NO. 98973-7
COURT OF APPEALS NO. 36330-9-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRIAN JEFFREY ANDERSON,

Petitioner.

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

The Honorable Scott R. Sparks, Judge

PETITION FOR REVIEW

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RULES, STATUTES, AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Brian Jeffrey Anderson, the appellant below, seeks review of the split court of appeals decision in State v. Anderson, noted at ___ Wn. App. 2d ___, 2020 WL 3121174, No. 36330-9-III (Jun. 4, 2020) (Appendix A), following denial of his motion for reconsideration on July 30, 2020 (Appendix B).

B. ISSUES PRESENTED FOR REVIEW

1. The special verdict form asked the jury to decide if Mr. Anderson delivered a controlled substance within 1,000 feet of a "school bus route stop." "School bus" was defined in the jury instructions as a vehicle with a seating capacity of more than 10 persons and a vehicle owned and operated by a school district as opposed to a municipality. No evidence was presented on seating capacity, ownership, or operation of the school buses. Does the definition of "school bus" in the jury instructions delineate the state's burden of proof as to whether Mr. Anderson's actions occurred within 1,000 feet of a "school bus route stop" under the law of the case and should review be granted given that the three separate court of appeals opinions could not decide this question?

2a. Did the court of appeals violate Mr. Anderson's constitutional right to appeal by refusing to address his sufficiency

challenge to the major violation of the Uniform Controlled Substances Act (VUCSA) aggravator stated in RCW 9.94A.535(3)(e)(1).

2b. Under RCW 9.94A.535(3)(e)(1), where an offense involves at least three separate transactions, it constitutes a major VUCSA offense. The four offenses at issue involved only one transaction each, not three. Was there insufficient evidence to support the jury's special verdicts that each conviction constituted a major VUCSA violation?

2c. Despite no exceptional sentence, did the major VUCSA violation aggravators nonetheless prejudice Mr. Anderson at sentencing, such that this issue is not moot as the court of appeals claimed?

3. Did the trial court err in permitting the state to amend the school bus route stop aggravator in the information after it had rested its case in chief?

C. STATEMENT OF THE CASE

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

The August 2015 count (Count 1) was based on a controlled buy performed by James "Jim Bob" Pearson, who testified he gave Anderson money outside of a Fred Meyer, waited for Anderson to go to Yakima and back, and then "went up to his house and went inside and got drugs and left." RP 378, 381. The March 2016 counts (Counts 2 through 4) involved confidential informant Zachary Morrell who police stated had "bought methamphetamine from Mr. Anderson." RP 212-13. Morrell testified that in early March, he bought $50 worth of meth from Anderson. RP 282. A second controlled buy occurred the following day, March 4, 2016; Morrell stated he bought a "little under a gram" of meth from Anderson. RP 214-15, 283-84. On the third and final controlled buy performed by Morrell on March 10, 2016, Morrell wore a wire. RP 216-17. Morrell stated he had to wait for someone else to bring Anderson meth, but that he ultimately purchased $20 worth of meth from Anderson. RP 285-86.

The prosecution also alleged that Anderson's August 2015 delivery of methamphetamine to Pearson occurred within 1000 feet of a school bus route stop. CP 31. The third amended information, which was the current charging document at the commencement of trial, alleged that Anderson violated RCW 69.50.401 "by manufacturing, selling, delivering, or possessing with intent to manufacture, sell, or deliver a controlled substance listed under that subsection by selling for profit any controlled substance or

counterfeit substance classified in schedule I, RCW 69.50.204 . . . ." CP 31. After the State rested, defense counsel moved to dismiss the aggravator because methamphetamine is not a schedule I drug, but a schedule II drug. RP 478-79, 487-88. The trial court refused, instead allowing the State to amend the information despite having rested, ruling that the "by selling for profit any controlled substance or counterfeit substance classified in schedule I" language was unnecessary surplus language that did not bind the State. RP 488-89; compare CP 31 (third amended information) with CP 33 (fourth amended information).

With respect to the school bus stop route aggravator, the jury was provided with a definition of "school bus." CP 57. The definition required school buses to be vehicles with seating capacity of more than 10 persons, including the driver, to be regularly used to transport students to and from school or in connection with school activities, and to be owned and operated by any school district. CP 57. Although Ellensburg's director of transportation testified that there were five regularly used school bus stops within 1000 feet of Anderson's address in August 2015, no testimony or other evidence was presented about the seating capacity, ownership, or operation of any vehicle. RP 233-38.

The State also alleged that all four deliveries of a controlled substance constituted major violations of the Uniform Controlled Substances

Act pursuant to RCW 9.94A.535(3)(e)(1), which provides, "The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so." CP 33-34. The jury was instructed on this definition of a major violation. CP 59-64. But each charged count corresponded to precisely one transaction only.

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

At sentencing, the trial court imposed a standard range sentence of 30 months on each count, including an additional 24 months for the school bus route stop enhancement, for a total of 54 months' confinement. CP 96-97; RP 630. Although the trial court did not impose an exceptional sentence based on the major violation aggravators, the trial court invoked the aggravators immediately before imposing the standard range sentence and immediately before rejecting Anderson's request for a prison-based drug offender sentencing alternative (DOSA). CP 83-87; RP 629-30. Anderson appealed, CP 105, raising the arguments discussed below.

D. ARGUMENT IN SUPPORT OF REVIEW

1. **Review should be granted because the splintered court of appeals opinion could not resolve whether the state was required to prove a "school bus," as that term was precisely defined in the jury instructions, stopped at "school bus route stop[s]" under the law of the case**

The due process clause of the Fourteenth Amendment requires the State to prove every fact necessary to constitute the charge beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). On review for sufficiency, the appellate court views the evidence in the light most favorable to the prosecution asks whether a rational trier of fact could find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

The jury instructions constitute the law of the case and establish the burden the prosecution must meet. State v. Hickman, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998); State v. Nam, 136 Wn. App. 698, 706-07, 150 P.3d 617 (2007). "[T]he law of the case doctrine applies to all unchallenged instructions, not just the to-convict instruction." State v. France, 180 Wn.2d 809, 816, 329 P.3d 864 (2014). It "is a broad doctrine that has been applied to to-convict instructions and definitional instructions." State v. Calvin, 176 Wn. App. 1, 21, 316 P.3d 496 (2013) (collecting cases).

The jury was given a special verdict form in which it was asked to answer "yes" or "no" to the question, "Did the defendant deliver a controlled substance to a person within one thousand feet of a school bus route stop designated by a school district." CP 55, 66. The jury received the definition of "school bus," which required a seating capacity of more than 10 persons, including the driver, and ownership and operation by a school district rather than a municipality. CP 57.

The state presented no such proof. The Ellensburg Transportation Department Assistant Director testified about school bus stops. He said nothing about the seating capacity of the buses. He said nothing about who owned and operated the school buses and, notably, he appeared to be a municipal employee of Ellensburg rather than a school district employee. RP 236. Therefore, there was no proof that a school bus, as that term was defined in the jury instructions, presented at trial, even viewing the evidence in the light most favorable to the state.

The court of appeals panel could not agree on how to resolve Mr. Anderson's claim. The lead opinion responded by asserting that the state was required to prove the existence of just a "bus *stop* rather than a school bus." Slip op., 12-13. But the instructions required proof of a "school bus route stop," which necessarily includes the term "school bus." The term "school bus" was defined for the jury and the court of appeals did not dispute

that there was no proof of a "school bus route stop" of a "school bus" per the instructions. Thus, the lead opinion reads out the definitional instruction altogether, which violates the instructions themselves. CP 38 ("The order of these instructions has no significant as to their relative importance. They are all important."). The lead opinion conflicts with Hickman and Calvin which establish that the jury instructions given are binding in the case. Hickman, 135 Wn.2d at 101 n.2; Calvin,176 Wn. App. at 121. RAP 13.4(b)(1) and (2) review is warranted.

Also, the lead opinion errs in relying on France and State v. Tyler, 191 Wn.2d 206, 422 P.3d 436 (2018), both of which decided whether multiple definitions of a term created alternative means, not a question presented here. See slip op. (Fearing, J., dissenting in part) at 5-6. This case does not involve multiple definitions or an alternative means argument. It involves the one definition of school bus provided to the jury and whether that definition controlled the proof required to decide Mr. Anderson delivered drugs within 1,000 feet of a "school bus route stop."

This case is thus more akin to State v. Stevens, 158 Wn.2d 304, 143 P.3d 817 (2006). There, the court considered whether the state was required to show sexual gratification in order to prove "sexual contact" even though sexual gratification was not itself an element of child molestation and answered yes. Id. at 309. "Sexual contact" was defined to include "sexual

gratification" and so the prosecution had to prove sexual gratification despite it being definitional. Id. at 307, 309-10.

Definitions fall within the law of the case doctrine when they delineate what the jury must decide. Each case must be evaluated in the context of the instructions as a whole. France, 180 Wn.2d at 816; State v. Benn, 120 Wn.2d 631, 654-55, 845 P.2d 289 (1993). Here, the jury had to decide whether Mr. Anderson delivered a controlled substance within 1,000 feet of a "school bus route stop." CP 75. The only way they could decide under the instructions was deciding whether a "[s]chool bus" as was defined for had a certain seating capacity and ownership/operation, yet no such evidence was presented. CP 57. The definition of "school bus" delineated the state's burden of proof under Stevens and Hickman; any other conclusion renders the definition of "school bus" given to the jury wholly superfluous and fails to evaluate the instructions as a whole. Because the result of the court of appeals opinion conflicts with Washington's law of the case doctrine, review is warranted under RAP 13.4(b)(1) and (2).

The concurrence would not even address the effect of the jury instructions at all and instead stated, "Because the question in the special verdict form comes directly from the statute, we must discern what the legislature, by enacting RCW 69.50.435(1)(c), intended the State to prove." Slip op. (Lawrence-Berrey, J., concurring), 1. But this just ignores that the

jury was instructed on the meaning of "school bus" to determine whether a "school bus route stop" was in 1,000 feet of a drug delivery. If legislative intent answered this question, then why have a law of the case doctrine at all? The concurrence also conflicts with the law of the case doctrine by incorrectly sidestepping it altogether, meriting RAP 13.4(b)(1) and (2) review.

And the concurrence fails to apply penal statutes strictly, which is required. State v. Carter, 89 Wn.2d 236, 242, 570 P.2d 1218 (1977). Also, statutes must be read to give effect to all the language enacted and, where a term is defined, that definition controls. G-P Gypsum Corp. v. Dep't of Revenue, 169 Wn.2d 304, 309, 237 P.3d 256 (2010); United States v. Hoffman, 154 Wn.2d 730, 741, 116 P.3d 999 (2005). As with the jury instructions, the definition of "school bus" is a necessary ingredient of "school bus route stop" under the statute. The term "school bus route stop" incorporates the term "school bus" without a doubt. The concurrence reads "school bus" out of "school bus route stop" thereby rendering part of the legislative enactment superfluous. And it fails to construe the statute strictly to ensure that on conduct clearly and manifestly within the statutory terms is subject to criminal penalty. Cf. Carter, 89 Wn.2d at 242.

At the very least, the concurrence's interpretation is not the only reasonable one, rendering the statute ambiguous and subject to the rule of

lenity. See State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2005); State v. Tvedt, 153 Wn.2d 705, 711, 107 P.3d 728 (2005). Indeed, the concurrence stated, "one might infer when a school district designates a school bus route stop, a school bus actually stops there." Slip op. (Lawrence Berrey, J., concurring), 2-3. This what "one might infer" analysis implicitly acknowledges that there is a more robust and strict reading of the statute that is also reasonable. Lenity requires the reasonable interpretation that favors Mr. Anderson.

Each member of the court of appeals panel wrote separately and the court did not make a holding on this law of the case issue. This merits review by the Washington Supreme Court to determine the effect of the definitional instruction given in a non-alternative means, sentencing enhancement context, and points out conflicts and confusions in Washington jurisprudence on the role of definitions in establishing the prosecution's burden of proof under the law of the case doctrine. Under RAP 13.4(b)(1), (2), and (4), Mr. Anderson's petition should be reviewed.

2. **The court of appeals completely ignored Mr. Anderson's sole argument about the insufficiency of evidence supporting the major drug offense aggravator found by the jury, which should be reviewed per Mr. Anderson's article I, section 22 right to appeal**

a. An argument raised in a criminal appeal must be addressed by the court of appeals under the state constitution

The court of appeals disposed of Mr. Anderson's sufficiency challenge to the major violation of the Uniform Controlled Substances Act (VUCSA), calling it moot "[b]ecause the trial court did not impose an exceptional sentence" and claiming "[t]he sentence would not change even if we agree with Mr. Anderson's position." Slip op. (lead op.), 15-16. The court of appeals simply refused to address Mr. Anderson's actual position, which should be reviewed as a state right-to-appeal violation under article I, section 22. RAP 13.4(b)(3).

Mr. Anderson presented arguments challenging the sufficiency of the aggravators based on the language of RCW 9.94A.535(3)(e)(i), which states, "The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so . . . ." Br. of Appellant, 23-28; Reply Br., 8-10; CP 64. Mr. Anderson asserted that each offense he was convicted of corresponded to exactly one transaction, so there was no evidence to support the notion that any one of the offense involved at least three separate transactions. The state responded

and claimed that the word "offense" must be interpreted as the "case as a whole" rather than pertaining to each count. Br. of Resp't, 27. The state admitted it was "not arguing that standing alone, the counts would each support the allegation." Br. of Resp't, 27. Mr. Anderson replied that the state's interpretation was incorrect and that, in any event, the jury indeed was instructed to determine whether each individual count was a VUCSA offense, "standing alone." Reply Br., 8-11.

Mr. Anderson also fully acknowledged that, despite the aggravators found by the jury, no exceptional sentence was imposed. Br. of Appellant, 28. Instead, Mr. Anderson's argument was that the aggravators nonetheless influenced the trial court's decision to deny a DOSA. Indeed, at the time the DOSA was requested, the trial court referred to the aggravators as a "tool that the State has to, you know, urge you, urge you to jump on the bandwagon and take responsibility early and get your treatment started early and your sentence done early." RP 629. "But you rolled the dice instead, you went to trial," the court told Mr. Anderson. RP 629. The court claimed it was not punishing Mr. Anderson for exercising his constitutional rights, yet it stated, "You absolutely have a right to go to trial, but you don't get credit, you know, the system doesn't get anything out of that, right?" RP 629. Then the court denied the DOSA, stating, "I can't." RP 630.

Mr. Anderson criticized the trial court's "apparent belief that no credit should be given to defendants who exercise their constitutional rights, which in turn stemmed from the trial court's apparent belief that aggravating circumstances existed as a tool for the State to coerce plea deals in lieu of trials." Br. of Appellant, 29-30. Because the trial court invoked the aggravators to deny the DOSA, Mr. Anderson asserted "the aggravator still had a prejudicial impact at sentencing." Br. of Appellant, 30.

The court of appeals opinion reads as though Mr. Anderson presented no such argument. It does not acknowledge, let alone address Mr. Anderson's citations to the record that support his claims of prejudice at sentencing despite the lack of exceptional sentence. This violates Mr. Anderson's constitutional right to appeal.

The Washington Constitution guaranties the accused "the right to appeal in all cases[.]" CONST. art. I, § 22. This includes the right to have the appellate court consider the merits of the issues raised. State v. Rolax, 104 Wn.2d 129, 134-35, 702 P.2d 1185 (1985). Where the nature of the appeal is clear and the relevant issues are clearly briefed with citations and arguments, the court of appeals has no lawful basis for failing or refusing to consider the merits of an issue. State v. Olson, 126 Wn.2d 315, 323, 893 P.2d 629 (1995); accord State v. Grimes, 92 Wn. App. 973, 978, 966 P.2d

394 (1998) (appellate court to reach the merits if "reasonably clear" from briefing).

Mr. Anderson argued the trial court denied the DOSA by relying on the major VUCSA aggravators and that the VUCSA aggravators were not supported by sufficient evidence. The record supports his contentions. The court of appeals decision conflicts with the authority cited in the preceding paragraph, undermines the constitutional right to appeal, and undermines the integrity of the courts. Every RAP 13.4(b) criterion is satisfied.

b. The issue is not moot and involves the prosecution's novel and incorrect application of the major VUCSA aggravator under RCW 9.94A.535(3)(e)(i)

Only by completely ignoring Mr. Anderson's arguments did the court of appeals conclude they were moot. As noted, Mr. Anderson claimed he was prejudiced at sentencing by the four aggravators found by the jury. An issue is moot where the appellate court cannot no longer provide effective relief. In re Pers. Restraint of Mattson, 166 Wn.2d 730, 736, 214 P.3d 141 (2009). The issue Mr. Anderson raised is not moot. Effective relief can still be provided in the form of resentencing wherein Mr. Anderson may again request a DOSA without the trial court relying on aggravators that were not supported by sufficient evidence. The court of appeals misapprehends mootness, contradicting Washington law. RAP 13.4(b)(1)-(2).

The issue should be decided because it is not moot and presents a novel sentencing issue that has potentially large consequences. Each of the four charged counts here pertained to precisely one VUCSA delivery on different days. RCW 9.94A.535(3)(e)(i) reads, "The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so . . . ." (Emphasis added.) The jury instructions mirrored this language. CP 64. The jury was instructed to decide whether all four of the VUCSA deliveries each constituted a major VUCSA violation. CP 59-64, 67, 69, 71, 73.

Under the language of the statute, the current offense—in the singular form—each must involve three separate transactions. There must be more than one single transaction as part of the current offense; there must be at least three according to the statute. Here, though, each of the four offenses involved only one transaction apiece. See CP 31-34 (informations listing four separate dates for each count); CP 47-50 (to-convict instructions for each count); RP 214-15, 282-86, 406, 425 (trial testimony confirming one transaction on each date). None of the offenses "involved at leas three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so." CP 64; RCW 9.94A.535(3)(e)(i).

The state asserted "offense" in the state means the "case as a whole" rather than pertaining to each count. Br. of Resp't, 27. Aggravators do not

apply to the "case as a whole" but "for an offense" as RCW 9.94A.535's first sentence says. Chapter 9.94A RCW shows the legislature intended everything to be determined on a per-count or per-offense basis. E.g., RCW 9.94A.505(1), 2(a)(i) (standard range sentence); RCW 9.94A.510 (sentencing grid based on offender score and seriousness level per offense); RCW 9.94A.517 (same); RCW 9.94A.520 (enumerating offense seriousness levels); RCW 9.94A.525 (instructing to calculate offender score for each separate offense). The state's interpretation is incorrect.

And, regardless, Mr. Anderson's jury surely was instructed to determine whether each individual count was a major VUCSA offense. CP 60-63. The jury was told to determine whether each of the four counts standing alone individually supported each of the four aggravators. CP 60-63. Because there was only one transaction, not three, on the date of each offense, no rational trier of fact could conclude that each count involved at least three separate transactions within any stretch of the imagination, let alone beyond a reasonable doubt as required by the due process clauses. Cf. Jackson, 443 U.S. at 319; Green, 94 Wn.2d at 220-21.

The court of appeals decision violated Mr. Anderson's right to appeal by not considering this issue and also incorrectly stated it was moot. This case involves an important issue of statutory interpretation that should be decided by the Washington courts so that major VUCSA aggravators are not

erroneously charged and convicted on in the future in violation of due process under the Fourteenth Amendment. Every RAP 13.4(b) criterion supports review.

3. The court of appeals decision conflicts with cases the prohibit amending the information after the prosecution rests

Under article I, section 22, the accused must be informed of the charge he or she is to meet a trial and cannot be tried for an offense not charged. State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987). After the state rests, the only exceptions to the general rule permit amend charges to only lesser included or inferior degree offense. Id. at 488, 491. It is automatic reversible error to otherwise allow the information to be amended. Id.; State v. Vangerpen, 125 Wn.2d 782, 789, 888 P.2d 1177 (1995); State v. Markle, 118 Wn.2d 424, 437, 823 P.2d 1101 (1992).

The third amended information alleged Mr. Anderson violated RCW 69.50.401 "by manufacturing, selling, delivering, or possessing with the intent to manufacture, sell, or deliver a controlled substance listed under that subjection by selling for profit any controlled substance or counterfeit substance classified in schedule I, RCW 69.50.204" to a person within 1000 feet of school bus route stop. CP 31 (emphasis added). After the state rested, it moved to amend the information to delete the emphasized language and the defense objected to the amendment, given that the state had not

proved Mr. Anderson distributed a Schedule I drug, but meth, a Schedule II drug. RP 478-79, 487-88; see RCW 69.50.206(a), (d)(2) (meth is Schedule II drug). The court allowed this amendment, characterizing it as surplusage under Tvedt.

Tvedt involved multiple named victims in the information. 153 Wn.2d at 718-19. The naming of just one person was sufficient to state the elements of robbery. Id. at 719. Therefore, the inclusion of more than one person could be "disregarded as surplusage" or "unnecessary language." Id. at 718-19. The court of appeals agreed. Slip op. (lead op.), 9.

The same is not true here. The state alleged Mr. Anderson committed the aggravator by manufacturing, selling, delivering, or possessing with intent "by selling for profit any controlled substance . . . classified in schedule I . . . ." CP 31. This language was not superfluous but it formed the precise basis fo the state's charged aggravator. The state should not have been permitted to amend its information after resting. The court of appeals decision conflicts with the Pelkey line of cases and misapplies Tvedt. Review should be granted under RAP 13.4(b)(1) and (2).

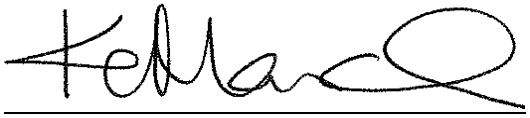
E. CONCLUSIO

Because Mr. Anderson satisfies all RAP 13.4(b) review criteria, his petition for review should be granted.

DATED this 31st day of August, 2020.

Respectfully submitted,

NIELSEN KOCH, PLLC



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APPENDIX A

FILED
JUNE 4, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 36330-9-III
Respondent,	)	
	)	
v.	)	
	)	
BRIAN JEFFREY ANDERSON,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

KORSMO, J. — Brian Anderson raises multiple challenges to his four convictions for delivery of a controlled substance. We affirm the convictions and sentence, but remand to strike certain financial aspects of the judgment.

FACTS

Mr. Anderson was charged in the Kittitas County Superior Court with the four noted offenses. The third amended information alleged that each count was subject to the aggravating factor that the offense was part of three or more separate drug transactions. That document also alleged that count one was subject to the aggravating factor that the offense occurred within 1,000 feet of a school bus route stop. Clerk's Papers (CP) at 31. The specific language of the charging document concerning the bus stop provided:

> the defendant did violate RCW 69.50.401 by manufacturing, selling, delivering, or possessing with the intent to manufacture, sell, or deliver a

> controlled substance listed under that subsection by selling for profit any controlled substance or counterfeit substance classified in schedule I, RCW 69.50.204, except leaves and flowering tops of marihuana, to a person within one thousand feet of a school bus route stop designated by the school district in violation of 69.50.435.

CP at 31.[1]

The charges were based on drug purchases made by police informants from Mr. Anderson in 2015 and 2016. Charles Briet was identified as a defense witness. A member of the venire, former Kittitas Chief of Police Lail, stated during voir dire that he had previously arrested Briet and would not give any credibility to the man. Report of Proceedings (RP) at 46-47. The juror was excused. Defense counsel consulted with his client and decided to not request a mistrial, but did indicate he would seek a curative instruction and also indicated he would address the problem when questioning Briet. RP at 150. He subsequently deferred the curative instruction until the defense case. RP at 153.

The State presented trial testimony from a school district official that five school bus stops within 1,000 feet of the 2015 drug sale were actively used by summer school students at that time. The testimony did not discuss schools or school buses.

[1] This language tracks the introductory paragraph of RCW 69.50.435(1), combined with the specific allegation of 69.50.435(1)(c) that the offense was near a school bus route stop.

When the State had rested, defense counsel moved to dismiss the school bus stop aggravating factor due to lack of proof that methamphetamine was a schedule I drug. The State responded by seeking permission to amend the information to delete much of the previously quoted language from that allegation. Defense counsel objected, noting that his argument was a highly technical one and that an amendment was untimely. The court allowed the amendment on the basis of *State v. Tvedt*, 153 Wn.2d 705, 107 P.3d 728 (2005). Defense counsel advised the court that he knew what allegation the State had originally charged and that it would be "ridiculous" to claim prejudice from the amendment. RP at 490. A fourth amended information was filed.

During the defense case, counsel did not propose or request any curative instruction. On direct examination, counsel asked Briet about his most recent criminal conviction and sentence. Briet explained that he served a 25 month drug offender sentencing alternative (DOSA) sentence for possessing firearms while a felon. Upon completing treatment, he had been drug free and "clean" for two years. He was quite knowledgeable about the Ellensburg drug world and testified about the behavior of one of the police informants, James Pearson, during the August 2015 drug buy. Both Briet and Ashley Hone testified that Pearson brought his own drugs and Anderson did not sell the drugs to Pearson.

On cross-examination, the prosecutor briefly asked Briet about the prison sentence and got him to confirm that it also included charges of harassment and aiming a firearm.

He also admitted to having a 2006 conviction for second degree theft, but told the prosecutor that a later third degree theft count had been dismissed.

The jury was instructed on the elements of the four charges, along with the school bus stop enhancement and the major drug transaction aggravating factor. Included with the enhancement instruction were definitions of "school" and "school bus."

In closing, counsel argued that the police investigation was incomplete and "sloppy," and that the defense witnesses established that the informant, not Mr. Anderson, brought the drugs involved in count 1. With respect to the prosecutor's credibility arguments concerning the drug-using witnesses, defense counsel argued:

> [Pearson] had the drugs when he walked in the house, okay. They're no cleaner than the State's witnesses, but Ms. Hammond cannot tell you they're not trustworthy, and at the same time say but my scummy drug addicts are. I'm sorry, it doesn't work that way.

RP at 584.

The jury found Mr. Anderson guilty as charged. It also determined that count I occurred within 1,000 feet of a school bus route stop and that all four drug sales were part of a series of transactions. As a result, Mr. Anderson faced a standard range of 20 to 60 months in prison on each charge, with count I carrying a 24 month enhancement due to the bus stop finding. The defense sought a prison-based DOSA sentence. The court rejected the request, stating that Mr. Anderson had not taken responsibility for his actions. The court was particularly concerned that count I had involved Mr. Anderson

driving to Yakima to obtain the drugs that he brought into Ellensburg. The court imposed a 54 month sentence on count I due to the bus stop enhancement, and concurrent 30 month sentences on the other charges.

Mr. Anderson timely appealed to this court. A panel considered his appeal without hearing argument.

ANALYSIS

This appeal presents five arguments. In order, we consider contentions that: (1) counsel failed to provide effective assistance, (2) the court erred in amending the information, (3) no evidence supported the school bus instruction, (4) the evidence did not support the multiple transactions aggravating factor, and (5) error in imposing the legal financial obligations (LFOs). The latter two issues are discussed together.

Ineffective Assistance Argument

The first contention[2] is an argument that defense counsel rendered ineffective assistance by asking Briet a question that permitted the prosecutor to further inquire about Briet's prior convictions. This was clearly a reasonable tactic for counsel to pursue.

[2] Mr. Anderson filed a statement of additional grounds (SAG) that is related to this argument. He claims that trial counsel rendered ineffective assistance concerning the statement made by Mr. Lail in voir dire. Our discussion of the ineffective assistance claim adequately answers the SAG since the decision to address Lail's statement by establishing Briet's rehabilitation was clearly a tactical choice by counsel.

Appellate courts review ineffective assistance of counsel claims in accordance with well-settled standards of review. An attorney's failure to perform according to the standards of the profession will require a new trial when the client has been prejudiced by counsel's failure. *State v. McFarland*, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions and there is a strong presumption that counsel was effective. A strategic or tactical decision is not a basis for finding error. *Strickland v. Washington*, 466 U.S. 668, 689-691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under *Strickland*, courts evaluate counsel's performance using a two-prong test that requires courts to determine whether or not (1) counsel's performance failed to meet a standard of reasonableness, and (2) actual prejudice resulted from counsel's failures. *Id*. at 690-692. When a claim can be disposed of on one ground, a reviewing court need not consider both *Strickland* prongs. *Id*. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

Defense counsel asked about the nature of the convictions that sent Briet to prison and the ensuing DOSA sentence that freed Briet from his drug problems. Briet's answer focused on the gun charges, leaving the prosecutor to ask about the harassment and drug charges that accompanied the gun offenses. The prosecutor also asked about the prior theft conviction, an offense that was admissible per ER 609. Mr. Anderson argues that the prosecutor's questions were prejudicial, making trial counsel's performance in raising the topic deficient. He is wrong on both counts.

This was a case based in large part on the testimony of two police informants who were members of Ellensburg's drug culture. The defense attacked the credibility of the informants by presenting its own members of that culture. The topic of drug use was unavoidable. Accordingly, defense counsel reasonably attempted to defend by presenting "better" drug user witnesses on behalf of the defense than the State was able to offer. The fact that Briet had served a significant, rehabilitative sentence and was now living a clean life allowed the defense to present a *former* member of the drug culture as a credible defense witness.[3] The discussion also explained why Mr. Lail's voir dire commentary was not of concern—the person that Lail knew was not the person Briet now was.

The question about the DOSA sentence for gun possession was a very reasonable tactic for counsel to use. Under *Strickland*, there was no error. Moreover, Mr. Anderson was not prejudiced by Briet's admission that he had a prior drug conviction. Mr. Briet's bona fides as a member of the Ellensburg drug culture were essential to his testimony; the fact that he had a prior conviction was not harmful under these facts, and certainly was not harmful to Mr. Anderson. The theft conviction was per se admissible under ER 609, so defense counsel's questioning had nothing to do with the admission of that answer. It, too, did not prejudice the defense.

[3] The witnesses also allowed Mr. Anderson to avoid testifying about the sales.

Mr. Anderson has not established either that his counsel erred or that he was prejudiced by the alleged error. Accordingly, he has not established that his counsel performed ineffectively.

Amendment of the Information

Mr. Anderson next argues that the trial court erred in allowing the fourth amended information. The court did not abuse its discretion by permitting the removal of surplus language from the charging document.

CrR 2.1(d) allows an amendment of the information "any time before verdict or finding if substantial rights of the defendant are not prejudiced." This court reviews the decision on a motion to amend for abuse of discretion. *State v. Lamb*, 175 Wn.2d 121, 130, 285 P.3d 27 (2012). Discretion is abused when it exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Although the rule would permit amendment prior to verdict, a substantive limit on that authority exists in our case law. "A criminal charge may not be amended after the State has rested its case-in-chief unless the amendment is to a lesser degree of the same charge or a lesser included offense." *State v. Pelkey*, 109 Wn.2d 484, 491, 745 P.2d 854 (1987). This substantive limitation does not apply to amendments that do not change the crime in question. *State v. Brooks*, 195 Wn.2d 91, 98, 455 P.3d 1151 (2020) (permitting amendment that changed charging dates). As explained in *Brooks*, it is a change to the

essential elements of the charged crime that presents the possibility of prejudicial error. *Id*. at 97.

Here, the parties agreed at trial that the challenged language from the third amended information was surplus language. It long has been the rule that "surplus language in a charging document may be disregarded." *Tvedt*, 153 Wn.2d at 718. When surplus 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." *Id*. The trial court cited to the *Tvedt* principle when it granted the motion to amend. While it was not necessary to amend the information in order that the surplus language be "disregarded," *Tvedt* provided a tenable basis for granting the motion to amend.

On appeal, Mr. Anderson now argues that the amendment violated the *Pelkey* line of authority by changing the sentencing enhancement at issue. Even assuming that *Pelkey* could apply to an enhancement, it did not apply in this case. RCW 69.50.435(1) authorizes a sentencing enhancement whenever one commits a violation of RCW 69.50.401 (generally prohibiting the production and distribution of drugs) or RCW 69.50.410 (selling schedule I drugs for profit) near specified public locations. Here, Mr. Anderson was charged with violating § 401 within 1,000 feet of a school bus route stop. RCW 69.50.435(1)(c).

There was but a single enhancement for delivering methamphetamine in count one within 1,000 feet of a school bus route stop. While a person could commit a violation of

§ 401 or § 410 in multiple different ways, there was only a single § 435 protected location alleged in the aggravating factor. How the drug transaction was accomplished was the subject of the charging language in count I; the enhancement did not charge an additional offense. It only alleged that the charged offense occurred within a particular protected area. Whether *Pelkey* applies when an amendment changes the protected zone is a question we need not answer because the only enhancement charged here involved the school bus route stop. RCW 69.50.435(1)(c). Eliminating one method of committing that single enhancement did not change the nature of the enhancement that was charged. *Pelkey* was inapplicable to this case.

Mr. Anderson could still prevail if he could show that he was prejudiced by the amendment. He does not make that argument here—instead relying on the per se standard of *Pelkey*—and agreed below that it would be "ridiculous" to allege prejudice under the circumstances. There is no allegation of prejudice, let alone a showing of it.

The trial court did not abuse its discretion by permitting the unnecessary amendment to the information.

School Bus Definition

Mr. Anderson next argues that the definition of "school bus" was not proved at trial, thus requiring the school bus stop enhancement to be struck. His argument attempts to expand the law of the case doctrine in a manner previously rejected by the case law.

Here, instruction 20 defined the term "school bus" for the jury:

> "School bus" means a vehicle that meets the following requirements: (1) has a seating capacity of more than ten persons including the driver; (2) is regularly used to transport students to and from school or in connection with school activities; and (3) is owned and operated by any school district for the transportation of students. The term does not include buses operated by common carriers in the urban transportation of students such as transportation of students through a municipal transportation system.

CP at 57.[4]

As has been often noted, the "term 'law of the case' means different things in different circumstances." *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 113, 829 P.2d 746 (1992). In particular, it can refer (1) to the effect of an appellate court ruling on subsequent proceedings in the trial court, (2) to the effect of unchallenged jury instructions in setting forth the applicable law, and (3) to an appellate court's refusal to reconsider the determinations made in a prior appeal. *Id*. The jury instruction aspect of the law of the case is at issue here.

That concept commonly has been explained:

> Under the law of the case doctrine jury instructions not objected to become the law of the case. *State v. Hickman*, 135 Wn.2d 97, 101-102, 954 P.2d 900 (1998). Thus, when the State adds an unnecessary element to a to-

[4] The statutory definition is found in RCW 69.50.435(6)(b):
> "School bus" means a school bus as defined by the superintendent of public instruction by rule which is owned and operated by any school district and all school buses which are privately owned and operated under contract or otherwise with any school district in the state for the transportation of students. The term does not include buses operated by common carriers in the urban transportation of students such as transportation of students through a municipal transportation system.

> convict instruction and the jury convicts the defendant, the unnecessary element must be supported by sufficient evidence. *Id*. at 105.

State v. Calvin, 176 Wn. App. 1, 21, 316 P.3d 496 (2013). The doctrine also can apply to definitional instructions. *Id*.; *State v. France*, 180 Wn.2d 809, 816, 329 P.3d 864 (2014). However, treatment of the two types of instructions varies significantly.

As noted from the *Hickman* citation in *Calvin*, the addition of an unnecessary element to a to-convict instruction requires proof of the unnecessary element. *Hickman*, 135 Wn.2d at 105; *State v. Johnson*, 188 Wn.2d 742, 756, 399 P.3d 507 (2017). The failure to prove the unnecessary element will result in the reversal of a criminal conviction due to insufficient evidence. *Hickman*, 135 Wn.2d at 105-106.

In contrast, the existence of a definitional instruction normally does not itself raise a *Hickman*-type evidentiary sufficiency problem. Definitional instructions do not create new elements. *France*, 180 Wn.2d 816-819. That proposition remains true even if the definition is included in the elements instruction. *State v. Tyler*, 191 Wn.2d 205, 213, 422 P.3d 436 (2018). A definition of an element simply does not create a new element or supplant the statutory element. *Id*. at 215.

Mr. Anderson argues that the State presented no evidence that the Ellensburg school buses satisfied the definition of school bus found in Instruction 20 and that this "essential element" thus was unproved. There are a couple of answers to this argument. First, the special verdict form required the State to prove the existence of a bus *stop*

rather than a school bus. The school district's witness testified that five school bus *stops* were within 1,000 feet of the crime scene. The evidence justified finding that a bus stop existed near the crime scene.

Second, a "school bus" was not an "essential element" of the special verdict merely because a definitional instruction was provided to the jury. There are rare instances where a definitional instruction will become the subject of element-style proof because of statutory or constitutional concerns unrelated to the law of the case doctrine. *France* provides a discussion of some examples:

> France is correct that under some circumstances, the State may be required to prove facts not specifically contained in the to-convict instruction, not as elements but because those facts serve some other function that requires the State to prove them, such as a "true threat" or "sexual gratification."

180 Wn.2d at 817. For instance, because the element of "sexual contact" in an indecent liberties prosecution was defined by statute to require proof of "sexual gratification," the State was required to prove "sexual gratification" even though it was not an element of the indecent liberties statute. *Id*. at 817-818 (discussing *State v. Stevens*, 158 Wn.2d 304, 143 P.3d 817 (2006)). Similarly, the State needed to prove in a harassment prosecution the existence of a "true threat," a concept that is not an element of the crime, because otherwise the harassment statute could impinge on First Amendment protected rights. *Id*. at 818-819 (discussing *State v. Allen*, 176 Wn.2d 611, 294 P.3d 679 (2013)).

At issue in each of these examples was a definitional instruction, not an element, and the *instruction* was needed in order that elements were properly defined for the jury—the "sub-element" of "sexual gratification" and the limiting definition of "true threat." The law of the case doctrine did not require the State to provide evidence in support of the definitions—proof was required due to statutory and constitutional requirements. *France* used this understanding to reject the appellant's argument that a definitional instruction created an element that the State needed to prove to the jury. 180 Wn.2d at 819.

Calvin presented a slightly different twist on the law of the case doctrine. There the trial court had given an assault definition that included the topic of lawful use of force, a subject not raised at trial. 176 Wn. App. at 20. When the jury inquired about the instruction, the court realized its error and, over defense objection, substituted a different instruction that deleted the topic. *Id*. at 20-21. While recognizing that the law of the case doctrine applied to all jury instructions, *Calvin* concluded that the issue was "not whether the law of the case doctrine bound the State to the 'unlawful force' language," but the true issue was whether the trial court abused its discretion in substituting the other instruction. *Id*. at 22. Although the law of the case doctrine prevents a party from challenging on appeal an instruction that was not challenged at trial, since the defense had objected to the amended instruction, the issue was properly before the court. *Id*.

Because Mr. Calvin did not show prejudice from the substitution, the court did not err. *Id*. at 22-24.

France and *Calvin* demonstrate the meaning of the law of the case doctrine as it concerns definitional instructions. The doctrine prohibits a party from challenging an instruction for the first time on appeal. *Id*. at 22; *accord* RAP 2.5(a); *State v. Scott*, 110 Wn.2d 682, 757 P.2d 492 (1988). A defendant can claim that the unchallenged instruction imposes an obligation of proof on the State a la *Hickman*, but this argument typically will fail unless the definitional instruction falls within one of the exceptions noted by *France*, 180 Wn.2d at 817.

France and *Tyler* control the outcome of this case. The school bus definition did not create a new element for the prosecutor to prove. *Tyler*, 191 Wn.2d at 213; *France*, 180 Wn.2d at 818. It is not one of the rare definitional instructions identified by *France* that needed to be the subject of proof. While probably an unnecessary instruction, it also was not one that impacted the outcome of this case.

Mr. Anderson has not identified any error arising from the use of the school bus definition. His argument is without merit.

Sentencing Issues

The next assignment of error is an extended discussion of the "major violation" aggravating factor governing multiple drug sales. Because the trial court did not impose an exceptional sentence, this claim is moot.

An argument is moot when an appellate court cannot grant effective relief. *In re Det. of LaBelle*, 107 Wn.2d 196, 200, 728 P.2d 138 (1986). That is the situation here. The trial court imposed midrange sentences; it did not use the aggravating factor findings to direct an exceptional sentence. The sentence would not change even if we agree with Mr. Anderson's position. This issue is moot.

Mr. Anderson also argues, and the State agrees, that the trial court erred by imposing the criminal filing fee and directing that interest run on the legal financial obligations. We remand to strike both of those provisions.

Affirmed and remanded.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, A.C.J.

No. 36330-9-III

FEARING, J. (concurring in part/dissenting in part) — I join the majority in all rulings except the affirmation of the school bus stop sentencing enhancement. I would reverse the enhancement and remand for resentencing because of the lack of evidence as to the seating capacity of school buses that used the school bus stops near the scene of the one sale of controlled substances by Brian Anderson.

RCW 69.50.435 declares:

> (1) 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, . . . to a person:
>
> . . . .
>
> (c) Within one thousand feet of a school bus route stop designated by the school district; . . .
>
> . . . .
>
> may be punished by a fine of up to twice the fine otherwise authorized by this chapter . . . or by imprisonment of up to twice the imprisonment otherwise authorized by this chapter . . . or by both such fine and imprisonment.
>
> . . . .
>
> (6) As used in this section the following terms have the meanings indicated unless the context clearly requires otherwise:
>
> . . . .
>
> (b) "School bus" means a school bus as defined by the superintendent of public instruction by rule which is owned and operated by any school district and all school buses which are privately owned and

> operated under contract or otherwise with any school district in the state for the transportation of students. . . .
>
> (c) "School bus route stop" means a school bus stop as designated by a school district;

In turn, the Washington State Superintendent of Public Instruction defines "school bus" as:

> "School bus" means every vehicle with a seating capacity of more than ten persons including the driver regularly used to transport students to and from school or in connection with school activities.

WAC 392-143-010(1).

Under Washington statute and regulation, to find Brian Anderson guilty of the sentencing enhancement, the State needed to prove beyond a reasonable doubt that Anderson sold a controlled substance near a "school bus stop." The phrase "school bus stop" includes the term "school bus." Since the same statute includes definitions for both "school bus stop" and "school bus," logically the legislature expected a "school bus" as defined by the statute to stop at the stop. To prove that a "school bus" used a stop, the State needed to prove that a bus possessed the seating capacity of more than ten persons. If the jury instructions did not inform the jury of the need for the State to prove beyond a reasonable doubt that a bus had a minimum seating capacity, the instructions should have done so.

The concurring opinion author writes that no school bus needed to stop at a location as long as the school district designated the location as a school bus stop.

Conceivably, under the concurrence's reasoning, in order to find an accused guilty of the sentencing enhancement, a school district need not operate any school buses as long as the district designates stops. Such reasoning leads to absurd results, and this court avoids absurd results when interpreting statutes. *State v. Schwartz*, 194 Wn.2d 432, 443, 450 P.3d 141 (2019).

In the alternative, under the concurrence, the jury could find the accused guilty of the sentencing enhancement if the school district only sends buses with seating capacities with less than eleven to the school bus stop. Such a result would conflict with the intent of the legislature. When the legislature created a sentencing enhancement for dealing drugs within one thousand feet of a school bus stop, the legislature assumed that a school bus, as defined by the superintendent of public instruction, would stop at the stop. Otherwise, placing the definition of a "school bus" in RCW 69.50.435 served no purpose. For that matter, having any definition of a "school bus" would serve no purpose.

John Landon, Ellensburg School District Assistant Director of Transportation, testified to five school bus stops within one thousand feet of the location of one of the Brian Anderson's sales. Landon did not describe any of the buses used by the school district. I do not know if I have ever seen a school bus, or any form of bus, that did not seat at least eleven people, but apparently such buses exist since the Superintendent of Public Instruction expressly requires that the bus seat more than ten in order to qualify under the law. I would be speculating to conclude that the State showed that all

Ellensburg School District buses accommodated at least eleven people by testimony that the school district operated buses.

Presumably because the existence of a school bus stop was not an element of a crime, but rather an element of an aggravating circumstance, the trial court did not give a to-convict instruction for the school bus stop enhancement. Instead, in Verdict Form A-1, the court asked the jury to answer a question:

> We, the jury, answer the question submitted by the court as follows:
> QUESTION: Did the defendant deliver a controlled substance to a person within one thousand feet of a school bus route stop designated by a school district?
> ANSWER: _____ (write in "yes" or "no.")

Clerk's Papers (CP) at 66. A jury instruction informed the jury that it should not answer the question "yes" unless the jurors were unanimous beyond a reasonable doubt that "yes" was the correct answer.

The trial court also delivered a jury instruction that defined "school bus." Jury instruction 20 declared:

> "School bus" means a vehicle that meets the following requirements: (1) *has a seating capacity of more than ten persons including the driver*; (2) is regularly used to transport students to and from school or in connection with school activities; and (3) is owned and operated by any school district for the transportation of students. The term does not include buses operated by common carriers in the urban transportation of students such as transportation of students through a municipal transportation system.

CP at 57 (emphasis added). The concurring author ignores the presence of jury instruction 20. The court delivered the instruction to inform the jury that it must find that

buses with a seating capacity of more than ten persons used the school bus stop. Otherwise, jury instruction 20 served no purpose. To repeat, the State presented no evidence of a bus with a capacity of more than ten persons. Therefore, under the jury instructions delivered to the jury, in addition to the statute and administrative code, the State did not prove the school bus stop enhancement.

I am not convinced that this reviewing court must address the law of the case doctrine as formulated in *State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998). The jury instructions at issue in Brian Anderson's trial merely restated the controlling law rather than adding any element to a crime. The doctrine applies when the jury instruction adds an element beyond the statutory elements. Assuming the law of the case doctrine applies, the doctrine bolsters the need to reverse the sentencing enhancement.

The lead opinion relies on *State v. Tyler*, 191 Wn.2d 205, 422 P.3d 436 (2018) and *State v. France*, 180 Wn.2d 809, 329 P.3d 864 (2014). Neither case applies to this appeal. *State v. Tyler* is a unique case because the to-convict instruction omitted an important conjunction, and the jury could not be sure, based on the to-convict instruction, whether the conjunction should be an "or" or an "and." A separate instruction used the word "or." The decision focused on whether the crime of possessing a stolen motor vehicle was an alternate means crime and the ramifications of the missing conjunction.

State v. France also focused on whether the charged crime was an alternate means crime. The case turned on whether an instruction containing one of many statutory

definitions of the term "threat," at least one of which was contained in the to-convict instruction and that had a common meaning, created an additional fact the State was required to prove. Brian Anderson's appeal does not entail an alternate means crime nor was he charged with a crime or sentencing enhancement with alternate definitions for one of its elements.

Fearing, J.

Fearing, J.

No. 36330-9-III

LAWRENCE-BERREY, J. (concurring) — I write separately to explain my reason for affirming the enhanced sentence. I construe the special verdict form as asking whether the school district designated the stop a school bus route stop. For this reason, the jury was not required to apply the definition of "school bus" as given in the separate instruction.

The special verdict form asked the jury: "*Did the defendant deliver a controlled substance to a person within one thousand feet of a school bus route stop designated by a school district?*" Clerk's Papers at 66 (emphasis added). This question comes directly from the statutory language of RCW 69.50.435 (1)(c), which imposes additional punishment for controlled substance violations that occur "[w]ithin one thousand feet of a school bus route stop designated by the school district."

Because the question in the special verdict form comes directly from the statute, we must discern what the legislature, by enacting RCW 69.50.435(1)(c), intended the State to prove. More specifically, did the legislature intend for the State to prove only that a school district designated the stop a school bus route stop or did the legislature

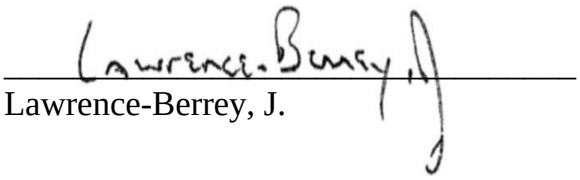
intend the State to prove more—that a school bus actually stopped at the school bus route stop?

When interpreting a statute, the court's fundamental objective is to ascertain and give effect to the legislature's intent. We begin with the plain meaning of the statute. In doing so, we consider the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole. If the meaning of the statute is plain on its face, then we must give effect to that meaning as an expression of legislative intent. *Lenander v. Dep't of Retirement Sys.*, 186 Wn.2d 393, 405, 377 P.3d 199 (2016).

Here, it is plain what the legislature intended the State to prove by enacting RCW 69.50.435(1)(c). The legislature defined "school bus route stop" as "a school bus stop as designated by a school district." RCW 69.50.435(6)(c). Thus, the legislature intended the State to prove only that a school district had designated the stop a school bus route stop. The legislature did not intend the State to prove more—that a "school bus" actually stopped at the school bus route stop. For this reason, the special verdict question did not require the jury to apply the definition of "school bus" as given in the separate instruction.

The concurring/dissenting opinion finds it absurd the statute might be construed as not requiring proof that a "school bus" stops at a designated school bus route stop. It is

not absurd, given that one might infer when a school district designates a school bus route stop, a school bus actually stops there.



Lawrence-Berrey, J.

APPENDIX B

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BRIAN JEFFREY ANDERSON, Appellant.	)	No. 36330-9-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of June 4, 2020 is hereby denied.

PANEL: Korsmo, Fearing, Lawrence-Berrey

FOR THE COURT:

REBECCA PENNELL
Chief Judge

NIELSEN KOCH P.L.L.C.

August 31, 2020 - 3:22 PM

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