No. 47290-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent

v.

JOSHUA MULLENS, Appellant

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

THE HONORABLE STANLEY RUMBAUGH, JUDGE

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. ASSIGNMENT OF ERROR 1

II. STATEMENT OF FACTS..... 1

III. ARGUMENT

A Conviction For Possession Of A Stolen Motor Vehicle Pursuant To An Information That Fails To Allege All Of The Essential Elements Of The Offense Must Be Reversed. 4

IV. CONCLUSION 8

TABLE OF AUTHORITIES

WASHINGTON CASES

City of Auburn v. Brooke, 119 Wn.2d 623, 836 P.2d 212 (1992) ---------- 7
State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985) ---------- 4
State v. Holt, 104 Wn.2d 315, 704 P.2d 1189 (1985) ---------- 5
State v. Hopper, 118 Wn.2d 151, 822 P.2d 775 (1992) ---------- 5
State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991) ---------- 5
State v. Satterthwaite, 186 Wn.App. 359, 344 P.3d 738, 741 (2014) ------ 6
State v. Siers, 174 Wn.2d 269, 274 P.3d 358 (2012) ---------- 4
State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (1995) ---------- 5
State v. Zillyette, 178 Wn.2d 153, 307 P.3d 712 (2013) ---------- 5

STATUTES

RCW 9A.56.068(1) ---------- 6
RCW 9A.56.140(1) ---------- 6

CONSTITUTIONAL PROVISIONS

Sixth Amendment to the U.S. Constitution ---------- 4
Washington State Constitution, Article 1, § 22 ---------- 4

I. ASSIGNMENT OF ERROR

A. The Information Omitted An Essential Element Of The Crime Of Possession Of A Stolen Vehicle, In Violation Of The Washington State Constitution Article 1, §22 Requiring Reversal and Dismissal Under Washington Law.

Issue Relating To Assignment of Error

A. An accused has a protected constitutional right to be informed of the criminal charges when he is hailed into court, so that he will be able to prepare and mount a defense. Is the information charging possession of a stolen vehicle defective in failing to allege that Mr. Mullens withheld or appropriated the motor vehicle to the use of someone other than the true owner or person entitled thereto?

II. STATEMENT OF FACTS

Around 4:30 a.m. on the morning of October 28, 2014, Officer Benboe of the Tacoma Police Department responded to a dispatch call of a motor vehicle theft. (2 RP 33). The reported missing vehicle was a 1977 Ford F-150 truck, beige and orange colored, registered to Jeffrey Meyer. (2 RP 41;46). The following morning, around 10:45, Officer Jason Robillard, observed an F-150

truck, with the same coloring heading westbound on 35th Avenue. (1 RP 17-29) Robillard noted the truck pulled off the roadway into a graveled parking area in front of a residence and came to a stop. He observed Joshua Mullens get out of the driver's seat, and walk toward the front of the house. (1 RP 20-21).

As Robillard drove by the truck, he obtained the rear license plate number and ran it through his computer. The plate belonged to a 1985 green Ford truck, with expired vehicle tags. (1RP 20-21). Between five and ten minutes later, Robillard had circled the block and observed Mr. Mullens again in the driver's seat of the parked truck, leaning over to his right. (1RP 22-23). Robillard reported that Mr. Mullens looked up in his direction and got out of the truck. (1RP 23).

Robillard testified he "made contact" with Mr. Mullens, put handcuffs on him and patted him down for weapons. (1RP 25). He felt hard objects in Mr. Mullens' coat pockets and identified them as keys, two key rings, and a small flashlight. (1RP 28-29). Mr. Mullens was placed in the patrol car and Robillard confirmed by the VIN number that the truck had been reported stolen. (1RP 30-31).

Robillard advised Mr. Mullens of his Miranda rights. (1RP 35). Upon questioning, Mr. Mullens told Robillard he had borrowed

the truck the previous day from his friend, Ramone, in order to pick up some garbage. (1RP 37). The bed of the pickup truck was full of yard waste and trash, which the truck owner later testified had not previously been in the truck. (2RP 54). Mr. Mullens also explained that he had the various keys for different makes of cars because he worked on the vehicles. (1RP 38).

Pierce County prosecutors charged Mr. Mullens as follows:

> I, Mark Lindquist, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse Joshua James Mullens of the crime of unlawful possession of a stolen vehicle, committed as follows:
> That Joshua James Mullens, in the State of Washington, on or about the 29th day of October, 2014, did unlawfully and feloniously knowingly possess a stolen motor vehicle, knowing that it had been stolen, contrary to RCW 9A.56.068 and 9A.56.140, and against the peace and dignity of the State of Washington.

(CP 1).

Mr. Mullens did not challenge the sufficiency of the charging document at trial. After a CrR 3.6 hearing, the court denied a motion to suppress the keys, ruling the arrest and pat-down were within a valid *Terry* search and appropriate in light of officer safety concerns. (1RP 61). The jury found Mr. Mullens guilty of

possession of a stolen motor vehicle. (CP 49). Mr. Mullens makes this timely appeal. (CP 74).

III. ARGUMENT

A Conviction For Possession Of A Stolen Motor Vehicle Pursuant To An Information That Fails To Allege All Of The Essential Elements Of The Offense Must Be Reversed.

An appellate court reviews allegations of constitutional violations de novo. *State v. Siers,* 174 Wn.2d 269, 273-74, 274 P.3d 358 (2012).

A criminal defendant has the constitutional right under both the federal and state constitutions, to be informed of the criminal charge against him so he may be able to mount a defense at trial. *State v. Bergeron,* 105 Wn.2d 1, 18, 711 P.2d 1000 (1985). The Sixth Amendment to the U.S. Constitution requires that "[i]n all criminal prosecutions, the accused shall … be informed of the nature and cause of the accusation… ." The Washington State Constitution, Article 1, § 22 (amend. 10) further requires that "[i]n criminal prosecutions the accused shall have the right …to demand the nature and cause of the action against him…" When an information omits a statutory element of a charged crime, it is

constitutionally insufficient because it fails to state an offense. *State v. Holt,* 104 Wn.2d 315, 320-21, 704 P.2d 1189 (1985).

An information must contain, every essential element of the charge, and along with all supporting facts must be put forth with clarity. *State v. Kjorsvik,* 117 Wn.2d 93, 97, 812 P.2d 86 (1991). To satisfy constitutional requirements, a charging document must state both the statutory and nonstatutory essential elements of the crime charged. *State v. Vangerpen,* 125 Wn.2d 782, 787, 888 P.2d 1177 (1995).

"'An essential element is one whose specification is necessary to establish the very illegality of the behavior charged.'" *State v. Zillyette,* 178 Wn.2d 153, 158, 307 P.3d 712 (2013). (internal citation omitted). Charging documents that fail to set forth the essential elements of a crime are constitutionally defective and require dismissal, regardless of whether the defendant has shown prejudice. *State v. Hopper,* 118 Wn.2d 151, 155, 822 P.2d 775 (1992). Here, the information at issue in this case reads as follows:

> I, Mark Lindquist, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse Joshua James Mullens of the crime of unlawful possession of a stolen vehicle, committed as follows:

> That Joshua James Mullens, in the State of Washington, on or about the 29th day of October, 2014, did unlawfully and feloniously knowingly possess a stolen motor vehicle, knowing that it had been stolen, contrary to RCW 9A.56.068 and 9A.56.140, and against the peace and dignity of the State of Washington.

(CP 1).

The two statutes cited provide the essential elements of unlawful possession of a stolen vehicle: RCW 9A.56.068(1): A person is guilty of possession of a stolen vehicle if he or she possesses a stolen motor vehicle; and RCW 9A.56.140(1): 'Possessing stolen property' means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen *and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.* (emphasis added).

The information has alleged that Mr. Mullens "did unlawfully and feloniously knowingly possess a stolen motor vehicle, knowing that it had been stolen." An essential element of the crime of unlawful possession of a stolen motor vehicle, however, is the "withholding or appropriating of the property to the use of someone other than the true owner." *State v. Satterthwaite,* 186 Wn.App. 359, 344 P.3d 738, 741 (2014)(quoting RCW 9A.56.140).

As this Court reasoned in *Satterthwaite,* "It is the withholding or appropriating of a stolen item of property to the use of someone other than the owner that ultimately makes the possession illegal, thus differentiating between a person attempting to return known stolen property and a person choosing to keep, use or dispose of known stolen property." *Satterthwaite,* 186 Wn.App. at 364. By failing to list the withholding or appropriating element, the information failed to apprise Mr. Mullens of the nature of the charge. While the information cites to the statute, merely citing to a statute is insufficient to apprise a defendant of the essential elements of the crime with which he is charged. *Zillyette,* 178 Wn.2d at 162; *Vangerpen,* 125 Wn.2d at 787. Defendants should not have to search for the rules or regulations they are accused of violating. *City of Auburn v. Brooke,* 119 Wn.2d 623, 627, 836 P.2d 212 (1992).

Under *Kjorsvik,* the test for the sufficiency of a charging document challenged for the first time on appeal is:

> 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 was nonetheless actually prejudiced by the inartful language which caused a lack of notice?

Kjorsvik, 117 Wn.2d at 105-106.

Where the defendant satisfies the first prong of the *Kjorsvik* test, the Court presumes prejudice and reverses without reaching the second prong. *Zillyette,* 178 Wn.2d at 162. Here, because the necessary facts of the essential element of "withhold or appropriate" do not appear in the charging document, prejudice is presumed and the remedy, controlled by *Satterthwaite,* and *Zillyette,* is reversal of the conviction for possession of a stolen motor vehicle. *Satterthwaite,* 186 Wn.App. at 366; *Zillyette,* 178 Wn.2d at 163.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Mullens respectfully asks this Court, in accordance with *Satterthwaite,* to reverse his conviction.

Dated this 20th day of July 2015.

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CERTIFICATE

I certify that on July 20, 2015, I served a copy of the brief of appellant by electronic service, by prior agreement between the parties, or by USPS first class mail, postage prepaid, to the following:

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