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Division III
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NO. 37232-4-III

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER BACON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Maryann C. Moreno, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The charging document violated appellant's constitutional rights because it omitted an essential element of one of the crimes charged.

Issue Pertaining to Assignment of Error

Appellant was charged with Making or Possessing a Motor Vehicle Theft Tool. An essential element of that crime is that the defendant intended to use or employ the tool, or allow it to be used or employed, to commit a motor vehicle theft or that he knew the tool was intended for that purpose. The charging document in appellant's case, however, failed to include this element. In light of this omission, is reversal of appellant's conviction required?

B. STATEMENT OF THE CASE

The Spokane County Prosecutor's Office charged Christopher Bacon with (count 1) Possession of a Stolen Motor Vehicle and (count 2) Making or Possessing a Motor Vehicle Theft Tool. CP 6.

Evidence at trial revealed that, on May 11, 2019, someone stole Victoria Laurent's white 1991 Honda Accord, which had been parked just outside her apartment. RP 180. The car had been locked, Laurent had the only key to the car, and she did not give

anyone permission to drive it. RP 180. A Spokane County Sheriff's Deputy took a vehicle theft report. RP 180.

On May 15, 2019, a Spokane Police Officer spotted the Honda, confirmed it had been reported stolen and, with the assistance of a second officer, followed the car and initiated a stop. RP 184-188, 192-193, 250-251. The car was being driven by Kendra Mitchell, and Bacon was riding in the front passenger seat. RP 195, 241-242, 252.

A spring loaded punch (able to break glass windows) that Bacon identified as an "engraver" was found in his front pocket. RP 196-200. A shaved Chevrolet key was found in Bacon's back pocket. RP 203, 216. Inside the car, a shaved key designed for a General Motors vehicle was in the ignition on a ring with other modified keys. RP 203, 211-212. And another key ring holding several additional shaved keys was found on the front passenger seat. RP 203, 214-215. There was no damage to the car, however – no broken windows or damage to the ignition or steering column – and the car still bore its correct license plates. RP 200-201, 225-226, 257-258.

At trial, the prosecutor's office granted Mitchell immunity from prosecution. RP 244, 247-248. She testified that Bacon had picked her up in the Honda and eventually asked her to takeover driving when he became sleepy. RP 240-241. She testified she had no idea the car was stolen. RP 244..

Jurors convicted Bacon as charged. RP 315; CP 30-31. The Honorable Maryann Moreno imposed a standard range 48-month sentence on count 1 and a concurrent 364-day sentence (with 278 days suspended for a period of 12 months) on count 2. RP 332-333; CP 43-44. Bacon timely filed his Notice of Appeal. CP 59-60.

C. ARGUMENT

THE INFORMATION CHARGING BACON WITH MAKING OR POSSESSING A MOTOR VEHICLE THEFT TOOL WAS CONSTITUTIONALLY DEFICIENT.

"[A]n accused has a protected right, under our state and federal charters, to be informed of the criminal charge against him so he will be able to prepare and mount a defense at trial." State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). Under both the Federal and Washington Constitutions, a charging document must include all essential elements of a crime. U.S. Const. amend.

VI; Const. art. I, § 22 (amendment 10)¹; State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991). Essential elements are the facts that must be proved beyond a reasonable doubt to convict the defendant; they are elements necessary to establish the illegality. State v. Johnson, 180 Wn.2d 295, 300, 325 P.3d 135 (2014); State v. Zillyette, 178 Wn.2d 153, 158, 307 P.3d 712 (2013).

Where a challenge to the constitutional sufficiency of a charging document is raised for the first time on appeal, this Court applies the "liberal construction" test set forth in Kjorsvik: "(1) do the necessary elements appear in any form, or by fair construction can they be found, in the information, and if so (2) can the defendant show he was actually prejudiced by the inartful language." McCarty, 140 Wn.2d at 425 (citing Kjorsvik, 117 Wn.2d at 105-106).

"If the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it." State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995). And, if the necessary elements are not found, prejudice is presumed and reversal required without

¹ U.S. Const. amend. VI provides, "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation . . ." Washington Const. art. I, § 22 provides, "In criminal prosecutions, the accused shall have the right to . . . demand the nature and cause of the accusation"

reaching the question of actual prejudice. McCarty, 140 Wn.2d at 425. Review of the charging document is de novo. Johnson, 180 Wn.2d at 300.

Bacon was charged in count 2 with Making or Possessing a Motor Vehicle Theft Tool. Under Washington law:

Any person who . . . has in his or her possession any motor vehicle theft tool, that is adapted, designed, or commonly used for the commission of motor vehicle related theft, under circumstances evincing an intent to use or employ, or allow the same to be used or employed, in the commission of motor vehicle theft, or knowing that the same is intended to be so used, is guilty of making or having motor vehicle theft tools.²

RCW 9A.56.063(1).

The information filed in Bacon's case provided a truncated description of this crime:

That the defendant, CHRISTOPHER BACON, in the State of Washington, on or about May 15, 2019, did possess a motor vehicle theft tool or implement that has been adapted, designed or is commonly used in the commission of motor vehicle related theft, to wit: a SHAVED KEYS, allowing the motor vehicle theft tool to be used or employed in the commission of motor vehicle theft.

CP 6.

² The term "motor vehicle theft tools" includes altered, shaved, and "jiggler" keys. RCW 9A.56.063(2).

This information was constitutionally deficient because it failed to inform Bacon of the requisite intent for the crime, i.e., circumstances evincing *an intent* to use or employ, or allow it to be used or employed, in the commission of motor vehicle theft *or with knowledge* the tool is intended to be used for this purpose. See RCW 9A.56.063(1); see also CP 25-26 (proper intent element included in jury instructions as proof necessary for conviction on count 2). Instead, the information merely indicates the State was required to prove that Bacon possessed a tool that allowed it to be used or employed in the commission of a motor vehicle theft. See CP 6.

While it is not necessary to use the precise words of a statute in the charging document, the words chosen must convey the same meaning and import. State v. Moavenzadeh, 135 Wn.2d 359, 362, 956 P.2d 1097 (1998); Kjorsvik, 117 Wn.2d at 108. The information in Bacon's case fails to do so. Even under the most liberal of readings, it omits an essential element of the offense in count 2.

Although the information cites to RCW 9A.56.063 adjacent to the case caption, this does not save it. "The primary goal of a charging document is to give notice to the accused so that he or

she can prepare an adequate defense, without having to search for the violated rule or regulations." State v. Armstrong, 69 Wn. App. 430, 433, 848 P.2d 1322 (citing Kjorsvik, 117 Wn.2d at 101-02), review denied, 122 Wn.2d 1005, 859 P.2d 602 (1993). Merely citing to the pertinent statute and naming the offense is insufficient unless that name informs the defendant of each of the essential elements. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). That did not occur here.

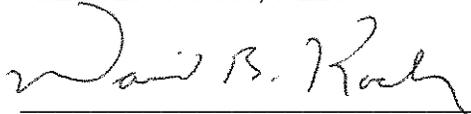
D. CONCLUSION

Bacon's conviction for Making or Possession a Motor Vehicle Theft Tool must be reversed. See State v. Simon, 120 Wn.2d 196, 199, 840 P.2d 172 (1992) (proper remedy is reversal without prejudice to the State refiling the information and retrying the defendant).

DATED this 16th day of June, 2020.

Respectfully submitted,

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