NO. 102842-3

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

CHRISTOPHER CRUMP,

Respondent.

FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR WALLA WALLA COUNTY

ANSWER TO PETITION FOR REVIEW

CHRISTOPHER PETRONI
Attorney for Respondent

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711

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A. INTRODUCTION

In August 2021, the Court of Appeals held in a published opinion that the phrase "did unlawfully possess a stolen motor vehicle" provided insufficient notice of the essential element of knowledge.

In September 2021, the prosecution alleged Mr. Crump "did unlawfully possess a stolen motor vehicle." The predictable result of this failure to follow published precedent was the Court of Appeals's reversal of Mr. Crump's conviction and remand to dismiss the charge without prejudice.

The prosecution attempts to escape the consequences of its mistake by asserting the Court of Appeals's decision contradicts inapposite precedent and casting aspersions at the entire criminal defense bar. This Court should disregard the prosecution's deflections. Review should be denied.

B. ISSUES PRESENTED FOR REVIEW

1. The information must allege all elements of the charged crime, including non-statutory ones. As courts do for many possession offenses, the Court of Appeals recognized knowledge as a non-statutory element of possessing a stolen motor vehicle. In its unrelated opinion in *State v. Porter*, 186 Wn.2d 85, 375 P.3d 664 (2016), this Court held the information need not allege the definition of "possessing stolen property." Because knowledge is an essential non-statutory element, not a mere definition of an element, the Court of Appeals's decision does not contradict *Porter* and this Court should deny review. RAP 13.4(b)(1).

2. In *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991), this Court held an accused person may challenge the sufficiency of the information for the first time on appeal, but must demonstrate an essential

element is not only absent but also cannot be deemed implied by liberal construction of the information's text. This heightened standard protects accused persons' right to notice of the charges against them while fully complying with RAP 2.5(a)(3). *Kjorsvik* is not incorrect and harmful and this Court should deny review. RAP 13.4(b)(3), (4).

C. STATEMENT OF THE CASE

The prosecution filed an information alleging

> That the said Christopher Michael Crump in the County of Walla Walla, State of Washington, on or about September 15, 2021, *did unlawfully possess a stolen motor vehicle*, to-wit: 1994 Ford Escort, the property of Stephan [sic] R. Hansell; . . . .

CP 38 (emphasis added). A jury found Mr. Crump guilty of this charge. CP 69.

The Court of Appeals reversed and remanded for dismissal of the charge without prejudice. Slip op. at 10. The Court found Mr. Crump's case to be "on all

fours with our decision" in *State v. Level*, 19 Wn. App. 2d 56, 493 P.3d 1230 (2021), where it found language identical to that italicized above failed to provide notice of all elements of the offense. Slip op. at 4; 19 Wn. App. 2d at 59, 63.

D. ARGUMENT

1. **The Court of Appeals's opinion does not contradict this Court's precedent.**

A charging document must allege each essential element of the charged crime. *Kjorsvik*, 117 Wn.2d at 98. This includes non-statutory elements. *Id.* at 101–02; *State v. Vanderpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). If an element does not appear in the information or cannot be inferred by fair construction, it is deficient and must be dismissed. *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000); *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

To prove Mr. Crump guilty of possessing a stolen motor vehicle, the prosecution had to prove he (1) possessed a stolen vehicle; (2) knew he possessed the vehicle; and (3) knew the vehicle was stolen. RCW 9A.56.068(1); *Level*, 19 Wn. App. 2d at 59–60. The knowledge requirement is a non-statutory element. *Level*, 19 Wn. App. 2d at 60.

The charge against Mr. Crump alleged he "did unlawfully possess a stolen motor vehicle," without expressly alleging he knowingly possessed the vehicle or knew it was stolen. CP 38. In *Level*, the Court of Appeals held an information containing identical language was insufficient. 19 Wn. App. 2d 59, 63. The Court of Appeals adhered to *Level* and directed the trial court to dismiss the charge. Slip op. at 4–5.

Now, the prosecution argues the Court of Appeals's straightforward application of *Level* is

contrary to this Court's decision in *Porter*. Pet. for Rev. at 6–9. As the Court of Appeals correctly observed, "[t]he State is wrong." Slip op. at 4.

At issue in *Porter* was whether the information must allege the entire statutory definition of "possessing stolen property" contained in RCW 9A.56.140(1). 186 Wn.2d at 90 (alteration omitted). According to this Court, the answer is no—the allegation Mr. Porter "did unlawfully and feloniously *knowingly* possess a stolen motor vehicle" provided sufficient notice of the essential elements. *Id.* at 88, 91–92 (emphasis added).

As the Court of Appeals correctly reasoned, *Porter* "did not hold that an information need not allege a nonstatutory element." Slip op. at 4. Indeed, *Porter* noted the information "alleged that Porter *knowingly* possessed property he *knew to be stolen*" in

concluding "the information sufficiently articulated the essential elements of the crime." 186 Wn.2d at 92 (emphasis added).

Appellate courts, including this Court, often hold knowledge is an implied element of a possession offense. *See State v. Anderson*, 141 Wn.2d 357, 362–63, 5 P.3d 1247 (2000) (knowledge is an implied element of unlawful possession of a firearm). Failure to do so risks punishing passive, innocent conduct, which may violate due process. *Id.* at 366; *State v. Blake*, 197 Wn.2d 170, 173, 481 P.3d 521 (2021).

The Court of Appeals's recognition in *Level* that knowledge is an implied, non-statutory element of possessing a stolen vehicle does not contradict this Court's holding in *Porter* that statutory definitions of essential elements need not be alleged in the information. This Court should deny review.

2. *Kjorsvik* is an essential safeguard of the constitutional right to notice and is neither incorrect nor harmful.

"Accused persons have the constitutional right to know the charges against them." *State v. Pry*, 194 Wn.2d 745, 751, 452 P.3d 536 (2019) (citing U.S. Const. amend. VI; Const. art. I, § 22). The "essential element rule" of *Kjorsvik* vindicates this right by requiring prosecutors to allege all facts necessary to prove the charged crime in the information. *Id.*; *accord Kjorsvik*, 117 Wn.2d at 101–02. When an accused person challenges the information for the first time on appeal, courts construe the allegations liberally—"if the necessary facts appear in any form, or by a fair construction can be found within the terms of the charge, then the charging document will be upheld on appeal." *Kjorsvik*, 117 Wn. 2d at 104–05.

Contrary to the prosecution's petition, *Kjorsvik* is perfectly consistent with RAP 2.5(a)(3). Pet. for Rev. at 10–11. Constitutional error is "manifest" within that rule's meaning if "the error is so obvious on the record that the error warrants appellate review." *State v. O'Hara*, 167 Wn.2d 91, 99–100, 217 P.3d 756 (2009). If the information is so completely lacking that a missing element does not appear even by liberal construction, the error is obvious enough to be manifest. *Kjorsvik*, 117 Wn.2d at 105. RAP 2.5(a)(3) does *not* require a showing of prejudice within the meaning of a harmless error analysis. *O'Hara*, 167 Wn.2d at 99.

Kjorsvik's deferential standard makes a concrete difference. For example, in *State v. Derri*, 199 Wn.2d 658, 511 P.3d 1267 (2022), this Court held the use of force or fear "to obtain or retain possession of the property" was an essential element of robbery and not

merely a definition of element. *Id.* at 696. The Court upheld the information anyway because this element, though absent in express terms, appeared by fair construction of the allegations. *Id.* at 696–97 (citing *Kjorsvik*, 117 Wn.2d at 101).

The prosecution fails to grasp the significance of the numbers it cites. If the Court of Appeals has reversed convictions in roughly 40 cases in the last 15 years, that means the prosecution has *omitted an essential element* from the information in each of those cases. Pet. for Rev. at 12–15. Rather than accuse defense attorneys of "abusive sandbagging," the prosecution should examine why prosecutors so often file deficient charging documents. *Id.* at 25.

That defense arguments based on *Kjorsvik* fail three times as often as they succeed is unremarkable. Pet. for Rev. at 16–24. As the undersigned knows all

too well, most criminal appeals end in affirmance. *See* Michael Heise, *Federal Criminal Appeals: A Brief Empirical Perspective*, 93 Marq. L. Rev. 825, 829–30 (2009) (discussing affirmance rate in federal criminal appeals). That defense attorneys make the attempt anyway is a sign of zealous representation of their clients and in no way improper.

The prosecution has no one to blame but itself for the outcome here. In August 2021, in a published opinion, the Court of Appeals held an allegation that an accused person "did unlawfully possess a stolen motor vehicle" failed to allege all elements of the offense. *Level*, 19 Wn. App. 2d at 59, 63. In September 2021, and again in October 2021 and March 2022, the prosecution alleged Mr. Crump "did unlawfully possess a stolen motor vehicle." CP 6, 8–9, 38. Had the

prosecution kept up with case-law developments, it would not have made this mistake.

The prosecution has not shown *Kjorsvik* is incorrect and harmful. This Court should deny review.

E. CONCLUSION

This Court should deny review.

Per RAP 18.17(c)(10), the undersigned certifies this answer contains 1,555 words.

DATED this 26th day of March, 2024.

Christopher Petroni, WSBA #46966
Washington Appellate Project - 91052
Email: wapofficemail@washapp.org
chris@washapp.org

Attorney for Christopher Crump

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[gacosta@co.walla-walla.wa.us]
Walla Walla County Prosecutor's Office

☒ petitioner Randall Sutton
[rsutton@co.kitsap.wa.us]
[kcpa@co.kitsap.wa.us]
Kitsap County Prosecutor's Office

☒ respondent

MARIA ANA ARRANZA RILEY, Legal Assistant Date: March 26, 2024
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