

NO. 69633-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BILLY MOORE,

Appellant.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I
2013 MAY 29 PM 2:00

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LORI K. SMITH

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUE PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS	1
2. SUBSTANTIVE FACTS	2
C. <u>ARGUMENT</u>	5
1. ALL NECESSARY ELEMENTS APPEARED IN THE CHARGING DOCUMENT AND MOORE WAS NOT PREJUDICED BY A LACK OF NOTICE	5
a. By "Hand, Voice, Emergency Light, Or Siren" Is Not An Essential Element Of Attempting To Elude.....	8
b. Even If "By Hand, Voice, Emergency Light, Or Siren" Is An Essential Element, Moore Was Sufficiently Notified Of The Statutory Requirements And Was Not Prejudiced By The Charging Document.....	10
D. <u>CONCLUSION</u>	13

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Hopper, 118 Wn.2d 151,
822 P.2d 775 (1992)..... 11

State v. Kjorsvik, 117 Wn.2d 93,
812 P.2d 86 (1991)..... 7, 10, 11, 12

State v. Leach, 113 Wn.2d 679,
782 P.2d 552 (1989)..... 7, 12

State v. Naillieux, 158 Wn. App. 603,
241 P.3d 1280 (2010)..... 12

State v. Nonog, 145 Wn. App. 802,
187 P.3d 335 (2008)..... 11

State v. Tandecki, 153 Wn.2d 842,
109 P.3d 398 (2005)..... 8

Constitutional Provisions

Federal:

U.S. Const. amend. 6 7

Washington State:

Const. art. 1, § 22 (amend. 10) 7

Statutes

Washington State:

Former RCW 46.61.024 8
RCW 46.61.024..... 6, 9

Rules and Regulations

Washington State:

CrR 2.1 7

A. ISSUE PRESENTED

1. A charging document must set forth all essential elements of the crime charged so that a defendant may adequately prepare a defense. Where the sufficiency of a charging document is challenged for the first time after a verdict, the information is liberally construed in favor of validity. Here, the charging document accusing Moore of attempting to elude a pursuing police vehicle contained language that Moore was given a “visual and audible signal” to stop; the information did not include that the signal may be made “by hand, voice, emergency light, or siren,” additional descriptive language contained in the statute. Construing the information liberally in favor of validity, has Moore failed to show that the information lacked an essential element?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Billy Moore was charged by Amended Information with possession of a stolen vehicle, attempting to elude a pursuing police vehicle, and violation of the Uniform Controlled Substances Act- possession of methamphetamine. CP 13-14. All offenses were alleged to have occurred on March 14, 2012. CP 13-14.

Moore waived his right to a jury trial and was subsequently found guilty as charged in a bench trial presided over by the Honorable Judge Lori Smith. CP 15; 2RP¹ 5; 4RP 45. The trial court imposed standard range sentences for all three offenses (possession of a stolen vehicle- 57 months; attempting to elude- 29 months; and possession of methamphetamine- 24 months). CP 99, 101; 5RP 11. The sentences on all three counts were imposed concurrently. CP 101; 5RP 11.

2. SUBSTANTIVE FACTS.

Upon waking up on the morning of March 14, 2012, Theresa Williamson discovered that her teenage son's red Mazda Miata had been stolen. 2RP 33; 3RP 4-5. That afternoon at approximately 3:30 p.m., Williamson spotted her son's car while she was driving to pick up her daughter from school. 3RP 6-7. Williamson saw Billy Moore driving the Mazda; he was the vehicle's only occupant. 3RP 7. Williamson did a U-turn to follow her son's car while she called 911. 3RP 10. After losing sight of the Mazda, Williamson

¹ There are 5 volumes of verbatim report of proceedings. They will be referred to as follows: 1RP (Oct. 16, 2012); 2RP (Oct. 17, 2012); 3RP (Oct. 18, 2012); 4RP (Oct. 22, 2012); and 5RP (Nov. 2, 2012).

met with Federal Way Police Officer Steven Olson and gave him a description of the car and of Moore. 2RP 34; 3RP 10.

Officer Olson located the car approximately ten blocks away from where he had met with Williamson. 2RP 35-37. In his marked patrol car, Olson began to follow behind the Mazda. 2RP 35-37. Olson did not immediately activate his vehicle's lights and sirens, because he was waiting for other officers to arrive in the area. 2RP 36-37. Olson continued to follow Moore as he turned into the Camelot Square Mobile Home Park. 2RP 38. Initially, Moore drove slowly inside the mobile home park. 2RP 39. While Olson followed Moore, another officer set up "spike strips" at the exit of the mobile home park to disable the vehicle if Moore failed to stop. 2RP 29; 3RP 40.

As Moore approached the exit, he saw the spike strips being set up and immediately turned down a side street. 2RP 40. Officer Olson activated his patrol car's lights and siren and followed behind Moore. 2RP 40. Moore accelerated the Mazda very quickly and failed to stop. 2RP 40. Despite traveling in a residential neighborhood in the middle of the afternoon, Moore drove in both lanes of travel and cut corners as he turned at a high rate of speed. 2RP 41.

Due to the safety concern of pursuing a fleeing vehicle through a residential neighborhood, Officer Olson turned off his lights and sirens and slowed his vehicle while continuing to follow Moore. 2RP 41-42. As he tried to quickly make a turn, Moore spun the Mazda out onto the main road of the mobile home park causing the vehicle to spin and come to a stop. 2RP 42-43. Officer Olson drove his patrol car right alongside the stolen car, exited the patrol car, and told Moore to put his hands up and exit the vehicle. 2RP 42-43. Olson recognized Moore from prior encounters. 2RP 49. Instead of exiting, Moore put the car in reverse and drove away. 2RP 43.

Olson returned to his patrol car and drove in the direction of where he had seen the Mazda. 2RP 45. As he approached the area, Olson saw the Mazda crashed into the side of a trailer home. 2RP 45. The Mazda was embedded in the trailer with its engine still running. 3RP 44. Moore was no longer in the car. 2RP 45. Within minutes, officers located Moore nearby hiding "on his back and side in between a shed and a chain link fence." 2RP 77; 3RP 25.

Upon his arrest, Moore had methamphetamine in his possession. 2RP 48, 53; 3RP 59. After arresting Moore, Officer

Olson told him, "You know you could have killed somebody with your driving." 2RP 49. Moore agreed. 2RP 49.

At trial, Moore testified. 4RP 8. Moore claimed that he never drove the Mazda and was never pursued by police on March 14, 2012. 2RP 18. Instead, Moore claimed that he took a bus to Camelot "to get weed" and hid when he saw police officers because he had an outstanding warrant. 4RP 8-10.

C. ARGUMENT

1. ALL NECESSARY ELEMENTS APPEARED IN THE CHARGING DOCUMENT AND MOORE WAS NOT PREJUDICED BY A LACK OF NOTICE.

Moore contends that the charging document for attempting to elude a pursuing police vehicle "omitted an essential element" where it did not include language that the signal to stop be made "by hand, voice, emergency light, or siren." This argument should be rejected. The charging document contained all essential elements of the crime, including that Moore was given a "visual and audible signal" to stop. Even if this Court finds that "by hand, voice, emergency light, or siren" constitutes an essential element, the information sufficiently notified Moore of the crime charged so that he could adequately prepare a defense.

Moore was charged in count two of the Amended Information with attempting to elude a pursuing police vehicle as follows:

That the defendant, Billy Bret Moore in King County, Washington, on or about March 14, 2012, while driving a motor vehicle and having been given a visual and audible signal by a uniformed police officer to bring the vehicle to a stop, willfully failed and refused to immediately stop and drove the vehicle in a reckless manner while attempting to elude a pursuing police vehicle that was equipped with lights and sirens;

Contrary to RCW 46.61.024, and against the peace and dignity of the State of Washington.

CP 14.

The statute defining attempting to elude a police vehicle, states in relevant part:

(1) Any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.

RCW 46.61.024.

All essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). Both the federal and state constitutions require that notice be provided to the person charged. “In all criminal prosecutions, the accused shall ... be informed of the nature and cause of the accusation; ...” U.S. Const. amend. 6. “In criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation against him, ...” Wash. Const. art. 1, § 22 (amend. 10). Criminal Rule 2.1(a)(1) provides in part: “the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.”

In an information or complaint for a statutory offense, it is sufficient to charge in the language of the statute if the statute sufficiently defines the crime to apprise an accused person with reasonable certainty of the nature of the accusation. State v. Leach, 113 Wn.2d 679, 686, 782 P.2d 552 (1989). However, it is not necessary to use the exact words of the statute, if other words are used that equivalently or more extensively signify the words in the statute. Id.

- a. "By Hand, Voice, Emergency Light, Or Siren" Is Not An Essential Element Of Attempting To Elude.

Washington courts have never held that the language "by hand, voice, emergency light, or siren" is an element of attempting to elude a pursuing vehicle. State v. Tandecki, 153 Wn.2d 842, 848, 109 P.3d 398 (2005).² The Washington Supreme Court recently addressed the elements of attempting to elude in Tandecki. The court delineated the elements of attempting to elude such that, in order to be guilty of the crime, a suspect must (1) willfully fail (2) to immediately bring his vehicle to a stop, (3) and drive in a manner indicating a wanton and willful disregard for the lives or property of others (4) while attempting to elude police after being signaled to stop by a uniformed officer. Id.

² Tandecki was decided using Former RCW 46.61.024. The amendments to RCW 46.61.024 do not affect the issue addressed in this appeal. Former RCW 46.61.024 stated:

Any driver of a motor vehicle who willfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a manner indicating a wanton or willful disregard for the lives or property of others while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. *The signal given by the police officer may be by hand, voice, emergency light, or siren.* The officer giving such a signal shall be in uniform and his vehicle shall be appropriately marked showing it to be an official police vehicle.

(emphasis added).

Although “being given a visual or audible signal” to stop is an element of attempting to elude, the statutory language describing how that signal may be made is not an element of the crime. Here, legislative intent is shown through the use of “may” and “shall.” The sentence in the statute, “[t]he signal *may* be by hand, voice, emergency light, or siren[.]” provides a non-exclusive list describing ways that the signal to stop *may* be given. RCW 46.61.024 (emphasis added). This is distinguishable from the next sentence in the statute where the legislature prescribed mandatory requirements through the use of the word “shall,” “[t]he officer giving such a signal *shall* be in uniform and the vehicle *shall* be equipped with lights and sirens.” Id. (emphasis added).

Because Washington courts have never included “by hand, voice, emergency light, or siren” as an element of attempting to elude and because the language of the statute does not support such a conclusion, Moore’s request for this Court to create an additional element should be rejected.

- b. Even If “By Hand, Voice, Emergency Light, Or Siren” Is An Essential Element, Moore Was Sufficiently Notified Of The Statutory Requirements And Was Not Prejudiced By The Charging Document.

Here, even if “by hand, voice, emergency light, or siren” is an essential element, a common sense and practical reading of the information demonstrates that it sufficiently notified Moore of the statutory requirements. CP 14. The information states, in part, that: “while driving a motor vehicle and having been given a visual and audible signal by a uniformed police officer to bring the vehicle to a stop...[Moore] ... attempt[ed] to elude a pursuing police vehicle that was equipped with lights and sirens.” CP 14. Thus, the charging document contained information that the signal given by the officer was “visual and audible” and that the pursuing police vehicle was equipped with “lights and sirens.” CP 14.

When a charging document is challenged for the first time on appeal, it will be liberally construed in favor of validity. Kjorsvik, 117 Wn.2d at 102. The reviewing court should examine the document to determine if there is any fair construction by which the elements are all contained in the document. Id. at 105. In order to establish an information’s insufficiency after the verdict, a defendant must establish: 1) the necessary elements of the offense

are not in the information in any form, and 2) how the defendant was prejudiced by the faulty information. Id. at 105-06.

Employing the two-prong Kjorsvik test, “the primary question is whether the necessary facts appear in any form, or by fair construction can be found, in the charging document however inartfully it may be worded.” State v. Nonog, 145 Wn. App. 802, 806, 187 P.3d 335 (2008). If so, the information will be held sufficient unless the defendant suffered actual prejudice as a result of the inartful charging language. Id. (citing Kjorsvik, 117 Wn.2d at 105-06).

Using the more liberal construction applied when the charging document is first challenged on appeal, “if the information contains allegations expressing the crime that was meant to be charged, it is sufficient even though it does not contain the statutory language.” State v. Hopper, 118 Wn.2d 151, 156, 822 P.2d 775 (1992). A reviewing court should be “guided by common sense and practicality” in determining the sufficiency of the language. Id. Even missing elements may be implied if the language supports such a result. Id.

The question here is not whether the information contains the exact words of the statute, but instead, whether the words used

sufficiently convey the same meaning and import. Kjorsvik, 117 Wn.2d at 109; Leach, 113 Wn.2d at 689. Accordingly, by fair construction, the words used in the information sufficiently convey the same meaning and import as the statute.

Moore claims that the “missing element” in his information is analogous to the information in Naillieux, where the court found that essential elements were missing. 158 Wn. App. 603, 643-45, 241 P.3d 1280 (2010). Moore’s argument should be rejected. In Naillieux, the court held that it was reversible error where the information failed to include two new elements of the newly amended attempting to elude statute: “reckless manner and lights and sirens.” Id. at 645. The information in Naillieux mistakenly alleged the elements of the former attempting to elude statute. Id. at 643-45.

Finally, Moore was not prejudiced by any vagueness in the language of the information. In fact, Moore fails to even argue that he was prejudiced. Nowhere does Moore state that he was confused or misled. Moore received full advice from counsel and never sought a bill of particulars to seek further details for the crimes charged against him. The information was not constitutionally deficient, and Moore was not prejudiced by any

vagueness in the charging language. His conviction should be affirmed.

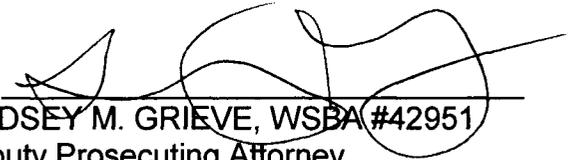
D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Moore's conviction and sentence.

DATED this 29 day of May, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

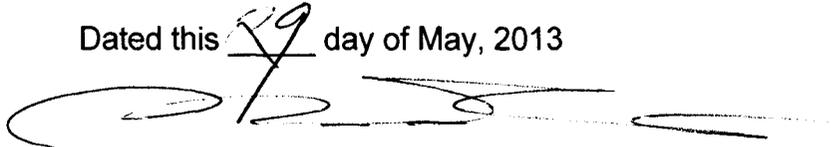
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer M. Winkler, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. BILLY MOORE, Cause No. 69633-5 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 19 day of May, 2013

A handwritten signature in black ink, appearing to be "J. Winkler", written over a horizontal line.

Name
Done in Seattle, Washington