

No. 34653-6-III

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON

Chelan County Superior Court  
Cause No. 16-1-00307-0

STATE OF WASHINGTON,  
Plaintiff/Respondent,

v.

JOEL GALVAN SERRANO,  
Defendant/Appellant.

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BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	<u>Page</u>
I. <u>COUNTER-STATEMENT OF ISSUES</u> -----	1
II. <u>STATEMENT OF THE CASE</u> -----	1
III. <u>ARGUMENT</u> -----	2
A. Mr. Galvan-Serrano cannot challenge the sufficiency of the charging information because none of the orders designated in his notice of appeal relate to the lower court’s decision to accept the information. -----	3
B. The information charging Mr. Galvan-Serrano was not deficient and in the alternative any error was harmless. -----	4
1. Disproof of compliance with RCW 9.41.175 is not an essential element of Alien in Possession of a Firearm. -----	4
2. Alternatively, Mr. Galvan-Serrano was not harmed by any defect in the information. -----	12

TABLE OF CONTENTS (con't)

	<u>Page</u>
C. The appellant's motion to deny costs fails to follow this Court's general order. -----	16
IV. <u>CONCLUSION</u> -----	16

## TABLE OF AUTHORITIES

<u>State Cases</u>	<u>Page</u>
<i>City of Spokane v. Karlsten</i> , 137 Wash. 414, 242 P. 389 (1926)-----	10,11,12
<i>In re Rosier</i> , 105 Wn.2d 606, 717 P.2d 1353 (1986)-----	6
<i>State v. Johnson</i> , 180 Wn.2d 295, 325 P. 3d 135 (2014)-----	12
<i>State v. Kjorsvik</i> , 117 Wn.2d, 93, 812 P.2d 86 (1991)-----	12,13,15
<i>State v. McCarty</i> , 140 Wn.2d 420, 998 P. 2d 296 (2000)-----	13
<i>State v. Moses</i> , 79 Wn.2d 104 483 P.2d 832 (1971)-----	<i>passim</i>
<i>State v. Shelton</i> , 16 Wash. 590, 48 P. 258 (1897)-----	9,10,12
<i>State v. Tinker</i> , 155 Wn.2d 219, 118 P.3d 885 (2005)-----	13
<i>State v. Vangerpen</i> , 125 Wn.2d 782, 888 P. 2d 1177 (1995)-----	12,15
<i>State v. Carter</i> , 161 Wn. App. 532, 255 P.3d 721 (2011)-----	<i>passim</i>
<i>State v. Mason</i> , 170 Wn. App. 375, 285 P.3d 154 (2012)-----	15,16

TABLE OF AUTHORITIES (con't)

<u>State Cases</u>	<u>Page</u>
<i>State v. Pittman</i> , 185 Wn. App. 614, 341 P.3d 1024 (2015) -----	13
<i>State v. Satterthwaite</i> , 186 Wn. App. 359, 344 P.3d 738 (2015) -----	13
<u>Federal Cases</u>	<u>Page</u>
<i>Fotoudis v. City &amp; County of Honolulu</i> , 54 F. Supp. 3d 1136 (D. HI 2014) -----	6
<i>Madriz-Alvarado v. Ashcroft</i> , 383 F.3d 321 (5th Cir. 2004) -----	6
<i>United States v. Mirza</i> , 454 Fed. Appx. 249 (5th Cir. 2011) -----	6
<i>United States v. Santos-Riviera</i> , 183 F.3d 367 (5th Cir. 1999) -----	6
<i>United States v. Sisson</i> , 399 U.S. 267, 90 S. Ct. 2117, 26 L. Ed. 2d 608 (1970) -----	7
<u>Rules and Statutes</u>	<u>Page</u>
LAWS OF 1996, c 295 § 11 -----	6
RAP 2.4 -----	3,4
RAP 10.4 -----	3

TABLE OF AUTHORITIES

<u>Rules and Statutes</u>	<u>Page</u>
RCW 9.41.170-----	6
RCW 9.41.171-----	<i>passim</i>
RCW 9.41.173-----	5
RCW 9.41.175-----	<i>passim</i>

## **I. COUNTER-STATEMENT OF ISSUES**

- A. Should the Court dismiss this appeal for failure to comply with RAP 2.4?
- B. What are the essential elements of RCW 9.41.171?
- C. Has Mr. Galvan-Serrano met his burden of production to support his motion to deny costs on appeal?

## **II. STATEMENT OF THE CASE**

On May 16, 2016, the State charged Joel Galvan-Serrano with two counts of Alien in Possession of a Firearm under RCW 9.41.171. CP 8-10. Mr. Galvan-Serrano brought a motion to suppress statements and evidence under CrR 3.5 and 3.6. CP 14-23. Mr. Galvan-Serrano eventually stipulated to the admissibility of his statements under CrR 3.5. CP 66. After a hearing, the court denied Mr. Galvan-Serrano's CrR 3.6 motion. CP 107-124. Following denial of his motion, Mr. Galvan-Serrano entered into a stipulated facts trial, and the court found him guilty on both counts. CP 68-73, 91-2. That same day, July 21, 2016, the court sentenced Mr. Galvan-Serrano. CP 93-106.

Twenty-five days later, Mr. Galvan-Serrano filed a timely notice of appeal designating the order on the suppression motion as

the only decision he sought to appeal. CP 131. Sixty days after that, Mr. Galvan-Serrano filed an untimely, and unauthorized amended notice of appeal seeking review of the order on the CrR 3.5/3.6 motion, the decision following the stipulated facts trial, and the judgment and sentence. CP 152.

### **III. ARGUMENT**

Abandoning his appeal of the CrR 3.5/3.6 ruling, Mr. Galvan-Serrano raises one issue for review—the sufficiency of the charging information—and a motion to deny costs. This brief addresses three issues. First, the State challenges Mr. Galvan-Serrano’s ability to raise his new issue on appeal. Second, the State addresses the sufficiency of the charging information. Within that second issue, the State responds that disproof of compliance with RCW 9.41.175 is not an essential element of Alien in Possession of a Firearm, and argues in the alternative that any defect in the information does not merit reversal. Finally, the State responds to Mr. Galvan-Serrano’s motion to deny costs on appeal.

**A. Mr. Galvan-Serrano cannot challenge the sufficiency of the charging information because none of the orders designated in his notice of appeal relate to the lower court's decision to accept the information.**

RAP 10.4(d) authorizes the State to make a motion in a brief which "would preclude hearing the case on the merits." Accordingly, the State moves the Court for an order dismissing this appeal for failure to seek review of any issues designated in the Notice of Appeal.

RAP 2.4(a) states that the Court will only "review the decision or parts of the decision designated in the notice of appeal." Here, Galvan-Serrano's notice of appeal seeks review only of his CrR 3.5 and 3.6 motions. CP 131. However, the Brief of Appellant does not address the CrR 3.5/3.6 motions. The brief only addresses the trial court's decision to accept filing of the information and finding probable cause via his challenge to the underlying sufficiency of the charging document. Because Mr. Galvan-Serrano does not challenge any of the decisions he designated in his notice of appeal, this Court must dismiss his appeal.

RAP 2.4(b) permits this Court to review an order or ruling not designated in the notice of appeal only if the issue "prejudicially

affects the decision designated in the notice.” Whether or not the charging document is sufficient has no bearing on the CrR 3.5 and 3.6 motions because those motions both deal with issues that arose prior to the filing of the information. Mr. Galvan-Serrano might argue that the acceptance of the information prejudicially affected the order on the CrR 3.5/3.6 motion because without the deficient information there would not have been a criminal case to begin with. Such an argument would necessarily fail because, as Mr. Galvan-Serrano already conceded, the remedy for a defective information is refiling of the information—not reversal of the CrR 3.5/3.6 order. Br. of App. at 10. Accordingly, RAP 2.4(b) does not save Mr. Galvan-Serrano’s errant appeal.

**B. The information charging Mr. Galvan-Serrano was not deficient and in the alternative any error was harmless.**

**1. Disproof of compliance with RCW 9.41.175 is not an essential element of Alien in Possession of a Firearm.**

The determination of a crime’s essential elements is a question of statutory interpretation, which this Court reviews *de novo*. *State v. Carter*, 161 Wn. App. 532, 539-40, 255 P.3d 721 (2011).

Mr. Galvan-Serrano argues that because the Legislature did not set out in a separate subsection the exceptions regarding being a lawful permanent, RCW 9.41.173, and RCW 9.41.175, that the Legislature intended those to be elements that the State must disprove. Br. of App. at 9. Specifically, he cites *Carter*, which held that setting out an exception in a separate subsection is evidence of legislative intent to create an affirmative defense, rather than an element of the offense. *Carter*, 161 Wn. App. at 542. However, he ignores the fact that the Legislature did more than separate those into separate subsections. It actually made them separate sections altogether.

Prior to the 2009 creation of RCW 9.41.175, RCW 9.41.173 and .175 did not exist, nor was there an exception for lawful permanent residents.<sup>1</sup> Instead, everything was contained within

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<sup>1</sup> Mr. Galvan-Serrano makes an equal-protection argument about placing the burden on lawful permanent residents (green-card holders) to prove their status in order have a defense to RCW 9.41.171. Br. of App. at 7-8. This argument lacks any thoughtful analysis, lacks any discussion concerning the proper standard of review under an equal protection challenge (i.e. rational basis versus strict scrutiny), and fails to cite to any cases where equal protection has ever been raised to determine whether a statutory provision was an element or a defense. As such, this is nothing more than a naked

RCW 9.41.170 (now repealed), which allowed one exception. That exception was for those holding an alien firearm license and was codified in the separate subsections of RCW 9.41.170. LAWS OF 1996, c 295 § 11. Considering that the Legislature in 2009 chose to recodify the exception and requirements for alien firearm licenses that had been in subsections into their own separate section (RCW 9.41.173), *Carter* would suggest that the Legislature intended these exceptions to be defenses and not elements.

Regardless, separate sections and subsections are not the sole factor when determining whether the Legislature intended an element or defense. As Mr. Galvan-Serrano recognizes in his brief, another consideration is who has easier access to the facts constituting the exception. Br. of App. at 8-9. “It is generally held

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casting into the constitutional sea. *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) (“[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.”). “Indeed, many courts have rejected Second Amendment and equal protection challenges by illegal aliens to alien-in-possession statutes.” *Fotoudis v. City & County of Honolulu*, 54 F. Supp. 3d 1136, 1142 n. 4 (D. HI 2014). That is largely because “[w]e apply the deferential rational basis test to [statutes] that classify based on alienage.” *United States v. Mirza*, 454 Fed. Appx. 249, 258 (5th Cir. 2011) (quoting *United States v. Santos-Riviera*, 183 F.3d 367, 373 (5th Cir. 1999)); accord *Madriz-Alvarado v. Ashcroft*, 383 F.3d 321, 332 (5th Cir. 2004).

in criminal cases that, if the facts of an affirmative defense lie immediately within the knowledge of the defendant, the *onus probandi*, under the principle of ‘balancing of convenience,’ should be his.” *State v. Moses*, 79 Wn.2d 104, 110, 483 P.2d 832 (1971) (citing *United States v. Sisson*, 399 U.S. 267, 90 S. Ct. 2117, 26 L. Ed. 2d 608 (1970)). Importantly, *immediately* within the defendant’s knowledge does not mean *exclusively*.

Mr. Galvan-Serrano tries to argue that the facts constituting RCW 9.41.175 lie with the State. He is incorrect. RCW 9.41.175 requires proof that the person has a valid passport and visa, a U.S. D.O.J. A.T.F.-6 N.I.A. permit, and either a valid hunting license or an invitation to participate in a trade show or sport shooting event in this or another contiguous state or country. These are not facts readily in the knowledge of local law enforcement and local prosecutors. Furthermore, just because local law enforcement may be able obtain the same information through third parties does not put the burden on the State to disprove the element when all of the pertinent information is readily in the defendant’s possession. This applies even when the information is in the knowledge of the

defendant is a government document. For example, a defendant claiming a defense in a hunting case based on Indian treaty fishing rights has the burden of showing the existence of the treaty and that he is a beneficiary of it. *Moses*, 79 Wn.2d at 110.

Specifically, Mr. Galvan-Serrano argues that a valid passport and visa are within the government's knowledge because they are government issued documents. This argument fails first and foremost because RCW 9.41.175 concerns non-citizens, meaning that the passport at issue is a foreign passport issued by a foreign government. The "government" would thus have no knowledge or access to the validity of that document absent seeking verification from a foreign country.

While the United States federal government issues visas, the "government" is not a monolith. Local law enforcement and local prosecutors have no greater access to U.S. State Department records than the person named in those records. Furthermore, the visa at issue in RCW 9.41.175 is a physical stamp placed on the defendant's foreign passport. Whether a visa stamp exists in the defendant's passport book is physical evidence in the exclusive possession of the

defendant. Similarly, the defendant also has exclusive control over any physical permit issued by Bureau of Alcohol, Tobacco, and Firearms. These documents are no different than the treaty at issue in *Moses*.

In another case involving a defense proved through government documents, the Supreme Court held that the burden was on the defendant to prove that he had a license to sell liquor, despite the fact that the liquor license was a locally issued government document:

[T]he greater number of cases seem to hold that this burden should be placed on the defendant, and this undoubtedly is the more convenient rule, for, if the defendant has a license, it is imposing upon him no hardship to require him to make proof of it, and he has the same right of recourse to the public records to prove the issuance of it that the prosecution has, and in a locality where many licenses are issued, and the record of the issuance thereby rendered voluminous, it might be somewhat of a hardship on the state to require the prosecution to show from such records that no license had been issued to the defendant.

*State v. Shelton*, 16 Wash. 590, 592, 48 P. 258 (1897) (citations omitted). This case exemplifies clearly the reasoning set forth in *Moses* that the burden is placed using a balancing of convenience. The situation here is no different considering that the government

documents specified in RCW 9.41.175 are all either foreign documents or documents issued by an arm of the federal government.

Regarding the last prong, an invitation to a trade show or sport shooting event is not a government issued document. Considering that under this section the show or event could be anywhere in Washington, Idaho, Oregon, or Canada, local law enforcement would have no idea who to ask about a particular person's invitation to a show or event, other than to ask the defendant. Because all of the information required to prove the exception in RCW 9.41.175 is within the defendant's immediate knowledge, *Shelton* and *Moses* hold that RCW 9.41.175 is a defense, and not an element of RCW 9.41.171.

Historically, case law involving similar statutory language also supports the State's analysis that everything following the word "unless" in RCW 9.41.171 constitute defenses and not elements that need to be pled and proven by the State. In *Karlsten*, the Supreme Court differentiated a negative essential element from a defense based on the language used to set off the provision from the main

body of the crime. At issue was an ordinance that criminalized the possession of “any intoxicating liquors other than alcohol.” *City of Spokane v. Karlsten*, 137 Wash. 414, 415, 242 P. 389 (1926). In charging, the State did not allege the phrase “other than alcohol.” *Id.*

Ultimately, the Court held that this phrase was an essential element and not a defense because it was not phrased as an exception or proviso. *Id.* at 416. In order to constitute an exception or a proviso, which would put the burden on the defendant, the Court explained that the exception could still be within the same section as the crime, but that it would have to be set off by an appropriate disjunction.<sup>2</sup> Notably, the example given of a proper proviso was a comma followed by the disjunction “unless.” *Id.* at 417. This is also the exact same disjunction used by the Legislature in RCW 9.41.171 to set off the exception that Mr. Galvan-Serrano claims is an element and not a defense. Given the holding in *Karlsten*, the grammatical placement of the three exceptions referenced in RCW 9.41.171 are

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<sup>2</sup> “So in this case, if the ordinance prohibited the possession of intoxicating liquor other than alcohol, unless one had a license therefor or was a regularly ordained clergyman, etc., the latter would constitute exceptions and be matters of defense.” *Id.* at 417.

defenses, not negative elements that the State must plead and disprove.

Based on the guidance in *Carter, Moses, Shelton*, and *Karlsten*, disproof of RCW 9.41.175 is not an essential element of Alien in Possession of a Firearm.

**2. Alternatively, Mr. Galvan-Serrano was not harmed by any defect in the information.**

In the alternative, if this Court does hold that the exceptions stated in RCW 9.41.171 are essential elements, reversal is not warranted because the charging document was minimally sufficient and because Mr. Galvan-Serrano does not allege any prejudice.

This Court reviews a charging document's adequacy *de novo*. *State v. Johnson*, 180 Wn.2d 295, 300, 325 P. 3d 135 (2014). "[A] charging document is constitutionally adequate only if all essential elements of a crime, statutory and nonstatutory, are included in the document so as to apprise the accused of the charges against him or her and to allow the defendant to prepare a defense." *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P. 2d 1177 (1995). "Words in a charging document are read as a whole, construed according to common sense, and include facts which are necessarily implied."

*State v. Kjorsvik*, 117 Wn.2d, 93, 109, 812 P.2d 86 (1991). “[T]he charging document need not repeat the exact language of the statute.” *State v. Tinker*, 155 Wn.2d 219, 221, 118 P.3d 885 (2005).

“Where a defendant challenges the charging document’s sufficiency for the first time on appeal, we construe the document liberally and will find it sufficient if the necessary elements appear in any form, or by fair construction may be found, on the document’s face. But if the document cannot be construed to give notice of or to contain in some manner the essential elements of an offense, the document is insufficient, and even the most liberal reading cannot cure it.” *State v. Satterthwaite*, 186 Wn. App. 359, 362-63, 344 P.3d 738 (2015) (citing *State v. McCarty*, 140 Wn.2d 420, 425, 998 P. 2d 296 (2000)). “Liberal construction requires that we determine whether “the necessary elements appear in any form, or by fair construction, on the face of the document and, if so, whether the defendant [can] show he or she was actually prejudiced by the unartful language.” *State v. Pittman*, 185 Wn. App. 614, 619, 341 P.3d 1024 (2015).

Liberally construing the charging information in this case, the State alleged Mr. Galvan-Serrano's noncompliance with RCW 9.41.175. The information in this case reads in relevant part:

was not a lawful permanent resident of the United States of America, had not obtained a valid alien firearm license pursuant to RCW 9.41.173, and did not then possess a valid passport and visa showing he or she was lawfully within the United States of America.

CP 8-9. Notably, the phrase "did not then possess a valid passport and visa showing he or she was lawfully within the United States of America" is, in all relevant respects, verbatim the same as RCW 9.41.175(1)(a). Thus, the State clearly alleged that Mr. Galvan-Serrano did not satisfy the requirements of RCW 9.41.175 as required by RCW 9.41.171. The fact that the State did not go on to specify that Mr. Galvan-Serrano did not also satisfy the requirements of RCW 9.41.175(1)(b) and (c) is of no consequence because in order to receive the protections of § 175, a defendant must meet all three subsections of §175(1). By specifying the particular subsection on which the State relied, the State arguably did Mr. Galvan-Serrano a favor. If the State had not specified its reliance on § 175(1)(a), the information would have been susceptible to a

motion for a bill of particulars asking for clarification of whether the State was claiming noncompliance with § 175(1)(a), (b), or (c).

To the extent Mr. Galvan-Serrano's argument is that the information needed to include the statutory citation number "RCW 9.41.175," that argument is incorrect because a citation to the statutory number has never been held to be an element of a crime. *See Vangerpen*, 125 Wn.2d 787-88 ("Merely citing to the proper statute and naming the offense is insufficient to charge a crime unless the name of the offense apprises the defendant of all of the essential elements of the crime. Error in a numerical statutory citation is not reversible error unless it prejudiced the accused.").

Thus, at its worst, the information in this case was potentially a little vague, which is not grounds for reversal unless the defendant can demonstrate actual prejudice. *Kjorsvik*, 117 Wn.2d at 106 ("can the defendant show that he or she was nonetheless actually prejudiced by the inartful language"); *see also, State v. Mason*, 170 Wn. App. 375, 378-79, 285 P.3d 154 (2012) ("A charging document is constitutionally sufficient if the information states each essential element of the crime, whether statutory or nonstatutory, even if it is

vague as to some other matter significant to the defense.”). Because Mr. Galvan-Serrano does not claim any prejudice, any vagueness in the charging information is not grounds for reversal.

**C. The appellant’s motion to deny costs fails to follow this Court’s general order.**

Mr. Galvan-Serrano’s last contention is a motion for the Court to deny costs to the State in the event the State is the substantially prevailing party. This Court’s general order from June 10, 2016, authorizes this procedure. However, that order states that when inability is a factor in the request to deny costs that the “offender shall also file a report as to continued indigency and likely future inability to pay an award of costs . . . [and] [t]he original report, signed by the offender under penalty of perjury, shall be filed with the court.” Because the defendant has failed to comply with this requirement, the defendant’s motion is not proper and should be referred to the commissioner or clerk under RAP 14.2 after completion of this appeal.

**IV. CONCLUSION**

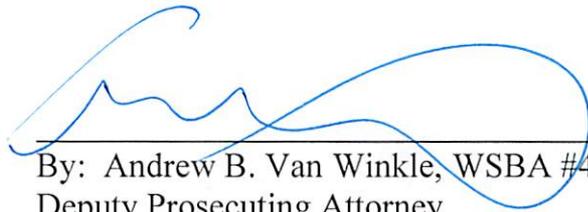
Based on the foregoing arguments and authorities, the State respectfully requests this Court to dismiss this appeal for failure to

comply with RAP 2.4. Alternatively, the State requests this Court affirm Mr. Galvan-Serrano's convictions because the exceptions stated under RCW 9.41.171 are not essential elements or because any defect in the charging information was not harmful.

DATED this 6<sup>th</sup> day of July, 2017.

Respectfully submitted,

Douglas J. Shae  
Chelan County Prosecuting Attorney



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By: Andrew B. Van Winkle, WSBA #45219  
Deputy Prosecuting Attorney

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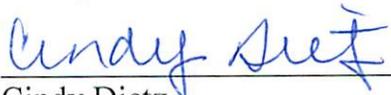
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,	)	No. 34653-6-III
Plaintiff/Respondent,	)	Chelan Co. Superior Court No. 16-1-00307-0
vs.	)	DECLARATION OF SERVICE
JOEL GALVAN SERRANO,	)	
Defendant/Appellant.	)	

I, Cindy Dietz, under penalty of perjury under the laws of the State of Washington, declare that on the 6th day of July, 2017, I caused the original BRIEF OF RESPONDENT to be filed via electronic transmission with the Court of Appeals, Division III, and a true and correct copy of the same to be served on the following in the manner indicated below:

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Signed at Wenatchee, Washington, this 6th day of July, 2017.

  
 \_\_\_\_\_  
 Cindy Dietz  
 Legal Administrative Supervisor  
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# CHELAN COUNTY PROSECUTING ATTORNEY

July 06, 2017 - 3:00 PM

## Transmittal Information

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