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No. 63437-2-I

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

**STATE OF WASHINGTON,
Appellant,**

v.

**STEVEN THOMAS BARBERI
Respondent.**

BRIEF OF RESPONDENT

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By HILARY A. THOMAS
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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the information, challenged for the first time on appeal, was fatally defective where it omitted the statutory language setting forth the actus reus and the mens rea for burglary in the second degree and whether the burglary charges should be dismissed without prejudice and the matter remanded for resentencing on the remaining conviction.

C. STATEMENT OF THE CASE

The State accepts Appellant Steven Barberi's recitation of the facts relevant to this appeal. The State would add, however, that Barberi was sentenced to a standard range sentence on all three counts, to be served concurrently. CP 15, 18. On the bail jumping charge, on an offender score of five, Barberi was faced with a standard range of 17-22 months and the judge imposed a 20 month sentence. CP 15, 18.

D. ARGUMENT

The State concedes that the information herein was fatally defective on the charges of burglary in the second degree, counts I and II. In omitting a significant clause of the statutory language for burglary in the second degree, the information failed to charge an actus reus and the proper mens rea, as contended by Barberi. The burglary charges should

therefore be dismissed without prejudice to refile and this matter remanded for resentencing on the remaining conviction for bail jumping.

- 1. The information failed to allege all the essential elements of burglary in the second degree; therefore those convictions should be dismissed without prejudice.**

For the first time on appeal Barberi asserts that the information was constitutionally defective because it failed to state all the essential elements of the charge of burglary in the second degree, namely the actus reus and the requisite mens rea. It appears the information omitted an entire clause of the burglary in the second degree statute. The State therefore concedes error and requests Barberi's convictions for burglary be dismissed without prejudice and the matter remanded for resentencing on the bail jumping conviction.

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). "Words in a charging document are read as a whole, construed according to common sense, and

include facts which are necessarily implied.” Kjorsvik, 117 Wn.2d at 109. If a defendant is prejudiced by a defective information, the charge is dismissed without prejudice to refile. State v. McCarty, 140 Wn.2d 420, 428, 998 P.2d 296 (2000).

A constitutional challenge to the sufficiency of an information may be asserted for the first time on appeal. *Id.* at 102. When the sufficiency of a charging document is challenged for the first time after the verdict, courts liberally construe the information in favor of validity. State v. Phillips, 98 Wn. App. 936, 940, 991 P.2d 1195 (2000). Under the liberal construction rule, the court inquires: (1) do the necessary elements or facts appear in any form, or can the alleged missing element or fact be fairly implied from the language within the information; and (2) can the defendant show that he or she was actually prejudiced by the inartful language. McCarty, 140 Wn.2d at 425; Kjorsvik, 117 Wn.2d at 105-06. 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, n.32.

In this case, all three informations omitted the clause “commit a crime against a person or property therein, ... did” after “with intent to” and before “enter or remain unlawfully.”¹ RCW 9A.56.030(1); CP 76-77, 98-100, 103-04. Omitting this clause rendered the information fatally defective because no actus reus, entering or remaining unlawfully, was alleged and the wrong mens rea, “intent to enter or remain unlawfully,” was alleged. Even under a liberal construction of the information, the information fails to allege all the essential elements of burglary in the second degree. Dismissal of the burglary convictions, without prejudice to refile, is therefore the appropriate remedy.

E. CONCLUSION

Based on the foregoing, the State respectfully requests that Barberi’s convictions for burglary in the second degree be dismissed without prejudice and the matter remanded for resentencing on the bail jumping conviction.

¹ RCW 9A.56.030 provides: “A person is guilty of burglary in the second degree if, with **intent to commit a crime against a person or property therein, he enters or remains unlawfully** in a building other than a vehicle or a dwelling.” RCW 9A.56.030(1).

Respectfully submitted this 9th day of February, 2010.


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CERTIFICATE

I certify that on this date I placed in the mail a properly stamped and addressed envelope, or caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Respondent/
Cross-Appellant's attorney, Lila J. Silverstein,
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Legal Assistant

02/10/2010
Date