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NO. 69633-5-I

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

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2013 MAR 21 PM 4:32

REC'D  
MAR 21 2013  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

BILLY MOORE,

Appellant.

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

The Honorable Lori K. Smith, Judge

BRIEF OF APPELLANT

JENNIFER M. WINKLER  
Attorney for Appellant

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**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENT OF ERROR</u> .....	1
<u>Issue Pertaining to Assignment of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
C. <u>ARGUMENT</u> .....	2
THE INFORMATION OMITTED AN ESSENTIAL ELEMENT OF THE CRIME OF ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE. ....	2
a. <u>Applicable law</u> .....	2
b. <u>The charging document failed to notify Moore of an essential         element of the crime.</u> .....	3
D. <u>CONCLUSION</u> .....	6

**TABLE OF AUTHORITIES (CONT'D)**

Page

WASHINGTON CASES

State v. Johnson  
119 Wn.2d 143, 829 P.2d 1078 (1992)..... 2

State v. Kjorsvik  
117 Wn.2d 93, 812 P.2d 86 (1991)..... 2, 3, 5

State v. Leach  
113 Wn.2d 679, 782 P.2d 552 (1989)..... 3

State v. McCarty  
140 Wn.2d 420, 998 P.2d 296 (2000)..... 3, 5

State v. Naillieux  
158 Wn. App. 630, 241 P.3d 1280 (2010)..... 3, 4

FEDERAL CASES

United States v. Cina  
699 F.2d 853 (7th Cir.)  
cert. denied, 64 U.S. 991 (1983)..... 2

RULES, STATUTES AND OTHER AUTHORITIES

11A Washington Practice: Washington Pattern Jury Instructions:  
Criminal 94.02 (3rd ed. 2008) ..... 4

Former RCW 46.61.024 (1982)..... 5

Laws of 2003, ch. 101, §1..... 5

RCW 46.61.024 ..... 3

U.S. Const. amend. VI..... 2

Wash. Const. art. I, § 22 ..... 2

A. ASSIGNMENT OF ERROR

The information omitted an essential element of the crime of attempting to elude a pursuing police vehicle, in violation of the appellant's right to due process.

Issue Pertaining to Assignment of Error

Where the information omitted an essential element of the crime of attempting to elude a pursuing police vehicle, is reversal and dismissal of that charge required?

B. STATEMENT OF THE CASE<sup>1</sup>

The State charged Billy Moore with possession of a stolen vehicle (count one), attempting to elude a pursuing police vehicle (count two), and possession of methamphetamine (count three) for an incident occurring March 14, 2012. CP 1-6, 13-14.

Moore waived his right to a jury. CP 15, 20-23; 2RP 5-6. The judge found Moore guilty as charged, sentenced him to the high end of the standard range on each count, and ran the terms concurrently.<sup>2</sup> CP 20-23, 98-106; 4RP 43-49.

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<sup>1</sup> This brief refers to the verbatim report as follows: 1RP – 10/16/12; 2RP – 10/17/12; 3RP – 10/18/12; 4RP – 10/22/12; and 5RP – 11/2/12.

<sup>2</sup> The court declined the State's request to impose an exceptional sentence upward by running the sentences consecutively. 5RP 11.

Moore timely appeals. CP 108.

C. ARGUMENT

THE INFORMATION OMITTED AN ESSENTIAL ELEMENT OF THE CRIME OF ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE.

Even under a liberal reading, the charging document failed to notify Moore that an attempt to elude a pursuing police vehicle required that the police signal to stop be made by “hand, voice, emergency light, or siren.” Because the information omitted an essential element of the crime, this Court should reverse and dismiss count two.

a. Applicable law

A charging document must include all essential elements of a crime. U.S. Const. amend. VI; Const. art. I, § 22 (amend. 10);<sup>3</sup> State v. Kjorsvik, 117 Wn.2d 93, 108, 812 P.2d 86 (1991). 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,

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<sup>3</sup> 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.”

998 P.2d 296 (2000); State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). Citation to the correct statute, even if the statute contains each element, is insufficient. State v. Naillieux, 158 Wn. App. 630, 645, 241 P.3d 1280 (2010).

Where, as here, the adequacy of an information is challenged for the first time on appeal, this Court engages in a two-pronged inquiry: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). If the necessary elements are neither found nor fairly implied in the charging document, this Court presumes prejudice and reverses without further inquiry. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

- b. The charging document failed to notify Moore of an essential element of the crime.

RCW 46.61.024(1) criminalizes an attempt to elude a pursuing police vehicle. That statute provides in part that:

Any driver of a motor vehicle who willfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer

may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.

That the driver be signaled to stop by a uniformed police officer using “hand, voice, emergency light, or siren” is an element of the crime. Id.; see also 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 94.02, at 332 (3rd ed. 2008).

Here, count two of the information alleged

That . . . Moore, on or about March 14, 2012, while driving a motor vehicle and having been given *a visual and audible signal* by a uniformed police officer to bring the vehicle to a stop, willfully failed and refused to immediately stop and drove the vehicle in a reckless manner while attempting to elude a pursuing police vehicle that was equipped with lights and sirens. . . .

CP 14 (emphasis added).

The information therefore omitted the requirement the signal to stop be accomplished by “hand, voice, emergency light, or siren.” This provision clearly limits what “visual [or] audible signal” an officer may use. For example, blowing a whistle would not suffice for purposes of this statute. But nothing about the information informed Moore of that limitation.

In Naillieux, for example, the Court held the requirement that the pursuing police vehicle be equipped with “lights and sirens” could not be inferred from the charging document, even though it included a

requirement that the vehicle be “appropriately marked showing it to be an official police vehicle.”<sup>4</sup> 158 Wn. App. at 645. The deficiency here is similar in that it involves substitution of a general term for the very specific requirements of the statute. As in Naillieux, reversal is required. Id.

The State is required to provide notice of the elements of the crime so an accused can properly prepare his case. Kjorsvik, 117 Wn.2d at 101-02. Because the missing element cannot be fairly implied from the language in the information, a showing of prejudice is not required. Such constitutionally inadequate notice requires reversal and dismissal without prejudice. McCarty, 140 Wn.2d at 425-26, 428.

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<sup>4</sup> This language was from the pre-2003 version of the eluding statute. Former RCW 46.61.024 (1982); Laws of 2003, ch. 101, §1.

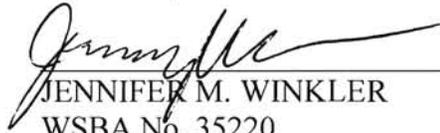
D. CONCLUSION

This Court should reverse and dismiss the eluding charge because the information omits an essential element of the offense.

DATED this 21<sup>ST</sup> day of March, 2013.

Respectfully submitted,

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Respondent,	)	
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v.	)	COA NO. 69633-5-1
	)	
BILLY MOORE,	)	
	)	
Appellant.	)	

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**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 21<sup>ST</sup> DAY OF MARCH 2013, 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 AND/OR VIA EMAIL.

[X] BILLY MOORE  
DOC NO. 889580  
CLALLAM BAY CORRECTIONS CENTER  
1830 EAGLE CREST WAY  
CLALLAM BAY, WA 99326

**SIGNED** IN SEATTLE WASHINGTON, THIS 21<sup>ST</sup> DAY OF MARCH 2013.

X *Patrick Mayovsky*

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