NO. 102842-3

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,
Petitioner,

v.

CHRISTOPHER MICHAEL CRUMP,
Respondent.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION III
Court of Appeals No. 38963-4-III
Walla Walla County Superior Court No. 21-1-00238-36

STATE'S PETITION FOR REVIEW

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SERVIC		
	Christopher Mark Petroni 1511 3rd Avenue, Suite 610 Seattle, WA 98101-1683 **chris@washapp.org**	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED February 29, 2024, Port Orchard, WA _____ **Original e-filed at the Supreme Court; Copy as at left.** **Office ID #91103 kcpa@kitsap.gov**

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I. IDENTITY OF PETITIONER

The petitioner is the State of Washington. The answer is filed by Walla Wall County Special Deputy Prosecuting Attorney Randall Sutton.

II. COURT OF APPEALS DECISION

The State seeks review of the Court of Appeals unpublished decision in *State v. Crump*, No. 38963-4-III (Jan. 30, 2024), in which the Court held that the information did not include all the elements of the offense of possession of a motor vehicle, specifically, knowledge. No motion for reconsideration was filed. A copy of the Court's decision is attached as Appendix.

III. ISSUES PRESENTED FOR REVIEW

1. Whether review is appropriate under RAP 13.4(b)(1) the Court of Appeals decision conflicts with the decision of this Court in *State v. Porter*, 186 Wn.2d 85, 375 P.3d 664 (2016), which held that definitional terms of the crime

of possession of a stolen motor vehicle are not elements of the offense that must be included in the information?

2. Whether, if the information omitted an element, this Court should revisit the holding *State v. Kjorsvik*, 117 Wn.2d 93, 104, 812 P.2d 86 (1991), as applied to claims raised for the first time on appeal, which under RAP 13.4(b)(3) & (4) presents a significant question of law under the Constitution of the State of Washington and of the United States, and an issue of substantial public interest that should be determined by this Court?

IV. STATEMENT OF THE CASE

Christopher Crump was charged in Count I with possession of a stolen motor vehicle, and in Counts II and III, with malicious mischief. CP 38. A jury found Crump guilty on Counts I and II and acquitted him of Count III. CP 69; 5RP 422. The court imposed a standard range sentence.

On appeal, Crump argued for the first time that the

information omitted the element of knowledge. App., at 3. Citing its prior decision in *State v. Level*, 19 Wn. App. 2d 56, 60, 493 P.3d 1230 (2021), the court concluded that knowledge was an nonstatutory element of the crime of possessing a stolen motor vehicle. App., at 4. The court therefore reversed Crump's conviction and remanded for dismissal without prejudice. App., at 4.[1]

V. ARGUMENT

A. CONSIDERATIONS GOVERNING ACCEPTANCE OF REVIEW SET FORTH IN RAP 13.4(B) SUPPORT ACCEPTANCE OF REVIEW.

RAP 13.4(b) sets forth the considerations governing this Court's acceptance of review:

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published

[1] The facts of the offense are not germane to the issues raised herein but are set forth in the opinion below. App., at 1-2.

> decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This Court should accept review because the decision of the Court of Appeals because the first, third and fourth criteria are met.

B. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S ON-POINT HOLDING IN *STATE V. PORTER*.

Crump argued for the first time on appeal that the information alleging possession of a stolen motor vehicle (PSMV) was constitutionally insufficient. The Court of Appeals agreed and reversed. But the case on which Crump and the Court of Appeals relied is directly contrary to the prior holding of this Court. The Court should accept review to resolve this conflict.

An information is constitutionally sufficient "if all

essential elements of a crime, statutory and nonstatutory, are included in the document." *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995).

When, as here, the information is challenged for the first time on appeal, the charging document will be construed quite liberally. *State v. Kjorsvik*, 117 Wn.2d 93, 105, 812 P.2d 86 (1991). The primary purpose of the essential element rule is "to apprise the accused of the charges against him or her and to allow the defendant to prepare a defense." *Vangerpen*, 125 Wn.2d at 787, 888 P.2d 1177. If the State fails to allege every essential element, then the information is insufficient and the charge must be dismissed without prejudice. *Nonog*, 169 Wn.2d at 226 n.3.

Here, the information charged Crump in Count I with possession of a stolen motor vehicle:

> Count 1: That the said **Christopher Michael Crump** in the County of Walla Walla, State of Washington, on or about September 15, 2021, did

> unlawfully possess a stolen motor vehicle, to-wit: 1994 Ford Escort, the property of Stephan R. Hansell.

CP 38 (emphasis in original).

Relying on *State v. Level*, 19 Wn. App. 2d 56, 63, 493 P.3d 1230 (2021), the Court of Appeals held that this language was insufficient because it did not include the alleged "nonstatutory" element of "knowingly." However, *Level* failed to address this Court's holding in *State v. Porter*, 186 Wn.2d 85, 375 P.3d 664 (2016). Because *Level* was contrary to an on-point holding of this Court, this court below should have followed *Porter* rather than *Level*, and found Crump's information sufficient.

In *Porter*, as here, the defendant was charged with PSMV. The statute reads:

> A person is guilty of possession of a stolen vehicle if he or she possess [possesses] a stolen motor vehicle.

RCW 9A.56.068(1) (alteration in RCW). Porter argued that the

information was deficient because it did not contain the statutory definition of "possess," which is found in a separate statute, RCW 9A.56.140. This is relevant in the present case because the alleged nonstatutory element of knowledge is part of the definition of "possess" found in RCW 9A.56.140(1):

> "Possessing stolen property" means *knowingly* to receive, retain, possess, conceal, or dispose of stolen property *knowing* that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

(Emphasis supplied).

At issue in *Porter* was whether RCW 9A.56.140 "merely define[d] the essential element of 'possession' or instead provide[d] an additional essential element the State must allege when charging a criminal defendant with possession of a stolen motor vehicle." *Porter*, 186 Wn.2d at 90. This Court concluded that RCW 9A.56.140 merely defined the element and therefore did not need to be included in the information:

> Contrary to Porter's argument, the State was not

> required to include the definition of "possess." Like the definition of "restrain," the definition of "possess" defines and limits the scope of the essential elements of the crime of unlawful possession of a stolen motor vehicle.

Porter, 186 Wn.2d at 91.

Although the information in *Porter* did include the term "knowingly," 186 Wn.2d at 88, the Court's opinion nevertheless makes clear that that word did not need to be included:

> The fact that "possession" is more precisely defined in a way that might vindicate someone who unwittingly possesses the stolen property and thus does not withhold it from the true owner does not *add* to the essential elements of RCW 9A.56.068. Instead, it limits and defines the scope of the essential element, which the State is not required to allege under *Johnson*.

Porter, 186 Wn.2d at 92 (emphasis the Court's). In view of the foregoing, it is clear that *Level* is contrary to this Court's holding in *Porter*, and should not have been followed. Because under *Porter* the information in this case included all essential elements, the Court of Appeals erred in concluding that the

information should be dismissed. Review should be granted to correct the error and clarify the essential elements of PSMV.

C. AS APPLIED TO CLAIMS RAISED FOR THE FIRST TIME ON APPEAL, *KJORSVIK* IS INCORRECT AND HARMFUL AND SHOULD BE RECONSIDERED.

If this Court determines that the Court of Appeals correctly applied the law, then this Court should reconsider its holding in *Kjorsvik*, which is both incorrect and harmful. As will be shown, this is a significant question of law under the Constitution of the State of Washington and involves an issue of substantial public interest.

It is well settled that a constitutional right, or a right of any other sort, may be waived by the failure to assert it at trial. *United States v. Olano*, 507 U.S. 725, 731, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993); *Yakus v. United States*, 321 U.S. 414, 444, 64 S. Ct. 660, 88 L. Ed. 834 (1944). Timely objection affords the trial court an opportunity to rule correctly on a

matter before it can be presented on appeal. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). There is great potential for abuse when a party does not raise an issue below because it encourages parties to simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal. *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). The rule also serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials. *Strine*, 176 Wn.2d at 749-50; *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988).

The harshness of a blanket rule is ameliorated by the exception found in RAP 2.5(a)(3), which allows consideration for the first time on appeal of "manifest error affecting a constitutional right." Under this standard, defendants must show how the alleged error actually affected their rights. It is this showing of actual prejudice that makes the error

"manifest," allowing appellate review. *State v. O'Hara*, 167 Wn.2d at 99, 217 P.3d 756 (2010); *Scott*, 110 Wn.2d at 688.

Despite the applicability of this formulation to most unpreserved constitutional claims, *State v. Kjorsvik*, 117 Wn.2d 93, 109, 812 P.2d 86 (1991), chose a different path for unpreserved claims regarding the sufficiency of the charging document. Prior to that *Kjorsvik*, a claim that the charging document was insufficient could always be raised for the first time on appeal. *State v. Leach*, 113 Wn.2d 679, 691, 782 P.2d 552 (1989). The concurrence, however, expressed concerns that the rule could be abused:

> I am disturbed, however, by the possibility that a defendant may be well aware at the outset of the proceedings that the charging document fails to state a crime, and yet maintain silence until appeal. When faced with the question whether an indictment sufficiently charges an offense, federal courts have held that "indictments which are tardily challenged are liberally construed in favor of validity."

Leach, 113 Wn.2d at 700 (Brachtenbach, J., concurring)

(*quoting United States v. Pheaster*, 544 F.2d 353, 361 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977). That concern was addressed in *Kjorsvik*, which concluded that a "different standard of review should be applied when no challenge to the charging document has been raised at or before trial because otherwise the defendant has no incentive to timely make such a challenge, since it might only result in an amendment or a dismissal potentially followed by a refiling of the charge." *Kjorsvik*, 117 Wn.2d at 103.

But the rule in *Kjorsvik* has also failed to satisfy the rationale for which it was promulgated. It is therefore both incorrect and harmful. *See State v. Barber*, 170 Wn.2d 854, 864, 248 P.3d 494 (2011). The rule should be modified to subject claims regarding the sufficiency of the charging document to the same standard applied to most other constitutional errors raised for the first time on appeal.

Kjorsvik has been the rule in Washington for nearly 30

years. Yet in just the 15 years before the decision below, appellate courts have vacated 44 convictions. *State v. Combs*, 23 Wn. App. 2d 1005 (2022); *State v. LaBounty*, 21 Wn. App. 2d 1055 (2022); *State v. Smith*, 20 Wn. App. 2d 1068 (2022); *Level*, *supra*; *State v. Briggs*, 18 Wn. App. 2d 544, 492 P.3d 218 (2021); *State v. Bacon*, 16 Wn. App. 2d 603, 481 P.3d 1120 (2021); *State v. Mullins*, 15 Wn. App. 2d 1042 (2020); *State v. Hugdahl*, 195 Wn.2d 319, 458 P.3d 760 (2020); *State v. Markham*, 12 Wn. App. 2d 1026 (2020); *State v. Pry*, 194 Wn.2d 745, 452 P.3d 536 (2019); *State v. Woodall*, 8 Wn. App. 2d 1020 (2019); *State v. Mellgren*, 6 Wn. App. 2d 1035 (2018); *State v. Torre*, 6 Wn. App. 2d 1016 (2018); *State v. Mendoza-Vera*, 4 Wn. App. 2d 1074 (2018); *State v. Holcomb*, 200 Wn. App. 54, 401 P.3d 412 (2017); *State v. Garcia*, 199 Wn. App. 1031 (2017), *review denied*, 189 Wn.2d 1032 (2018); *State v. Sullivan*, 196 Wn. App. 314, 382 P.3d 736 (2016); *State v. McCrea*, 195 Wn. App. 1038 (2016); *State v. Tolentino-Cuevas*,

194 Wn. App. 1001 (2016); *State v. Hernandez*, 193 Wn. App. 1017 (2016), *review granted and remanded*, 187 Wn.2d 1001 (2017); *State v. Tolman*, 192 Wn. App. 1009, *review granted and remanded*, 186 Wn.2d 1008 (2016); *State v. Nord*, 188 Wn. App. 1032 (2015), *review denied*, 185 Wn.2d 1003 (2016); *State v. Gibson*, 187 Wn. App. 1031 (2015); *State v. Smith*, 187 Wn. App. 1010 (2015); *State v. Nord*, 186 Wn. App. 1032, *review denied*, 184 Wn.2d 1002 (2015); *State v. Satterthwaite*, 186 Wn. App. 359, 344 P.3d 738 (2015); *State v. Jones*, 184 Wn. App. 1059 (2014); *State v. Floyd*, 178 Wn. App. 402, 316 P.3d 1091 (2013); *State v. Zillyette*, 178 Wn.2d 153, 307 P.3d 712 (2013); *State v. Morfin-Camacho*, 174 Wn. App. 1051 (2013); *State v. Anguiano-Alcazar*, 169 Wn. App. 1019 (2012); *State v. Rivas*, 168 Wn. App. 882, 890, 278 P.3d 686, 691 (2012), *review denied*, 176 Wn.2d 1007 (2013); *State v. Burns*, 163 Wn. App. 1030 (2011); *State v. O'Grady*, 163 Wn. App. 1003 (2011); *State v. Michael*, 160 Wn. App. 522, 247 P.3d

842, *review denied*, 172 Wn.2d 1015 (2011); *State v. Lira*, 159 Wn. App. 1010 (2011); *State v. Siers*, 158 Wn. App. 686, 244 P.3d 15 (2010); *State v. Naillieux*, 158 Wn. App. 630, 241 P.3d 1280 (2010); *State v. Brown*, 169 Wn.2d 195, 234 P.3d 212 (2010); *State v. Barberi*, 155 Wn. App. 1045 (2010); *State v. Gouley*, 150 Wn. App. 1060 (2009); *State v. Marin*, 150 Wn. App. 434, 208 P.3d 1184, , *review denied*, 167 Wn.2d 1012 (2009); *State v. I.A.O.*, 150 Wn. App. 1006 (2009).[2]

Of these reversals, in only a single case, *State v. Holcomb*, did the Court find prejudice to the defense. Thus, in just 15 years, the trial courts and the State have had to retry 43 cases without there have been any showing that the defendant was denied a fair trial. This is a cost to taxpayers and crime victims that is without any conceivable justification.

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[2] Many of these cases are unpublished and a number are from before March 1, 2013. *See* GR 14.1(a). However, the State does not cite them for persuasive authority. It cites them only to demonstrate the number of cases that the appellate courts have considered under *Kjorsvik*.

Perhaps even more demonstrative of why *Kjorsvik* is both incorrect and harmful is the number of *Kjorsvik* claims the appellate courts have *rejected*. These cases highlight how *Kjorsvik* is seen by the defense as an ace up the sleeve. Shockingly, in just the last 10 years, the appellate courts considered over 120 meritless *Kjorsvik* claims. *State v. Hansen*, ___ Wn. App. 2d ___, 2024 WL 194808 (2024); *State v. Creekmore*, ___ Wn. App. 2d ___, 2024 WL 123545 (2024); *State v. Filippini*, ___ Wn. App. 2d ___, 2023 WL 8771705 (2023); *State v. Shields*, ___ Wn. App. 2d ___, 2023 WL 6549733 (2023), *review denied,* 542 P.3d 583 (2024); *State v. Kriger*, ___ Wn. App. 2d ___, 2023 WL 6442528 (2023), *review denied,* 542 P.3d 579 (2024); *State v. Bell*, ___ Wn. App. 2d ___, 2023 WL 6388244 (2023); *State v. Winger*, 27 Wn. App. 2d 1005, *review denied,* 537 P.3d 1027 (2023); *State v. Faulkner*, 25 Wn. App. 2d 1026 (2023); *State v. Etue*, 25 Wn. App. 2d 1014, *review denied,* 528 P.3d 360 (2023); *State v.*

Chambers, 23 Wn. App. 2d 917, 518 P.3d 649 (2022), *review denied,* 200 Wn.2d 1030 (2023); *State v. Olson*, 23 Wn. App. 2d 1022 (2022), *review denied,* 200 Wn.2d 1030 (2023); *State v. Jones*, 23 Wn. App. 2d 1011 (2022), *review denied,* 200 Wn.2d 1024 (2023); *State v. Bianchi*, 21 Wn. App. 2d 1047, *review denied,* 200 Wn.2d 1007 (2022); *State v. Boudrieau*, 21 Wn. App. 2d 1038, *review denied,* 199 Wn.2d 1026 (2022); *State v. Canela*, 199 Wn.2d 321, 505 P.3d 1166 (2022); *State v. Yaffee*, 21 Wn. App. 2d 1011, *review denied*, 199 Wn.2d 1024 (2022); *State v. Hamilton*, 21 Wn. App. 2d 1010, *review denied,* 199 Wn.2d 1027 (2022); *In re Turner*, 20 Wn. App. 2d 1062 (2022); *State v. Clay*, 19 Wn. App. 2d 1018 (2021); *State v. Hackett*, 18 Wn. App. 2d 1065 (2021); *State v. Peters*, 17 Wn. App. 2d 522, 486 P.3d 925 (2021); *State v. Derri*, 17 Wn. App. 2d 376, 486 P.3d 901 (2021), *aff'd*, 199 Wn.2d 658 (2022); *State v. B.J.N.*, 16 Wn. App. 2d 1060 (2021); *State v. Maulolo*, 16 Wn. App. 2d 1050 (2021); *State v. Stewart*, 16 Wn. App. 2d

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[3] Again, many of these cases are unpublished, but are not being cited as authority.

In most of the foregoing cases the defendants did not even allege prejudice. However, a showing of prejudice is a reasonable requirement. Every criminal defendant has the right to representation by counsel. Plainly one of counsel's most essential duties is to determine what the State must prove and how the defendant will meet that proof. Indeed, evaluating the charging document was one of the essential tasks for which the United States Supreme Court found defendants needed counsel:

> If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad.

Gideon v. Wainwright, 372 U.S. 335, 345, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (*quoting Powell v. Alabama*, 287 U.S. 45, 69, 53 S. Ct. 55, 77 L. Ed. 158 (1932)).

Yet the rule in *Kjorsvik* essentially presumes that counsel failed in this basic duty if the State mistakenly omits a single element of the charge. This is directly contrary to the rule in *Strickland*, which presumes that counsel was effective unless

shown otherwise. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Notably, the *Kjorsvik* rule traces its lineage to *Hagner v. United States*, 285 U.S. 427, 52 S. Ct. 417, 76 L. Ed. 861 (1932),[4] a decision that predates the U.S. Supreme Court's mandate of universal appointed counsel by nearly 30 years.

It is time for a rule that reflects modern criminal procedure. The State does not suggest that the right to be informed of the charges should not be enforceable on appeal. It merely asks that as with other constitutional rights, the defendant should seek his or her remedy first in the trial court. And if the defendant fails to do so, he or she should be required to show prejudice before having his or her conviction vacated.

Thirty years of experience shows that the *Kjorsvik* rule has failed to curb the abusive sandbagging it was intended to forestall. It is therefore harmful and incorrect and should be

[4] *Kjorsvik*, 117 Wn.2d at 104.

overturned. In its place this Court should instead require defendants to meet the requirements of RAP 2.5, as is the case with most other constitutional claims raised for the first time on appeal.

Under the standards set forth in RAP 2.5 and the cases interpreting that provision, the court below did not even consider whether Crump suffered prejudice. As discussed in earlier briefing, none is apparent. The State respectfully asks that review be granted and the decision of the Court of Appeals be reversed and remanded for further proceedings.[5]

VI. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court grant review and reverse the decision of the Court of Appeals.

[5] Similar issues are raised in *State v. Merritt*, No. 102679-0.

VII. CERTIFICATION

This document contains 4453 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED February 29, 2024.

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APPENDIX

FILED
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In the Office of the Clerk of Court
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER MICHAEL CRUMP, Appellant.	)))))))))	No. 38963-4-III UNPUBLISHED OPINION

PENNELL, J. — Christopher Michael Crump appeals his conviction for possession of a stolen motor vehicle. He also challenges the constitutionality of various legal financial obligations (LFOs) imposed in relation to this and a simultaneous malicious mischief conviction. We reverse Mr. Crump's stolen motor vehicle conviction without prejudice as the State's charging document failed to recite all elements of the offense. We reject Mr. Crump's constitutional challenge to his court-ordered LFOs, but nevertheless remand so that Mr. Crump may take advantage of recent statutory amendments that afford relief to indigent defendants.

FACTS

Christopher Crump was pulled over by police on suspicion of driving a stolen vehicle and having expired license plate tabs. During the stop, the police confirmed the

vehicle was stolen and Mr. Crump was placed under arrest. In a post-arrest search of the vehicle, police found two hats: a red hat and a black and red New England Patriots hat.

Mr. Crump was charged with possession of a stolen vehicle and released on electronic home monitoring. During his pretrial release, Mr. Crump tampered with the monitoring device, causing damage. He was then charged with two counts of malicious mischief.

At trial, Mr. Crump did not dispute he possessed the car or that he damaged the monitoring device. He claimed he borrowed the car from an unnamed friend and that he did not know the car was stolen until the police told him.

The State's evidence included testimony from a law enforcement officer about his past interactions with Mr. Crump. The officer stated he had seen Mr. Crump about a dozen times in the past and Mr. Crump was often wearing a red hat. The State then sought to elicit testimony from the officer about a Facebook profile photo that depicted Mr. Crump wearing a red Chicago Bulls hat. Mr. Crump objected to the admission of the photo, arguing it was irrelevant and would serve only to suggest that he had been the subject of a prior police investigation. The State argued the photo was relevant to prove Mr. Crump possessed the car because it showed he wore a hat similar to those found in the car, thus implying he possessed it "'as opposed to just, like, maybe he's just driving

it on a whim.'" 5 Rep. of Proc. (Mar. 22, 2022) at 288-89. The trial court overruled the objection and allowed the evidence.

The jury found Mr. Crump guilty of possessing a stolen motor vehicle, and one count of second degree malicious mischief. The trial court ordered Mr. Crump to pay restitution in the amount of the victims' losses, with $1,001.00 payable to Walla Walla Court Services for the damaged electronic monitoring equipment and $1,534.50 to the owner of the stolen vehicle. The court also imposed a $500.00 crime victim penalty assessment.

Mr. Crump now appeals.

ANALYSIS

Sufficiency of charging document

Mr. Crump challenges the sufficiency of the State's information, arguing it did not include the essential element of knowledge. Because this claim was not raised at trial, we must liberally review the charging document in favor of validity. "An information is sufficient under this standard if it contains some language from which notice of each required element of the offense can be found." *State v. Level*, 19 Wn. App. 2d 56, 60, 493 P.3d 1230 (2021). All elements must be included, even a nonstatutory element such

as knowledge. *Id.* "If facts supporting one or more elements cannot fairly be implied, prejudice is presumed and the charge must be reversed." *Id.*

Here, Count 1 of the amended information alleged:

> That the said **Christopher Michael Crump** in the County of Walla Walla, State of Washington, on or about September 15, 2021, did unlawfully possess a stolen motor vehicle, to-wit: 1994 Ford Escort, the property of Stephan R. Hansell; . . . .

Clerk's Papers at 38.

This case is on all fours with our decision in *Level*. The crime of unlawful possession of a stolen motor vehicle includes a nonstatutory element of knowledge. Even under the liberal construction standard, a charging document that merely accuses a defendant of "'unlawful'" possession of a "stolen" motor vehicle is insufficient to convey the element of knowledge. *Level*, 19 Wn. App. 2d at 63.

The State argues this court should decline to follow *Level* because its holding is "directly contrary" to the Washington Supreme Court's decision in *State v. Porter*, 186 Wn.2d 85, 375 P.3d 664 (2016). *See* Br. of Resp't at 8-9. The State is wrong. *Porter* is factually and legally distinct from this case.

In *Porter*, the Supreme Court held that a charging document need not allege a statutory *definition* of an element of the offense; the court did not hold that an information need not allege a nonstatutory element. If anything, *Porter* supports our conclusion that

reference to the nonstatutory element is required. The charge in *Porter* involved unlawful possession of a stolen motor vehicle. The court noted the charging document "alleged that [Clifford] Porter knowingly possessed property that he knew to be stolen." *Porter*, 186 Wn.2d at 92. According to the court, this language "sufficiently articulated the essential elements of the crime." *Id.* Nothing in *Porter* suggests the State's information would have passed muster had it excluded reference to the mens rea element of knowledge.

The State's information here failed to adequately allege the crime of possession of a stolen motor vehicle. Mr. Crump's conviction for this charge must therefore be dismissed without prejudice.

Evidentiary challenge

Mr. Crump contends the trial court committed prejudicial error by admitting evidence of Mr. Crump's Facebook profile photo found by police during a prior investigation. Although the admissibility of the photo is technically moot given our disposition of the stolen motor vehicle charge, we address Mr. Crump's claim in the event that there is a retrial of the stolen motor vehicle charge.

"The fundamental limitation on the information that the parties can present to the jury is that the evidence must be relevant." Miguel A. Méndez, EVIDENCE:

THE CALIFORNIA CODE AND THE FEDERAL RULES A PROBLEM APPROACH § 1.01, at 2 (1995). Relevance is a necessary, but not sufficient, condition for the admissibility of evidence. To be admissible, evidence must be relevant. ER 402. But not all relevant evidence is admissible. *Id.* Sometimes relevant evidence must be excluded on constitutional grounds "or as otherwise provided by statute" or rules. *Id.* Evidence is relevant if it tends to make a fact of consequence more or less likely to be true than it would be without the evidence. ER 401.

The evidence at issue here is a two-year-old picture of Mr. Crump wearing a red Chicago Bulls hat in a Facebook photo. According to the State, the photo is relevant to show Mr. Crump possessed the vehicle at issue in this case. The State's reasoning is that the similarity between the hat in the photo and the hats found in the stolen vehicle suggest they are owned by the same person. And if the hats in the vehicle belonged to Mr. Crump, this would suggest that he was in primary possession of the vehicle, contrary to his claim that he had merely borrowed the car from a friend.

We disagree that the Facebook photo is relevant. The hat depicted in the Facebook photo is not the same as either of the hats found in the vehicle. This circumstance alone dooms the State's theory of relevance. Hats are a common accessory. The fact that Mr. Crump often wears hats does not tend to suggest that he owned either of the two

hats found in the car. To be sure, the fact that the hats were found in a car driven by Mr. Crump tends to suggest that Mr. Crump was the owner of the hats. But the fact that Mr. Crump has been seen on past occasions wearing hats does not make his ownership or possession of the hats in the car more probable. *Cf.* ER 401 (defining relevance).

The State emphasizes that the hats in the car were red and that Mr. Crump often wears red hats. This is not a helpful detail. Red is an exceedingly common color. Of the 32 teams in the National Football League, 11 use the color red.[1] Of the 30 teams in Major League Baseball, 17 use the color red.[2] And in the National Basketball Association, 12 of the 30 teams use the color red.[3] This of course is just a small sampling of hat types. Red is also a common attribute in hats associated with other professional and

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[1] Buffalo Bills, New England Patriots, Pittsburgh Steelers, Houston Texans, Tennessee Titans, Kansas City Chiefs, New York Giants, Atlanta Falcons, Tampa Bay Buccaneers, Arizona Cardinals, and San Francisco 49ers. *Teams*, NAT'L FOOTBALL LEAGUE, https://www.nfl.com/teams/ (last visited Jan. 29, 2024).

[2] Arizona Diamondbacks, Boston Red Sox, Chicago Cubs, Cincinnati Reds, Cleveland Guardians, Los Angeles Angels, Los Angeles Dodgers, Miami Marlins, Minnesota Twins, New York Yankees, Philadelphia Phillies, Seattle Mariners, St. Louis Cardinals, Texas Rangers, Toronto Blue Jays, and Washington Nationals. An 18th team, the Atlanta Braves uses the similar but apparently distinct color of scarlet. *Teams*, MAJOR LEAGUE BASEBALL, https://www.mlb.com/team (last visited Jan. 29, 2024).

[3] Atlanta Hawks, Chicago Bulls, Denver Nuggets, Detroit Pistons, Houston Rockets, Los Angeles Clippers, Miami Heat, New Orleans Pelicans, Philadelphia 76ers, Portland Trailblazers, Toronto Raptors, and Washington Wizards. *Teams*, NAT'L BASKETBALL ASS'N, https://www.nba.com/teams (last visited Jan. 29, 2024).

nonprofessional sports teams, political enthusiasts, and patriotic Americans. The fact that a particular hat is red is not sufficient to suggest that the hat may be associated with any one person.

It could be that what the State is trying to say is that Mr. Crump is the type of person who prefers red hats. This is speculative. Given the ubiquity of the color red, the fact that Mr. Crump may often be seen wearing a red hat does not suggest he has picked out his hats for their red color, as opposed to some other reason. But even if there were some truth to the idea that Mr. Crump is uniquely interested in hats that are red, the implications of this suggestion would appear improper. As many people know—including most likely many prospective jurors—red is a color associated with the Norteños street gang. The suggestion that Mr. Crump might be associated with the Norteños is highly prejudicial and wholly irrelevant to the charged crime. *See State v. Juarez DeLeon*, 185 Wn.2d 478, 490-91, 374 P.3d 95 (2016). The State is prohibited from introducing evidence that implies gang association without a strong theory of relevance. *See id.*

The Facebook photo depicting Mr. Crump wearing a red hat is not relevant. It should have been excluded from evidence under ER 402.[4]

[4] Because the hat is not relevant, it has no probative value. Thus, there is no need for balancing probative value versus prejudicial effect under ER 403.

LFOs

Mr. Crump contends that by ordering restitution, interest, and a crime victim penalty assessment without first considering his ability to pay, the trial court violated his constitutional right to be free from excessive fines. We disagree with this constitutional challenge. Nevertheless, recent statutory changes provide Mr. Crump some relief.

Our case law holds that restitution tied to a victim's losses, interest, and penalties such as a special penalty assessment, does not violate the excessive fines clause. *See State v. Ellis*, 27 Wn. App. 2d 1, 13, 530 P.3d 1048 (2023); *State v. Ramos*, 24 Wn. App. 2d 204, 229-230, 520 P.3d 65 (2022). Here, Mr. Crump's restitution award was tied to the victims' actual losses. Thus, he states no constitutional claim.[5]

Although Mr. Crump's constitutional challenge fails, he is entitled to the benefit of several recent statutory amendments given his case is pending direct review. *See State v. Ramirez*, 191 Wn.2d 732, 748-49, 426 P.3d 714 (2018); *Ellis*, 27 Wn. App. 2d at 16. Under RCW 9.94A.753(3)(b), Mr. Ellis may seek relief from restitution and interest ordered payable to a state agency based on an inability to pay.[6] Relief from interest on

[5] Given our disposition of the stolen motor vehicle charge, the only restitution order at issue in this appeal pertains to the damage to the malicious mischief charge.

[6] It is unclear whether Walla Walla Court Services qualifies as a state agency. That issue can be resolved on remand.

restitution is also possible under RCW 10.82.090(2). Finally, because the trial court has found Mr. Crump indigent, Mr. Crump is entitled to waiver of the $500 crime victim penalty assessment under RCW 7.68.035(4).

We remand this matter so that Mr. Crump may take advantage of the foregoing statutory provisions.

CONCLUSION

Mr. Crump's conviction for unlawful possession of a motor vehicle is reversed without prejudice. The conviction for malicious mischief is affirmed, but we remand for resentencing consistent with the terms of this decision.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

WE CONCUR:

Lawrence-Berrey, A.C.J.

Staab, J.

KITSAP CO PROSECUTOR'S OFFICE

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