

63026-1

63026-1

NO. 63026-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL SCHERMERHORN,

Appellant.

FILED
STATE OF WASHINGTON
2009 SEP 20 PM 4: 21

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

The Honorable Charles R. Snyder, Judge

BRIEF OF APPELLANT

JENNIFER M. WINKLER
Attorney for Appellant

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A. ASSIGNMENT OF ERROR

The information omitted an essential element of possession of a stolen motor vehicle.

Issue Pertaining to Assignment of Error

The State alleged appellant possessed a stolen vehicle, not a stolen *motor* vehicle, which is an essential element of the crime. Must appellant's conviction be reversed and dismissed without prejudice?

B. STATEMENT OF THE CASE¹

The Whatcom County prosecutor charged appellant Michael Schermerhorn with possession of a stolen motor vehicle. RCW 9A.56.068;² see also CP 40-41 (first amended information, attached as Appendix A); CP 54-55 (original information charging first degree possession of stolen property, attached as Appendix B).³

The "first amended information" alleges:

POSSESSION OF A STOLEN VEHICLE

That on or about [11/16/08, Schermerhorn] . . . did knowingly possess, receive, retain, conceal, dispose of a stolen vehicle, knowing it was stolen and withheld or appropriated such property to the use of a person other than

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – 2/9/09; 2RP – 2/10/09; 3RP – 2/11/09; and 4RP – 2/12/09.

² RCW 9A.56.068 states, "A person is guilty of possession of a stolen vehicle if he or she [possesses] a stolen motor vehicle."

³ The State filed a probable cause affidavit separately. CP 52-53.

the victim or true owner or person entitled to such property, contrary to [RCW] 9A.56.068, which violation is a Class B Felony.

CP 40-41.

A jury convicted Schermerhorn as charged, and the court sentenced Schermerhorn within the standard range. CP 9, 16.

C. ARGUMENT

THE INFORMATION OMITTED AN ESSENTIAL ELEMENT OF THE CRIME.

The State need not duplicate a statute's precise wording in a charging document, provided the language it uses conveys the same meaning. State v. Kjorsvik, 117 Wn.2d 93, 108, 812 P.2d 86 (1991). Even under a liberal reading, the information here failed to notify Schermerhorn that in order to violate RCW 9A.56.068, he must have possessed not a mere "vehicle" but a "motor vehicle." The omission of the modifier "motor" requires reversal and dismissal of the charge.

1. Applicable Law

A charging document must include all essential elements of a crime. U.S. Const. amend. VI; Const. art. I, § 22 (amend. 10);⁴ Kjorsvik, 117 Wn.2d at 98; State v. Gill, 103 Wn. App. 435, 441-42, 13 P.3d 646

⁴ U.S. Const. amend. VI provides, "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation . . ." Const. art. I, § 22 provides, "In criminal prosecutions, the accused shall have the right to . . . demand the nature and cause of the accusation."

(2000). An "essential element is one whose specification is necessary to establish the very illegality of the behavior[.]" State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992) (citing United States v. Cina, 699 F.2d 853, 859 (7th Cir.), cert. denied, 64 U.S. 991 (1983)). Essential elements may derive from statutes, common law, or the constitution. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000); State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). Put another way, to satisfy the rule, a charging document must allege facts supporting every element of the offense and adequately identify the crime charged. Id.

Charging documents that fail to set forth the essential elements of a crime are constitutionally defective. State v. Hopper, 118 Wn.2d 151, 155, 822 P.2d 775 (1992). The remedy is reversal and dismissal without prejudice. State v. Vangerpen, 125 Wn.2d 782, 792-93, 888 P.2d 1177 (1995).

When a charging document is challenged for the first time on appeal, this Court reviews it under a more liberal standard. Kjorsvik, 117 Wn.2d at 105. Under this test, if the missing element cannot be fairly implied from the language in the information, the conviction will be reversed. Id. at 105-06.

2. Possession of a “Motor Vehicle” is an Essential Element of the Crime.

Adopted in 2007, RCW 9A.56.068 provides, "A person is guilty of possession of a stolen vehicle if he or she [possesses] a stolen motor vehicle." RCW 9A.56.068.

Before 2007, the crime was charged as possession of stolen property. RCW 9A.56.140(1); former RCW 9A.56.150(1) (1995); Laws of 2007 ch. 199, § 6; State v. Rhinehart, 92 Wn.2d 923, 925, 602 P.2d 1188 (1979). Although various unpublished cases assert that, as with possession of stolen property, knowledge is an element of the crime,⁵ no published case has explicitly set forth the new crime's essential elements. Consistent with possession of stolen property and the language of the new statute, the pattern jury instruction lists the following elements:

- (1) That on or about _____, the defendant knowingly [received] [retained] [possessed] [concealed] [disposed of] a stolen motor vehicle;
- (2) That the defendant acted with knowledge that the motor vehicle had been stolen;
- (3) That the defendant withheld or appropriated the motor vehicle to the use of someone other than the true owner or person entitled thereto;
- (4) That any of these acts occurred in the State of Washington.

⁵ See State v. Moavenzadeh, 135 Wn.2d 359, 362, 956 P.2d 1097 (1998) (knowledge is an element of possession of stolen property).

11A Washington Practice: Washington Pattern Jury Instructions: Criminal, 77.21 at 177-78 (3rd ed. 2008); 11A Wash. Prac. WPIC 77.20 at 176 (definitional instruction); CP 30-31 (jury instructions in this case). Possession of a stolen motor vehicle is thus an essential element of the charged crime.

3. A "Vehicle" is not necessarily a "Motor Vehicle."

The State alleged Schermerhorn possessed, received, retained, concealed, or disposed of a stolen "vehicle." Based on the statutes, familiar canons of statutory construction, and an everyday understanding of the terms, however, a "vehicle" and a "motor vehicle" are not the same.

RCW 9A.04.110(28) defines "[v]ehicle" as a "'motor vehicle' as defined in the vehicle and traffic laws, any aircraft, or any vessel equipped for propulsion by mechanical means or by sail." Title 46 RCW, entitled "Motor Vehicles," defines a "motor vehicle" as "every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails." RCW 46.04.320; State v. Kypreos, 115 Wn. App. 207, 216, 61 P.3d 352 (2002), review denied, 149 Wn.2d 1029 (2003); see also RCW 47.04.010 (19) (defining "motor vehicle" as a "self-propelled unit.")

Under Title 46 RCW, however, a "motor vehicle" is not the same as a "vehicle." For example, before 1991, the definition of "vehicle"

under RCW 46.04.670 excluded bicycles as well as all devices moved by human power. Former RCW 46.04.670; Laws of 1961, ch. 12. But in 1991, the legislature amended the “vehicle” definition to include “every device capable of being moved upon a public highway and in, upon, or by which any persons or property is or may be transported or drawn upon a public highway, including bicycles.” RCW 46.04.670; Laws of 1991, ch. 214, §2; City of Montesano v. Wells, 79 Wn. App. 529, 532, 902 P.2d 1266 (1995); see also Borromeo v. Shea, 138 Wn. App. 290, 156 P.3d 946 (2007) (bicycle is a vehicle).

Thus, under the very “vehicle and traffic” statutes incorporated by RCW 9A.04.110(28), a “vehicle” is not the same as a “motor vehicle.” In addition, RCW 9A.56.068 itself uses the term “motor vehicle,” not “vehicle.” Statutes must be construed to give all language effect with no portion rendered meaningless or superfluous. State v. Keller, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001). In summary, based on the statutes, as well as an everyday understanding of the terms, “vehicle” does not convey the same meaning as “motor vehicle.”

4. The Charging Document Thus Failed to Notify Schermerhorn of An Essential Element.

If an information “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. Moavenzadeh, 135 Wn.2d 359, 363, 956 P.2d 1097 (1998) (quoting State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995)). By charging Schermerhorn with possessing a mere “vehicle” and not a “motor vehicle,” the State failed to fully inform him of both the nature of the illegal conduct and the crime it was charging. Leach, 113 Wn.2d at 689.

In State v. Tresenriter, an accused charged with possession of stolen property and other related crimes claimed the information was inadequate because it provided no notice “as to what the property was, where the property was located when he allegedly possessed it,” or if it was connected to the thefts and burglary also charged in the information. 101 Wn. App. 486, 495, 4 P.3d 145 (2000). The Court of Appeals rejected Tresenriter’s claim because none of these claimed omissions were elements of the crime of possession of stolen property. Thus, his remedy was to seek instead a bill of particulars. Id.

In contrast, the information here impermissibly omitted a statutory essential element of the crime. Omission of this statutory element is, moreover, akin to omission of value, which may be an essential element of the higher degrees of theft and possession of stolen property. See, e.g., State v. Tinker, 155 Wn.2d 219, 222-23, 118 P.3d 885 (2005).

Not even a liberal reading of the information reveals Schermerhorn was required to possess a stolen “motor vehicle” in order to commit the charged crime. Such constitutionally inadequate notice requires reversal and dismissal without prejudice. McCarty, 140 Wn.2d at 425-26, 428.

D. CONCLUSION

This Court should reverse and dismiss the charge without prejudice.

DATED this ^{30TH} day of September, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC


JENNIFER M. WINKLER
WSBA No. 35220
Office ID No. 91051
Attorneys for Appellant

APPENDIX A

ORIGINAL

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2009 FEB -9 AM 8:31

WHATCOM COUNTY
WASHINGTON

BY SK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

15	THE STATE OF WASHINGTON,	)	No.: 08-1-01541-9
17	Plaintiff.	)	FIRST AMENDED
19	vs.	)	INFORMATION FOR:
21	MICHAEL ALAN SCHERMERHORN,	)	POSSESSION OF A STOLEN
23	AKA: Ama Schermerhorn; Jerry Patrick	)	VEHICLE
25	Schermerhorn)	
27	Defendant.)	

I, DONA BRACKE, Deputy Prosecuting Attorney in and for Whatcom County, State of Washington, comes now in the name and by the authority of the State of Washington and by this information do accuse **MICHAEL ALAN SCHERMERHORN** with the crime(s) of **POSSESSION OF A STOLEN VEHICLE**, committed as follows:

then and there being in Whatcom County, Washington,

POSSESSION OF A STOLEN VEHICLE

That on or about the 16th day of November, 2008, the said defendant, MICHAEL ALAN SCHERMERHORN, then and there being in said county and state, did knowingly possess, receive, retain, conceal, dispose of a stolen vehicle, knowing it was stolen and withheld or appropriated such property to the use of a person other than the victim or true owner or person entitled to such property; contrary to Revised Code of Washington 9A.56.068, which violation is a Class B Felony;

1 contrary to the form of the Statute in such cases made and provided and against the peace and
3 dignity of the State of Washington.

5 DATED THIS 9 day of February, 2009.

7 

9 DONA BRACKE, WSBA #29753, Deputy Prosecuting Attorney
11 in and for Whatcom County, State of Washington

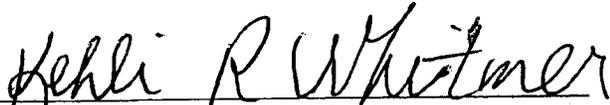
13 STATE OF WASHINGTON)
15) ss.
17 COUNTY OF WHATCOM)

19 I, Dona Bracke, being first duly sworn on oath, depose and say: that I am a duly
21 appointed and acting Deputy Prosecuting Attorney in and for Whatcom County, State of
23 Washington. I have read the foregoing information, know the contents thereof and the same is
25 true as I verily believe.

23 

25 DONA BRACKE, #29753
Deputy Prosecuting Attorney

27 SUBSCRIBED AND SWORN to before me this 9 day of February, 2009.

29 

31 NOTARY PUBLIC in and for the
33 State of Washington. My commission
35 expires on: July 15, 2009

APPENDIX B

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WHATCOM COUNTY
WASHINGTON

BY _____ (signature)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

15	THE STATE OF WASHINGTON,	)	No.: 08-1-01541-9
17)	
17	Plaintiff.)	
19		)	INFORMATION FOR:
19	vs.)	
21		)	POSSESSION OF STOLEN PROPERTY
21	MICHAEL ALAN SCHERMERHORN,	)	IN THE FIRST DEGREE
23	AKA: Ama Schermerhorn; Jerry Patrick)	
23	Schermerhorn)	
25)	
25	Defendant.)	

I, DAVID A. GRAHAM, Deputy Prosecuting Attorney in and for Whatcom County, State of Washington, comes now in the name and by the authority of the State of Washington and by this information do accuse **MICHAEL ALAN SCHERMERHORN** with the crime(s) of **POSSESSION OF STOLEN PROPERTY IN THE FIRST DEGREE**, committed as follows:

then and there being in Whatcom County, Washington,

POSSESSION OF STOLEN PROPERTY IN THE FIRST DEGREE

That on or about the 16th day of November, 2008, the said defendant, MICHAEL ALAN SCHERMERHORN, then and there being in said county and state, did knowingly possess, receive, retain, conceal, dispose of stolen property of a value in excess of \$1,500.00 knowing it was stolen and withheld or appropriated such property to the use of a person other than the victim or true owner or person entitled to such property in violation of RCW 9A.56.150(1), which violation is a Class B Felony;

1 contrary to the form of the Statute in such cases made and provided and against the peace and
dignity of the State of Washington.

3 DATED THIS 19 day of November 2008.

5
7
9 DAVID A. GRAHAM, WSBA #20988, Deputy Prosecuting Attorney
in and for Whatcom County, State of Washington

11 STATE OF WASHINGTON)
13) ss.
15 COUNTY OF WHATCOM)

17 I, David A. Graham, being first duly sworn on oath, depose and say: that I am a duly
19 appointed and acting Deputy Prosecuting Attorney in and for Whatcom County, State of
Washington. I have read the foregoing information, know the contents thereof and the same is
true as I verily believe.

21
23 DAVID A. GRAHAM, #20988
Deputy Prosecuting Attorney

25 SUBSCRIBED AND SWORN to before me this 19 day of November 2008.

27
29 Laura S. Hatwell
31 NOTARY PUBLIC in and for the
State of Washington. My commission
33 expires on: July 9, 2012

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.	)	COA NO. 63026-1-1
)	
MICHAEL SCHERMERHORN,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF SEPTEMBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] WHATCOM COUNTY PROSECUTOR'S OFFICE
WHATCOM COUNTY COURTHOUSE
311 GRAND AVENUE
BELLINGHAM, WA 98227

- [X] MICHAEL SCHERMERHORN
13982 DONNELL ROAD
ANACORTES, WA 98221

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF SEPTEMBER, 2009.

x *Patrick Mayovsky*

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STATE OF WASHINGTON
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