s introductions are not evidence. Landon’s actual testimony (and the only evidence adduced at trial on this subject) was that he worked at the “Ellensburg Transportation Department,” not the school district. RP 234. More to the point, even somehow assuming Landon was a school district employee, Landon did not testify that any of the school buses were owned and operated by the school district as opposed to another organization, such as the municipality of Ellensburg or a private entity. Therefore, the State failed to prove that the school bus route stops involved school buses “owned and operated by any school district for the transportation of students,” regardless of where Landon was employed.

In sum, the State presented no evidence regarding the seating capacity or ownership of school buses. Even viewing all the evidence in the light most favorable to the State, the State failed to prove that the route stops were actually school bus route stops under the law of this case. The school bus route stop sentence enhancement must be vacated.

4. EXCEPTIONAL SENTENCES ARE IMPOSED ON A PER-COUNT BASIS

Because each of the four charged counts pertained to precisely one delivery of a controlled substance, the major VUCSA¹ aggravator provided in RCW 9.94A.535(3)(e)(i) does not apply. The State’s argument to the contrary hinges on the proposition that the word “offense” must be interpreted as the “case as a whole” rather than pertaining to each count. Br. of Resp’t at 27.

Aggravators do not broadly apply to the “case as a whole.” They apply to each count—each “offense”—individually. The first words of RCW 9.94A.535 read, “The court may impose a sentence outside the standard sentence range for an offense if it finds” (Emphasis added.) A standard sentence range for an offense is determined on a per-count basis. See RCW 9.94A.505(1), (2)(a)(i) (“When a person is convicted of a felony” the “court shall impose a sentence within the standard range established in RCW 9.94A.510 or 9.94A.517”). RCW 9.94A.510 and RCW 9.94A.517 give a sentencing grid based on the offender score and seriousness level for each individual offense. See RCW 9.94A.520 (enumerating offense seriousness levels); RCW 9.94A.525 (instructing on how to calculate offender scores for each offense). The State’s interpretation of the word “offense” to include the “case as a whole” is not supportable.

¹ Violation of the Uniform Controlled Substances Act.

Even if the State is correct, however, the rule of lenity would still require a ruling in Anderson's favor. Anderson's argument is that "offense" as used in RCW 9.94A.535(3)(e)(i) means each individual count of conviction. The State's argument is that "offense" means the "case as a whole." Anderson's argument is not so implausible that the State has shown its interpretation is unambiguously sound. If a statute is susceptible to more than one interpretation, it is ambiguous. Berger v. Sonneland, 144 Wn.2d 91, 105, 26 P.3d 257 (2001). "If a statute is ambiguous, the rule of lenity requires [courts] to interpret the statute in favor of the defendant absent legislative intent to the contrary." State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). Thus, even assuming the State's interpretation of RCW 9.94A.535(3)(e)(i) is plausible, it is not unambiguously the only reasonable interpretation. Thus, the rule of lenity requires the interpretation that favors Anderson, which is the interpretation that "offense" mean each count of conviction.

More to the point given the facts here, though, Anderson's jury was not instructed to determine whether, "as a whole," Anderson committed a major VUCSA offense. The jury was instructed to determine whether each individual count was a VUCSA offense. CP 60-63. Thus, even if the State's interpretation is unambiguously correct, contrary to its interpretation, the jury here was instructed to find whether each count constituted a major VUCSA

offense. The State admits it “is not arguing that standing alone, the counts would each support the allegation” Br. of Resp’t at 27. This admission should be dispositive because the jury was told to consider whether, standing alone, each count individually supported the aggravator. CP 60-63. Because no rational trier of fact could have found that each of the counts involved at least three separate transactions, there was insufficient evidence to support the special verdicts that any of the four counts was a major VUCSA offense.

Finally, the State points out that no exceptional sentence was imposed. Br. of Resp’t at 28. Indeed, Anderson fully acknowledged this in his opening brief. Br. of Appellant at 28. Anderson does not contend an exceptional sentence was imposed in error; Anderson contends that the trial court used the major VUCSA offense aggravators found by the jury as a basis to deny Anderson’s requested prison-based drug offender sentencing alternative. Br. of Appellant at 28-29. The State addresses no aspect of Anderson’s argument, which, again, should be taken as its concession that Anderson is correct. Ward, 125 Wn. App. at 144; E.A.J., 116 Wn. App. at 789.

Because the major VUCSA offense aggravator was not supported by sufficient evidence for any of the counts and directly impacted the trial court’s sentencing decision, Anderson asks that his sentence be vacated and that this case be remanded for resentencing.

B. CONCLUSION

For the reasons stated here and in his opening brief, Anderson's delivery conviction for Count 1 should be reversed and remanded for a new trial. Alternatively, the school bus route stop enhancement and major violation aggravator should be vacated and this case should be remanded for resentencing.

DATED this 9th day of August, 2019.

Respectfully submitted,

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

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