IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOSE ANGUIANO-ALCAZAR, Appellant.	No. 41535-6-II UNPUBLISHED OPINION

Armstrong, J.--- Jose Anguiano-Alcazar appeals his convictions for (1) delivery of a controlled substance and (2) selling a controlled substance for profit. Anguiano-Alcazar argues that he did not receive sufficient notice on either count, that the counts must merge to satisfy double jeopardy principles, that the State violated its disclosure duty by failing to produce an alleged agreement with the confidential informant, and that the trial court violated his right to confront the witnesses by limiting his cross-examination of the confidential informant. The State concedes that in count I, it erroneously alleged possession with intent to deliver rather than delivery of a controlled substance as the State intended; accordingly, we reverse Anguiano-Alcazar's conviction for count I and remand for the trial court to dismiss without prejudice. As to the remaining issues, we find no error and, therefore, affirm.

FACTS

Thomas Milam, a confidential informant working with the Clark/Skamania Drug Task Force, purchased heroin from Anguiano-Alcazar at a restaurant. Anguiano-Alcazar initially delivered the heroin to Milam as the two were sitting at a table. Anguiano-Alcazar then asked Milam to return the heroin. After Milam returned the heroin, Anguiano-Alcazar went to the

men's restroom; when he returned, he told Milam the heroin was underneath the garbage can in the restroom. Milam retrieved the heroin from the restroom. Anguiano-Alcazar denied selling heroin to Milam.

Milam became a confidential informant in July 2009, after police found heroin in his car. In August 2009, the State filed a motion for exoneration in Milam's case because "[f]urther investigation is necessary." Clerk's Papers (CP) at 122. At about the same time, Milam started working with the Clark/Skamania Drug Task Force. Milam testified that he had no agreement with law enforcement or the prosecutor's office regarding his potential drug charges, but he had a "hope" that Deputy Nelson, one of his supervisors, would make a good recommendation to the prosecutors for him. Report of Proceedings (RP) at 181, 188. Deputy Nelson also testified that he made no deals with Milam regarding his criminal activity in July 2009, but that he might give Milam a positive recommendation to the prosecutor. The State ultimately charged Milam with possession of a controlled substance with intent to deliver in November 2010.

Anguiano-Alcazar's trial counsel sought discovery before trial of any agreement between Milam and the State. The trial court reviewed, in camera, documents from the prosecutor's "cold intake" file[1] regarding Milam and determined that most documents were not discoverable under *Brady*.[2] RP at 33, 90.

[1] The record reflects that a "cold intake" is a case that is ready for review by the prosecutors but the prosecutors have yet to file any charges. RP at 88-89. The prosecutor has not decided whether to charge and may never file charges in the case.

[2] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). *Brady* and its progeny require the State to disclose all impeachment and exculpatory evidence known to the prosecutor and the police. *Strickler v. Greene*, 527 U.S. 263, 280-81, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).

After Milam testified, Anguiano-Alcazar's counsel moved to dismiss the charges based on the State's failure to disclose its agreement with Milam. In the alternative, he asked permission to re-call Milam to inquire further about a possible agreement between the State and Milam. The trial court denied both motions, explaining that Deputy Nelson's possible positive recommendation was an agreement the State should have disclosed. But, the court reasoned, the failure to disclose did not violate *Brady* because the State had not intentionally hidden the information. The trial court ruled that the defense could not re-call Milam absent some evidence the State and Milam had an agreement. After trial, Anguiano-Alcazar's trial counsel filed a second declaration on disclosure of informant to support his motion to disclose the informant and the deals made with Milam. He then interviewed Senior Deputy Prosecuting Attorney Philip Meyers who explained that his office had no set process for charging a defendant, and that the State had no agreement with Milam.

The State charged Anguiano-Alcazar by information on October 2, 2009. The information read, in pertinent part:

> **COUNT 01 – DELIVERY OF A CONTROLLED SUBSTANCE – HEROIN – 69.50.401 (1), (2)(a)**
> That he, Jose Louis Anguiano-Alcazar, in the County of Clark, State of Washington, on or about September 17, 2009, did knowingly possess a controlled substance with intent to deliver, to-wit: Heroin; contrary to Revised Code of Washington 69.50.401(1), (2)(a).
> . . . .
> **COUNT 02 – SELLING FOR PROFIT ANY CONTROLLED OR COUNTERFEIT SUBSTANCE – 69.50.410(1), (3)(a)**
> That he, Jose Louis Anguiano-Alcazar, in the County of Clark, State of Washington, on or about September 17, 2009, did sell for profit a controlled substance classified in Schedule I, RCW 69.50.204, to wit: heroin, contrary to Revised Code of Washington 69.50.410(1), (3)(a).

CP at 3-4.

The jury found Anguiano-Alcazar guilty of both counts.

ANALYSIS

I. Notice

Anguiano-Alcazar argues that the State violated his constitutional right to notice of the crimes charged in both counts I and II.

The United States and Washington constitutions require the State to provide notice to the defendant of the crimes it intends to prove. *See* U.S. Const. amend VI ("In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation; . . . ."); Wash. Const. art. 1, § 22 ("In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him . . . ."). Thus, the State must allege "[*a*]*ll* essential elements of a crime . . . in a charging document." *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991) (emphasis added). Essential elements include both the statutory and nonstatutory elements of the crime and the facts that support each element. *Kjorsvik*, 117 Wn.2d at 97-98 (discussing including the nonstatutory "intent to steal" element in a robbery case).

Our standard for reviewing a charging document's adequacy depends on the timing of the challenge. *State v. Ralph*, 85 Wn. App. 82, 84, 930 P.2d 1235 (1997). If the defendant challenges the sufficiency of the information at or before trial, we strictly construe the language of the charging document, which must state all elements of the charged crimes. *State v. Phillips*, 98 Wn. App. 936, 940, 991 P.2d 1195 (2000) (citing *State v. Vangerpen*, 125 Wn.2d 782, 788, 888

P.2d 1177 (1995)). If it does not contain all the elements, we must remand for dismissal without prejudice. *State v. Johnson*, 119 Wn.2d 143, 149, 829 P.2d 1078 (1992) ("[W]hen an information is challenged pretrial, defendants need not show they were prejudiced by missing elements.").

When the defendant challenges the charging documents for the first time on appeal, we liberally construe the language in the charging document by asking whether the "necessary facts appear in any form, or by fair construction can . . . be found in the charging document." *Kjorsvik*, 117 Wn.2d at 105. If we find the allegations sufficient under this standard, we then ask whether the defendant can nonetheless show that the charging document's unartful language prejudiced him. *Kjorsvik*, 117 Wn.2d at 105-06. In addressing the first question, we look only at the language on the face of the charging document. *Kjorsvik*, 117 Wn.2d at 106. In addressing possible prejudice, we can look beyond the language of the charging document, for example, to the certificate of probable cause. *Kjorsvik*, 117 Wn.2d at 106, 111; *see also Phillips*, 98 Wn. App. at 943-44 (challenge to information fails because affidavit of probable cause set forth all necessary allegations).

A. Count I

Anguiano-Alcazar argues the State violated his right to notice for count I because the information purported to charge him with delivery of a controlled substance, but set forth the elements of possession of a controlled substance with the intent to deliver, and the jury was instructed on the former. The State concedes the issue. We reverse and remand for the trial court to dismiss count I without prejudice. *Vangerpen*, 125 Wn.2d at 791.

B. Count II

Anguiano-Alcazar also argues that the State failed to provide sufficient notice for count II, sale of a controlled substance, because the information failed to allege that he "knowingly" sold heroin. Br. of Appellant at 13. The State responds that, assuming it had to prove Anguiano-Alcazar knowingly sold heroin, the information, read liberally, provided the necessary notice.

Count II charged Anguiano-Alcazar with selling for profit a controlled substance under RCW 69.50.410(1),(3)(a). The statute reads, in pertinent part:

> (1) Except as authorized by this chapter it is a class C felony for any person to sell for profit any controlled substance or counterfeit substance classified in Schedule I, RCW 69.50.204, except leaves and flowering tops of mari[j]uana.
> For the purposes of this section only, the following words and phrases shall have the following meanings:
> (a) "To sell" means the passing of title and possession of a controlled substance from the seller to the buyer for a price whether or not the price is paid immediately or at a future date.
> (b) "For profit" means the obtaining of anything of value in exchange for a controlled substance.
> (c) "Price" means anything of value.

We need not decide whether "knowledge" is an element of the crime because even if it is, a liberal reading of the information gave Anguiano-Alcazar such notice. Because Anguiano-Alcazar did not challenge the information at or before trial, we liberally construe the document in favor of giving notice. *Kjorsvik*, 117 Wn.2d at 105.

Where the State charges multiple related drug offenses and one count does not allege the required "knowingly" element, we can look to the other counts to provide the necessary notice under a liberal reading of the information. *State v. Valdobinos*, 122 Wn.2d 270, 286, 858 P.2d 199 (1993). In *Valdobino*s, the State charged the defendant with (1) delivery of a controlled

substance, (2) conspiracy to deliver a controlled substance, and (3) possession of a controlled substance with the intent to deliver. *Valdobinos*, 122 Wn.2d at 286. For the first count, delivery of a controlled substance, the State alleged only that the defendant "feloniously [not knowingly] deliver[ed]" a controlled substance. *Valdobinos*, 122 Wn.2d at 285. The court reasoned that possession with intent to deliver already has an intent element, thus there is no additional "guilty knowledge" requirement. *Valdobinos*, 122 Wn.2d at 283-84. And, conspiracy to deliver also does not require "guilty knowledge" because "it [is] impossible for people to engage in a conspiracy to deliver [a controlled substance] without knowing what they are doing." *Valdobinos*, 122 Wn.2d at 285. Thus, liberally construing the information, the court concluded that "[i]t is inconceivable that [the defendant] would not have been on notice that he was accused of knowing the substance in question [for the delivery count] was cocaine" because the count read together with the other two counts provided sufficient notice of the element. *Valdobinos*, 122 Wn.2d at 286.

Here, the State charged Anguiano-Alcazar with two counts revolving around the same drug transaction with Milam. For count I, the information specifically states that Anguiano-Alcazar "did knowingly possess a controlled substance with intent to deliver." CP at 3. Although count II did not explicitly allege that Anguiano-Alcazar knowingly sold heroin for a profit to Milam, the two counts together gave Anguiano-Alcazar notice that the State had to prove he knowingly sold heroin to Milam. *See Valdobinos*, 122 Wn.2d 286.

We next consider whether the information's unartful language actually prejudiced Anguiano-Alcazar. Anguiano-Alcazar does not claim that the charging document prejudiced him

as to count II, and he has the burden to show prejudice. Thus, we conclude that the charging documents gave Anguiano-Alcazar sufficient notice that the State had to prove that he knowingly dealt with heroin, and the unartful language did not prejudice him.

II. Double Jeopardy

Anguiano-Alcazar argues that his convictions for delivery of a controlled substance and sale of a controlled substance for profit merge and violate his right to be free from double jeopardy. Because the State conceded the first issue and the remedy is to dismiss that count without prejudice, we need not reach the double jeopardy issue.

III. Statement of Additional Grounds (SAG)

A. *Brady* Violation

Anguiano-Alcazar's SAG issues I and II revolve around the same claim: the State violated the *Brady* rule by failing to disclose any agreements between Milam and the State for favorable treatment on Milam's potential drug charges. SAG at 7-11.

The State violates a defendant's rights to due process where it suppresses evidence that is material to either guilt or punishment, regardless of whether the prosecutor acted in good faith. *Strickler v. Greene*, 527 U.S. 263, 280, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999) (citing *Brady*, 373 U.S. at 87). To establish a *Brady* violation, the defendant must show: (1) the evidence was favorable to the defendant, (2) the State suppressed the evidence, and (3) the suppression prejudiced the defendant. *Strickler*, 527 U.S. at 281-82. The State must disclose both impeaching and exculpatory evidence, and the prosecutor must disclose all favorable evidence known to either the prosecutor or the police. *Strickler*, 527 U.S. at 280-81. A defendant can

show prejudice "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Strickler*, 527 U.S. at 280 (quoting *U.S. v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)). In reviewing a Brady challenge on direct review, we can consider only matters demonstrated by the trial record. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

In *In re Personal Restraint of Gentry*, 137 Wn.2d 378, 396-97, 972 P.2d 1250 (1999), Gentry claimed that after trial, he discovered information that the State actually had made agreements with the three inmates who testified against him. At trial, all three informants testified that the State provided no benefit to them for testifying against Gentry. *Gentry*, 137 Wn.2d at 396-97. In his personal restraint petition, Gentry submitted evidence that one inmate informant, Brian Dyste, made a deal with the State on unrelated drug charges and then benefitted from being a drug informant. The court found, however, that Gentry's claim of an agreement between Dyste and the State pertaining to Dyste's testimony at Gentry's trial was completely speculative and unsupported by any evidence. *Gentry*, 137 Wn.2d at 397-98. Moreover, the court found that even if the State had agreements with the informants pertaining to their testimony, Gentry had shown no prejudice because his defense counsel impeached the inmates on other grounds, such as prior criminal conduct. *Gentry*, 137 Wn.2d at 400.

Here, the prosecutor stated on the record several times that Milam had no agreement with the prosecutor other than a consent agreement.[3] The trial court reviewed Milam's "cold intake" file, in camera, and determined that most of the evidence would not support a *Brady* violation,

[3] The consent agreement states that Milam agreed to not represent himself as a law enforcement officer and to obey all laws. This was disclosed to the defense and does not constitute any benefit to Milam. Additionally, the trial court allowed questioning regarding this consent agreement.

and the trial court disclosed the evidence that could lead to *Brady* material. RP at 33, 90. Additionally, defense counsel's post-trial interview of the supervising prosecutor for the drug unit revealed no evidence of an agreement between the State and Milam.

Both Milam and Deputy Nelson testified that the State had not promised Milam any benefit if he acted as a confidential informant in Anguiano-Alcazar's case. And the trial court ruled that the State's failure to reveal Deputy Nelson's possible "good recommendation" did not violate *Brady* because "*Brady* is where they [the State] are hiding evidence. . . ." RP at 204. Although the trial court may have erred in considering the prosecutor's intent, Anguiano-Alcazar has not shown prejudice. *Strickler*, 527 U.S. at 281-82. Anguiano-Alcazar's counsel cross-examined Deputy Nelson about his promise to talk with the prosecutor about Milam's pending charges, questioning the deputy's credibility about this "agreement." Thus, Anguiano-Alcazar has shown no prejudice from the State's delay in revealing the promise. *Strickler*, 527 U.S. at 281-82. And we agree with the trial court that Anguiano-Alcazar's assertion that an agreement existed is purely speculative. *See Gentry*, 137 Wn.2d at 397-98. Thus, Anguiano-Alcazar's *Brady* claim fails.

B. Confrontation

Anguiano-Alcazar next argues that the trial court violated his right to confront the witnesses by limiting his counsel's inquiry into the alleged agreement between Milam and the State.

The Sixth Amendment to the United States Constitution and article I section 22 of the Washington State Constitution provide criminal defendants with the right to confront the

witnesses against them. U.S. Const. amend. VI; Wash. Const. art. I, § 22. The constitutional provisions ensure the defendant has an opportunity to meaningfully cross-examine adverse witnesses. *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). The right, however, is not absolute, and a trial court has discretion to limit or deny the cross-examination where "the evidence sought is vague, argumentative, or speculative." *Darden*, 145 Wn.2d at 620-21. We review the trial court's decision limiting the scope of cross-examination for a manifest abuse of discretion. *Darden*, 145 Wn.2d at 619.

Again, Anguiano-Alcazar points to the alleged agreement between Milam and the State. As we have discussed above, Anguiano-Alcazar uncovered no evidence of an agreement other than Deputy Nelson's promise to talk to the prosecutor about Milam's pending charges, which Anguiano-Alcazar's counsel explored on cross-examination of the deputy. In the absence of some evidence that defendant's counsel, on further cross-examination, would have elicited another agreement, the trial court did not err in denying counsel further cross-examination. Finally, in his post-trial interview with the prosecutor, counsel found no evidence of an agreement other than the one revealed. Thus, the trial court's ruling, even if wrong, did not prejudice Anguiano-Alcazar.

We reverse the conviction for count I and remand for the trial court to dismiss without prejudice. We affirm all other issues.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Penoyar, J.

Johanson, A.C.J.