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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 38553-8-II
COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BEAU E. NUGENT,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Toni A. Sheldon, Trial Court Judge
Cause No. 08-1-00304-3

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in giving Instruction No. 18, the to-convict instruction, as it is an inaccurate statement of the law that relieved the State of its burden of proof of all the essential elements of crime of theft of a motor vehicle as charged in Count II.
2. The trial court erred in allowing Nugent to be represented by counsel who provided ineffective assistance in failing to object to instruction No. 18 as it is an inaccurate statement of the law that relieved the State of its burden of proof on all of the essential elements of the crime of theft of motor vehicle as charged in Count II.
3. The trial court erred in allowing Nugent to be found guilty of theft of a motor vehicle (Count II) where the information was defective in that it failed to allege all the essential elements of the crime.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in giving Instruction No. 18, the “to convict” instruction, when the jurors were given an accurate statement of the law and all the essential elements of RCW 9A.56.065-Theft of motor vehicle?
2. Did Nugent receive ineffective assistance of counsel when his attorney did not object to Instruction No. 18, the “to convict” instruction, when doing so would have been meritless?
3. Was Nugent improperly found guilty of theft of a motor vehicle when the amended information contained all the essential elements of RCW 9A.56.065?

C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as “RP.” The Clerk’s Papers shall be referred to as “CP.” The Appellant’s Brief shall be referred to as “AB.”

D. STATEMENT OF THE CASE

1 & 2. Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts Nugent's recitation of the procedural history and facts.

3. Summary of Argument

The trial court did not err in giving Instruction No. 18, the "to convict" instruction, because it contained an accurate statement of the law and all the essential elements of RCW 9A.56.065-Theft of motor vehicle. Additionally, the jurors were told through Instruction No. 1 that they should consider the instructions as a whole and to not place undue emphasis on any particular instruction.

Immediately preceding Instruction No. 18 for theft of motor vehicle, the jurors also had the following definitions provided for them: "vehicle" in No. 8, "willful" in Nos. 9 and 13, "knowledge" in No. 10, "intent" in Nos. 11 and 17, "theft of motor vehicle" in No. 15 and "theft" in No. 16. CP 21.4. When read as a complete set the jurors were, once again, properly informed of the controlling law, and the State was not relieved of its burden of proving all the essential elements of RCW 9A.56.065.

Nugent likewise did not receive ineffective assistance of counsel when his attorney did not object to Instruction No. 18, the "to convict"

instruction, because the jury was properly instructed. An defense objection, given the instructions as a whole, would have been meritless.

Lastly, Nugent was not improperly found guilty of theft of a motor vehicle because the amended information contained all the essential elements of RCW 9A.56.065. Simply phrased, this statute reads, “A person is guilty of theft of a motor vehicle if he or she commits theft of a motor vehicle.” Under the “liberal interpretation” test of Kjorsvik, Nugent was provided with ample opportunity in which to prepare a defense to this charge involving this single vehicle.

Error did not occur in Nugent’s case, and the State respectfully requests the Court to affirm his judgement and sentence as being complete and correct.

E. ARGUMENT

1. THE TRIAL COURT DID NOT ERR IN GIVING INSTRUCTION NO. 18 THE “TO CONVICT” INSTRUCTION BECAUSE IT CONTAINED AN ACCURATE STATEMENT OF THE LAW AND ALL THE ESSENTIAL ELEMENTS OF RCW 9A.56.065-THEFT OF MOTOR VEHICLE.

The trial court did not err in giving Instruction No. 18, the “to convict” instruction, because it contained an accurate statement of the law and all the essential elements of RCW 9A.56.065-Theft of motor vehicle.

Jury instructions challenged on appeal are reviewed de novo. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). The effect of a particular phrase in an instruction is examined by considering the instructions as a whole and reading challenged portions in the context of all the instructions given. Pirtle, 127 Wn.2d at 656. Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law. State v. Riley, 137 Wn.2d 904, 908-909, 976 P.2d 624 (1999). Read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). The jury is presumed to follow the instructions of the court. State v. Grisby, 97 Wash.2d 493, 499, 647 P.2d 6 (1982).

While Nugent stresses that WPIC 70.26-Theft of Motor Vehicle-Elements, should control, nowhere in RCW 9A.56.065 do the elements of “wrongfully obtained or exerted unauthorized control” or “intended to deprive” appear. AB 6. These instructions also pass muster when read as a whole, because they properly informed the jurors of the applicable law.

Starting with the first sentence of Instruction No. 1, the trial court properly instructed the jury by stating, “[i]t is your duty to determine which facts have been proved in this case from the evidence produced in

court.” CP 21.4. On page 1 of Instruction No. 1, the jurors were also specifically informed that “[y]ou should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.” CP 21.4 Following these general instructions, the jury was given definitions for “vehicle” in No. 8, “willful” in Nos. 9 and 13, “knowledge” in No. 10, “intent” in Nos. 11 and 17, “theft of motor vehicle” in No. 15 and “theft” in No. 16. CP 21.4. On its face however, Instruction No. 18 properly instructed the jury on the relevant law.

2. NUGENT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY DID NOT OBJECT TO INSTRUCTION NO. 18 THE “TO CONVICT” INSTRUCTION BECAUSE SUCH AN OBJECTION WOULD HAVE BEEN MERITLESS.

Nugent did not receive ineffective assistance of counsel when his attorney did not object to Instruction No. 18, the “to convict” instruction, because such an objection would have been meritless.

To establish ineffective assistance of counsel, a defendant must show that: (1) his counsel’s performance was deficient; and (2) the deficient performance resulted in prejudice. State v. Walker, 143 Wash.App. 880, 890, 181 P.3d 31 (2008); see Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Deficient performance is performance below an objective standard of reasonableness based on consideration of all the circumstances. State v. Rodriguez, 121 Wash.App. 180, 184, 87 P.3d 1201 (2004). Prejudice means that there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. State v. McFarland, 127 Wash.2d 322, 334-335, 899 P.2d 1251 (1995). Competency of counsel will be determined upon the entire record. State v. Gilmore, 76 Wn.2d 293, 297, 456 P.2d 344 (1969). Effective assistance of counsel does not mean successful assistance of counsel. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

Neither prong of Strickland is satisfied in Nugent's case regarding any lack of objection to Instruction No. 18, because the instruction contained all the essential elements of RCW 9A.56.065. That counsel for Nugent was unsuccessful in earning an acquittal for his client on Count II- Theft of motor vehicle, does not mean that Nugent was denied effective assistance. Based on consideration of all the circumstances, there is nothing in the record to show that the performance of Nugent's court-appointed attorney was anything but effective, albeit unsuccessful.

3. NUGENT WAS NOT IMPROPERLY FOUND GUILTY OF THEFT OF MOTOR VEHICLE BECAUSE THE AMENDED INFORMATION CONTAINED ALL THE ESSENTIAL ELEMENTS OF RCW 9A.56.065.

Nugent was not improperly found guilty of theft of motor vehicle because the amended information contained all the essential elements of RCW 9A.56.065.

Under article I, section 22 of the Washington Constitution, “the accused shall have the right...to demand the nature and cause of the accusation against him.” State v. Berrier, 143 Wash.App. 547, 553-554, 178 P.3d 1064 (2008). This requires that “[a] criminal defendant is to be provided with notice of all charged crimes.” State v. Schaffer, 120 Wash.2d 616, 619, 845 P.2d 281 (1993).

Our state and federal constitutions require only that a criminal defendant be provided notice of the charges sufficient to allow the defendant to prepare a defense. State v. Recuenco, 163 Wash.2d 428, 434, 180 P.3d 1276 (2008); see State v. Kjorsvik, 117 Wash.2d 93, 97, 812 P.2d 86 (1991).

Although a defendant may challenge the sufficiency of the information for the first time on appeal, the document is liberally construed in favor of its validity. State v. Laramie, 141 Wash.App. 332, 337, 169 P.3d 859 (2007). In determining the validity of an information, a

two-prong test is applied: (1) whether the necessary facts appear in any form, or by fair construction can be found in the charging document; and if so, (2) whether the defendant nonetheless suffered actual prejudice as a result of the inartful, vague or ambiguous charging language. Laramie, 141 Wash.App. at 338.

If the necessary elements, however, are not found or fairly implied, prejudice is presumed and reversal occurs. State v. McCarty, 140 Wash.2d 420, 425, 998 P.2d 296 (2006). Such liberal construction prevents what has been described as “sandbagging,” insofar as it removes any incentive to refrain from challenging a defective information before or during trial, when a successful objection would result only in an amendment to the information. Laramie, 141 Wash.App. at 338.

Moreover, it reinforces the “primary goal” of the essential elements rule, which is to provide constitutionally mandated notice to the defendant of the charges against which he or she must be prepared to defend. State v. Davis, 119 Wash.2d 657, 661, 835 P.2d 1039 (1992). The goal of notice is met where a fair, commonsense construction of the charging document “would reasonably apprise an accused of the elements of the crime charged.” Laramie, 141 Wash.App. at 338.

It has never been necessary to use the exact words of a statute in a charging document, as it is sufficient if words conveying the same

meaning and import are used. Kjorsvik, 117 Wash.2d at 108. This same rule applies to nonstatutory elements.

Nugent's argument that his information was defective is without merit, because it contains all the essential elements of RCW 9A.56.065.

As that statute reads:

A person is guilty of theft of a motor vehicle if he or she commits theft of a motor vehicle.

In the State's amended information that was filed on September 25, 2008, the charging language in Count II states:

In the County of Mason, State of Washington, on or about the 12th day of July, 2008, the above-named Defendant, BEAU E. NUGENT, did commit THEFT OF A MOTOR VEHICLE, a Class B Felony, in that said defendant did commit theft of a motor vehicle...CP 21.

Leaving nothing to chance, the State further alleged that Nugent committed the theft of:

"...a 1994 Honda Accord, Oregon License # CK60155, contrary to RCW 9A.56.065. CP 21.

Because Nugent had been on notice since July 16, 2008, that he had been charged under RCW 9A.56.068(1) with Possession of Stolen Vehicle involving the exact same car, he had more than ample notice in which to prepare a defense regarding a possession or theft charge.

Nugent's argument that the theft of motor vehicle charge is defective because it did not address whether he "knowingly" or "intended"

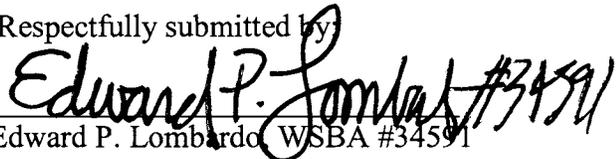
to steal it is without merit, because those elements are not included anywhere in the statute. AB 11; RCW 9A.56.065. Even if Nugent's argument had merit, the instructions, when read as whole, included definitions for "vehicle" in No. 8, "willful" in Nos. 9 and 13, "knowledge" in No. 10, "intent" in Nos. 11 and 17, "theft of motor vehicle" in No. 15 and "theft" in No. 16. CP 21.4. Count II of the amended information in Nugent's case, however, contained all the essential elements of RCW 9A.56.065, and error did not occur.

F. CONCLUSION

The State respectfully requests that the judgment and sentence of the trial court be affirmed.

Dated this 3RD day of SEPTEMBER, 2009

Respectfully submitted by

Edward P. Lombardo #34591

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Deputy Prosecuting Attorney for Respondent
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Mason County, WA

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

STATE OF WASHINGTON,)	
)	No. 38553-8-II
Respondent,)	
)	DECLARATION OF
vs.)	FILING/MAILING
)	PROOF OF SERVICE
BEAU E. NUGENT,)	
)	
Appellant,)	
_____)	

I, EDWARD P. LOMBARDO, declare and state as follows:

On THURSDAY, SEPTEMBER 3, 2009, I deposited in the U.S.

Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached, BRIEF OF RESPONDENT, to:

Patricia A. Pethick
PO Box 7269
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STATE OF WASHINGTON
BY *EW*
DEPUTY

I, EDWARD P. LOMBARDO, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 3RD day of SEPTEMBER, 2009, at Shelton, Washington.

Edward P. Lombardo #34591

Edward P. Lombardo, WSBA #34591