

No. 39831-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

THOMAS E. MORGAN
Appellant.

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

The Honorable, Judge Carol Murphy
Cause No. 09-1-00886-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Was the second amended information facially valid and was the defendant prejudiced by the charging language?

2. Was the trial court's instruction on the special verdict form a manifest constitutional error?

3. Was trial counsel's performance deficient? Even assuming for the sake of argument that this court found a deficiency, did Mr. Morgan suffer any prejudice?

B. STATEMENT OF THE CASE.

The State accepts the Appellant's Statement of the Case with the following additions and corrections.

1. Facts.

Detective Russell, a four year member of the Thurston County Narcotics Task Force (TNT) and a fifteen year veteran of the Thurston County Sheriff's Office (TCSO), testified that the goal of the TNT (a multi-agency law enforcement task force consisting of members from the City of Lacey Police Department, City of Olympia Police Department, City of Tumwater Police Department, the Thurston County Sheriff's Office, the Washington State Patrol, and an advisor from the National Guard) was to target mid- to upper-level drug dealers in and around Thurston County. [RP 61-62].

In the following exchange, Detective Russell explained how TNT conducts investigations into the illegal sale and distribution of illegal controlled substances:

A. Typically, we use confidential informants, and we use them for information or to lead us into an investigation that we cannot conduct ourselves, and we have them set up controlled buys, if you will, under our direction and in order to, I guess, complete drug transactions and to find out who all was involved and, what we like to call it, climb the ladder to the higher level to try to find out who the source is of the drug.

Q. All right. So your ultimate goal is what in these investigations?

A. Obviously – sorry. ...

Q. Your reference climbing the ladder. Explain that a little more.

A. Well, everybody has a source. Everyone gets their drugs from somebody, and, typically, they get it from higher-level drug dealers, whether it's somebody on the street buying what would be a teener. They obviously get it from somebody who is, you know, able to get more or purchase more, so we want to climb that ladder and find out just where the bigger fish is, in a sense.

Q. Now let me ask you this: You indicated that a lot of times, you do this – you have to use informants to conduct controlled buys. Tell us why that is, why you have to use informants.

A. Well, informants, as mentioned earlier, they can go into a world that we can't. They live this lifestyle every day. We don't live it every day. And also mentioned earlier, like me, I grew up around here, a lot of people know me. So I cannot go out myself, and many other detectives can't go out, into the streets to try to buy drugs because a lot of these people know who we are, which is one of the reasons why, a lot of times, we'll try to change our appearance a little bit. But the reality is they're still going to know who we are.

So a lot of the informants, they already have these connections, they already have these associations with

people in the drug world, and so we utilize them for that information, simply because they live that lifestyle, and they're able to get into these people, and there's already that trust established with these other drug dealers, whereas we don't have that trustability, we don't have that association.

[RP 63-65].

On May 13, 2009, Detective Russell, the case agent, supervised a controlled buy where a confidential informant purchased methamphetamine from Mr. Morgan in the parking lot of the Home Depot located at 1325 Fones Road in Olympia, Washington. [RP 91-103]. Ms. Kee, a forensic scientist at the Washington State Patrol Crime lab, tested the substance and confirmed that it was, in fact, methamphetamine. [RP 50-60].

Mr. Weight, the director of transportation for the North Thurston School District testified that there are three designated school bus route stops near 1325 Fones Road; the three designated school bus route stops serve elementary, middle school, and high school students and were located at 1324 Fones Road, 1328 Fones Road and 1400 Fones Road. [RP 197-198]. Detective Russell testified that 1324 Fones Road and the 1328 Fones Road designated school bus route stops were well within 600-800 feet of where the drug transaction occurred. [RP 173-176]. These measurements were determined using both the

Thurston County GeoData mapping system and also verified using a hand-held measuring device; there was no objection to this testimony. [RP 173-176].

While in the custody of the Thurston County Jail, Mr. Morgan directed his associates to find the informant he suspected to be the informant in his case; Detective Russell was able to monitor these calls as inmate phone calls from the jail are recorded with the consent of the inmate making the call. [RP 154-169]. These phone calls were played for the jury. [Transcription of Jail Phone Recordings, 1-134].

Mr. Morgan was very focused on his associates finding the confidential informant who he believed he had identified, even telling his associates not to bail him out but to focus on the “other thing”, then his associate named the person they believed to be the confidential informant. [Transcription of Jail Phone Recordings, 35-37]. Mr. Morgan, in another phone call, says he needs one thing more than anything else; the other person suggests that the “first situation” needs to “disappear” and Mr. Morgan states that would be “awesome”. [Transcription of Jail Phone Recordings, 25]. Mr. Morgan discusses where the confidential informant lives and who she lives with. [Transcription of Jail Phone Recordings, 41]. Mr.

Morgan then says he is looking at “120 plus the 15 hanging over my head: and tells them to pull together and help him with this situation. [Transcription of Jail Phone Recordings, 44]. Mr. Morgan then says:

“You know, I don’t give a fuck if you’ve got to fuck her down, whatever. You know what I mean?”

[Transcription of Jail Phone Recordings, 46].

Based on the above, Detective Russell became concerned for the life of the confidential informant and contacted police in Ocean Shores to provide protection for her as she was living in their jurisdiction. [RP 170]. Law enforcement ultimately arrested associates of Mr. Morgan in Grays Harbor in the area of Ocean Shores. [RP 170-171]. Mr. Morgan and his associates then discuss how the police made the arrests in Ocean Shores. [Transcription of Jail Phone Recordings, 123].

2. Procedure.

On June 17, 2009, the State brought a motion to increase bail for the following reasons:

MR. JACKSON: Your Honor, one of the additional charges that the State is bringing at this time is conspiracy to intimidate a witness. That’s based on Mr. Morgan’s conduct while in the jail. He has made several phone calls to people the police have identified. On these phone calls, Mr. Morgan and his conspirators are talking about finding who the

confidential informant in this case was. Mr. Morgan stresses that if she's not found, he's facing eleven of that, years of prison. He engages in a conversation where he talks to a person in Grays Harbor, or about seeking a person in Grays Harbor County to find this informant who this defendant believes was the person that was working with the police. He names the informant by name. He tells the person that he's discussing this situation with on the phone that he does need this person's help. He doesn't care if he has to, quote unquote, fuck her down. He stresses to the person how important it is that they get to this informant. So the State -- there's various other things in these phone calls.....

[6/17/09, RP 4-5].

The State also filed a first amended information charge at this hearing that alleging the new criminal conduct. [CP 5-6].

On June 29, 2009, Mr. Morgan was arraigned on the second amended information; the defense waived the reading of that information, waived the advisement of rights and entered pleas of not guilty to both counts. [6/29/09, RP3].

After being instructed as to the law by the trial court, the jury asked no questions of the trial court prior to their finding of guilty as charged. [CP 16-17].

The charging document was not challenged until Mr. Morgan filed this appeal.

C. ARGUMENT.

1. The second amended information was facially valid and the defendant was not prejudiced by the charging language.

“It is not “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.” *State v. Kjorsvik*, 117 Wn.2d 93, 108, 812 P.2d 86 (1991). When an information is challenged for the first time on appeal, the Court will construe is “quite liberally.” *State v. Hopper*, 118 Wn.2d 151, 156, 822 P.2d 775 (1992); *State v. Campbell*, 125 Wn.2d 797, 801, 888 P.2d 1185 (1995). The inquiry is whether the elements appear “in any form, or by fair construction can be found in this information.” *State v. Kjorsvik*, 117 Wn.2d at 108.

“A court should be guided by common sense and practicality in construing the language. Even missing elements may be implied if the language supports such a result.” *State v. Campbell*, 125 Wn.2d at 801 (*quoting Hopper*, 118 Wn.2d at 156). However, “if the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it.” *State v. Campbell*, 125 Wn.2d at 802. An information which is facially valid under this liberal standard is

constitutionally deficient only if the defendant can show that he was prejudiced by the imprecise language. *Id.*

Intent or knowledge can in some instances be fairly implied from the manner in which the offense is described or even from commonly understood terms. *State v. Hopper*, 118 Wn.2d 151, 822 P.2d 775 (the term “assault” by itself conveys an intentional or knowing act); *see also State v. Tunney*, 129 Wn.2d 336, 917 P.2d 95 (1996) (knowledge that assault victim was police officer held to be implied from other charging language); *State v. Kjorsvik*, 117 Wn.2d at 110 (intent to steal element of robbery fairly implied from description of a forceful unlawful taking).

In the present case, the requirement if intent is fairly implied from the manner in which the offense is described and from its commonly understood terms. The charging language in the second amended information cites to RCW 9A.28.040 and RCW 9A.72.110 and states:

In that the defendant, THOMAS EUGENE MORGAN, in the State of Washington, on or between May 18, 2009 and June 16, 2009, did conspire by use of a threat directed against a current or prospective witness, attempted to influence the testimony of that person, and took a substantial step toward the commission of the crime.

[CP 8].

The Webster's New Universal Unabridged Dictionary (2003)

defines "conspire" as follows:

1. to agree together, esp. secretly, to do something wrong, evil, or illegal: *They conspired to kill the king.*
2. to act or work together toward the same result or goal. –v.t.
3. to plot (something wrong, evil, or illegal).

In the present case, Mr. Morgan, while confined in the Thurston County Jail, directed his associates to implicitly threaten the person he believed to be the confidential informant. Clearly, under these facts, it is clear that Mr. Morgan was put on notice that the State was alleging that he acted with the "intent that conduct constituting a crime be performed" and that he "agreed with one or more persons to engage in or cause the performance of such conduct..." [Brief of Appellant, page 6]. While the language used in the charging document could certainly be more precise, it strains credulity to believe that Mr. Morgan was not put on notice by the State's second amended information and the facts of this case.

The liberal standard that must be applied to this case supports the validity of this charging notice under the facts as alleged. Therefore, as Mr. Morgan did not raise this issue at the trial court level, he must now show that he was prejudiced by the

imprecise language. As the trial court correctly and precisely informed the jury of the law and as his trial counsel ably argued the correct law, Mr. Morgan cannot show he was prejudiced by the imprecise language and the State respectfully requests that this Court deny his claim.

2. The court's instruction on the special verdict form is not a manifest constitutional error.

The jury instructions regarding the school zone enhancement stated:

You will also be given a special verdict form for the crimes charged in count I. If you find the defendant not guilty of the crime of Unlawful Delivery of a Controlled Substance in Count I, do not use the special verdict form. If you find the defendant guilty of Unlawful Delivery of a Controlled Substance in Count I, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. All twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form "yes" you must unanimously be satisfied beyond a reasonable doubt that "yes is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

[CP 46].

The defendant argues for the first time on appeal that this instruction was error which entitles him to an order vacating the special verdict findings and sentence enhancements. He relies on

State v. Bashaw, 169 Wn.2d 133, 147, 234 P.3d 195 (2010) and *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003). *Bashaw* relied on *Goldberg* to hold that a unanimous jury decision is not required to find the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence. *Bashaw*, 169 Wn.2d at 146. The Court in *Bashaw* overturned a special verdict where the jury had been given the same instruction given in this case, stating the instruction erroneously required the jury agree on their answer to the special verdict even if they did not unanimously find the presence of the special finding. *Id.* at 147.

The defendant did not object to the special verdict instruction at trial. [RP 260-262]. Generally, appellate courts do not consider issues raised for the first time on appeal. RAP 2.5(a), *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). An error which was not objected to at the trial level may be considered by the court if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3), *State v. Lynn*, 67 Wn. App. 339, 342, 835 P.2d 251 (1992). Whether the Court will consider an asserted error under these circumstances is determined by a four part analysis set out in *Lynn*.

First, reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis.

Lynn, 67 Wn. App. at 345.

This Court should decline to consider the issue because the defendant has not identified any constitutional provision implicated by the instruction given in this case. The rule which the Court in *Bashaw* relied on to find the special verdict instruction in that case was erroneous is not compelled by double jeopardy protections. *Bashaw*, 169 Wn.2d at 146, n. 7. Since it is not readily apparent that the issue raised by the defendant here implicates the constitution, the Court should decline to consider this issue for the first time on appeal.

This Court has recognized that “instructional errors may implicate constitutional due process.” *Lynn*, 67 Wn. App. at 343. Even if due process is implicated by the instruction given the jury

here¹, no manifest error exists here. “Manifest” within the meaning of RAP 2.5(a)(3) requires the defendant to show that he was actually prejudiced. *State v. O’Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009), *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). The actual prejudice standard differs from the harmless error standard in that under the former test the focus is on “whether the error is so obvious on the record that the error warrants appellate review.” *O’Hara*, 167 Wn.2d at 99-100.

To show actual prejudice the defendant must show that the error had a practical and identifiable consequence in the trial of the case. *Id.* “If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” *McFarland*, 127 Wn.2d at 333. Only after the Court concludes that manifest constitutional error has occurred does the Court then engage in a harmless error analysis. *O’Hara*, 167 Wn.2d at 99. Any error in this case does not satisfy the manifest requirement to justify review.

The uncontroverted evidence established that Mr. Morgan delivered methamphetamine, a controlled substance, within 1,000

¹ The State does not concede that the defendant’s due process rights were violated by the special verdict instruction. However, it is addressed for the sake of argument.

feet of two separate school bus route stops. [RP 173-176, RP 197-198].

In light of the forgoing circumstances the defendant cannot show that he was prejudiced by the special verdict jury instruction. In *Goldberg* the jury was actually hung on the aggravating factor before it reached a unanimous verdict. *Goldberg*, 149 Wn.2d at 894. Here the jury did not initially come back without a unanimous verdict on the school bus route stop allegation. [CP 17].

In *Bashaw* there was conflicting evidence regarding the school zone enhancement. *Bashaw*, 169 Wn.2d at 138-39. One or more jurors may not have been convinced that the facts supporting the enhancement were credible. However here there was no contradictory evidence that Mr. Morgan delivered methamphetamine, a controlled substance, within 1,000 of a school bus route stop. Where there is no evidence the jury was actually hung on the school zone enhancement question, or that there would have been a basis for disagreement on that finding, the defendant cannot show that he was prejudiced by the instruction.

The defendant's failure to object deprived the trial court of the opportunity to prevent the instructional error he now raises. *Kirkman*, 159 Wn.2d at 935. Had the defendant argued the holding

in *Goldberg* applied to the special verdict instruction in this case the court could have easily modified the instruction to ensure jurors were not required to be unanimous on a “no” vote. This Court should decline to consider the issue for the first time on appeal because the special verdict instruction does not raise an issue of manifest constitutional error.

Finally, even if the Court considers the issue and reverses the special verdict, the Court should decide what the appropriate remedy should be. The usual remedy for erroneous jury instructions is remand for a new trial. See, e.g., *State v. Jackman*, 156 Wn.2d 736, 745, 132 P.2d 136 (2008); *State v. Johnston*, 156 Wn.2d 355, 127 P.3d 707 (2006). This reflects fundamental considerations of justice:

Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.

United States v. Tateo, 377 U.S. 463, 466, 84 S. Ct. 1587, 12 L. Ed. 2d 448 (1964).

This observation is particularly applicable to the present case, where no objection was raised to the alleged error and the evidence was overwhelming and uncontroverted. Here the base sentence was 100 months. The school zone enhancement added an additional 24 months to the defendant's term of confinement. The jury made the finding beyond a reasonable doubt finding this enhancement was proved by the State; it would be unfair to the State, if the Court overturns the jury's finding, to not allow the State the opportunity to bring this issue before the jury again.

In *Bashaw*, the court set out policy reasons why a weapon enhancement should not be retried after a jury fails to agree on the special verdict. The court said that allowing retrials would violate the "policies of judicial economy and finality." *Bashaw*, 163 Wn.2d at 146-47. When, however, a defendant successfully challenges his conviction, he loses any right to have that conviction treated as final. See *State v. Ervin*, 158 Wn.2d 746, 147 P.3d 567 (2006). While judicial economy is a worthy goal, it should not be used to subvert the will of the public through the jury and the legislature.

3. Trial counsel's performance was not deficient but, assuming for the sake of argument that this court found a deficiency, there was no prejudice suffered by Mr. Morgan.

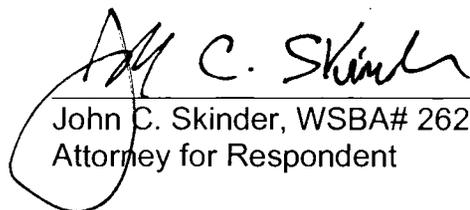
To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when "but for the deficient performance, the outcome would have been different." *In the Matter of the Personal Restraint Petition of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. *See Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995).

The appellant contends that his trial counsel erred by failing to anticipate this change in the law. But courts have consistently held that failure to anticipate a change in the law does not constitute ineffective assistance. *In re Benn*, 134 Wn.2d 868, 939, 952 P.2d 116 (1998). Even if this Court disagrees and determines that somehow trial counsel should have anticipated this change, the claim of ineffective assistance must fail because there is no indication from the facts in this case that the outcome would have been any different. There was no argument that the illegal drug delivery did not occur within 1,000 of a school bus route stop and the evidence supporting the school zone enhancement was overwhelming.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests that this Court affirm the convictions, the special verdict and the sentence in Mr. Morgan's case.

Respectfully submitted this 27th day of DECEMBER, 2010.


John C. Skinder, WSBA# 26224
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the BRIEF OF RESPONDENT, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by to Supreme Court

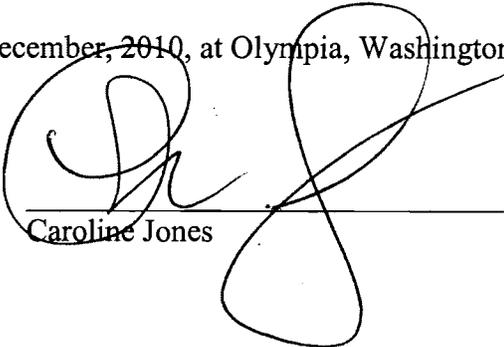
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--AND--

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 28 day of December, 2010, at Olympia, Washington.



Caroline Jones