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IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON
DIVISION III
No. 36330-9-III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

BRIAN JEFFREY ANDERSON,

Defendant/Appellant.

Respondent's Brief

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A. RESPONSE TO ASSIGNMENTS OF ERROR

- a. Defense counsel was effective when he “drew the sting” of the defense witness’ criminal history by addressing the issue on direct examination rather than leaving it to be exposed to the jury in the cross examination of the witness by the state, although the defendant did not give an honest answer, corrected by the state on cross examination.
- b. A clerical amendment to the Information by the state, even after the state rests its case does not violate due process when the amendment removes superfluous information that is not an element of the aggravator.
- c. The evidence of delivery within 1000 feet of a school bus route stop was sufficient when the transportation director introduced to the jury as working for the Ellensburg School District testified about the “bus” stops and it is not beyond a common understanding of “bus” for a jury to conclude that the district employed typical school buses, even when specifically defined for the jury with a WPIC.

- d. There was sufficient evidence to support the VUCSA aggravator pursuant to the statute when the state proved the defendant sold different quantities of methamphetamine for different dollar amounts on four separate occasions, making the case or the “offense” one that was a major violation of the Controlled Substances Act.
- e. The criminal filing fee should be struck pursuant to current caselaw regarding indigency and what LFOs are required or discretionary.

B. ISSUES PRESENTED

- a. Is a defense attorney who “draws the sting” of a defense witness’ criminal history ineffective when the witness is dishonest in his answer and is corrected by the state on cross examination?
- b. Can the state amend the Information after resting when the amendment strikes superfluous language that is not a required element of a charged aggravator?

- c. Does a jury need specific evidence about what school buses are from the school district transportation director when a WPIC is given defining school bus?
- d. Can a jury find an aggravator that the offense was a major violation of the Uniform Controlled Substances Act when the state proves that there were four separate sales of differing amounts of methamphetamine for different prices on four different dates using two different informants in a span of eight months?

C. STATEMENT OF THE CASE

The defendant was charged via an Amended Information¹ with four counts of Delivery of a Controlled Substance occurring on four different dates with a school bus route stop

¹ The original Information filed on March 30, 2016 alleged four counts of delivery of a controlled substance (Count 1 on August 20, 2015; Counts 2 – 4 each on or between March 3, 2016 and March 10, 2016 with no aggravators or enhancements. (CP at 4). That information was amended on March 24, 2017 to add the school bus route aggravator pursuant to RCW 69.50.435 to count one and the three separate transaction under the VUCSA statute aggravator under RCW 9.94A.535(3)(e)(i) to counts one through four, with no changes to the actual charges or dates. (CP at 47). On June 11, 2018, the Information was Amended a Second time to allege specific dates for Counts 2 – 4 (March 3 for count 2; March 4 for count 3; March 10 for count 4). (CP at 104.4). On July 31, 2018 the information was amended a third time to add the word “stop” to the “school bus route” stop aggravator for count one pursuant to RCW 69.50.435. (CP at 123). The final amendment (Fourth Amended Information) was filed on August 2, 2018 after the state had rested to correct and remove superfluous language about Schedule I drugs from the Information. (CP at 129, RP at 486).

aggravator for count one and a second multiple transaction VUCSA aggravator alleged on all four counts. (CP at 104.4; CP at 129). He went to trial on the counts and aggravators and was found guilty by a jury of his peers of all four counts and all aggravators alleged (CP at 133 – 141). The school bus route stop enhancement was only alleged and proven for count one. (CP at 104.4; CP at 129). He was sentenced and ordered to pay a criminal filing fee of \$200 in his judgement and sentence entered on September 7, 2018 pursuant to RCW 9.94A.760, 9.94A.505, RCW 10.01.160, and RCW 10.46.190 (CP at 153).

Ellensburg Police Detective John Bean testified for the state that he was one of two anti-crime team members within the Detectives unit at the Ellensburg Police Department that focus primarily on drug enforcement, specifically using confidential informants to buy controlled substances from people. (RP at 180, 183). Detective Bean testified extensively about the use of informants and the facts related to this case², including the identity of one of the CIs

² Although interesting, most of the testimony in the case does not relate to the issues raised on appeal and so the state provides a very brief summary of most of the testimony.

(Zach Morrell) used in this case including knowing that he was an drug addict and the particulars of the transactions that Mr. Morrell assisted the Ellensburg Police Department in that included buying drugs from Brian Anderson on three different dates in March at his home 1500 Pott Road, in Ellensburg. CP at 189.

Zach Morrell testified that he knew the defendant Brian Anderson and had known him for six or seven years and that he was an addict who abused methamphetamine and heroin. (RP at 276). He testified that he worked with the Ellensburg Police Department Detectives “Kliff and John” to get a reduction or dismissal of his own charge of delivery of a controlled substance (RP at 278 – 9). He testified that he bought drugs from the defendant on three different occasions (RP at 281, 286 – 7). He said the first time was the beginning of March, between the first and the tenth and he bought \$50 of meth – he indicated he bought almost a gram for that price. RP at 282. He testified that the next buy occurred the next day and he bought just under a gram for \$40 from the defendant at the defendant’s house, more

specifically in a garage where the defendant lived. (RP at 283 – 5).

Mr. Morrell testified about buying drugs a third time from Mr. Anderson, indicating that on that third occasion, they waited for Erica Lynch to bring Brian Anderson the meth and then Zach bought the meth from Mr. Anderson (RP at 285 – 6). He bought “a 20 sack, like a few points” from Mr. Anderson with \$20 he had been given by the police (RP at 286).

The other half of the Ellensburg Police Department Anti-Crimes Detective unit, Klifford Caillier also provided testimony for the state regarding the use of Confidential Informants, the controlled buys in this case, and the surveillance of the operations on the different dates. (RP at 404 – 405, 409). Specifically, Detective Caillier testified that Mr. Pearson bought 14 grams of methamphetamine from Brian Anderson on August 20, 2015, which the Detective testified was “more than a user amount” and that for \$250, he believed Mr. Pearson got a good deal on the buy. (RP at 406, 425, 431).

A second confidential informant, Jim Bob Pearson testified that he also worked for the Ellensburg Police Department in August 2015 to buy drugs from Brian Anderson, a person known to him. (RP 369, 372, 375). He arranged to buy a half an ounce of methamphetamine from Mr. Anderson for \$250; Mr. Pearson testified that amount of methamphetamine would last an average single meth-user using by themselves approximately a month. (RP at 376, 377). Jim Bob said he bought the drugs from Brian Anderson, in Mr. Anderson's home while at least three other people were present in the home: Steven Morgan, Ashley Hone, and a girl named "Samantha;" he couldn't remember her last name. (RP at 384).

There was testimony from several police officers about the surveillance done by the Ellensburg Police Department during all of the controlled buys with Brian Anderson as a target. (RP at 199 – 200, 321, 333 – 335, 339 – 40, 411 – 13, 419 – 21). Detective Sergeant Josh Bender testified that the drugs from the three controlled buys from Brian Anderson in March, 2016 and the drugs from the controlled buy from Brian Anderson in March, 2015 were all

sent to the crime lab to be tested, all packaged separately (RP at 324, 327).

John Landon was called by the state and announced to the jury as “John Landon with the Ellensburg School District.” (RP at 233) During Voir Dire, the court had also told the jury that “John Landon from the Ellensburg School District Transportation Department” would be testifying. (RP at 44). Mr. Landon testified that he was the assistant director of transportation for the “Ellensburg Transportation Department” and that it would be part of his job to tell the jury about school bus routes and their stops. (RP at 234). He testified and was aided by a map of the school district’s active bus stops with a central point of 315 West University Way that included a 1,000 foot diameter red circle and all the bus stops located within the diameter that were in existence on August 20, 2015. (RP at 234). He testified about the use in the department for using a “educational logistic software” called “Edulog” that works with county maps to maintain the bus stops, depending on ridership and if there are any “active students” if they have “graduated.” He confirmed that within 1000 feet of 315 West University Way on August 20, 2015

there were five active school bus route stops. (RP at 237).

He furthered testified on cross examination that the stops were active on August 20, 2015 based on the summer school schedule. (RP at 237 – 38).

After the state rested their case, defense moved to dismiss the school bus stop enhancement because defense argued the way the aggravator read in the third amended information because it “smooshed” the requirements of RCW 69.50.435 by alleging Mr. Anderson sold a Schedule I controlled substance within 1000 feet of a school yard (RP at 479). Defense argued that because methamphetamine was not a Schedule I drug, the state had not proved the allegation, but admitted that there were two ways to satisfy the allegation of the aggravator. (RP at 478 – 79). The state responded by amending the Information and removing the superfluous language that referenced Schedule I drugs, arguing that there was no due process argument to the defendant because the language being removed was to help clarify the charges and was superfluous. (RP at 487). The court, referencing State v. Tvedt, 153 Wn.2d 705, 718 (2005) held that superfluous language in an information does not

render the information void and allowed the amendment to delete the superfluous language (RP at 488 – 89). The court inquired whether there was any prejudice to the defendant to strike the language and allow the amendment and his attorney indicated there was none, reiterating that there was sufficient notice of what the state was alleging (RP at 489 – 90).

The defendant called Ashley Hone who testified that she was involved in the drug community and had been convicted of buying cocaine as a juvenile and of “borrowing” someone’s car and not bringing it back; indicating she had a criminal history (RP at 496 -98). She testified she was present at Mr. Anderson’s house (where she rented a room) when Jim Bob Pearson came to the house to buy drugs on August 20, 2015 (RP at 499, 501). She confirmed that her boyfriend Chance was at the house along with Mr. Anderson, Samantha Mello and Steven Morgan (RP at 502). On cross examination she admitted in March, 2018 that she gave a false statement to the police regarding a separate case. (RP at 505).

The defendant called Charles “Chance” Briet also to testify who agreed to “answer honestly” anything defense asked, affirmed that he had a criminal record and when asked, indicated his most recent criminal offense and incarceration was based on a guilty plea on August 12, 2016 for multiple gun charges and drugs clarifying that the charges were for “unlawful possession” because he was a convicted felon who could not possess a firearm (RP at 509 – 10)³. He admitted he knew Brian Anderson through just hanging out and doing drugs and confirmed that he was at his house in August, 2015 when Jim Bob Pearson came over to Mr. Anderson’s house (RP at 511, 514). He indicated he was present along with Ashely Hone (his girlfriend at the time), Mr. Anderson, Sam Mello, Steve Morgan, and Jim Bob Pearson. (RP at 515). On cross examination, the state clarified that the guilty gun charges Mr. Briet plead to in 2016 were related not only to unlawful possession, as he had testified, but also to unlawful harassment for aiming a

³ On cross examination, the prosecutor asked Briet about a 2017 theft conviction, which could have been what the defense attorney was referencing in asking about his “most recent conviction.” (RP at 517). Mr. Briet told the prosecutor that case had been “dropped” or dismissed. (RP at 517). The record is unclear which charge or conviction the defense attorney was referring to in his question, “most recent criminal offense.” (RP at 509).

firearm at someone (RP at 516). He was also cross examined about his 2006 theft conviction and a third conviction from 2014, which he admitted (RP at 516).

The defendant was found guilty of four counts of delivery of a controlled substance and specifically found that the defendant delivered a controlled substance to a person within 1,000 feet of a school bus route stop for count one and that each of the counts was a major violation of the Uniform Controlled Substance Act. (CP at 75 – 81). The defendant was sentenced to a standard range sentence for all counts and the court imposed the twenty-four month consecutive enhancement to count one based on jury finding the VUCSA offense in the protected zone (school bus route stop) (CP at 94 – 104; RP at 630). In fact for counts two through four the range was below the mid-point of the standard range, despite the jury finding an aggravating factor (RP at 629 – 630).

D. ARGUMENT

- a. Mr. Anderson had effective trial counsel when his attorney tried to “draw the sting” regarding a defense witness’s criminal history and the defense witness was not accurate in describing the prior and was cross

examined by the state about the full nature of his prior offense.

Defendants are, as Petitioner states, entitled to effective counsel. Strickland v. Washington, 466 U.S. 668 (1984). There is a “strong presumption counsel’s representation was effective”, and the burden is on the defendant to show deficient representation. State v. McFarland, 127 Wn. 2d 322, 335 (1995). To prove ineffective assistance of counsel, Petitioner must prove both that that the representation provided was deficient, “ ... i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances ...” and that prejudice resulted, “ ... i.e., there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” State v. Thomas, 109 Wn. 2d 222, 225-226 (1987) (emphasis added). State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). The defendant must overcome a strong presumption that counsel's performance was not deficient. Id. In assessing performance, "the court

must make every effort to eliminate the distorting effects of hindsight." Id., quoting In re Pers. Restraint of Rice, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992). Prejudice is established if the defendant shows that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different. Id. If either part of the test is not satisfied, the inquiry need go no further. State v. Mierz, 127 Wn.2d 460, 470, 901 P.2d 286 (1995). Claims of ineffective assistance of counsel present mixed questions of law and fact, and are reviewed de novo." In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). If there were factual findings concerning, for example, defense counsel's strategy or tactics, the court would review those for "substantial evidence." Id. But "the legal conclusions flowing from such findings and testimony are reviewed de novo." Id. at 873-74. In August, 2018 the Supreme Court indicated the record on ineffective cases is often underdeveloped, noting: "If a defendant wishes to raise issues on appeal that require

evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition, which may be filed [and heard] concurrently with the direct appeal.” State v. Linville, 191 Wn.2d 513, 525, 423 P.3d 842, 847 (2018) (citing McFarland, 127 Wn.2d at 335 (citing WASH. STATE BAR ASS'N, WASHINGTON APPELLATE PRACTICE DESKBOOK § 32.2(3) (c), at 32-6 (2d ed. 1993) (citing State v. Byrd, 30 Wn. App. 794, 800, 638 P.2d 601 (1981))).

Mr. Anderson has to show that counsel did not function “... as the 'counsel' guaranteed the defendant by the Sixth Amendment" and that his errors if any were "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." In re Personal Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P. 2d 593 (1998) (citations omitted). This burden cannot be met in this case with this record.

On appeal, defendant argues that the questioning of Mr. Briet about his criminal history was ineffective because the defense attorney chose to

open up his direct examination of his own witness by acknowledging the witness had prior convictions that may affect his credibility, letting the jury know about them upfront rather than leave them to be discovered by the jury on cross examination of the witness by the state.⁴ The problem in this case was that the defendant did not answer truthfully about his “most recent criminal conviction. What was an attempt by the defense attorney to show the witness could be trusted was upended by the witness himself. Instead of testifying truthfully about his most recent conviction, he downplayed the charges and the state was able to cross examine him about the true nature of his offense – not merely unlawful possession of a firearm, but in fact felony harassment. The cross examination on the actual charge might not have been allowed under a strict reading of ER 609 alone, but when the witness was not truthful about the conviction and gave misleading information to the

⁴ The reference to “drawing the sting” can be summarized by gaining credibility with the jury by admitting weaknesses of one’s own case is a common trial advocacy practice taught and employed by many attorneys. See Smith v. Spisak, 558 U.S. 139, 161 (2010).

jury about the charges, the state corrected that in cross examination. To put the blame for the witness' less than candid response on the defense attorney does not rise to the level of ineffective assistance when what the defense attorney was trying to do was very effective – show the jury the witness was to be believed. It was the witness who underplayed his conviction which opened him up to extensive cross examination – behavior that cannot be attributed to the defense attorney, who arguably did a smart thing to attempt to bolster credibility by addressing the conviction first. There is also the real possibility that when asking about the witness' “most recent” criminal conviction, the defense attorney was referring to the Theft conviction (see footnote 3 above) from 2017 referenced also by the prosecutor and was simply mistaken that the witness believed his “most recent conviction” were the gun charges, which he significantly underplayed and was then cross examined on. Misreading a criminal history report is

clearly a mistake, but does not rise to ineffective assistance.⁵

Additionally, the defendant would have to show actual prejudice from the error, which would also be a very difficult burden with the facts of this case when Mr. Briet was only relevant to Count 1 – the controlled drug purchase involving James Pearson. Because the jury also convicted the defendant on three other counts, where Mr. Briet’s credibility was not a factor, the defendant cannot show actual prejudice.

- b. There was no prejudice to the defendant in allowing the state to amend the information after the state rested when the defense attorney pointed out superfluous language in the Information for the aggravator for count one that the amendment struck.

Generally, a trial court may allow amendment of the information at any time before the verdict as

⁵ A LexisNexis search for “miscalculated w/s offender w/s score” in the state of Washington yields 710 cases. While miscalculating a score and misreading a criminal history record are not exactly the same, the numerous cases with miscalculated scores highlights the difficulty in reading criminal history reports and underscores that while an error, this is not ineffective.

long as the “substantial rights of the defendant are not prejudiced.” CrR 2.1(d). Although the court rules permit liberal amendment, this approach is tempered by article I, section 22 of the Washington Constitution, which requires that the accused be adequately informed of the charge against which he must defend at trial. State v. Pelkey, 109 Wn.2d 484, 487-90 (1987). Under Pelkey, the State cannot amend a charge after it has rested its case in chief unless the amended charge is a lesser included offense or a lesser degree of the same offense. Pelkey, 109 Wn.2d at 491; see also State v. Vangerpen, 125 Wn.2d 782, 789-91, 888 P.2d 1177 (1995) (citing Pelkey, 109 Wn.2d at 491); State v. Markle, 118 Wn.2d 424, 436-37, 823 P.2d 1101 (1992) (quoting Pelkey, 109 Wn.2d at 491). The Pelkey court held that because such late amendment “necessarily prejudices” a defendant's constitutional right to demand the nature and cause of the accusation against him, a trial court commits per se reversible error if it allows the State to amend the information after the

State has rested its case. Markle, 118 Wn.2d at 437 (emphasis omitted) (quoting Pelkey, 109 Wn.2d at 491).

An information must state all the essential statutory and non-statutory elements of the crimes charged. U.S. CONST., amend. VI; CONST. art. I, § 22; CrR 2.1(a)(1); State v. McCarty, 140 Wn.2d 420, 424-25, 998 P.2d 296 (2000). However, surplus language in a charging document may be disregarded. See State v. Stritmatter, 102 Wn.2d 516, 523-24, 688 P.2d 499 (1984); State v. Worsham, 154 Wash. 575, 283 P. 167 (1929). That is, where unnecessary language is included in an information, the surplus language is not an element of the crime that must be proved unless it is repeated in the jury instructions. State v. Miller, 71 Wn.2d 143, 146, 426 P.2d 986 (1967); State v. Weiding, 60 Wn. App. 184, 187 n.3, 803 P.2d 17 (1991); State v. Rivas, 49 Wn. App. 677, 682-83, 746 P.2d 312 (1987); State v. McGary, 37 Wn. App. 856, 859-60, 683 P.2d 1125 (1984). Nor is the information insufficient as a charging document if

the defendant is not prejudiced by the inclusion of the unnecessary language. Stritmatter, 102 Wn.2d at 524; RCW 10.37.056; State v. Tvedt, 153 Wn.2d 705, 718, 107 P.3d 728, 736, (2005).

RCW 69.50.435 is a special sentencing statute that applies to violations of the Uniform Controlled Substance Act (referred to commonly as “VUCSAs”). It allows the state to allege that when conducted in certain places, VUCSA offenses carry additional penalties. Specifically, it states, “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 marihuana to a person: ... (c) Within one thousand feet of a school bus route stop designated by the school district...” (Emphasis added) Within the statute, it is clear a violation

occurs when someone delivers a controlled substance listed under RCW 69.50.401 (including methamphetamine) or by selling for profit any Schedule I drug.

The third amended information that was in effect at the beginning of the trial alleged that the defendant had violated RCW 69.50.435 in either of the two ways specified – either by delivering a controlled substance under 69.50.401 or by selling for profit any Schedule I drug – although the aggravator was written unclearly and likely was missing an “or” or “for” as pointed out by the prosecution in argument, the additional language referencing Schedule I drugs was superfluous. The court considered defense argument, applied clearly established caselaw and allowed the state to strike the superfluous language, even after the state rests. This is one of those exceptional circumstances contemplated by Pelkey, where there is no prejudice because as other caselaw points out, superfluous language adds no required elements to the offense.

The court properly treated this like a CrR 2.1 (b) motion by the defense and did not abuse its discretion and committed no error in allowing the state to strike the language from the Information.

- c. There was sufficient evidence for the jury to find the school bus stop zone enhancement when the Ellensburg School District Interim Transportation Director testified that there were five bus stops within 1000 feet of the location of the drug transaction in existence on the date of the crime.

When addressing a claim of insufficient evidence, a reviewing court considers “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” State v. Johnson, 188 Wn.2d 742, 762 (2017) (internal quotation marks omitted) (quoting State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (plurality opinion)). “When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence

must be drawn in favor of the State and interpreted most strongly against the defendant.” Id. (quoting State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

Reasonable inferences to be made from the evidence in this case are that when the transportation director testified there were stops indicated on the map for students who ride the bus that he was referring to a typical school bus – the kind that satisfy the statutory requirement that they have a capacity of more than ten persons. A juror knows what the director was referring to when he referred to “busses” “bus stops” and students riding busses – that inference is reasonable from the evidence and the state did not have to provide additional evidence like the kind suggested by defense.

Defense argues that Mr. Landon was a “municipal employee” rather than an employee of the school district, which is not supported by the record. He was introduced to the jury as working for the Ellensburg School District and was also told during

voir dire by the judge that he worked for the school district. Additionally, the record is unclear about what if any uniform he was wearing at the time of testimony indicating his employment. Defense's argument that a definitional statute adds elements for the state to prove to an aggravating offense reaches too far into the juror's province to know what a "school bus" is when there is no situation where a person would use the word "school bus" and assume anything less than the buses the director talked about during his testimony. The inference that the jury knew what he was talking about when he used the word "bus" is logical and required by the law.

- d. The evidence that there was a major violation of the Uniformed Controlled Substances Act was sufficient when there was testimony of four different drug deals for different quantities of drugs, on different dates, for different purchase prices from two different informants in a seven month period of time and statutory interpretation rules dictate the court interpret

the word “offense” to be analogous with “case” and not “count” as argued by defense.

Statutory interpretation requires a court to “ascertain and carry out ... legislative intent.” Dep’t of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). First, a court must examine the plain language of the statute “as ‘[t]he surest indication of legislative intent.’” State v. Larson, 184 Wn.2d 843, 848, 365 P.3d 740 (2015) (alteration in original) (quoting State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010)). To interpret a statute’s plain language, the court examines the text of the statute, “as well as “the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.”” Id. (quoting Ervin, 169 Wn.2d at 820) (quoting State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005)); see also Campbell & Gwinn, 146 Wn.2d at 11 (stating that “meaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in

question”). We may not interpret a statute in a way that renders a portion ““meaningless or superfluous.”” State v. K.L.B., 180 Wn.2d 735, 742, 328 P.3d 886 (2014) (quoting Jongeward v BNSF Ry. Co., 174 Wn.2d 586, 601, 278 P.3d 157 (2012)).

The distinction in this case is whether the word “offense” as used in the statute means particular count or case as a whole – the state argues that a plain reading of the statute requires this court to interpret the word “offense” as case and not the more particular phrase the legislature could have used – “count.” The “offense” is the case, taken together which charges four separate counts of delivery. The offense involves three or more deliveries, even when each “count” is not supported by that evidence.

The state is not arguing that standing alone, the counts would each support the allegation, but instead when taken as a whole case, the offense involves multiple transactions making it a major violation of the Uniform Controlled Substances Act.

The defendant was not sentenced with an aggravated sentence, and in fact was sentenced to below the mid-point of the standard range for each count, despite this jury finding.

- e. The criminal filing fee imposed should be struck.

The defendant was found indigent and the court imposed the criminal filing fee, which should be struck because in June, 2018 the criminal filing fee and the interest on non-restitution LFOs could no longer be imposed on indigent defendants and Mr. Anderson was sentenced in September, 2018.

E. CONCLUSION

For the reasons stated, the sentence should be affirmed. The case may be remanded to the Superior Court to strike the order on payment of Legal and Financial obligations for the criminal filing fee and the interest on the non-restitution LFOs.

Dated this 2nd day of July, 2019,

/s/ Jodi M. Hammond
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PROOF OF SERVICE

I, Jodi M. Hammond, do hereby certify under penalty of perjury that on 2nd day of July, 2019, 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 Respondent's Brief:

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