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NO. 52092-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JEFFREY KAZULIN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Phillip K. Sorensen, Judge

No. 17-1-04489-1

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether defendant's argument was waived where no bill of particulars was requested at trial, and even if the court reaches the merits of defendant's claim, whether the information was constitutionally sufficient?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On November 27, 2017, the Pierce County Prosecuting Attorney charged Jeffrey Kazulin, hereinafter, "defendant," with one count of Unlawful Possession of a Stolen Vehicle by information. CP 1. The information stated,

That JEFFREY JAY KAZULIN, in the State of Washington, on or about the 22nd day of November, 2017, did unlawfully and feloniously knowingly possess a stolen motor vehicle, knowing that it had been stolen and did withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto, contrary to RCW 9A.56.068 and 9A.56.140, and against the peace and dignity of the State of Washington.

Id. Defendant did not object to the language of the information prior to or during trial. *See*, 6/18,19/18 RP.¹

The case proceeded to trial on June 19, 2018. 6/18,19/18 RP 15. The State presented three witnesses including Gary Wells, the owner of the stolen vehicle, and two Pierce County Sherriff's Deputies. *See*, 6/18,19/18 RP 18, 36, 51. The jury found defendant guilty of Possession of a Stolen Vehicle. 6/20,29/18 RP 164. Defendant timely appealed. CP 54.

2. FACTS

In November of 2017, Gary and Shirley Wells were “still in shock,” after witnessing the recent tragic death of their son. CP 2-3. The Wells were in the process of disposing of their son's property, when, on November 18, 2017, there was a knock at their front door. *Id.*, 6/18,19/18 RP 19. Phillip Wells (no relation to Gary and Shirley Wells) appeared, telling the Wells he was a friend of their son, expressing his condolences, and offering to help in any way he could. *Id.* The defendant was with Phillip.² 6/18,19/18 RP 19.

¹ The Verbatim Report of Proceedings is not consecutively paginated or volumized, so the State will refer to each volume by date.

² Because Gary and Phillip Wells share the same last name, but are of no relation, the State will refer to Phillip by his first name for clarity. No disrespect is intended.

The men expressed interest in a white Honda Civic that Gary Wells wanted to get rid of. *Id.* at 19-20. The Honda had belonged to his son, but was not running, so he wanted it out of his yard. *Id.* at 20. Gary Wells was busy that day, so he told the men to return the following Saturday. *Id.* When they returned, defendant expressed interest in another one of Gary Wells' vehicles, a 1999 Ford F-250 truck. *Id.* Phillip was not involved in the conversation about the truck. *Id.* at 28. At that time, Phillip was underneath the Honda working on it. *Id.*

The truck had a dead battery and had been sitting for a while. *Id.* at 20. Defendant was alone in the truck while Gary Wells went into his garage to get jumper cables. *Id.* at 20-21. Defendant sat in the driver's seat of the truck alone while Gary Wells used jumper cables to start it. *Id.* Defendant listened to the truck's engine momentarily, then Gary Wells shut the hood. *Id.* Defendant did not agree to purchase the truck. *Id.*, *Id.* at 29. Meanwhile, Phillip got the Honda running. *Id.* at 29. Phillip and defendant left with the Honda. *Id.*

Early the next morning, Gary Wells heard his dog barking. *Id.* at 30. When he got out of bed a couple of hours later and looked out the window, he noticed that his truck was missing. *Id.* at 21. Upon reviewing his security cameras, he saw someone ride up to the property on a bike, roll the truck to the street, start it, and drive away. *Id.* The person in the

video kept their head down, as if they knew the cameras were there above them. *Id.* at 22. Gary Wells subsequently noticed the keys to his truck were missing as well. *Id.*

Gary Wells reported his truck stolen to law enforcement. *Id.* at 23. On November 22, 2017, Tacoma Police Officer Timothy Caber found the stolen truck parked at a residence in Tacoma. *Id.* at 54. Shortly thereafter, defendant got in the truck and started driving away. *Id.* at 55. Officer Caber activated his emergency lights, and the truck pulled into a nearby yard. *Id.* at 58. The truck had been modified so the ignition could operate without a key. 6/18,19/18 RP 70. Defendant was arrested and charged with Possession of a Stolen Vehicle. CP 1.

C. ARGUMENT.

1. DEFENDANT'S ARGUMENT IS WAIVED WHERE NO BILL OF PARTICULARS WAS REQUESTED AT TRIAL, AND EVEN IF THE COURT REACHES THE MERITS OF DEFENDANT'S CLAIM, THE INFORMATION WAS CONSTITUTIONALLY SUFFICIENT.

A charging document must contain “[a]ll essential elements of a crime,” so as to give the defendant notice of the charges and allow the defendant to prepare a defense. *State v. Winings*, 126 Wn. App. 75, 84, 107 P.3d 141, 146 (2005) (citing *State v. Tresenriter*, 101 Wn. App. 486, 491, 4 P.3d 145 (2000)). A charging document must state essential facts to apprise defendant of charges against him; however, it may be construed to

include facts necessarily implied by allegations. *U.S. v. Broncheau*, 597 F.2d 1260 (9th Cir. 1979).

It is sufficient to charge the crime in the language of the statute if the statute defines the crime with certainty. *State v. Grant*, 89 Wn.2d 678, 686, 575 P.2d 210 (1978); *State v. Royse*, 66 Wn.2d 552, 556, 403 P.2d 838 (1965); *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590 (1974).

Courts review an information as a whole, according to common sense and including implied facts, to determine if the accused is reasonably apprised of the elements of the crime charged. *State v. Kjorsvik*, 117 Wn.2d 93, 105-08, 812 P.2d 86 (1991). If the information does include all essential elements, the defendant may prevail only if he can show the inartful or vague language in the charging document actually prejudiced him. *Kjorsvik*, 117 Wn.2d at 106.

- a. Defendant's argument is waived on appeal because he did not raise it below.

Washington courts consistently distinguish between charging documents that are constitutionally deficient because of the State's failure to allege each essential element of the crime charged and charging documents that are factually vague as to some other significant matter. *State v. Bonds*, 98 Wn.2d 1, 17, 653 P.2d 1024 (1982); *State v. Mason*,

170 Wn. App. 375, 385, 285 P.3d 154 (2012); *Winings*, 126 Wn. App. at 84; *Tresenriter*, 101 Wn. App. at 495.

The court in *Leach* clearly addressed this distinction in reaching its holding that the information there was constitutionally deficient, because it omitted an essential element of RCW 9A.88.010, that the victim was under 14 years of age. *State v. Leach*, 113 Wn.2d 679, 688-690, 782 P.2d 552, 557 (1989). The court stated, “a charging document which states the statutory elements of a crime, but is vague as to some other significant matter, may be corrected under a bill of particulars. A defendant may not challenge a charging document for ‘vagueness’ on appeal if no bill of particulars was requested at trial.” *Id.* at 687 (citing *State v. Holt*, 104 Wn.2d 315, 320, 704 P.2d 1189 (1985)); *Bonds*, 98 Wn.2d at 17; *See also*, *Winings*, 126 Wn. App. at 84; *Mason*, 170 Wn. App. at 385.

Where a defendant alleges that a charging document fails to describe the facts supporting the charge with great specificity, courts review the claim as a vagueness challenge. *Winings*, 126 Wn. App. at 85-86; *Bonds*, 98 Wn.2d at 17; *Tresenriter*, 101 Wn. App. at 495. Where a defendant is charged with possession of a stolen vehicle, as in this case, a claim of constitutional insufficiency based on an information failing to identify the vehicle or the owner of the vehicle is deemed a vagueness challenge, and cannot be raised on appeal if no bill of particulars was

requested. *State v. Tolman*, No. 46632-5-II, 2016 WL 6995552, at *7 (Wash. Ct. App. November 29, 2016) (unpublished).³

Here, defendant's argument is waived on appeal where he challenges the information as factually vague, because he failed to object to it and request a bill of particulars at trial. First of all, defendant's claim is a vagueness challenge, because he does not claim the information was missing an essential element of the offense, but merely claims the information omitted "critical facts," ie. "the nature or character of the motor vehicle." *See*, Brief of Appellant 4. Defendant concedes that the information contained all of the essential elements of the offense. *Id.*

Because defendant alleges the information failed to describe the facts with great specificity, his challenge goes to the vagueness of the document. *Winings*, 126 Wn. App. at 85-86; *Bonds*, 98 Wn.2d at 17; *Tresenriter*, 101 Wn. App. at 495. This exact challenge was raised in *Tolman*, where the court held that the defendant there made a vagueness challenge when he alleged the information charging him with possession of a stolen vehicle was insufficient, because it lacked facts about the vehicle, ie. the identifying characteristics or owner of the vehicle. 2016 WL

³ GR 14.1 allows citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013. The unpublished decision cited above has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

6995552, at *7. Defendant makes the same challenge here, as to the omission of facts related to the stolen vehicle, so his claim is similarly a vagueness challenge.

Defendant argues that Washington caselaw is adverse to federal caselaw on the matter of vagueness challenges to charging documents. Br. of App. 6. However, federal courts consistently hold that the remedy for a factually vague charging document is requesting a bill of particulars prior to or at trial. *Young v. United States*, 288 F.2d 398, 400 (D.C. Cir. 1961); *Barnard v. United States*, 16 F.2d 451, 453 (9th Cir. 1926); *Thomas v. United States*, 188 F.2d 6, 8 (8th Cir. 1951); *Alm v. United States*, 238 F.2d 604, 605 (8th Cir. 1956).

Similarly, federal caselaw is consistent with Washington caselaw, in that failing to object to defects in a charging document constitutes a waiver of that objection. *United States v. Lerma*, 657 F.2d 786, 790 (5th Cir. 1981); *United States v. Crowley*, 318 F.3d 401, 419 (2nd Cir. 2003); *Winings*, 126 Wn. App. at 84. For example, in *Barnard*, a motion for bill of particulars on the day of trial, a year after the plea was entered, was not timely made. 16 F.2d at 453.

Here, defendant did not object to the information or request a bill of particulars prior to or at trial, so his argument is waived on appeal. When a defendant challenges a charging document for factual vagueness,

the remedy is requesting a bill of particulars before or at trial, when the State still has the chance to correct the deficiency. *Winings*, 126 Wn. App. at 84; *Leach*, 113 Wn.2d at 687; *Tresenriter*, 101 Wn. App. at 495.

Defendant did not request a bill of particulars, so his argument is waived on appeal. Accordingly, this Court should affirm defendant's conviction.

- b. Even if the court reaches the merits of defendant's claim, the information was constitutionally sufficient, because it adequately informed defendant of the charge against him.

When a defendant challenges a charging document for the first time on appeal, courts liberally construe the document in favor of validity. *Winings*, 126 Wn. App. at 84; *Tresenriter*, 101 Wn. App. at 491. Liberal construction balances the defendant's right to notice against the risk of "sandbagging," that is, that a defendant might keep quiet about defects in the information only to challenge them after the State has rested and can no longer amend it. *Kjorsvik*, 117 Wn.2d at 104.

A charging document is constitutionally sufficient if it states each statutory element of the crime, even if it is vague as to some other matter significant to the defense. *Holt*, 104 Wn.2d at 320; *Bonds*, 98 Wn.2d at 16. It is sufficient to charge the crime in the language of the statute if the statute defines the crime with certainty. *Grant*, 89 Wn.2d at 686; *Royse*, 66 Wn.2d at 556; *Hamling*, 418 U.S. at 117. Where an information

charges possession of stolen property, it need not identify the property.

Tresenriter, 101 Wn. App. at 494-95.

First of all, the information in this case is constitutionally sufficient because it stated the essential elements of the offense, even if it was factually vague. *Holt*, 104 Wn.2d at 320; *Bonds*, 98 Wn.2d at 16. Defendant concedes that information contained all of the essential elements of the offense. Br. of App. 4. Accordingly, the information is constitutionally sufficient and adequately informed defendant of the charge against him.

Furthermore, the information here is not constitutionally deficient merely because it omits identifying factual information about the stolen vehicle. In cases involving theft of property, the information need not identify the stolen property. *Tresenriter*, 101 Wn. App. at 494-95; *Tolman*, 2016 WL 6995552, at *7. It is sufficient in an indictment for a statutory crime to charge the crime in the language of the statute if the statute defines the crime with certainty. *Grant*, 89 Wn.2d at 686.

For example, in *Porter*, a charging document using the statutory language and not identifying the vehicle, which was nearly identical to the information in this case, was held constitutionally sufficient. *State v. Porter*, 186 Wn.2d 85, 88, 375 P.3d 664 (2016). In that case, the information read as follows:

That CLIFFORD MELVIN PORTER, JR., in the State of Washington, on or about the 27th day of August, 2011, did unlawfully and feloniously knowingly possess a stolen motor vehicle, knowing that it had been stolen, contrary to RCW 9A.56.068 and 9A.56.140, and against the peace and dignity of the State of Washington.

Id. at 88. The court held that the information sufficiently articulated the essential elements of the crime for which Porter was charged, making further elaboration unnecessary. *Id.* at 92.

Here, the information used nearly the exact wording as that in *Porter*, and went further by stating that defendant “did withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.” CP 1. Accordingly, the information was constitutionally sufficient, because it adequately captured the essential elements of the offense, and great factual specificity as to the identity of the stolen vehicle was not required.

Furthermore, defendant’s claim fails because he fails to show that he was prejudiced by the language used in the information. Under the test set out in *Kjorsvik*, when a court considers a challenge to a charging document for the first time on appeal, and the essential elements are present in the document, the defendant must “show that he was nonetheless actually prejudiced by the inartful or vague language.” *Kjorsvik*, 117 Wn.2d at 105-06. The prejudice prong of the test may look beyond the face of the charging document to determine if the accused

actually received notice of the charges he or she must have been prepared to defend against. *Id.* at 106.

Defendant concedes that the essential elements were present in the information, but provides no argument for how he was actually prejudiced by the alleged factual deficiency. *See*, Br. of App. 2-8. Defendant was not prejudiced by a lack of notice, because he knew the identity of the stolen vehicle at all times during the trial. It was undisputed that defendant had gone to Gary Wells' home, expressed interest in his truck, and even sat in the driver's seat with access to the keys alone, the day before it was stolen. 6/18,19/18 RP 19-21. At no point before or during trial did defendant suggest he was unaware of the identity of the stolen vehicle or its owner. Defendant offers no evidence of prejudice to his trial preparation or conduct of the trial arising from the allegedly insufficient information.

Similarly, defendant fails to show how his defense would have differed had more factual information been included in the information. Defendant's defense was not that he never possessed Gary Wells' stolen truck. Defendant's defense was that he possessed the stolen truck, knowing it was Gary Wells' truck, but not knowing that it was stolen. 6/20, 29/18 RP 140-142. Defendant fails to argue how his defense could have been stronger or different had the information identified the truck or its owner. Accordingly, defendant was not prejudiced by the information

where there is no evidence that the greater factual specificity he seeks would have changed his defense at trial.

Defendant cites *Edwards v. United States* for the proposition that a charging document that includes “not a single word to indicate the nature, character, or value of the property” is “too vague and indefinite upon which to deprive one of his liberty.” 266 F. 848, 851 (4th Cir. 1920); Br. of App. 4. In that case, the information merely referenced “certain property of the United States” to describe stolen bales of hay. *Id.* That is not what happened here. The information here clearly indicated the nature and character of the property, a stolen motor vehicle. CP 1.

Citing *Valentine v. Konteh*, 395 F.3d 626, 631 (6th Cir. 2005), defendant argues the information here was insufficient to protect him against the risk of double jeopardy. Br. of App. 5. In that case, the information charged the defendant with 40 counts of 2 offenses over a 10 month charging period. *Valentine*, 395 F.3d at 629. Because each set of 20 counts were identically worded, the court held that defendant was deprived of protection against double jeopardy. *Id.* at 636. The same risk is not present in this case, because defendant was charged with one count of one offense on a singular specified date.

Consistent with Washington law, the information in this case was constitutionally sufficient, because it contained all of the essential

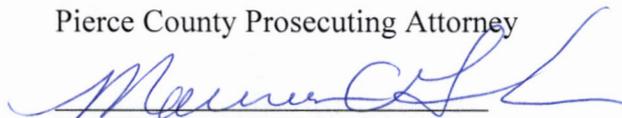
elements of the offense charged. *Holt*, 104 Wn.2d at 320; *Bonds*, 98 Wn.2d at 16; CP 1. Factual details as to the identity of the stolen truck were not required. *Tresenriter*, 101 Wn. App. at 494-95. Defendant fails to show that he was prejudiced by the factual omissions in the information, so his challenge to its sufficiency fails. *Kjorsvik*, 117 Wn.2d at 105-06. Accordingly, defendant's argument that the information inadequately informed him of the charge is without merit. This Court should affirm defendant's conviction.

D. CONCLUSION.

The State respectfully requests that this Court deny defendant's appeal. Even if this Court reaches the merits of defendant's claim, this Court should affirm defendant's conviction.

DATED: April 2, 2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney

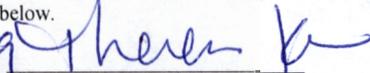


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4-21-19 

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PIERCE COUNTY PROSECUTING ATTORNEY

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