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State of Washington  
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NO. 35497-1-III

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

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THE STATE OF WASHINGTON

Respondent

v.

BENJAMIN ALEXANDER HANKINS

Petitioner/Appellant

---

BRIEF OF RESPONDENT

---

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Stevens County

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2. THE TO-CONVICT INSTRUCTION FOR SECOND DEGREE TRAFFICKING IN STOLEN PROPERTY WAS DEFECTIVE BECAUSE IT ALLOWED MR. HANKINS TO BE CONVICTED OF A CRIME NOT CHARGED IN THE INFORMATION.
3. THE TRIAL COURT ERRED IN INCLUDING AN OUT OF STATE CONVICTION IN THE CALCULATION OF MR. HANKINS' OFFENDER SCORE WITHOUT CONDUCTING A COMPARABILITY ANALYSIS. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO OR ALERT THE TRIAL COURT TO ITS COMPARABILITY ANALYSIS REQUIREMENT.
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3. DID THE STATE OVERCHARGE MR. HANKINS WHEN CHARGES OF TRAFFICKING IN STOLEN PROPERTY IN THE FIRST DEGREE WERE FIRST FILED?

## V. STATEMENT OF THE CASE

The respondent accepts the appellant's statement of the case.

## VI. ARGUMENT REGARDING ISSUES RAISED IN OPENING BRIEF

### 1. IS THE VARIANCE BETWEEN THE CHARGING DOCUMENT AND THE PROOF PRESENTED AT TRIAL MATERIAL TO THE POINT IT WARRANTS DISRUPTING MR. HANKINS' CONVICTION?

The variance between the charging document and the proof which was presented at trial is immaterial and non-prejudicial to Mr. Hankins and it does not warrant disrupting the jury's verdict. In criminal cases, accused persons have a constitutional right under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution to know the charges that have been brought against them. The State provides formal notice of the charges in the information or charging document. CrR 2.1(a)(1) ("[T]he information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."). *State v. Ring*, 191 Wn. App. 787, 790, 364 P.3d 853, 855 (2015). A charging document is constitutionally sufficient if it includes all the "essential elements" of a crime. *State v. Johnson*, 180 Wash.2d 295, 300, 325 P.3d 135 (2014). The purpose of this essential elements rule is to give notice to the accused of the charges and to allow him or her to

prepare a defense. *Id.* An essential element of an offense is an element that is necessary to establish the illegality of the behavior charged. *Id.* Essential elements include only those facts that must be proved beyond a reasonable doubt to convict a defendant of the charged crime. *State v. Zillyette*, 178 Wash.2d 153, 158, 307 P.3d 712 (2013). “If the State fails to allege every essential element, then the information is insufficient and the charge must be dismissed without prejudice.” *Johnson*, 180 Wash.2d at 300–01, 325 P.3d 135.

The court of appeals shall review the constitutional sufficiency of a charging document de novo. *Id.* at 300, 325 P.3d 135. Where, a defendant challenges the sufficiency of a charging document for the first time on appeal, “[the court shall] 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.” *State v. Satterthwaite*, 186 Wash.App. 359, 362, 344 P.3d 738 (2015). If the charging document cannot be construed to give notice of or to contain in some manner the essential elements of an offense, it is insufficient and even the most liberal reading cannot cure it. *Id.* at 362–63, 344 P.3d 738.

Misidentifying a victim or the property of a theft does not warrant the disruption of the jury’s verdict. In *State v. Ewing* a defendant was charged with the crime of Assault in the first degree. *State v. Ewing* 67

Wash. 395, 121 P. 834 (1912). The state had alleged that the defendant had assaulted an individual by the name of “Sylvia Russell.” *Id.* at 395 – 396. At trial the evidence which was presented established that the individual that was assaulted by the defendant was an individual by the name of “Sylvia Ewing.” *Id.* at 396. The defendant did not dispute the fact he had in fact assaulted another individual. *Id.* at 397. Likewise, the defendant made no claim that the name which appeared in the information somehow misled him as to what he was being accused of. *Id.* The Supreme Court concluded that since the defendant was not misled by the difference in names the variance between the information and the proof which was presented at trial was immaterial. *Id.*

The Supreme Court reached the same conclusion in *State v. Chapman*. In *Chapman* the defendant was charged with assaulting an individual who was identified as “Otha L. Robinson” in the information. *State v. Chapman*, 78 Wash.2d 160, 469 P.2d 883 (1970). The evidence that was presented at trial established that the defendant had assaulted an individual by the name of “Xavier L. Peacock.” *Id.* at 162. The court ruled that this variance in the evidence was immaterial citing back to *State v. Ewing* the court noted:

...we stated in *State v. Ewing*, 67 Wash. 395, at 397, 121 P. 834 at 835 (1912):

But the modern rule is to treat the question as one of identity, and if the offense is otherwise described with sufficient certainty to identify the act to hold the variance immaterial, unless the misnomer actually misleads the defendant

To the same general effect see *State v. Crane*, 88 Wash. 210, 152 P. 989 (1915); *State v. Jennen*, 58 Wash.2d 171, 361 P.2d 739 (1961).

*Chapman*, 78 Wash. 2d at 163.

The Court went on to observe that,

As we have heretofore indicated, defendant on this appeal makes no contention that he did not, in fact, fire the shots involved nor does he quarrel with the proposition that such actions, under the circumstances, amounted in law to an assault. Neither does he make any assertion that he was misled as to the identity of the offense described in the amended information, nor does he point to any misdirection flowing from any misnomer of the person allegedly assaulted. Although it would have been the better part of wisdom for the prosecuting attorney to have set forth both names by which the purported victim was allegedly known, we find no prejudice to the defendant in the instant case by the state's failure so to do. The variance in the names, therefore, was immaterial and nonfatal to the conviction.

*Id.*

*Ewing* and *Chapman* addressed situations in which the information misstated the name of a victim. In *State v. McGary* the defendant was charged with taking a motor vehicle without permission. *State v. McGary*, 37 Wash.App. 856, 683 P.2d 1125 (1984). In the information the defendant was charged with stealing “a 1972 Yamaha motorcycle VIN # R-

5004275.” *Id.* at 859. At trial there was no evidence presented regarding the VIN number of the motorcycle which had been taken. *Id.* The defendant appealed arguing that there was insufficient evidence to find him guilty of the crime that he had been charged with because the information alleged a specific VIN number. *Id.*

When addressing challenges regarding the sufficiency of evidence the Court of Appeals draws all reasonable inferences from the evidence in the prosecution's favor, and interprets the evidence most strongly against the defendant. *State v. Joy*, 121 Wash.2d 333, 339, 851 P.2d 654 (1993); *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). The court assumes the truth of the prosecution's evidence and all inferences that the trier of fact could reasonably draw from it. *State v. Wilson*, 71 Wash. App. 880, 891, 863 P.2d 116 (1993), *rev'd on other grounds*, 125 Wash.2d 212, 883 P.2d 320 (1994).

With respect to the sufficiency of evidence argument the *McGary* court upheld the conviction noting,

Viewing this evidence in the light most favorable to the prosecution, *State v. Green*, 94 Wash.2d 216, 616 P.2d 628 (1980), the trier of fact could have found that McGary took the motorcycle charged in the information. *See State v. Gerard*, 36 Wash.App. 7, 9, 671 P.2d 286 (1983). The inclusion of the VIN was merely surplusage and did not make the content of the phrase an element of the crime. *State v. Serr*, 35 Wash.App. 5, 8, 664 P.2d 1301 (1983).

*State v. McGary*, 37 Wash.App at 859.

The facts of this case are indistinguishable from what occurred in the above cited cases. A variance existed between what was contained in the charging document and the evidence which was presented at trial. Like in *Chapman* Mr. Hankins does not take issue with the conduct which was alleged by the state. His only issue is with the variance. Mr. Hankins likewise does not argue that he was somehow misled by the variance and therefore prejudiced in his presentation of his defense. The facts of the case are clear. There was only one jet-ski which was at issue. This jet-ski was identified by both the victim and Mr. Hankins through photographs. More than enough evidence was presented to the jury for it to conclude that Mr. Hankins recklessly trafficked in stolen property.

2. IS THE ISSUE REGARDING MR. HANKINS' OFFENDER SCORE INVITED ERROR?

Mr. Hankins is precluded from arguing any error with respect to the calculation of his offender score as he stipulated to the inclusion of his out of state conviction after having consulted with counsel. Raising this issue at this time is prohibited by the invited error doctrine. Under the invited error doctrine, a criminal defendant may not set up error at trial and then complain of it on appeal. *In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 723, 10 P.3d 380 (2000). The doctrine applies when counsel

takes affirmative action that induces the trial court to take an action that party later challenges on appeal. *Id.* at 723-24.

Generally, The State bears the burden of establishing the classification of prior out-of-state convictions, but the sentencing court may properly rely on a stipulation or acknowledgment to support a determination of classification. *State v. Hunter*, 116 Wash.App. 300, 301, 65 P.3d 371 (2003), *aff'd*, 152 Wash.2d 220, 95 P.3d 1225 (2004). However, when a defendant affirmatively agrees with the State's classification of out-of-state convictions, the sentencing court may include the convictions in the defendant's offender score without further proof of classification. *Hunter*, 116 Wash.App. at 301, 65 P.3d 371.

Mr. Hankins relies on *State v. Thieffault* to support his claim that his attorney's actions were deficient when he failed to raise a challenge to the calculation of his offender score. However, the facts of *Thieffault* are distinguishable from what occurred in this case. *State v. Thieffault*, 160 Wsh.2d 409, 413, 158 P.3d 580 (2007). In *Thieffault* defense counsel at resentencing did not challenge the defendant's offender score noting that it was their understanding that the comparability of the out of state convictions had already been made. *Id.* The defendant was represented by different counsel at resentencing. *Id.* The trial court incorporated its comparability findings from the prior sentencing. *Id.* The Supreme Court

found that the defendant received ineffective assistance of counsel because counsel failed to object to the comparability analysis which has been previously conducted. *Id.* In *Thiefauld* defense counsel was ineffective because the court had conducted a comparability analysis, defense counsel knew about the hearing, but did not attempt to determine if it had been done properly. That is not what occurred in this case.

In the present case the parties specifically addressed Mr. Hankins' out of state conviction when discussing when the sentencing hearing was set. The following exchange between the parties and the court occurred:

Mr. Radzimski: Judge, I ask that we go out a little bit further. Mr. Hankins has some criminal history out of state I'm going to need to get a certified copy of his J&S unless he's going to be stipulating to criminal history, which in his omnibus he indicated that he would not.

The Court: Okay.

Mr. Simeone: What are we contending the criminal history is? Maybe we can.

Mr. Radzimski: Mr. – Based on my calculation he's got an offender score of three.

Mr. Simeone: Is that from a more recent conviction, here?

Mr. Radzimski: He's got two felonies out of Washington and one out of Oregon.

Mr. Simeone: 'Cause when I looked at the – earlier information I thought you had – had two. Is there something since then?

Mr. Radzimski: Yes. He pled guilty in Pend Oreille County and picked up another point.

Mr. Simeone: We agree to the criminal history.

RP at 352 - 353

In addition to the above referenced exchange the parties also entered an order which provided, "It is ordered that: sentencing shall occur on July 25, 17 at 10:00 AM. All conditions of release shall remain in effect. Mr. Hankins stipulates to an offender score of 3." CP at 125.

In this case Mr. Hankins was made aware of the fact that the state was prepared to obtain the necessary records to conduct the comparability analysis. After consulting with counsel Mr. Hankins agreed to stipulate an offender score of three. Mr. Hankins agreed that the court should conclude that his offender score was a three. It is now inappropriate for him to assign error to this.

3. SHOULD THE COURT AWARD COSTS AGAINST MR. HANKINS IN THE EVENT THE STATE IS THE SUBSTANTIALLY PREVAILING PARTY?

The State has no objection to this Court not imposing appellate costs in the event Mr. Hankins appeal is unsuccessful.

VII. ARGUMENT REGARDING ISSUES RAISED IN  
PERSONAL RESTRAINT PETITION

1. DOES THE EVIDENCE REGARDING THE HULL  
IDENTIFICATION NUMBER JUSTIFY SETTING  
ASIDE MR. HANKINS' CONVICTION?

The evidence which has been put forth regarding the HIN number does not justify disturbing Mr. Hankins' conviction. In order to justify the granting of a new trial based on newly discovered evidence the moving party must demonstrate that the evidence "(1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching." *State v. Williams*, 96 Wash.2d 215, 223, 634 P.2d 868 (1981). The absence of any one of these factors is grounds to deny a new trial. *Id.*

In the instant case Mr. Hankins' request for a new trial based on newly discovered evidence fails to satisfy several of the elements stated in *Williams*. First and foremost Mr. Hankins fails to establish that this evidence could not have been discovered before the trial by the exercise of diligence. There is no assertion that Mr. Hankins was unable to obtain this evidence before trial. Secondly, Mr. Hankins fails to establish that this evidence would have changed the result of the trial. The testimony presented at trial established that Mr. Hankins, by his own admission, had

come into possession of the Jet Ski under dubious circumstances. Lastly, the evidence regarding the hull identification number is cumulative and impeaching. The victim, Mr. Reynolds, was cross examined extensively by defense counsel regarding how he came into possession of the Jet Ski and what documentation he had related to it. This court should deny Mr. Hankins request for new trial due to the fact that Mr. Hankins has failed to satisfy several of the elements necessary to justify granting a new trial.

2. WAS THERE SUFFICIENT EVIDENCE FOR THE JURY TO FIND MR. HANKINS GUILTY OF TRAFFICKING IN STOLEN PROPERTY IN THE SECOND DEGREE?

Several of the issues that Mr. Hankins raises in his Personal Restraint Petition pertain to the sufficiency of the evidence which was presented at trial. As noted above the Court of Appeals draws all reasonable inferences from the evidence in the prosecution's favor, and interprets the evidence most strongly against the defendant when reviewing challenges to the sufficiency of the evidence. *State v. Joy*, 121 Wash.2d 333, 339, 851 P.2d 654 (1993); *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992).

In the present case trial counsel attacked the thoroughness of the investigation and made arguments that more could have, and should have been done with respect to the investigation of this case. The jury heard

and considered all of this information when it decided to find Mr. Hankins guilty of the crime of Trafficking in Stolen Property in the Second Degree.

3. DID THE STATE OVERCHARGE MR. HANKINS WHEN CHARGES OF TRAFFICKING IN STOLEN PROPERTY IN THE FIRST DEGREE WERE FIRST FILED?

Mr. Hankins also contends that the state overcharged him when charges of Trafficking in Stolen Property were filed in relation to this case. RCW 9.94A.411 sets forth guidelines that prosecutors should follow when making charging decisions. Mr. Hankins properly notes that prosecutors should not overcharge a case in order to obtain a guilty plea. With respect to challenges involving allegations of overcharging the court has noted that, “[a] defendant's ultimate protection against overcharging lies in the requirement that the State prove all elements of the charged crime beyond a reasonable doubt.” *State v. Lee*, 69 Wash.App. 31, 38, 847 P.2d 25 (1993). RCW 9.94A.411(2)(a) provides, “Crimes against property/other crimes will be filed if the admissible evidence is of such convincing force as to make it probable that a reasonable and objective fact finder would convict after hearing all the admissible evidence and the most plausible defense that could be raised.”

The decision to charge Mr. Hankins with the crime of Trafficking in Stolen Property in the First Degree was proper. The court found

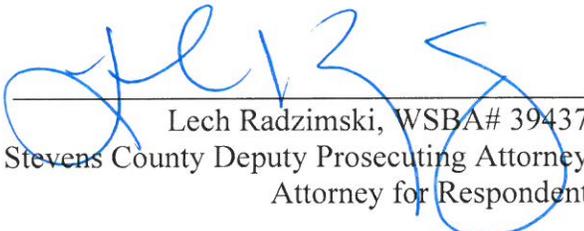
probable cause for the higher charge. After hearing the evidence the jury declined to find him guilty of the higher offense and he was found not guilty. No impropriety exists.

VIII. CONCLUSION

For the above stated reasons, the State respectfully requests that this court deny the relief Mr. Hankins seeks in his appeal and his personal restraint petition.

Respectfully submitted this 21<sup>st</sup> day of May, 2018

Tim Rasmussen, WSBA # 32105  
Stevens County Prosecutor



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Stevens County Deputy Prosecuting Attorney  
Attorney for Respondent

**Affidavit of Certification**

I certify under penalty of perjury under the laws of the State of Washington, that I electronically filed a true and correct copy of the Brief of Respondent to the Court of Appeals, Division III, and e-mailed a true and correct copy to Eastern Washington Appellate Law, [admin@ewalaw.com](mailto:admin@ewalaw.com) and [jill@ewalaw.com](mailto:jill@ewalaw.com) on May 21, 2018.

  
Michele Lembcke, Legal Assistant  
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**STEVENS COUNTY PROSECUTOR'S OFFICE**

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