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No. 97148-0

NO. 35428-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

JAMIE HUGDAHL,

Appellant.

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

The Honorable Scott R. Sparks, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by giving Instruction 9. CP 23 (to-convict instruction for delivery of heroin).

2. The trial court erred in giving Instruction 10. CP 24 (to-convict instruction for delivery of methamphetamine).

3. The trial court erred in giving Instruction 11. CP 25 (to-convict instruction for delivery of Alprazolam).

4. The trial court erred in giving Instruction 12. CP 26 (to-convict instruction for delivery of MDA)

5. Appellant was deprived of her right to present and to have jurors consider her entrapment defense.

6. Appellant was deprived of her right to effective assistance of counsel.

7. Appellant was deprived of her constitutional right to adequate notice of the criminal allegations against her.

Issues Pertaining to Assignments of Error

Appellant was tried on four unlawful drug delivery charges, one each for heroin, methamphetamine, Alprazolam and MDA. Appellant testified, admitting she delivered the drugs, but claimed she was entrapped by law enforcement into doing so. A jury found Appellant guilty.

1. Was Appellant deprived of her constitutional right to present and have jurors consider her entrapment defense when the trial court instructed jurors that if they found beyond a reasonable doubt Appellant delivered the alleged drug on the date in question while in the State of Washington, “then it will be your duty to return a verdict of guilty,” when the trial court failed to also instruct jurors that no such “duty” existed if they found the deliveries were the result of entrapment?

2. To the extent the instructional errors above are attributed to trial counsel’s failure to object, then was Appellant deprived of her right to effective assistance of counsel because counsel’s failures nullified the entrapment defense, which constitutes deficient performance that prejudiced Appellant by removing her defense from the jury’s consideration?

3. Was Appellant deprived of her constitutional right to adequate notice of the criminal allegations against her when they included an aggravating circumstance for each charge that she delivered a controlled substance within 1,000 feet of a “school bus route,” when the statutorily authorized aggravating circumstance requires proof that the delivery occurred within 1,000 feet of a “school bus route stop,” not just a “school bus route”?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Kittitas County Prosecutor charged appellant Jamie Hugdahl with four unlawful drug delivery charges, one each for heroin, methamphetamine, Alprazolam and MDA. CP 58-59. The prosecution alleged that on January 19, 2017, Hugdahl delivered heroin, and that on January 20, 2017, Hugdahl delivered methamphetamine, Alprazolam and MDA. Id. The prosecution also alleged that all four deliveries occurred within 1,000 feet of a “school bus route designated by the school district in violation of [RCW] 69.50.435.” CP 1-2, 5-6, 58-59.¹

A jury trial was held June 27-28, 2017, before the Honorable Scott R. Sparks. RP² 1-327. The jury found Hugdahl guilty as charged, including that each delivery occurred “within one thousand feet of a school bus route stop designated by a school district.” CP 50-57.

¹ The prosecution amended the charging language three times after the initial charges were filed March 16, 2017. CP 1-2. The original information, and the first and third amended information included the language quoted above for each charge. The “Second Amended Information,” however, did not allege any aggravating circumstances. CP 45-46.

² There are currently two consecutively paginated volumes of verbatim report of proceedings referenced here as “RP.” Counsel has requested transcription of the June 30, 2017, sentencing hearing, which was not authorized under the original indigency order, and will seek leave to file a supplemental brief in the event it reveals any additional meritorious issue to raise on appeal.

Hugdahl was sentenced to 64 months of incarceration. CP 61-73.
She now appeals. CP 74.

2. Substantive Facts

Steven Litzenberg was released from prison on January 8, 2017. RP 92. Litzenberg, a methamphetamine and heroin user since the age of 12, and known by Ellensburg police for violent encounters with them, thereafter approached the Ellensburg police about being a confidential informant (CI) in the hope, he claimed, of garnering their favor to help get his young daughter out of the care of her mother, Emily Chaney, who Litzenberg claimed had relapsed on drugs following his daughter's birth. RP 47, 74, 92, 121. According to Litzenberg, Chaney and his daughter were living with Jamie Hugdahl's brother, Jake, and was allowing wanted felons to be around her, which he did not approve of. RP 119-20.

The officers Litzenberg contacted, Detective Clifford Caillier and Detective John Bean, recalled that in addition to wanting help with his daughter's placement, Litzenberg also wanted help getting his driving privileges restored and claimed he also wanted to help rid Ellensburg of its drug problem. RP 47, 77, 185, 216. They negotiated to pay Litzenberg \$125 for each drug purchase he could make under their watch. RP 49-50.

According to Bean, when the Ellensburg police employs CIs for drug transaction, they have them pick the target for the transaction. RP

50-52. According to Litzenberg, he named two failed targets before he identified Jamie Hugdahl as a potential target, who he claimed to have “probably” bought both heroin and methamphetamine from “like way a long time ago.” RP 102-03. At least one of the prior named targets allegedly refused to engage Litzenberg in the drug transaction because Litzenberg was now “clean.” RP 103. Caillier agreed that Hugdahl was the third target named by Litzenberg. RP 211.

On January 19, 2017, Bean and Caillier were authorized to use Litzenberg to try to purchase \$20 of heroin from Hugdahl midday on January 19, 2017, at the Safeway in Ellensburg. RP 53-57. Surveillance officers were deployed in advance to various vantage point to witness the anticipated transaction. RP 57-58. Before deploying Litzenberg, police strip searched him to ensure he had no contraband. RP 59-61. They then gave him a \$20 bill that had been photocopied in advance, and sent him on a predetermined path to meet with Hugdahl in the Safeway parking lot. RP 61-62, 201-02, 320.

Surveillance officers who were positioned in a car in the Safeway parking lot on January 19, 2017, testified seeing Hugdahl pull in and park behind and to the left of the space they had backed into. RP 140, 155-56. They watched through the car mirrors as a man, Demarco Covey, got in the front passenger seat of Hugdahl’s car before Litzenberg showed up

and got into the driver's side back passenger seat. RP 140-44, 156-57. They watched what appeared to be a brief discussion between Hugdahl and Litzenberg before Hugdahl turned toward the back seat and seemed to hand something to Litzenberg. RP 142-44, 158. Litzenberg got out and returned to Bean and Caillier, and Hugdahl and the other man drove away. RP 63-64, 158. When Litzenberg returned to Bean and Caillier, he handed them a baggy containing a substance that latter tested positive for heroin. RP 64, 202-03. Litzenberg also informed them that he had arranged to purchase methamphetamine from Hugdahl the following day, January 20th, once again at the Safeway parking lot. RP 67-68.

Bean, Caillier, Litzenberg and the other officers prepared for the second transaction as before, except this time they gave him \$100 for the purchase, asked him to complain about the quality of the heroin she sold him the day before, and also equipped him with a recording device so they could capture the conversation between Hugdahl and Litzenberg during their meeting.³ RP 68-70, 190. When Hugdahl arrived at the Safeway

³ The recording resulting from the recording device was played for the jury at trial and transcribed into the verbatim report of proceedings. RP 192-95. Most of the comments attributed to Hugdahl by the transcriber are listed as "UNINTELLIGIBLE." *Id.* Those that are not are without substance. Comments attributed to Litzenberg indicate he may have corrected Hugdahl about what substance it was she was selling him ("No, this is Ecstasy." RP 193), was surprised to learn a woman named Rachel Hunter had pistol whipped Hugdahl (*id.*), complained about the quality of

parking lot on January 20th, she was by herself. RP 168. After Litzenberg got in, Hugdahl pulled the out of the lot and drove around, so officers followed until Litzenberg was dropped off. RP 167-68. When Litzenberg returned to Bean and Caillier, he gave them a baggy containing methamphetamine, and two pills, one containing MDA and the other containing Alprazolam. RP 71, 205-06.

Litzenberg testified at Hugdahl's trial. RP 91-132. Litzenberg recalled meeting Hugdahl at an NA meeting, after which they both relapsed and then "used together." RP 92. Litzenberg claimed he was not using drugs after he got out, at least not until later in January, when he found out one of his sons died in a car accident. RP 96.

Litzenberg admitted contacting Ellensburg police about working as a CI, hoping they could help him get his daughter away from her mother. RP 96-97. He recalled police paid him "a little bit," but claimed his motive was not the money. RP 98. He recalled providing two other targets to police before he targeted Hugdahl. RP 102.

Although he claimed not to remember much from the January 19th transaction, Litzenberg recalled he "threw a fit" at Hugdahl during the

the heroin from the day before and asked her to provide better quality next time (*id.*), was in disbelief when Hugdahl apparently told her she found a bag of drugs in the back of a patrol car (RP 194), asked about someone named "Marshall," and then told Hugdahl as he was leaving that she might see him later (*id.*).

transaction for having someone else in the car with her, claiming at trial he “was playing the role like I didn’t want people to know that I was using and stuff, so.” RP 106, 109-10. He nonetheless testified he gave Hugdahl the \$20 bill provided by police and she gave him a bag of heroin. Id. Litzenberg said he believed the other man in the car was also buying drugs from Hugdahl, and witnessed an exchange between them. RP 107-08. Litzenberg also recalled that during the January 19th transaction he was distracted by the bruise on Hugdahl’s face, which she allegedly told him was from being “pistol-whipped” by someone. RP 107. Litzenberg said the transaction took between 10 and 15 minutes, claiming he drew the encounter out a bit to make it seem like a “normal” drug purchase. RP 110-11.

Litzenberg recalled that when he met up with Hugdahl on January 20th, she was “sketchy,” appeared to have been awake for a long time and drove them around with her music up load. RP 112. Litzenberg recalled complaining to Hugdahl about the heroin she sold him the day before, to which she allegedly replied that she had warned him of that when he bought it. RP 112-13. When Hugdahl handed him the methamphetamine, he told her it was not enough, so she gave him two pills, “Ecstasy and Xanax.” RP 113.

Litzenberg testified that after the transaction on January 20th, he and Hugdahl met up and got a motel room where they spent the night together. RP 116. It was then Litzenberg claims he learned one of his sons had died. Id. Litzenberg admitted he relapsed on drugs that evening. RP 129.

Litzenberg denied ever making threats towards Hugdahl during either transaction. RP 116. He admitted, however, that he was upset with Hugdahl and others about how they treated him the previous year, and he also admitted being upset that Hugdahl's brother was dating Chaney, and acknowledged sending her brother a threatening note about what he would do if his daughter was harmed. RP 119.

Hugdahl testified in her defense. RP 238-269. Hugdahl met Litzenberg in 2012, and she described him as a "violent" man, who had threatened her and others, once strangled a cat, had been involved in numerous fights, and carried guns. RP 243-45. Hugdahl recalled a specific instance when Litzenberg threatened her by asking if she wanted to "meet the Kenwoods," referring to the speakers he kept in the trunk of his car, implying he would put her in the trunk. RP 244. Hugdahl said Litzenberg was known in some circles for his violence as "Light'em Up, Litzenberg." RP 243.

Hugdahl said she normally only purchases enough drugs for herself, and only gave drugs to Litzenberg out of fear. RP 261. She also admitted she owed him drugs from earlier in the month, so part of it was for pay back. RP 265-67. Hugdahl also recalled that Litzenberg gave her no money during the first transaction, and demanded the \$100 back from the second transaction when they met up later that evening. RP 261, 266. Hugdahl said Litzenberg was trying to control her during the month of January, and that she supplied him with drugs to appease him and for her own personal safety. RP 311-14.

In closing argument, Hugdahl's counsel did not contest that she had delivered the drugs to Litzenberg as the prosecution claimed. Instead, her counsel's entire closing argument focused on her entrapment defense, arguing she had no criminal intent when she gave him the drugs, and instead did so out of fear that if she refused, Litzenberg would harm her. RP 346-55. The jury was instructed on the defense of "entrapment." CP 36 (Instruction 20).

C. ARGUMENTS

1. THE “DUTY TO CONVICT” LANGUAGE IN INSTRUCTIONS 9-12 DEPRIVED HUGDAHL OF HER RIGHT TO PRESENT A DEFENSE BECAUSE THEY NULLIFIED HER ENTRAPMENT DEFENSE.

Instructions 9-12, the to-convict instructions, unequivocally directed jurors that if they found beyond a reasonable doubt Hugdahl delivered the drug or drugs she was accused of delivering in the State of Washington on or about January 19 or 20, 2017, “it will be your duty to return a verdict of guilty.” CP 23-26. This is an incorrect statement of the law. It is incorrect because there is no “duty” to convict if, despite finding beyond a reasonable doubt Hugdahl delivered the drug, jurors also found by a preponderance of the evidence that Hugdahl committed one or more of the deliveries as a result of entrapment. CP 34 (Instruction 20 - entrapment instruction). Unfortunately, the jury was never properly instructed on the interplay between instructions 9-12 and instruction 20, leaving the false impression that if Hugdahl delivered the drugs, the jury had to a “duty” to convict, even if it found she was entrapped into committing the offense or offenses. This deprived Hugdahl of her right to present a defense, and this Court should therefore reverse and remand for a new trial.

The Sixth Amendment and due process require an accused be given a meaningful opportunity to present a complete defense. State v. Cayetano-Jaimes, 190 Wn. App. 286, 295-98, 359 P.3d 919 (2015); Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); U.S. Const. amend. V, VI, XIV; Wash. Const. art. 1, § 3, 22. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

A defendant is also entitled to have the jury fully instructed on the defense theory of the case when there is evidence to support that theory. State v. Fernandez-Medina, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000). This is a due process requirement. State v. Koch, 157 Wn. App. 20, 33, 237 P.3d 287 (2010), review denied, 170 Wn.2d 1022 (2011); U. S. Const. amend. XIV; Const. art I, § 3. Failure to so instruct is prejudicial error. State v. Riley, 137 Wn.2d 904, 908 n.1, 976 P.2d 624 (1999).

Juries are presumed to follow the instructions provided by the court. State v. Allen, 182 Wn.2d 364, 380, 341 P.3d 268 (2015). A trial court's instructions to the jury should not contradict each other. State v. Walden, 131 Wn.2d 469, 478, 932 P.2d 1237 (1997). If the inconsistency relates to a material point, the error is presumed prejudicial because "it is impossible to know what effect [such an error] may have on the verdict."

Koker v. Armstrong Cork, Inc., 60 Wn. App. 466, 483, 804 P.2d 659 (1991) (citing Hall v. Corp. of Catholic Archbishop of Seattle, 80 Wn.2d 797, 803-04, 498 P.2d 844 (1972)). Instructions providing “inconsistent decisional standards” require reversal.⁴ Dever v. Fowler, 63 Wn. App. 35, 41, 816 P.2d 1237 (1991) amended, 824 P.2d 1237 (1992) (citing Renner v. Nestor, 33 Wn. App. 546, 550, 656 P.2d 533 (1983)). Such errors “are rarely cured by giving the stock instruction that all instructions are to be considered as a whole.” Donner v. Donner, 46 Wn.2d 130, 137, 278 P.2d 780 (1955).

Although defense counsel did not object to instructions 9-12 at trial, Hugdahl may challenge them for the first time on appeal because they involve “manifest error affecting a constitutional right.” RAP 2.5(a)(3). Constitutional error is manifest when it causes actual prejudice or as practical and identifiable consequences. State v. Montgomery, 163 Wn.2d 577, 595, 183 P.3d 267 (2008). As discussed infra, the instructional errors here caused actual prejudice to Hugdahl by eliminating from the jury’s consideration her entrapment defense.

⁴ Reversal is also required if the inconsistency is due to a “clear misstatement of the law.” Walden, 131 Wn.2d at 478 (quoting State v. Wanrow, 88 Wn.2d 221, 239, 559 P.2d 548 (1977) (citations omitted)).

A conviction for unlawful delivery of a controlled substance requires proof the accused knowingly delivered a controlled substance. RCW 69.50.401(1); CP 23-26.

Here, the court correctly instructed jurors that heroin, methamphetamine, Alprazolam, methamphetamine and MDA are “controlled substance[s],” (CP 28-31, Instructions 14-17), that “delivery” can be either “actual” or “constructive,” (CP 27, Instruction 13), that knowledge that it is a controlled substance can be actual or implied under the “reasonable person” standard (CP 32, Instruction 18), and that a convictions for delivery requires finding beyond a reasonable doubt that Hugdahl delivered the controlled substance in question “on or about January [19 or 20], 2017,” in the State of Washington (CP 23-26, Instructions 9-12). The court failed, however, to properly instruct jurors on Hugdahl’s entrapment defense, despite ample evidence to support it, because it failed to make clear to jurors they had no “duty” to convict despite finding beyond a reasonable doubt that she delivered the controlled substances in Washington on the dates in question, if they also found by a preponderance of the evidence that she “was lured or induced to commit a crime that [she] had not otherwise intended to commit.” CP 34 (Instruction 20).

The problem is with the to-convict instructions. These instructions purport to identify what jurors must find to convict Hugdahl, even going so far as to assert they have a “duty” to enter a guilty verdict if they find the listed elements beyond a reasonable doubt. “[A]n instruction purporting to contain all the elements must in fact contain them all.” Donner v. Donner, 46 Wn.2d 130, 134, 278 P.2d 780 (1955).

Instructions 9-12, however, fail to advise jurors they must also conclude Hugdahl failed to establish entrapment before they could convict. As such, the to-convict and entrapment instructions provide inconsistent decisional standards. Fowler, 63 Wn. App. at 41. Instruction 9-12 told jurors they must convict if the State met its burden, while Instruction 20 told jurors a person is not guilty of controlled substance delivery if they were “lured or induced to commit a crime that the defendant had not otherwise intended to commit.” CP 34 (Instruction 20). One can only speculate how jurors interpreted these two instructions when it convicted Hugdahl. For this reason, the error must be presumed prejudicial. Koker, 60 Wn. App. at 483. The State bears the burden of showing this constitutional error was harmless beyond a reasonable doubt. Cayetano-Jaimes, 190 Wn. App. at 303. The State cannot meet this burden.

The court's instructions contradicted one another. Koker, 60 Wn. App. at 483. The court's instructions effectively nullified Hugdahl's only defense. Hugdahl's delivery convictions must therefore be reversed. Id. at 485.

2. HUGDAHL WAS DENIED HER RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

If this Court concludes Hugdahl may not properly raise on appeal the instructional issues discussed above because his trial counsel failed to object or otherwise raise the issue at trial, then Hugdahl was denied her right to effective assistance of counsel, for which reversal is required.

A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and Article I, Section 22 Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

Error! Bookmark not defined.

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Here, defense counsel argued the jury should acquit Hugdahl of heroin possession based on her claim she only gave Litzenberg the controlled substances out of fear he would otherwise harm her. RP 346-55. Unfortunately, instructions 9-12 told them they had a “duty” to convict her of the delivery charges if they found she knowingly delivered a controlled substance, on or about “January [19 or 20], 2017, in the State of Washington, all of which was uncontested. Yet Hugdahl’s counsel implicitly approved of the instructions given by failing to register the appropriate objections. RP 274-80.

There is no reasonable strategic basis for defense counsel failure to object to Instructions 9-12. There was no downside for Hugdahl in making such objections. Either the court would agree and corrected the instructions, or not, which would have left Hugdahl in no worse a position than not asking. On the other hand, by failing to object, counsel allowed Hugdahl’s only defense to be eliminated from the jury’s consideration. There is no reasonable strategic basis for Hugdahl’s counsel not to object and therefore counsel’s performance was deficient.

Defense counsel’s deficient performance prejudiced Hugdahl. As discussed, Instructions 9-12 eliminated the entrapment defense, thereby ensuring a conviction because it was undisputed Hugdahl knowingly delivered controlled substances the dates and place alleged. Had the jury

been properly instructed, there is a reasonable probability the outcome of trial would have been an acquittal. Hugdahl's judgment and sentence should therefore be reversed. Thomas, 109 Wn.2d at 229.

3. THE INFORMATION IS CONSTITUTIONALLY DEFECTIVE BECAUSE IT FAILS TO ADEQUATELY INFORM HUGDAHL OF THE CHARGES AGAINST HER.

The charging document here is deficient because it fails to include a necessary fact in charging the sentence enhancement: that the delivery occurred within 1,000 feet of a "school bus route stop." RCW 69.50.435(1)(c). Instead, the document only alleged that the delivery occurred within 1,000 feet of a "school bus route." CP 1-2, 5-6, 58-59. This violated Hugdahl's constitutional right to be adequately informed of the charges against her.

A charging document is constitutionally defective if it fails to include all "essential elements" of the crime. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995); Hamling v. United States, 418 U.S. 87, 117, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974); U.S. Const. Amend. VI; Wash. Const. Art. I, § 22. "More than merely listing the elements, the information must allege the particular facts supporting them." State v. Nonog, 169 Wn.2d 220, 226, 237 P.3d 250 (2010) (citing State v. Leach, 113 Wn.2d 679, 688, 782 P.2d 552 (1989)). This is a

requirement of the essential elements rule. State v. Simms, 171 Wn.2d 244, 250, 250 P.3d 107 (2011). "Failure to provide the facts 'necessary to a plain, concise and definite statement' of the offense renders the information deficient." Nonog, 169 Wn.2d at 626 (citing Leach, 113 Wn.2d at 690 (quoting JCrR 2.04(a)).

That an unlawful drug delivery occurred within 1,000 feet of a "school bus route stop" is just as important and essential as the other requirements of the information for a delivery charge because it increased the sentence beyond the statutory maximum sentence for the underlying offense. State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008).⁵

⁵ The Recuenco Court stated:

Sentencing enhancements, such as a deadly weapon allegation, must be included in the information. In re Pers. Restraint of Bush, 95 Wn.2d 551, 554, 627 P.2d 953 (1981). When the term "sentence enhancement" describes an increase beyond the maximum authorized statutory sentence, it becomes the equivalent of an "element" of a greater offense than the one covered by the jury's guilty verdict. Apprendi [v. New Jersey], 530 U.S. [466], 494 n.19[, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)]. Contrary to the dissent's assertions, Washington law requires the State to allege in the information the crime which it seeks to establish. This includes sentencing enhancements. See State v. Crawford, 159 Wn.2d 86, 94, 147 P.3d 1288 (2006) (stating that prosecutors must set forth their intent to seek enhanced penalties for the underlying crime in the information).

Recuenco, 163 Wn.2d at 435-45 (footnote omitted).

A challenge to the sufficiency of a charging document is reviewed de novo. State v. Williams, 162 Wn.2d 177, 182, 170 P.3d 30 (2007). Where, as here, a charging document is challenged for the first time on appeal, it is to be "liberally construed in favor of validity." State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). Under a liberal standard of review, the appellate court undertakes a two-pronged inquiry: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" Kjorsvik, 117 Wn.2d at 105-06.

Under the first prong of the Kjorsvik test, the court looks at the face of the document only. Id. at 106. If a necessary element is neither found nor fairly implied in the charging document under the first prong, the reviewing court must presume prejudice and reverse. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000); State v. Brown, 169 Wn.2d 195, 198, 234 P.3d 212 (2010).

In Recuenco, the information alleged the defendant assaulted his spouse with a "deadly weapon," and the jury returned a special verdict finding the defendant was armed with a deadly weapon. Recuenco, 163 Wn.2d at 431-32. The Court held that the defendant was entitled to have the jury determine "if he was guilty of the crime and sentencing

enhancement charged.” Recuenco, 163 Wn.2d at 440. Because the jury did not find the defendant was armed with a “firearm” during the commission of the charged offense, the court concluded the sentencing court erred by imposing the firearm enhancement. Recuenco, 163 Wn.2d at 439.

Here the problem is the allegations in the information fail to match what the jury was asked to find. The information alleged Hugdahl made the deliveries within 1,000 feet of a “school bus route,” but jurors were asked to determine if they were made within 1,000 feet of a “school bus route stop.” Compare CP 58-59 (Third Amended Information) and CP 51, 53, 55, 57 (verdict forms for sentence enhancements). The body of the information affirmatively and specifically accuses Hugdahl of making the unlawful drug deliveries within 1,000 feet of a “school bus route.” But there is no sentence enhancement consequence for making an unlawful drug delivery within 1,000 feet of a “school bus route.” See RCW 69.50.435.⁶ There being no adverse consequence for making deliveries

⁶ RCW 69.50.435(1) provides for a sentence enhancement if an unlawful drug delivery is made:

- (a) In a school;
- (b) On a school bus;
- (c) Within one thousand feet of a school bus route stop designated by the school district;

within 1,000 feet of a “school bus route,” Hugdahl had no reason to defend against that allegation.

None of the charging documents filed provided Hugdahl notice that the prosecution was accusing her of making the deliveries within 1,000 feet of a “school bus route stop,” which if proved, could lead to adverse consequences in the form of a longer sentence. CP 1-2, 5-6, 45-46, 58-59; RCW 69.50.435(1)(c). The prosecution repeatedly failed to include the essential element that the delivery occurred within 1,000 feet of a “school bus route stop.” Nor can the “stop” element be reasonably

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- (d) Within one thousand feet of the perimeter of the school grounds;
 - (e) In a public park;
 - (f) In a public housing project designated by a local governing authority as a drug-free zone;
 - (g) On a public transit vehicle;
 - (h) In a public transit stop shelter;
 - (i) At a civic center designated as a drug-free zone by the local governing authority; or
 - (j) Within one thousand feet of the perimeter of a facility designated under (i) of this subsection, if the local governing authority specifically designates the one thousand foot perimeter may be punished by a fine of up to twice the fine otherwise authorized by this chapter, but not including twice the fine authorized by RCW 69.50.406, or by imprisonment of up to twice the imprisonment otherwise authorized by this chapter, but not including twice the imprisonment authorized by RCW 69.50.406, or by both such fine and imprisonment. The provisions of this section shall not operate to more than double the fine or imprisonment otherwise authorized by this chapter for an offense.

implied from any of the charging language employed by the prosecution. As such, the prosecution's charging language fails to pass the first prong of the Kjorsvik inquiry. 117 Wn.2d at 105-06. The remedy for a defective charging document under these circumstances is dismissal without prejudice. Brown, 169 Wn.2d at 198.

D. CONCLUSION

For the reasons stated, this Court should reverse Hugdahl's judgment and sentence and remand for a new, fair trial.

DATED this 29th day of December 2017.

Respectfully submitted,

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