NO. 97116-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

PAMELA JEAN WOODALL,

Respondent.

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ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 50953-9-II
Kitsap County Superior Court No. 17-1-00715-1

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# PETITION FOR REVIEW

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| **SERVICE** | Lise Ellner<br>Po Box 2711<br>Vashon, Wa 98070-2711<br>Email: liseellnerlaw@comcast.net | This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.<br>DATED April 24, 2019, Port Orchard, WA<br>**Original e-filed at the Supreme Court; Copy to counsel listed at left.**<br>**Office ID #91103 kcpa@co.kitsap.wa.us** |

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## I. IDENTITY OF RESPONDENT

The petitioner is the State of Washington. The petition is filed by Kitsap County Deputy Prosecuting Attorney RANDALL A. SUTTON.

## II. COURT OF APPEALS DECISION

The State seeks review of the Court of Appeals unpublished decision in *State v. Woodall*, No. 50953-9-II (Apr. 2, 2019). No motion for reconsideration was filed. A copy of the Court's decision is attached.

## III. ISSUES PRESENTED FOR REVIEW[1]

1. Whether the Court of Appeals erred in finding that the charging document was inadequate for not including language found in a separate definitional statute?

2. Whether the appellate preservation rule in *Kjorsvik* is wrong and harmful where every defendant is entitled to counsel, and the rule is primarily used as a "pocket issue" for appeal?

## IV. STATEMENT OF THE CASE

Pamela Jean Woodall was charged by information filed in Kitsap County Superior Court, cause number 17-1-00715-1, with possession of stolen mail and second-degree possession of stolen property. CP 1. She subsequently pled guilty. CP 8, 14.

[1] **The State notes that these same issues are presently before the Court in *State v.***

For the first time on appeal, Woodall challenged the sufficiency of the charging document. The Court of Appeals agreed with her argument and reversed the stolen mail conviction.

## V. ARGUMENT

### THIS COURT SHOULD ACCEPT REVIEW OF THE COURT OF APPEALS DECISION BECAUSE THREE OF THE CRITERIA OF RAP 13.4(B) ARE MET.

RAP 13.4(b) sets forth the considerations governing this Court's acceptance of review:

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision by the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This Court should accept review because the decision of the Court of Appeals because criteria (1), (3) and (4) are met.

#### *1. The decision below conflicts with this Court's holding in* State v. Porter.

The Court of Appeals decision conflicts with this Court's holding in *State v. Porter*, 186 Wn.2d 85, 90, 375 P.3d 664 (2016). At issue there was whether RCW 9A.56.140 "merely define[d] the essential element of 'possession' or instead provide[d] an additional essential element the State

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***Pry*, No. 96599-4, which is set for oral argument on June 25, 2019.**

must allege when charging a criminal defendant with possession of a stolen motor vehicle." *Porter*, 186 Wn.2d at 90. The Court ruled that the latter statute merely defined an element and therefore did not need to be included in the information. *Id.* As argued below, the situation in that case is indistinguishable.

### *2. Kjorsvik should be reformulated because it has failed to achieve its purpose of balancing the defendant's right to notice with the jurisprudential interest in preventing needless appeals.*

If this Court determines that the Court of Appeals correctly applied the law, then this Court should reconsider its holding in *Kjorsvik*, which is both incorrect and harmful. As will be shown, this is a significant question of law under the Constitution of the State of Washington and involves an issue of substantial public interest.

It is well settled that a constitutional right, or a right of any other sort, may be forfeited in criminal cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. *United States v. Olano*, 507 U.S. 725, 731, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993); *Yakus v. United States*, 321 U.S. 414, 444, 64 S. Ct. 660, 88 L. Ed. 834 (1944). Good sense lies behind the requirement that arguments be first asserted at trial: it affords the trial court an opportunity to rule correctly on a matter before it can be presented on appeal. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). There is great potential for

abuse when a party does not raise an issue below because it encourages partied to simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal. *State v. Weber*, 159 Wn.2d 252, 271-72, 149 P.3d 646 (2006); *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). The rule also serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials. *Strine*, 176 Wn.2d at 749-50; *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988).

Nevertheless, the harshness of a blanket rule is ameliorated by the exception found in RAP 2.5(a)(3). Numerous decisions have fleshed out what constitutes a "manifest error affecting a constitutional right." First, a manifest error is one "truly of constitutional magnitude." *Scott*, 110 Wn.2d at 688. Second, the defendant must show how the alleged error actually affected the defendant's rights. It is this showing of actual prejudice that makes the error "manifest," allowing appellate review. *State v. O'Hara*, 167 Wn.2d at 99, 217 P.3d 756 (2010); *Scott*, 110 Wn.2d at 688.

Despite the applicability of this formulation to most unpreserved constitutional claims, the Court in *State v. Kjorsvik*, 117 Wn.2d 93, 109, 812 P.2d 86 (1991), chose a different path for unpreserved claims

regarding the sufficiency of the charging document.[2] *Kjorsvik* first adopted the so-called "liberal construction" approach in Washington. Prior to that time, a claim that the charging document was insufficient could always be raised for the first time on appeal. *State v. Leach*, 113 Wn.2d 679, 691, 782 P.2d 552 (1989). In his concurring opinion *Leach*, however, Justice Brachtenbach expressed concerns that the rule could be abused:

> I am disturbed, however, by the possibility that a defendant may be well aware at the outset of the proceedings that the charging document fails to state a crime, and yet maintain silence until appeal. When faced with the question whether an indictment sufficiently charges an offense, federal courts have held that "indictments which are tardily challenged are liberally construed in favor of validity."

*Leach*, 113 Wn.2d at 700 (Brachtenbach, J., concurring) (*quoting United States v. Pheaster*, 544 F.2d 353, 361 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977)). The justice added, however that this was an issue for another case. That case was *Kjorsvik*, which concluded that a "different standard of review should be applied when no challenge to the charging document has been raised at or before trial because otherwise the defendant has no incentive to timely make such a challenge, since it might only result in an amendment or a dismissal potentially followed by a refiling of the charge." *Kjorsvik*, 117 Wn.2d at 103.

The State submits that the rule in *Kjorsvik* has also failed to satisfy

[2] RAP 2.5(a)(1) does not come into play because an inadequate charging document does not implicate the jurisdiction of the trial court. *Kjorsvik*, 117 Wn.2d at 108.

the rationale for which it was promulgated. It is therefore both incorrect and harmful. *See State v. Barber*, 170 Wn.2d 854, 864, 248 P.3d 494 (2011). The *Kjorsvik* rule should therefore be modified to subject claims regarding the sufficiency of the charging document to the same standard applied to most other constitutional errors raised for the first time on appeal.

*Kjorsvik* has been the rule in Washington for nearly 30 years. Yet in just the 10 years before the decision below, appellate courts have vacated 34 convictions. *State v. Woodall*, ___ Wn. App. 2d ___, 2019 WL 1490666 (Apr. 2, 2019) (instant case); *State v. Mellgren*, 6 Wn. App. 2d 1035 (2018) (failure to allege premeditation in first-degree murder charge); *State v. Torre*, 6 Wn. App. 2d 1016 (2018) (underlying offense is an essential element of bail jumping; prejudice not considered); *State v. Pry*, 6 Wn. App. 2d 1013 (2018), *review granted*, 192 Wn.2d 1022 (2019) (*review granted* on *Kjorsvik* issue); *State v. Mendoza-Vera*, 4 Wn. App. 2d 1074 (2018) (intent element of luring); *State v. Holcomb*, 200 Wn. App. 54, 401 P.3d 412 (2017) (specific underlying DV offense of interference charge); *State v. Garcia*, 199 Wn. App. 1031 (2017), *review denied*, 189 Wn.2d 1032, (2018) (reasonable fear element of felony harassment); *State v. Sullivan*, 196 Wn. App. 314, 382 P.3d 736 (2016) (recklessness element of second-degree assault of a child); *State v. McCrea*, 195 Wn. App. 1038

(2016) (knowledge element of failure to register); *State v. Tolentino-Cuevas*, 194 Wn. App. 1001 (2016) (unlawful resident element of crime of alien in possession of a firearm); *State v. Hernandez*, 193 Wn. App. 1017 (2016) (alleged "withhold or appropriate" element of possession of stolen property), *review granted and remanded*, 187 Wn.2d 1001 (2017); *State v. Tolman*, 192 Wn. App. 1009 (alleged "withhold or appropriate" element of possession of stolen property), *review granted and remanded*, 186 Wn.2d 1008 (2016); *State v. Nord*, 188 Wn. App. 1032 (2015), *review denied*, 185 Wn.2d 1003 (2016) (elements of resisting arrest that resistance was intentional or that the arrest was lawful); *State v. Gibson*, 187 Wn. App. 1031 (2015) (knowledge element of failure to register); *State v. Smith*, 187 Wn. App. 1010 (2015) (knowledge element of possession of stolen property); *State v. Nord*, 186 Wn. App. 1032, *review denied*, 184 Wn.2d 1002 (2015) (willfulness element of eluding); *State v. Satterthwaite*, 186 Wn. App. 359, 344 P.3d 738 (2015) (alleged "withhold or appropriate" element of possession of stolen property), *disapproved*, *State v. Porter*, 186 Wn.2d 85, 375 P.3d 664 (2016); *State v. Jones*, 184 Wn. App. 1059 (2014) (addition of the word "attempt" in allegation of promoting prostitution); *State v. Floyd*, 178 Wn. App. 402, 316 P.3d 1091 (2013) (POAA predicate 1972 robbery conviction held facially invalid due to stating of elements of against the will of the victim and by force or threat of violence in disjunctive); *State v. Zillyette*, 178 Wn.2d 153, 307

P.3d 712 (2013) (identity of controlled substance in controlled-substance homicide); *State v. Morfin-Camacho*, 174 Wn. App. 1051 (2013) (reporting requirement of misdemeanor hit and run); *State v. Anguiano-Alcazar*, 169 Wn. App. 1019 (2012) (information purported to charge delivery of controlled substance but listed elements of possession with intent); *State v. Rivas*, 168 Wn. App. 882, 890, 278 P.3d 686, 691 (2012), *review denied*, 176 Wn.2d 1007 (2013) (a common scheme or plan is an essential element of second degree malicious mischief when the State aggregates the value of damaged items of property in order to reach the statutory damage threshold; State failed to so allege); *State v. Burns*, 163 Wn. App. 1030 (2011) (failure to include element of first-degree robbery of taking personal property); *State v. O'Grady*, 163 Wn. App. 1003 (2011) (not including element that prior DUIs occurred within last 10 years fatal to charge of felony DUI); *State v. Michael*, 160 Wn. App. 522, 247 P.3d 842,*review denied*, 172 Wn.2d 1015 (2011) (knowledge element of unlawful possession of a firearm); *State v. Lira*, 159 Wn. App. 1010 (2011) (correct value element of malicious mischief omitted); *State v. Siers*, 158 Wn. App. 686, 244 P.3d 15 (2010) (reversal of second-degree assault conviction due to failure to plead aggravating factor in information, even though no exceptional sentence was imposed), *reversed*, 174 Wn.2d 269 (2012); *State v. Naillieux*, 158 Wn. App. 630, 241 P.3d 1280 (2010) (failure to allege reckless manner and lights and sirens in

eluding charge); *State v. Brown*, 169 Wn.2d 195, 234 P.3d 212 (2010) (knowledge element of escape; rejecting Court of Appeals consideration of lack of prejudice); *State v. Barberi*, 155 Wn. App. 1045 (2010) (information alleged the wrong mens rea and omitted the actus reus of second-degree burglary); *State v. Gouley*, 150 Wn. App. 1060 (2009) (knowledge element of possession of a stolen motor vehicle); *State v. Marin*, 150 Wn. App. 434, 208 P.3d 1184, , *review denied*, 167 Wn.2d 1012 (2009) (underlying charge in bail jumping); *State v. I.A.O.*, 150 Wn. App. 1006 (2009) (official duties element of custodial assault).[3]

Of these reversals, in only a single case, *State v. Holcomb*, did the Court find prejudice to the defense. Thus, in just 10 years, the trial courts and the State have had to retry 33 cases without there have been any showing that he defendant was denied a fair trial. This is a cost to taxpayers and crime victims that is without any conceivable justification.

Perhaps even more demonstrative of why *Kjorsvik* is both incorrect and harmful is the number of *Kjorsvik* claims the appellate courts have *rejected* in the last 10 years. These cases highlight how *Kjorsvik* is seen by the defense as an ace up the sleeve. Shockingly, this Court and the Supreme Court have considered 185 meritless *Kjorsvik* claims in the last

[3] Many of these cases are unpublished and a number are from before March 1, 2013. *See* GR 14.1(a). However, the State does not cite them for persuasive authority. It cites them only to demonstrate the number of cases that the appellate courts have considered under

10 years alone. *State v. Hugdahl*, ___ Wn. App. 2d ___, 2019 WL 1494748 (Apr. 2, 2019); *State v. Mulroy*, ___ Wn. App. 2d ___, 2019 WL 1223111 (Mar. 14, 2019); *State v. Smith*, ___ W. App. 2d ___, 2019 WL 931748 (Feb. 25, 2019); *State v. Merritt*, 200 Wn. App. 398, 402 P.3d 862 (2017), *aff'd*, ___ Wn.2d ___, 434 P.3d 1016 (2019); *State v. Trent*, ___ Wn. App. 2d ___, 2019 WL 720958 (Feb. 20, 2019); *State v. Avalos*, ___ Wn. App. 2d ___, 2019 WL 637239 (Feb. 14, 2019); *State v. Garay*, ___ Wn. App. 2d ___, 2019 WL 461567 (Feb. 6, 2019); *State v. Warlick*, 5 Wn. App. 2d 1039 (2018), *review denied*, 192 Wn.2d 1020 (2019); *State v. Williams*, 5 Wn. App. 2d 1027 (2018); *State v. Chavez*, 4 Wn. App 2d 1080, *review denied*, 192 Wn.2d 1007 (2018); *State v. Negrete*, 3 Wn. App. 2d 1018 (2018); *State v. K.M.*, 2 Wn. App. 2d 1046, *review denied*, 190 Wn.2d 1029 (2018) (rejecting claim that *Kjorsvik* applies to notice of SSODA revocation); *State v. Galvan-Serrano*, 2 Wn. App. 2d 1029 (2018); *State v. Ibrahim*, 200 Wn. App. 1025 (2017), *review denied*, 190 Wn.2d 1010 (2018); *State v. Padilla*, 198 Wn. App. 1049 (2017), *reversed on other grounds*, 190 Wn.2d 672 (2018); *State v. Espinoza-Reyes*, 198 Wn. App. 1041, *review denied*, 189 Wn.2d 1013 (2017); *State v. Rezene*, 198 Wn. App. 1030 (2017); *State v. Hernandez*, 198 Wn. App. 1019 (2017); *State v. Jordan*, 198 Wn. App. 1010, *review denied*, 188 Wn.2d

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*Kjorsvik.*

1022 (2017); *State v. Parks*, 198 Wn. App. 1007 (2017); *State v. Delgado*, 197 Wn. App. 1079, *review denied*, 188 Wn.2d 1014 (2017); *State v. Watkins*, 197 Wn. App. 1063 (2017); *State v. Aquino*, 197 Wn. App. 1041, *review denied*, 188 Wn.2d 1010 (2017); *State v. Tolman*, 196 Wn. App. 1074 (2016) (*Kjorsvik* claim rejected on remand from Supreme Court); *State v. Perry*, 196 Wn. App. 1037 (2016); *State v. Donnette-Sherman*, 196 Wn. App. 1038 (2016); *State v. Hughes*, 196 Wn. App. 1041 (2016); *State v. Flores-Rodriguez*, 196 Wn. App. 1033 (2016); *State v. Ollison*, 196 Wn. App. 1002 (2016); *State v. Bowen*, 195 Wn. App. 1043 (2016); *State v. Goss*, 189 Wn. App. 571, 358 P.3d 436 (2015), *aff'd*, 186 Wn.2d 372 (2016); *State v. Porter*, 186 Wn.2d 85, 375 P.3d 664 (2016); *State v. Jenson*, 194 Wn. App. 900, 378 P.3d 270 (2016); *State v. Correa*, 194 Wn. App. 1017 (2016); *State v. Botello-Garcia*, 193 Wn. App. 1037 (2016); *State v. Allen*, 193 Wn. App. 1034 (2016); *State v. Stewart*, 193 Wn. App. 1034 (2016); *State v. Oleson*, 193 Wn. App. 1018 (2016); *State v. Grant*, 192 Wn. App. 1067 (2016); *State v. Taylor*, 192 Wn. App. 1035 (2016); *State v. Garoutte*, 192 Wn. App. 1029, *review denied*, 186 Wn.2d 1002 (2016); *State v. Buurman*, 191 Wn. App. 1044 (2015); *State v. King*, 191 Wn. App. 1036 (2015), *review granted and remanded on other grounds*, 185 Wn.2d 1025 (2016); *State v. Parker*, 190 Wn. App. 1037 (2015), *review denied*, 185 Wn.2d 1026 (2016); *State v. Lister*, 189 Wn. App. 1040 (2015), *review denied*, 185 Wn.2d 1019, *cert. denied*, 137 S. Ct. 545

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1052 (2012); *State v. Haynes*, 170 Wn. App. 1034 (2012), *review denied*, 176 Wn.2d 1025 (2013); *State v. Walker*, 170 Wn. App. 1033 (2012), *review denied*, 176 Wn.2d 1021 (2013); *State v. Mason*, 170 Wn. App. 375, 285 P.3d 154 (2012), *review denied*, 176 Wn.2d 1014 (2013); *State v. White*, 170 Wn. App. 1011 (2012), *review denied*, 176 Wn.2d 1030 (2013); *State v. Whitlock*, 169 Wn. App. 1040 (2012); *State v. Stoken*, 169 Wn. App. 1036 (2012); *State v. Nicia*, 169 Wn. App. 1008 (2012), *review denied*, 177 Wn.2d 1004 (2013); *State v. Kosewicz*, 174 Wn.2d 683, 278 P.3d 184 (2012) (declining to apply *Kjorsvik* to predicate crime); *State v. White*, 168 Wn. App. 1016 (2012); *State v. Pagel*, 168 Wn. App. 1005, *review denied*, 175 Wn.2d 1014 (2012); *State v. Wintch*, 167 Wn. App. 1038, 175 Wn.2d 1020 (2012); *State v. Viles*, 167 Wn. App. 1029 (2012); *State v. Branham*, 167 Wn. App. 1030, *review denied*, 175 Wn.2d 1007 (2012); *State v. Harris*, 167 Wn. App. 340, 272 P.3d 299, *review denied*, 175 Wn.2d 1006 (2012); *State v. Edwards*, 166 Wn. App. 1036 (2012); *State v. Hazelmyer*, 166 Wn. App. 1034 (2012); *State v. Divsar*, 166 Wn. App. 1030, *review denied*, 174 Wn.2d 1010 (2012); *State v. Wedemeyer*, 165 Wn. App. 1026, *review denied*, 174 Wn.2d 1006 (2012); *State v. Aulis*, 165 Wn. App. 1011 (2011); *State v. Kiliona-Garramone*, 166 Wn. App. 16, 267 P.3d 426 (2011), *review denied*, 174 Wn.2d 1014 (2012) (reversing trial court's half-time dismissal); *State v. Peterson*, 164 Wn. App. 1044 (2011), *review denied*, 173 Wn.2d 1028 (2012); *State v.*

*Stribling*, 164 Wn. App. 867, 267 P.3d 403 (2011) (in unpublished portion of opinion); *State v. Jerred*, 164 Wn. App. 1021 (2011); *State v. Butler*, 163 Wn. App. 1031 (2011); *State v. Duran-Madrigal*, 163 Wn. App. 608, 261 P.3d 194 (2011), *review denied*, 173 Wn.2d 1015 (2012) (in unpublished portion of opinion); *State v. Byron*, 163 Wn. App. 1021 (2011); *State v. Morgan*, 163 Wn. App. 341, 261 P.3d 167 (2011), *review denied*, 175 Wn.2d 1013 (2012); *State v. Hahn*, 162 Wn. App. 885, 256 P.3d 1267 (2011), *reversed on other grounds*, 174 Wn.2d 126 (2012); *State v. Chappelle*, 162 Wn. App. 1044 (2011); *State v. Trusley*, 162 Wn. App. 1042 (2011); *State v. Alston*, 161 Wn. App. 1042, *review denied*, 172 Wn.2d 1018 (2011); *State v. Buckley*, 161 Wn. App. 1028 (2011); *State v. Wiggin*, 161 Wn. App. 1020, *review denied*, 172 Wn.2d 1019 (2011); *State v. Elkey*, 160 Wn. App. 1030 (2011); *State v. Lee*, 159 Wn. App. 795, 247 P.3d 470 (2011), *review denied*, 177 Wn.2d 1012 (2013) (in unpublished portion of opinion); *In re Benavidez*, 160 Wn. App. 165, 246 P.3d 842 (2011); *State v. Smith-Lloyd*, 159 Wn. App. 1032 (2011); *State v. Puga*, 159 Wn. App. 1030 (2011); *State v. Gray*, 159 Wn. App. 1023 (2011); *State v. Thompson*, 158 Wn. App. 1038 (2010), *review denied*, 171 Wn.2d 1018 (2011); *State v. Hassan*, 158 Wn. App. 1029 (2010), *review denied*, 171 Wn.2d 1006 (2011); *State v. Belyeu*, 158 Wn. App. 1026 (2010), *review denied*, 176 Wn.2d 1019 (2013); *State v. Loomis*, 158 Wn. App. 1020 (2010); *State v. LaTourette*, 157 Wn. App. 1030 (2010), *review*

*granted and remanded on other grounds*, 171 Wn.2d 1016 (2011); *State v. Thomas*, 157 Wn. App. 1016, *review denied*, 170 Wn.2d 1016 (2010); *State v. Aslanyan*, 157 Wn. App. 1017, *review denied*, 170 Wn.2d 1012 (2010); *State v. Knapp*, 157 Wn. App. 1012 (2010), *review denied*, 170 Wn.2d 1023 (2011); *State v. Nonog*, 169 Wn.2d 220, 237 P.3d 250 (2010); *State v. Carter*, 156 Wn. App. 1053, *review denied*, 170 Wn.2d 1015 (2010); *State v. Johnson*, 156 Wn. App. 1054, *review denied*, 170 Wn.2d 1015 (2010); *State v. Betts*, 156 Wn. App. 1040 (2010); *State v. Merino*, 155 Wn. App. 1039, *review denied*, 170 Wn.2d 1007 (2010); *State v. Schermerhorn*, 155 Wn. App. 1036 (2010); *State v. Talley*, 154 Wn. App. 1056 (2010); *State v. Nugent*, 154 Wn. App. 1053, 169 Wn.2d 1013 (2010); *State v. Brosius*, 154 Wn. App. 714, 225 P.3d 1049 (2010); *State v. Johnsen*, 154 Wn. App. 1045, *review denied*, 169 Wn.2d 1015 (2010); *State v. Pineda-Pineda*, 154 Wn. App. 653, 671, 226 P.3d 164, 173 (2010); *State v. Flowers*, 154 Wn. App. 1029 (2010); *State v. Nelson*, 154 Wn. App. 1013 (2010); *State v. Edwards*, 154 Wn. App. 1015, *review denied*, 168 Wn.2d 1039 (2010); *State v. Scanlan*, 153 Wn. App. 1039 (2009), *review denied*, 169 Wn.2d 1027 (2010); *State v. Powell*, 167 Wn.2d 672, 223 P.3d 493 (2009) (rejecting claim, but five justices holding that aggravating circumstances must be included in information), *overruled, State v. Siers*, 174 Wn.2d 269 (2012); *State v. Brown*, 153 Wn. App. 1034 (2009); *State v. Hartzell*, 153 Wn. App. 137, 221 P.3d 928

(2009), *review granted and remanded on other grounds*, 168 Wn.2d 1027 (2010); *State v. Coleman*, 153 Wn. App. 1003 (2009); *State v. Skyberg*, 152 Wn. App. 1066 (2009); *State v. Parkins*, 152 Wn. App. 1011 (2009), *review denied*, 168 Wn.2d 1021 (2010); *State v. Bobenhouse*, 166 Wn.2d 881, 214 P.3d 907 (2009); *State v. Smith*, 150 Wn. App. 1015 (2009); *State v. Bremer*, 150 Wn. App. 1008, *review denied*, 167 Wn.2d 1004 (2009); *State v. Toliver*, 149 Wn. App. 1067 (2009); *State v. Johnson*, 149 Wn. App. 1063 (2009); *State v. Sloan*, 149 Wn. App. 736, 205 P.3d 172, *review denied*, 220 P.3d 783 (2009); *State v. League*, 149 Wn. App. 1025 (2009), *reversed on other grounds*, 167 Wn.2d 671 (2009); *State v. Page*, 147 Wn. App. 849, 199 P.3d 437 (2008), *review denied*, 166 Wn.2d 1008 (2009), *disapproved on other grounds*, *State v. Cardenas-Flores*, 189 Wn.2d 243 (2017); *State v. Scanlon*, 147 Wn. App. 1039 (2008), *review denied*, 166 Wn.2d 1003 (2009).

In most of the foregoing cases the defendants did not even allege prejudice. However, a showing of prejudice is a reasonable requirement. Every criminal defendant has the right to representation by counsel. Plainly one of counsel's most essential duties is to determine what the State must prove and how the defendant will meet that proof. Indeed, evaluating the charging document was one of the essential tasks for which the United States Supreme Court found defendants needed counsel:

> If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad.

*Gideon v. Wainwright*, 372 U.S. 335, 345, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (*quoting Powell v. Alabama*, 287 U.S. 45, 69, 53 S. Ct. 55, 77 L. Ed. 158 (1932)).

Yet the rule in *Kjorsvik* essentially presumes that counsel failed in this basic duty if the State mistakenly omits a single element of the charge. This is directly contrary to the rule in *Strickland*, which presumes that counsel was effective unless shown otherwise. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Notably, the *Kjorsvik* rule traces its lineage to *Hagner v. United States*, 285 U.S. 427, 52 S. Ct. 417, 76 L. Ed. 861 (1932),[4] a decision that predates the U.S. Supreme Court's mandate of universal appointed counsel by nearly 30 years.

It is time for a rule that reflects modern criminal procedure. The State does not suggest that the right to be informed of the charges should not be enforceable on appeal. It merely asks that as with other constitutional rights, the defendant should seek his or her remedy first in the trial court. And if the defendant fails to do so, he or she should be required to show prejudice before having his or her conviction vacated.

[4] *Kjorsvik*, 117 Wn.2d at 104.

Thirty years of experience shows that the *Kjorsvik* rule has failed to curb the abusive sandbagging it was intended to forestall. It is therefore harmful and incorrect and should be overturned. In its place this Court should instead require defendants to meet the requirements of RAP 2.5, as is the case with most other constitutional claims raised for the first time on appeal.

Under the standards set forth in RAP 2.5 and the cases interpreting that provision, the court below did not even consider whether Woodall suffered prejudice. As discussed in earlier briefing, none is apparent. The State respectfully asks that review be granted and the decision of the Court of Appeals should be reversed and remanded for further proceedings.

## VI. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court grant review of the decision of the Court of Appeals.

DATED April 24, 2019.

Respectfully submitted,
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# APPENDIX

Filed
Washington State
Court of Appeals
Division Two

April 2, 2019

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| | |
|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>PAMELA JEAN WOODALL,<br><br>Appellant. | No. 50953-9-II<br><br><br><br><br><br>UNPUBLISHED OPINION |

LEE, A.C.J. — Pamela J. Woodall appeals her possession of stolen mail and second degree possession of stolen property convictions under Kitsap County Superior Court cause number 17-1-00715-1.[1] She contends the charging information was constitutionally deficient with regard to the possession of stolen mail charge. She further contends her guilty pleas were not made voluntarily, knowingly, and intelligently because the trial court failed to apprise her of the nature of the offenses before she pleaded guilty. Woodall also challenges the trial court's imposition of certain legal financial obligations (LFOs). The State concedes to Woodall's argument with regard to the LFO challenge.

[1] Woodall also challenges several other convictions under separate cause numbers. However, her notice of appeal solely references cause number 17-1-00715-1. This court reviews the decision designated in the notice of appeal. RAP 2.4(a). For this reason, we do not address Woodall's contentions relating to other unappealed convictions.

We agree the information was constitutionally deficient with regard to Woodall's possession of stolen mail conviction, and we accept the State's concession regarding LFOs. Accordingly, we affirm Woodall's second degree possession of stolen property conviction, reverse her possession of stolen mail conviction, and remand for the trial court for further proceedings consistent with this opinion.

## FACTS

After searching Woodall's vehicle pursuant to a search warrant, officers located numerous pieces of mail addressed to multiple different locations and two stolen credit cards. The State charged Woodall with possession of stolen mail and second degree possession of stolen property. For the possession of stolen mail charge, the information states:

> On or about April 25, 2017, in the County of Kitsap, State of Washington, the above-named Defendant did (a) possess stolen mail addressed to three or more different mailboxes; and (b) possess a minimum of ten separate piece [sic] of stolen mail, and, did withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto; contrary to the Revised Code of Washington 9A.56.380(1) and (2).

Clerk's Papers (CP) at 1. The probable cause statement states:

> On 04/25/2017 Suquamish Tribal Police and Kitsap County Sheriff Deputies conducted a traffic stop on Suquamish Way on a vehicle registered to Pamela Woodall. Woodall was driving the vehicle and police knew the passenger had an arrest warrant. A search warrant related to controlled substances and stolen mail was obtained for the vehicle. Upon service of the search warrant, 48 pieces of mail addressed to 19 different addresses in Kitsap County was [sic] recovered from the vehicle. Additionally, two stolen credit cards were recovered from the vehicle. The credit cards had been used after they were stolen with charges in the amount of $777. The credit cards were located above the passenger side sun visor. The mailing insert on which one of the cards would have been affixed was over the driver sun visor. Mail belonging to owners of the credit cards was found on the passenger side floorboard. The owners of the stolen credit cards, Thomas and Jane Reyes, were contacted and provided statements that neither Woodall nor her

> passenger, Sherei Butler, should be in possession of the stolen credit cards or mail. On the driver's side floorboard was additional mail which was determined to have been stolen. The mail on the passenger floorboard totaled 14 pieces addressed to 12 different addresses. The stolen mail had been predominately postmarked on 04/21/2017 and would have been delivered between April 21st and April 24th. Over the driver sun visor was personal paperwork belonging to Woodall. At the time of the traffic stop Woodall acknowledged she was the owner of the vehicle.
>
> A search warrant was also obtained for Woodall's cell phone. In one of the text conversations on the phone, Woodall discusses giving a pair of pants taken from a mailbox to another person.
>
> The passenger, Sherei Butler, was arrested on a felony warrant and later interviewed. Butler stated she had no knowledge of the stolen mail.
>
> Probable cause exists to arrest Pamela Woodall for Possession of Stolen Mail and Possessing Stolen Property 2nd Degree.

CP at 5-6.

Woodall decided to plead guilty. At the plea hearing, Woodall informed the trial court that she had read and signed all the documents relating to her plea agreement. In her guilty plea statement, Woodall agreed, "Instead of making a statement, I agree that the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea." CP at 23. She further agreed to use the "Criminal Information" to set forth the elements of the charged offenses. CP at 14. The trial court stated, "[R]ather than writing a statement out, you are agreeing I can read the probable cause. I've read the report. There are facts sufficient to find you guilty." Verbatim Report of Proceedings (VRP) (Aug. 3, 2017) at 5.

Woodall pleaded guilty to both offenses. The trial court then stated, "I accept those pleas. I believe you have made them freely and voluntarily." VRP (Aug. 3, 2017) at 5. The trial court

sentenced Woodall to 22 months. The trial court also imposed LFOs on Woodall, including a criminal filing fee and a deoxyribonucleic acid (DNA) collection fee.

Woodall appeals.

## ANALYSIS

Woodall contends, for the first time on appeal, that the charging information was constitutionally deficient on the possession of stolen mail charge. Woodall also contends her guilty plea on both charges was not voluntarily, knowingly, and intelligently made.

### A. CONSTITUTIONALITY OF CHARGING DOCUMENT

#### 1. Legal Principles

A defendant has the constitutional right to be informed of the charges against him or her. *State v. Johnson*, 180 Wn.2d 295, 300, 325 P.3d 135 (2014); U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. The State formally gives notice of charges by information, which "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." CrR 2.1(a)(1).

We review the adequacy of a charging document de novo. *Johnson*, 180 Wn.2d at 300. However, when the information is challenged for the first time on appeal, the charging document will be construed " 'quite liberally.' " *State v. Porter*, 186 Wn.2d 85, 89, 375 P.3d 664 (2016) (quoting *State v. Hopper*, 118 Wn.2d 151, 156, 822 P.2d 775 (1992)). We analyze whether the necessary facts appear in any form or, by fair construction, can be found in the charging document, and if the language is vague, we inquire whether there was actual prejudice to the defendant. *State v. Kjorsvik*, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991).

The charging information is constitutionally sufficient if all the essential elements of the crime are included in the document. *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 quotation marks omitted) (quoting *State v. Ward*, 148 Wn.2d 803, 811, 64 P.3d 640 (2003)). The primary purpose of the essential element rule is "to apprise the accused of the charges against him or her and to allow the defendant to prepare a defense." *Vangerpen*, 125 Wn.2d at 787. Definitions of essential elements are not necessary to include. *Porter*, 186 Wn.2d at 94.

If the State fails to allege every essential element of the crime, then the information is deficient and the charge must be dismissed without prejudice. *State v. Nonog*, 169 Wn.2d 220, 226, 237 P.3d 250 (2010).

2. Charging Information for Possession of Stolen Mail Constitutionally Deficient

Woodall argues that the charging information was constitutionally deficient because it failed to set forth all the essential elements of possession of stolen mail. Specifically, she argues that the charging information did not allege "knowledge." Br. of Appellant at 7 We agree.

RCW 9A.56.380(1) states, "A person is guilty of possession of stolen mail if he or she: (a) Possesses stolen mail addressed to three or more different mailboxes; and (b) possesses a minimum of ten separate pieces of stolen mail." "Possesses stolen mail" is defined as "knowingly receive, retain, possess, conceal, or dispose of stolen mail knowing that it has been stolen, and to withhold or appropriate to the use of any person other than the true owner, or the person to whom the mail is addressed." RCW 9A.56.380(2).

Here, the charging information states that Woodall,

> did (a) possess stolen mail addressed to three or more different mailboxes; and (b) possess a minimum of ten separate piece [sic] of stolen mail, and, did withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto; contrary to the Revised Code of Washington 9A.56.380(1) and (2).

CP at 1.

Woodall relies on *Porter* to support her argument. In *Porter*, our Supreme Court addressed the argument that Porter's possession of a stolen vehicle conviction should be overturned because the charging document omitted "withhold or appropriate" language, which Porter alleged was an essential element of the offense of possession of a stolen vehicle. 186 Wn.2d at 88.

Porter was charged with unlawful possession of a stolen motor vehicle under RCW 9A.56.068. *Id* at 87-88. That statute reads, "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) (alteration in original). RCW 9A.56.140(1) defines "possessing stolen property" as "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." This definition is nearly identical to RCW 9A.56.380(2)'s definition of possession of stolen mail.

The charging information in *Porter* alleged that Porter " 'did unlawfully and feloniously *knowingly* possess a stolen motor vehicle,' " but it did *not* state that possession includes " 'to 'withhold or appropriate [stolen property] to the use of any person other than the true owner or person entitled thereto.' " 186 Wn.2d at 88 (emphasis added) (alternation in original) (quoting RCW 9A.56.140(1)). *Porter* held that the charging document was constitutionally sufficient. *Id*. at 94. The court reasoned that the charging document did not need to include RCW 9A.56.140(1)'s

"withhold or appropriate" language because it merely "define[d] and limit[ed] the scope of the essential elements of the crime of unlawful possession of a stolen motor vehicle." *Id*. at 91. The court emphasized that the charging document "sufficiently articulated the essential elements of the crime for which Porter was charged, making further elaboration of what it mean[t] to unlawfully possess stolen property unnecessary." *Id*. at 92.

*Porter* clarified that "the knowledge element of possession of stolen property is an essential element." *Id*. at 93. The court reasoned that Porter's charging document "clearly put Porter on notice" that he was being charged with possessing a stolen motor vehicle that he knew had been stolen. *Id*. Therefore, further elaboration of how a person may "possess" stolen property was unnecessary. *Id*.

Similarly, in *State v. Moavenzadeh*, our Supreme Court reversed a defendant's conviction when an information charging three counts of first degree possession of stolen property "contain[ed] no language which c[ould] fairly be read to allege that [the defendant] knew the property was stolen." 135 Wn.2d 359, 363, 956 P.2d 1097 (1998). The court held that the knowledge element of possession of stolen property is an essential element. *Id*. at 363-64.

Here, the charging information contained no language to allege that Woodall knew the mail was stolen. It simply alleges that Woodall "possess[ed] stolen mail addressed to three or more different mailboxes; and (b) possess[ed] a minimum of ten separate piece [sic] of stolen mail." CP at 1.

Even construing the charging information liberally, it fails to apprise Woodall of the mens rea of possession of stolen mail charge. RCW 9A.56.380(2) requires the possession to be

"knowingly." Knowledge is an essential element of a possession conviction. *Porter*, 186 Wn.2d at 93; *Moavenzadeh*, 135 Wn.2d at 363-64. Therefore, because the charging information failed to allege this essential element, the information is deficient. Accordingly, the possession of stolen mail conviction must be dismissed without prejudice. *Nonog*, 169 Wn.2d at 226.

B. VALIDITY OF PLEA

Woodall next contends her plea was not made voluntarily, knowingly, and intelligently because she was not informed of the essential elements of the charged offenses. Because we reverse Woodall's possession of stolen mail conviction, we need not address the voluntariness of her guilty plea to that offense. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005). As to the voluntariness of her guilty plea to second degree possession of stolen property, we disagree with Woodall.

Before accepting a guilty plea, due process requires the trial court to " 'determin[e] that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.' " *State v. Codiga*, 162 Wn.2d 912, 922, 175 P.2d 1082 (2008) (quoting CrR 4.2(d)). The defendant is sufficiently informed of the nature of the offense if he or she is advised of the offense's essential elements. *State v. Holsworth*, 93 Wn.2d 148, 153, 607 P.2d 845 (1980).

In a plea hearing, the trial court is not required to orally recite the elements of each crime or the facts that satisfy those elements, and is not required to orally question the defendant to ascertain whether he or she understands the nature of the defense. *See Codiga*, 162 Wn.2d at 924. Instead, the trial court can rely on the written plea agreement if the defendant confirms that he or

she read the agreement and that its statements were true. *Id.* at 923-24. Also, an information detailing the acts and state of mind necessary to constitute the charged crime adequately informs the defendant of the nature of the offense. *In re Pers. Restraint of Montoya*, 109 Wn.2d 270, 278-79, 744 P.2d 340 (1987).

Here, with regard to the charge of second degree possession of stolen property, the information states, "[Woodall] did, knowingly receive, retain, possess, conceal, or dispose of stolen property, knowing that it had been stolen, and did withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto, said property being a stolen access device." CP at 2. Additionally, the statement of probable cause states:

> [T]wo stolen credit cards were recovered from the vehicle. The credit cards had been used after they were stolen with charges in the amount of $777. The credit cards were located above the passenger side sun visor. The mailing insert on which one of the cards would have been affixed was over the driver sun visor. Mail belonging to owners of the credit cards was found on the passenger side floorboard. The owners of the stolen credit cards, Thomas and Jane Reyes, were contacted and provided statements that neither Woodall nor her passenger, Sherei Butler, should be in possession of the stolen credit cards or mail.

CP at 5.

At the plea hearing, Woodall informed the court that she had read and signed all the documents relating to her plea agreement. In her guilty plea statement, Woodall agreed, "Instead of making a statement, I agree that the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea." CP at 23. She further agreed to use the "Criminal Information" to set forth the elements of the offense. CP at 14. In addressing Woodall's plea, the trial court stated, "[R]ather than writing a statement out, you are

agreeing I can read the probable cause. I've read the report. There are facts sufficient to find you guilty." VRP (Aug. 3, 2017) at 5.

Based on the above, Woodall was advised of the essential elements of second degree possession of stolen property. Thus, Woodall was sufficiently informed of the nature of the offense, and her plea was made voluntarily, knowingly, and intelligently with an understanding of the nature of the charge and the consequences of the plea.

C. LFOs

Woodall requests that we strike the trial court's imposition of certain LFOs; specifically, the $200 criminal filing fee and the $100 DNA collection fee. Woodall relies on recent legislative amendments relating to these LFOs and *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018). The State concedes. We agree.

The legislature amended former RCW 36.18.020(2)(h) (2017), prohibiting trial courts from imposing the $200 criminal filing fee on defendants who are indigent at the time of sentencing. LAWS OF 2018, ch. 269, §17; *Ramirez*, 191 Wn.2d at 747. The legislature also amended former RCW 43.43.7541 (2015), authorizing the imposition of a DNA collection fee "unless the state has previously collected the offender's DNA as a result of a prior conviction." LAWS OF 2018, ch. 269, § 18. Our Supreme Court has held that the amendments apply prospectively and are applicable to cases pending on direct review and not final when the amendment was enacted. *Ramirez*, 191 Wn.2d at 747.

Here, there is no dispute that Woodall is indigent and that her DNA has previously been collected. But because we reverse one of Woodall's convictions, she will ultimately be

resentenced and a new judgment and sentence will be entered. On resentence, we instruct the trial court to impose LFOs consistent with the recent legislative amendments and *Ramirez*.

We affirm Woodall's second degree possession of stolen property conviction, reverse her possession of stolen mail conviction, and remand to the trial court for further proceedings consistent with this opinion.

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.

Lee, A.C.J.

We concur:

Worswick, J.

Sutton, J.

## KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION

## April 24, 2019 - 12:01 PM

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| **Superior Court Case Number:** | 17-1-00715-1 |

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