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STATE OF WASHINGTON

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NO. 40450-8-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Appellant,

v.

JASON R. BURNS, Respondent.

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APPELLANT'S BRIEF

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court violated due process and relieved the State of its burden of proof by failing to instruct the jury that the State had the burden of proving beyond a reasonable doubt that the crime occurred within a protected zone.
2. The trial court erred in imposing a protected zone enhancement where the jury was not instructed that the State had the burden of proof.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did Instruction number 12 violate due process where it failed to inform the jury that the state had the burden of proving the school zone allegation?

## **III. STATEMENT OF THE CASE**

### Statement of Facts

On July 17, 2009, police set up a controlled-buy with an informant, Brad Lampman. RP3 279. Lampman had been pulled over for driving with a suspended license, and when police found heroin in the car, he was

offered a deal if he would work with the police. RP2 183, RP3 370-71, RP4 370-71. Lampman, an admitted drug user and addict, testified that he had bought from many people, both before and after working with the police. RP4 438. However, he gave the police only one name—his friend, Jason Burns. RP3 279, RP4 438.

Lampman told police he had placed a call to Jason Burns and arranged to purchase .5 ounce of heroin. RP2 191, RP3 283. Police gave him marked money and he went into the rooming-house where Burns lived. RP2 191, RP3 286-87. The police did not enter the rooming house with Lampman and could not see the alleged buy. RP4 462. No one saw Burns except, allegedly, Lampman. RP4 462. Lampman went in and came out 20 minutes later with 10.9 grams of heroin. RP3 288, 293, RP3 350. Lampman testified that he went to Burns' room, Burns gave him the heroin, and he gave Burns the money. RP2 196.

Weeks later, on August 10, 2009, Lampman was again asked to participate in a controlled-buy targeting Burns. RP3 304. He called Burns, then went to pick him up at his house. RP3 306-7. The two men proceeded to another location, where heroin was allegedly purchased. RP2 201, 204. Lampman said he gave Burns money, Burns went in to the house and returned with the heroin. RP2 205. The police could not see any of this from their vantage point. RP3 314-15. Then, according to

Lampman, they went back to Burns' room, weighed the drugs, and Lampman left with the heroin. RP2 207. Lampman gave police 10.9 grams of heroin. RP3 319, RP3 350.

Lampman was wearing a camera given to him by police, but the camera did not capture the buy. RP4 424. None of the marked buy money from either alleged buy was ever recovered. RP4 414.

Following these two meetings, the charges against Lampman were dropped, RP2 211, and police sought a search warrant in Kitsap County Superior Court, CP 93-100.

The search warrant was executed by officers from several jurisdictions—part of a taskforce known as “WestNet”. RP3 264. The officers in WestNet included a criminal investigator with the Bremerton Police, RP3 258, and a Kitsap County Sherriff's Office Deputy, RP3 264. Both Burns and his wife were arrested at their residence when the warrant was executed. RP3 325.

Police testified that that an elementary school was 631 feet from his boarding house. RP4 388-89. A school official testified that there are two schools within 1,000 feet of Burns' boarding house, an elementary and a middle school, and one bus stop for the high school. RP4 465.

### Procedural History

Burns was charged with two counts of unlawful delivery of a controlled substance, one count of possession of an imitation controlled substance with intent to distribute, and one count of unlawful possession of marijuana (40g or less).<sup>1</sup> CP 152-54. The State also alleged that the crimes had been committed within a school zone. CP 152-54.

Burns asked the court to permit him to proceed pro se and, after a lengthy colloquy, was granted permission with stand-by counsel. CP 167.

Prior to trial, Burns moved to dismiss the charges, arguing that the Pierce County Superior Court lacked jurisdiction because the case began with the search warrant executed in Kitsap County Superior Court. RP1 46. The court denied the motion. RP1 54.

Burns moved successfully to suppress the fruits of the search of his room, arguing that the police officers had violated the “knock-and-talk” rule by failing to announce themselves before entering the rooming house. RP1 136, CP 227-230. This resulted in the prosecutor dropping two counts against Burns—possession of marijuana and possession of imitation substance with intent to deliver. RP1 139.

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<sup>1</sup> The court dismissed one charge, possession of a controlled substance (oxycodone), as untimely filed in the second amended information. CP 167.

Following Lampman's testimony, Burns moved to dismiss the case for discovery violations because the prosecutor had failed to provide him with Lampman's statements to police about the buys. RP2 212-3. The court denied the motion, but gave Burns an opportunity to review the tapes and re-call Lampman. RP2 213.

Burns also moved to dismiss based on prosecutorial misconduct, when the prosecutor monitored calls Burns made as his own attorney to a witness, after telling the court he would not do so. RP1 140-42. The court denied this motion. RP1 141.

The jury acquitted Burns on count two (the alleged delivery that occurred outside his home), but convicted him of count one (the alleged delivery within his room). RP 526-27. The jury also returned a special verdict finding that the crime had occurred within a school zone. RP 527, CP 209.

Burns moved to arrest judgment, arguing insufficient evidence supported his conviction. RP 543. The motion was denied. RP 543.

Burns was sentenced to 94 months for his underlying sentence, plus a 24 month enhancement for the protected zone. RP 544, CP 216. The school zone enhancement also resulted in the statutory maximum sentence being doubled. RP 540-41, CP 216, 219.

This appeal timely follows.

## IV. ARGUMENT

### **ISSUE 1: INSTRUCTION NUMBER 12 VIOLATED THE CONSTITUTION WHERE IT FAILED TO INFORM THE JURY THAT THE STATE HAD THE BURDEN OF PROVING THE SCHOOL ZONE ALLEGATION.**

The jury instructions in this case violated due process by relieving the State of its burden of proof with regard to the school zone enhancement because the jury was never instructed that the State has the burden of proving the facts necessary to the special verdict beyond a reasonable doubt.

Due process requires a criminal defendant be convicted only when every element of the charged crime is proved beyond a reasonable doubt. U.S. Const. amend. XIV; *see* Wash. Const. art I, § 22; *Jackson v. Virginia*, 443 U.S. 307, 311, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *In re Winship*, 397 U.S. 358, 365-66, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A sentence enhancement creates what is the equivalent of an element of a greater offense. *State v. Recuenco*, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008). An erroneous instruction that shifts the burden of proof is a manifest error of constitutional magnitude and therefore may be raised for the first time on appeal. *State v. O'Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009); *State v. McCullum*, 98 Wn.2d 484, 487-88, 656 P.2d 1064 (1983).

To satisfy the constitutional demands of a fair trial, the jury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case. *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005).

“The test is whether the jury was informed, or could understand from the instructions as a whole, that the State bears the burden of proof.” *State v. Acosta*, 101 Wn.2d 612, 622, 683 P.2d 1069 (1984).

The instruction in this case, Instruction number 12, stated:

If you find the defendant guilty on counts I or II, it will then be your duty to determine whether the defendant committed the crime or crimes within one thousand feet of a school bus route stop designated by a school district. You will be furnished with special verdict forms for this purpose and shall fill in the blank with the answer “yes” or “no” according to the decision you reach. Because this is a criminal case, 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 200. The special verdict form the jury asked the jury to answer the following question:

We, the jury, having found the defendant guilty of the crime of unlawful sale of a controlled substance, as charged in count I, return a special verdict by answering as follows:

On July 17, 2009, did the defendant sell a controlled substance within one thousand feet of a school bus route stop designated by a school district?

CP 209. The jury was generally instructed that the State had the burden of proving “each element of the crime beyond a reasonable doubt.” CP 190. However, the jury was never instructed that the State also had the burden of proving the facts necessary to the special verdict.

In *State v. Tongate*, 93 Wn.2d 751, 754-55, 613 P.2d 1001 (1980), the Court held that the special verdict form relieved the state of its burden of proof on the sentence enhancement because the instruction did not tell the jury that the State had the burden of proving the element beyond a reasonable doubt. The Court stated:

The special verdict is a separate finding made after the guilt-determining stage of the jury’s deliberations. It cannot be assumed that a reasonable jury, in the absence of an explicit instruction on the standard of proof, will understand the applicable standard to be applied to the separate finding where, as here, the fact to be found is not an element of the crime as charged. [citations omitted]

93 Wn.2d at 754-55.

Likewise, the State has the burden of proving the school zone allegation beyond a reasonable doubt. *State v. Hennessey*, 80 Wn. App. 190, 907 P.2d 331 (1995). However, as in *Tongate*, the court here did not separately instruct the jury that the State had this burden for the special verdict. Therefore, the instruction on the enhancement given in this case was erroneous.

Although Mr. Burns, acting pro se, did not object to this instruction, this issue can still be raised on appeal because an instructional error that results in the State being impermissibly relieved of its burden of proof is an error of constitutional magnitude that may be raised for the first time on appeal. *State v. McCullum*, 98 Wn.2d 484, 487-88, 656 P.2d 1064 (1983).

When the court finds that the instruction given is an erroneous statement of the law, the following test is applied:

When the record discloses An error in an instruction given on behalf of the party in whose favor the verdict was returned, the error *is presumed to have been prejudicial, and to furnish ground for reversal, unless it affirmatively appears that it was harmless. . . .*

A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.

*(italics added)* *State v. Golladay*, 78 Wn.2d 121, 139, 470 P.2d 191, 202 (1970) (*Overruled on other grounds, State v. Arndt*, 87 Wn.2d 374, 553 P.2d 1328 (1976)); *See also, State v. Martin*, 73 Wn.2d 616, 627, 440 P.2d 429 (1968); *State v. Rogers*, 5 Wn. App. 347, 352, 486 P.2d 1125 (1971); *State v. Johnson*, 1 Wn. App. 553, 463 P.2d 205 (1969).

Whether the State produced sufficient evidence for a rational juror to find proximity to a school is irrelevant to whether the jury instruction

was correctly drafted. *See State v. Tongate*, 93 Wash.2d 751, 755, 613 P.2d 121 (1980) (finding the evidence was sufficient for the underlying crime, but faulty jury instruction meant enhanced penalty could not be imposed); *see also State v. Becker*, 132 Wn.2d 54, 65, 935 P.2d 1321 (1997).

Because the jury was not instructed that the State has the burden of proof in proving the school zone allegation, the State was impermissibly relieved of its burden of proof. This error was not “trivial” and was prejudicial to Burns’ “substantial rights” because the State was relieved of its burden of proof—the most fundamental part of due process. Therefore, Mr. Burns’ sentence must be reversed and remanded for resentencing without the protected zone enhancement. *See State v. Becker*, 132 Wn.2d 54, 65-66, 935 P.2d 1321 (1997).

## V. CONCLUSION

The jury here was instructed erroneously in that the instructions on the school zone enhancement relieved the State of its burden of proof in that the jury was not instructed that the State had the burden. Thus, the enhancement must be reversed and the case remanded for resentencing.

