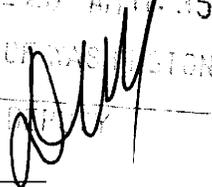


NO. 38769-7-II  
COURT OF APPEALS, DIVISION II

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DIVISION II  
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STATE OF WASHINGTON  
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STATE OF WASHINGTON,

Respondent

vs.

WAYNE R. KNAPP,

Appellant.

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BRIEF OF APPELLANT

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APPEAL FROM THE SUPERIOR COURT FOR  
THURSTON COUNTY  
The Honorable Chris Wickham, Judge  
Cause No. 08-1-01755-2

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing Knapp to be found guilty of conspiracy to commit robbery in the first degree (Count I) where the information was defective in that it failed to allege all the essential elements of the crime.
2. The trial court erred in allowing Knapp, in violation of double jeopardy principles, to be found guilty of conspiracy to commit robbery in the first degree (Count I) requiring the use of a firearm as an element and then imposing a firearm sentence enhancement.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in allowing Knapp to be found guilty of conspiracy to commit robbery in the first degree (Count I) where the information was defective in that it failed to allege all the essential elements of the crime? [Assignment of Error No. 1].
2. Whether the trial court erred in allowing Knapp, in violation of double jeopardy principles, to be found guilty of conspiracy to commit robbery in the first degree (Count I) requiring the use of a firearm as an element and then imposing a firearm sentence enhancement? [Assignment of Error No. 2].

C. STATEMENT OF THE CASE

1. Procedure

Wayne R. Knapp (Knapp) was charged by second amended information filed in Thurston County Superior Court with one count of conspiracy to commit robbery in the first degree (Count I), one count of unlawful possession of a firearm in the first degree (Count II), and one count of unlawful possession of a controlled substance (Count III). [CP

14-15]. Count I also included a sentence enhancement allegation charging that the crime was committed while armed with a firearm. [CP 14-15].

Prior to trial, no motions regarding CrR 3.5 or CrR 3.6 were made or heard. Knapp was tried by a jury, the Honorable Chris Wickham presiding. Knapp entered a stipulation admitting that he “had previously been convicted of a serious offense, Burglary in the Second Degree.” [CP 16; Vol. II RP 216]. Knapp had no objections and took no exceptions to the instructions. [CP 23-49; Vol. III RP 257-260]. The jury found Knapp guilty on Count I (conspiracy to commit robbery in the first degree) entering a special verdict finding that the crime was committed while armed with a firearm; guilty of Count II (unlawful possession of a firearm in the first degree); and not guilty of Count III (unlawful possession of a controlled substance). [CP 17, 18, 50, 51; Vol. III RP 320-326].

The court sentenced Knapp to 120-months on Count I (84-months for the underlying crime plus 36-months for the firearm enhancement) and 101-months on Count II, and after finding substantial and compelling reasons to impose an exceptional sentence (Knapp’s high offender score of 23 resulting in his actions going unpunished pursuant to State v. Alvarado, 164 Wn.2d 556, 192 P.3d 345 (2008)) ordered that the sentences be served consecutively for a total sentence of 221-months. [CP 52-74, 76-86, 87-98, 102, 103-107; 1-8-09 RP 17-22].

Timely notice of appeal was filed on January 8, 2009. [CP 99].

This appeal follows.

2. Facts

On September 26, 2008, at approximately 10 PM, Phyllis Whalen (Whalen) was at Irish Alana beauty salon located just around the corner from Pellegrino's Restaurant doing her cleaning job when she noticed two vehicles, a blue truck and a gray car, pull into a back lot and douse their lights. [Vol. I RP 22-26, 39]. Whalen thought it might be the husband of Carmen Berg (Berg), a hairdresser at the salon, coming to pick Berg up after work. [Vol. I RP 23, 26-27, 38-39]. It wasn't Berg's husband. [Vol. I RP 26-27, 38-39]. Berg went out to the garbage can to empty the salon's trash and to have a cigarette with Whalen accompanying her for Berg's safety. [Vol. I RP 29-30, 39-42]. Berg saw a man in the truck wearing a ski mask and when the man saw her he took off the ski mask and slid down out of sight. [Vol. I RP 30, 39-42]. Whalen told Berg to call 911, which she did. [Vol. I RP 30, 39-42]. Whalen and Berg stayed inside the salon while the police arrived and investigated ultimately detaining two men. [Vol. I RP 31-33, 39-43]. At trial, Berg identified Knapp as the man she saw in the truck removing the ski mask after admitting that his appearance had changed from the night in question to trial. [Vol. I RP 43-44].

Tumwater Police Officers Ty Hollinger (Hollinger) and Carlos Quiles (Quiles) were dispatched to Berg's 911 call. [Vol. I RP 63-64; Vol. II RP 146-147]. Hollinger arrived first, saw the two vehicles, began looking around, noticed a man emerging from a nearby alley, and contacted the man. [Vol. I RP 65-71]. The man was identified as Willard Derouen (Derouen), who explained that he was going to Pellergrino's Restaurant, but couldn't find parking. [Vol. I RP 71-73]. Derouen said he was alone and denied any knowledge about the blue truck but admitted the gray car was his. [Vol. I RP 73-77]. Eventually found a pair of gloves in Derouen's pocket. [Vol. II RP 134-135].

Quiles, who had arrived and gone to search the alley where Derouen had emerged and returned with another man whom both he and Hollinger knew to be Knapp. [Vol. I RP 82-83; Vol. II RP 150-154]. Knapp denied any knowledge about the blue truck, but explained that he was in the area looking for his friend whom he identified as Derouen. [Vol. I RP 88-89; Vol. II RP 154-155]. The officers ran the license plate of the truck and determined the true owner as John Stanfield (Stanfield). [Vol. I RP 92, 107-108]. Stanfield was contacted, admitted that he owned the truck, but that his son or his son's friend, Knapp, maybe driving the truck. [Vol. I RP 92-95, 107-109]. He gave the officers permission to search his truck and inside the officer's found Knapp's identification as

well as suspected methamphetamine in the console. [Vol. I RP 94-104, 110].

Quiles went back down the alley where both Knapp and Derouen had been seen and found that screens off a number of businesses' windows. [Vol. I RP 85; Vol. II RP 162-166]. More importantly, where he had first seen Knapp, Quiles found another pair of gloves, two ski masks, and an unloaded gun. [Vol. II RP 136, 173-178].

Bernadette Pellegrino (Pellegrino), the manager of her parents' Pellegrino's Restaurant, testified that Derouen was one of her former employees. [Vol. I RP 11-12]. About a week before September 26, 2008, Derouen was fired/quit based on his failure to appear for scheduled shifts in the restaurant. [Vol. I RP 12-13]. Pellegrino also testified that Derouen was aware that the restaurant closed at approximately 10 PM at which time the cash receipts were counted and put in the safe. [Vol. I RP 13-15]. On September 26, 2008, as she was walked to her car by a cook, Pellegrino noticed police in the area with Derouen, and was told what had just occurred; she informed the police that Derouen was a former employee. [Vol. I RP 16-17]. Finally, Pellegrino testified that she recognized Knapp as someone who had come into the restaurant a couple of times with Derouen to eat before Derouen was fired. [Vol. I RP 17-18].

Derouen testified, after accepting a plea agreement from the State, that he had agreed with Knapp to rob Pellegrino's Restaurant, his former employer, but that they had gotten caught on September 26, 2008, before they could do so. [Vol. II RP 222-225, 233-236]. Derouen further testified that the gun found at the scene was Knapp's gun and that it was Knapp who had supplied the ski masks. [Vol. II RP 225-226, 228-231]. Derouen also admitted that he and Knapp had tried to rob Pellegrino's Restaurant the day before September 26, 2008, but they had not gone through with the plan that time. [Vol. II RP 227-228].

Knapp did not testify.

D. ARGUMENT

- (1) A CONVICTION FOR CONSPIRACY TO COMMIT ROBBERY IN THE FIRST DEGREE (COUNT I) PURSUANT TO AN INFORMATION THAT FAILS TO ALLEGE ALL OF THE ELEMENTS OF THE OFFENSE MUST BE REVERSED AND DISMISSED.

The constitutional right of a person to be informed of the nature and cause of the accusation against him or her requires that every material element of the offense be charged with definiteness and certainty. 2 C. Torcia, Wharton on Criminal Procedure Section 238, at 69 (13th ed. 1990). In Washington, the information must include the essential common law elements, as well as the statutory elements, of the crime charged in order to appraise the accused of the nature of the charge. Sixth

Amendment; Const. Art. 1, Section 22 (amend. 10); CrR 2.1(b); State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991). Charging documents that fail to set forth the essential elements of a crime are constitutionally defective and require dismissal, regardless of whether the defendant has shown prejudice. State v. Hopper, 118 Wn.2d 151, 155, 822 P.2d 775 (1992). If, as here, the sufficiency of the information is not challenged until after the verdict, the information “will be more liberally construed in favor of validity....” State v. Kjorsvik, 117 Wn.2d at 102. The test for the sufficiency of charging documents challenged for the first time on appeal is as follows:

(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 at 105-06.

It is not fatal to an information that the exact words of the statute are not used; it is instead sufficient “to use words conveying the same meaning and import as the statutory language.” State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). The information must, however, “state the acts constituting the offense in ordinary and concise language....” State v. Royse, 66 Wn.2d 552, 557, 403 P.2d 838 (1965).

The question “is whether the words would reasonably appraise an accused of the elements of the crime charged.” State v. Kjorsvik, 117 Wn.2d at 109.

The primary purpose (of a charging document) is to give notice to an accused so a defense can be prepared. (citation omitted) There are two aspects of this notice function involved in a charging document: (1) the description (elements) of the crime charged; and (2) a description of the specific conduct of the defendant which allegedly constituted the crime.

Auburn v. Brooke, 119 Wn.2d 623, 629-30, 836 P.2d 212 (1992).

RCW 9A.28.040 provides, in relevant part:

(1) A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuant of such agreement.

[Emphasis added].

However, here, the second amended information charging Knapp with the offense of conspiracy to commit robbery in the first degree (Count I) did not allege this element—that Knapp agreed with one or more persons to commit robbery in the first degree—and states:

COUNT I—CONSPIRACY TO COMMIT ROBBERY IN THE FIRST DEGREE, WHILE ARMED WITH A DEADLY WEAPON—RCW 9A.56.200(1), RCW 9.94A.602 AND RCW 9.94A.533(3)—CLASS B FELONY:

In that the defendant, WAYNE RICHARD KNAPP in the State of Washington, on or about September 26, 2008, acting with intent that conduct constituting the crime of Robbery in the First Degree be performed, to wit: the unlawful taking personal property from a person, against such person's will, by use or threatened use of immediate force, violence, or fear of injury to such person or their property, or the property of another, with the intent to commit theft of the property, and in the commission of or immediate flight therefrom the accused was armed with a deadly weapon, and he did take a substantial step toward the commission of this crime. It is further alleged that during the commission of this offense, the defendant or an accomplice was armed with a deadly weapon, to wit: a firearm.

[CP 46-47].

This information failed to apprise Knapp of the nature of the charge as to Count I—conspiracy to commit robbery in the first degree. It did not allege that he agreed with one or more persons to commit the crime. “(S)ince both charging documents and jury instructions must identify the essential elements of the crime for which the defendant is charged [information] and tried [jury instructions](,)” State v. McCarty, 140 Wn.2d 420, 426 n.1, 998 P.2d 296 (2000) (a case in which our State Supreme Court reversed the conviction where the information charging conspiracy to deliver a controlled substance omitted the essential element of an agreement by the required number of persons); the information is defective, and the conviction obtained on this charge must be reversed and dismissed. State v. Kitchen, 61 Wn. App. 911, 812 P.2d 888 (1991).

Knapp need not show prejudice, since Kjorsvik calls for a review of prejudice only if the “liberal interpretation” upholds the validity of the information. *See State v. Kjorsvik*, 117 Wn.2d at 105-06. This court should reverse Knapp’s conviction in Count II of theft of a motor vehicle.

(2) DOUBLE JEOPARDY PRINCIPLES WERE VIOLATED WHERE KNAPP’S USE OF A FIREARM WAS BOTH AN ELEMENT OF CONSPIRACY TO COMMIT ROBBERY IN THE FIRST DEGREE (COUNT I) AND A BASIS FOR IMPOSING A FIREARM SENTENCE ENHANCEMENT.

In the instant case, Knapp was convicted in Count I of conspiracy to commit robbery in the first degree (requiring the use of a deadly weapon—a firearm under RCW 9A.56.200(1)(a)) [CP 14-15, 17], the jury returned a special verdict finding that the crime was committed while Knapp was armed with that deadly weapon and specifically found that to be a firearm [CP 51], and the sentence imposed on Count I including a firearm sentence enhancement. [CP 87-98].

It has long been the law that sentence enhancements for offenses committed with weapons do not violate double jeopardy even where the use of the weapon is an element of the crime. State v. Pentland, 43 Wn. App. 808, 811-12, 719 P.2d 605 (1986). This principle has consistently been upheld. *See State v. Nguyen*, 134 Wn. App. 863, 142 P.3d 1117

(2006), *review denied* 163 Wn.2d 1053, 187 P.2d 752 (2008), *cert. denied* (Dec. 1, 2008); State v. Kelly, 146 Wn. App. 370, 189 P.3d 853 (2008). However, the State Supreme Court on March 3, 2009, accepted review of Kelly on the issue of whether double jeopardy principles are violated when a defendant's use of a weapon is both an element of the crime and the basis for imposing a weapon sentence enhancement. [S.C. No. 82111-9]. In light of this and out of abundance of caution, Knapp asserts that under Art. 1 sec. 9 of the Washington Constitution and the Fifth Amendment to the United States Constitution, the double jeopardy prohibition against multiple punishments prevents him from being sentenced for the crime of conspiracy to commit robbery in the first degree (Count I) which crime includes as an element a deadly weapon--firearm, and also being sentenced to a firearm sentence enhancement. *See Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); Sattazahn v. Pennsylvania, 537 U.S. 101, 111-12, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003).

E. CONCLUSION

Based on the above, Knapp respectfully requests this court to reverse and dismiss his conviction for conspiracy to commit robbery in the first degree and/or remand for resentencing without imposition of the firearm sentence enhancement.

DATED this 17<sup>th</sup> day of July 2009.

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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 17<sup>th</sup> day of July 2009, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

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09 JUL 20 AM 11:35  
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COURT OF APPEALS  
DIVISION II  
BY \_\_\_\_\_  
DENNY