90782-0

No. 44175-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY CONOVER,

Appellant.

---

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

---

# BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The courtroom doors were locked for almost half an hour during the trial, in violation of the First and Sixth Amendments to the United States Constitution and article I, sections 10 and 22 of the Washington Constitution.

2. The trial court erred in overruling Mr. Conover's objection to Instruction 3, because the instruction misstated the definition of proof beyond a reasonable doubt.

3. The sentencing court violated the Sentencing Reform Act and Mr. Conover's Fourteenth Amendment right to due process by calculating the offender score based on the prosecutor's unsupported criminal history summary.

4. The sentencing court erred in ordering that the bus-zone enhancements for each count run consecutively to one another rather than concurrently.

5. The aggravating factor of "major violation of the Uniform Controlled Substances Act," based on "three separate transactions," does not apply to this case.

6. The State presented insufficient evidence to prove the aggravating factor of "major violation of the Uniform Controlled

Substances Act," based on "quantities substantially larger than for personal use."

7. The aggravating factor of "major violation of the Uniform Controlled Substances Act," based on "quantities substantially larger than for personal use" is unconstitutionally vague as applied.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A trial court violates the defendant's and public's constitutional right to the open administration of justice if it closes a portion of the trial without satisfying the factors set forth in *State v. Bone-Club*, including identifying a compelling interest in closure, balancing that interest against the public trial right, and entering formal findings and conclusions in a closure order. There is no "de minimis" exception to this rule. Here, the courtroom doors were locked for almost half an hour during trial, and, when the trial court discovered the error, it declared the violation "harmless" and refused to cure the error. Did the trial court violate the First and Sixth Amendments and article I, sections 10 and 22?

2. The role of the jury is to decide whether the prosecution met its burden of proof, and it misleads the jury to encourage it to search for "the truth." Over Mr. Conover's objection, the court instructed the jury that it could find the State met its burden of proof if it had "an abiding belief in the truth of the charge." Where both this Court and the Supreme Court

have held it is not the jury's job to determine the truth, did the court misstate the burden of proof by focusing the jurors on whether they believed the charge was true?

3. Due Process and the Sentencing Reform Act, as constitutionally construed, require the State to prove a defendant's criminal history by a preponderance of the evidence. A prosecutor's summary of alleged history is insufficient to meet this burden; the State must present certified copies of prior judgments or equally reliable documents. Did the Sentencing Court violate the SRA and Mr. Conover's right to due process by calculating his offender score based only on the prosecutor's one-page summary of alleged criminal history, which was presented with no supporting evidence?

4. The Sentencing Reform Act mandates that firearm and deadly weapon enhancements run "consecutively to all other sentencing provisions, **including other firearm or deadly weapon enhancements**, for all offenses sentenced under this chapter." Before the legislature added the highlighted language, the Supreme Court held that enhancements for multiple counts were to run concurrently where the base sentences were concurrent. The statute governing the bus-zone enhancement at issue here does not include language similar to the highlighted language in the weapon enhancement section. Did the trial

court err in running the bus-zone enhancements for each count consecutively rather than concurrently?

5. One of the aggravating factors listed in the Sentencing Reform Act applies where an offense is "a major violation of the Uniform Controlled Substances Act." The statue provides that "the current offense" is a major violation if "[t]he current offense involved at least three separate transactions…." RCW 9.94A.535(3)(e)(i). Here, the jury found this aggravating factor existed where Mr. Conover was convicted of three separate offenses, each of which was based on a single transaction. Must this finding be stricken because this aggravator applies only where a single offense consists of three or more transactions?

6. The "major violation" aggravator also applies where the current offense involved "quantities substantially larger than for personal use." The State presented evidence that Mr. Conover sold $350-$400 worth of heroin to an informant, and that although some users buy as little as $20 worth at a time, "[a] lot of them will have $100-a-day habits." Did the State fail to prove Mr. Conover's offenses involved quantities substantially larger than for personal use?

7. A statute is void for vagueness if it either (1) does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited, or (2) does not provide

ascertainable standards of guilt to protect against arbitrary enforcement. Is the "major VUCSA" aggravating factor unconstitutionally vague as applied to Mr. Conover, because it is not clear what "*substantially* larger than for personal use" means?

C. STATEMENT OF THE CASE

Police arrested Virgil Kell for delivering drugs. 1 RP 33.[1] He wanted to "work off" the charges, so he agreed to arrange drug transactions with other people, including Timothy Conover. 1 RP 33-34. Police used Kell for "controlled buys" with Mr. Conover on May 13, May 31, and July 7, 2011. 1 RP 35, 71, 79. Each time, Kell said he purchased a quarter-ounce of heroin from Mr. Conover for $350-$400. 1 RP 35, 71, 79.

The State charged Mr. Conover with three counts of delivering a controlled substance. The State alleged that a zone enhancement applied to each count, because each occurred within 1,000 feet of a school bus stop. The State also alleged that the aggravating factor of "major violation of the Uniform Controlled Substances Act" applied. CP 12-13.

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[1] 1RP refers to the volume of proceedings from 10/11/12. 2 RP refers to the volume of proceedings from 10/12/12 and 10/15/12. 3 RP refers to the small volume consisting of short pretrial hearings on 12/14/11, 6/6/12, and 8/23, 12, as well as sentencing on 10/24/12.

At trial, Virgil Kell and multiple police officers testified that Mr. Conover delivered a quarter-ounce of heroin to Kell on three occasions. 1 RP 28-100; 2 RP 8-112. After both sides rested their cases, the court instructed the jury. 2 RP 112-26.

Just as the court finished instructing the jury, it became apparent that the main door to the courtroom had been locked for approximately half an hour while the proceedings were on the record. 2 RP 175-77. Security had locked the doors during the lunch break and forgotten to unlock them when trial started again. 2 RP 176-77. It was not until someone rattled the door that the participants realized there was a problem. 2 RP 176. The door had been locked the entire time the court instructed the jury. 2 RP 177.

The court was uninclined to cure the error, stating it was "an inadvertent closure of the court and it was for a limited amount of time." 2 RP 176. The court also stated that the ideals furthered by the public-trial right were not harmed by having the doors locked while the court instructed the jury, since no testimony was taken during that time. 2 RP 177-78. Thus, the court did not reinstruct the jury in an open courtroom.

The jury convicted Mr. Conover as charged. CP 49-58. At sentencing, the prosecutor presented a one page summary of alleged criminal history, listing two convictions from 2005, one Oregon

conviction from 2006, and a washed-out conviction from 1990. CP 89. The State presented no evidence supporting the criminal history allegations. The court nevertheless concluded Mr. Conover's offender score was five, based on the three alleged prior convictions and two other current convictions. CP 61-62. Based on this offender score, the range was 20-60 months for each count. CP 62.

Although the court did not impose an exceptional sentence based on the aggravating factors, it did impose an enhanced sentence because the jury found Mr. Conover committed each count within 1000 feet of a school bus zone. CP 60-65. At the prosecutor's urging, the court imposed the two-year enhancements consecutively. It ruled that for each count, the base sentence was 48 months and the enhancements totaled 72 months. 3 RP 19. The court ruled the base sentences would be served concurrently, but stacked the enhancements and ordered Mr. Conover to serve ten years in prison. CP 65.

Mr. Conover appeals. CP 73.

D. ARGUMENT

**1. A new trial should be granted because the courtroom doors were locked for half an hour while the court instructed the jury, in violation of the First and Sixth Amendments and article I, sections 10 and 22.**

a. The state and federal constitutions guarantee the right to a public trial.

The First and Sixth Amendments to the United States Constitution and article I, sections 10 and 22 of the Washington Constitution guarantee the right to a public trial. U.S. Const. amends. I, VI; Const. art. I, §§ 10, 22; *State v. Wise*, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012).[2] "A public trial is a core safeguard in our system of justice. Be it through members of the media, victims, the family or friends of a party, or passersby, the public can keep watch over the administration of justice when the courtroom is open." *Wise*, 176 Wn.2d at 5-6.

Although the right to a public trial is not absolute, proceedings may be closed "in only the most unusual circumstances." *State v. Strode*,

[2] The First Amendment protects the freedom of the press. U.S. Const. amend. I. The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. The Washington Constitution similarly states, "In criminal prosecutions the accused shall have the right … to have a speedy public trial." Const. art. I, § 22. The state constitution further mandates, "Justice in all cases shall be administered openly." Const. art. I, § 10.

167 Wn.2d 222, 226, 217 P.3d 310 (2009). Before closing proceedings to the public, the trial court must:

1. identify a compelling interest that the closure is essential to protect and show a "serious and imminent threat" to that compelling interest;

2. provide anyone present with the opportunity to object;

3. ensure that the method for curtailing open access is the least restrictive means available for protecting the threatened interests;

4. weigh the competing interests of the proponent of the closure and the public; and

5. ensure that the closure is no broader in its application or duration than necessary to serve its purpose.

*State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995); *see also In re the Personal Restraint of Orange*, 152 Wn.2d 795, 809, 100 P.3d 291 (2005). The trial court must enter formal findings of fact and conclusions of law on these factors, which "should be as specific as possible rather than conclusory." *Orange*, 152 Wn.2d at 807; *accord Strode*, 167 Wn.2d at 228.

This Court reviews *de novo* the question of whether the trial court violated the constitutional right to a public trial. *State v. Paumier*, 176 Wn.2d 29, 34, 288 P.3d 1126 (2012).

b. The trial court erred in refusing to cure the constitutional violation that occurred when the courtroom doors were locked for half an hour during trial.

In this case, the courtroom doors were locked for almost half an hour while the court instructed the jury. Security officers had locked the doors over the lunch break and forgotten to unlock them before proceedings recommenced. It was not until an assertive person rattled the door that the participants realized the error and unlocked the doors.

The court had not evaluated the *Bone-Club* factors because it had not planned to lock the courtroom during the trial. Upon discovering the problem, though, the court chose not to cure the constitutional violation. The judge said the violation was "harmless" because it was "an inadvertent closure of the court and it was for a limited amount of time" during which no testimony was taken. 2 RP 176-78. Thus, the court did not reinstruct the jury in an open courtroom.

The court erred because public-trial violations cannot be deemed "harmless" or "de minimis". To begin with, the fact that the closure occurred while the court was instructing the jury as opposed to taking testimony is irrelevant. "The public trial right extends beyond the taking of a witness's testimony at trial." *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). *Every* part of the trial is subject to the open-

courtroom guarantee. *Id.* at 178 (because of our interest in protecting the transparency and fairness of criminal trials, "**all stages of courtroom proceedings** [must] remain open unless the trial court identifies a compelling interest to be served by closure") (emphasis added); Const. art. I, §§ 10, 22. Indeed, even pre-trial proceedings like voir dire and suppression hearings must be open to the public. *See Orange*, 152 Wn.2d at 812; *Bone-Club*, 128 Wn.2d at 257. Clearly, the constitutional right to a public trial includes the right to an open courtroom while the judge instructs the jury. *Commonwealth v. Patry*, 48 Mass. App. Ct. 470, 474, 722 N.E.2d 979 (2000) (reversing where judge gave supplemental instruction to jury in jury room instead of in open courtroom).

Nor does it matter that the closure was inadvertent and that the doors were locked for "only" half an hour. "[A] courtroom closure can occur even in the absence of an explicit court order." *State v. Njonge*, 161 Wn. App. 568, 575, 255 P.3d 753 (2011). Furthermore, "[w]hether the closure was intentional or inadvertent is constitutionally irrelevant," even under the federal constitution. *Walton v. Briley*, 361 F.3d 431, 433 (7th Cir. 2004). It is certainly irrelevant under our more-protective state constitution, which has no "de minimis" exception to the open courts requirement. *Easterling*, 157 Wn.2d at 181 n.12; *State v. Leyerle*, 158 Wn. App. 474, 485, 242 P.3d 921 (2010); *see also Paumier*, 176 Wn.2d at

32-37 (reversing for public trial violation even though only four jurors were briefly questioned during voir dire outside public courtroom). In sum, the closed proceedings in this case violated the constitutional right to a public trial, and the court erred in minimizing and refusing to cure the violation.

c. The remedy is reversal and remand for a new trial.

A violation of the constitutional right to a public trial is structural error requiring reversal of the convictions and remand for a new trial. *Paumier*, 176 Wn.2d at 37; *Wise*, 176 Wn.2d at 6; *Easterling*, 157 Wn.2d at 181. Mr. Conover accordingly requests that this Court reverse and remand for a new trial.

**2. The trial court erred in overruling Mr. Conover's objection to the reasonable-doubt instruction, because the Supreme Court has held the jury's job is not to find the truth but to determine whether the State proved its case.**

A jury's role is not to search for the truth. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); *see also State v. Berube*, 171 Wn. App. 103, 286 P.3d 402, 411 (2012) ("truth is not the jury's job. And arguing that the jury should search for truth and not for reasonable doubt both misstates the jury's duty and sweeps aside the State's burden"). Instead, the job of the jury "is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Emery*, 174 Wn.2d at

760. "[A] a jury instruction misstating the reasonable doubt standard is subject to automatic reversal without any showing of prejudice." *Id.* at 757 (quoting *Sullivan v. Louisiana,* 508 U.S. 275, 281–82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)).

Over Mr. Conover's objection, the trial court instructed the jury that proof beyond a reasonable doubt means that, after considering the evidence, the jurors had "an abiding belief in the truth of the charge." CP 29 (Instruction 3); CP 20 (defense proposed instruction without this language); 2 RP 3-4. By equating proof beyond a reasonable doubt with a "belief in the truth" of the charge, the court confused the critical role of the jury. The "belief in the truth" language encourages the jury to undertake an impermissible search for the truth and invites the error identified in *Emery*.

The presumption of innocence may be diluted or even "washed away" by confusing jury instructions. *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). It is the court's obligation to vigilantly protect the presumption of innocence. *Id.* In *Bennett*, the Supreme Court found the reasonable doubt instruction derived from *State v. Castle*, 86 Wn. App. 48, 53, 935 P.2d 656 (1997), was "problematic" as it was inaccurate and misleading. 161 Wn.2d at 317-18. Exercising its "inherent

supervisory powers," the Supreme Court directed trial courts to use WPIC 4.01 in all future cases. *Id.* at 318.

That pattern instruction reads:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. [If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt].

11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 4.01, at 85 (3rd ed. 2008) ("WPIC").

The *Bennett* Court did not comment on the bracketed "belief in the truth" language. However, recent cases show the problematic nature of such language. In *Emery*, the prosecution told the jury that "your verdict should speak the truth," and "the truth of the matter is, the truth of these charges, are that" the defendants are guilty. 174 Wn.2d at 751. These remarks misstated the jury's role, but because they were not part of the

court's instructions, and the evidence was overwhelming, the error was harmless. *Id.* at 764 n.14.

In *Pirtle*, the Court held that the "abiding belief" language did not "diminish" the pattern instruction defining reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 657-58, 904 P.2d 245 (1995). The Court ruled that the "[a]ddition of the last sentence [regarding having an abiding belief in the truth] was unnecessary but was not an error." *Id.* at 658. The *Pirtle* Court did not focus its attention on whether this language encouraged the jury to view its role as searching for the truth. *Id.* at 657-58. Instead, it was addressing whether the phrase "abiding belief" was different from proof beyond a reasonable doubt. *Id.*

The *Pirtle* Court concluded that this language was unnecessary but not erroneous, which is far from an endorsement of the language. Yet *Emery* demonstrates the danger of injecting a search for the truth into the definition of the State's burden of proof. This language invites the jury to be confused about its role and serves as a platform for improper arguments about the jury's role in looking for the truth, as explained in *Emery*. 174 Wn.2d at 760.

Improperly instructing the jury on the meaning of proof beyond a reasonable doubt is structural error. *Sullivan*, 508 U.S. at 281-82. Furthermore, this Court has a supervisory role in ensuring the jury's

instructions fairly and accurately convey the law. *Bennett*, 161 Wn.2d at 318. This Court should hold that directing the jury to treat proof beyond a reasonable doubt as the equivalent of having an "abiding belief in the truth of the charge" misstates the prosecution's burden of proof, confuses the jury's role, and denies an accused person his right to a fair trial by jury as protected by the state and federal constitutions.

**3. In derogation of due process and the Sentencing Reform Act, the trial court calculated Mr. Conover's offender score based on the prosecutor's unsupported criminal history allegation.**

a. The sentencing court calculated Mr. Conover's offender score based on the prosecutor's one-page "Statement of Defendant's Criminal History," which was submitted with no supporting evidence.

At sentencing, the prosecutor filed a one-page "Prosecutor's Statement of Criminal History," listing four alleged prior convictions. CP 89. The prosecutor listed an alleged eluding conviction from 1990, which the State said washed out, one "VUCSA Poss" and one bail jump from 2005, and another "VUCSA Poss" from 2006. CP 89. There was no cause number listed for the alleged 2005 drug possession, and the prosecutor cited "Columbia, OR" as the location of the 2006 conviction. CP 89. No certified judgments or other evidence of the alleged prior convictions were attached to this document or otherwise submitted.

Despite the absence of evidence, the sentencing court calculated Mr. Conover's offender score as a five, based on two current convictions and the three prior convictions alleged on the Prosecutor's summary. CP 61-62. The criminal history listed on the judgment and sentence includes no cause numbers, and the 2006 conviction is listed as occurring in "Cowlitz, WA," even though the prosecutor's summary stated it occurred in "Columbia, OR." CP 61, 89.

As explained below, because the State failed to prove Mr. Conover's criminal history by a preponderance of the evidence, the court erred in calculating the offender score as a five rather than a two.

b. The sentencing court erred in calculating the offender score based on the prosecutor's unsupported allegations, because the State bears the burden of proving criminal history by a preponderance of the evidence.

The Sentencing Reform Act ("SRA") creates a grid of standard sentencing ranges calculated according to the seriousness level of the crime in question and the defendant's offender score. RCW 9.94A.505, .517, .518, .525, .530; *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). The offender score is the sum of points accrued as a result of prior and other current convictions. RCW 9.94A.525.

A defendant may challenge the offender score for the first time on appeal. *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). This Court reviews *de novo* the sentencing court's calculation of the offender score. *State v. Rivers*, 130 Wn. App. 689, 699, 128 P.3d 608 (2005).

It is the State's burden to prove the existence of prior convictions by a preponderance of the evidence. *Ford*, 137 Wn.2d at 479-80. The best evidence of a prior conviction is a certified copy of the judgment and sentence. *Rivers*, 130 Wn. App. at 698. The State may prove prior convictions by other evidence only if (1) it shows a certified copy of the judgment and sentence is unavailable due to some reason other than the serious fault of the proponent, and (2) the evidence introduced in lieu of certified copies of the judgment and sentence is of comparable reliability. *Id.* at 698-99. The State's burden is not obviated by a defendant's failure to object. *Ford*, 137 Wn.2d at 482-83.

In 2008, the legislature attempted to change the above rules by amending the SRA. *See State v. Hunley*, 175 Wn.2d 901, 287 P.3d 584 (2012). But both this Court and the Supreme Court held that relieving the State of its burden of proof violated due process. *Id.* at 905. "[A] sentencing court violate[s] a defendant's right to due process by basing the

imposed sentence on prior convictions demonstrated only by the prosecutor's written summary and the defendant's failure to object." *Id.*

Under *Hunley* and the SRA as constitutionally construed, the trial court erred in calculating Mr. Conover's offender score. *See id.* The remedy is reversal of the sentence and remand for resentencing. *Id.* at 906 n.2.

**4. The sentencing court erred in running the bus-zone enhancements consecutively rather than concurrently.**

As noted above, the sentencing court calculated Mr. Conover's offender score as a five, which resulted in a standard range of 20-60 months. CP 62; RCW 9.94A.517, .518. The jury had also found that Mr. Conover committed each of the three current offenses within a school-bus zone, resulting in a two-year enhancement for each count. CP 50, 53, 56; RCW 9.94A.533(6). However, instead of increasing the standard range for each count to 44-84 months and imposing concurrent sentences within that enhanced range, the sentencing court ruled that the enhancements were supposed to run *consecutively* to one another. At the prosecutor's urging, the court imposed 10 years on each count, consisting of "48 months on each … plus 72 months in enhancements on each for a total of 120, all concurrent." 3 RP 19. This was error.

This issue is one of statutory construction, a question of law this Court reviews de novo. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). In determining the meaning of a statute, courts look first to the text; if the statute is clear on its face, its meaning is to be derived from the language alone. *State v. Moeurn*, 170 Wn.2d 169, 174, 240 P.3d 1158 (2010). If the statute is susceptible to more than one reasonable interpretation, "we may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent." *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010) (internal citation omitted). Where a statute is ambiguous, the rule of lenity requires it be interpreted strictly against the State and in favor of the accused. *State v. Mullins*, 128 Wn. App. 633, 642, 116 P.3d 441 (2005).

The statute governing enhancements is RCW 9.94A.533. Subsection (3) imposes additional time for crimes committed with a firearm; subsection (4) does the same for other deadly weapons; and subsection (5) deals with crimes committed in jail or prison. Other sections address enhancements for prior DUIs, for crimes committed with sexual motivation, for offenders who involved minors in gang crimes, and for other conduct. *See id.* The enhancement at issue here is listed in subsection (6):

> An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435[3] or 9.94A.827. All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

RCW 9.94A.533(6).

Importantly, the legislature did not use the same language in each section of RCW 9.94A.533. The firearm-enhancement section, unlike the drug-zone enhancement section, explicitly mandates that multiple enhancements are to run consecutively to each other, not just the base sentence:

> Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, **including other firearm or deadly weapon enhancements**, for all offenses sentenced under this chapter.

RCW 9.94A.533(3)(e) (emphasis added). A prior version of the firearm-enhancement section looked more like the current drug crimes enhancement section:

> Notwithstanding any other provision of law, any and all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall not run concurrently with any other sentencing provisions.

---

[3] RCW 69.50.435 includes the enhancement applicable here, for delivering drugs "within one thousand feet of a school bus route stop designated by the school district." RCW 69.50.435(1)(c).

*In re the Postsentence Review of Charles*, 135 Wn.2d 239, 247, 955 P.2d 798 (1998) (quoting former RCW 9.94A.310(3)(e)). The Supreme Court held that under this prior version of the statute, firearm enhancements did not run consecutively to each other, but only to the base sentence. *Charles*, 135 Wn.2d at 253-54. The only time enhancements were to run consecutively to each other is if the underlying sentences themselves were consecutive. *Id.* at 254. This makes sense, because "[a]n enhancement is not a separate sentence; rather, it is a statutorily mandated increase to an offender's sentence range because of a specified factor in the commission of the offense." *Id.* at 253.

In response to *Charles*, the Legislature amended the statute to add the language emphasized above: "...shall run consecutively to all other sentencing provisions, **including other firearm or deadly weapon enhancements**." *State v. DeSantiago*, 149 Wn.2d 402, 415-16, 68 P.3d 1065 (2003) (citing RCW 9.94A.510(3)(e); RCW 9.94A.510(4)(e); Laws of 1998, ch. 235 § 1)). Following the amendments, "all firearm and deadly weapon enhancements are mandatory and, where multiple enhancements are imposed, they must be served consecutively to base sentences and to any other enhancements." *DeSantiago*, 140 Wn.2d at 416.

Critically, the Legislature did not add this language to the section at issue here. Although subsection (6) mandates that a drug-crime enhancement run consecutively to the base sentence (and to other enhancements applied to the same count), it does not state that it runs consecutively to enhancements on other counts. *Compare* RCW 9.94A.533(6) *with* RCW 9.94A.533(3)(e). "Where the Legislature omits language from a statute, intentionally or inadvertently, this court will not read into the statute the language that it believes was omitted." *State v. Slattum*, ___ Wn. App. ___, 295 P.3d 788, 796 (2013) (citing *State v. Moses*,145 Wn.2d 370, 374, 37 P.3d 1216 (2002)). Indeed, it is clear that the Legislature knew how to state that enhancements must run consecutively to each other, because it said so in the firearm and deadly weapon enhancement sections. RCW 9.94A.533(3)(e). The fact that the legislature explicitly provided for consecutive enhancements in one section of the statute shows it did not intend for courts to impose consecutive enhancements in the section in which it omitted such language. *See Slattum*, 295 P.3d at 796; *State v. Roberts*, 117 Wn. 2d 576, 586, 817 P.2d 855 (1991) ("Where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent").

Thus, as to the drug-zone enhancements, the reasoning of *Charles* controls, and the enhancements do not run consecutively to each other. Rather, for each count, the enhancement increases the standard range by two years. The court then sentences the defendant within the enhanced range for each count. The question of whether the sentences run concurrently or consecutively is determined by reference to RCW 9.94A.589. *See Charles*, 135 Wn.2d at 254 (citing former RCW 9.94A.400, since recodified at 9.94A.589). Because the crimes at issue here are not serious violent offenses, the sentences are concurrent, not consecutive. RCW 9.94A.589. The remedy is reversal and remand for resentencing. *Charles*, 135 Wn.2d at 255.

**5. The findings on the aggravating factor should be stricken because Mr. Conover's convictions were not "major violations of the Uniform Controlled Substances Act."**

The court did not impose an exceptional sentence based on the jury's finding of aggravating factors. CP 60-72. Mr. Conover nevertheless challenges these findings because they are on his record. CP 51, 54, 57, 58. For each count, the jury found the crime was "a major violation of the Uniform Controlled Substance Act involving the attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use." CP 51, 54, 57. The jury also

found, as to all three counts combined, the crimes were "a major violation of the Uniform Controlled Substance Act involving at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so." CP 58.

The statute at issue is RCW 9.94A.535, which lists several aggravating factors, including the one charged here:

> (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;
> (ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;
> . . .

RCW 9.94A.535(3)(e).

But the aggravator does not apply to Mr. Conover's crimes. To begin with, the jury's finding regarding "three separate transactions" must be stricken because none of the offenses for which Mr. Conover was convicted involved more than one transaction. The State could have charged Mr. Conover with a single offense and then charged him with this aggravating factor, but because the State instead charged him with three

separate offenses, the aggravator does not apply. The statue provides that "**the current offense**" is a major violation if "[t]he **current offense** involved at least three separate transactions...." RCW 9.94A.535(3)(e)(i) (emphasis added). "Offense" is a singular noun. Each of the three counts for which Mr. Conover was convicted was a separate "offense," and none involved three transactions. This statutory aggravating factor therefore does not apply.

As to the other basis for finding that these were "major" violations of the Controlled Substances Act, the State failed to prove the quantities involved were "**substantially** larger than for personal use." RCW 9.94A.535(3)(e)(2) (emphasis added). The amount of heroin Mr. Conover allegedly sold to the informant in each of the three counts was a quarter ounce, at a price of $350-$400. 1 RP 35, 71, 79.

Detective Russell Hanson testified that "a typical dose of heroin" is "going to depend a lot on the user." 1 RP 36. He said that although some people buy as little as $20 worth at a time, "[a] lot of them will have $100-a-day habits." 1 RP 36-37. As Mr. Conover's attorney pointed out in closing argument, four days' worth of heroin is not substantially larger than for personal use. 2 RP 161.

If the phrase "substantially larger than for personal use" can be applied to these facts, the aggravator is unconstitutionally vague. Due

Process requires that statutes give citizens fair warning of prohibited conduct and protect them from "arbitrary, ad hoc, or discriminatory law enforcement." *State v. Halstien*, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993); U.S. Const. amend. XIV. A statute is void for vagueness if it either (1) does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited, or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. *Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). A statute that "leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case," is unconstitutional. *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966). "It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face." *Walton v. Arizona*, 497 U.S. 639, 653, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584, 609, 122 S.Ct. 2348, 153 L.Ed.2d 556 (2002).

If the "substantially larger than for personal use" aggravating factors can be applied in this case, it is unconstitutionally vague. The phrase is not defined, so the jury was "free to decide, without any legally fixed standards," whether Mr. Conover was guilty of the aggravating

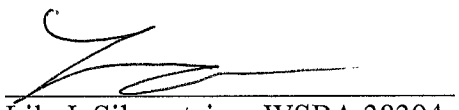
factor. *See Giaccio*, 382 U.S. at 402-03. This type of standardless discretion violates due process. *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). For this additional reason, this Court should reverse and remand for vacation of the aggravating factors.

E. CONCLUSION

For the reasons set forth above Mr. Conover asks this Court to reverse his convictions and remand for a new trial. In the alternative, the case should be remanded for resentencing because the trial court improperly calculated the offender score and incorrectly ran the enhancements on multiple counts consecutively rather than concurrently. Finally, the findings on the aggravating factor should be stricken.

DATED this 1st day of May, 2013.

Respectfully submitted,



Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**
**DIVISION TWO**

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| STATE OF WASHINGTON, | ) | |
| | ) | |
| RESPONDENT, | ) | |
| | ) | NO. 44175-6-II |
| v. | ) | |
| | ) | |
| TIMOTHY CONOVER, | ) | |
| | ) | |
| APPELLANT. | ) | |

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