

61971-3

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FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2009 ASS. 12 (11) 10: 29

No. 61971-3-I

**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE**

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**STATE OF WASHINGTON,  
Appellant,**

**v.**

**MICHAEL EDMOUND JOHNSEN  
Respondent.**

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**BRIEF OF RESPONDENT**

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**A. ASSIGNMENTS OF ERROR**

None.

**B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

1. Whether the year the offense was committed could be fairly implied from the date the information was signed where the motion to dismiss based on a defective information was made right after the finding of guilt and where the date is not a material element of the offense.
2. Whether there is sufficient evidence for a rational trier of fact to conclude beyond a reasonable doubt that the defendant knew the car that had recently been stolen was stolen where the defendant was seen driving the car the day after it was stolen, but denied having driven the car that day and where the defendant was a passenger in the car when it eluded officers the next day.

**C. STATEMENT OF THE CASE**

Appellant Michael E. Johnsen was charged with Possession of Stolen Property in the First Degree, in violation of RCW 9.94A.150, on March 1<sup>st</sup>, 2006. CP 249-51. He entered into Whatcom County Superior Court Drug Court, but was revoked from the program on April 10, 2008. CP 240-45. He proceeded to a stipulated trial in accord with his drug court petition and was found guilty. CP 242-45, 270-72. After being found guilty he orally moved for dismissal of his conviction due to a

defect in the information, which motion was denied. RP 12-13.<sup>1</sup> He was sentenced to a standard range sentence of 33 months. CP 186-94.

The substantive facts are set forth in the Findings and Conclusions attached as Appendix B to Johnsen's brief and are further discussed in section two of the brief herein.

**D. ARGUMENT**

On appeal Johnsen alleges that the information is fatally defective for failure to state the year in which the offense occurred. As the date usually is not an essential element of possession of stolen property in the first degree, and under the liberal standard of review the year of the offense could be fairly implied from the date the information was signed, Johnsen's claim fails.

Johnsen also asserts that there was insufficient evidence that he knew the car was stolen. Only slight corroborating evidence is needed to corroborate his possession as felonious. Here he denied having been in the car the day after it was stolen while the evidence showed that he had been driving the car that day. His false explanation was sufficient to corroborate that he knowingly possessed stolen property.

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<sup>1</sup> RP refers to the verbatim report of proceedings for May 1, 2008.

- 1. The information alleged all the essential elements of possession of stolen property in the first degree and under the liberal, post-verdict, standard of review Johnsen was adequately informed of the date of the offense.**

Johnsen asserts that the information charging possession of stolen property was defective because it failed to state the year within the language of the count. He does not assert that the essential elements are not contained in the information, nor does he assert that he was prejudiced by any lack of notice as to the year at the time of the stipulated trial. In fact, defense counsel waited until right after the judge reviewed the police rights, heard argument from counsel, and found Johnsen guilty to move to dismiss the information on this basis. The information contained all the essential elements, and given the timing of his objection to the information, Johnsen was adequately informed of the year of the offense.

A charging document is constitutionally adequate only if all of the essential elements, statutory and non-statutory, are included in the document so as to place the defendant on notice of the charges and allow the defendant to prepare a defense. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). A constitutional challenge to the sufficiency of an information may be asserted for the first time on appeal. *Id.* at 102. On the other hand, “[t]echnical defects not affecting the substance of the

charged offense do not prejudice the defendant and thus do not require dismissal.” State v. Leach, 113 Wn.2d 679, 696, 782 P.2d 552 (1989); *see also*, Seattle v. Reel, 69 Wn.2d 227, 418 P.2d 237 (1966) (challenge to sufficiency of complaint on grounds that misdemeanor citation failed to state day of month violation occurred, as well as date citation was issued, did not warrant dismissal of complaint where omissions did not result in prejudice to defendant). An information stating the statutory elements of a crime, but vague as to some other significant matter, is subject to correction via a bill of particulars, but a defendant may not challenge an information for vagueness on appeal if he didn’t make a request for a bill of particulars. Leach, 113 Wn.2d at 687; *accord*, State v. Winings, 126 Wn. App. 75, 84, 107 P.3d 141 (2005). Furthermore, a variance between the information and the proof at trial that does not relate to an element of the crime does not require reversal unless there was prejudice to the defendant. Leach, 113 Wn.2d at 696.

When the sufficiency of a charging document is challenged for the first time after the verdict, courts liberally construe the information in favor of validity. State v. Phillips, 98 Wn. App. 936, 940, 991 P.2d 1195 (2000). The need for a different standard of review under such circumstances was addressed in State v. Kjorsvik:

A different standard of review should be applied when no challenge to the charging document has been raised at or before trial because otherwise the defendant has no incentive to timely make such a challenge, since it might only result in an amendment or a dismissal potentially followed by a refile of the charge. ... Applying a more liberal construction on appeal discourages what Professor LaFave has described as “sandbagging”. He explains this as a potential defense practice wherein the defendant recognizes a defect in the charging document but foregoes raising it before trial when a successful objection would usually result only in an amendment of the pleading.

Kjorsvik, 117 Wn.2d at 103 (footnotes omitted).

Under the liberal construction rule, the court inquires: (1) do the necessary elements or facts appear in any form, or can the alleged missing element or fact be fairly implied from the language within the information; and (2) can the defendant show that he or she was actually prejudiced by the inartful language. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000); Kjorsvik, 117 Wn.2d at 105-06. “Words in a charging document are read as a whole, construed according to common sense, and include facts which are necessarily implied.” Kjorsvik, 117 Wn.2d at 109. If a defendant is prejudiced by a faulty information, the charge is dismissed without prejudice to refile. McCarty, 140 Wn.2d at 428.

An essential element is one whose specification is necessary to establish the very illegality of the behavior charged. State v. Ward, 148

Wn.2d 803, 811, 64 P.3d 640 (2003). Generally the date of the offense is not an essential element. State v. Fischer, 40 Wn. App. 506, 511, 699 P.2d 249, *rev. denied*, 104 Wn.2d 1004 (1985); *see also*, U.S. v. Titterington, 374 F.3d 453, 457 (6<sup>th</sup> Cir. 2004), *cert. denied*, 543 U.S. 1153 (2005) (time is not an element of the offense and the court will not quash an indictment because it does not appear on the face of the indictment that it is found to be within the statute of limitations).

Washington courts have held that leaving a blank where the defendant's name should be does not render the information invalid as long as the charging language in some manner relates to the name of the defendant in the caption. *See*, State v. Maldonado, 21 Wash. 653, 59 P. 489 (1899); Port Angeles v. Fisher, 130 Wash. 110, 226 P. 489 (1924). In such a case, the defendant's name is fairly implied from the document.

In this case, the information, filed on March 1<sup>st</sup>, 2006, stated:

**POSSESSION OF STOLEN PROPERTY IN THE  
FIRST DEGREE**

That on or about the 24<sup>th</sup> day of February, the said defendant, MICHAEL EDMOUND JOHNSEN, then and there being in said county and state, did knowingly receive, retain, possess, conceal, or dispose of stolen property, other than a firearm as defined in RCW 9A.01.010, to wit: 1993 Honda Accord, of a value in excess of \$1,500, knowing that it had been stolen and did withhold or appropriate the property to the use of a person other than the true owner or person entitled thereto ; in violation of RCW 9A.56.140

.150<sup>2</sup>, which violation is a class B felony; contrary to the form of the Statute in such cases made and provided and against the peace and dignity of the State of Washington.

DATED THIS 1 day of ~~February~~ March<sup>3</sup>, 2006.

CP 36. Construed under the liberal test, the year of the offense can be found and/or fairly implied from the fact that the information was signed with the year 2006. That year is referenced in the document and no other year is. The implication and presumption therefore is that the offense was committed the same year it was signed and filed, in 2006. Just as the court may consider the caption of an information in determining whether the information sufficiently stated the name of a defendant, so too should the court be able to consider the year the information was signed in determining if the date of the offense is sufficiently alleged to provide adequate notice. *See, Maldonado*, 21 Wash. at 654; *Fisher*, 130 Wash. at 112. This is not a situation in which the information alleged on its face that the offense occurred outside the statute of limitations.

Moreover, Johnsen was arrested on this matter the same day as the day in the information and initially appeared before the court on it on

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<sup>2</sup> The reference to section .140 was stricken and the section .150 was handwritten in underneath it, along with the phrase "ok per P.A."

<sup>3</sup> The reference to February was stricken and "March" was handwritten in above it.

February 27<sup>th</sup>. Supp CP \_\_\_, Sub Nom 1, 2, 3, 4. He was then arraigned on the information, which was filed on March 1<sup>st</sup>, on March 10<sup>th</sup>. Supp CP \_\_\_, Sub Nom 12. The fact that Johnsen can show no prejudice from the lack of the year appearing within the language is abundantly clear from the fact that defense counsel waited until right after the judge found Johnsen guilty to assert any issue regarding the information. RP 12-13. In fact defense counsel's closing argument was not based on, nor raised any confusion with, the date of the offense. See RP 6-10. Johnsen's attorney clearly waited until a time that the State could no longer move to amend the information to assert a technical defect with the information. This is clearly the type of sandbagging the court was concerned with in Kjorsvik and was attempting to avoid by imposing a liberal construction standard on review.

Johnsen cites to U.S. v. Gammill, 421 F.2d 185 (10<sup>th</sup> Cir. 1970), for the argument that failure to include the year in a charging document is fatally defective. However, another more recent federal circuit case reached a different conclusion. In U.S. v. Jaswal, 47 F.3d 539 (2<sup>nd</sup> Cir. 1995) one of the counts in the indictment failed to allege the year the offense was committed. The court there held that "[t]he failure to include the year in Count IV of the indictment is not fatally defective because the

exact time when the defendants committed the crime in this case is immaterial.” Id. at 542. The court noted that the defendant was free to insure protection of his constitutional rights by requesting a bill of particulars. Id. at 543.

a. *The statute of limitations is not a “jurisdictional” issue*

Johnsen asserts that a statute of limitations is “jurisdictional.” A statute of limitations claim is jurisdictional only in the sense that a crime charged outside the statute of limitations may not be prosecuted, but it is not jurisdictional in the sense that the court loses subject-matter jurisdiction. See, State v. Kjorsvik, 117 Wn.2d at 107-08 (constitutional challenge to information does not affect the court’s power to hear the case). “Jurisdiction becomes an issue only if no offense is charged at all.” State v. Barnes, 146 Wn.2d 74, 86, 43 P.3d 490 (2002). The filing of an information invokes the jurisdiction of the court. Id. at 88.<sup>4</sup>

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<sup>4</sup> In fact federal courts generally treat a statute of limitations claim as an affirmative defense. See, John R. Sand & Gravel Company v. U.S., 552 U.S. 130, 128 S.Ct. 750, 169 L.Ed.2d 591 (2008) (“law typically treats a limitations defense as an affirmative defense that the defendant must raise at the pleadings stage and that is subject to rules of forfeiture and waiver”); U.S. v. Titterington, 374 F.3d 453, 456 (6<sup>th</sup> Cir. 2004), citing U.S. v. Cook, 17 Wall. 168, 84 U.S. 168, 21 L.Ed. 538 (1872); U.S. v. Wild, 551 F.2d 418, 421-22 (D.C. Cir. 1977). “[D]efects in an indictment do not deprive a court of its power to adjudicate a case.” U.S. v. Cotton, 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002).

Johnsen cites to Osborne and Gottfreedson<sup>5</sup> for the proposition that the statute of limitations is jurisdictional and that the information must show on its face that the offense is alleged to have occurred within the statute of limitations. Appellant's Brief at 6-7. In State v. Osborne, the court held that the allegation of time is immaterial as long as the information shows that the right to prosecute the crime is not barred by the statute of limitations. Osborne, 39 Wash. at 551. The court noted that the requirement that the information include the allegation that the offense occurred within the statute of limitations specifically derives from statute. Osborne, 39 Wash. at 551. However, in both cases, the defendants' motions to dismiss for defective informations were made before or during the trial. Osborne, 39 Wash. at 549 (defendant moved for a directed verdict during State's case in chief when witness testified that no sexual intercourse occurred on the date alleged in the information); Gottfreedson, 24 Wash. at 399 (demurrer filed to information on basis that it did not conform to Code). Here, Johnsen raised the statute of limitations defect after the verdict.

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<sup>5</sup> State v. Osborne, 39 Wash. 548, 81 P. 1096 (1905); State v. Gottfreedson, 24 Wash. 398, 64 P. 523 (1901).

Johnsen also cites to State v. Ansell, 36 Wn. App. 492, 675 P.2d 614, *rev. denied*, 101 Wn.2d 1006 (1984) for the proposition that the statute of limitations is jurisdictional. In that case, upon the State's appeal of a dismissal of the information, the court permitted the defendant to challenge the validity of the information on appeal for the first time because the information did not allege the facts regarding tolling of the limitations period, thus rendering the information void on its face. Ansell, 36 Wn. App. at 492. The trial court in that case had dismissed the charges despite the State's argument that the statute of limitations had been tolled when the defendant had not been available within the state. *Id.* at 493. The appellate court reviewed the affidavit of probable cause to determine if the defendant had been prejudiced by the fact that the information did not contain the facts that showed that the charge fell within the statute of limitations. *Id.* at 496. Finding no prejudice, the court remanded with permission to amend the information. *Id.*

*b. RCW 10.37.050 does not provide or require a different standard of review*

Johnsen references the statutory requirement under RCW 10.37.050 that the information demonstrate that the charge fell within the statute of limitations. To the extent that Johnsen relies upon a *statutory*

basis for his claim, he waived this argument by failing to object before the verdict. It's the constitutional underpinning of due process that requires that a defendant receive adequate notice of the charges against him.<sup>6</sup> That is the Kjorsvik analysis cited above. State v. Franks, 105 Wn. App. 950, 957-58, 22 P.3d 269 (2001).

RCW 10.37.050 provides that an information is sufficient if it, among other things, states that the crime was committed before the information was filed and within the statute of limitation, and if the crime is stated with sufficient certainty to permit a court to pronounce judgment. State v. Cozza, 71 Wn. App. 252, 255, 858 P.2d 270 (1993), *citing* RCW 10.37.050(5), (7). Chapter 10.37 RCW, however, also provides:

No indictment or information is insufficient, nor can the trial, judgment or other proceedings thereon be affected, by reason of any of the following matters, which were formerly deemed defects or imperfections:

(1) For want of an allegation of the time or place of any material fact, when the time and place have been once stated;

...; nor

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<sup>6</sup> “An information that fails to state the essential elements of the charged crime raises an issue that can be considered on appeal despite the lack of objection below. But the issue raised is lack of due process, not lack of jurisdiction.” State v. Franks, 105 Wn. App. 950, 957, 22 P.3d 269 (2001).

(5) For any other matter which was formerly deemed a defect or imperfection, but which does not tend to the prejudice of the substantial rights of the defendant upon the merits.

RCW 10.37.056.

A technically defective information like the one here could have been easily remedied by request for a bill of particulars. Instead, Johnsen purposefully chose to raise the technical defect of the year not appearing with the language of the count until after the judge found him guilty, at a time when the State would be precluded from amending the information. This Court should not countenance such sandbagging. It's clear from the record that Johnsen suffered no prejudice from the failure of the information to state "2006" after "the 24<sup>th</sup> of February." Under the Kjorsvik liberal standard of review, the year can be fairly implied from the date the information was signed. Moreover, the year of the offense was referenced in the probable cause affidavit and Johnsen was arrested on the same day listed in the information, so Johnsen clearly had notice that the offense fell within the statute of limitations. CP 246-48; Supp CP \_\_, Sub Nom 4; *see Seattle v. Reel*, 69 Wn.2d 227, 228, 418 P.2d 237 (1967) (fact that citation did not state day of month the violation was alleged to have occurred, nor the date of issuance of the citation, was not reversible error where defendant was aware of actual date of issuance of citation,

defendant was arrested on offense and defendant was not misled or prejudiced by the omissions).

**2. Taking the evidence in the light most favorable to the State there was sufficient evidence for a rational trier of fact to have found that Johnsen knew the car was stolen beyond a reasonable doubt.**

Johnsen contends that there was insufficient evidence for the court to find that he knew that the car was stolen. Under a sufficiency of the evidence analysis, the test is “whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Findings of fact challenged on appeal are evaluated for substantial evidence; unchallenged findings are deemed verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Where, as here, none of the findings of fact are challenged, the only issue is whether any rational trier of fact could have found the elements from the findings.

In applying the test, “all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” Joy, 121 Wn.2d at 339. Such a challenge admits the truth of the State’s evidence and all reasonable inferences therefrom. State v.

Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is as reliable as direct evidence. State v. Hernandez, 85 Wn. App. 672, 675, 935 P.2d 623 (1997). The [trier of fact] “is permitted to infer from one fact the existence of another essential to guilt, if reason and experience support the inference.” State v. Bencivenga, 137 Wn.2d 703, 707, 974 P.2d 832 (1999) (*quoting* State v. Jackson, 112 Wn.2d 867, 875, 774 P.2d 1211 (1989)).

Johnsen only asserts that there was insufficient evidence to support the conclusion that he knew the car was stolen. In order to prove possession of stolen property, in addition to proving that the defendant possessed the stolen item, the State must also prove that the defendant knew the property was stolen. State v. Plank, 46 Wn.App. 728, 731, 731 P.2d 1170 (1987). Proof of mere possession is insufficient to prove that the defendant knew the item was stolen. State v. Hatch, 4 Wn. App. 691, 694, 483 P.2d 864 (1971). “Possession is, however, a relevant circumstance to be considered with other evidence tending to prove the elements of the crime.” *Id.* Only slight corroborative evidence of other inculpatory circumstances is needed to support a finding of guilt when the defendant is found in possession of recently stolen property. *Id.* A defendant’s false or improbable explanation of his possession of the stolen

item is sufficient to support a conclusion that he knew the item was stolen.

Id.

In this case, the owner of the car reported that it had been stolen sometime after 9 p.m. on February 22<sup>nd</sup>. CP 270, FF 1. Around noon the next day, Johnsen was seen driving the car, no one else was with him at the time. Id. FF 3. The car was placed under surveillance at the motel where Johnsen parked it. CP 271, FF 3, 4, 5. Around 6 p.m. that evening, a female and Johnsen got in the car and drove away. When officers attempted to stop the car, the female driver refused to stop and eluded the officers, striking two vehicles in the course of the escape. Id. FF 5, 6. Johnsen admitted to being in the car when the female driver eluded the officers, but denied being in the vehicle the day before.<sup>7</sup> Id. FF 7.

Here there is corroborating evidence that Johnsen knew that the car was stolen. His denial of being in the car the day before directly contradicted the evidence that he was seen driving the car that day. In addition, he was inside the car when it eluded the police the next day. The trial court was entitled to disbelieve Johnsen's explanation and to conclude

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<sup>7</sup> The reports reflect that he told the officer that he walked to the motel. CP 235.

that it was false given the evidence that he had been seen driving the car on the day he denied being in it. Only slight evidence was needed to corroborate that Johnsen's possession was felonious. *See, State v. Pisauro*, 14 Wn. App. 217, 540 P.2d 447 (1975) (defendant's presence when her companion attempted to sell stolen guns and her surprise at their presence in her car when she had previously stated the guns were from California was sufficient to prove she knew the guns were stolen). Taking the evidence in the light most favorable to the State, there was sufficient evidence for a rational trier of fact to conclude that Johnsen knew the car was stolen.

**E. CONCLUSION**

Based on the foregoing, the State respectfully requests that Johnsen's conviction for possession of stolen property be affirmed.

Respectfully submitted this 11<sup>th</sup> day of August, 2009.

  
HILARY A. THOMAS, WSBA#22007  
Appellate Deputy Prosecuting Attorney  
Attorney for Respondent

**CERTIFICATE**

I certify that on this date I placed in the mail a properly stamped and addressed envelope, or caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Respondent/ Cross-Appellant's attorney, Maureen Cyr, addressed as follows:

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*Audrey A. Koss*  
\_\_\_\_\_  
Legal Assistant

*08/11/2009*  
\_\_\_\_\_  
Date

2009 AUG 11 10:30  
CLERK OF COURT  
STATE OF WASHINGTON