NO. 45796-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

CLIFFORD PORTER, JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Frank E. Cuthbertson, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

KEVIN A. MARCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. INTRODUCTION TO SUPPLEMENTAL BRIEF

On March 10, 2015, this court filed a published opinion in State v. Satterthwaite, ___ Wn. App. ___, ___ P.3d ___, 2015 WL ____, slip op. at 2-6 (Wash. Ct. App. Mar. 10, 2015), requiring that charging documents in possession of stolen property cases provide notice of the essential element that the person charged "withhold or appropriate" the stolen property to the use of a person who is not the true owner or otherwise entitled to the property.[1] In the information charging Clifford Melvin Porter, Jr. with the crime of possession of a stolen vehicle, the words "withhold or appropriate" do not appear. Nor by fair construction of the charging document can these words be found. Therefore, under Satterthwaite, this court must reverse Porter's conviction and remand for a new trial.

B. SUPPLEMENTAL ASSIGNMENT OF ERROR

The charging document was constitutionally deficient for failure to include RCW 9A.56.140(1)'s term that the defendant must "withhold or appropriate [possessed stolen property] to the use of any person other than the true owner or person entitled thereto."

[1] Given that Satterthwaite is only a day old and does not yet appear in Westlaw or the Washington advance sheets, Porter has attached a copy of the Satterthwaite slip opinion as an appendix to this brief to facilitate this court's review.

Issue Pertaining to Supplemental Assignment of Error

Porter was charged with possession of a stolen vehicle. An essential element of this crime is that the person charged "withhold or appropriate" the stolen vehicle to the use of any person other than the true owner or other person entitled thereto. Does the State's omission of this essential element in the charging documentation require reversal?

C. SUPPLEMENTAL STATEMENT OF THE CASE

The State charged Porter with unlawful possession of a stolen vehicle. CP 1. The information, filed January 2, 2013, stated the crime was committed as follows:

> That CLIFFORD MELVIN PORTER, JR., in the State of Washington, on or about the 27th day of August, 2011, 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.

D. SUPPLEMENTAL ARGUMENT

THE INFORMATION CHARGING PORTER WITH POSSESSION OF A STOLEN VEHICLE WAS CONSTITUTIONALLY DEFICIENT

Under both the United States and Washington Constitutions, a charging document must include all essential elements of a crime. U.S.

CONST. amend. VI; CONST. art. I, § 22; State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991).[2]

When a challenge to the constitutional sufficiency of a charging document is raised for the first time on appeal, this court applies the "liberal construction" test. Satterthwaite, slip op. at 3. Under this test, courts "construe the document liberally and will find it sufficient if the necessary elements appear in any form, or by fair construction may be found, on the document's face." Id. (citing State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000)). But if "the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it." State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995). If any necessary element is neither found nor fairly implied in the charging document, the court presumes prejudice and reverses. McCarty, 140 Wn.2d at 425.

Porter was charged with possession of a stolen vehicle. "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). "RCW 9A.56.068(1) implicitly incorporates RCW 9A.56.140(1)'s terms because the terms apply to other

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[2] The Sixth Amendment to the United State Constitution provides, "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation . . . ." Under article I, section 22 of the Washington Constitution, "the accused shall have the right to . . . demand the nature and cause of the accusation . . . ."

possession of stolen property offenses in the same chapter and provide the mens rea element of the offense of possession of a stolen motor vehicle." Satterthwaite, slip op. at 4. Under 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.)

Under Satterthwaite, "withhold or appropriate" is an essential element of all crimes enumerated in chapter 9A.56 RCW, including possession of a stolen vehicle under RCW 9A.56.068. Satterthwaite, slip op. at 4. This is so because it is the withholding or appropriation of stolen property "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." Id. at 5.

Here, as in Satterthwaite, the information did not mention Porter's withholding or appropriating the stolen vehicle to the use of a person other than the owner or other person entitled to it. CP 1; Satterthwaite, slip op. at 6. Therefore, the necessary fact of "withhold or appropriate" did not appear in the charging document.

Neither can, by a fair construction, the facts of withholding or appropriation be found in the information. Unlike Satterthwaite, the

information in this case referenced RCW 9A.56.140. CP 1; Satterthwaite, slip op. at 6 (mentioning that the State forgot to cite RCW 9A.56.140 in the charging document). But this is not dispositive. "The primary goal of a charging document is to give notice to the accused so that he or she can prepare an adequate defense, without having to search for the violated rule or regulations." State v. Armstrong, 69 Wn. App. 430, 433, 848 P.2d 1322 (1993) (citing Kjorsvik, 117 Wn.2d at 101-02). Indeed, "[m]erely citing to the proper statute and naming the offense is insufficient to charge a crime unless the name of the offense apprises the defendant of all of the essential elements of the crime." State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). The fact that the information filed in this case cited RCW 9A.56.140 does not and cannot save the information from being constitutionally deficient.

This court concluded in Satterthwaite, "Because the necessary facts of the essential element of 'withhold or appropriate' do not appear in any form, nor by fair construction can they be found, in the charging document, the charging document was insufficient." Satterthwaite, slip op. at 6. The same is true in this case. This court must reverse Porter's conviction and remand for a new trial.

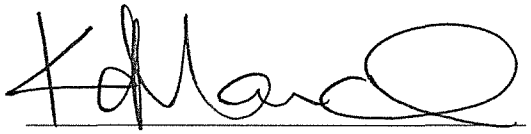
E. CONCLUSION

Porter asks this court to reverse his conviction for possession of a stolen vehicle because the charging document was constitutionally deficient under Satterthwaite.

DATED this 11th day of March, 2015.

Respectfully submitted.

NIELSEN, BROMAN & KOCH, PLLC



KEVIN A. MARCH
WSBA No. 45397
Office ID No. 91051

Attorneys for Appellant

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAMIE C. SATTERTHWAITE, Appellant.	No. 45732-6-II PUBLISHED OPINION

WORSWICK, J. — Jamie Satterthwaite appeals her conviction for possession of a stolen motor vehicle,[1] arguing the charging document was constitutionally deficient for failure to include RCW 9A.56.140(1)'s term that the defendant must "withhold or appropriate [possessed stolen property] to the use of any person other than the true owner or person entitled thereto." We hold as a matter of first impression that "withhold or appropriate" is an essential element of RCW 9A.56.068's possession of a stolen motor vehicle. Because the necessary facts of RCW 9A.56.068's "withhold or appropriate" element do not appear in any form, nor by fair construction can they be found, in the charging document, we reverse Satterthwaite's conviction and remand for further proceedings.

[1] RCW 9A.56.068.

FACTS

The State charged Jamie Satterthwaite with possession of a stolen motor vehicle and bail jumping.[2] The third amended information stated the following about the possession of a stolen motor vehicle count:

> In the County of Mason, State of Washington, on or about the 8th day of April, 2013, the above-named defendant, JAMIE C. SATTERTHWAITE, did commit POSSESSION OF A STOLEN MOTOR VEHICLE, a Class B Felony, in that said defendant did knowingly possess a stolen vehicle, to wit: 1988 Chevrolet S-10, WA License Number 624-XMK, belonging to Fred Anderson, contrary to RCW 9A.56.068 and against the peace and dignity of the State of Washington.

Clerk's Papers (CP) at 53. Satterthwaite did not object to this charging document below.

A jury found Satterthwaite guilty of possession of a stolen motor vehicle and bail jumping. Satterthwaite appeals.

ANALYSIS

Satterthwaite argues for the first time on appeal that the charging document was constitutionally deficient because it omitted an essential element of the offense of possession of a stolen motor vehicle: RCW 9A.56.140(1)'s term requiring that the defendant "withhold or appropriate [possessed stolen property] to the use of any person other than the true owner or person entitled thereto." The State argues it need not include RCW 9A.56.140(1)'s "withhold or appropriate" term because the term is a *definition* of an essential element, rather than an essential element itself. We agree with Satterthwaite.

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[2] RCW 9A.76.170. The bail jumping count is not germane to this appeal.

I. STANDARD OF REVIEW FOR CHARGING DOCUMENTS CHALLENGED THE FIRST TIME ON APPEAL

We review a charging document's adequacy de novo. *State v. Johnson*, 180 Wn.2d 295, 300, 325 P.3d 135 (2014). "[A] charging document is constitutionally adequate only if all essential elements of a crime, statutory and nonstatutory, are included in the document so as to apprise the accused of the charges against him or her and to allow the defendant to prepare a defense." *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). "Words in a charging document are read as a whole, construed according to common sense, and include facts which are necessarily implied." *State v. Kjorsvik*, 117 Wn.2d, 93, 109, 812 P.2d 86 (1991).

Where a defendant challenges the charging document's sufficiency for the first time on appeal, we construe the document liberally and will find it sufficient if the necessary elements appear in any form, or by fair construction may be found, on the document's face. *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). But if the document cannot be construed to give notice of or to contain in some manner the essential elements of an offense, the document is insufficient, and even the most liberal reading cannot cure it. 140 Wn.2d at 425.

After Satterthwaite's opening brief, but before the State's response brief, our Supreme Court decided *Johnson*. 180 Wn.2d at 295. In *Johnson*, the charging document charged Johnson with "**Unlawful Imprisonment—Domestic Violence**" and alleged Johnson "did knowingly restrain [J.J.], a human being." 180 Wn.2d at 301 (alteration in original). In holding the charging document was not deficient, the Court rejected Johnson's argument that the charging document must include the statutory definition of "restrain." 180 Wn.2d at 301-02. It held the State did not need to include definitions of elements, and it was enough that the State alleged all of the essential elements found in the unlawful imprisonment statute. 180 Wn.2d at 302. The

Court explained: "'An essential element is one whose specification is necessary to establish the very illegality of the behavior charged.'" 180 Wn.2d at 300 (quoting *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013)). Conversely, a definition of an element "defines and limits the scope of" an element. 180 Wn.2d at 302.

II. CHAPTER 9A.56 RCW'S POSSESSION OF STOLEN PROPERTY OFFENSES

Multiple possession of stolen property offenses fall under chapter 9A.56 RCW. RCW 9A.56.068(1) states:

> A person is guilty of possession of a stolen vehicle if he or she possess [possesses] a stolen motor vehicle.

RCW 9A.56.140(1) states:

> "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.) RCW 9A.56.068(1) implicitly incorporates RCW 9A.56.140(1)'s terms because the terms apply to other possession of stolen property offenses in the same chapter and provide the mens rea element of the offense of possession of a stolen motor vehicle. *See* 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 77.21 at 178 (3d ed. 2008); *State v. Hayes*, 164 Wn. App. 459, 479-80, 262 P.3d 538 (2011).

III. "WITHHOLD OR APPROPRIATE" AS AN ESSENTIAL ELEMENT

We hold that under *Johnson's* framework, "withhold or appropriate" is an essential element of chapter 9A.56 RCW's possession of stolen property offenses. The test for whether a term is an essential element of an offense is whether the term's specification is necessary to

establish the very illegality of the behavior charged, rather than a term that defines and limits the elements' scope. *Johnson*, 180 Wn.2d at 300, 302.

It is the withholding or appropriation 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. Thus, RCW 9A.56.140(1)'s "withhold or appropriate" is a term whose specification is necessary to establish the very illegality of the behavior charged in chapter 9A.56 RCW's possession of stolen property offenses, rather than a term that defines and limits the elements' scope. Therefore, even though RCW 9A.56.140(1)'s "withhold or appropriate" purports to define the meaning of "[p]ossessing stolen property," RCW 9A.56.140(1)'s "withhold or appropriate" is an essential element of chapter 9A.56 RCW's possession of stolen property offenses, including RCW 9A.56.068's possession of a stolen motor vehicle. *See Johnson*, 180 Wn.2d at 300, 302.

This holding is consistent with decisions on closely related issues. In *State v. McKinsey*, our Supreme Court reviewed the statutory elements of possession of stolen property offenses under chapter 9A.56 RCW to determine whether first degree possession of stolen property was an offense of dishonesty admissible under ER 609(a)(2). 116 Wn.2d 911, 913, 810 P.2d 907 (1991). In doing so, the court emphasized the importance of RCW 9A.56.140(1)'s "withhold or appropriate" as an element of first degree possession of stolen property. 116 Wn.2d at 913. In *State v. Khlee*, while not addressing the issue, we cited to RCW 9A.56.140(1) and RCW 9A.56.310(4) to note that chapter 9A.56 RCW "includes appropriation as an element of the offense of knowingly possessing a stolen firearm." 106 Wn. App. 21, 25, 22 P.3d 1264 (2001).

IV. The Charging Document in Satterthwaite's Case

Here, the charging document stated Satterthwaite committed "possession of a stolen motor vehicle" because she "did knowingly possess a stolen vehicle . . . belonging to Fred Anderson, contrary to RCW 9A.56.068." CP at 53. The charging document did not mention withholding or appropriating the stolen vehicle to the use of a person other than the owner, and did not cite RCW 9A.56.140. Thus, the necessary facts of "withhold or appropriate" do not appear in any form, nor by fair construction can they be found, in the charging document.

"Withhold or appropriate" is an essential element of possession of a stolen motor vehicle because it is the withholding or appropriation of a stolen motor vehicle to the use of someone other than the owner that ultimately makes the possession illegal, differentiating between the person attempting to return a known stolen motor vehicle and the person choosing to keep, use, or dispose of a known stolen motor vehicle. Because the necessary facts of the essential element of "withhold or appropriate" do not appear in any form, nor by fair construction can they be found, in the charging document, the charging document was insufficient. Accordingly, we reverse Satterthwaite's conviction for possession of a stolen motor vehicle and remand for further proceedings.

Worswick, J.

We concur:

Bjorgen, A.C.J.
Bjorgen, A.C.J.

Sutton, J.
Sutton, J.

NIELSEN, BROMAN & KOCH, PLLC

March 11, 2015 - 3:44 PM

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