Supreme Ct No. 95655-3

COA No. 34438-0-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

GLEN H. PINKHAM, Petitioner

PETITION FOR REVIEW

Janet Gemberling
Attorney for Petitioner

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A. IDENTITY OF PETITIONER

Glen Pinkham asks this court to accept review of the decision of Division Three of the Court of Appeals, designated in Part B of this petition, terminating review.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals decision filed on October 26, 2016, denying modification of the Commissioner's Ruling which denied review of one of two issues presented for review, which decision became final when the Court of Appeals filed its opinion in this matter on February 6, 2018. Copies of the Commissioner's Ruling, the Decision Denying the Motion to Modify the Commissioner's Ruling, and the court Opinion are attached as Appendices B, C and D, respectively.

C. ISSUES PRESENTED FOR REVIEW

1. Is a state law criminalizing possession of a loaded firearm in a motor vehicle enforceable against a tribal member exercising "in common" hunting rights reserved under the 1855 Treaty of Walla Walla?

2. Does enforcement of a State law that infringes the treaty rights of a member of the Yakima Nation violate the Supremacy Clause of the United States Constitution?

D. FACTS

Glen Pinkham had parked on a forest service road and was field dressing a female elk. (RP 102-03) Officer Michael Caton was on patrol when he approached Mr. Pinkham, requested identification and asked him if he was a Yakima Tribal member. (RP 102-03) Mr. Pinkham provided the officer with his tribal identification and Washington driver's license. (RP 103)

Officer Caton asked Mr. Pinkham where his firearm was and whether it was loaded. (RP 103-04) Mr. Pinkham replied that it was in his SUV and that he had not yet unloaded it. (RP 104) Officer Caton walked over to the SUV, looked inside, and saw a rifle on the passenger seat. (RP 104) He opened the door, picked up and opened the rifle, and found two rounds in the magazine. (RP 105)

The State charged Mr. Pinkham with unlawful possession of a loaded firearm in a motor vehicle, RCW 77.15.460(1). (CP 5) Mr. Pinkham moved to dismiss the charge, alleging that RCW 77.15.460 infringes hunting rights guaranteed to him under the Treaty of Walla Walla, June 9, 1855 (the

"Yakima treaty"). (CP 40, 48-51) The court denied the motion, finding it to be a reasonable safety regulation that does not discriminate against Indians. (RP 82-84) A jury found Mr. Pinkham guilty. (RP 124, 154) Mr. Pinkham appealed, and the Superior Court affirmed the conviction, relying on State v. Olney. (Supp. RP 19)[1]

Mr. Pinkham moved for discretionary review in the Court of Appeals arguing that the conviction violated his rights under the Yakima treaty and that the trial court erred in failing to instruct the jury that knowledge is an essential element of the charged offense. (Appendix A) The motion was granted in part, as to whether knowledge was an essential element of the charged offense, but denied as to whether the conviction violated Mr. Pinkham's treaty rights. (Appendix B) In denying review of the treaty issue, the commissioner relied on *State* v. *Olney*, 117 Wn. App. 524, 528-31, 72 P.3d 235 (2003), *review denied*, 151 Wn.2d 1004 (2004). (Appendix B at 3-4) The court denied Mr. Pinkham's motion to modify the commissioner's ruling. (Appendix C)

The Court of Appeals affirmed Mr. Pinkham's conviction, and he now moves for discretionary review of the decisions denying his motion for review of the treaty rights issue. (Appendix C Opinion)

[1] The transcript of the superior court hearing is cited as Supp. RP; the district court transcript is cited as RP.

E. ARGUMENT

Discretionary review of an interlocutory decision of the Court of Appeals may be accepted by the Supreme Court if the Court of Appeals has committed an obvious error which would render further proceedings useless; the Court of Appeals has committed probable error and the decision of the Court of Appeals substantially alters the status quo or substantially limits the freedom of a party to act; or the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a trial court or administrative agency, as to call for the exercise of revisory jurisdiction by the Supreme Court. RAP 13.5(b).

A petition for review should be accepted by the Supreme Court if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b).

The present case involves the lower courts' continuing reliance on *State v. Olney*, a decision which incorrectly held that a statute prohibiting possession of a loaded firearm may be enforced against a member of the Yakima Nation, who is in possession such a weapon while engaged in hunting activities, without regard to provisions of a treaty that gives the Indians the right to hunt on unclaimed lands in common with non-Indians.

State v. Olney, 117 Wn. App. 524, 72 P.3d 235 (2003), disagreed with by *Confederated Tribes of Colville Reservation v. Anderson*, 903 F. Supp. 2d 1187 (E.D. Wash. 2011). Despite the unsound reasoning of the *Olney* decision, the lower courts continue to rely on its holding as support for affirming convictions of tribal members. This case implicates the Supremacy Clause of the United States Constitution and the public interest in protecting the rights reserved to the members of numerous tribes within the State of Washington that are parties to treaties with the United States government.

1. CONGRESS MAY PASS LAWS ABROGATING TREATY RIGHTS; NO SUCH POWER ACCRUES TO THE STATE LEGISLATURES.

The 1855 treaty between the federal government and the [Yakima] nation "gave the Indians the right to hunt on unclaimed lands in common with non-Indians . . . . [T]his Treaty, like other federal laws, supersedes any conflicting provisions of State laws . . . ." *State v. Satiacum*, 50 Wn.2d 513, 516, 314 P.2d 400 (1957); see *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 99 S. Ct. 3055, 61 L. Ed. 2d 823 (1979) (citing, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553, 23 S. Ct. 216, 47 L. Ed. 299 (1903)).

A treaty with Indians is the supreme law of the land and is binding on the State until Congress limits or abrogates the treaty. *Antoine v. Washington*, 420 U.S. 194, 201, 95 S. Ct. 944, 43 L. Ed. 2d 129 (1975); *State v. McCormack*, 117 Wn.2d 141, 143, 812 P.2d 483 (1991); U.S. Const. art. VI.

In *United States v. Fox*, the federal court rejected the claim that hunting rights created by treaty belonged only to the Navajo tribe and not to the individual members. *United States v. Winans*, 198 U.S. 371, 25 S. Ct. 662, 49 L. Ed. 1089 (1905); *United States v. Fox*, 573 F.3d 1050, 1053-54 (Cir 10, 2009).[2] The Yakima treaty of 1855 expressly grants Indians, as individuals, the right to hunt on open lands outside the reservation: "The exclusive right of taking fish . . . is further *secured to said Indians*; . . . *together with the privilege of hunting*, . . . *upon open and unclaimed land.*" Yakima Treaty of 1855, Article III (emphasis added).

These decisions compel the conclusion that the Yakima Treaty supercedes the State's power to enforce a statute that purports to criminalize the possession of a weapon used for hunting on lands ceded under the Yakima treaty against a member of the Yakima Nation.

[2] The *Fox* court concluded that the defendant could be properly convicted under state law, not because the Navajo treaty did not create individual rights, but because it expressly provided the individual members who committed crimes were thereby deprived of their rights under the treaty. *Id.* at 1054-55.

The lower courts in the present case have relied on *Olney* as authority to the contrary. But *Olney* incorrectly relied on *United States v. Gallaher*, 275 F.3d 784 (9th Cir.2001) and *United States v. Three Winchester 30-30 Caliber Lever Action Carbines*, 504 F.2d 1288, 1291 (7th Cir. 1974) for the proposition that "no specific treaty right exempt[ed the appellants] from laws of general applicability off reservation boundaries." 117 Wn. App. at 530-31. But these cases addressed solely the application of federal law: "In order to exempt tribal members from a *federal law* of otherwise general applicability, the treaty itself must specifically so provide" 275 F.3d at 788–89 (emphasis added); "It is well settled that a *federal statute* of general applicability is applicable to the native American." 504 F.2d at 1291 (emphasis added).

Olney failed to appreciate the distinction between federal and state governments and their relationships with an Indian treaty. State governments cannot pass laws that supersede treaty rights, without special federal authorization, and then only to the extent so authorized. *United States v. Dion*, 476 U.S. 734, 740, 106 S. Ct. 2216, 90 L. Ed. 2d 767 (1986); see *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 411 n. 12, 88 S. Ct. 1705, 20 L. Ed. 2d 697 (1968). Only congress can abrogate the provisions of treaties; statutes only operate to abrogate treaty rights if

congress considers the conflict between treaty rights and the statute and chooses to abrogate the treaty rights. *Id*. 476 U.S. at 740.

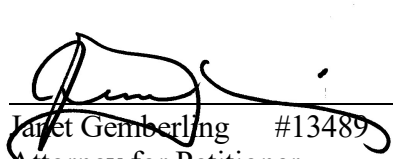
It is not disputed that Mr. Pinkham is a member of the Yakima Nation. His right to hunt on open lands and to possess weapons appropriate for the purpose is protected by treaty, and cannot be abrogated by Washington State law. A state law that supersedes rights granted under the 1855 treaty is not enforceable against a member of the Yakima Nation, and Mr. Pinkham's conviction violates that treaty.

F. CONCLUSION

This Court should grant review, reject the flawed *Olney* analysis, and reverse Mr. Pinkham's conviction.

Dated this 7th day of March, 2018.

Respectfully submitted,



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APPENDIX A

_____-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

GLEN H. PINKHAM, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

APPELLANT'S MOTION FOR DISCRETIONARY REVIEW

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A. ASSIGNMENTS OF ERROR

1. The court's judgment violated Yakima Nation treaty rights and the Supremacy Clause of the United States Constitution.

2. The court erred in omitting the knowledge mens rea from the jury instruction stating the elements of the offense.

B. ISSUES

1. Do Washington State courts have jurisdiction to enforce laws effectively abrogating rights granted by the Yakima Treaty of 1855?

2. Does the Yakima Treaty confer rights upon individual Indians?

3. Once a suspect has identified himself as a member of a treaty tribe having a right to hunt on common lands, does an officer's warrantless search of the suspect's vehicle, in order to ascertain compliance with a statute that restricts those rights, violate the Fourth Amendment?

4. Knowledge is an essential element of felony unlawful possession of a firearm. Is knowledge an essential element of misdemeanor unlawful possession of a loaded firearm and did the trial court err in declining to so instruct the jury?

C. STATEMENT OF THE CASE

Glen Pinkham, and enrolled member of the Yakima Nation, had parked on a forest service road and was field dressing a female elk. (RP 102-03) Officer Michael Caton was on patrol when he saw Mr. Pinkham. (RP 102) He approached Mr. Pinkham, requested identification and asked him if he was a Yakima Tribal member. (RP 103) Mr. Pinkham provided the officer with his tribal identification and Washington driver's license. (RP 103)

Officer Caton asked Mr. Pinkham where his firearm was and whether it was loaded. (RP 103-04) Mr. Pinkham replied that it was in his SUV and that he had not yet unloaded it. (RP 104) Officer Caton walked over to the SUV, looked inside, and saw a rifle on the passenger seat. (RP 104) He opened the door, picked up the rifle, opened it and found two rounds in the magazine. (RP 105)

The State charged Mr. Pinkham with having a loaded rifle in a vehicle, RCW 77.15.460(1). (Complaint) Mr. Pinkham moved to suppress evidence derived from the search of his SUV, alleging the search was unconstitutional. (Motion to Suppress State's Evidence) The court denied the motion finding RCW 77.15.080 is a reasonable safety regulation that does not discriminate against Indians, and the search was authorized by that statute.[1] (RP 82-84)

The matter was tried to a jury. (RP 98) The state's proposed "to convict" instruction omitted the knowledge element of unlawful possession of a firearm. (Plaintiff's Proposed Instructions) The State acknowledged that the charging document had alleged the knowledge element but suggested that element should be stricken. (RP 124) The court acknowledged that the word "knowingly" did not appear in the statute, crossed out the term "knowingly" on the complaint, and accepted the proposed instruction over defendant's objection. (RP 124) The jury found Mr. Pinkham guilty. (RP 124, 154)

The Superior Court affirmed the District Court's decision as to jurisdiction and mens rea and remanded for a determination of the defendant's ability to pay costs. (Order)

[1] The court declined to find the search was a permissible weapons search incident to an investigative stop. (RP 87)

D. ARGUMENT

Review should be granted when a decision of the Superior Court reviewing a decision of a court of limited jurisdiction conflicts with a decision of the Supreme Court or the Court of Appeals, involves a significant question of law under the Constitution of the United States or involves an issue of public interest that should be determined by an appellate court. RAP 2.3(d).

1. CONGRESS MAY PASS LAWS ABROGATING TREATY RIGHTS; NO SUCH POWER ACCRUES TO THE STATE LEGISLATURES.

The 1855 treaty between the federal government and the [Yakima] nation "gave the Indians the right to hunt on unclaimed lands in common with non-Indians . . . . [T]his Treaty, like other federal laws, supersedes any conflicting provisions of State laws . . . ." *State v. Satiacum,* 50 Wn.2d 513, 516, 314 P.2d 400 (1957). This is because "[a] treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 99 S. Ct. 3055, 61 L. Ed. 2d 823 (1979); *citing, e. g., Lone Wolf v. Hitchcock,* 187 U.S. 553, 23 S. Ct. 216, 47 L. Ed. 299 (1903).

> '[A] treaty with Indians is the supreme law of the land and is binding on the State until Congress limits or abrogates the treaty.' *Id.* at 201, 978 P.2d 1070 (citing U.S. CONST. ART. VI; *Antoine v. Washington*, 420 U.S. 194, 201, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975); *State v. McCormack*, 117 Wash.2d 141, 143, 812 P.2d 483 (1991), *cert. denied*, 502 U.S. 1111, 112 S.Ct. 1215, 117 L.Ed.2d 453 (1992)).

State v. Olney, 117 Wn. App. 524, 527, 72 P.3d 235 (2003).

Whether and how the Federal government may pass laws that supersede treaty rights has been a matter of debate with which this court need not concern itself. *See U.S. v. Three Winchester 30-30 Caliber Lever Action Carbines*, 504 F.2d 1288, 1291-1292, n.8 (C.A.Wis. 1974). *Three Winchester Carbines* held "a federal statute of general applicability is applicable to the native American unless there exists some treaty right which exempts the Indian from the operation of the particular statutes in question." *Id*. at 1291.

More significant, for the present case, is that state governments cannot pass laws that supersede treaty rights, without special federal authorization, and then only to the extent so authorized. *U.S. v. Dion*, 476 U.S. 734, 740, 106 S. Ct. 2216, 90 L. Ed. 2d 767 (1986). Only congress can abrogate the provisions of treaties; statutes only operate to abrogate treaty rights if congress considers the conflict between treaty rights and the statute and chooses to abrogate the treaty rights. *Id*. 476 U.S. at 740. In passing the Major Crimes Act congress abrogated provisions of Indian

treaties to the extent they conflicted with certain specified federal criminal laws. 18 USC § 1162-1163. These statutes do not apply to the enforcement of State laws. 476 U.S. at 740.

In *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406, 88 S. Ct. 1705, 1707, 20 L. Ed. 2d 697 (1968), the Supreme Court held the State of Wisconsin could not extinguish the hunting and fishing rights of the Menominee Indians through the enforcement of its hunting and fishing regulations. The basis for this holding was that the state lacked authority to regulate hunting and fishing rights established by treaty. *Id*.; *see Three Winchester Carbines,* 504 F.2d at 1292.

"[F]ederal criminal statutes apply to Indians 'unless there exists some treaty right which exempts the Indian from the operation of the particular statutes in question.'" *United States v. Burns*, 529 F.2d 114, 117 (9th Cir.1976).

United States v. Gallaher, 275 F.3d 784 (9th Cir.2001) held that a member of the Colville Confederated Tribes could be convicted under federal law of being a felon in possession of ammunition. *Gallaher* is not, however, authority for convicting a member of a treaty tribe under state law. Appellant has found no authority that would grant a state court jurisdiction to apply a state law that supersedes rights granted under the 1855 treaty when applied to a member of the Yakima nation.

2. WHETHER TREATIES CONFER RIGHTS UPON INDIVIDUAL INDIANS DEPENDS ON THE LANGUAGE OF THE TREATY.

In applying a law of general application to a member of a treaty tribe, *Gallaher* relied on *Three Winchester Carbines* for the proposition that the treaty-created right to hunt belongs to the tribe, not to the individual, and thus prosecution of the individual for a firearms offense does not infringe any treaty rights. 275 F.3d at 789.

But the treaty at issue in *Three Winchester Carbines* made no provision for individual hunting or fishing:

> The treaty provides that the Indians are to be ceded a tract of land lying upon the Wolf River 'to be held as Indian lands are held . . . .' *Id*. The Supreme Court has interpreted this language to mean that the Menominee Indians retain the right to hunt and fish upon the ceded land.

U.S. v. Three Winchester 30-30 Caliber Lever Action Carbines, 504 F.2d at 1292.

The treaty at issue in *Gallaher* likewise made no reference to the rights of Indians as individuals: "'the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged.' Colville Treaty, May 9, 1891, Art. 6, *reprinted in* 23 Cong. Rec. 3837-40 (1892)." *Gallaher* at 788.

In *United States v. Fox*, the federal court rejected the claim that hunting rights created by treaty belonged only to the Navajo tribe and not

to the individual members. *United States v. Fox*, 573 F.3d 1050, 1053 (Cir 10, 2009).

> But while such treaties are the product of negotiations with tribes as collective entities, there can be little doubt that they endow individual tribal members with rights and responsibilities. As the Supreme Court commented in *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 181, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973), '[w]e cannot accept the notion that it is irrelevant whether [the law] infringes on (appellant's) rights as an individual Navajo Indian.... To be sure, when Congress has legislated on Indian matters, it has, most often, dealt with the tribes as collective entities. But those entities are, after all, composed of individual Indians, and the legislation confers individual rights.' (quotation and citation omitted).

Id. at 1053-54. The federal court relied on the Supreme Court's opinion that the rights reserved by treaty belong to the individual members of the tribe:

> [T]he treaty [creating a reservation] was not a grant of rights to the Indians, but a grant of right from them--a reservation of those not granted . . . . Reservations were not of particular parcels of land, and could not be expressed in deeds, as dealings between private individuals. The reservations were in large areas of territory, and the negotiations were with the tribe. *They reserved rights, however, to every individual Indian, as though named therein.*

Id. at 1054, *quoting United States v. Winans*, 198 U.S. 371, 25 S. Ct. 662, 49 L. Ed. 1089 (1905) (emphasis added).

The *Fox* court concluded that the defendant could be properly convicted under state law, not because the Navajo treaty did not create

individual rights, but because it expressly provided the individual members who committed crimes were thereby deprived of their rights under the treaty. *Id*. at 1054-55.

The Yakima treaty of 1855 contains language expressly granting Indians, as individuals, the right to hunt on open lands outside the reservation: "The exclusive right of taking fish . . . is further *secured to said Indians*; *. . . together with the privilege of hunting, . . . upon open and unclaimed land."* Yakima Treaty of 1855, Article III (emphasis added).

Treaties are to be interpreted in favor of Indians; treaty ambiguities are to be resolved in Indians' favor; and treaties are to be interpreted as Indians would have understood them: "we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999).

Indians may employ modern hunting aids such as modern lighting, firearms, and the like. *United States v Washington*, 384 Fed Supp 312, (WD Washington 1974) *affirmed* 520 F.2d 676 (9th Cir.1975). The State may not regulate the Indian's use of tools and implements used for fishing and hunting. *See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 682-683.

It is not disputed that Mr. Pinkham is a member of the Yakima nation. His right to hunt on open lands and to possess weapons appropriate for the purpose is protected by treaty, and cannot be abrogated by Washington State law. The court lacks jurisdiction to apply to a member of the Yakima nation a state law that regulates the use of tools and implements used for fishing and hunting .that supersedes rights granted under the 1855 treaty.

3. OMISSION OF THE ESSENTIAL MENTAL ELEMENT OF KNOWLEDGE FROM THE POSSESSION OF A FIREARM JURY INSTRUCTION VIOLATED DUE PROCESS.

Criminal defendants have a constitutional due process right to jury instructions that include the essential elements of each charged crime. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). Omission of an element relieves the State of its burden to prove every essential element beyond a reasonable doubt. *Id.* at 265.

Although the knowledge element is not included in the statute, knowledge is an essential element of second degree unlawful possession of a firearm. *State v. Anderson*, 141 Wn.2d 357, 366, 5 P.3d 1247 (2000). Similarly, knowledge is not an express element of possession of a loaded

rifle in a vehicle under RCW 77.15.460, but the reasoning of *Anderson* is equally applicable here.

In finding RCW was not a strict liability offense, the *Anderson* Court considered a number of relevant factors:

> (1) . . . the statute must be construed in light of the background rules of the common law, and its conventional mens rea element; (2) whether the crime can be characterized as a "public welfare offense" created by the Legislature; (3) the extent to which a strict liability reading of the statute would encompass seemingly entirely innocent conduct; (4) . . . the harshness of the penalty . . . [;] (5) the seriousness of the harm to the public; (6) the ease or difficulty of the defendant ascertaining the true facts; (7) relieving the prosecution of difficult and time-consuming proof of fault where the Legislature thinks it important to stamp out harmful conduct at all costs, "even at the cost of convicting innocent-minded and blameless people"; and (8) the number of prosecutions to be expected.

141 Wn.2d 357 at 363 (quoting *State v. Bash*, 130 Wn.2d 594, 605-06, 925 P.2d 978 (1996)).

The Court noted that "these factors are to be read in light of the principle that offenses with no mental element are generally disfavored." 141 Wn.2d at 363 (quoting *Bash*, 130 Wn.2d at 606). While acknowledging that firearms are potentially dangerous items, the court placed particular emphasis on the fact that construing the unlawful possession statutes as creating a strict liability offense "would criminalize a broad range of apparently innocent behavior." 141 Wn.2d at 364.

The Court further determined that "the factor of seriousness of harm to the public also weighs in favor of" implying knowledge as an element of the offense because, "[w]hile one can easily argue that there is danger to the society if persons who have been convicted of certain crimes knowingly possess firearms, we fail to see how their unwitting possession of a firearm poses a significant danger to the public." *Id.* at 365.

The reasoning in *Anderson* applies to the possession of a loaded firearm in a vehicle at issue here. Absent a prior criminal history and actual knowledge that the firearm is loaded, it is hard to imagine how a person presents a danger to society merely by having the firearm in his vehicle. The court's instructions in the present case omitted the essential element of acting knowingly, and thus violated Mr. Pinkham's right to due process.

4. STRIKING THE WORD "KNOWINGLY" FROM THE COMPLAINT RENDERED IT CONSTITUTIONALLY DEFECTIVE.

At the prosecutor's request, the court struck the word "knowingly" from the Complaint. (RP 124)

A charging document that fails to state all the essential elements of the offense, both statutory and court-imposed, is constitutionally defective. *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991). The essential

elements rule applies to all charging documents. *City of Auburn v. Brooke*, 119 Wn.2d 623, 636, 836 P.2d 212 (1992). 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. *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995).

When the sufficiency of the charging document is first challenged on appeal, the defendant must show that either (a) the language of the charge, when liberally construed, fails to provide any notice of the omitted element; or (b) the defendant can establish actual prejudice resulting from inartful or vague language. 117 Wn.2d at 106. If the necessary elements are not found or fairly implied, the reviewing court will presume prejudice and reverse without reaching the question of prejudice. *Kjorsvik*, 117 Wn.2d at 105-06.

Once the word "knowingly" was omitted from the charge, the complaint was constitutionally defective. As the State and court agreed, the word does not appear in the statute, nor is it contained or implied in the name of the offense. This court need not determine whether the omission of the essential element of knowledge from the Complaint prejudiced Mr. Pinkham. The conviction must be reversed.

E. CONCLUSION

Review should be granted because the decision of the Superior Court construing the rights granted under a treaty with the Yakima Nation involves a significant question of law under the Supremacy Clause of the United States Constitution. Const. art. VI; *Antoine v. Washington,* 420 U.S. 194, 201, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975); *State v. McCormack,* 117 Wash.2d 141, 143, 812 P.2d 483 (1991), *cert. denied,* 502 U.S. 1111, 112 S.Ct. 1215, 117 L.Ed.2d 453 (1992)).

Review should also be granted because the decision below conflicts with *State v. Kjorsvik* and *State v. Anderson* by affirming a criminal conviction for an offense despite the omission of an essential element of the offense from the charging document and jury instructions.

Dated this 1st day of June, 2016.

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Attorney for Appellant

APPENDIX B

FILED
Aug 15, 2016
Court of Appeals
Division III
State of Washington

The Court of Appeals
of the
State of Washington
Division III

STATE OF WASHINGTON,	)	No. 34438-0-III
	)	
Respondent,	)	
	)	
v.	)	COMMISSIONER'S RULING
	)	
GLEN HOWARD PINKHAM,	)	
	)	
Appellant.	)	

Glen Howard Pinkham moves for discretionary review of the Yakima County Superior Court's order affirming his district court conviction for unlawful possession of a loaded rifle in a vehicle, RCW 77.15.460(1). This court has considered the record, the file, the parties' written memoranda and oral argument, and the criteria in RAP 2.3(d), and denies in part and grants in part Mr. Pinkham's motion.

On March 31, 2014, Washington Department of Fish and Wildlife Officer Michael Caton was patrolling a forest service road on off-reservation public land when he saw Glen Pinkham, an enrolled member of the Yakama Nation, field dressing a female elk near his parked SUV. Upon Officer Caton's request, Mr. Pinkham provided his tribal identification and Washington driver's license. The officer asked Mr. Pinkham where his firearm was and whether it was loaded. Mr. Pinkham said it was in his vehicle and that

he had not yet unloaded it. Officer Caton walked to the SUV and observed a rifle on the passenger seat. He opened the door, retrieved the rifle, and removed two live rounds from the magazine.

The State charged Mr. Pinkham with unlawful possession of a loaded rifle in a vehicle, in violation of RCW 77.15.460(1).[1] The complaint alleged he "knowingly" committed the offense. Mr. Pinkham moved to suppress the evidence on constitutional grounds, or, alternatively to dismiss for lack of jurisdiction. The court denied the motion on the bases Officer Caton had authority under RCW 77.15.080 to initiate a temporary stop to check for compliance with the requirements of RCW Title 77, including to determine whether the rifle was loaded; and, that the State of Washington has criminal jurisdiction over Mr. Pinkham because RCW 77.15.460 is a non-discriminatory safety-based statute that does not infringe on tribal members treaty hunting rights.

The case proceeded to a jury trial at which Officer Caton was the sole witness. At the close of the evidence, pursuant to the State's request, the court struck the word "knowingly" from the complaint because that element does not appear in RCW 77.15.460(1). Over defense objection, the court gave the State's proposed "to convict"

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[1] RCW 77.15.460 provides in relevant part:
(1) A person is guilty of unlawful possession of a loaded rifle or shotgun in a motor vehicle, as defined in RCW 46.04.320 . . . if:
(a) The person carries, transports, conveys, possesses, or controls a rifle or shotgun in a motor vehicle . . . except as allowed by department rule; and
(b) The rifle or shotgun contains shells or cartridges in the magazine or chamber[.]

instruction that did not include a knowledge element. The jury found Mr. Pinkham guilty. On RALJ appeal, the superior court affirmed the district court's decision as to jurisdiction and the element of knowledge.

Mr. Pinkham first contends discretionary review is warranted under RAP 2.3(d)(2) on grounds that the court's judgment violates Yakama Nation treaty rights and the Supremacy Clause of the United States Constitution, art. VI, cl. 2. He contends the Treaty of 1855 with the federal government contains express language granting Indians, as individuals, the right to hunt on open lands outside the reservation and to possess weapons appropriate for the purpose—rights that he says cannot be abrogated by Washington State law. He thus concludes the court lacks jurisdiction to apply to a member of the Yakama Nation a state law, i.e., RCW 77.15.460, that regulates the use of tools and implements used for hunting that supersedes rights granted under the 1855 treaty.

The identical supremacy clause/lack of jurisdiction contentions raised by Mr. Pinkham were addressed and rejected in *Olney*, where this court held that RCW 77.15.460 is a safety-based statute of general application to persons (as opposed to only hunters) under the state's police powers and does not infringe on an individual's treaty hunting rights absent their showing that the treaty specifically exempts tribal members from the state law. *State v. Olney*, 117 Wn. App. 524, 528-31, 72 P.3d 235 (2003), *review denied*, 151 Wn.2d 1004 (2004). *Olney* resolves Mr. Pinkham's jurisdictional and

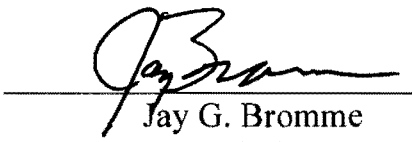
constitutional supremacy questions and thus controls the issues raised in his first ground for discretionary review. Accordingly, this court denies his request for discretionary review of that ground.

In his second ground, Mr. Pinkham contends the court erred in omitting the knowledge mens rea from the jury instruction stating the elements of unlawful possession of a loaded rifle in a vehicle. He also contends the court's striking of the word "knowingly" from the complaint rendered it constitutionally defective. He asserts that discretionary review is warranted because the court's decision conflicts with *State v. Anderson*, 141 Wn.2d 357, 5 P.3d (2000) (although not included in the statute, knowledge is an essential element of second degree unlawful possession of a firearm), and *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991) (charging document that fails to state all essential elements of the offense is constitutionally defective).

In view of the lack of Washington case law on the primary question whether knowledge is an element of unlawful possession of a loaded rifle or shotgun in a motor vehicle under RCW 77.15.460—the answer to which will guide the determination whether it is error to not include a knowledge element in the charging document and jury instructions—this court is of the opinion that the issue is one of public interest that should be determined by an appellate court, RAP 2.3(d)(3), now therefore,

IT IS ORDERED, the motion for discretionary review is DENIED as to Mr. Pinkham's first ground, and is GRANTED as to the issues raised in his second ground.

The Clerk shall set a perfection schedule for the appeal.



Jay G. Bromme
Commissioner

APPENDIX C

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

STATE OF WASHINGTON, Respondent, v. GLEN HOWARD PINKHAM, Appellant.	)	No. 34438-0-III ORDER DENYING MOTION TO MODIFY COMMISSIONER'S RULING

Having considered Appellant's motion to modify the commissioner's ruling of August 15, 2016, and the record and file herein;

IT IS ORDERED the motion to modify the commissioner's ruling is denied.

PANEL: Judges Korsmo, Fearing, Lawrence-Berrey

FOR THE COURT:

GEORGE FEARING
Chief Judge

APPENDIX D

FILED
FEBRUARY 6, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. GLEN H. PINKHAM, Petitioner.	)	No. 34438-0-III
	)	PUBLISHED OPINION

KORSMO, J. — This court granted discretionary review of this district court prosecution to determine if the crime of unlawful possession of a loaded rifle in a vehicle requires a mental state. We conclude that the legislature did not impose a mental state and that this safety regulation does not require one. Accordingly, we affirm.

FACTS

Petitioner Glen Pinkham was charged in the Yakima County District Court with one count of possession of a loaded rifle in a vehicle in violation of RCW 77.15.460(1) after being seen field dressing an elk by a wildlife officer. The complaint charging the crime alleged that he "knowingly" committed the offense.

The case proceeded to jury trial; the officer was the sole witness. Despite the knowledge element alleged in the charging document, the court, over defense objection, gave the State's proposed "to convict" instruction that did not include a knowledge element. The jury convicted as charged. The superior court affirmed on appeal.

This court granted discretionary review to resolve the mental state question.[1] A panel considered the matter without oral argument.

ANALYSIS

The sole question presented by this appeal is one that was not discussed or resolved in *State v. Olney*, 117 Wn. App. 524, 72 P.3d 235 (2003), *review denied*, 151 Wn.2d 1004 (2004).[2] Did the legislature intend that prosecution of the offense of possessing a loaded weapon in a vehicle require proof of a particular mental state, such as knowledge?

The statute provides:

> A person is guilty of unlawful possession of a loaded rifle or shotgun in a motor vehicle, as defined in RCW 46.04.320 . . . if:
>
> (a) The person carries, transports, conveys, possesses, or controls a rifle or shotgun in a motor vehicle . . . except as allowed by department rule; and

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[1] Our commissioner declined to review Mr. Pinkham's challenge to the wildlife agent's authority to investigate his hunting activities. *See State v. Olney*, 117 Wn. App. 524, 72 P.3d 235 (2003), *review denied*, 151 Wn.2d 1004 (2004).

[2] Petitioner also requests that he not be assessed appellate costs should he fail to prevail. Since the State has indicated it will not be seeking costs, the request is moot and will not be addressed.

> (b) The rifle or shotgun contains shells or cartridges in the magazine or chamber.

RCW 77.15.460(1).[3] This offense is a misdemeanor. RCW 77.15.460(3). It was enacted in 1998. LAWS OF 1998, ch. 190, § 28.

Like the statute itself, legislative history materials are silent on the question of whether a mental state was intended. Petitioner argues that the crime should not be treated as a strict liability offense, likening the situation to *State v. Anderson*, 141 Wn.2d 357, 5 P.3d 1247 (2000). There, our court determined that the crime of unlawful possession of a firearm in the second degree required imputation of a knowledge element that was not stated in the statute.[4]

It is the job of the legislature to define crimes. *State v. Feilen*, 70 Wash. 65, 70, 126 P. 75 (1912) (legislature has "the inherent power to prohibit and punish any act as a crime" (internal quotation marks omitted)); *State v. Danis*, 64 Wn. App. 814, 820, 826 P.2d 1096 (1992) ("The Legislature has extremely broad, almost plenary authority to define crimes."). Generally, the statute must state the essential elements of a crime. *State v. Wadsworth*, 139 Wn.2d 724, 734, 991 P.2d 80 (2000).

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[3] This statute replaced an earlier, similar provision. *See* former RCW 77.16.250 (1955) (unlawful "to carry, transport or convey, or to have in his possession or under his control in any . . . vehicle . . . any shotgun or rifle containing shells or cartridges therein"). Our research has not uncovered any case construing the former statute.

[4] The statute made it a crime to own, possess, or control a firearm after previously having been convicted of a felony other than a "serious offense." Former RCW 9.41.040(1)(b) (1995); *see Anderson*, 141 Wn.2d at 360.

The legislature is entitled to enact strict liability offenses. *State v. Rivas*, 126 Wn.2d 443, 452, 896 P.2d 57 (1995). Nonetheless, the courts will read mental states into criminal legislation if they believe the legislature intended a mental state or the common law requires one. *State v. Bash*, 130 Wn.2d 594, 604-07, 925 P.2d 978 (1996). Thus, review of this issue requires consideration of the text of the statute and review of legislative history. *Id.* at 604-05; *Anderson*, 141 Wn.2d at 361.

As noted previously, the text of the statute does not provide for a mental state and there is no legislative history for this offense or the predecessor offense that discusses this topic. In such instances,

> the United States Supreme Court identified several considerations which bear upon legislative intent to impose strict liability: (1) a statute's silence on a mental element is not dispositive of legislative intent; the statute must be construed in light of the background rules of the common law, and its conventional mens rea element; (2) whether the crime can be characterized as a "public welfare offense" created by the Legislature; (3) the extent to which a strict liability reading of the statute would encompass seemingly entirely innocent conduct; (4) and the harshness of the penalty. Other considerations include: (5) the seriousness of the harm to the public; (6) the ease or difficulty of the defendant ascertaining the true facts; (7) relieving the prosecution of difficult and time-consuming proof of fault where the Legislature thinks it important to stamp out harmful conduct at all costs, "even at the cost of convicting innocent-minded and blameless people"; and (8) the number of prosecutions to be expected.

Bash, 130 Wn.2d at 605-06 (quoting 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW § 3.8, at 341 (1986)). A reviewing court balances these various factors in reaching its assessment of legislative intent. *Id.* at 610.

We think that the balance weighs in favor of a strict liability reading of the statute. While RCW 77.15.460 does not contain a mental element, several accompanying provisions of that chapter, enacted at the same time as § 460 by Laws of 1998, ch. 190, do contain mental elements. *See* RCW 77.15.250 ("knowingly" unlawful release of fish or wildlife); RCW 77.15.265 (unlawful possession if actor "knows" wildlife was taken unlawfully); RCW 77.15.290 ("knowingly" engaging in unlawful transportation of fish or wildlife); RCW 77.15.310 ("knowingly" fails to use or maintain fish guard). Later additions to the chapter similarly describe some crimes with mental states and others without. *See, e.g.*, RCW 77.15.790 ("negligently" feed or attract wild carnivores); RCW 77.15.792 ("intentionally" feed or attract wild carnivores). The legislature clearly knew how to create crimes with mental states and without mental states and it enacted both varieties of offenses at the same time in the 1998 legislation. LAWS OF 1998, ch. 190. This first factor favors treating § 460 as a strict liability offense.

The second factor is whether this is a "public welfare offense." The statute is located in the fish and wildlife title of the Revised Code of Washington. It appears designed both to limit hunting from automobiles and to protect against the accidental discharge of a weapon in an automobile, something that could harm either the vehicle's occupants or others in the vicinity. *E.g.*, *Transamerica Ins. Grp. v. United Pac. Ins. Co.*, 92 Wn.2d 21, 22-23, 593 P.2d 156 (1979) (passenger's loaded rifle discharged when being removed from truck's gun rack, striking driver); *Heilman v. Wentworth*, 18 Wn.

App. 751, 752-53, 571 P.2d 963 (1977) (driver's shotgun slipped and accidentally discharged when truck accelerated, striking passenger). The harm to others that the legislation seeks to prevent would not be mitigated by the fact that it may not have been intended. This regulation is properly characterized as a public welfare offense. This factor, too, favors a strict liability reading of the statute.

The third factor is whether or not a strict reading of the statute would "encompass seemingly entirely innocent conduct." Again, we believe this factor favors strict liability. Carrying a loaded weapon in a moving vehicle is dangerous, not innocent, behavior. The regulation promotes safe gun handling activity and does not limit gun ownership. Carrying a loaded rifle in a vehicle is not "entirely innocent conduct."

The fourth factor is the harshness of the penalty. This offense is a simple misdemeanor, punishable by up to 90 days in jail and/or a fine of $1,000. RCW 9A.20.020(3); RCW 77.15.460(3). Unlike the felony provision at issue in *Anderson*, the punishment for this offense is the most lenient recognized in our general criminal law. This fact ameliorates the harsh nature of a strict liability offense and, on balance, favors that reading of the statute.

The fifth factor is the seriousness of the harm to the public. We believe this factor, too, favors treating this as a strict liability offense. The harm to a bystander is the same whether or not the owner remembered if his rifle was loaded when he put it in his vehicle. The legislature can legitimately determine that public safety is not enhanced by only

punishing those who knowingly carried a loaded weapon in a vehicle instead of those who ignorantly do so.

The sixth factor is the ease or difficulty of the defendant's ability to ascertain the true facts of the incident. Although we can envision fact patterns where a loaded rifle might be placed in a driver's vehicle without his knowledge—a fact pattern that could be addressed with an unwitting possession instruction—in most instances the rifle owner is in the superior position to know whether the weapon is loaded and where it is located. In the typical situation, this factor supports a strict liability reading of the statute.

The seventh factor is whether strict liability would relieve the government of a difficult burden of proof in an area that it is attempting to stamp out harmful conduct. Although the knowledge element often would be difficult to prove since the defendant is the best source of that information, absent evidence of stated legislative purpose to *eliminate* this specific harmful conduct, the seventh factor weighs against imposition of strict liability.

The final factor is the number of prosecutions that might be expected. No numbers have been supplied concerning the number of charges filed under this statute, but it does not appear to be a significant number given the relative dearth of discussion in our case law. This factor does not appear to weigh on either side of the issue.

On balance, these factors weigh in favor of treating this safety regulation as a strict liability offense. There are limited circumstances where hunting from a vehicle is even

permitted and no circumstances have been identified that would require that a loaded weapon be kept in the vehicle to facilitate hunting. The harm of an accidental discharge justifies the legislative prohibition on loaded rifles or shotguns in a vehicle. There is no need to impute a mental state to protect innocent behavior.

While our consideration of the factors cited in *Bash* leads to the conclusion that the legislature intended to impose strict liability, an even earlier *Anderson* case involving a similar statute also supports this result. *State v. Anderson*, 54 Wn. App. 384, 773 P.2d 882 (1989). At issue in that pre-*Bash* decision was RCW 9.41.050, the statute that prohibits carrying a loaded pistol in a vehicle unless the owner had a concealed weapons permit and was present.[5] This court declined to read a knowledge element into the statute, relying on out-of-state authorities. In particular, citing a California decision that considered the same United States Supreme Court authorities *Bash* would later consider, this court recognized that the primary purpose of the statute was regulation rather than punishment and constituted a matter of public health and safety. *Id.* at 386 (citing *People v. Dillard*, 154 Cal. App. 3d 261, 265, 201 Cal. Rptr. 136 (1984).[6]

---

[5] "A person shall not carry or place a loaded pistol in any vehicle unless the person has a license to carry a concealed pistol." RCW 9.41.050(2)(a).

[6] The California court went on to describe its loaded pistol in a car statute as "a quintessential public welfare statute which embraces a legislative judgment that in the interest of the larger good, the burden of acting at hazard is placed upon a person who, albeit innocent of criminal intent, is in a position to avert the public danger." *Dillard*, 154 Cal. App. 2d at 266 (quoted in *Anderson*, 54 Wn. App. at 387).

It would be incongruous to hold that a knowledge element is required when a hunting weapon is placed in a vehicle, but no such element is necessary when placing a loaded pistol in the vehicle. We conclude that our construction of that statute in the first *Anderson* case as a strict liability offense is consistent with our construction of the loaded rifle statute. Both operate as public welfare regulations for which the legislature did not intend to include a mental state.

The judgment of the district court is affirmed.

Korsmo, J.

WE CONCUR:

Fearing, J.

Fearing, ~~C.J.~~

Pennell, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. _____
Respondent,	)	
vs.	)	COA No. 34438-0-III
	)	
GLEN H. PINKHAM	)	CERTIFICATE
	)	OF MAILING
Petitioner.	)	

I certify under penalty of perjury under the laws of the State of Washington that the facts set out above are true and that on this day I served a copy of this document by email on the following attorneys, receipt confirmed, pursuant to the parties' agreement:

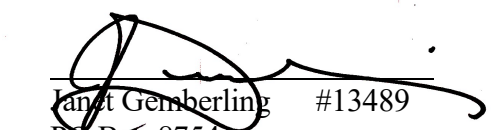
Dave Trefry
David.Trefry@co.yakima.wa.us

Heather Thorn
heather.thorn@co.yakima.wa.us

I certify under penalty of perjury under the laws of the State of Washington that on this day I served a copy of this document by first-class mail addressed to:

Glen H. Pinkham
5024 40th Ave NE
Seattle, WA 98105

Signed at Spokane, Washington on March 7, 2018.



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JANET GEMBERLING PS

March 07, 2018 - 12:23 PM

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