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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

REPLY BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ARGUMENTS IN REPLY

1. WASHINGTON PATTERN INSTRUCTIONS DO NOT CONSTITUTE "LAW," AND INSTEAD CONSTITUTE 'SUGGESTED' INSTRUCTIONS THAT ARE SUBJECT TO MODIFICATION WHEN NECESSARY TO FIT THE PARTICULARS OF A SPECIFIC CASE.

The prosecution's response brief reveals a fundamental misconception about Washington's pattern jury instructions (a.k.a "WPICs"). In responding to Hugdahl's claim that the to-convict instructions were flawed because they effectively eliminated her entrapment defense from the jury's consideration, the prosecution concedes there is an inconsistency in the decisional standards set forth in the instructions. See Brief of Respondent (BOR) at 22-24 (acknowledging the law prohibits contradictory instructions, but asserts the inconsistency argued by Hugdahl exists in every case where the defense pursues an affirmative defense). The prosecution argues, however, that such inconsistency is not fatal to Hugdahl's conviction because the instructions provided were "approved WPICs." BOR at 24. To the extent the prosecution is claiming WPICs constitute binding authority on par with published decisions, statutes and constitutional law, it is wrong.

The introductory chapter to the criminal WPICs specifically notes;

> The pattern instructions are not authoritative primary sources of the law; rather, they restate otherwise existing law for jurors. The pattern instructions do not receive advance approval from any court, although they are often treated as "persuasive." See, e.g., State v. Mills, 116 Wn. App. 106, 64 P.3d 1253 (2003), reversed on other grounds, 154 Wn.2d 1, 109 P.3d 415 (2005). Judicial review of the instructions instead occurs after the fact, when individual instructions are reviewed in appellate opinions. The pattern instructions are not binding on trial courts; they are intended to guide trial courts in drafting appropriate instructions for individual cases.

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 0.10 (4th Ed).

With regard to how to use WPICs, the introduction provides:

> Pattern instructions are examples that apply to a general category of cases, rather than an exact blueprint for use in every individual case. They provide a neutral starting point for the preparation of instructions that are individually tailored for a particular case. Trial judges and attorneys must consider whether modifications are needed to fit the individual case.
>
> Sometimes, this process can involve adding new language for points not addressed in the pattern instructions; it can mean omitting language that does not apply to an individual case; it can involve substituting more specific language for the necessarily general language of a pattern instruction; it can involve combining or reorganizing instructions that address related points. The goal, always, is to finish with a set of instructions that clearly and accurately state the law that applies to the particular case, no more and no less.

Id. (emphasis added).

Unwilling to accept that WPICs can and should, in the right circumstances, be modified to account for the specifics of the case, the

prosecution provides no substantive argument disputing Hugdahl's claim. Instead the prosecution speculates that Hugdahl may not have been entitled to the defense at all. BOR at 21. But that does not address the issue presented, which is whether the to-convict instructions that were provided affirmatively negated her entrapment defense by imposing a "duty" to find her guilty if they determined she delivered the drugs, regardless of whether she was entrapped.

In the context of Hugdahl's associated ineffective assistance of counsel claim, the prosecution persists with it faith in the power of WPICS by making the bold claim that "Appellant cannot point to any case in which the WPICs that were used have been ruled incorrect statements of the law." BOR at 27. The prosecution is wrong.

There are several instances where WPIC language has been deemed an incorrect statement of the law. One example is former WPIC 10.51, which set forth the concept of accomplice liability. The Washington Supreme Court concluded it contained an incorrect statement of the law by allowing liability in the event "a crime" is committed instead of "the crime" the accused allegedly intended to help commit. State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000).

Moreover, in the context of entrapment, the standard WPIC language has, in specific cases, been found to be an incorrect statement of

the law. State v. O'Neill, 91 Wn. App. 978, 989, 967 P.2d 985, 990 (1998). In O'Neill, the WPIC version of the entrapment defense instruction was provided, but it contained language that did not apply in the specific circumstances because the matter did not involve a "typical undercover or sting operation." Id. at 990. As a result, O'Neill's bribery conviction was reversed. Id. at 991.

This Court should reject the prosecution proposed legal doctrine, which is that WPICs always correctly state the law. It is simply incorrect. As the introduction to the criminal WPICs makes abundantly clear,

> Trial judges and attorneys must consider whether modifications are needed to fit the individual case.
>
> Sometimes, this process can involve adding new language for points not addressed in the pattern instructions; it can mean omitting language that does not apply to an individual case; it can involve substituting more specific language for the necessarily general language of a pattern instruction; it can involve combining or reorganizing instructions that address related points. The goal, always, is to finish with a set of instructions that clearly and accurately state the law that applies to the particular case, no more and no less.

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 0.10 (4th Ed) (emphasis added). The court and counsel in Hugdahl's trial failed to heed this admonishment. The result was a jury that had to convict Hugdahl because she admitted delivering the drugs. They had to convict her because the to-convict instructions provided directed the jury it had a "duty" to convict if

it found beyond a reasonable doubt Hugdahl made the deliveries. CP 23-26 (Instructions 9-12, the "to-convict" instructions). Because whether Hugdahl committed the drug deliveries was uncontested (see RP 346-55, defense counsel does not contest the deliveries, arguing instead only the entrapment defense), a guilty verdict was certain in light of the erroneous to-convict instructions.

Whether this Court concludes the erroneous instructions deprived Hugdahl of her constitutional right to present a defense, or instead deprived of her constitutional right to effective assistance of counsel, the result should be the same, reversal.

2. THE PROSECUTION'S FAILURE TO CORRECTLY CHARGE THE "SCHOOL BUS ROUTE STOP" SENTENCE AGGRAVATOR REQUIRES REMAND FOR RESENTENCING WITHOUT IMPOSITION OF THE AGGRAVATOR.

The prosecution concedes Hugdahl has correctly set for the applicable law with respect to this issue. BOR at 33. This Court should accept the concession. The prosecution also concedes it failed to correctly charge the aggravator by leaving out the word "stop." BOR at 38-41. This Court should also accept this concession.

The prosecution does, however, disagree with Hugdahl's assertion that the prosecution's numerous charging documents ever provided sufficient notice that she faced a sentence enhancement for delivering

drugs within 1,000 feet of a "school bus route stop." BOR at 33-34. The prosecution is mistaken because it fails to properly analyze the issue in the context of the relevant legal standard.

The prosecution analysis of the issue skips an important step based on a faulty assumption. The prosecution's analysis begins with the assumption that the charging documents "fairly implied" the missing "stop" element, without ever explaining the basis for this assumption. This allowed the prosecution to skip ahead to the second prong of the test under State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991), which sets forth that 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 (emphasis added). BOR at 38-42. The prosecution begins its analysis of the issue at the "and if so" stage of the inquiry. This was error.

As discussed in Hugdahl's opening brief, the problem here 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."

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." CP 1-2, 5-6, 45-46, 58-59. The prosecution repeatedly failed to include the essential element that the delivery occurred within 1,000 feet of a "school bus route stop."

The "stop" element cannot be reasonably implied from any of the charging language employed by the prosecution, nor does the prosecution ever explain how such language might be implied. The prosecution's charging language fails to pass the first prong of the Kjorsvik inquiry. 117 Wn.2d at 105-06. The remedy under these circumstances is dismissal without prejudice. Brown, 169 Wn.2d at 198.

The prosecution's decision to skip the first prong of the Kjorsvik inquiry is understandable in light of the consequence. But this Court should reject the prosecution's attempt to avoid what is required here. None of the charging documents filled in this case ever provided Hugdahl with either explicit or implicit notice that she needed to defend against a

"school bus route stop" sentence aggravator. Instead, those that contained reference to an alleged sentence aggravator all set forth one that does not exist. CP 1-2, 5-6, 58-59. Absent such notice, reversal and dismissal without prejudice is required. Brown, 169 Wn.2d 198. This Court should order that result here.

B. CONCLUSION

Hugdahl was deprived of her right to present a defense because the to-convict instructions did not allow for acquittal, even if the jury concluded Hugdahl sufficiently proved her entrapment defense. Reversal is therefore required.

If this Court concludes Hugdahl was not deprived of her right to present a defense, then this Court should still reverse and dismiss the "school bus route stop" aggravator because Hugdahl was deprived of her due process right to adequate notice of that allegation.

DATED this 31st day of July 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

CHRISTOPHER H. GIBSON
WSBA No. 25097
Office ID No. 91051

Attorneys for Appellant

NIELSEN, BROMAN & KOCH P.L.L.C.

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Sender Name: John Sloane - Email: Sloanej@nwattorney.net
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