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NO. 36330-9-III

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

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STATE OF WASHINGTON,

Respondent,

v.

BRIAN ANDERSON,

Appellant.

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

The Honorable Scott R. Sparks, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Defense counsel rendered constitutionally ineffective assistance when he opened the door to a key defense witness's entire criminal history.

2. The trial court erred in permitting the State to amend its school bus route aggravator charge in the information after it had rested its case in chief.

3. Under the law of this case defining "school bus," there was insufficient evidence that the deliveries of a controlled substance occurred within 1000 feet of a school bus route stop.

4. Under plain statutory language, the State's evidence was insufficient to support the verdict that each of the four separate delivery of meth counts constituted major violations of the Uniform Controlled Substances Act pursuant to RCW 9.94A.535(3)(e)(1).

5. The trial court erred in imposing the \$200 criminal filing fee and interest accrual provision in the judgment and sentence.

Issues Pertaining to Assignments of Error

1. During the testimony of a defense witness who contradicted the testimony of one of the confidential informants, defense counsel elicited testimony that the witness had recently been convicted of unlawful possession of a firearm. This opened the door to the State's elicitation of

the witness's significantly more detailed criminal history, including a harassment conviction for aiming a gun, a theft committed more than 10 years prior, and another unknown felony conviction. By opening the door to inadmissible criminal history, did defense counsel render ineffective assistance of counsel?

2. The State is not permitted to amend the information's allegations after it has rested its case in chief except in narrow circumstances not applicable here. Did the trial court err in permitting the State to amend how it charged the school bus stop route aggravator after it had rested its case in chief?

3. "School bus" was defined in the jury instructions as a vehicle with a seating capacity of more than 10 persons and a vehicle that was owned and operated by the school district. No evidence was presented as to any school bus's seating capacity, ownership, or operation and the sole witness who testified about school bus stops was a municipal employee, not a school district employee. Under the law of this case reflected in the jury instructions, was there insufficient evidence to support that the route stops were actually school bus route stops?

4. Under RCW 9.94A.535(3)(e)(1), where the current offense involves at least three separate transactions, it constitutes a major violation of the Uniform Controlled Substances Act. The four current offenses at

issue in this case each involved only one transaction, not three. Was there therefore insufficient evidence to support the jury's special verdicts that each conviction constituted a major violation of the Uniform Controlled Substances Act?

5. Based on recent legislative amendments and case law, must the criminal filing fee and interest accrual provision be stricken from Brian Anderson's judgment and sentence?

B. STATEMENT OF THE CASE

Ellensburg police officers relied on two confidential informants who claimed they purchased methamphetamine from Brian Anderson on August 20, 2015, March 3, 2016, March 4, 2016, and March 10, 2016, which formed the basis for four counts of delivery of a controlled substance. CP 31-34 (third and fourth amended informations); CP 47-50 (to-convict instructions). Each delivery count corresponded to a single meth transaction that occurred on each date.

The August 2015 count (Count 1) was based on a controlled buy performed by James "Jim Bob" Pearson, who testified he gave Anderson money outside of a Fred Meyer, waited for Anderson to go to Yakima and back, and then "went up to his house and went inside and got drugs and left." RP 378, 381. A police officer who worked with Pearson likewise testified Pearson returned from Anderson's house with a bag of methamphetamine

Pearson had purchased there. RP 406, 426. Although another police officer had testified that Ellensburg's confidential informants were required to be reliable and credible, the officers apparently had no idea that Pearson was actively using methamphetamine while working as police informant. RP 185-86, 189, 458-60.

Defense witnesses who were present at the time Pearson allegedly purchased meth from Anderson in August 2015 stated that Pearson was the one who supplied the meth, not Anderson. RP 502-04, 515. During the testimony of one such witness, Charles Briet, defense counsel elicited Briet's 2016 convictions for multiple gun charges, but did not inquire as to any of Briet's other criminal history. RP 509. Ostensibly based on defense counsel's opening the door, the prosecution elicited additional criminal history from Briet on cross examination, including a felony harassment conviction for aiming a gun, a 2006 conviction for theft, an unknown other conviction, and other criminal charges that were apparently dropped. RP 516-17.

The March 2016 counts (Counts 2 through 4) involved confidential informant Zachary Morrell who police stated had "bought methamphetamine from Mr. Anderson." RP 212-13. Morrell testified that in early March, he bought \$50 worth of meth from Anderson. RP 282. A second controlled buy occurred the following day, March 4, 2016; Morrell stated he bought a "little under a gram" of meth from Anderson. RP 214-15, 283-84. On the third and

final controlled buy performed by Morrell on March 10, 2016, Morrell wore a wire. RP 216-17. Morrell stated he had to wait for someone else to bring Anderson meth, but that he ultimately purchased \$20 worth of meth from Anderson. RP 285-86.

Morrell had written a statement subsequent to his work as a confidential informant that indicated he had purchased the drugs from someone else or had hidden drugs in a locker on Anderson's property. RP 290, 305-12. Morrell testified at trial that Anderson had instructed him to write this letter.<sup>1</sup> RP 290-91. Morrell confirmed that a different person was the source of the drugs on the third buy, but claimed Anderson still packaged and sold the drugs. RP 285, 313-14.

Again, despite police officer testimony about how reliable and credible their confidential informants were, an officer was forced to admit that Morrell had violated several conditions in his confidential informant contract, including actively using drugs while working as a confidential informant and failing to keep police apprised of his whereabouts. RP 270-72. In addition, officers admitted they had no evidence to corroborate that Morrell actually

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<sup>1</sup> After the State rested, the trial court dismissed the State's charge for intimidating a witness, given that the State had presented no evidence Anderson had threatened Morrell as inducement to write the letter. RP 490-94, 526-27.

purchased meth from Anderson rather than buying from another person or retrieving drugs he had previously stored himself. RP 264-66, 463.

The State also alleged that Anderson's August 2015 delivery of methamphetamine to Pearson occurred within 1000 feet of a school bus route stop. CP 31. The third amended information, which was the current charging document at the commencement of trial, alleged that Anderson violated RCW 69.50.401 "by manufacturing, selling, delivering, or possessing with 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 . . . ." CP 31. After the State rested, defense counsel moved to dismiss the aggravator because methamphetamine is not a schedule I drug, but a schedule II drug. RP 478-79, 487-88. The trial court refused, instead allowing the State to amend the information despite having rested, ruling that the "by selling for profit any controlled substance or counterfeit substance classified in schedule I" language was unnecessary surplus language that did not bind the State. RP 488-89; compare CP 31 (third amended information) with CP 33 (fourth amended information).

With respect to the school bus stop route aggravator, the jury was provided with a definition of "school bus." CP 57. The definition required school buses to be vehicles with seating capacity of more than 10 persons, including the driver, to be regularly used to transport students to and from

school or in connection with school activities, and to be owned and operated by any school district. CP 57. Although Ellensburg's director of transportation testified that there were five regularly used school bus stops within 1000 feet of Anderson's address in August 2015, no testimony or other evidence was presented about the seating capacity, ownership, or operation of any vehicle. RP 233-38.

The State also alleged that all four deliveries of a controlled substance constituted major violations of the Uniform Controlled Substances Act pursuant to RCW 9.94A.535(3)(e)(1), which provides, "The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so." CP 33-34. The jury was instructed on this definition of a major violation as well. CP 59-64. However, each charged count corresponded to precisely one transaction only.

The jury returned guilty verdicts on all four delivery charges, found Anderson's delivery in Count 1 occurred within 1000 feet of a school bus route stop, and found that each count constituted a major violation of the Uniform Controlled Substance Act. CP 74-81; RP 595-96.

At sentencing, the trial court imposed a standard range sentence of 30 months on each count, including an additional 24 months for the school bus route stop enhancement, for a total of 54 months' confinement. CP 96-97; RP 630. Although the trial court did not impose an exceptional sentence based on

the major violation aggravators, the trial court invoked the aggravators immediately before imposing the standard range sentence and immediately before rejecting Anderson's request for a prison-based drug offender sentencing alternative (DOSA). CP 83-87; RP 629-30. The trial court also imposed a \$200 criminal filing fee and a provision in the judgment and sentence that stated that interest would accrue on all legal financial obligations until paid in full at the rate applicable to civil judgments. CP 100-01. Anderson appeals. CP 105.

C. ARGUMENT

1. DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY OPENING THE DOOR TO THE CRIMINAL HISTORY OF A KEY DEFENSE WITNESS

Every accused person has the right to effective assistance of counsel. U.S. CONST. amend. VI; CONST. art. I, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). The right is violated when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the accused. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Counsel's performance is deficient when it falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. If counsel's conduct demonstrates a legitimate trial strategy or tactic, it cannot serve as a basis for an ineffective assistance claim. Strickland, 466 U.S. at 689; State v.

Yarbrough, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009). However, “[t]he relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.” Roe v. Flores Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

Prejudice occurs when there is a reasonable probability that, but for counsel’s deficiency, the result would have been different. Thomas, 109 Wn.2d at 226. A “‘reasonable probability’ is lower than a preponderance standard” and constitutes a “probability sufficient to undermine confidence in the outcome.” State v. Estes, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017) (quoting Strickland, 466 U.S. at 694).

“A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude.” State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). Ineffective assistance of counsel claims are reviewed de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).

During the defense case in chief, Anderson presented three witnesses, John Bean, Ashley Hone, and Charles Briet. Hone’s and Briet’s testimony was intended to establish that the During direct examination of Briet, defense counsel asked, “So do you have a criminal record?” and “What was your most recent criminal offense and incarceration?” RP 509. Briet responded that he

pleaded guilty to multiple gun charges (unlawful possessions of a firearm) in August 2016. RP 509-10.

Following up on cross examination, the State elicited that Briet had also pleaded guilty to a harassment charge for aiming a gun in July 2016. RP 516. The State also asked Briet if he had a theft conviction from 2006 and a “third conviction from 2014”; Briet answered “Yeah” to both questions. RP 516.

ER 609(a) provides that prior convictions are admissible “[f]or the purpose of attacking the credibility of a witness in a criminal or civil case.” This includes prior felonies where “the probative value of admitting this evidence outweighs the prejudice” under ER 609(a)(1), and prior convictions for crimes of dishonesty or false statement under ER 609(a)(2). Furthermore, evidence of prior convictions is not admissible if a period of more than 10 years has elapsed since the date of conviction or release from confinement unless the court determines that the probative value of the prior conviction outweighs its prejudicial effect. ER 609(b). And only where the proponent of such evidence gives advance written notice of intent to use the outdated prior conviction is the evidence admissible. ER 609(b). “[F]ew prior offenses that do not involve crimes of dishonesty or false statements are likely to be probative of a witness’ veracity.” State v. Hardy, 133 Wn.2d 701, 708, 946 P.2d 1175 (1997) (quoting State v. Jones, 101 Wn.2d 113, 120, 677 P.2d

131 (1984), overruled on other grounds by State v. Ray, 116 Wn.2d 531, 806 P.2d 1220 (1991)). Only prior convictions that are actually probative of a witness's truthfulness are admissible under ER 609(a)(1). Hardy, 133 Wn.2d at 707-08.

Briet's 2016 unlawful possession of a firearm convictions would not have been admissible under ER 609 given that they are not probative of his truthfulness. The only effect of defense counsel bringing up this inadmissible prior conviction was to open the door to allow the State to recite Briet's entire criminal history, including a harassment conviction for aiming a gun at another, a theft conviction more than 10 years old, and an unspecified other conviction. See RP 516-17. By opening the door to such evidence, defense counsel performed deficiently. See State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996) (counsel performed deficiently in failing to object to State's introduction of two prior convictions); State v. Saunders, 91 Wn. App. 575, 579-80, 958 P.2d 364 (1998) (counsel performed deficiently in eliciting out an inadmissible prior conviction).

Under the "open door" doctrine, otherwise inadmissible evidence may become relevant and admissible when the opposing party raises the issue. State v. Berg, 147 Wn. App. 923, 939, 198 P.3d 529 (2008), abrogated on other grounds by State v. Mutch, 171 Wn.2d 646, 254 P.3d 803 (2011); see also State v. Brush, 32 Wn. App. 445, 451, 648 P.2d 897 (1982) (open door

doctrine overcomes evidentiary rule). The doctrine preserves fairness of proceedings by preventing a party from raising a subject to gain an advantage and then barring the other party from further inquiry. State v. Avendano Lopez, 79 Wn. App. 706, 714, 904 P.2d 324 (1995) (citing State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)).

When defense counsel asked Briet about his most recent criminal conviction, the 2016 unlawful possession of a firearm charge, it gave a skewed view of Briet's criminal history. Thus, fairness dictated that the State could elicit Briet's full criminal history, including the harassment conviction, the 2006 theft, and another unspecified conviction. No reasonable defense attorney would have opened this door given that such criminal history was not admissible under ER 609. Counsel's performance was deficient.

The deficient performance was prejudicial as to Count 1, which was based on a controlled buy performed by confidential informant James "Jim Bob" Pearson. The defense strategy at trial was to attack the credibility of the confidential informants given that they kept using drugs despite working with the Ellensburg Police Department. See RP 458-60 (establishing that Pearson used meth despite working as confidential informant). Officers testified about how reliable and credible their confidential informants were, RP 185-86, 189, which seemed dubious when their informants were using drugs right under their nose. Defense counsel also pointed out a time discrepancy in the reported

police surveillance of Pearson leading up to the controlled buy; the police reports stated it took Pearson seven minutes to go a quarter-mile, which defense counsel indicated suggested a four-and-a-half-minute gap in surveillance. RP 451-53. The purpose of Hone's and Briet's testimony was to point to Pearson, rather than Anderson, as the person who delivered methamphetamine. RP 502-04 (Hone's testimony that she supplied the pipe and Pearson supplied the meth when they smoked at Anderson's house in August 2015); RP 515 (Briet's testimony that "Jim Bob [Pearson] pulled out a bag of dope and we smoked and smoked and smoked" and "I can't tell you exactly where he pulled it out of, but he had a bag of dope in his hand, and it was a big bag of dope"). Thus, the jury's assessment of the evidence presented as to Count I stemming from the August 2015 controlled buy hinged on the credibility of the police officers and Pearson versus Hone and Briet.

Because credibility was so essential to Anderson's defense, opening the door to allow the State to recite Briet's entire criminal history was extremely prejudicial. The State was permitted to elicit serious felony charges not otherwise admissible, including that Briet had aimed a gun at someone and had theft conviction from more than 10 years prior. Defense counsel's deficient performance prejudiced the outcome of Anderson's trial within a reasonable probability. Count 1 should be reversed and remanded for a fair trial.

2. THE TRIAL COURT ERRED IN PERMITTING THE STATE TO AMEND THE INFORMATION AFTER IT HAD RESTED TO CHARGE A DIFFERENT AGGRAVATING CIRCUMSTANCE

“Under [article I, section 22 of the Washington Constitution], an accused person must be informed of the charge he or she is to meet at trial, and cannot be tried for an offense not charged.” State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987) (citing State v. Carr, 97 Wn.2d 436, 439, 645 P.2d 1098 (1982); State v. Rhinehart, 92 Wn.2d 923, 602 P.2d 1188 (1979)).

This rule is subject to two narrowly defined statutory exceptions: “(1) where a defendant is convicted of a lesser included offense of the one charged in the information pursuant to RCW 10.61.006; and (2) where a defendant is convicted of an offense which is a crime of an inferior degree to the one charged, pursuant to RCW 10.61.003.”<sup>[2]</sup>

Id. at 488 (quoting State v. Foster, 91 Wn.2d 466, 471, 589 P.2d 789 (1979)).

The State is free to amend its charges during the pretrial investigatory period. Id. at 490. “The constitutionality of amending an information after trial has already begun presents a different question” because “[a]ll of the pre-trial motions, voir dire of the jury, opening argument, questioning and cross-

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<sup>2</sup> RCW 10.61.003 provides, “Upon an . . . information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the . . . information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.” RCW 10.61.006 provides, “In all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he or she is charged in the . . . information.”

examination of witnesses are based on the precise nature of the charge alleged in the information.” Id. Thus,

A criminal charge may not be amended after the State has rested its case-in-chief unless the amendment is to a lesser degree of the same charge or a lesser included offense. Anything else is a violation of the defendant’s article I, section 22 right to demand the nature and cause of the accusation against him or her.

Id. at 491. “Such a violation necessarily prejudices this substantial constitutional right, within the meaning of [former] CrR 2.1(e).”<sup>3</sup> Id.

It is bright-line reversible error for the trial court to permit an amendment to the information that is neither a lesser included offense nor a lesser degree of the same charged after the State has presented its case in chief. Id.; accord State v. Vangerpen, 125 Wn.2d 782, 789, 888 P.2d 1177 (1995); State v. Schaffer, 120 Wn.2d 616, 622, 845 P.2d 281 (1993); State v. Markle, 118 Wn.2d 424, 437, 823 P.2d 1101 (1992). The trial court violated this bright-line rule when it allowed the State to amend its aggravating circumstance allegation after it had rested.

In its third amended information, the State alleged that Anderson 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

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<sup>3</sup> Former CrR 2.1(e) was amended in 1986, “revers[ing] present sections (d) and (e) to maintain a more logical order in the rule.” CrR 2.1, 1986 cmt. CrR 2.1(d) states, “The court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.”

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 thousands feet of a school bus route stop designated by the school district in violation of [RCW] 69.50.435.

CP 31 (emphasis added). The language, and particularly the emphasized language, of the allegation makes clear that Anderson was alleged to violate RCW 69.50.401 based solely on his selling for profit any controlled substance or counterfeit classified as a schedule I drug.

After the State rested, defense counsel moved to dismiss this allegation because methamphetamine is not a schedule I drug: “they have charged my client with a crime that their evidence does not prove. Their evidence proves that -- the most it proves is that he distributed a Schedule II substance in a school zone. They have alleged that he distributed a Schedule I. That’s fatal.” RP 487-88; see also RP 478-79 (“what they’ve essentially alleged is that Brian Anderson sold a Schedule 1 controlled substance within a thousand feet of a schoolyard. Methamphetamine is not a Schedule 1 controlled substance, your Honor”). Defense counsel was correct that methamphetamine is not a schedule I drug. RCW 69.50.206(a), (d)(2) (listing “Methamphetamine, its salts, isomers, and salts of its isomers” as “included in Schedule II”).

Despite the fact that the State had rested, the trial court permitted the State to amend the information to take out the “by selling for profit any controlled substance or counterfeit substance classified in schedule I”

language. Compare CP 31 with CP 33; RP 488-89. The trial court cited State v. Tvedt, 153 Wn.2d 705, 107 P.3d 728 (2005), stating, “surplus language in a charging document may be disregarded,” characterizing the by selling for profit and schedule I language as merely unnecessary surplusage. RP 488-89.

The trial court was mistaken and its reliance on Tvedt was misplaced. Tvedt involved analysis of the unit of prosecution for robbery and held that where there is only one taking of property, the taking constitutes only one robbery even if there is more than one person present who has authority over the property. 153 Wn.2d at 715-16. In conducting this analysis, the court considered that several counts in the information alleged that Tvedt robbed multiple named persons. Id. at 718-19. The court concluded, “the State did not need to name every person who was present and placed in fear where only a single taking of property occurred.” Id. at 719. Thus, naming just one person who was robbed “was sufficient to state the elements of the offenses charged.” Id. at 719. The inclusion of more than one named person in the counts of robbery could therefore “be disregarded as surplusage” or as “unnecessary language.” Id. at 718-19.

The same is not true in this case. The third amended information alleged that the way Anderson committed the school bus route stop aggravator was “by selling for profit any controlled substance or counterfeit substance classified in schedule I . . . .” CP 31. The “by selling for profit any controlled

substance . . . classified in schedule I” language was therefore not superfluous or unnecessary; it was alone what formed the basis for the State’s allegation of the school bus route aggravator.<sup>4</sup> The trial court erred in reading this language in the information as surplusage where it plainly was not. Selling a schedule I controlled substance for profit was precisely how the State alleged Anderson committed the aggravator.

Because of the nature of the State’s allegation, the trial court should not have permitted the State to amend its information to remove the “by selling” clause. An information “may not be amended after the State has rested its case in chief unless the amendment is to a lesser degree of the same crime or a lesser included offense.” Vangerpen, 125 Wn.2d at 789. The State had rested and there is no lesser degree or lesser included offense of the RCW 69.50.435 aggravator. Permitting the amendment therefore must be “deemed to be a violation of the defendant’s article I, § 22 (amend. 10) right to demand the nature and cause of the accusation against him or her.” Vangerpen, 125 Wn.2d at 789. Because the State’s case in chief was concluded and all the

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<sup>4</sup> RCW 69.50.435(1) provides two general ways to violate the statute and then enumerates several different physical places where such violations may occur. RCW 69.50.435(1)(a)–(j). The two general ways to violate the statute include (1) a violation of RCW 69.50.401 merely by selling or delivering a controlled substance or (2) a violation of RCW 69.50.410 by selling for profit any controlled substance classified in schedule I. The third amended information unmistakably alleged that Anderson violated the statute not by merely selling or delivering a controlled substance, but by selling for profit a controlled substance classified in schedule I. CP 31.

State's evidence had been presented, it was error to allow the amendment of the information to remove the "by selling for profit any controlled substance . . . classified in schedule I" language. Such an amendment is per se prejudicial and constitutes reversible error. Id.; Pelkey, 109 Wn.2d at 491.

Because the State alleged in the information that Anderson sold for profit any controlled substance or counterfeit substance classified in schedule I but failed to prove this prior to resting its case in chief, it should not have been permitted to amend the information. The additional penalty of 24 months imposed for violating RCW 69.50.435 must be reversed and stricken from Anderson's judgment and sentence.

3. THERE WAS INSUFFICIENT EVIDENCE THAT THE CRIMES WERE COMMITTED WITHIN 1000 FEET OF A "SCHOOL BUS" STOP IN LIGHT OF THE DEFINITION OF "SCHOOL BUS" PROVIDED TO THE JURY

In criminal prosecutions, the due process clause of the Fourteenth Amendment requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where the defendant challenges the sufficiency of the evidence, the reviewing court views the evidence in the light most favorable to the prosecution and asks whether there was a sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt.

Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

Whenever the State takes on additional proof beyond the elements of a particular offense and the jury is so instructed, the additional proof becomes the law of the case and must be proved by the State beyond a reasonable doubt, just like any other element. State v. Hickman, 135 Wn.2d 97, 102-02, 954 P.2d 900 (1998); State v. Nam, 136 Wn. App. 698, 706-07, 150 P.3d 617 (2007).<sup>5</sup> “[T]he 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). The law of the case doctrine “is a broad doctrine that has been applied to to-convict instructions and definitional instructions.” State v. Calvin, 176 Wn. App. 1, 21, 316 P.3d 496 (2013) (collecting cases).

Anderson’s jury was instructed that it would be given a special verdict form that it needed to answer “‘yes’ or ‘no’ according to the decision you

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<sup>5</sup> As the Washington Supreme Court stated long ago,

It is the approved rule in this state that the parties are bound by law laid down by the court in its instructions where, as here, the charge is approved by counsel for each party, no objections or exceptions thereto having been made at any stage. In such case, the sufficiency of the evidence to sustain the verdict is to be determined by the law application of the instructions and rules of law laid down in the charge.

Tonkovich v. Dep’t of Labor & Indus., 31 Wn.2d 220, 225, 195 P.2d 638 (1948).

reach.” CP 55. The special verdict form asked, “Did the defendant deliver a controlled substance to a person within one thousand feet of a school bus route stop designated by a school district?” CP 66. The jury also received a definition of “school bus” for it to evaluate whether the State had proved beyond a reasonable doubt that the delivery of a controlled substance occurred within 1000 feet of a school bus route stop. CP 57. The instruction defining school bus read,

“School bus” means a vehicle that meets the following requirements: (1) has 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 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 57. Under these instructions, which became the law of this case, a rational jury could conclude the delivery occurred within 1000 feet of a school bus route stop only if the school buses on such route stops had total seating capacity of at least 11 persons, were regularly used to transport students, and were owned and operated by the school district for transporting students.

The State’s proof failed under the school bus definition provided to the jury. The sole evidence of school bus route stops was presented through John Landon, the assistant director of transportation at the Ellensburg Transportation Department. RP 234. Landon testified that there were five

active school bus route stops as of August 20, 2015 within 1000 feet of 315 West University, when and where one of Anderson's deliveries of a controlled substance was alleged to have occurred. RP 236-38. At most, Landon's testimony met only one part of the school bus definition, that school buses were "regularly used to transport students to and from school or in connection with school activities." However, Landon provided no testimony about the seating capacity of any of the school buses used. Nor did Landon testify that any of the school buses were owned and operated by the school district for the transportation of the students rather than by municipal carriers.<sup>6</sup>

The jury instructions required the State to satisfy the definition of "school bus" in proving that the delivery of a controlled substance occurred within 1000 feet of a "school bus route stop." Yet it presented no evidence whatsoever regarding the seating capacity or ownership of the school buses. It did not establish that the school buses that stopped on the route stops were not part of a municipal transportation system. As such, even viewing the evidence in the light most favorable to the prosecution, the State failed to prove that the route stops were actually school bus route stops under the law of this case. The special verdict was not supported by sufficient evidence.

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<sup>6</sup> Notably, Landon was a municipal employee of Ellensburg, not an employee of the school district, yet was nevertheless responsible to use routing software to "add or subtract and to remove bus stops, depending on ridership . . . ." RP 236.

The RCW 69.50.435 school bus route stop sentence enhancement must accordingly be vacated.

4. THERE WAS INSUFFICIENT EVIDENCE THAT ANY OF THE FOUR COUNTS CONSTITUTED A MAJOR VIOLATION OF THE UNIFORM CONTROLLED SUBSTANCE ACT, GIVEN THAT EACH COUNT ITSELF REPRESENTED ONLY A SINGLE TRANSACTION

The “fundamental objective in construing a statute is to ascertain and carry out the intent of the legislature.” State v. Veliz, 176 Wn.2d 849, 854, 298 P.3d 75 (2013) (quoting State v. Morales, 173 Wn.2d 560, 567, 269 P.3d 263 (2012)). “The surest indication of legislative intent is the language enacted by the legislature,” and if the language is plain on its face, that language is given effect. State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). “The ‘plain meaning’ of a statutory provision is to be discerned from the ordinary meaning of the language at issue as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005) (citing Dep’t of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 10-12, 43 P.3d 4 (2002)). Courts must “interpret statutes to give effect to all the language used so that no portion is rendered meaningless or unnecessary.” Cornu-Labat v. Hosp. Dist. No. 2 of Grant County, 177 Wn.2d 221, 231, 298 P.3d 741 (2013). Appellate courts review issues of statutory interpretation de novo. State v. J.P., 149 Wn.2d 444, 449, 69 P.3d 318 (2003).

As noted above, claims that there was insufficient evidence to meet a statutory definition of a criminal offense or aggravator are reviewed by construing the evidence in the light most favorable to the State and asking whether any rational trier of fact could find guilt beyond a reasonable doubt. Jackson, 443 U.S. at 319; Green, 94 W.2d at 220-21.

The State alleged and the jury was instructed to decide whether all four of Anderson's deliveries constituted a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW. CP 59-64, 67, 69, 71, 73. The pertinent statutory provision states,

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so . . . .

RCW 9.94A.535(3)(e)(i).<sup>7</sup> The jury instructions mirrored this statutory language. CP 64.

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<sup>7</sup> The statute provides five other criteria whereby a current offense may qualify as a major violation of the Uniform Controlled Substances Act. RCW 9.94A.535(3)(e)(ii)-(vi). None of these other criteria was alleged by the State or provided in the jury instructions, and therefore none applies in this case.

Under the plain language of the statute, the current offense—in the singular form, not offenses or set of offenses—each must involve three separate transactions in which controlled substances were sold, transferred, or possessed with intent for the offense to qualify as a major violation. In other words, there must be more than one single transaction as part of the current offense; the statute plainly says that the current offense must involve at least three such transactions. This appears akin to a Petrich<sup>8</sup> situation in which the State pleads one offense but alleges that more than one act or transaction constituted the offense. See Petrich, 101 Wn.2d at 572. For a current offense to satisfy the statutory definition of major VUCSA, then, more than one single transaction must be involved under the statute’s plain language. If there are fewer than three transactions undergirding the current offense, the current offense does not qualify as a major violation under the plain language of RCW 9.94A.535(3)(e)(i).

In this case, each of the four current VUCSA offenses involved only one transaction in which controlled substances were sold. Indeed, each of the deliveries alleged in Counts 1 through 4 were alleged to have occurred respectively on August 20, 2015, March 3, 2016, March 4, 2016, and March 10, 2016. CP 31-34 (third and fourth amended informations); CP 47-50 (to-

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<sup>8</sup> State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984), overruled in part by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1998).

convict instructions for each count). Each VUCSA delivery count corresponded to a single transaction that occurred on each date.

Trial testimony pertaining to each of these dates confirmed that only a single transaction occurred. As for the August 2015 offense (Count 1), confidential informant James “Jim Bob” Pearson testified he gave Anderson money outside of the Ellensburg Fred Meyer, waited 90 minutes for Anderson to go to Yakima and back, and then “went up to his house and went inside and got drugs and left.” RP 378, 381. The police officer, Klifford Caillier, who worked with Pearson likewise testified that one single controlled buy took place on August 20, 2015 and presented photos of bagged methamphetamine “that we had purchased from Mr. Anderson and James Pearson returned back to us with.” RP 406, 426. Only one transaction occurred on August 20, 2015 that formed the basis for the State’s delivery charges.

The same is true for each of the three March 2016 offenses (Counts 2 through 4). Officer John Bean testified that at the first controlled buy, confidential informant Zachary Morrell “bought methamphetamine from Mr. Anderson.” RP 212-13. Morrell testified that that first time occurred in early March and he bought \$50 worth of meth from Anderson on that occasion. RP 282. Bean and Morrell testified that the second controlled buy occurred the next day, March 4, 2016, and Morrell made one purchase of \$40 worth of methamphetamine, a “little under a gram.” RP 214-15, 283-84. On the third

March 2016 controlled buy, Morrell wore a wire. RP 216-17. Morrell stated he had to wait for someone to bring Anderson the drugs, but that he ultimately purchased \$20 worth of methamphetamine from Anderson. RP 285-86. Each of the March 2016 offenses consisted of only one single transaction a piece.

Because each count corresponded to only one transaction, none of the counts “involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so.” RCW 9.94A.535(3)(e)(i); CP 64. Even viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found that each of the counts involved at least three separate transactions. The evidence was plain that, on each date corresponding to each count, only one transaction had occurred. The State failed to present sufficient evidence to establish that any of the four counts was a major violation of the Uniformed Controlled Substances Act.

The State’s allegation of a major violation rested on a confused and mistaken reading of the plain statutory language. The evidence was certainly sufficient to show that Anderson had committed four separate current offenses based on four separate drug transactions that occurred on four separate dates. But the statute does not make four separate transactions that each constitute one offense punishable as a major violation. Rather, the plain language of the statute requires that each “current offense” itself involve at least three separate

transactions. Because none of the four current offenses involved at least three separate transactions, none was a major violation under RCW 9.94A.535(3)(e)(i). There was insufficient evidence to support the jury's major violation special verdicts.

Anderson acknowledges that the trial court did not invoke the major violation aggravator as a basis to impose an exceptional sentence and instead imposed a sentence within the standard range. CP 96-98; RP 630. Nevertheless, the trial court expressly mentioned the major violation aggravator when imposing its sentence and denying Anderson the drug offender sentencing alternative (DOSA) he requested. See CP 83-87 (defense motion for prison-based DOSA). Indeed, the trial court stated that the aggravator was “a tool that the State has to, you know, urge you, urge you to jump on the bandwagon and take responsibility early and get your treatment started early and your sentence done early. But you rolled the dice instead, you went to trial.” RP 629. The trial court proceeded to claim it was not punishing Anderson for exercising his right to go to trial, yet stated, “You absolutely have a right to go to trial, but you don't get credit, you know, the system doesn't get anything out of that, right?” RP 629. Then the trial court refused to impose Anderson's requested DOSA, stating, “I can't.” RP 630.

From the trial court's comments at sentencing, the major violation aggravator clearly played into its decision-making in imposing the sentence,

even though it opted not to impose an exceptional sentence. The trial court expressly mentioned the aggravator, discussed it as a tool the State could use to coerce a plea, stated in contrast that Anderson should get no “credit” for insisting on exercising his trial right, and then denied Anderson’s request for a DOSA. Thus, denying the DOSA seemed to be part of the trial court’s apparent belief that no credit should be given to defendants who exercise their constitutional rights, which in turn stemmed from the trial court’s apparent belief that aggravating circumstances existed as a tool for the State to coerce plea deals in lieu of trials. The record shows a clear connection between the major violation aggravator and the denial of the DOSA. Therefore, even though no exceptional sentence was imposed based on the aggravator, the aggravator still had a prejudicial impact at sentencing.

Because the major violation aggravator was not supported by sufficient evidence yet had an impact on the trial court’s sentencing decision, Anderson asks that his sentence be vacated and that his case be remanded for resentencing where he may again request a DOSA.

5. THE CRIMINAL FILING FEE AND INTEREST ACCRUAL PROVISION MUST BE STRICKEN FROM THE JUDGMENT AND SENTENCE BASED ON INDIGENCY

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783) applies prospectively to cases currently pending on

direct appeal. State v. Ramirez, 191 Wn.2d 732, 747-50, 426 P.3d 714 (2018). When legal financial obligations are impermissibly imposed, the remedy is “for the trial court to amend the judgment and sentence to strike the improperly imposed LFOs.” Id. at 750.

The criminal filing fee and nonrestitution interest were imposed against Anderson in the judgment and sentence. CP 100-01. Anderson is indigent and has qualified as such throughout these proceedings. CP 118-20. Accordingly, the criminal filing fee and interest provisions must be stricken from Anderson’s judgment and sentence pursuant to Ramirez’s prospective application of HB 1783.

RCW 36.18.020(2)(h) now states that the \$200 criminal filing fee “shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3)(a) through (c).” LAWS OF 2018, ch. 269, § 17. Anderson’s indigency is established in the record, given that the order issued at arraignment and the order of indigency provide that Anderson was financially unable to obtain counsel without causing substantial financial hardship. Supp. CP \_\_\_\_ (sub no. 8; order appointing counsel); CP 118, 121-24. Therefore, Anderson is “entitled to benefit from this statutory change,” requiring the criminal filing fee to be stricken from Anderson’s judgment and sentence. Ramirez, 191 Wn.2d at 749.

HB 1783 also eliminated interest accrual on nonrestitution LFOs.<sup>9</sup> LAWS OF 2018, ch. 269, § 1 (codified as amended at RCW 10.82.090); Ramirez, 191 Wn.2d at 747. Although interest must accrue on restitution amounts, if any, “[a]s of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations.” RCW 10.82.090(1).

The judgment and sentence was entered on September 7, 2018 in this case. CP 94. Yet the judgment and sentence states, “The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090.” CP 101. The judgment and sentence violates RCW 10.82.090(1). Accordingly, this court should strike the interest accrual provision from the judgment and sentence.

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<sup>9</sup> No restitution was imposed in this case.

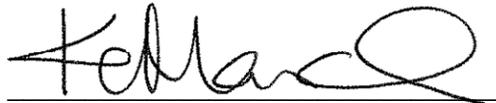
D. CONCLUSION

For the stated reasons, Anderson's conviction based on the delivery of a controlled substance occurring in August 2015 should be reversed and this count should be remanded for a new trial. Alternatively, the school bus route enhancement and major violation aggravator should be reversed, and this case should be remanded for resentencing.

DATED this 13<sup>th</sup> day of May, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

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

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