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COURT OF APPEALS  
DIVISION II

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NO. 34208-1-II

STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II

*CMM*  
DEPUTY

STATE OF WASHINGTON,

Respondent

vs.

JOSHUA M. ICE,

Appellant

APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
The Honorable Richard D. Hicks, Judge  
Cause No. 04-1-01916-1

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in accepting the defendant's plea to vehicular assault, count II, set forth in a defective information.
02. The trial court erred when it ordered, as a condition of community custody, that Ice undergo an evaluation for treatment for substance abuse.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether a conviction for vehicular assault pursuant to an information that fails to allege all of the elements of the offense must be reversed and dismissed? [Assignment of Error No. 1].
02. Whether the trial court erred when it ordered, as a condition of community custody, that Ice undergo an evaluation for treatment for substance abuse? [Assignment of Error No. 2].

C. STATEMENT OF THE CASE

Joshua M. Ice was charged by third amended information filed in Thurston County Superior Court on November 8, 2005, with vehicular homicide, count I, and vehicular assault, count II, contrary to RCWs 46.61.520(1)(c) and 46.61.522(1)(c). [CP 25].

On the same day, Ice entered a plea to the charges and stipulated to allowing the court to read the certificate of probable cause in determining whether there was a factual basis for the plea. [RP 11/08/05 4-5; CP 4-5].

Ice acknowledged that he had the opportunity to review the change of plea form and that he understood what he was doing. [RP 11/08/05 4]. When questioned whether “this is a knowingly intelligent and voluntarily made plea [RP 11/08/05 4](,)” Ice’s counsel responded:

I do, Your Honor. I’ve met with Mr. Ice and members of his family in my office on numerous occasions, and we’ve discussed this case in a great amount of detail, and I reviewed the plea form with him and it’s my belief that he understands what he’s doing here this morning.

[RP 11/08/05 4-5].

In his “Statement of Defendant on Plea of Guilty(,)” Ice confirmed that he understood his standard range was 26 to 34 months on count I and 4 to 12 months on count II, that the community custody range was 18 to 36 months on count I and 9 to 18 months on count II, and that the maximum term and fine for the respective offenses was life and \$20,000 for count I and 10 years and \$10,000 for count II. [CP 16].

The court accepted Ice’s plea of guilty to the charges after reviewing the probable cause statement for a factual basis. [RP 11/08/05 5].

Ice was sentenced the following December 1. Exercising his right of allocution, Ice informed the court:

I’m sorry for everything that’s happened, and I understand how the Whites feel about losing their daughter. I did lose a friend. All this stuff has come about because of what

happened, and I mean there's nothing I can do to go and change it. I acknowledge that I did pass poor judgment, and I'm ready to get it over with and be sentenced and do my time.

[RP 11/08/05 9-10].

The court sentenced Ice within his standard range to a duration of 26 months. [RP 12/01/05 19; CP 39]. Timely notice of appeal followed. [CP 45-46].

On January 26, 2006, pursuant to a letter sent to the court by Ice [CP 47], the court denied Ice's motion to vacate his guilty plea:

I'm finding that there's an insufficient factual basis to grant a motion to vacate the guilty plea contained in the file, and that's basically a motion that was filed by Mr. Ice in a letter to Judge Hicks. It says the following: 'I'm trying to get in touch with a witness to make a time to give his statement to my lawyer, Mr. Meyer. I appreciate your concern and help.'

I'm simply going to deny the motion at this time.

[RP 01/26/06 4-5].

D. ARGUMENT

01. A CONVICTION FOR VEHICULAR ASSAULT PURSUANT TO AN INFORMATION THAT FAILS TO ALLEGE ALL OF THE THE ELEMENTS OF THE OFFENSE MUST BE REVERSED AND DISMISSED.

The constitutional right of a person to be informed of the nature and cause of the accusation against him or her requires that every material element of the offense be charged with definiteness and

certainty. 2 C. Torcia, Wharton on Criminal Procedure Section 238, at 69 (13th ed. 1990). In Washington, the information must include the essential common law elements, as well as the statutory elements, of the crime charged in order to appraise the accused of the nature of the charge. Sixth Amendment; Const. art. 1, Section 22 (amend. 10); CrR 2.1(b); State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991). Charging documents that fail to set forth the essential elements of a crime are constitutionally defective and require dismissal, regardless of whether the defendant has shown prejudice. State v. Hopper, 118 Wn.2d 151, 155, 822 P.2d 775 (1992). If, as here, the sufficiency of the information is not challenged until after the verdict, the information “will be more liberally construed in favor of validity....” Kjorsvik, 117 Wn.2d at 102. The test for the sufficiency of charging documents challenged for the first time on appeal is as follows:

(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?

Kjorsvik, 117 Wn.2d at 105-06.

It is not fatal to an information that the exact words of the statute are not used; it is instead sufficient “to use words conveying the same meaning and import as the statutory language.” State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). The information must, however,

“state the acts constituting the offense in ordinary and concise language....” State v. Royse, 66 Wn.2d 552, 557, 403 P.2d 838 (1965).

The question “is whether the words would reasonably appraise an accused of the elements of the crime charged.” Kjorsvik, 117 Wn.2d at 109.

The primary purpose (of a charging document) is to give notice to an accused so a defense can be prepared. (citation omitted) There are two aspects of this notice function involved in a charging document: (1) the description (elements) of the crime charged; and (2) a description of the specific conduct of the defendant which allegedly constituted the crime.

Auburn v. Brooke, 119 Wn.2d 623, 629-30, 836 P.2d 212 (1992).

RCW 46.61.522(1)(c) provides that a person is guilty of vehicular assault if he or she operates or drives any vehicle:

(c) With disregard for the safety of others and causes substantial bodily harm to another.

To constitute vehicular assault, there must be a causal connection between the injury to a person and the criminal conduct of the defendant so that the act done was a cause of the resulting substantial bodily harm.

See State v. Neher, 112 Wn.2d 347, 352, 771 P.2d 330 (1989).

Ice was charged in the third amended information as follows:

That the defendant, JOSHUA MICHAEL ICE, in the State of Washington, on or about the 9<sup>th</sup> day of May, 2004, the above-named defendant did cause substantial bodily harm to another, to wit RACHEL ONITHA GOMEZ and/or did operate or drive a motor vehicle with disregard for the safety of others. [Emphasis added].

[CP 25].

This information is upside down because it does not allege the causal connection between the alleged criminal conduct on the part of Ice and the injury to another person, as set forth in RCW 46.61.522(1)(c) (With disregard for the safety of others and causes substantial bodily harm to another), which reflects the conduct-and-caused-substantial- bodily-harm verbiage of RCW 46.61.522. Instead, the information alleges only that Ice caused substantial bodily harm and/or did operate or drive a vehicle in the proscribed prohibited manner, not that he drove in the prohibited manner and thereby caused the bodily injury.

The information is thus defective, and the conviction obtained on the charge of vehicular assault must be reversed and the charge dismissed. State v. Kitchen, 61 Wn. App. 911, 812 P.2d 888 (1991). Ice need not show prejudice, since Kjorsvik calls for a review of prejudice only if the “liberal interpretation” upholds the validity of the information. See Kjorsvik, 117 Wn.2d at 105-06.

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02. THE TRIAL COURT ERRED IN ORDERING THAT ICE UNDERGO AN EVALUATION FOR TREATMENT FOR SUBSTANCE ABUSE.

At sentencing, as a condition of community custody, the court ordered that Ice “undergo an evaluation for treatment for ... substance abuse.” [CP 40]. However, as the court acknowledged that alcohol and drugs played no part in Ice’s crimes [RP 12/01/05 13, 17], the court could not impose any substance abuse evaluation or treatment conditions. State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003).

E. CONCLUSION

Based on the above, Ice respectfully requests this court to reverse and dismiss his conviction for vehicular assault and to remand his case for resentencing consistent with the arguments presented herein.

DATED this 1<sup>st</sup> day of August 2006.

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CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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DATED this 1<sup>st</sup> day of August 2006.

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