102530-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 38983-9-III

STATE OF WASHINGTON, Respondent,

v.

IVAN VALENTINOVICH KRIGER, Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Ivan Kriger requests that this court accept review of the decision designated in Part II of this petition.

II. DECISION OF THE COURT OF APPEALS

Petitioner seeks review of the decision of the Court of Appeals filed on October 3, 2023, concluding that an information that omitted an essential *mens rea* element was constitutionally sufficient. A copy of the Court of Appeals' unpublished opinion is attached hereto.

III. ISSUES PRESENTED FOR REVIEW

The crime of presenting a false insurance claim requires proof that the defendant knowingly presented a false or fraudulent claim. RCW 48.30.230. Here, the information alleged only that Mr. Kriger did present a false or fraudulent claim, omitting the knowledge element. CP 32. Can the "knowing" element be found by fair construction in the use of the terms "present" and "false or fraudulent"?

IV. STATEMENT OF THE CASE

The State contended that Ivan Kriger sought to recover insurance damages for a house flood that it alleged did not occur. *See generally* I RP 118-19 (State's opening statement). It charged him with two counts: attempted first degree theft and presenting a false insurance claim. CP 32. The case proceeded to jury trial. CP 69.

The second count of the amended information charged Mr. Kriger with violating RCW 48.30.230. CP 32. That statute provides,

> 1) It is unlawful for any person, **knowing it to be such**, to:
>
> (a) Present, or cause to be presented, a false or fraudulent claim, or any proof in support of such a claim, for the payment of a loss under a contract of insurance.

(Emphasis added). However, the charging document stated only that on or about January 3, 2018, Mr. Kriger

> did present or cause to be presented, a false or fraudulent claim or any proof in support of such

> claim, for the payment of a loss under a contract of insurance, and said claim being in excess of $1,500.00.

CP 32.

Mr. Kriger was convicted of both charged counts. CP 58-59. On appeal, he contended that the information was constitutionally insufficient because it excluded the essential element of knowledge. *Appellant's Brief*, at p. 1. The Court of Appeals concluded, in an unpublished opinion, that because the verb "present" conveys active conduct and because the term "false or fraudulent" implies knowing or intentional behavior, the information gave sufficient notice of the *mens rea* element of the crime. *Opinion*, at pp. 3-4.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be granted under RAP 13.4(b)(3) as the sufficiency of the information presents a significant question of law under the U.S. and Washington Constitutions.

Under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution, a charging document must include all essential elements of a crime to inform a defendant of the charges against him and to allow preparation for the defense. U.S. Const. amend. VI (providing "[i]n all criminal prosecutions, the accused shall...be informed of the nature and cause of the accusation"); Wash. Const. art. 1 § 22 (amend. 10) (providing "[i]n criminal prosecutions the accused shall have the right...to demand the nature and cause of the accusation against him"); *State v. Kjorsvik*, 117 Wn.2d 93, 101–02, 812 P.2d 86 (1991). A charging document is constitutionally sufficient if the information states each statutory element of the crime, even if it is vague as to some other matter significant to the defense. *State v. Holt*, 104 Wn.2d 315, 320, 704 P.2d 1189 (1985). Citing the statute and naming the offense are themselves insufficient unless they convey all of the essential elements of

the charge. *State v. Sullivan*, 196 Wn. App. 314, 323, 382 P.3d 736 (2016).

A challenge to the sufficiency of the charging document may be raised at any time. *Kjorsvik*, 117 Wn.2d at 102. When a defendant challenges the sufficiency of a charging document, the standard of review depends on the timing of the challenge. *State v. Ralph*, 85 Wn. App. 82, 84, 930 P.2d 1235 (1997). An information which is not challenged until after the verdict is liberally construed in favor of validity. *Kjorsvik*, 117 Wn.2d at 102. Applying this review, the court asks whether the necessary facts appear in any form or can be found by fair construction on the face of the charging document. *State v. Pry*, 194 Wn.2d 745, 752, 452 P.3d 536 (2019). If they cannot, then prejudice is presumed and reversal is automatic. *Id.* at 753. If the essential element can be found in some inartful fashion, then the court considers whether the defendant was prejudiced by the lack of notice. *Id.* at 752-53.

Here, the information fails to state the statutory "knowing" element of the crime. Omitting an essential mental state element from the charging document has required reversal in other cases. In *State v. Johnson*, 119 Wn.2d 143, 829 P.2d 1078 (1992), where the information did not include a non-statutory "knowledge" element of delivery of a controlled substance, the element was not reasonably inferred from characterizing the delivery as "unlawful." In *Holt*, where knowing possession and knowledge of the contents of the matter sold were essential elements of a child pornography charge, the information was unconstitutionally defective when it omitted them. 104 Wn.2d at 319, 321. And in *State v. Vangerpen*, 125 Wn.2d 782, 888 P.2d 1177 (1995), omitting the premeditation element of first degree murder required reversal.

In some cases, other language in the charging document has been found sufficient to imply the omitted element and thus cures the defect. For example, in *State v. Nieblas-Duarte*, 55 Wn. App. 376, 380, 777 P.2d 583, *review denied*, 113 Wn.2d

1030 (1989), the State charged the defendant with "unlawfully and feloniously" delivering a controlled substance. In that case, the court held that the unstated "knowledge" element was nevertheless adequately communicated by the term "feloniously" because that term means "with intent to commit a crime." *Id.; accord Johnson*, 119 Wn.2d at 147-78. Similarly, in other cases, the facts of the conduct charged were sufficient to imply the omitted elements. *See, e.g., State v. Taylor*, 140 Wn.2d 229, 996 P.2d 571 (2000) (allegation of assault by pushing, kicking and punching victim in the face sufficient implied intent element); *State v. Chaten*, 84 Wn. App. 85, 87, 925 P.2d 631 (1996) ("assault" is defined and commonly understood as an intentional act).

But the information here does not allege specific conduct by Mr. Kriger that implies a knowing act, nor can the "knowing" element be inferred from the language included. Arguably, the term "fraudulent claim" could be understood to imply a knowledge element because knowledge of falsity is an

element of common law fraud. *See Martin v. Miller*, 24 Wn. App. 306, 308, 600 P.2d 698 (1979) (stating elements of common law fraud claim). But the information allows conviction based on a false *or* fraudulent claim. CP 32. As written, RCW 48.30.230 requires that a false claim be made knowingly; but the information distinguishes a false claim, which can be false for many reasons including inadvertence, from a fraudulent claim, which is inherently knowing. Consequently, because the knowledge element cannot be fairly implied as to the "false claim" prong, the inclusion of the term "fraudulent" does not cure the deficiency.

The Court of Appeals also reasoned that the use of the verb "present" implies active, rather than passive, conduct. *Opinion*, at p. 3. But alleging a volitional act is insufficient to imply a knowing act. In *Johnson*, the allegation of "delivery," which is also a volitional act, did not save the information from failing to set forth the knowledge element even when the

delivery was alleged to have been committed "unlawfully." 119 Wn.2d at 147-50.

Because the Court of Appeals' decision implicates a significant question of the adequacy of notice afforded by the information in this case, review is appropriate and should be granted under RAP 13.4(b)(3).

VI. CONCLUSION

For the foregoing reasons, the petition for review should be granted under RAP 13.4(b)(3) and this Court should enter a ruling that the information impermissibly omitted the essential element of knowledge.

RESPECTFULLY SUBMITTED this 2 day of November, 2023.

TWO ARROWS, PLLC

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Attorney for Petitioner

CERTIFICATE OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Petition for Review upon the following parties in interest, pursuant to prior agreement of the parties, by e-mail through the Court of Appeals' electronic filing portal to the following:

Deputy Prosecuting Attorney
SCPAAppeals@spokanecounty.org

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 2 day of November, 2023 in Kennewick, Washington.

Andrea Burkhart

Court of Appeals Opinion no. 38983-9-III (filed 10/3/2023)

APPENDIX A

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. IVAN V. KRIGER, Appellant.	)	No. 38983-9-III UNPUBLISHED OPINION

PENNELL, J. — Ivan Valentinovich Kriger appeals his convictions for attempted first degree theft and presenting a false insurance claim, arguing the State's charging document failed to include an essential element of the false insurance claim offense. Because Mr. Kriger's claim was not raised in the trial court, our review is deferential to the jury's guilty verdict. With this standard in mind, we find the charging document sufficient and reject Mr. Kriger's challenge. His convictions are therefore affirmed.

FACTS

In late December 2017, Ivan Valentinovich Kriger obtained a homeowners' insurance policy for his property in Spokane. Two weeks later, Mr. Kriger filed a water loss claim, indicating his pipes had frozen, causing flooding throughout the house. The insurance company assigned a claims adjuster to Mr. Kriger's case, who discovered that

the water service to Mr. Kriger's home had been shut off in September 2017 and had not been turned back on until over two weeks after Mr. Kriger's alleged flooding incident.

Law enforcement became involved and the State eventually charged Mr. Kriger with attempted first degree theft and presenting a false claim for insurance purposes. The charging document provided the following language for Mr. Kriger's false claim charge:

> That the defendant, IVAN V. KRIGER aka EVAAN S. SOLOMON, in the State of Washington, on or about January 03, 2018, did present or cause to be presented, a false or fraudulent claim or any proof in support of such claim, for the payment of a loss under a contract of insurance, and said claim being in excess of $1,500.00.

Clerk's Papers at 32.

The case proceeded to trial and the jury convicted Mr. Kriger of both charges. Mr. Kriger timely appeals from his judgment and sentence. The sole argument on appeal is that the above-quoted charging language was constitutionally deficient because it failed to include the mens rea element of knowledge.

ANALYSIS

RCW 48.30.230(1)(a) requires the State to prove that the defendant presented a "false or fraudulent" insurance claim, knowing the claim "to be such." Mr. Kriger points out that the State's charging document failed to track this statutory language. Specifically, the information omitted reference to the element of knowledge. According to Mr. Kriger,

this deficiency violated his constitutional right to notice and requires reversal of his convictions.

Because Mr. Kriger's claim is being raised for the first time on appeal, it is governed by a standard that liberally construes the charging document in favor of validity. *State v. Marcum*, 116 Wn. App. 526, 534, 66 P.3d 690 (2003). An information is sufficient under this standard if it contains some language from which notice of each required element of the offense can be found. *Id.* If facts supporting one or more elements cannot be fairly implied, prejudice is presumed and the charge must be reversed. *State v. Hugdahl*, 195 Wn.2d 319, 325, 458 P.3d 760 (2020). But if the terms used in the charging document are merely vague or inartful, reversal requires a showing of prejudice. *State v. Kjorsvik*, 117 Wn.2d 93, 106, 812 P.2d 86 (1991).

Liberally construed, the language in the State's charging document fairly implies the required element of knowledge. The use of the verb "present" conveys the idea that the defendant must have engaged in active, as opposed to passive conduct. Further, the item presented by the defendant must have been either "false or fraudulent." As Mr. Kriger concedes, the adjective "fraudulent" implies an element of knowledge since knowledge of falsity is an element of common law fraud. *See Martin v. Miller*, 24 Wn. App. 306, 308, 600 P.2d 698 (1979). Further, because the term "false" is described as

an alternative way of committing the same crime, a reasonable inference would be that knowledge must also be extended to the term "false." Indeed, the adjective "false" can be defined as something that is "intentionally untrue." WEBSTER'S THIRD NEW INT'L DICTIONARY 819 (1993). *See also* BLACK'S LAW DICTIONARY 745 (11th ed. 2019) (defining "false" as "[u]ntrue" and as "[d]eceitful; lying").

The State undoubtedly could have (and should have) used clearer language in its charging document. But Mr. Kriger does not claim that he was prejudiced by any ambiguity. His postconviction challenge to the sufficiency of the charging document therefore fails.

CONCLUSION

The judgment of conviction is 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.

Pennell, J.

WE CONCUR:

Lawrence-Berrey, A.C.J.

Staab, J.

BURKHART & BURKHART, PLLC

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