Supreme Court No. 98491-3
Court of Appeals No. 79117-6-I

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY GEISEN,

Petitioner.

PETITION FOR DISCRTIONARY REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Timothy Geisen, the petitioner, asks this Court to grant review of the Court of Appeals' decision terminating review. The decision is attached in the appendix.

B. ISSUES FOR WHICH REVIEW SHOULD BE GRANTED

1. To comply with the state and federal constitutions, a charging document must both fairly inform the defendant of the facts underlying the charge and enable the defendant to plead double jeopardy as a bar in a future prosecution for the same offense. The charging document alleging bribery was generic and failed to allege specific facts to provide notice of the offense. Except for alleging the "when" of the offense, the document failed to allege the "who," "what," "where," and "how." By failing to provide notice and not enabling a plea of double jeopardy, is the charge of bribery constitutionally deficient?

2. The charge for driving under the influence was generic and failed to allege specific facts to provide notice of the offense. The document failed to allege the "what" and "how" of the offense. By failing to provide notice and not enabling a plea of double jeopardy, is the charge of driving under the influence constitutionally deficient?

3. Bribery requires proof that the defendant acted with *corrupt* intent. Voluntary intoxication is a defense to bribery because intoxication

may negate the element of corrupt intent. In support of Mr. Geisen's intoxication defense to bribery, defense counsel proposed and obtained a voluntary intoxication instruction. But the instruction told the jury evidence of intoxication was relevant only as to whether Mr. Geisen acted with intent, rather than *corrupt* intent. Was Mr. Geisen deprived of effective assistance of counsel?

C. STATEMENT OF THE CASE

According to the evidence elicited at trial, around 8:00 p.m. on June 19, 2018, Officer Sierra Swartz of the Edmonds Police Department was driving southbound on Highway 99 around the 20,000 block in Snohomish County. RP 160-62, 164. After observing a truck cross back and forth over the center line about eight times, she turned on her emergency lights to stop the driver for improper lane use. RP 162, 174. The driver stopped in a largely vacant Car Max parking lot. RP 163-64; Exs. 8-11.

The driver was Timothy Geisen. Upon approaching Mr. Geisen, Officer Swartz observed many signs indicating that Mr. Geisen had been drinking. RP 165. There was a strong odor of alcohol from the vehicle and Mr. Geisen. RP 165. An open beer can of "Steel Reserve," about 22 or 24 ounces in size, sat in the center console. RP 152, 157, 165; Ex. 12. The alcohol content for this kind of beer is relatively high, about eight percent

per volume. RP 152, 158. There were about four empty cans of Steel Reserve beer on the floor. RP 157; Ex. 13. Mr. Geisen's eyes were very bloodshot and he slurred his words. RP 165. Mr. Geisen stated he had been drinking and admitted he should not be driving. RP 166.

According to Officer Swartz, Mr. Geisen reached into the center console, retrieved two $100 dollar bills, presented them to her, and asked, "Will this take care of this?" RP 167. Officer Swartz said it would not. RP 167.

Mr. Geisen agreed to participate in field sobriety tests. RP 175. On the walk and turn test, Mr. Geisen was unable to keep his balance, missed placing his heel to his toe on every single step, stepped off the line on each step, raised his hands to keep his balance, and failed to turn and walk back. RP 183, 213. The horizontal gaze nystagmus test indicated that Mr. Geisen had been drinking. RP 183. On both tests, Mr. Geisen was unable to follow the instructions. RP 211-12. After the tests, Officer Swartz arrested Mr. Geisen for driving under the influence.[1] RP 185.

Officer Samuel Gagner, who had arrived to assist Officer Swartz, searched Mr. Geisen incident to his arrest. RP 149, 154. He gave the property he seized to Officer Swartz, who put the items in a bag. RP 156.

[1] Mr. Geisen later declined to participate in the breath test. RP 192-93.

Officer Swartz counted the money taken from Mr. Geisen in front of him, calculating it as $495. RP 187. This currency excluded the $200 from the center console. RP 216. While Officer Swartz counted the money in front of Mr. Geisen, Mr. Geisen purportedly stated "150 of that could have been yours if you would have let me go." RP 187. On the ride to the jail, Mr. Geisen ranted and expressed that he did not understand why the officer was taking him to a different state. RP 206, 215.

The prosecution charged Mr. Geisen with one count of bribery, a felony, and one count of driving under the influence, a gross misdemeanor. CP 111. Defense counsel conceded at trial that her client had driven while under the influence and presented an intoxication defense to the charge of bribery. RP 143-45 (opening statement). She argued that the evidence did not prove beyond a reasonable doubt that Mr. Geisen acted with corrupt intent, an essential element of bribery, due to the affect Mr. Geisen's intoxication had on his state of mind. RP 145, 241-44. The jury convicted Mr. Geisen as charged. RP 252.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED.

1. Contrary to precedent, the Court of Appeals held that a generic recitation of the essential elements of an offense in a charging document is constitutionally sufficient and that specific conduct need not be alleged. Review should be granted to resolve the conflict and address this constitutional issue.

To afford notice to a defendant of the nature and cause of the accusation, the State must include all the essential elements of the crime in the charging document. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); Const. art. I, §§ 3, 22; U.S. Const. amends. VI, XIV. "The 'essential elements' rule requires that a charging document *allege facts supporting every element of the offense,* in addition to adequately identifying the crime charged." State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). Thus, more is required than simply stating every element of the charged crime. Id. The rule "requires that the defendant be apprised of the elements of the crime charged *and the conduct of the defendant which is alleged to have constituted that crime*." Kjorsvik, 117 Wn.2d at 98 (emphasis added).

Restated, "[t]he information is constitutionally adequate only if it sets forth all essential elements of the crime, statutory or otherwise, *and the particular facts supporting them*." State v. Hugdahl, __ Wn.2d __, 458 P.3d 760, 762 (2020) (emphasis added). "The State bears this burden and

failure to set forth the required elements *and facts* renders the information deficient in charging the crime." Id. (emphasis added).

The constitutional rule serves two fundamental purposes. First, by notifying the defendant of the facts alleged to constitute the charged crime, it helps ensure that defendants can prepare a defense. Kjorsvik, 117 Wn.2d at 101. Second, it protects the double jeopardy rights of defendants by allowing them to plead the first judgment as a bar to a future prosecution for the same offense. Leach, 113 Wn.2d at 688; State v. Royse, 66 Wn.2d 552, 557, 403 P.2d 838 (1965); State v. Carey, 4 Wash. 424, 432-33, 30 P. 729 (1892). Thus, to be constitutionally sufficient, a charging document must both fairly inform the defendant of the charge and enable the defendant to plead double jeopardy in a future prosecution. United States v. Resendiz-Ponce, 549 U.S. 102, 108, 127 S. Ct. 782, 166 L. Ed. 2d 591 (2007).

A challenge to the validity of a charging document may be raised for the first time on appeal as manifest constitutional error. Leach, 113 Wn.2d at 691; RAP 2.5(a)(3). When hearing a challenge to the sufficiency of the information for the first time on appeal, the court liberally construes the document, and analyzes whether "the necessary facts appear in any form, or by fair construction can they be found, in the charging document . . ." Kjorsvik, 117 Wn.2d at 105. If the necessary facts do not appear,

prejudice is presumed and reversal is required. State v. Zillyette, 178 Wn.2d 153, 162-63, 307 P.3d 712 (2013). Challenges to the sufficiency of a charging document are reviewed de novo. Id. at 158.

The information, which was never amended, contained a bare bones recitation of the essential elements of bribery. CP 11; RCW 9A.68.010(1)(a). This charging document, however, failed to allege facts supporting every element of the offense:

> Count 1: BRIBERY, committed as follows:
>
> That the defendant, on or about the 19th day of June, 2018, with corrupt intent to secure a particular result in a particular matter involving the exercise of a public servant's vote, opinion, judgment, exercise of discretion, and other action in his/her official capacity, did offer, confer and agree to confer a pecuniary benefit upon, a public servant; proscribed by RCW 9A.68.010(1)(a), a felony.

CP 11.

Excluding the allegation that the crime occurred on or about June 19, 2018, the charge is completely generic and could be used in *any* bribery prosecution. It does not state the "who," "what," "where," or "how." For example, the information could have identified (1) the "public servant" (Officer Sierra Swartz); (2) what the "pecuniary benefit" consisted of (American currency); (3) how the benefit was offered or conferred (an oral offer or presentation of $200 from truck's console, or

the latter statement that $150 of $495 in wallet could have been officer's); (4) what the "particular result" sought to be secured (not being arrested); and (5) where the act occurred (Highway 99, Snohomish County, Washington). By not providing *any* specific factual underpinning, the charging document failed to provide Mr. Geisen notice of the specific conduct alleged to have constituted the crime of bribery, affecting his ability to prepare a defense.

As with the charge of bribery, the charging document failed to allege facts in support of all the essential elements of the offense.

> Count 2: DRIVING WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR AND/OR ANY DRUG (DUI), committed as follows:
>
> That the defendant, in Snohomish County, Washington on or about the 19th day of June, 2018, did drive a vehicle, while the defendant was under the influence of or affected by intoxicating liquor, marijuana, or any drug; proscribed by RCW 46.61.502(5), a gross misdemeanor[.]

CP 111.

While this charge identifies that offense occurred in Snohomish County, Washington, on or about June 19, 2018, it is otherwise generic. The language fails to specify the "vehicle" (a truck) or where the driving specifically occurred (Highway 99). By failing to provide any factual specificity, Mr. Geisen was not afforded the requisite notice to prepare a

defense or enabled to plead the judgment in bar of future prosecutions for the same offense.

A decision by the Court of Appeals shows that the charging document in this case was constitutionally defective on both counts. City of Seattle v. Termain, 124 Wn. App. 798, 801, 103 P.3d 209 (2004). In Termain, the Court of Appeals held that a charging document alleging two counts of violating a domestic violence order was constitutionally deficient. 124 Wn. App. at 801. As in this case, the charging language was generic. Id. at 800. [2] Termain reasoned that while the charging document

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[2] The charging document read:

> Between June 11, 2002 and June 16, 2002, in the City of Seattle, King County, Washington, the above-named defendant did commit the following offense(s):
>
> Count 1 [or Count 2] Commit the crime of VIOLATION OF A DOMESTIC VIOLENCE ORDER by knowingly violating a restraint provision, a provision excluding him or her from a residence, workplace, school or daycare or a provision prohibiting him or her from knowingly coming within or knowingly remaining within a specified distance of a location of an order granted under Seattle Municipal Code Chapter 12A.06 by Seattle Municipal Court or of an order granted under Revised Code of Washington Chapter 10.99, Chapter 26.09, Chapter 26.10, Chapter 26.26, Chapter 26.50, Chapter 74.34 or an equivalent ordinance by a court of competent jurisdiction or knowingly violating a provision of a foreign protection order specifically indicating that a violation will be a crime issued by a court having jurisdiction over him or her and the person protected by the order and the matter under the law of the state, territory, possession, tribe or United States military tribunal, Contrary to Seattle Municipal Code Section(s): 12A.06.180–A

tracked the statutory language, it failed to identify the order claimed to be violated and lacked any factual basis in support of the charges:

> The complaint tracks the language of the ordinance, but other than setting forth the dates of the charging period, the complaint fails to specifically identify the order claimed to be violated or the court granting the order. Further, *the charging document does not contain any factual basis for the charges* or identify the victim, even by using initials.

Id. at 803 (emphasis added). While identifying the name of the victim may not be necessary to provide notice, sufficient facts must be included to provide the requisite notice. Id. at 805. Because the information lacked sufficient facts that fairly conveyed what conduct was being charged, the information was insufficient. Id. at 805-06.

Consistent with Termain, this Court has recognized in some instances the "mere recitation of the statutory language in the charging document may be inadequate." Hugdahl, 458 P.3d at 764 n3. (2020) (quoting Leach, 113 Wn.2d at 688). Mr. Geisen submits that bribery and driving under the influence are these types of offenses where recitation of the statutory language is inadequate.

As in Termain, the information charging bribery did not "fairly imply what actual conduct was being charged." Id. at 806. It made Mr. Geisen "guess at the crime alleged to have been committed." Id. Similarly,

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Termain, 124 Wn. App. at 800-01.

the charge for driving under the influence was inadequate because it did not specify the vehicle or where the offense occurred. By failing to provide any factual specificity on both counts, Mr. Geisen was not afforded the requisite notice to prepare a defense or enabled to plead the judgment in bar of future prosecutions for the same offense.

The Court of Appeals asserted that the information clearly provided notice of "the particular conduct [Mr. Geisen] was alleged to have engaged in that constitutes each crime." Slip op. at 6. That is incorrect. Excluding the date, the bribery charge was completely generic. It did not provide notice of what conduct made up the offense. Bribery is an abstract concept and allegations of the specific facts are required to provide notice. The driving under the influence charge similarly failed to provide the requisite notice.

In addition to failing to provide Mr. Geisen adequate notice, the charging document was inadequate to satisfy the double jeopardy rationale of the essential elements rule. The charging document must enable the defendant to plead an acquittal or conviction in bar of future prosecutions for the same offense. Zillyette, 178 Wn.2d at 159; Resendiz-Ponce, 549 U.S. at 108. This Court has held a charging document was constitutionally deficient because the alleged facts in the charging document would have not permitted the defendant to successfully plead the conviction to bar a

future prosecution for the same offense. State v. Carey, 4 Wash. 424, 430, 30 P. 729 (1892). The court reasoned that the offense at issue could be committed more than once in a 24-hour period and therefore simply alleging the date of the offense was inadequate:

> Supposing this defendant had seen fit to plead guilty to the indictment, and had paid the fine imposed, and had afterwards been indicted for practicing medicine on the same day, there could have been nothing in the record to show that it was not for the same offense, and no plea in bar could possibly have been made; for there would have been no way to determine that fact, unless it be concluded that a man cannot practice medicine but once in a given day, which is a conclusion unfortunately not warranted by the common experience of mankind. *If defendant, Carey, practiced medicine on that day by prescribing for a fee for somebody, that fact should have been stated, with the name of the person for whom he prescribed*. It is no hardship on the state to be held to this particularity, and it is nothing more than common justice that the defendant should know the particular unlawful acts he is charged with committing.

Carey, 4 Wash. at 432-33 (emphasis added).

Here, the same is true. If Mr. Geisen pleaded guilty to the charges and was again charged with the same offenses, he would have been subject to multiple prosecutions in violation of the prohibition against double jeopardy. Cf. Resendiz-Ponce, 549 U.S. at 108 ("the time-and-date specification in respondent's indictment provided ample protection against the risk of multiple prosecutions for the same crime" of illegally

reentering the United States). Thus, for this second reason, the information was constitutionally defective.

While Mr. Geisen advanced the double jeopardy argument and cited that portion of the essential elements rule, the Court of Appeals ignored it and nowhere acknowledged the double jeopardy rationale for the essential elements rule. Concerning Carey, the Court of Appeals questioned its validity. Slip op. at 7. Although the decision may be ancient, it is still binding precedent. "[O]nce this court has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by this court." State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). The Court of Appeals violated *stare decisis* by disregarding this Court's decision in Carey. Id.

This Court should grant review because the Court of Appeals' decision conflicts with Carey and Termain, along with numerous decisions from this Court setting out the essential elements rule. RAP 13.4(b)(1), (2). This is also a constitutional issue that should be decided by this Court. RAP 13.4(b)(3). Despite the solid foundation for the rule that specific facts must be alleged in the charging document to provide notice and enable a double jeopardy claim in a future prosecution for the same offense, most of the cases concern whether a legal element of the crime is absent in the document. Review is also in the public interest because the

issue will recur and prosecutors will feel free to charge solely using generic statutory language. RAP 13.4(b)(4).

2. Review should be granted to hold that it is deficient performance to propose a voluntary intoxication instruction that misstates the relevant *mens rea* element at issue. In this case, the relevant *mens rea* element for bribery was *corrupt intent*, not simple intent.

Criminal defendants have the right to effective assistance of counsel under our state and federal constitutions. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Const. art. I, § 22. "The purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial." Thomas, 109 Wn.2d at 225. To establish ineffective assistance of counsel, there must be deficient performance and resulting prejudice. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 226. An ineffective assistance of counsel claim is an issue of constitutional magnitude that is properly raised for the first time on appeal. State v. Salas, 1 Wn. App.2d 931, 949, 408 P.3d 383 (2018).

To convict Mr. Geisen of bribery, the prosecution had to prove not merely that he acted with intent, but that he "acted with *corrupt* intent." CP 82 (to-convict instruction) (emphasis added); State v. O'Neill, 103 Wn.2d 853, 858, 700 P.2d 711 (1985). Mr. Geisen's defense was one of

general denial and voluntary intoxication. "Evidence of voluntary intoxication is relevant to the trier of fact in determining in the first instance whether the defendant acted with *a particular degree of mental culpability*." Thomas, 109 Wn.2d at 227 (emphasis added) (internal quotation and brackets omitted).

Trial counsel requested and obtained a voluntary intoxication instruction. But the requested instruction only permitted the jury to consider evidence of intoxication in determining whether Mr. Geisen "acted with intent," not the requisite mental element of "corrupt intent." CP 88. Because this error deprived Mr. Geisen of his constitutional right to effective assistance of counsel, the Court of Appeals should have reversed the conviction for bribery. Br. of App. at 21-30.

The Court of Appeals agreed that the requisite mental state for bribery was "corrupt intent" rather than simple intent. Nevertheless, the Court of Appeals held deficient performance was not shown because a voluntary intoxication instruction with the requisite mental element of "corrupt intent" would have been a "modified" from the "standard" intoxication instruction. Slip. op at 9-10. This is false. The instruction is the same standard instruction, except the requisite mental state would have been filed in correctly. The standard instruction states in parentheses that the "requisite mental state" should be filled in:

> No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant [acted] [or] [failed to act] with (fill in requisite mental state).

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 18.10 (4th Ed).

Further, this Court has held it is reversible error for the trial court to refuse provide a voluntary intoxication instruction that incorrectly states the mental element. State v. Brooks, 97 Wn.2d 873, 651 P.2d 217 (1982). In Brooks, the defendant was tried for first degree murder, which requires proof of *premeditated* intent. 97 Wn.2d at 874. Notwithstanding the evidence of the defendant's voluntary intoxication, the trial court refused to instruct the jury on voluntary intoxication as to premeditation, reasoning that voluntary intoxication had no bearing on premeditation. Id. at 875. This Court disagreed, reasoning that premeditation was a process of the mind and that it was distinct from "intent." Id. at 876-77. "[T]he fact of intoxication and its impact upon a defendant's mental process may be shown to demonstrate an absence of premeditation." Id. at 879. The Court held that failure to give the defendant's requested voluntary intoxication instruction, which would have instructed that intoxication could be considered in relation to the issue of premeditated intent, was reversible error. Id. at 878.

Similarly, just as intoxication bears on whether a person acted with *premeditated* intent, intoxication bears on whether a person acted with *corrupt* intent. Consistent with the law, the jury was instructed that to convict Mr. Geisen of bribery, it had to find that he acted with "corrupt intent." CP 82 (instruction no. 5).

The Court of Appeals reasoned that no deficient performance was shown because the to-convict instruction correctly required proof of corrupt intent. Slip op. at 9-10. That the to-convict instruction was correct does not remedy the error. The to-convict instruction was correct in Brooks as well. The mismatch in the mental element between the to-convict and voluntary intoxication instruction is the error.

Contrary to the Court of Appeals' decision, there is no apparent strategic or tactical reason why counsel would seek a voluntary intoxication instruction only as to intent, and not corrupt intent, the requisite mental state. Cf. Salas, 1 Wn. App.2d at 951 (no strategic or tactical reason for defense counsel to not seek suppression of evidence based on statutory privilege because counsel was already seeking suppression on other grounds). "Reasonable conduct for an attorney includes carrying out the duty to research the relevant law." State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).. Although the statute does not state the requirement of corrupt intent, caselaw does. If counsel had

discovered the Brooks case, she would have seen that a voluntary intoxication defense applies to mental states higher than intent, such as premeditated intent.

It would have also supported defense counsel's argument to the jury that the evidence did not prove Mr. Geisen acted corruptly due to being intoxicated. RP 241-45. Her argument to the jury that emphasized "corrupt intent" was completely ineffective because the intoxication instruction she obtained did not support her argument. RP 241-42. Under these facts, failure to propose the appropriate instruction was objectively unreasonable. Kyllo, 166 Wn.2d at 868-69 (deficient performance to propose erroneous self-defense instruction); State v. Kruger, 116 Wn. App. 685, 693-94, 67 P.3d 1147 (2003). (deficient performance to fail to propose voluntary intoxication instruction); State v. Powell, 150 Wn. App. 139, 155, 206 P.3d 703 (2009) (deficient performance not to propose "reasonable belief" instruction when evidence supported it, counsel effectively argued the defense, and the defense was consistent with the defendant's theory of the case).

The Court of Appeals adopted the prosecution's speculative theory that defense counsel had a valid tactical reason for proposing the wrong instruction because proposing the correct instruction might have caused the prosecution to seek a definition for "corrupt." Why the prosecution

would want one in response is not explained. The prosecution had the burden of proving corrupt intent as stated in the to-convict instruction, but did not request an instruction defining the term.

Further, such an instruction would have only helped Mr. Geisen because such an instruction would have emphasized that the prosecution had to prove "corrupt intent," not mere "intent." Just as proving "premeditated intent" is more difficult than proving intent, proving "corrupt intent" is more difficult. And a proper instruction would have highlighted corrupt intent required the prosecution to prove "conscious wrongdoing, or as it has sometimes been expressed, a bad or evil state of mind." Brennan T. Hughes, The Crucial "Corrupt Intent" Element in Federal Bribery Laws, 51 Cal. W.L. Rev. 25, 35, 53-54 (2014) (quoting *Modern Federal Jury Instructions*--Criminal, P 16.01 (Matthew Bender); see, e.g., United States v. Quinn, 359 F.3d 666, 674 (4th Cir. 2004) (district court used language from this instruction to instruct jury on corrupt intent).

The Court of Appeals did not reach the prejudice prong. As explained in the briefing, Mr. Geisen establishes prejudice. Br. of App. at 27-30. Voluntary intoxication was the defense on the bribery charge. Defense counsel tried to argue that the evidence of intoxication created a reasonable doubt on whether Mr. Geisen acted corruptly. RP 241-242. But

under the instructions, intoxication was only relevant as to whether Mr. Geisen acted with intent, not whether he acted corruptly. There is a reasonable probability of a different result.

The Court of Appeals' decision in this case is in conflict with this precedent, particularly this Court's opinion in Brooks. RAP 13.4(b)(1), (2). There is also a dearth of precedent on bribery. Review is in the public interest to provide clarity how jurors should be instructed in bribery cases and to clarify that "corrupt intent" is a higher mental state than mere "intent." RAP 13.4(b)(4).

E. CONCLUSION

For the foregoing reasons, Mr. Geisen respectfully asks this Court grant his petition for review.

Respectfully submitted this 29th day of April, 2020.

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Attorney for Petitioner

Appendix

FILED
3/30/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. TIMOTHY MANNON GEISEN, Appellant.	)	No. 79117-6-I DIVISION ONE UNPUBLISHED OPINION FILED: March 30, 2020

HAZELRIGG, J. — Timothy M. Geisen was convicted as charged of bribery and misdemeanor driving under the influence after a jury trial. Geisen challenges the sufficiency of the charging document as to both counts for the first time on appeal as manifest constitutional error. He further argues that his counsel was ineffective based on failure to seek specific language in the voluntary intoxication instruction. We find that the charging document sufficiently put Geisen on notice as to the crimes alleged and his counsel was not ineffective. Accordingly, we affirm, but, based on the State's concession, remand for correction of the judgment and sentence to remove the interest accrual provision on legal financial obligations.

FACTS

On the evening of June 19, 2018, Edmonds Police Officer Sierra Swartz noticed a pickup truck swerving as it drove in front of her, crossing the center line

a number of times. Swartz activated her emergency lights and pulled the truck over. The driver in the truck was Timothy Geisen. As Swartz approached, Geisen opened his door. During her contact with him, Swartz smelled a strong odor of alcohol on Geisen's breath and observed that he had bloodshot eyes and slurred speech.

Swartz asked Geisen how much he had been drinking, to which he replied a few beers. In an unsolicited statement, Geisen further admitted that he knew he should not be driving. He asked the officer if she was going to take him in and she responded by asking for his license, registration, and insurance. Geisen reached into his center console and pulled out two $100 bills and asked the officer, "[w]ill this take care of this?" Swartz replied that it wouldn't and continued asking for identification.

The officer then asked Geisen to perform standardized field sobriety tests (SFSTs) and he agreed. The horizontal gaze nystagmus and walk-and-turn tests were administered, but Geisen refused the one-leg stand due to complaints of back pain. Swartz placed Geisen under arrest based on probable cause developed via her observations and the SFSTs. A second officer, Samuel Gagner, searched Geisen incident to arrest and handed Swartz the inventory. Swartz counted $495 contained in a wallet—one of the items recovered from Geisen. As it was being counted by Swartz, Geisen stated "150 of that could have been yours if you would have let me go."

Geisen was charged with bribery and gross misdemeanor driving under the influence. After trial, a jury convicted Geisen on both counts. Geisen timely appealed.

ANALYSIS

I. Sufficiency of the Charging Document

Geisen argues for the first time on appeal that the charging document failed to specify sufficient facts of both the charge of bribery and driving under the influence. Geisen did not present this argument at the trial court, but it is properly raised for the first time on appeal under RAP 2.5(a)(3) as manifest constitutional error. State v. Leach, 113 Wn.2d 679, 691, 782 P.2d 552 (1989) (abrogated on other grounds by State v. Pry, 194 Wn.2d 745, 452 P.3d 536 (2019)). Leach made clear that challenges to the sufficiency of the charging document implicate due process and thereby may be raised for the first time under RAP 2.5(A)(3). Id. Challenges to the sufficiency of the charging document are reviewed de novo. State v. Zillyette, 178 Wn.2d 153, 161-63, 307 P.3d 712 (2013).

In a criminal case, the accused has a constitutional right to know the charges against them. U. S. Const. amend. VI; Wash. Const. art. I § 22. The information is constitutionally sufficient "only if all the 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). "[I]t is sufficient to charge in the language of a statute if the statute defines the offense with certainty." State v. Kjorsvik, 117 Wn.2d 93, 99, 812 P.2d 86 (1991) (emphasis omitted). "[D]efendants should not have to search for the rules or regulations they are accused of violating." Id. at 101.

If "a charging document is challenged for the first time on appeal, we construe it liberally." Pry, 194 Wn.2d at 752. The review for necessary facts is restrained to the four corners of the charging document. Id.

In the present case, the specificity requirements for a charging document were met as to both charges. The language in the information was as follows:

> Count 1: BRIBERY, committed as follows:
> That the defendant, on or about the 19th day of June, 2018, with corrupt intent to secure a particular result in a particular matter involving the exercise of a public servant's vote, opinion, judgment, exercise of discretion, and other action in his/her official capacity, did offer, confer, and agree to confer a pecuniary benefit upon, a public servant; proscribed by RCW 9A.68.010(1)(a), a felony.
>
> Count 2: DRIVING WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR AND/OR ANY DRUG (DUI), committed as follows:
> That the defendant, in Snohomish County, Washington on or about the 19th day of June, 2018, did drive a vehicle, while the defendant was under the influence of or affected by intoxicating liquor, marijuana, or any drug; proscribed by RCW 46.61.502(5), a gross misdemeanor.

The charging document is sufficient as to both counts; the statements under each listed count include all essential elements of each of the named crimes.

As to the felony bribery charge in count one, RCW 9A.68.010(1)(a) reads:

> (1) A person is guilty of bribery if:
> (a) With the intent to secure a particular result in a particular matter involving the exercise of the public servant's vote, opinion, judgment, exercise of discretion, or other action in his or her official capacity, he or she offers, confers, or agrees to confer any pecuniary benefit upon such public servant.

All essential elements of the bribery statute are included in the information. Further, the information supplements that statutory language by including the date of the allegation and, more importantly, specifying the mental state for the bribery

charge as "corrupt intent," which is not set out in the statute, but has been developed through case law. See State v. O'Neil, 103 Wn.2d 853, 859, 700 P.2d 711 (1985).

The statute for misdemeanor driving under the influence, RCW 46.61.502(1), states:

> 1) A person is guilty of driving while under the influence of intoxicating liquor, marijuana, or any drug if the person drives a vehicle within this state:
> (a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506; or
> (b) The person has, within two hours after driving, a THC concentration of 5.00 or higher as shown by analysis of the person's blood made under RCW 46.61.506; or
> (c) While the person is under the influence of or affected by intoxicating liquor, marijuana, or any drug; or
> (d) While the person is under the combined influence of or affected by intoxicating liquor, marijuana, and any drug.

As to the driving under the influence charge, the information is also specific as to all essential elements. Though the charging document does not include subsections (a), (b) or (d) from the statute, these were not relevant to Geisen's case since the State focused on proving the case under subsection (c), commonly referred to as the "affected by" prong. Again, the State supplemented the statutory language by including the date and county of the alleged criminal conduct. As to this charge, the information was also constitutionally sufficient.

Geisen relies on two cases that are not relevant here. The first, City of Seattle v. Termain, addresses a charging document for violating a domestic violence order, however the information did not identify the order which was alleged to have been violated. 124 Wn. App. 798, 803, 103 P.3d 209 (2004). This

court held that the document was insufficient based on the omission of that specific fact, or any other facts sufficient to apprise the defendant of the actions giving rise to criminal charges. Id. at 806. The court stated that the charging document was "awkwardly worded and vague" and further described it as "gobbledygook." Id. The information, standing alone, did not establish that any order was currently in place that restricted the defendant's conduct. Alternatively, if the defendant had more than one active order restricting contact with different parties, it would have been difficult to determine the criminal conduct alleged based on the charging instrument alone.

That is not the case here as it is clear from the information both what Geisen was being charged with and the particular conduct he was alleged to have engaged in that constitutes each crime. Though Geisen advances the argument that the information should provide specificity as to each fact alleged, this is not a requirement of the case law, nor is it required by statute.

The other case Geisen cites is from 1892 and involved our supreme court addressing early codification of common law causes of action, ensuring that the statutes provide sufficient specificity. See State v. Carey, 4 Wash. 424, 30 P. 729 (1892). Carey involved an indictment for practicing medicine without a license. Id. at 430. However, the charging instrument did not provide sufficient detail regarding the conduct the charged individual was alleged to have engaged in due to the vagueness of the statutory language. Id. at 431-32. The Supreme Court's analysis included the concern that the charging language was purely statutory and the defendant needed to be put on notice as to what conduct the state believed

constituted the unlawful practice of medicine. Id. 432-34. This case is not analogous since the language in the charging document here is not vague enough to warrant the concerns raised in Carey. Furthermore, as this court has previously noted, the modern precedential value of Carey is questionable given the numerous "legal developments such as discovery and an indigent's right to state-appointed counsel" that have evolved since 1892. State v. Davis, 60 Wn. App. 813, 818 n.4, 808 P.2d 167 (1991).

In a recent opinion, the Supreme Court directed that

> [r]eviewing courts use a two-pronged test to resolve challenges to the sufficiency of evidence: (1) do the necessary facts appear in any form, or by fair construction can they be found, on the face of the charging document and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language that caused a lack of notice?

Pry, 194 Wn.2d at 752-53; See also Zillyette, 178 Wn.2 at 162.

As to the prong of the first test, "we look solely to the face of the information to determine if the essential elements of the crime appear in any form, or by fair construction, in the charging document." Zillyette, 178 Wn.2d at 162. Here, as discussed above, the first prong of this test is met; the necessary facts, those of the essential elements, are contained within the charging document. Recently, the Supreme Court held that a charging document that primarily recited the language from the statute sufficiently advised the defendant as to the nature and elements of the criminal accusation. See State v. Merritt, 193 Wn.2d 70, 74-75, 434 P.3d 1016 (2019). Merritt involved a mortgage fraud charge that was more factually complex than either of the charges at issue here, yet recitation of the statute was sufficient.

When we look to the second prong, whether Geisen can show actual prejudice, it is clear from this record that he cannot. Geisen argues that he is at risk of double jeopardy because the charging document is not specific enough so as to avoid a second charge for the same conduct. This, however, is speculative and does not demonstrate actual prejudice. As the State argued in its briefing, double jeopardy is a much more complex question that can only be resolved by a deeper inquiry than merely looking to the charging document. Further, the fact that defense counsel didn't seek a Bill of Particulars at the trial court suggests that they understood which actions and circumstances gave rise to the charges. See CrR 2.1(c). There is nothing in the record before us to suggest Geisen's trial counsel was unclear about the changes or concerns about a risk of double jeopardy.

The charging document, standing alone, provided all essential elements of the crime which constitute the necessary facts, such that Geisen was informed of what he was being charged with as to both count one, felony bribery, and count two, misdemeanor driving under the influence. Additionally, Geisen fails to demonstrate actual prejudice resulting from the language of the charging instrument.

II. Ineffective Assistance of Counsel

Geisen next argues that he was deprived of effective assistance of counsel due to his attorney's failure to request specific language in the voluntary intoxication instruction. For Geisen to prevail on a claim of ineffective assistance of counsel, he must show both deficient performance by his attorney and resulting

prejudice. State v. Grier, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). "[P]erformance is deficient if 'it falls below an objective standard of reasonableness.'" Id. at 33 (quoting Strickland v. Washington, 466 U.S. 688, 104 S. Ct. 2052 (1984)). A showing of prejudice requires a reasonable probability that, but for the deficient performance, the outcome of the proceeding would have been different. State v. Estes, 188 Wn.2d. 450, 458, 395 P.3d 1045 (2017). "Courts engage in a strong presumption counsel's representation was effective." State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Judicial review of how counsel handled an individual's case must be highly deferential. Strickland, 466 U.S. at 689.

Geisen's argument emphasizes that his trial counsel did not request specific "corrupt intent" language in the voluntary intoxication jury instruction. However, defense counsel did seek, and obtained, the standard voluntary intoxication instruction regarding intent as follows: "[n]o act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent."

"Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law." State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). The "to convict" instruction provided to the jury properly identified the mens rea element of bribery as "corrupt intent," so, as a whole, jurors were properly informed as to the applicable law in Geisen's case.

This instruction was sufficient to allow defense counsel to argue their theory of the case. Defense counsel in closing argued the following: "[n]ow, Instruction 11 tells you that the intoxication can go into whether he had—he acted with intent. Now, the State keeps saying acted with intent, but the WPIC actually says with corrupt intent. Not just intent, but a corrupt intent that day." Geisen fails to establish deficient performance.

Additionally, defense counsel's choice to not propose a modified voluntary intoxication instruction which utilized the phrase "corrupt intent" could have been for any number of strategic reasons. Defense counsel may be cautious about proposing a non-standard jury instruction, determining that use of standard instructions is a strategically safer choice in a particular case. See State v. Studd, 137 Wn.2d 533, 547-48, 973 P.2d 1049 (1999). Further, as the State pointed out at oral argument, asking for the language proposed by Geisen on appeal might have prompted the prosecutor to ask for a defining instruction for the term corrupt intent which may have been even narrower than what the jury considered it to be. In light of the strong presumption that counsel was effective, and the number of legitimate tactical reasons to decline to pursue specific language in the involuntary intoxication instruction, Geisen fails to demonstrate deficient performance by counsel, which ends our inquiry.

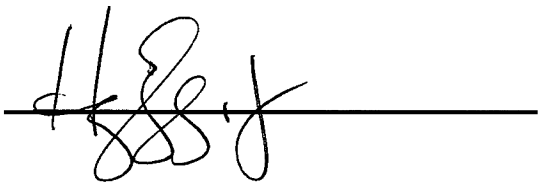
III. Interest on Legal Financial Obligations

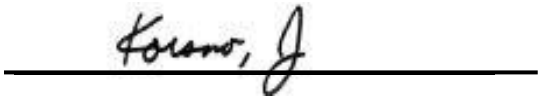
Finally, Geisen argues that the interest accrual provision in his judgment and sentence is improper. The State concedes this point. We accept the

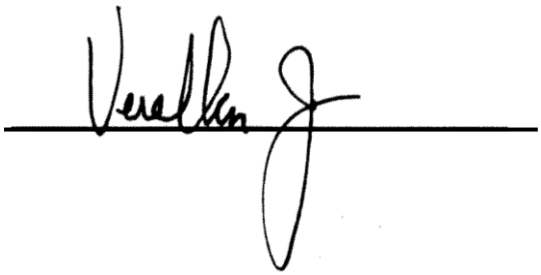
concession. We affirm Geisen's convictions, but remand only for the trial court to strike the interest provision from the judgment and sentence.

Affirmed, remanded in part.

WE CONCUR:







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MARIA ANA ARRANZA RILEY, Legal Assistant Date: May 1, 2020
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