

NO. 35602-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

KEVIN D. MOORE,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR  
THURSTON COUNTY

THE HONORABLE GARY R. TABOR  
CAUSE NO. 04-1-00531-4

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**BRIEF OF RESPONDENT**

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## **A. ISSUES PRESENTED**

1. Did the trial court commit reversible error in denying Moore's motion for a mistrial where a witness testified in marginal violation of an in limine order and the jury was immediately instructed to disregard the answer where the proof of guilt was overwhelming and the error, if any, was harmless?

2. Did the trial court commit reversible error in denying Moore's motion for mistrial where in closing argument the state argued material that the trial court ruled was not violative of an in limine order where the proof of guilt was overwhelming and the error, if any, was harmless?

3. Did the trial court commit reversible error in declining to strike designated-school-bus-route-stop enhancement where the information alleged all the necessary elements of the enhancement and the trial court properly instructed the jury on the definition of designated-school-bus-route-stop?

4. Did the trial court commit reversible error in calculating Moore's offender score by including his seven prior convictions where all parties acknowledged the existence of the seven prior convictions and defense counsel argued for a midrange sentence of 90 months that was in the middle of the range of 60 - 120 months for a person with six or more prior convictions?

## **B. STATEMENT OF THE CASE**

With the following notation, the State accepts as adequate, for the purposes of this

response, Appellant's "Statement of the Case"  
[App. Br.2-4]. Additionally, the first drug  
purchase was also video-recorded and played to the  
jury. [RP Vol. I 63-76]. During direct testimony  
describing the operation of a controlled drug buy,  
Detective Adam Seig testified without objection  
that the amount of drugs normally purchased would  
be "What the informant's capable of buying from  
his or her source." And later on cross-  
examination of Detective Seig the following  
colloquy occurred:

Q. Because as far as you know, she'd never  
done this before, right?

A. You mean never purchased drugs or worked  
the task force?

Q. Worked with the task force doing this type  
of thing.

A. That's right.

[RP Vol. I 109].

At sentencing the State submitted a Statement  
of Criminal History which was not disputed by

Moore. [RP Sentencing 3-11].

### C. ARGUMENT

1. **THE TRIAL COURT DID NOT COMMIT ERROR IN DENYING MOORE'S MOTIONS FOR MISTRIAL REGARDING A WITNESS STATEMENT MARGINALLY IN VIOLATION OF AN IN LIMINE ORDER WHERE THE JURY WAS IMMEDIATELY INSTRUCTED TO DISREGARD THE COMMENT AND REGARDING CLOSING ARGUMENT BY THE STATE FOUND NOT BE IN VIOLATION OF THE IN LIMINE ORDER WERE THE PROOF OF GUILT WAS OVERWHELMING AND THE ERRORS, IF ANY, WERE HARMLESS.**

- a. Witness testimony.

As noted by Moore, at the outset of the trial the court entered an order prohibiting the State's confidential informant (CI) from testifying that she had prior drug dealings with Moore. [RP Vol. I 32]. At trial the CI testified that she identified potential buy targets and in response to the question, "Why did you target them?", replied, "Because that was my person I was getting it from anyways." [RP Vol. II 274]. The trial court immediately instructed the jury to disregard the statement and again instructed them at the close of the trial that

they were not to consider any evidence stricken by the court. [RP Vol. II 387].

While the trial judge felt that the CI's statement was a violation of the in limine order at the time of the statement, he recognized later that the phrase "This was my person that I was getting it from anyways" was subject to several interpretations, including "that was her plan who she would be getting it from and that she had indicated to (the) police." In weighing the import of the CI's statement, it must be remembered that the jury had already heard, without defense objection, that the amount of drugs to be purchased by a CI was determined by the amount "the informant was capable of buying from his or her source." [RP Vol. I 43]. Det. Seig further testified, without objection, that they generally did not ask the CI to purchase a larger quantity of drugs than the CI had been purchasing because an out of the norm amount could cause suspicion. [RP Vol. I 43]. This

clearly put before the jury, without objection, the idea that the CI in this case had purchased drugs from Moore before. Additionally, the jury had heard and seen considerable evidence regarding the drug transactions, including video recordings and an audio recording of the second transaction. It was equally obvious from the brevity of the transactions, that the CI knew Moore and had dealt with him before.

It is submitted, in light of the overwhelming evidence of guilt before the jury, that the court's two instructions to the jury to not consider evidence that had been stricken were more than adequate to cure the possible mistake by the CI. Viewed in the context of this trial it may be presumed that the jury followed the court's instructions to disregard the CI's brief statement. *State v. Lord*, 117 Wn.2d 829, 861, 822 P.2d 177 (1991). Error, if any, was clearly harmless. If an error results from a violation of an evidentiary rule, this court must query

whether "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). The error is harmless "if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). Anyone would be hard put to establish that the CI's brief comment, which was stricken from the jury's consideration, had any affect on the outcome of this trial.

b. State's closing argument.

In her closing argument, the State's attorney stated that the CI had testified that her job was to purchase crack cocaine "from somebody I knew I could purchase from." [RP Vol. III 404]. The defense objection was overruled on the grounds that the statement was fair closing argument. A later motion for mistrial was denied, with the trial judge finding a distinction from the CI's

stricken statement that Moore was her "source" and the prohibited implication that the CI knew that Moore had committed prior "bad acts." The trial judge correctly observed that "It's quite clear that Ms. Cardwell (the CI) did not simply open the phone book, close her eyes and point her finger at a name and pick the person that she would have contact with." [RP Vol. III 480]. There was no mention by the State's attorney that the CI had purchased drugs from Moore prior to 2 March 2004. For the reasons set out above, the trial court was correct in denying Moore's motion for mistrial.

**2. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN DECLINING TO STRIKE DESIGNATED-SCHOOL-BUS-ROUTE-STOP ENHANCEMENT WHERE THE INFORMATION ALLEGED ALL THE NECESSARY ELEMENTS OF THE ENHANCEMENT AND THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE DEFINITION OF DESIGNATED-SCHOOL-BUS-ROUTE-STOP.**

a. The Charging Language

As acknowledged by Moore [App.Br. 13-14], the State's second amended information charged the

enhancement in both counts as follows: "It is further alleged that said offense took place within 1000 feet of a designated school bus route stop." As required by case law, the trial court in Instruction No. 17 defined the technical term school bus route stop as follows: "School bus route stop means a school bus route stop as designated by the school district." [RP Vol. II 374 & 394]; *State v. Olmedo*, 112 Wn.App. 525, 534, 49 P.3d 960 (2002). In the charging titles of each count of the information, the school bus route stop enhancement statute - RCW 69.50.435 - is specifically referenced, giving Moore full notice of the parameters of the charge and the penalties if the elements of the enhancement are proven. [App. Br. 13-14]. Failure to add the definitional words "by the school district" in the information did not deprive Moore of notice of what had to be proven in the enhancements nor was he deprived of notice of the penalties required by RCW 69.50.435. As noted by the trial judge, Moore

was represented by experienced counsel. [RP Vol. I 17]. He does not allege that he was not properly advised by his trial attorney.

b. Liberal Construction of Information Applies

"When a defendant challenges the sufficiency of a charging document, the standard of review depends on the timing of the challenge." *State v. Grant*, 104 Wn.App. 715, 720, 17 P.3d 1051(2001). If the defendant does not challenge the information until after the State's opportunity to amend the information has been lost, liberal, rather than strict, construction applies. *State v. Vangerpen*, 125 Wn. 2d 782,788, 888 P.2d 1177(1995); *State v. Mendoza-Solorio*, 108 Wn.App. 823, 829, 33 P.3d 411(2001). This difference in standards discourages "sandbagging," the potential defense practice of remaining silent in the face of a constitutionally defective charging document because a timely challenge will merely result in the State amending the information to cure the

defect. *State v. Kjorsvik*, 117 Wn.2d 93, 103, 812 P.2d 86(1991).

Moore challenges the charging document for the first time on appeal; thus, the instant charging document should be liberally construed in favor of validity. *State v. Hopper*, 118 Wn.2d 151, 155, 822 P.2d 775(1992); *Kjorsvik*, 117 Wn.2d at 103. Under the liberal review standard, the reviewing court applies a two-prong analysis: "(1) do the necessary elements appear in any form, or by fair construction can they be found, in the information; and if so (2) can the defendant nonetheless show he or she was actually prejudiced by the in-artful language." *State v. McCarty*, 140 Wn.2d 420, 425, 822 P.2d 296(2000). If the necessary elements are not found or fairly implied, however, prejudice is presumed, *McCarty*, 140 Wn.2d at 425 (citing *Kjorsvik*, 117 Wn.2d at 105-06; *City of Auburn v. Brooke*, 119 Wn.2d 623, 636, 836 P.2d 212 (1992)).

While it is the State's position that no element of the crime was missing from the charging document, it is submitted that case law involving claims of a missing element are instructive.

An Indictment or Information must be sufficiently clear to apprise the accused of the crime that he or she is accused of committing. *State v. Kjorsvik*, 117 Wn.2d at 97; RCW 10.37.050. It must allege all essential elements of the offense charged. *Id.* at 97-8. However, "it has never been necessary to use the exact words of a statute in a charging document; it is sufficient if words conveying the same meaning and import are used." *Id.* at 108. Where the precise words of the statute are not used:

... the question in such situations is whether all the words used would reasonably apprise an accused of the elements of the crime charged. Words in a charging document are read as a whole, construed according to common sense, and include facts which are necessarily implied. *Id.* at 109.

The standard of review adopted by the

*Kjorsvik* court requires at least some language in the information giving notice of the alleged missing element. Here the charging language in the enhancement portion of each count that referred to "designated" school bus route stop" coupled with the specific references to RCW 69.50.435 would give a person of common understanding notice that he was in fact being charged with commission of a drug crime within 1000 feet of a designated school bus route stop, which is defined as a "school bus route stop as designated by the school district."

In *Kjorsvik* while finding that the document charging *Kjorsvik* with robbery in the first degree lacked the court-created element of intent, the Court read the charging document in a commonsense manner and found that the charging document did inform the defendant of all the elements of robbery. *Id.* at 110-11. It is submitted the charging language used in the instant case more than adequately informed the defendant of all the

elements of the enhancements he was charged with.

Applying the second prong of the standard of review we need to ascertain whether Moore has shown that he was somehow prejudiced by the charging language used in this case. At trial Moore did not challenge the fact that the locations where he briefly met with the State's confidential informant were within 1000 feet of a school bus route stop designated by the school district. [RP Vol. II 357-58 & 366]. Moore was not prejudiced by the enhancement charging language.

**3. THE TRIAL COURT DID NOT ERROR IN CALCULATING MOORE'S OFFENDER SCORE BY INCLUDING HIS SEVEN PRIOR CONVICTIONS WHERE ALL PARTIES ACKNOWLEDGED THE EXISTENCE OF THE SEVEN PRIOR CONVICTIONS AND DEFENSE COUNSEL ARGUED FOR A MIDRANGE SENTENCE OF 90 MONTHS THAT WAS IN THE MIDDLE OF THE RANGE OF 60-90 MONTHS FOR A PERSON WITH SIX OR MORE PRIOR CONVICTIONS**

At sentencing, all parties were aware of Moore's seven prior convictions, as well as, the fact that Moore's current convictions occurred

while he was on community custody. [RP Sentencing 4]. At the outset of the sentencing, the trial judge specifically refers to the State's statement of criminal history which indicated "there are six prior felony convictions, and an offender worksheet, which indicate(d) that the standard range would be 60 plus to 120 months, ...." [RP Sentencing 3]. In argument the State referred to the 6 prior felonies plus a recent robbery conviction which resulted from a crime that occurred and was tried while Moore was out on bail on the instant charges. [RP Sentencing 5]. In his argument defense counsel acknowledged that the standard range was 60 plus to 120 months [RP 9] and argued for a midrange sentence of 90 months. [RP Sentencing 11].

Moore now disputes the calculation of his offender score for the first time on appeal. An appellate court reviews a sentencing court's calculation of an offender score de novo. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003).

The State bears the burden of proving the existence of prior convictions by a preponderance of the evidence. *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 876, 123 P.3d 456 (2005). If the State alleges the existence of prior convictions at sentencing and the defense fails to "specifically object" before the imposition of sentence, then the case is remanded for resentencing and the State is permitted to introduce new evidence. *State v. Lopez*, 147 Wn.2d 515, 520, 55 P.3d 609 (2002). If, as here, the State alleges the existence of prior convictions and the defense not only fails to specifically object but agrees with the State's depiction of the defendant's criminal history, then the defendant waives the right to challenge the criminal history after the sentence is imposed. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). Sentencing courts can rely on defense acknowledgment of prior convictions without further proof. *Cadwallader*,

155 Wn.2d at 873. Acknowledgement includes not objecting to information included in presentence reports. *Id.* at 874. It is the State's position that failure to object to information in a prosecutor's statement of criminal history also amounts to an acknowledgement of the prior convictions contained therein.

Calculation of an offender score may not be challenged for the first time on appeal where, as here, defense counsel not only failed to identify a factual dispute for the sentencing judge's resolution, but impliedly acknowledged the State's offender score calculation, clearly leading the sentencing judge to believe that the proper sentencing range was 60 - 120 - the range for a drug sale conviction for a person with 6 or more felony priors. *State v. Nitsch*, 100 Wn.App 512, 997 P.2d 1000, rev. denied, 141 Wn.2d 1030 (2000).

#### **D. CONCLUSION**

Moore's conviction and sentence should be affirmed.

Pursuant to RAP 14.2 and 14.3 and RCW 10.73.160, the State respectfully requests that appellant be required to pay all taxable costs of this appeal, including the cost of the reproduction of briefs, verbatim transcripts, clerk's papers, filing fee, and the fee to be paid to appellant's court-appointed counsel. *State v. Blank*, 131 Wn.2d 230, 910 P.2d 545 (1996).

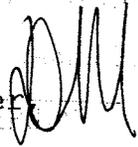
Dated this 30<sup>th</sup> day of December, 2007.

Respectfully submitted,

  
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CERTIFICATE

STATE OF  
BY  
DATE



I certify that on the 31<sup>st</sup> day of December, 2007 I mailed a copy of the foregoing Response Brief by depositing same in the United States Mail, postage pre-paid, to the following parties at the addresses indicated:

Thomas E. Doyle	Kevin D. Moore
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DATED this 31<sup>st</sup> day of December, 2007.



Jeremy Randolph