No. 47351-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

SHAWN D. OLLISON,

Appellant.

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

The Honorable Carol Murphy, Judge
Cause No. 14-1-01309-8

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

Whether the information included all of the essential elements of robbery in the first degree.

B. STATEMENT OF THE CASE.

The State again accepts Ollison's statement of the case, and incorporates all arguments presented in the State's Amended Response Brief.

C. ARGUMENT.

> The charging document included all of the essential elements of the offense of first degree robbery. Ollison was reasonably apprised of the elements of the crime.
>
> Robbery is defined in RCW 9A.56.190:
>
> A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial.

Count I of the Second Amended Information, on which Ollison was tried, charged robbery in the first degree while armed with a deadly weapon. Supp. CP 2. The charging language read as follows:

> In that the defendant, SHAWN DION OLLISON in the State of Washington, on or about August 25, 2014, did unlawfully take personal property from a person or in his or her presence, to-wit: Aleta Miller, against such person's will, by use or threatened use of immediate force, violence, or fear of injury to such person or their property, or the property of another, with the intent to commit theft of the property, and such force or fear having been used to obtain or retain such property or to prevent or overcome resistance to the taking, and in the commission of or immediate flight therefrom the accused was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon. It is further alleged that during the commission of this offense the defendant was armed with a deadly weapon.

Supp. CP 2.

Ollison argues in his supplemental brief that this charging language fails to include the essential nonstatutory element that the victim had an ownership, representative, or possessory interest in the property stolen. State v. Richie, ___ Wn. App. ___, ___ P.3d ___ 2015 Wash. App. LEXIS 3050 (Dec. 22, 2015).

Under the Sixth Amendment to the United States Constitution and Article 1, section 22 of the Washington State Constitution, a charging document must set forth all of the essential elements of the alleged crime so that a criminal defendant can be apprised of the nature of the charge and can prepare an adequate defense. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991).

When the sufficiency of the charging document is raised for the first time on appeal, the court will engage in a liberal construction of the document in order to determine its validity. Under that liberal analysis, the appellate court examines: (1) whether the essential elements of the alleged crime appear in any form in the charging document, or whether they can be found by fair construction; and if so, (2) whether the defendant can show that he was nonetheless actually prejudiced by the inartful language used in the document. Kjorsvik, 117 Wn.2d at 105-106. It is not necessary to use the exact words of a statute; it is sufficient if words conveying the same meaning are used. A court should be guided by common sense and practicality in construing the language. Even missing elements may be implied if the language supports such a result. State v. Moavenzadeh, 135 Wn.2d 359, 262, 956 P.2d 1097 (1998).

Ollison received permission to file a supplemental brief because of the recent opinion issued in Richie. The Richie case was a challenge to the sufficiency of the evidence; the appellant argued that the State failed to prove the necessary interest of the victim in the property taken. Richie, 2015 Wash. App. LEXIS 3050 at 1. The court found that the to-convict jury instruction relieved the State of its burden to prove every essential element of the offense

beyond a reasonable doubt because it did not include the possessory interest. Id. at 12-17. That opinion cited to three Supreme Court cases which included some discussion of charging language: State v. Hall, 54 Wash. 142, 102 P. 888 (1909), Kjorsvik, *supra*, and State v. Tvedt, 153 Wn.2d 705, 107 P.3d 728 (2005). An examination of those three cases demonstrates that the charging language used in Ollison's case was sufficient.

In Hall, the charging language named the victim, and charged that the property was taken from his immediate presence, not his person. It did not allege that the victim owned, possessed, or had any legal right to the property. Hall, 54 Wash. at 142-43. The court found it insufficient and reversed. Id. at 144.

In Kjorsvik, the charging language read, in pertinent part, as follows:

> . . . did unlawfully take personal property, to-wit: lawful United States currency from the person and in the presence of Chris V. Balls, against his will by the use or threatened use of immediate force, violence and fear of injury to such person or his property and in the commission of and in immediate flight therefrom the defendants were armed with and displayed what appeared to be a deadly weapon, to-wit: a knife.

Kjorsvik, 117 Wn.2d at 96. The court concluded that "all of the essential elements of robbery were contained in the charging

document . . . ". Id. at 111. This conclusion followed a lengthy analysis of the constitutional and court rule requirements for charging documents, and the formulation of the two-prong standard of review mentioned above. The challenge in that case was whether the intent to steal element was included in the information, and there was no discussion of the non-statutory element of the victim's right to possess the stolen property.

In Tvedt, 153 Wn.2d 705, the issue before the court was the unit of prosecution for robbery. The opinion does not include the text of the charging language, but the court summarized it as follows:

> In relevant part, count VIII charged Tvedt with taking the cash from or from the presence of Younce and Schaefer. Count IX charged Tvedt with robbery based on taking Younce's truck. Count X charged Tvedt with taking cash from or from the presence of Shepherd and Piper. Count XI charged Tvedt with robbery based on taking Shepherd's cellular telephone.

Id. at 709.

The court went on to cite to Hall and other cases cited by the Richie court for the holding that the victim must have a legally cognizable interest in the property stolen. Tvedt, 153 Wn.2d at 714. Finally, the court said:

> Here, to charge robbery the State had to allege, among other things, that property was taken from or from the presence of a person having an ownership, representative, or possessory interest in the property. The State charged in count VIII that Tvedt took the business's cash from or from the presence of Younce and Shaefer, and in count X charged Tvedt with taking cash from or from the presence of Shepherd and Piper. . . . *[I]dentifying the persons robbed as Schaefer and Piper was sufficient to state the elements of the offenses charged.*

Id. at 718-19, emphasis added.

Again, the State recognizes that the issue before the court in Tvedt was the unit of prosecution. But it did discuss the element of possessory interest of the victim, and seems to hold that identifying the victim by name is sufficient to satisfy that element, at least when applying the more liberal standard of review used when a charging document is challenged for the first time on appeal. Based upon these cases, the language in Ollison's charging document was sufficient to, at a minimum, include the element of the victim's interest by fair construction.

Ollison does not address the second prong of the Kjorsvik test, whether, even if all the essential elements of the crime can be found, the defendant is nevertheless prejudiced by the inartful language. His argument is that they aren't, and prejudice is

presumed. However, under the authorities cited above, the element is present.

Provided that the necessary elements appear in some form on the face of the document, a defendant can succeed in challenging the sufficiency of the information only where he was "actually prejudiced by the inartful language" of the charges. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000); Kjorsvik, 117 Wn.2d at 103, 106 (noting that a liberal construction and requirement of actual prejudice would prevent defendants from "sandbagging," or challenging an information only after defects could no longer be remedied). In determining whether a defendant suffered actual prejudice as a result of a charging document's lack of specificity, a court is permitted to look outside the document itself. State v. Williams, 162 Wn.2d 177, 186, 170 P.3d 30 (2007). Where an information is accompanied by a statement of probable cause that includes details of how the defendant is alleged to have committed the offense, such that the defendant can be shown to have had notice of the nature of the charges, the defendant cannot demonstrate that the information's lack of specificity caused him actual prejudice. In Ollison's case, the declaration of probable

cause made it clear that the stolen vehicle, cell phone, and money belonged to Aleta Miller. CP 3-5.

> We conclude that the 2-prong standard of postverdict review enunciated herein fairly balances the right of a defendant to proper and timely notice of the accusation against the defendant and the right of the State not to have basically fair convictions overturned on delayed postverdict challenges to the sufficiency of a charging document.

Kjorsvik, 117 Wn.2d at 108.

All of the essential elements of the offense of first degree robbery can fairly be found in the charging language in Count I of the Second Amended Information. There is no question but that Aleta Miller owned the property taken. Miller testified that the car, cell phone, and money were hers. 03/14/15 RP 123, 140, 168. Ollison has not challenged the jury instruction, which does not name the victim, and to which he did not object. 03/12/15 RP 128; CP 122.

Ollison was fairly convicted. The argument he now makes was available to him before trial, and had been since 1909, but he did not raise it. The charging language was sufficient.

D. CONCLUSION.

Based upon the argument and authorities above, the State respectfully asks this court to find the charging document sufficient and affirm all of Ollison's convictions.

Respectfully submitted this 18th day of February, 2016.

Carol La Verne, WSBA# 19229
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CERTIFICATE OF SERVICE

I certify that I served a copy of the State's Supplemental Brief of Respondent on the date below as follows:

Electronically filed at Division II

TO: DAVID C. PONZOHA, CLERK
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 18 day of February, 2016, at Olympia, Washington.

Nancy Jones-Hegg

THURSTON COUNTY PROSECUTOR

February 18, 2016 - 11:01 AM

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