

63026-1

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No. 63026-1-I

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

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**STATE OF WASHINGTON, Respondent,**

**v.**

**MICHAEL A. SCHERMERHORN, Appellant.**

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**BRIEF OF RESPONDENT**

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**A. ASSIGNMENTS OF ERROR**

None.

**B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

1. Whether the information charging Schermerhorn with felony possession of a stolen vehicle was constitutionally sufficient because the word "vehicle" when construed according to common sense, adequately conveyed the "motor vehicle" element of the statute and placed Schermerhorn on notice of the charges against him.

**C. FACTS**

On November 19<sup>th</sup>, 2008, Michael Schermerhorn was charged via information with one count of possession of stolen property in the first degree in violation of RCW 9A.56.150(1). CP 54-55. Then on February 9<sup>th</sup>, 2009 Whatcom County deputy prosecutor filed a first amended information charging Schermerhorn with the more specific charge of unlawful possession of a stolen vehicle in violation of 9A.56.068. 1RP 3. The information charging Schermerhorn with felony unlawful possession of a stolen vehicle provided:

That on or about the 16<sup>th</sup> day of November 2008, the said defendant, MICHEAL 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 the Revised Code of Washington 9A.56.068, which violation is a class B felony.

CP 40-41. Schermerhorn waived formal arraignment and entered a plea of not guilty to this amended charge. 1RP 4. Schermerhorn was accused of borrowing a dump truck and failing to return the vehicle to its rightful owner. CP 54, 55. At trial the court instructed the jury of the following essential elements of the crime:

To convict the defendant of the crime of possessing a motor vehicle, each of the following elements must be proved beyond a reasonable doubt:

- (1) That on or about November 16<sup>th</sup> 2008, the defendant knowingly received, retained, possessed, concealed or disposed of a stolen motor vehicle;
- (2) That the defendant acted with knowledge that the motor 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.

CP 17-37, instruction 11. Schermerhorn was convicted by jury as charged and given a standard range sentence of thirteen months. Supp CP \_\_ (sub. nom. 49).

**D. ARGUMENT**

- 1. The amended information charging Schermerhorn with unlawful possession of a stolen vehicle was sufficient because the term “vehicle” adequately conveyed the “motor” vehicle element of statute and thereby placed Schermerhorn on notice of the crime he was charged with.**

Schermerhorn claims for the first time on appeal that the information charging him with one count unlawful possession of a stolen vehicle was constitutionally deficient because it failed to convey that he was charged with unlawfully possessing a stolen “motor” vehicle and therefore failed to place him on notice of an essential element of the crime.

The record reflects, however, that by using the term “vehicle” the information sufficiently conveyed to Schermerhorn, under a liberal standard of review, that he was charged with unlawfully possessing a stolen “motor” vehicle. The term “vehicle” is commonly understood to mean or refer to a “motor vehicle.” Moreover, because Schermerhorn cannot demonstrate under the facts of this case how this alleged inartful language was prejudicial where the record clearly reflects Schermerhorn understood he was charged with unlawfully possessing or retaining a motor vehicle, specifically a dump truck, Schermerhorn’s new claim should be rejected.

A charging document is constitutionally adequate only if all of the essential elements, statutory and non statutory, are included in the document so as to place the defendant on notice of the charges and allow the defendant to prepare a defense. 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. Ward, 148 Wn.2d 803, 811, 64 P.3d 640 (2003).

When a charging document is challenged for the first time on appeal, courts liberally construe the information in favor of validity. Kjorsvik, 117 Wn.2d at 105. In contrast, when an information is challenged before the verdict, “the charging language must be strictly construed.” State v. Taylor, 140 Wn.2d 229, 237, 996 P.2d 571 (2000). The two distinct standards of review are intended in part to “encourage defendants to make timely challenges to defective charging documents to discourage ‘sandbagging’” Id at 237. This Court should employ the liberal construction standard of review because Schermerhorn did not challenge the sufficiency of the information until now.

Under the liberal construction rule, the question is whether the missing element may be fairly implied from the language within the

information. Id. If so, whether the defendant has shown he or she was actually prejudiced by the insufficient language that caused the lack of notice. Kjorsvik, 117 Wn.2d at 105-06. This liberal method of review permits the appellate court to fairly infer the apparent missing element from the charging document language. “Words in a charging document are read as a whole, construed according to common sense, and include facts which are necessarily implied. Id. at 109. In Kjorsvik, for example, the court employed a liberal standard of construction in favor of validity and held that the term “unlawfully” in the information sufficiently alleged the intent to steal element of the crime of robbery. Id. at 108-11. Similarly, the court in State v. Borrero, 147 Wn.2d 353, 58 P.3d 245 (2002), determined the word “attempt” adequately encompassed the “substantial step” element of the attempted murder charge the defendant faced.

The information charging Schermerhorn with felony unlawful possession of a stolen vehicle provided:

That on or about the 16<sup>th</sup> day of November 2008, the said defendant, MICHEAL 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 the Revised Code of Washington 9A.56.068, which violation is a class B felony.

CP 40-41. Schermerhorn claims for the first time on appeal that this amended information is defective because it did not place him on notice he was charged with unlawfully possessing a “motor” vehicle; a term Schermerhorn asserts is an essential element of the crime. The unlawful possession of a stolen vehicle statute states a person is guilty of possessing a stolen vehicle if he or she [possesses] a stolen motor vehicle. RCW 9A.56.068.

Schermerhorn contends use of the “vehicle” instead of “motor vehicle” is constitutionally insufficient under a liberal standard of review because the legislature defines the term “vehicle” and “motor vehicle” differently. See Br. of App. at 5, *citing* 9A.04.110(28) and RCW 46.04.320.

The issue before this Court however, is not whether “vehicle” and “motor vehicle” terms are defined in exactly the same way by the legislature but whether the use of the word “vehicle” placed Schermerhorn on notice that he was charged with unlawfully possessing a stolen “motor” vehicle. An information challenged on appeal need not use the exact

words of the statute, “so long as the words used adequately convey the same meaning.” State v. Trensener, 101 Wn.App. 486, 492, 4 P.3d 145 (2000), *citing* State v. Ralph, 85 Wn.App. 82, 85, 930 P.2d 1235 (1997). *See also* RCW 10.37.050(6) regarding sufficiency of the charging information “... that the act or omission charged as a crime is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what was intended.”

Despite the distinctions made by the legislature between vehicle and motor vehicle definitions in the traffic code and the criminal code, the term “vehicle” is commonly understood and used to reference a “motor vehicle.” Thus, in construing Schermerhorn’s information under a liberal standard of review in favor of validity, this Court should hold that the term “vehicle” as used in this charging document fairly implied or conveyed to Schermerhorn that he was charged with unlawfully possessing a stolen “motor” vehicle.

In State v. Chaten, 84 Wn.App.85, 87, 925 P.2d 631 (1996), for example, the court held under a strict standard of review that the information charging Chaten with assault was constitutionally sufficient

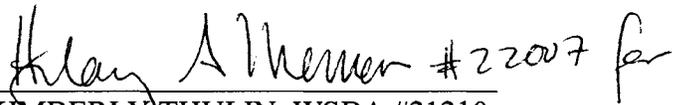
despite failing to explicitly state the essential element of intent “because an assault is commonly understood to be an intentional act” and the use of the term assault in the information therefore placed Chaten on notice that he was charged with “intentionally” assaulting another. *Id.* at 86. Use of the “assault” term without “intent” therefore adequately conveyed the missing essential element of the charge. *See also, State v. Goodman*, 150 Wn.2d 774, 83 P.3d 410 (2004) (term “meth” construed with common sense can be fairly implied to mean “methamphetamine”).

Similarly here, the term “vehicle” is commonly understood to mean or reference a “motor” vehicle and therefore the use of the term “vehicle” along with remaining language of the information sufficiently conveyed to Schermerhorn that he was charged with unlawfully possessing a stolen *motor* vehicle. As in *Kjorsvik*, *Borrero*, *Goodman* and *Chaten*, the State respectfully requests this Court uphold the information in this case as sufficient, find Schermerhorn has not demonstrated the requisite prejudice from the alleged in artful language and reject Schermerhorn’s appeal.

**E. CONCLUSION**

For the reasons set forth above, the State requests Schermerhorn's conviction for one count of unlawful possession of a stolen vehicle be affirmed on appeal.

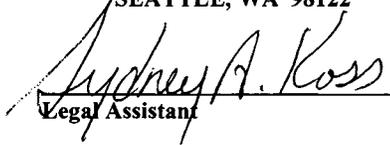
Respectfully submitted this 11<sup>th</sup> day of January, 2010.

  
KIMBERLY THULIN, WSBA #21210  
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**CERTIFICATE**

I certify that on this date I placed in the United States mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificate is attached, to appellant's counsel, Jennifer Winkler, addressed as follows:

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Legal Assistant

01/11/2010  
Date