Supreme Court No. 99614-8
(COA No. 80656-4-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PATRICK MAULOLO,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Patrick Maulolo asks this Court to review the opinion of the Court of Appeals in *State v. Maulolo,* No. 80656-4-I (issued on March 1, 2021). A copy of the opinion is attached as Appendix A.

B. ISSUE PRESENTED FOR REVIEW

A charging document must contain all the essential elements of the offense and the omission of an element requires reversal. An essential element of robbery is that force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking. The information filed by the State in this case omitted this element. Is the charging document defective, requiring reversal?

C. STATEMENT OF THE CASE

Mr. Maulolo is a veteran who served multiple tours in Iraq. CP 66-70. During his service, he witnessed children and adults drugged with heroin acting as suicide bombers. CP 67-68. He lost a close friend when the transport vehicle carrying the friend hit an explosive device, and two of his cousins were also killed by explosive devices. CP 67, 68. Mr. Maulolo recalled the smell of burning rubber and flesh. CP 67.

Upon returning home, Mr. Maulolo battled severe PTSD. CP 67. He "couldn't be around people. [He] couldn't sleep." CP 68. He began drinking heavily, in part to battle nightmares and night sweats. CP 69. His home life became unstable: he "was getting irritated – [his] anger was out of control." CP 70. He feared becoming violent with his wife and isolated himself. CP 70. After leaving home, he became addicted to drugs and was homelessness. CP 70. In a moment of desperation, triggered by his PTSD, he committed a robbery. RP 332.

The State charged Mr. Maulolo with first degree robbery, alleging:

> That the defendant PATRICK T MAULOLO in King County, Washington, on or about June 15, 2018, did unlawfully and with intent to commit theft take personal property of another to-wit: purse, from the person and in the presence of Jessica Crothamel, who had an ownership, representative, or possessory interest in that property, against her will, by the use or threatened use of immediate force, violence and fear of injury to such person or her property and to the person or property of another, and in the commission of and in the immediate flight therefrom, the defendant inflicted bodily injury on Jessica Crothamel.

CP 1. The to-convict instruction required the jury to find, among other elements, that "force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance

to the taking." CP 38. The jury convicted Mr. Maulolo as charged. CP 21.

On review, the Court of Appeals rejected Mr. Maulolo's argument that the information omitted an essential element of the offense. Reasoning that the "force or fear was used by the defendant to obtain or retain possession of the property" language was merely definitional, the court found the charging document was sufficient. Slip Op. at 4-5.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The information omitted a critical element of robbery, depriving Mr. Maulolo of constitutionally adequate notice of the charges against him.

a. An information is constitutionally deficient if it fails to set forth every essential element of the crime charged.

"[T]he accused . . . has a constitutional right to be apprised of the nature and cause of the accusation against him." *State v. Pry*, 194 Wn.2d 745, 751, 452 P.3d 536 (2019) (internal quotations omitted); U.S. Const. amends. VI, XIV; Const. art. I, § 22. "This doctrine is elementary and of universal application, and is founded on the plainest principle of justice." *Pry*, 194 Wn.2d at 751 (internal quotations omitted). Constitutional notice of the "nature and cause" of the charges

against the accused requires the information or charging document contain "all essential elements of the crime, statutory or otherwise, and the particular facts supporting them." *State v. Hugdahl*, 195 Wn.2d 319, 324, 458 P.3d 760 (2020).

If a fact is "necessary to establish the very illegality" of an offense, it is essential element. *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013) (quoting *State v. Ward*, 148 Wn.2d 803, 811, 64 P.3d 640 (2003)). Essential elements include "those facts that must be proved beyond a reasonable doubt to convict a defendant of the charged crime." *Id*. (internal quotations omitted). Where the necessary fact lies within the statutory scheme does not determine whether it is an essential element. *Pry*, 194 Wn.2d at 756-57.

On review, the court must liberally construe the information and analyze whether "the necessary facts appear in any form." *State v. Kjorsvik*, 117 Wn.2d 93, 105, 812 P.2d 86 (1991). If all essential elements do not appear in the information, reversal is required without proof of actual prejudice. *Pry*, 194 Wn.2d at 752-53.

> *b. An essential element of robbery is that the accused used or threatened force or fear for the specific purpose of obtaining or retaining possession of the property or preventing or overcoming resistance to the taking of the property.*

The State charged Mr. Maulolo with one count of first degree robbery under RCW 9A.56.200(1)(a)(iii). CP 1. That statute provides:

> A person is guilty of robbery in the first degree if in the commission of a robbery or in the immediate flight therefrom, he or she . . . inflicts bodily injury.

"Robbery" is further defined by statute as:

> 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.* Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190 (emphasis added). Thus, robbery requires proof the accused not only used force or fear, but that he did so specifically in order to obtain or retain possession of the property or to prevent or overcome resistance to the taking of the property. *Id*.

This Court ruled force or fear to obtain or retain property or to prevent or overcome resistance is an essential element in *State v. Johnson*, 155 Wn.2d 609, 121 P.3d 91 (2005). In *Johnson*, the defendant took items from a store and left without paying. 155 Wn.2d at 610. When security confronted him in the parking lot, he abandoned the property, tried to flee, and punched the security guard. *Id*. This Court found the incident did not constitute a robbery because, while the defendant used force, he did not do so to obtain or retain the property or to overcome resistance to the taking. *Id*. at 611. "[T]he force must relate to the taking or retention of the property, either as force used directly in the taking or retention or as force used to prevent or overcome resistance 'to the taking.'" *Id*. Because the State failed to prove that element, this Court reversed the conviction. *Id*.

Similarly, in *State v. Allen*, this Court considered the essential elements of first degree robbery in a sufficiency challenge to a murder conviction aggravated by robbery. 159 Wn.2d 1, 147 P.3d 581 (2006).

In finding the State presented sufficient evidence and affirming the conviction, the Court recognized the State was required to prove the defendant used or threatened to use force or fear specifically to take the property or to prevent resistance to the taking. *Id*. at 9.

In *State v. Todd*, 200 Wn. App. 879, 403 P.3d 867 (2017), the Court of Appeals also recognized "force or fear . . . to obtain or retain possession of the property, or to prevent or overcome resistance to the taking" is an essential element of robbery. *Id*. at 885-86; *see also State v. McIntyre*, 112 Wn. App. 478, 480-82, 49 P.3d 151 (2002).

These cases demonstrate that an essential element of robbery is the use of force of fear specifically to obtain or retain possession of property, or to prevent or overcome resistance to the taking. Therefore, the State must allege it in the information.

Despite this precedent, the Court of Appeals found in *State v. Phillips*, 9 Wn. App. 2d 368, 373-81, 444 P.3d 51, *review denied*, 194 Wn.2d 1007 (2019), that the use of force or fear to obtain or retain property is merely definitional. It applied its holding in *Phillips* to the instant case, concluding the State was not required to include this language in the information, despite the fact the jury was required to make such a finding beyond a reasonable doubt in order to convict Mr.

Maulolo. Slip Op. at 4-5. The court noted the disputed language was found under a definitional statute and simply defined the terms "force or fear" as used in the robbery statute. Slip Op. at 4.

But this Court rejected similar reasoning in *Pry*. The label "definitional" does not determine if a fact is or is not an essential element that must be in the charging document. Instead, the test is whether the fact is essential to proving the illegality of the offense. *Pry*, 194 Wn.2d at 755.

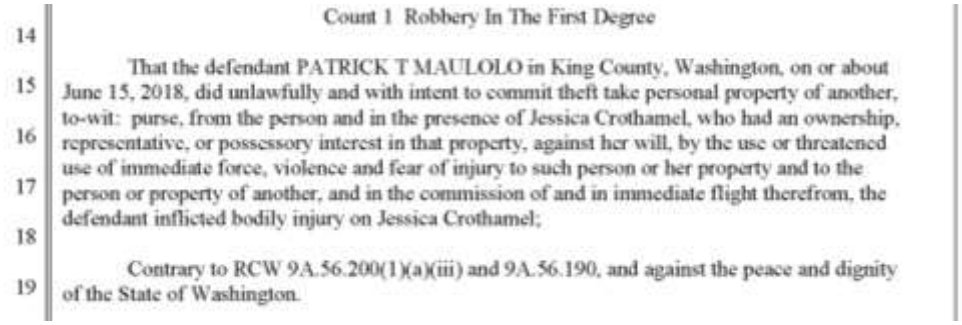
In *Pry*, the State charged the defendant with rendering criminal assistance but failed to include three essential elements of the offense in the information. 194 Wn.2d at 750. The State argued the missing elements were not essential because they appeared in a separate statutory section labeled "definition of terms." *Id*. at 757-59. This Court rejected that argument and found one section announced the essential elements for all levels of rendering criminal assistance while the other announced the additional elements required for rendering criminal assistance in the first degree. *Id*. at 759-60 (citing RCW 9A.76.050 and RCW 9A.76.070).

Similarly, here RCW 9A.56.200 codifies the offense of robbery in the first degree and contains the elements that elevate it from lower

level robberies, whereas RCW 9A.56.190 contains the essential elements of all levels of robbery. Both are required to sufficiently allege the crime of robbery in the first degree. Contrary to the Court of Appeals's reasoning, the challenged language does not merely define the terms "force" or "fear," but sets forth how the force or fear must be used in order to constitute a robbery. Consistent with the test in *Pry*, the fact that force or fear was used to obtain or retain property, or to overcome resistance to the taking, is essential to proving the illegality of robbery. 194 Wn.2d at 755. Regardless of the location within the statute, the State must allege this essential element in the information. *Id*. at 759-60.

c. The information is deficient because it omitted an essential element of the charge of robbery in the first degree.

Here, the information alleged Mr. Maulolo used or threatened to use force, but it failed to allege he used or threatened to use that force "to obtain or retain possession of the property, or to prevent or overcome resistance to the taking." RCW 9A.56.190. The information charged Mr. Maulolo with first degree robbery as follows:



Count 1 Robbery In The First Degree

That the defendant PATRICK T MAULOLO in King County, Washington, on or about June 15, 2018, did unlawfully and with intent to commit theft take personal property of another, to-wit: purse, from the person and in the presence of Jessica Crothamel, who had an ownership, representative, or possessory interest in that property, against her will, by the use or threatened use of immediate force, violence and fear of injury to such person or her property and to the person or property of another, and in the commission of and in immediate flight therefrom, the defendant inflicted bodily injury on Jessica Crothamel;

Contrary to RCW 9A.56.200(1)(a)(iii) and 9A.56.190, and against the peace and dignity of the State of Washington.

CP 1.

The court's decision to add the "force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking" language to the to-convict instruction further demonstrates it is an essential element which must be in the information. CP 38. The to-convict instruction, like the information, must also contain every essential element of the offense charged. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

Here, the State failed to allege in the information that Mr. Maulolo used or threatened to use force of fear in order to obtain or retain the property or to overcome or prevent resistance to the taking. Therefore, the information fails to allege all essential elements of the offense.

d. Because the information was constitutionally deficient, and because the Court of Appeals opinion conflicts with opinions of this Court and other Court of Appeals opinions, this Court should grant review.

The essential element that Mr. Maulolo used or threatened force in order "to obtain or retain possession of the property, or to prevent or overcome resistance to the taking" is missing from the elements enumerated in the information and is not otherwise included in the charging document. CP 1.Where a necessary element is absent in any form in an information, prejudice is presumed, and the remedy is dismissal without prejudice to the State's ability to refile. *Pry*, 194 Wn.2d at 753; *Kjorsvik*, 117 Wn.2d at 105-06. The Court of Appeals denied Mr. Maulolo this remedy because it found the challenged language merely definitional.

Because the Court of Appeals opinion conflicts with *Johnson*, *Pry*, and *Todd*, this Court should grant review to settle whether the "force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking" language set forth in RCW 9A.56.190 is an essential element of robbery.

E. CONCLUSION

Based on the foregoing, Mr. Maulolo respectfully requests that review be granted. RAP 13.4(b).

DATED this 31st day of March 2021.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. PATRICK T. MAULOLO, Appellant.	No. 80656-4-I DIVISION ONE UNPUBLISHED OPINION

APPELWICK, J. — Maulolo was convicted of first degree robbery. He argues that the omission of an essential element from the charging document deprived him of constitutionally adequate notice of the charges against him. We affirm.

FACTS

Patrick Maulolo committed a robbery at an automated teller machine (ATM) vestibule in Federal Way, Washington. As the victim deposited money, Maulolo entered the vestibule, hit her repeatedly in the head, and stole her purse. The robbery was captured on video surveillance.

The Federal Way Police Department disseminated a still image from video surveillance to other law enforcement agencies in an attempt to identify the suspect. A King County detective identified Maulolo as the suspect. Maulolo agreed to speak to police and admitted to committing the robbery.

The State charged Maulolo with first degree robbery. A jury convicted him as charged.

Maulolo appeals.

DISCUSSION

Maulolo asserts for the first time on appeal that the information omitted an essential element of robbery, depriving him of constitutionally adequate notice of the charges against him. He further asserts that this omission requires reversal of the robbery conviction and remand for dismissal without prejudice.

Accused persons have the constitutional right to know the charges against them. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; State v. Pry, 194 Wn.2d 745, 751, 452 P.3d 536 (2019). Pursuant to that right, a defendant must be given notice of the charges against them by information. See State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000); CrR 2.1(a)(1). An offense is not properly charged unless all essential elements of a crime, statutory or otherwise, are included in the charging document. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). An essential element is one whose specification is necessary to establish the very illegality of the behavior charged. State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992).

When an appellant challenges the sufficiency of a charging document for the first time on appeal, we construe the charging document liberally. McCarty, 140 Wn.2d at 425. We resolve such challenges with a two-pronged test: (1) do the necessary facts appear in any form, or by fair construction can they be found on the face of the charging document, and if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language that caused

a lack of notice? Pry, 194 Wn.2d at 752-53 (describing the test from Kjorsvik, 117 Wn.2d at 105-06). If the necessary elements cannot be found or fairly inferred from the charging document, prejudice is presumed without reaching the second prong of the test. State v. Phillips, 9 Wn. App. 2d 368, 375, 444 P.3d 51, review denied, 194 Wn.2d 1007, 451 P.3d 340 (2019). The remedy for an insufficient charging document is reversal and dismissal of the charges without prejudice to the State's ability to refile. Id.

A person is guilty of first degree robbery if in the commission of a robbery or of immediate flight therefrom, they are armed with or display a weapon or inflict bodily injury. RCW 9A.56.200(1)(a). The robbery definitional statute, RCW 9A.56.190, provides,

> 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 threated 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. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by use of force or fear.

(Emphasis added.)

The information tracked the statutory language of RCW 9A.56.200(1)(a)(iii) and the first sentence of RCW 9A.56.190:

> That the defendant PATRICK T MAULOLO in King County, Washington, on or about June 15, 2018, did unlawfully and with intent to commit theft take personal property of another to-wit: purse, from the person and in the presence of [the victim], who had an ownership, representative, or possessory interest in that property,

> against her will, by the use or threatened use of immediate force, violence and fear of injury to such person or her property and to the person or property of another, and in the commission of and in the immediate flight therefrom, the defendant inflicted bodily injury on [the victim].

Maulolo argues the information charging him with first degree robbery was deficient because it did not include the second sentence of RCW 9A.56.190—"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."—which he argues is an essential element to robbery.

This court has previously rejected that argument and held that the first sentence of RCW 9A.56.190 sets out the statutory elements of robbery while sentences two and three are mere definitional statements. Phillips, 9 Wn.2d at 377. Maulolo argues Phillips should not control because our Supreme Court in Pry, 194 Wn.2d at 755, rejected similar reasoning by holding the label "definitional" does not determine if a fact is or is not an essential element that must be in the charging document. We disagree.

In Phillips, we found the second sentence of RCW 9A.56.190 was merely definitional because, rather than broadening the statutory elements of robbery, it "defines 'force,' and 'fear,' as used in sentence one." 9 Wn. App. 2d at 377. We noted this was consistent with the determination of the essential elements of robbery in the first degree set forth in State v. Truong, 168 Wn. App. 529, 537, 277 P.3d 74 (2012).[1] Id. at 378.

[1]In support of his assertion that the second sentence of RCW 9A.56.190 is an essential element of robbery, Maulolo also relies on State v. Johnson, 155 Wn.2d 609, 610, 121 P.3d 91 (2005); State v. Allen, 159 Wn.2d 1, 9, 147 P.3d 581 (2006); and State v. Todd, 200 Wn. App. 879, 885-86, 403 P.3d 867 (2017). As

In Pry, the defendant contended the charging document did not include essential elements of rendering criminal assistance detailed in RCW 9A.76.050. 194 Wn.2d at 754. Similar to the analysis in Phillips, the court stated, "We must determine whether .050 provides the essential elements or merely defines the offense." Id. at 754-55. The State argued that the language in dispute was in a separate section and labeled definitional. Id. at 75657. The court rejected the notion that the language was "merely definitional" because it was labeled definitional. Id. at 57. It concluded the section did "substantially more than provide a definition." Id. at 756. The court noted it had already made clear that RCW 9A.76.050 provides essential elements of rendering criminal assistance in State v. Budik, 173 Wn.2d 727, 736-37, 272 P2d 816 (2012). Id. at 755.

Pry evaluated different language in a different statute. It did not reject expressly or implicitly the analysis or conclusion in Phillips. Consistent with Philips, we conclude the second sentence of RCW 9A.56.190 is merely definitional.

The information satisfies the first prong of Kjorsvik. Therefore, Maulolo must demonstrate actual prejudice resulting from any inartful language in order to obtain relief. He does not allege or establish actual prejudice. We hold the

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Maulolo acknowledges, the Phillips court previously considered these cases in relation to RCW 9A.56.190. 9 Wn. App. 2d at 378-80. It found the Todd court was incorrect in finding that Allen had announced the second sentence of RCW 9A.56.190 was a new statutory element of robbery. Id. at 379-380. Further, Phillips cites Johnson as clarifying that the second sentence of RCW 9A.56.190 "defines 'force,' and 'fear,' as used in sentence one." Phillips, 9 Wn. App. 2d at 377 (citing Johnson, 155 Wn.2d at 611). We agree with the Phillips court's analysis.

information charging Maulolo with first degree robbery was constitutionally sufficient.

We affirm.

Appelwick, J.

WE CONCUR:

Cobun, J.

Smith, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 80656-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: March 31, 2021
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