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Supreme Court No. (to be set)
Court of Appeals No. 38484-5-III
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

State of Washington v. Michael Duane Etue

Stevens County Superior Court

Cause No. 20-1-00053-6

The Honorable Judge Lech J. Radzimski

PETITION FOR REVIEW

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INTRODUCTION AND SUMMARY OF ARGUMENT

Michael Etue's conviction for possessing a stolen motor vehicle must be reversed for two reasons. First, the Information was constitutionally deficient because it omitted an essential element. The State did not allege that Mr. Etue knew the car was stolen. The charge must be dismissed without prejudice.

Second, the prosecutor committed reversible misconduct. The prosecutor improperly suggested that facts outside the record established Mr. Etue's guilt. The prosecutor also told jurors they could convict Mr. Etue if he "reasonably should have known" that the car was stolen. The case must be remanded for a new trial.

DECISION BELOW AND ISSUES PRESENTED

Petitioner Michael Etue, the appellant below, asks the Court to review the Court of Appeals opinion entered on January 10, 2023.[1] This case presents three issues:

[1] A copy of the opinion is attached.

1. Was the Information charging possession of a stolen motor vehicle deficient because it did not allege that Mr. Etue knew the car was stolen?

2. Did the prosecutor commit prejudicial misconduct by arguing that jurors could convict Mr. Etue of possessing a stolen vehicle if he "should have known" the car was stolen?

3. Did the prosecutor commit prejudicial argument by suggesting that evidence not introduced at trial supported conviction?

STATEMENT OF THE CASE

Michael Etue lived with his girlfriend over twelve years at her house. RP 403.The couple broke up in late 2020. RP 298, 404. Mr. Etue quickly found new love with Corina Prouty, and he moved out of the ex-girlfriend's house, which was becoming more of a drug house than a residence. RP 405-407.

The new couple didn't have a place to call home, and stayed in different places over the next couple months. RP 405, They met Ryan Forrest, and stayed at a cabin of his for a time. RP 408-411, 430.

Forrest's sister-in-law was driving an Audi, and Mr. Etue offered to buy it. RP 411. Mr. Etue's sons were about to get a

large sum of money, so he knew he'd be able to pay for the car once that happened. RP 408, 411. Mr. Etue had no idea how much the car was worth, so he offered $2500. RP 412.

Mr. Etue paid part of what he owed for the car, and was given its use.[2] RP 413, 452. He was very pleased with the deal he'd gotten, and proud of having a car that ran well, so he picked up several friends and his sons and took them to stores and to the casino. RP 413-416, 440-442. He offered his carless friends rides, and many people were in and out of the car that day and the next. RP 415-418, 424, 429, 456. He won at the casino and gave his winnings to Forrest for part of the car payment. RP 417-419.

He saw that there was a lot of property in the car, but knew that the car had been used by Forrest's sister-in-law, so he thought nothing of it. The car had obviously not been hot-wired

[2] He gave Forrest some money and some heroin. Mr. Etue readily acknowledges that he is a drug addict. RP 406, 411, 413.

and Mr. Etue was quite pleased to able to give his friends rides. RP 420, 432-434.

Then on a snowy dirt road in Stevens County, Mr. Etue and Prouty were lost trying to return to Forrest's cabin. RP 121, 219, 396, 400, 408, 447. Mr. Etue drove slowly, going 10 mph at times and starting and stopping. RP 120, 397. An officer saw the car and called it in, confirming that it had been reported as stolen. RP 121.

When Mr. Etue stopped at a Y in the road, the officer turned on his lights and pointed his gun. RP 122. As directed, Mr. Etue showed his hands but then put them back on the wheel and went into reverse. RP 123, 447. Another officer arrived and pinned the vehicle in. RP 123. Mr. Etue feared for his life. RP 397, 451.

The officers pulled Mr. Etue out of his car, and put him onto the ground, cutting his face. RP 125, 136-137, 398, 451.

The police found the key in the car, and noted that the ignition had not been punched or otherwise damaged. RP 194, 285-286.

When police searched the car, they found documents and property that appeared to belong to at least fourteen different people. RP 475. Some of those names were associated with the car from before it was reported stolen, some were associated with Mr. Etue's celebration, and some were not known. RP 178-185, 224-227, 233-234, 274-280, 291, 294-295, 298, 314, 329-338, 443-444. This property included items like letters, a car title, loan documents, EBT and phone cards, drug prescriptions, and paystubs. RP 185-188, 202-205, 224-230, 234-256, 291, 339-340, 446. Police also found a shaved key and drug paraphernalia. RP 171-177, 223.

According to Keanen Timmer, whose girlfriend was the registered owner of the car, Timmer bought the car from his mother. RP 327. Timmer's mother's ex-boyfriend was Ryan Forrest. Timmer said that Forrest had earlier stolen items out of

his girlfriend's mother's safe, including one of the keys to this car. RP 327, 345.

The state brought nine charges against Mr. Etue: possession of a stolen motor vehicle, making or possession of motor theft tools, two counts of possession of stolen property in the second degree, four counts of possession of stolen property in the third degree, and one count of obstructing an officer. CP 2-4. The possession of a stolen motor vehicle charge alleged only that Mr. Etue did "knowingly possess a stolen motor vehicle", leaving out the requirement that the person charged have knowledge that the vehicle was stolen. CP 2.

After presenting its evidence, the prosecutor acknowledged that they did not have proof for five of the nine counts. RP 373-374. Having "fallen short", the state moved to dismiss counts three, four, six, seven, and eight, which the court granted. RP 374.

When the jury came back in, the prosecutor moved to dismiss the charges again, explaining to the jury that it was

"due to our inability to bring those additional witnesses before the jury." RP 384.

Mr. Etue testified, and told the jury that he had no idea that the car was stolen. RP 413, 430. He said that the fact that the seller provided him with the key reassured him that the deal was legal. RP 413. He denied knowledge of property of other people in the car, and denied that the shaved key was his. RP 453-455.

The main focus of both attorneys' closing arguments was whether knowledge that the car and some contents were stolen property had been proven. RP 475-520. The prosecutor urged the jury to analyze knowledge: "If he reasonably should have known there was a problem with this car, then he had knowledge." RP 484. He also claimed that "a reasonable person under those circumstances would know that there is something up with this car. He had knowledge that the vehicle was stolen." RP 490.

The jury convicted Mr. Etue of all 4 remaining counts. RP 524-528; CP 34-37. The court imposed a standard range sentence of 50 months, and Mr. Etue timely appealed. RP 553-554; CP 38-43, 54. The Court of Appeals affirmed the convictions in an unpublished Opinion, attached.

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

I. THE INFORMATION FAILED TO ALLEGE THAT MR. ETUE KNEW THE CAR WAS STOLEN, AN ESSENTIAL ELEMENT OF POSSESSING A STOLEN MOTOR VEHICLE.

The Information alleged that Mr. Etue "did knowingly possess a stolen motor vehicle." CP 1. It did not allege that he knew the car was stolen, an essential element of the crime. CP 1. Because the Information was deficient, his conviction must be set aside, and the charge dismissed without prejudice.

An accused person "cannot be tried for an offense which has not been charged." *City of Auburn v. Brooke*, 119 Wn.2d 623, 627, 836 P.2d 212 (1992). A charging document must include all essential elements of the crime. *Id.* This rule is

grounded in the Sixth and Fourteenth Amendments and Wash. Const. art. I, §22.

The sufficiency of the Information can be challenged for the first time on appeal. *State v. Zillyette*, 178 Wn.2d 153, 161, 307 P.3d 712 (2013); *see also State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991). Under these circumstances, the Information is construed liberally. *Zillyette*, 178 Wn.2d at 161. A reviewing court must determine if "the necessary elements appear in any form, or by fair construction, on the face of the document." *Id.*, at 162.

If the Information omits essential elements, dismissal is required. *Id.* This is so, even in the absence of prejudice. *Id.*

Here, the Information did not properly charge possession of a stolen motor vehicle. CP 1. Because of this deficiency, Mr. Etue's conviction must be vacated, and the charge dismissed.

Possession of a stolen motor vehicle requires proof of knowledge. RCW 9A.56.068; RCW 9A.56.140(1). The knowledge element "has two components: the defendant must

both knowingly possess the motor vehicle and also act with knowledge that the motor vehicle had been stolen." *State v. Level*, 19 Wn.App.2d 56, 59, 493 P.3d 1230 (2021) (internal quotation marks and citation omitted); *see also* RCW 9A.56.140.

Where an offense includes two knowledge components, a charging document must allege both components. *See, e.g., State v. Briggs*, 18 Wn.App.2d 544, 492 P.3d 218 (2021). In *Briggs*, the defendant was accused of violating a protection order, an offense that requires proof that the defendant knew of the no-contact order and knowingly violated it. State alleged that "the defendant ... with knowledge that he was the subject of a protection order ... did violate the order." *Id.*, at 552.

The Court of Appeals found this language insufficient because it did not convey both components of the knowledge[3]

[3] Violation of a no-contact order requires proof of "willful" contact, which is established when a person acts knowingly. *Briggs*, 18 Wn.App.2d at 550-551.

requirement. *Id.* The court reiterated that the two components of the knowledge requirement "are two separate elements." *Id.*

The *Briggs* court pointed out that "[a] person does not knowingly violate an NCO if they accidentally or inadvertently contact the protected party, even if they know they are the subject of a valid NCO." *Id.* It rejected the State's argument that acting "with knowledge" of the no contact order was sufficient to charge a knowing violation: "the State wrongly conflates knowledge of the NCO with knowingly violating the NCO." *Id.*

A similar problem was addressed in *State v. Khlee*, 106 Wn.App. 21, 22 P.3d 1264 (2001). There, the Information alleged that the defendant "did knowingly possess a .380 caliber pistol, a stolen firearm." *Id.*, at 22. This language did not properly charge the two components of the knowledge requirement: that the defendant (a) knowingly possessed a firearm, (b) knowing it was stolen. *Id.* Saying that a person

knowingly possessed a stolen firearm "is not the same as saying that he possessed the gun knowing it to be stolen." *Id.,* at 25.

Here, as in *Khlee* and *Briggs,* the Information was deficient. Although the State alleged that Mr. Etue knowingly possessed a stolen vehicle, it did not allege that he knew the vehicle was stolen. CP 1; *cf.* Instruction No. 8, CP 17 (requiring jurors to find "[t]hat the defendant acted with knowledge that the motor vehicle had been stolen.")

The deficiency is not cured simply because the word "knowingly" appears somewhere in the charging language. This is so even under a liberal construction. *See State v. Simon*, 120 Wn.2d 196, 840 P.2d 172 (1992).

In *Simon,* the Supreme Court liberally construed the Information, which was challenged for the first time on appeal. *Id.,* at 198. The charging language in that case alleged that the defendant "did knowingly advance and profit by compelling [the victim] by threat and force to engage in prostitution; and

did advance and profit from the prostitution of [the victim], a person who was less than 18 years old. *Id.,* at 197–98.

The Supreme Court found this language insufficient. The court examined the Information using "simple rules of sentence structure and punctuation." *Id.,* at 199. It noted that a charging document "must be written in such a manner as to enable persons of common understanding to know what is intended." *Id.* Applying this standard, it found that "the term 'knowingly,' as used in the information, does not refer to the second means of committing the crime." *Id.* The Information did not make clear the requirement that the defendant knew the victim's age. *Id.*

In this case, the Court of Appeals' decision conflicts with *Simon.* The court found the Information charging Mr. Etue sufficient. Opinion, p. 6. According to the court, "the knowledge element can be fairly imputed to not only the verb but the entire direct object following the verb." Opinion, p. 6. Under this reading, "the word knowingly modifies the verb

'possess' along with the entire object it follows [sic], 'a stolen motor vehicle.'" Opinion, p. 6.

The court attempted to distinguish *Simon* based on a strained reading of that case. Opinion, p. 6, n. 1. According to the Court of Appeals, the Information in *Simon* was deficient because it used the phrase "did knowingly" instead of just the word "knowingly." Opinion, p. 6 n. 1.

The omission of the word "did" from the Information in this case does not cure the deficiency. Similarly, in *Simon*, the problem could not have been solved by removing the word "did" from the charging document.

The language does not convey the "two components" of the knowledge requirement. *Level*, 19 Wn.App.2d at 59. It does not make clear that the State is obligated to prove *both* knowing possession *and* knowledge that the vehicle was stolen. *See Khlee*, 106 Wn.App. at 22.

The Information did not include all essential elements of the offense. It did not charge a crime, and it violated Mr. Etue's rights under the Sixth Amendment and Wash. Const. art. I, §22.

Because the Information is deficient, Mr. Etue's conviction must be set aside. *Zillyette*, 178 Wn.2d at 163. The charge of possessing a stolen motor vehicle must be dismissed without prejudice. *Id.*

The Court of Appeals' decision conflicts with *Simon.* This court should grant review under RAP 13.4(b)(1).

II. THE PROSECUTOR COMMITTED MISCONDUCT THAT WAS FLAGRANT AND ILL-INTENTIONED.

In closing argument, the prosecutor improperly told jurors that Mr. Etue could be found guilty of possessing a stolen motor vehicle if he "reasonably should have known" the car was stolen. This argument relieved the State of its burden to prove that he had actual knowledge. The prosecutor also improperly suggested that evidence outside the record supported Mr. Etue's guilt. The prosecutor insinuated that

missing witnesses would have testified that Mr. Etue was guilty of additional crimes.

The prosecutor's flagrant and ill-intentioned misconduct violated Mr. Etue's Fourteenth Amendment right to due process, and requires reversal of the conviction in Count I.

A. Prosecutorial misconduct can deprive an accused person of a fair trial.

A prosecutor's misconduct can violate a defendant's Fourteenth Amendment right to a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. XIV, Wash. Const. art. I, §22. A conviction must be reversed where the misconduct prejudices the accused. *Id.*

A prosecutor "owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated." *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). Prosecuting attorneys "must function within boundaries while zealously seeking justice." *Id.*

A prosecutor does not fulfill the obligation to see justice done "by securing a conviction based on proceedings that violate a defendant's right to a fair trial—such convictions in fact undermine the integrity of our entire criminal justice system." *State v. Walker,* 182 Wn.2d 463, 476, 341 P.3d 976 (2015) (*Walker* I).

Prosecutorial misconduct may require reversal even where ample evidence supports the jury's verdict. *Id.*, at 711-12. The focus of the reviewing court's inquiry "must be on the misconduct," not on the sufficiency of the evidence. *Id.*, at 711.

Absent objection, reversal is required when misconduct is "so flagrant and ill-intentioned that an instruction would not have cured the prejudice." *Id.*, at 704. Here, the prosecutor committed misconduct that was flagrant and ill-intentioned.

B. The prosecutor misstated the law, arguing that Mr. Etue could be convicted if he "reasonably should have known" the car was stolen.

A prosecuting attorney commits misconduct by misstating the law. *State v. Allen,* 182 Wn.2d 364, 373, 341

P.3d 268 (2015); *State v. Jones*, 13 Wn.App.2d 386, 403, 463 P.3d 738 (2020). A prosecutor's misstatement of the law "is a serious irregularity having the grave potential to mislead the jury." *State v. Walker*, 164 Wn.App. 724, 736, 265 P.3d 191, 198 (2011), *as amended* (Nov. 18, 2011), *review granted, cause remanded*, 175 Wn.2d 1022, 295 P.3d 728 (2012) (*Walker* II).

Misconduct during argument can be particularly prejudicial. *Glasmann*, 175 Wn.2d at 706. There is a risk that jurors will lend it special weight because of the prestige associated with the prosecutor's office. *Id.*

Here, the State bore the burden of proving that Mr. Etue knowingly possessed a stolen vehicle "knowing that it ha[d] been stolen." RCW 9A.56.140(1). The offense requires proof of actual knowledge; constructive knowledge is insufficient. *Jones*, 13 Wn.App.2d at 398, 404.

A prosecutor commits misconduct by arguing that knowledge is established if the defendant "should have known" the car was stolen. *Id.*, at 405. Such misconduct is flagrant and

ill-intentioned, and the resulting prejudice cannot be cured by instruction. *Id.*, at 404-407; *see also State v. Tardiff*, 20 Wn. App. 2d 1015 (2021) (unpublished).

In this case, as in *Jones*, the prosecutor improperly argued that

> If he reasonably *should have known* there was a problem with this car, then he had knowledge…. [T]hat's Instruction Number 13 is the one that I'm talking about with regard to knowledge.
> RP 484 (emphasis added).

The prosecutor went on to say

> [A] reasonable person under those circumstances would know that there is something up with this car. He had knowledge that the vehicle was stolen.
> RP 490.

This was misconduct. *Jones*, 13 Wn.App.2d at 404-407. The prosecutor's remarks were nearly identical to those requiring reversal in *Jones. Id.; see also Tardiff*, Slip Op. at *6-8. The misstatements created "a serious irregularity bearing a grave potential to mislead the jury." *Jones*, 13 Wn.App.2d at 403.

The misconduct was flagrant and ill-intentioned and requires reversal. *Id.,* at 406. By "blatantly inviting the jury to convict based on a lesser standard of proof, the prosecutor deprived Mr. [Etue] of a fair trial." *Id.,* at 409.

As in *Jones*, an instruction "could not have cured the prejudice resulting from the State's attorney's closing argument." *Id.,* at 407. The court had already defined knowledge for the jury. Instruction No. 13, CP 22.

The prosecutor subverted the court's definition, improperly telling jurors that Instruction No. 13's permissive inference[4] allowed conviction if they believed Mr. Etue "should have known" the car was stolen. RP 484, 490. Repeating the previously delivered instruction would not have cured the problem. *Id.,* at 407.

[4] If a reasonable person would have had knowledge, "the jury is permitted but not required to find that he or she acted with knowledge." CP 22.

The Court of Appeals agreed that the prosecutor misstated the law. Opinion, p. 10. The court also noted that "the prosecutor in this case is not the first one to confuse the differences" between "constructive knowledge and actual knowledge proved by circumstantial evidence." Opinion, p. 11.

However, the court erroneously believed that the prosecutor's subsequent reference to the permissive inference instruction resolved the problem. Opinion, p. 10. This is incorrect.

The prosecutor wrongly told jurors that the permissive inference instruction *supported* his argument. RP 484. Rather than curing the problem, the prosecutor's reference to Instruction No. 13 made it seem as though his misstatement of the law was correct.

Furthermore, as the Court of Appeals noted, the difference between actual and constructive knowledge is "subtle" and can be confusing where the latter is proved by

circumstantial evidence. Opinion, p. 11. The court's instruction did not defuse the prosecutor's misstatement.

The misconduct violated Mr. Etue's due process right to a fair trial. *Id.,* at 402-408; *Glasmann,* 175 Wn.2d at 703. The Supreme Court should grant review under RAP 13.4(b)(2). The Court of Appeals' decision conflicts with *Jones* and *Tardiff.*

Mr. Etue's conviction must be reversed, and the case remanded for a new trial. *Jones,* 13 Wn.App.2d at 402-408.

C. The prosecutor committed misconduct by implying that evidence outside the record established Mr. Etue's guilt.

A prosecuting attorney "may never suggest that evidence not presented at trial provides additional grounds for finding a defendant guilty." *State v. Perez-Mejia,* 134 Wn.App. 907, 916, 143 P.3d 838 (2006) (citing *State v. Russell,* 125 Wn.2d 24, 87, 882 P.2d 747 (1994)). A prosecutor's "[r]eferences to evidence outside of the record… constitute[s] misconduct." *State v. Fisher,* 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

Here, in the presence of the jury, the prosecutor moved to dismiss five counts "[a]s a result of our inability to bring those additional witnesses before the jury." RP 384. This suggests that the witnesses would have testified that Mr. Etue was guilty of additional crimes, and that the reason for dismissal was that the prosecutor couldn't secure their attendance.

In closing, the prosecutor told jurors "[W]e can't prove the other charges that were initially charged." RP 485. This suggested that Mr. Etue was guilty but would get away with the other crimes because of a problem bringing the witnesses to confirm his guilt. RP 485.

The prosecutor's statement "suggest[ed] that evidence not presented at trial provides additional grounds for finding [Mr. Etue] guilty." *Perez-Mejia,* 134 Wn.App. at 916.

The misconduct was flagrant and ill-intentioned. Attorneys have long been prohibited from arguing facts not in evidence. *See, e.g., Russell,* 125 Wn.2d at 87. After the prosecutor's remarks, jurors knew that the dismissed charges

would have been pursued but for the absence of additional witnesses.

The Court of Appeals found that the prosecutor's reference to matters outside the record was not misconduct. According to the Court of Appeals, "[t]he prosecutor made absolutely no mention of any *facts* the witnesses would have testified to…" Opinion, p. 11 (emphasis added).

This reflects a misunderstanding of Mr. Etue's argument. The prosecutor's statements suggested that the *only* reason the State couldn't meet its burden on additional charges was because the witnesses were unavailable. This is not a neutral statement. The problem was not the insertion of case-specific facts; rather, it was the reference to other witnesses who could have presented additional evidence against Mr. Etue.

The Supreme Court should accept review. This case presents an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4). Mr. Etue's

convictions must be reversed. The case must be remanded for a new trial. *Perez-Mejia*, 134 Wn.App. at 916-921.

CONCLUSION

Mr. Etue's conviction for possessing a stolen vehicle must be reversed. Because the Information was constitutionally insufficient, the charge must be dismissed without prejudice. If the charge is not dismissed, the convictions must be reversed, and the case remanded for a new trial.

CERTIFICATE OF COMPLIANCE

I certify that this document complies with RAP 18.17, and that the word count (excluding materials listed in RAP 18.17(b)) is 3881 words, as calculated by our word processing software.

Respectfully submitted February 3, 2023.

BACKLUND AND MISTRY

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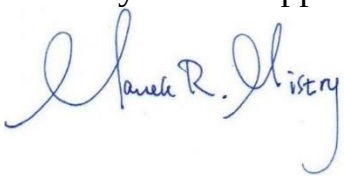

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Manek R. Mistry, No. 22922
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CERTIFICATE OF SERVICE

I certify that on today's date, I mailed a copy of this document to:

Michael Etue DOC# 331799
Washington State Penitentiary
1313 N. 13th Ave.
Walla Walla, WA 99362

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia Washington on February 3, 2023.

Jodi R. Backlund, No. 22917
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January 10, 2023

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CASE # 384845
State of Washington v. Michael Duane Etue
STEVENS COUNTY SUPERIOR COURT No. 2010005333

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be <u>received</u> (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Tristen L. Worthen
Clerk/Administrator

TLW:ko
Attach.
c: **Email** Hon. Lech Radzimski
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FILED
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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. MICHAEL DUANE ETUE, Appellant.	))))))))))	No. 38484-5-III UNPUBLISHED OPINION

STAAB, J. — Michael Etue appeals from four convictions, including one for possession of a stolen motor vehicle. He raises several issues on appeal that were not preserved below. We reject Etue's challenge to the sufficiency of the charging information. Under a liberal construction, the information sufficiently charged that Etue knowingly possessed the stolen motor vehicle. Etue also raises two claims of prosecutorial misconduct. We find no misconduct in the prosecutor's explanation for dismissing the charges due to unavailable witnesses. And while the prosecutor misstated the law in closing by suggesting that constructive knowledge was sufficient, the error was not flagrant or ill-intentioned and could have been, and actually was, corrected by proper jury instructions. We affirm.

BACKGROUND

Officer Matthew Miller of the Chewelah Police Department responded to a call reporting a stolen vehicle. Officer Miller found a car matching the description of the reported vehicle. He followed the vehicle and pulled it over.

The vehicle was driven by Etue who was subsequently charged with nine counts, including one count for possession of a stolen motor vehicle. The information for the possession of a stolen motor vehicle charge alleged that Etue "did knowingly possess a stolen motor vehicle." Clerk's Papers (CP) at 1.

The case proceeded to a jury trial. After the State had completed presenting its case in chief, with the jury present, it moved to dismiss five of the charges against Etue "as a result of [the State's] inability to bring those additional witnesses before the jury." Report of Proceedings (RP) at 384. The trial court granted the State's motion and dismissed the charges.

With regard to the charge for possession of a stolen motor vehicle, the trial court instructed the jury that to make a finding of guilt, it must find that Etue acted with knowledge that the vehicle had been stolen. The trial court further instructed the jury regarding the definition of knowledge:

> A person knows or acts knowingly or with knowledge with respect to a fact or circumstance when he or she is aware of that fact or circumstance. It is not necessary that the person know that the fact or circumstance is defined by law as being unlawful or an element of a crime.

> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

CP at 22.

During closing argument, the State specifically addressed the evidence that established Etue had knowledge that the vehicle was stolen. It stated:

> Again, when you determine knowledge, you are able [to] determine what is reasonable in determining knowledge. If [Etue] reasonably should have known there was a problem with this car, then he had knowledge. All of the other elements fall into place and I'll go over those real quickly in just a second. But that's Instruction Number 13 is the one that I'm talking about with regard to knowledge. So, I'd ask that you pay careful attention to that. And in fact, I'll read the second paragraph, so you know what I'm talking about. If a person has information that would lead a reasonable person in the same situation to believe that a fact exists the jury is permitted, but not required to find that he or she acted with knowledge.

RP at 484. The State also noted to the jury that it had earlier dismissed five of the counts because "[the State] can't prove the other charges that were initially charged." RP at 485.

The jury found Etue guilty of all four of the remaining charges, including possession of a stolen motor vehicle. Etue appeals.

ANALYSIS

1. SUFFICIENCY OF CHARGING INFORMATION

Etue challenges the sufficiency of the charging information for the first time on appeal. He contends that the information failed to provide notice that knowledge that the

vehicle was stolen was a necessary element of the crime charged. The State responds that, under a liberal construction of the information, all the necessary elements were included or could be inferred.

This court reviews a defendant's challenge to the sufficiency of a charging document de novo. *State v. Briggs*, 18 Wn. App. 2d 544, 548, 492 P.3d 218 (2021). The charging information must allege each essential element, statutory and otherwise, to apprise the accused of the charges against him or her and to allow for preparation of a defense. *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). The information must do more than merely list the offense, but it need not restate the precise language of the criminal statute. *State v. Nonog*, 169 Wn.2d 220, 226, 237 P.3d 250 (2010). "[I]t 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).

Etue did not challenge the sufficiency of the information before a verdict was reached. While a constitutional challenge to the charging document can be raised for the first time on appeal, the late objection changes the level of deference this court applies. *Id.* at 102. "When, as in this case, a charging document is challenged for the first time on appeal, we construe it liberally." *State v. Pry*, 194 Wn.2d 745, 752, 452 P.3d 536 (2019). Under this standard, this court considers the charging document, as a whole, in a common sense manner to determine if the missing element can be inferred through a liberal construction in favor of its validity. *Kjorsvik*, 117 Wn.2d at 110-11.

Under the two-prong test developed by *Kjorsvik*, the first question is whether the essential elements appear in any form or by fair construction can be found. *Id*. at 105. If the information fails to meet the first prong, prejudice is presumed and requires reversal. *State v. Zillyette*, 178 Wn.2d 153, 162, 307 P.3d 712 (2013). The second prong is prejudice. *Kjorsvik*, 117 Wn.2d at 106. If the first prong is met, we consider whether the defendant can show actual prejudice by the language used that caused a lack of notice. *Id*. at 106.

The information charged that Etue "did knowingly possess a stolen motor vehicle" in violation of RCW 9A.56.068(1). CP at 1. The statute the State charged Etue under states that "[a] person is guilty of possession of a stolen vehicle if he or she possess [possesses] a stolen motor vehicle." RCW 9A.56.068(1). Etue argues that the information was insufficient because it failed to allege that he knew the car was stolen—an essential element of the crime of possession of a stolen motor vehicle.

Proving the crime of possession of a stolen motor vehicle requires knowledge. *State v. Level*, 19 Wn. App. 2d 56, 59, 493 P.3d 1230 (2021). In *Level*, the court analyzed the information for possession of a stolen motor vehicle charge to determine whether it had sufficiently apprised the defendant of the knowledge component. *Id*. at 60. In doing so, the court determined that there are two components to the knowledge requirement. *Id.* at 59. A defendant's possession of the motor vehicle must be knowing and the defendant must be acting with knowledge that the motor vehicle was stolen. *Id.*

In this case, under the liberal construction rule, the knowledge element can be fairly imputed to not only the verb but the entire direct object following the verb. "In ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence." *Flores-Figueroa v. United States*, 556 U.S. 646, 650, 129 S. Ct. 1886, 173 L. Ed. 2d 853 (2009).

Similarly, this court should determine that the word knowingly modifies the verb "possess" along with the entire object it follows, "a stolen motor vehicle." CP at 1. As a result, the knowing element should be read as applying to the status of a motor vehicle as stolen along with the actual possession of the vehicle. Accordingly, the information charged communicates all of the essential knowledge elements for possession of a stolen motor vehicle.[1]

[1] Etue additionally argues that under *State v. Simon*, 120 Wn.2d 196, 840 P.2d 172 (1992), the mere fact that the word "knowingly" appeared in the charging information is insufficient. However, in *Simon*, the charging information alleged that the defendant "*did knowingly* advance and profit by compelling Bobbie J. Bartol by threat and force to engage in prostitution; and *did* advance and profit from the prostitution of Bobbie Bartol, a person who was less than 18 years old." *Id.* at 197-98 (emphasis added). As the court explained, by simple rules of sentence structure and punctuation, the "knowingly" cannot refer to the second means of committing the crime. *Id.* at 199. This is not the case here.

Etue argues that under *Briggs* this court should determine that the charging information was insufficient. In *Briggs*, the defendant was charged with violating a no contact order. 18 Wn. App. 2d 544. The defendant argued that the charging information, although it alleged that the defendant knew of the no contact order, failed to state that the violation of the no contact order was willful. *Id.* at 550. The court in *Briggs* agreed with the defendant. *Id.* at 555. The charging information stated:

> That defendant, on or about the 18th day of May, 2019, *with knowledge that he was the subject of a . . . no contact order* pursuant to [chapter 10.99 RCW or other specified statutes] issued by the Superior Court of Snohomish County, under cause no. 14-1-00408-1, on August 11, 2014, protecting [F.S.], and said order being valid and in effect, *did violate the order*.

Id. at 551. Unlike here, the only knowledge component in the charging information in *Briggs* was contained in a dependent clause. *Id*. at 553. Although the dependent clause modified the verb "did violate," it only did so to show that the defendant knew he was the subject of the no contact order when he violated it. It was not possible to construe the charging information in *Briggs* to read that the defendant both knew of the no contact order and knew that he was violating it. Accordingly, *Briggs* does not support Etue's position.

Etue also argues that the charging information was insufficient under *State v. Khlee*, 106 Wn. App. 21, 22 P.3d 1264 (2001). However, *Khlee* is distinguishable because the defendant challenged the sufficiency of the information prior to the verdict.

Id. at 23. Accordingly, in the court's review, it strictly construed the language of the information. *Id.* Under the strict construction interpretation, the court did "'not attempt to find the missing elements by construing the wording of the document.'" *Id.* (quoting *State v. Johnstone*, 96 Wn. App. 839, 844, 982 P.2d 119 (1999)). Further, the court determined that the charging information must not contain language that was "'inartful or vague.'" *Id.* (quoting *State v. Johnson*, 119 Wn.2d 143, 149-50, 829 P.2d 1078 (1992)). As explained above, this court should apply a much more liberal construction to the language of the charging information.

The charging information was sufficient because, under a liberal construction, it adequately conveyed the essential knowledge elements for possession of a stolen motor vehicle. Etue does not otherwise contend that the constitutionally sufficient language caused prejudice.

2. PROSECUTORIAL MISCONDUCT

Next, Etue argues that the prosecutor committed misconduct in closing arguments when he misstated the law and also when he improperly commented on the motion to dismiss certain charges. We disagree.

A defendant claiming prosecutorial misconduct must show the prosecutor's conduct was improper and prejudicial. *State v. Walker*, 182 Wn.2d 463, 477, 341 P.3d 976 (2015). "And where a defendant raises the issue for the first time on appeal, the defendant must also show 'that the misconduct was so flagrant and ill intentioned that an

instruction would not have cured the prejudice.'" *Id.* at 477-78 (quoting *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012)). In making this determination, the focus is not on the subjective intent of the prosecutor "but instead on whether the defendant received a fair trial in light of the prejudice caused by the violation of existing prosecutorial standards and whether that prejudice could have been cured with a timely objection." *Walker*, 182 Wn.2d at 478.

A prosecutor's misstatement of the law constitutes misconduct. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). A prosecutor also commits misconduct when they rely on evidence not admitted at trial. *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003). The prejudicial effect of the prosecutor's comments is reviewed in the context of the State's total argument. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

Etue alleges two incidents of prosecutorial misconduct. First, he argues that the prosecutor misstated the law when he told the jury that Etue should be convicted if he reasonably should have known the car was stolen.

The State had the burden of proving that Etue knowingly possessed the stolen vehicle, which required proof of actual knowledge. *See Level*, 19 Wn. App. 2d at 59. During closing argument, in discussing with the jury the evidence that supported the fact that Etue knew the car was stolen, the State said: "If [Etue] reasonably should have known there was a problem with this car, then he had knowledge." RP at 484. This was

a misstatement of the law because the law requires actual knowledge and not just constructive knowledge. However, a couple of sentences later, to explain how this evidence applied here, the prosecutor read from the jury instructions: "If a person has information that would lead a reasonable person in the same situation to believe that a fact exists[,] the jury is permitted, but not required to find that he or she acted with knowledge." RP at 484.

Although the prosecutor's statement on its own was a misstatement of the law, viewed in context of his total argument, it was not so flagrant and ill-intentioned that an instruction would not have cured it. The prosecutor was clearly trying to communicate to the jury that it could find actual knowledge from circumstantial evidence. This is demonstrated by the fact that the prosecutor, subsequent to the improper statement, read the instruction that clarified to the jury that it could, *but was not required to*, infer knowledge from such evidence. This misstatement was minor and would have been curable by an instruction had Etue objected.

In fact, the jury instruction correctly stated the law and an explanation of the definition of knowledge was given and read by the prosecutor. Absent evidence to the contrary, this court should presume the jury followed that instruction. *State v. Kalebaugh*, 183 Wn.2d 578, 586, 355 P.3d 253 (2015) ("Jurors are presumed to follow the court's instructions."). Etue fails to demonstrate that a curative instruction would not

have cured any prejudicial effect on the jury. *State v. Crossguns*, 199 Wn.2d 282, 299, 505 P.3d 529 (2022).

We note that the difference between constructive knowledge and actual knowledge proved by circumstantial evidence is subtle. The prosecutor in this case is not the first one to confuse the differences. While the language included in the *Washington Pattern Jury Instruction* correctly defines the law, we encourage the Washington Pattern Instructions Committee to consider modifications that will make this distinction more apparent.

In Etue's second claim of prosecutorial misconduct, he argues that the prosecutor committed misconduct by referring to evidence outside the record that suggested Etue's guilt on dismissed charges. While the jury was present, the prosecutor moved to dismiss five of the charges "[a]s a result of [the State's] inability to bring those additional witnesses before the jury." RP at 384. Etue argues that this statement improperly suggested he was guilty of additional crimes and that there were additional grounds for finding him guilty in front of the jury.

We do not agree with Etue that the prosecutor's comment amounted to misconduct. The prosecutor's motion included a brief explanation, the unavailability of witnesses, for why the charges were being dismissed. The prosecutor made absolutely no mention of any facts the witnesses would have testified to or any additional evidence that would have been relied on to support the dismissed charges. The request to dismiss the

charges was based on the fact that the State could not meet its burden. This is further emphasized in the prosecutor's own statement in closing argument that the jury was only considering four charges because "[the State] can't prove the other charges that were initially charged." RP at 485. As a result, Etue has failed to show an improper statement, let alone anything so flagrant and ill-intentioned that an instruction could not have remedied it.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Staab, J.

WE CONCUR:

Fearing, J.

Siddoway, C.J.

BACKLUND & MISTRY

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