

29406-4-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RODNEY DUPRIE, APPELLANT

APPEAL FROM THE SUPERIOR COURT

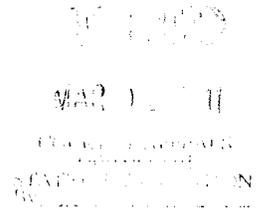
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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INDEX

APPELLANT’S ASSIGNMENTS OF ERROR.....1

ISSUES PRESENTED.....1

STATEMENT OF THE CASE.....2

ARGUMENT2

 A. DEFENDANT HAS NOT SHOWN THAT THE TRIAL COURT COMMITTED A MANIFEST ERROR WHICH QUALIFIES FOR REVIEW PURSUANT TO RAP 2.5(A)(3)2

 B. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING THE CHARGED CRIME OF POSSESSION OF A STOLEN MOTOR VEHICLE3

 1. The amended information properly notified defendant of the essential elements of the charged crime.....3

 2. The trial court properly instructed the jury with regard to the essential elements of the charged crime of Possession of a Stolen Vehicle6

 C. SUFFICIENT EVIDENCE SUPPORTED THE JURY’S VERDICT FINDING DEFENDANT GUILTY OF POSSESSION OF A STOLEN VEHICLE8

 D. THE TRIAL COURT CORRECTED THE JUDGMENT AND SENTENCE TO REFLECT DEFENDANT’S CONVICTION ON COUNT V, NOT IV11

CONCLUSION.....11

TABLE OF AUTHORITIES

WASHINGTON CASES

STATE V. CAMARILLO, 115 Wn.2d 60,
794 P.2d 850 (1990)..... 8

STATE V. DANA, 73 Wn.2d 533,
439 P.2d 403 (1968)..... 6

STATE V. DELMARTER, 94 Wn.2d 634,
618 P.2d 99 (1980)..... 8

STATE V. GOODMAN, 150 Wn.2d 774,
83 P.3d 410 (2004)..... 3, 4

STATE V. HENDRICKSON, 129 Wn.2d 61,
917 P.2d 563 (1996)..... 8

STATE V. JOHNSON, 124 Wn.2d 57,
873 P.2d 514 (1994)..... 7

STATE V. KJORSVIK, 117 Wn.2d 93,
812 P.2d 86 (1991)..... 3, 4

STATE V. KRONICH, 160 Wn.2d 893,
161 P.3d 982 (2007)..... 3

STATE V. MILLS, 154 Wn.2d 1,
109 P.3d 415 (2005)..... 6

STATE V. O'DONNELL, 142 Wn. App. 314,
174 P.3d 1205 (2007)..... 6

STATE V. PRADO, 144 Wn. App. 227,
181 P.3d 901 (2008)..... 6

STATE V. SCOTT, 110 Wn.2d 682,
757 P.2d 492 (1988)..... 2

STATE V. STEIN, 144 Wn.2d 236,
27 P.3d 184 (2001)..... 3

COURT RULES

RAP 2.5(a)(3)..... 2

I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The State failed to prove the essential elements of the crime of Possession of a Stolen Motor Vehicle beyond a reasonable doubt.
2. The essential elements instruction did not comport with the charging language set forth in the amended information.
3. Defendant was sentenced on Count IV, contrary to the jury verdict that defendant was guilty of Count V.

II.

ISSUES PRESENTED

1. Has defendant shown that the trial court committed a manifest error affecting a constitutional right?
2. Was there sufficient evidence to support the conviction of Possession of a Stolen Motor Vehicle?
3. Did the trial court violate defendant's due process rights with the essential elements instruction regarding Possession of a Stolen Motor Vehicle violate defendant's due process rights by not including all the essential elements that the State had the burden to prove beyond a reasonable doubt?

4. Does the Judgment and Sentence need to be corrected to reflect that defendant was convicted of count V, not Count IV and that the sentence imposed applied to Count V?

III.

STATEMENT OF THE CASE

The Respondent accepts the Appellant's statement of the case for purposes of this appeal.

IV.

ARGUMENT

- A. DEFENDANT HAS NOT SHOWN THAT THE TRIAL COURT COMMITTED A MANIFEST ERROR WHICH QUALIFIES FOR REVIEW PURSUANT TO RAP 2.5(a)(3).

Generally, the failure to object to a trial court's jury instruction precludes appellate review. *State v. Scott*, 110 Wn.2d 682, 685-6, 757 P.2d 492 (1988). Neither the defendant nor his counsel objected to the jury instruction that he now contends was erroneous. Generally, an issue cannot be raised for the first time on appeal unless it is a manifest error affecting a constitutional right. *See* RAP 2.5(a)(3). The applicability of RAP 2.5(a)(3) is determined by a test: (1) whether the alleged error is

truly constitutional and (2) whether the alleged error is manifest. *State v. Kronich*, 160 Wn.2d 893, 899, 161 P.3d 982 (2007). An error is manifest when it has practical *and* identifiable consequences in the trial of the case. *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). (Emphasis added). Here, defendant has identified no practical and identifiable consequences in the trial of this case that are directly attributable to the alleged error. The defendant has not satisfied the threshold burden that the trial court committed a manifest error which affected a constitutional right and is not entitled to appellate review thereof at this point.

B. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING THE CHARGED CRIME OF POSSESSION OF A STOLEN MOTOR VEHICLE.

1. The Amended Information Properly Notified The Defendant Of The Essential Elements Of The Charged Crime.

All essential elements of a charged crime, both statutory and non-statutory, must be included in the charging document. *State v. Goodman*, 150 Wn.2d 774, 784, 83 P.3d 410 (2004); *State v. Kjorsvik*, 117 Wn.2d 93, 101-102, 812 P.2d 86 (1991). The charging document must also allege facts supporting each element of the crime charged. *Goodman*, 150 Wn.2d at 786. Words in a charging document are to be read as a

whole, construed according to common sense, and include facts which are necessarily implied. *Kjorsvik*, 117 Wn.2d at 109. The primary purpose of this rule is to provide the defendant notice of the nature of the allegations so that a defense may be properly prepared. *Goodman*, 150 Wn.2d at 784; *Kjorsvik*, 117 Wn.2d at 101-102.

Charging documents challenged for the first time on appeal are more liberally construed in favor of validity than those challenged before or during trial. *Kjorsvik*, 117 Wn.2d at 102. A two-pronged test defines this liberal construction: (1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, (2) if so, can the defendant show that he or she was nonetheless actually prejudiced by the inartful language that caused a lack of notice? *Goodman*, 150 Wn.2d at 787-788; *Kjorsvik*, 117 Wn.2d at 105-106.

Defendant claims the trial court committed error by not ensuring that the essential elements instruction comported with the charging language of the amended information. Specifically, defendant takes issue with the fact that the amended information, in count I, lists *all* the statutory means of committing Possession of a Stolen Motor Vehicle in conjunctive form, yet the essential elements instruction references those same elements in the disjunctive form. Defendant argues that this

discrepancy constitutes both a notice violation and an instructional error that violate defendant's due process rights.

This case does not concern an omitted, or even misstated, essential element; rather, defendant was placed on notice by the amended information that he was charged with all the statutorily enumerated alternative means of committing the charged crime. The amended information notified the defendant that the State intended to prove all of those enumerated elements to the jury. Due process requires that a defendant be notified of the essential elements of the charged crime in order to afford the defendant the opportunity to present a defense to the charged crime.

Here, the amended information placed defendant on notice he should prepare a defense to each separately enumerated alternative means of committing the crime because the State charged in the conjunctive form. The record reflects that the defendant was fully notified of the essential elements of the crime charged, so there was no due process violation. Assuming, arguendo, that the defendant was prepared to defend against each of the separately enumerated alternative means of committing the charged offense, it is reasonable to conclude that it made no difference whether the amended information charged in the conjunctive or disjunctive provided the essential elements instruction properly mirrored

the statute. Accordingly, the defendant was fully advised that he needed to prepare a defense with regard to each of those enumerated alternative means, so there was no due process violation for a failure to notify defendant of the essential elements of the charged crime.

2. The Trial Court Properly Instructed The Jury With Regard To The Essential Elements Of The Charged Crime Of Possession Of A Stolen Vehicle.

Jury instructions satisfy the constitutional demands of a fair trial, when read as a whole, the instructions provide the jury with the applicable law, are not misleading, and permit the defendant to present his theory of the case. *State v. Prado*, 144 Wn. App. 227, 241, 181 P.3d 901 (2008) (citing *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005); *State v. Dana*, 73 Wn.2d 533, 536-37, 439 P.2d 403 (1968)). Erroneous jury instructions are subject to *de novo* review by the appellate court. *State v. O'Donnell*, 142 Wn. App. 314, 322, 174 P.3d 1205 (2007).

The trial court instructed the jury pursuant to the Washington Pattern Jury Instructions, Criminal (“WPIC”) 77.20 and 77.21 which defined the charged crime and set forth the essential elements that the State had to prove beyond a reasonable doubt. CP 14-44. The trial court’s essential elements instruction did not omit or misstate any of the statutorily enumerated alternative means of committing the charged crime.

Rather, the essential elements instruction properly advised the jury of the law to be applied to the evidence produced.

Here, the essential elements instruction advised the jury that it had to find that the defendant had committed one of the alternative means of committing the charged crime beyond a reasonable doubt, so the instruction did not relieve the State of its burden of proving all the essential elements beyond a reasonable doubt. Applied strictly, the essential elements rule requires that defendant's conviction be affirmed because the amended information *included the statutory and non-statutory elements of the charged crime*. Accordingly, there was no due process violation based upon the trial court's instructions to the jury.

Finally, a jury is presumed to follow the law as instructed by the trial court. *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). Here, the instructions stated the applicable law accurately, did not mislead, and afforded Mr. Duprie the basis upon which to argue his theory of the case. The record reflects that the jury considered defendant's theory of the case carefully prior to entering findings of guilty and not guilty on the various charged counts. If the jury was affected by the trial court's essential elements instruction, it would have sought clarification. Clearly, the trial court's essential elements instruction did not prevent defendant

from arguing his theory of the case, did not mislead the jury, and properly advised the jury of the applicable law.

C. SUFFICIENT EVIDENCE SUPPORTED THE JURY'S VERDICT FINDING DEFENDANT GUILTY OF POSSESSION OF A STOLEN VEHICLE.

Defendant argues that the evidence that he knew that the Ford Taurus was stolen or that he had actual or constructive possession was insufficient to support the jury's verdict finding him guilty of Possession of a Stolen Vehicle. Evidence is sufficient to support a conviction if, after reviewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements proved beyond a reasonable doubt. *State v. Hendrickson*, 129 Wn.2d 61, 81, 917 P.2d 563 (1996). The elements of a crime may be established by either direct or circumstantial evidence, one type being no more valuable than the other. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Issues regarding conflicting testimony and credibility of witnesses are for the finder of fact and cannot be reviewed on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The evidence presented at trial clearly demonstrated defendant knew that the Ford Taurus he and his conspirator were using during their criminal enterprise at the car dealership was stolen. On February 22,

2010, defendant was discovered on the private property of a dealership well after its business hours of 9:00 a.m. to 8:00 p.m. RP 92-97. It was 2:00 a.m., when defendant was observed prowling the private property of the dealership by witnesses working at the nearby bakery. RP 169. The witnesses observed the defendant return to the stolen Ford Taurus several times prior to the arrival of law enforcement. RP 169, 174. Spokane County Sheriff Deputies responded to the business. RP 108. The deputies found the stolen Ford Taurus parked on the sidewalk outside the business property. RP 100-102, 169-170. Deputy Karnitz investigated the dealership property pursuant to the report that witnesses had observed someone walking back and forth through the property with a flashlight. RP 108, 169, 174.

Deputy Karnitz initially discovered that two vehicles on the business property had been prowled. RP 109. As Deputy Karnitz continued his investigation, the defendant suddenly popped up like a “Jack-in-the-Box”. RP 111, 126, 130. Defendant appeared obviously surprised by the presence of Deputy Karnitz. RP 111, 126, 130. Defendant was found wearing a heavy coat with bulky pockets in which defendant kept his hands despite Deputy Karnitz’s orders to the contrary. RP 110. A search of defendant’s pockets revealed – a screwdriver, key rings with numerous shaved keys for several different makes of vehicles

(i.e. Nissan, Ford and Chrysler), flashlights, wire cutters, needle-nosed and regular pliers – tools associated with vehicle thefts and prowling. RP 112, 114-116, 128, 155-160.

Investigation of the stolen Ford Taurus revealed more auto theft and prowling tools as well as a large gas can, a mobile air pump, and extra tires. RP 155-160. An auto theft and prowling expert testified that the auto theft and prowling tools found in the stolen Ford Taurus along with the gas can, air pump, and extra tires was associated with the criminal enterprise of prowling and stealing vehicles. RP 155-160. The expert further testified that the evidence was strongly corroborative of a criminal enterprise that included possession of the stolen Ford Taurus. RP 158-160. The discovery of the defendant's partner hiding in the stolen Ford Taurus with switched license plates, in a reclined driver's seat with the tools of the trade necessary to facilitate their criminal enterprise was evidence that they were in knowing possession of a stolen motor vehicle. RP 152.

The record before the jury reveals that Mr. Duprie knowingly participated in the possession of a stolen motor vehicle as charged. Accordingly, there was sufficient evidence to support the jury finding Mr. Duprie complicit in, and guilty of, the possession of a stolen motor vehicle.

D. THE TRIAL COURT CORRECTED THE JUDGMENT AND SENTENCE TO REFLECT DEFENDANT'S CONVICTION ON COUNT V, NOT IV.

On October 27, 2010, the trial court entered an order correcting the judgment and sentence to reflect that the defendant was convicted on Count V, rather than Count IV. CP .

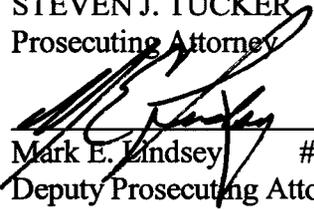
V.

CONCLUSION

For the reason stated, the convictions and sentences should be affirmed.

Respectfully submitted this 17 day of March, 2011.

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