NO. 46297-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RANDY RICHTER,

Appellant.

RESPONDENT'S BRIEF

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3. Was the trial court's imposition of an exceptional sentence clearly excessive?

4. Did the trial court err in imposing legal financial obligations upon the Appellant?

5. Is WPIC 4.01 unconstitutional?

II. SHORT ANSWER

1. **No**. The trial court properly denied the Appellant's motion for a mistrial.

2. **No**. The trial court properly run consecutively to one another.

3. **No**. The trial court's imposition of an exceptional sentence was not clearly excessive.

4. **No.** The Appellant did not object at the time of sentencing, so a reviewing court has discretion whether to review such a claim for the first time on appeal.

5. **No**. WPIC 4.01 is not unconstitutional.

III. STATEMENT OF FACTS

The State agrees, for the most part, with the factual and procedural history as set forth by the Appellant. Where appropriate, the State's brief will point to the record to address specific facts in contention regarding the issues before the Court.

IV. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN DENYING THE APPELLANT'S MOTION FOR A MISTRIAL.

A mistrial should be granted only when "nothing the trial court could have said or done would have remedied the harm done to the defendant." *State v. Gilcrist*, 91 Wn.2d 603, 612, 590 P.2d 809 (1979). The court will utilized three factors when determining a trial irregularity warrants a new trial: (1) the seriousness of the irregularity; (2) whether the statement was cumulative of evidence properly admitted; and (3) whether the irregularity could have been cured by an instruction. *State v. Post*, 118 Wn.2d 596, 620, 826 P.2d 599 (1992). A trial court's denial of a motion for a mistrial is reviewed for abuse of discretion. *State v. Allen*, 159 Wn.2d 1, 10, 147 P.3d 581 (2006); *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). A denial of a motion for a mistrial should be overturned only when there is a substantial likelihood that the prejudiced affected the verdict. *State v. Greiff*, 141 Wn.2d 910, 921, 10 P.3d 390 (2000). "Jurors are presumed to follow instructions." *State v. Hopson*, 113 Wn.2d 273, 287, 778 P.2d 1014 (1989).

Here, the Appellant's argument that the trial court abused its discretion when denying his motion for a mistrial is without merit. The State agrees with the Appellant that no CrR 3.5 hearing was held. The State

did not seek to offer any of the Appellant's statements as evidence during its case in chief. The Appellant's attorney, during cross examination, asked Detective Epperson, "[w]hat about the backpack, did you find any kind of mail or any kind of things that would indicate it was Randy's stuff?" 2RP at 158. Detective Epperson responded, "[n]o, it was sitting on the passenger seat right near some automotive-type things...that Mr. Richter later told me were his." 2RP at 158. Detective Epperson's testimony was immediately objected to and stricken from the record. 2RP at 158.

As stated above, the jury is presumed to follow instructions. They were specifically instructed to not consider Detective Epperson's testimony about the Appellant's statement as evidence: "You're ordered to disregard that." 2RP at 158. The court cured the irregularity by properly instructing the jury to not consider the statement. No other reference to the stricken testimony was made. The State did not attempt to reintroduce the statement during redirect or through any other witnesses. The State did not reference the statement during its closing argument, nor did it rely upon it as evidence of the Appellant's guilt.

The Appellant claims that even with this instruction, the bell cannot be unrung. This argument makes two false assumptions. First, that the Appellant's statement was a "confession." Secondly, the State had no other evidence to present to the jury. The bell that cannot be unrung is not the

statement that was made about automotive things that were not offered as evidence; rather, it's the fact that the Appellant was observed and video recorded selling drugs on three separate occasions.

Much of the Appellant's argument is based upon an assumption that the jury verdict was based upon an inadmissible confession. The Appellant consistently mischaracterizes the statement in question as a "confession." The statement in question, "that Mr. Richter later told me were his," is in regards to the automotive things, not the backpack or its contents. The Appellant's counsel acknowledges this fact. 2RP at 195. A "confession" does not appear anywhere in the record.

The Appellant claims that "Epperson's testimony *could have* resulted in a conviction based on an involuntary confession..." *Appellant's Brief* at 12. This argument assumes that the State had no other evidence of the Appellant's constructive possession of the methamphetamine. As the record clearly establishes, the Appellant was observed on three other occasions in control of the same maroon Ford Explorer.

Ms. Curley testified that when she conducted the controlled buys with the Appellant, he was with the Ford Explorer. 2RP at 56, 64, and 68. Detective Epperson personally observed the Appellant and the maroon Ford Explorer during the June 21, 2013 controlled buy. 2RP at 96. Sergeant Hartley observed the Appellant in control of the Ford Explorer during the

July 5, 2013 controlled buy. 2RP at 182-83. This controlled buy was video recorded by Sergeant Hartley. 2RP at 175. The recording was played for the jury. 2RP at 181. The jury observed the Appellant with the Ford Explorer. 2RP at 182-83. Sergeant Hartley observed the Appellant in control of the Ford Explorer during the July 11, 2013 controlled buy. 2RP at 184. This controlled buy was video recorded by Sergeant Hartley. 2RP at 183. The recording was played for the jury. 2RP at 188. Finally, Officer Sawyer observed the Appellant in control of the same Ford Explorer during the June 21, 2013 controlled buy. 3RP at 9-10. Officer Sawyer video recorded this controlled buy. 3RP at 14. The video recording was played for the jury. 3RP at 14.

In addition to the above stated evidence, when the Appellant was arrested, he was in control of the same Ford Explorer as he was during the three controlled buys. 2RP at 135. Thus, the jury was presented with overwhelming evidence that the Appellant was in constructive possession of the methamphetamine that was found in the Ford Explorer when he was arrested on August 28, 2013. He conducted three controlled buys out of that same vehicle within the past 60 days. The backpack containing the methamphetamine was found on the passenger seat in close proximity to the Appellant when he was arrested. 2RP at 158. Based upon its location, the jury would be permitted to infer that the Appellant had the immediate ability

to take control of the methamphetamine. Based upon the fact that the Appellant was in control of the same Ford Explorer on four separate and distinct occasions, the jury would reasonably be able to find that he had dominion and control over where the methamphetamine was found.

The trial court did not abuse its discretion when denying the Appellant's motion for a mistrial. The testimony was objected to, the objection was granted, and the jury was ordered to disregard the testimony. The State did elicit or reference the statement, nor did it rely upon it as evidence. The Appellant cannot establish that the irregularity warranted a new trial.

B. THE TRIAL COURT DID NOT ERR WHEN RUNNING THE SCHOOL BUS STOP ENHANCEMENTS CONSECUTIVELY.

The point of statutory construction, and the court's overall objective, is to determine the legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.,* 146 Wn.2d 1, 9, 43 P.3d 4 (2002). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Id.* at 9-10. Such "plain meaning" is determined by looking to the ordinary meaning of the statute, as well as the context of the statute, related provisions and the statutory scheme as a whole. *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 645, 62 P.3d 462 (2003).

If there is still room for more than one meaningful interpretation, the statute is ambiguous. *Id.* If ambiguous, the court would apply the rule of lenity and apply the statute in favor of the defendant. *In re PRP of Charles*, 135 Wn.2d 239, 249, 955 P.2d 798 (1998). The rule of lenity, however, only applies when there is no significant evidence of contrary legislative intent. *Id.* Statutes are interpreted to give effect to all language in the statute, thereby avoiding absurd results and rendering various portions of the statute meaningless. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003); *State v. Neher*, 112 Wn.2d 347, 351, 771 P.2d 330 (1989).

The legislature intended school zone enhancements under RCW 9.94A.533(6) to run consecutive to all other sentencing provisions, as well as one another. The evidence of legislative intent is shown by the legislature's response to *State v. Jacobs*, 154 Wn.2d 596, 115 P.3d 281 (2005). The Court in that case, interpreted former RCW 9.94A.310(6), which read "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 or 9.94A.605." *Id.* at 601-02. Petitioners had been sentenced to two enhancements under then RCW 9.94A.310(6), the bus stop enhancement (RCW 69.50.435) and the enhancement for manufacturing methamphetamine with someone under the age of 18 present (then RCW 9.94A.605). *Id.* at 600. Both enhancements

applied to a single count of unlawful manufacture of methamphetamine. *Id.* After substantial analysis, the Court found that former RCW 9.94A.310(6) was ambiguous as to whether or not it intended for the enhancements to run consecutive to one another and applied the rule of lenity. *Id.* at 604.

In response to *Jacobs*, the legislature amended RCW 9.94A.533(6) in 2006, adding a sentence, "[a]ll enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter." Looking to the House Bill Report governing the change to the statute, it is clear that the intent of the change was to ensure all such enhancements under that provision run consecutive to each other and everything else. The House Bill report noted that in *Jacobs*, "the defendants challenged the statutory language regarding the sentence enhancements for violations of the UCSA on the grounds that they believed multiple sentence enhancements should be applied concurrently instead of consecutively. The courts concluded that the statutory language appeared ambiguous and as a result, under the rule of lenity, it was ruled that sentencing courts should apply multiple sentencing enhancements concurrently to each other." H.B.. REP. on Second Substitute H.B. 6239, 59th Leg., Reg. Sess., at 7, 13–14 (2006) Though the legislature put the wrong citation in the House Bill Report (citing the Court of Appeals case that had actually upheld the application of consecutive sentences), the

remarks clearly and accurately describe the Court's decision in *Jacobs*. This reference is contained in a number of different bill reports. ENGROSSED SECOND SUBSTITUTE on Final Bill Report S.B. 6239, 59th Leg., Reg. Sess., at 4 (Wash.2006); ENGROSSED SECOND SUBSTITUTE S.B. 6239, 59th Leg., Reg. Sess., at 2, 5 (Wash.2006); H.B. REP.. on Second Substitute H.B. 6239, 59th Leg., Reg. Sess., at 7, 13–14 (2006). There is clear notice of the intent of the legislature.

The intent of the legislature is clear. Enhancements applied under RCW 9.94A.533(6) must be run consecutive to any other sentencing provision, including other enhancements applied under that section. Because there is clear evidence of legislative intent, the rule of lenity does not apply. This court should deny the appellant's motion to vacate the school zone enhancements.

C. THE TRIAL COURT'S IMPOSITION OF AN EXCEPTIONAL SENTENCE ABOVE THE STANDARD RANGE WAS NOT CLEARLY EXCESSIVE.

An exceptional sentence can be reversed if a review court finds:

> (a) either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

RCW 9.94A.585(4). The Appellant has conceded that there was a legally adequate basis for the imposition of the exceptional sentence above standard range. *Appellant's Brief* at 20. The Appellant basis his claim that the court abused its discretion and imposed a sentence that was clearly excessive upon the holdings in *State v. Sanchez*, 69 Wn. App. 255, 848 P.2d 208, *review denied*, 122 Wn.2d 1007, 859 P.2d 604 (1993) and *State v. Hortman*, 76 Wn. App. 454, 886 P.2d 234 (1994), *review denied*, 126 Wn.2d 1025, 895 P.2d 64 (1995). Those cases involved instances where the sentencing court imposed an exceptional sentence below the standard range. Both of those cases involved multiple buys controlled by the police, same buyer and seller, same location, and a short period of time (nine days in *Sanchez*; one month in *Hortman*).

"The fact that a sentencing court appropriately exercised its discretion in those cases to adjust the sentence downward does not imply that the court abused its discretion in this case." *State v. McCollum*, 88 Wn. App. 977, 986, 947 P.2d 1235 (1997). In *McCollum*, the sentencing court imposed an exceptional sentence above the standard range after the defendant pled guilty to three counts of delivery of a controlled substance and two counts of possession of a controlled substance with intent to deliver. *Id.* at 980-81. "*Sanchez* also held that nothing in its decision necessarily applies to police-controlled drug transactions 'that have a law enforcement

purpose other than to generate an increase in the offender's standard range." *Id.* at 986 (quoting *Sanchez*, 69 Wn. App. at 262-63). The court specifically noted that the defendant's convictions included one that was not a controlled buy and that it occurred at the time of his arrest. *McCollum*, 88 Wn. App. at 986. "[T]he offenses together draw a picture of an active drug dealer and the imposition of an exceptional sentence in this case was not an abuse of discretion." *Id.* at 986-87.

There are facts that distinguish the present matter from *Sanchez* and *Hortman*. First, like in *McCollum*, this case involved a conviction separate and distinct from the controlled buys. The Appellant conveniently ignores this fact in arguing that the difference between the first act and the cumulative effects of the subsequent acts are de minimus. The Appellant sold methamphetamine to Ms. Curley on June 21, 2013, July 5, 2013, and July 11, 2013 (a period of twenty days). On August 28, 2013, he in possession of methamphetamine with intent to deliver – sixty-seven days after the first controlled buy. As the State presented at trial, the fact that the Appellant sold methamphetamine on three separate occasions and was arrested for and convicted of possession of a controlled substance with intent to deliver draws a picture of an active drug dealer.

Second, and most importantly, the investigation into the Appellant cannot be considered as a means to increase his offender score. At the time

he committed these four felonies, the Appellant had twenty-five prior felony convictions. 3RP at 162. With three concurrent convictions, his offenders score at the time of sentencing was twenty-eight. 3RP at 163. Whether it was one controlled buy, three controlled buys, or fifteen controlled buys, the Appellant's sentence range was going to be the same.

The Appellant's extremely high offender score gives the court its legal and factual basis. As the Appellant points out, the SRA's purpose includes "ensuring punishments are proportionate to the seriousness of the offense and the offenders' criminal history, (2) promoting respect for the law by providing just punishment...(4) protecting the public." RCW 9.94A.010. The Appellant is a career criminal – that is evident from his criminal history and offender score. The Appellant has no respect for the law – that is evident from his criminal history and offender score. The public needs to be protected from the Appellant – that is evident from his criminal history and offender score. Therefore, the trial court was legally and factually justified in imposing the exceptional sentence, and the sentence is not clearly excessive.

D. THE COURT IS NOT OBLIGATED TO REVIEW THE TRIAL COURT'S IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS.

For the first time on appeal, the Defendant challenges the court's imposition of legal financial obligations, arguing that there is insufficient

evidence of his present or future ability to pay. Recently, the Washington Supreme Court decided *State v. Blazina*, 344 P.3d 680 (2015). It held that it is not error for a Court of Appeals to decline to reach the merits on a challenge to the imposition of LFO's made for the first time on appeal. *Id.* at 682. "Unpreserved LFO errors do not command review as a matter of right under *Ford* and its progeny." *Id.* at 684. The decision to review is discretionary on the reviewing court under RAP 2.5. *Id.* at 681. In other words, this Court may continue to apply its initial decision in *State v. Blazina,* 174 Wn. App. 906, 911, 301 P.3d 492 (2013) ("Because he did not object in the trial court to finding 2.5, we decline to allow him to raise it for the first time on appeal.").

RAP 2.5(a) reflects a policy which encourages the efficient use of judicial resources and discourages late claims that could have been corrected with a timely objection. *State v. Scott,* 110 Wn.2d 682, 685, 757 P.2d 492 (1988). The Appellant did not object to the legal financial obligations at the time of sentencing. The State respectfully requests this court not review the Appellant's claim.

E. WPIC 4.01 IS NOT UNCONSTITUTIONAL.

The Appellant's claim that the trial court's reasonable doubt instruction was unconstitutional must be rejected. WPIC 4.01 expressly was approved by the Washington Supreme Court in *State v. Bennett*, 161

Wn.2d 303, 317-18, 165 P.3d 1241 (2007). There, the Court noted that the instruction was adopted from well-established language in *State v. Tanzymore*, 54 Wn.2d 290, 340 P.2d 178 (1959), in which the Court, nearly sixty years prior, observed that "'[t]his instruction has been accepted as a correct statement of the law for so many years, we find the assignment [of error criticizing the instruction] without merit.'" *Bennett*, 161 Wn.2d at 308 (quoting *Tanzymore*, 54 Wn.2d at 291 (alterations original as quoted)). Indeed, the court in *Bennett* approved so strongly of WPIC 4.01 that it exercised its inherent supervisory authority to require trial courts in this state to issue WPIC 4.01—and *only* WPIC 4.01—in defining reasonable doubt. *Bennett*, 161 Wn.2d at 318.

The Appellant has not provided this court with any basis upon which to depart from the holding of the Washington Supreme Court in *Bennett*. *See State v. Watkins*, 136 Wn. App. 240, 246, 148 P.3d 1112 (2006) (observing that the Court of Appeals will follow the precedent of the Washington Supreme Court). Even if this court were inclined to entertain a challenge to controlling Washington State Supreme Court precedent, the Appellant bears the burden of making a "clear showing" that WPIC 4.01 is "incorrect and harmful." *In re Stranger Creek & Tributaries in Stevens Cnty.*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). The Appellant has failed to do so.

The Appellant relies on the "fill in the blank" line of cases typified by *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012), for the proposition that the inclusion of the indefinite article, "a," before "reasonable doubt," incorrectly requires jurors to articulate a specific reason for their doubt. *Supplemental Brief of Appellant* at 6-9 (quoting *Emery*, 174 Wn.2d at 760). However, the Appellant's argument actually fails under *Emery*. In that case, although holding that the prosecutor committed misconduct by urging the jury to articulate a reason for its doubt (i.e., to fill in the blank), the Washington Supreme Court observed that the prosecutor had "properly describ[ed] reasonable doubt as a 'doubt for which *a* reason exists[.]'" *Emery*, 174 Wn.2d at 760 (emphasis added). *Emery* prohibits only the *misuse* of this definition by prosecutors in closing argument; it starts with the premise that the definition of reasonable doubt employed by WPIC 4.01 is correct.

Division II of the Court has previously rejected the Appellant's same argument before. In *State v. Thompson*, 13 Wn. App. 1, 533 P.2d 395 (1975), the defendant argued that the phrase, "'. . . a doubt for which a reason exists[,]' . . . misleads the jury because it requires them to assign a reason for their doubt, in order to acquit." *Id.* at 4-5. The court rejected this argument because "the particular phrase, when read in the context of the entire instruction does not direct the jury to assign *a reason* for their doubts,

but merely points out that their doubts must be based on reason, and not something vague or imaginary." *Id.* at 5 (emphasis added).

Even if viewed separately from these controlling authorities, the Appellant's argument is a hyper-technical exercise in semantics that should be rejected. "The test for determining if jury instructions are misleading is not a matter of semantics, but whether the jury was misled as to its function and responsibilities under the law." *State v. Brown*, 29 Wn. App. 11, 18, 627 P.2d 132 (1981); *see also Wims v. Bi-State Dev. Agency*, 484 S.W.2d 323, 325 (Mo. 1972).[1]

> Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Boyde v. California, 494 U.S. 370, 380-81, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990).

The Appellant's claim is without merit because he assumes that jurors lack a commonsense understanding of the English language and that they

[1] "We have recently said that in determining the legal sufficiency of instructions . . . the court should not be hypertechnical in requiring grammatical perfection, the use of certain words or phrases, or any particular arrangement or form of language, but . . . should be concerned with the meaning of the instruction . . . to a jury of ordinarily intelligent laymen. And it has often been recognized that juries are composed of ordinarily intelligent persons who should be credited with having common sense and an average understanding of our language." (internal quotation marks and citations omitted).

would engage in hyper-technical hairsplitting. Using an instruction approved by the Washington Supreme Court, the trial court properly instructed the jury on the meaning of reasonable doubt.

V. CONCLUSION

For the above stated reasons, the Appellant's appeal should be denied.

Respectfully submitted this 1 day of May, 2015.

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CERTIFICATE OF SERVICE

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on May 1st, 2015.

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Michelle Sasser

COWLITZ COUNTY PROSECUTOR

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