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A. ASSIGNMENTS OF ERROR

01. The trial court erred in not taking count II from the jury for failure of the information to allege all of the elements of malicious mischief in the first degree.
02. The trial court erred in finding Peterson subject to the sentence enhancement for armed with a deadly weapon in count II, malicious mischief in the first degree, where the evidence does not support such a finding.
03. The trial court erred in not dismissing count I, attempted robbery in the first degree, for lack of sufficiency of the evidence.
04. In finding Peterson guilty of attempted robbery in the first degree, the trial court erred in entering findings of fact 11, 12, 13 and 15 as set forth herein at pages 6-7.
05. In finding Peterson guilty of malicious mischief in the first degree while armed with a deadly weapon, the trial court erred in entering finding of fact 15 as set forth herein at pages 8-9.
06. In finding Peterson guilty of attempted robbery in the first degree, the trial court erred in entering conclusions of law 2, 3 and 4 as set forth herein at pages 8-9.
07. In finding Peterson guilty of malicious mischief in the first degree while armed with a deadly weapon, the trial court erred in entering conclusions of law 7 and 8 as set forth herein at pages 9-10.

08. The trial court erred in entering the verdict finding Peterson guilty of attempted robbery in the first degree as set forth herein at page 10.
09. The trial court erred in entering the verdict finding Peterson guilty of malicious mischief in the first degree as set forth herein at page 10.
10. The trial court erred in entering the verdict finding Peterson armed with a deadly weapon at the time of the commission of count II, malicious mischief in the first degree as set forth herein at page 10.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether a conviction for malicious mischief in the first degree 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 there was sufficient evidence to support the sentence enhancement for armed with a deadly weapon in count II, malicious mischief in the first degree? [Assignments of Error Nos. 2, 5 and 7].
03. Whether an attempted robbery in the first degree conviction can be based upon force used after the property taken had been abandoned? [Assignments of Error Nos. 3, 4 and 6].
04. Whether there was sufficient evidence to uphold Peterson's criminal conviction for attempted robbery in the first degree? [Assignment of Error No. 3, 4 and 6].

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08. Whether the trial court erred in entering the verdict finding Peterson guilty of attempted robbery in the first degree? [Assignment of Error No. 8].
09. Whether the trial court erred in entering the verdict finding Peterson guilty of malicious mischief in the first degree? [Assignment of Error No. 9].
10. Whether the trial court erred in entering the verdict finding Peterson armed with a deadly weapon at the time of the commission of count II, malicious mischief in the first degree? [Assignment of Error No. 10].

C. STATEMENT OF THE CASE

01. Procedural Facts

Ronnie Adam Tyler Peterson (Peterson) was charged by first amended information filed in Thurston County Superior Court on April 11, 2006, with attempted robbery in the first degree while armed with a deadly weapon, count I, or, in the alternative, assault in the second degree while armed with a deadly weapon, and malicious mischief in the first degree while armed with a deadly weapon, count II, contrary to RCWs 9A.28.020, 9A.56.200(1)(a)(i) or (ii), 9A.36.021(1)(c) or (e), 9A.48.070(1)(a) and 9.94A.602. [CP 17-18].

Peterson was found guilty of attempted robbery in the first degree while armed with a deadly weapon and malicious mischief in the first

degree while armed with a deadly weapon. [CP 34]. The court entered the following Findings of Fact & Conclusions of Law, and Verdicts:

I. FINDINGS OF FACT

1. At about 6:30 p.m. on December 28, 2005, Donald Westfall, his 18-year old son “Donnie,” and the latter’s 18-year old friend Ryan Johnson, were returning to the Mudd Bay Park & Ride after a day of skiing. They were going to drop Ryan off where his car was parked.
2. “Donnie” was driving the Westfall vehicle. His father was in the front passenger seat, and Ryan was in the rear seat. As the trio approached Johnson’s parked car, they each noticed that the rear lights were flashing. There was one other car parked in the lot as well, some distance away (exhibit 17).
3. As the trio approached Johnson’s car they could see a person – later identified as the defendant – emerging from within Johnson’s car, lit up by the headlights of their truck. The defendant ran, and was seen to be carrying something. The defendant later admitted to the police that he had the car’s stereo in his left hand and knife in his right hand. The theft of the stereo was occurring as the trio was approaching Johnson’s vehicle.
4. Donald Westfall noted that the defendant ran to the vehicle parked on the southerly side of the lot, and then he ran west, towards the Madrona Beach Road and O’Leary Road intersection (exhibit 17). Donald ordered his son to pursue, and the boy did so, and

came along side the running defendant (exhibits 5, 6, 17).

5. While the vehicle was still moving Donald Westfall leaped from the passenger seat and saw the defendant try to escape into bushes that apparently were impenetrable, for the defendant turned and confronted Westfall. “Donnie” Westfall and Ryan Johnson heard the defendant threaten Donald, Senior, by saying “I have a knife – I’ll cut you!” or words to that effect. Donald Senior did not immediately see the knife, but put his arms out more than shoulder width apart to defend himself as the defendant “came at me,” as he testified.
6. Westfall blocked the defendant’s attack by grasping both his wrists and, after a brief struggle, overpowered the defendant and put him on the ground. The defendant continued to fight by trying to move his arms and buck Westfall from on top of him, to no avail. It was during these moments that Mr. Westfall could see the knife – blade out – (exhibit 10) in the defendant’s right hand. Westfall wrestled the knife away by verbal commands and physical force, and held the defendant on the ground until deputy sheriffs arrived.
7. Shortly after subduing the defendant, the other vehicle in the lot – the one the defendant initially had run to – pulled out of the park & ride and stopped by the scene. The defendant was heard to yell “Eric!” and urged the driver to leave, which he did – westbound on Madrona Beach Road (exhibit 17). The driver has never been identified.

8. Each of the “victims” – Donald Westfall, his son, “Donnie,” and Ryan Johnson, testified that things “happened fast” or “very fast.” Thus, “Donnie” and Johnson did not see the knife held by the defendant until he (the defendant) was on the ground. They were unsure of when the defendant – who was carrying the car stereo from Johnson’s car, relinquished it. Neither was Donald Westfall. He saw the defendant running with it, but did not notice it when the defendant turned and “came at” him. The car stereo – valued at \$650 – was located in the vicinity of where the altercation between the defendant and Donald Westfall took place. (exhibits 5, 6, 17).
9. After the deputies arrived, the defendant was interviewed at the scene. The tape-recorded interview and transcript of it were admitted into evidence as exhibits 13 and 14.
10. The defendant admitted that he used the knife (exhibit 10) to cut the wires and extricate the car stereo from the dashboard (exhibit 2 & 3). He had used a metal punch (exhibit 10) and flashlight to gain entry into the vehicle (exhibit 1 & 2). When he was caught leaving the car, the defendant had the stereo in his left hand and the knife in his right. He said that removing the stereo “was a bitch,” and that he “ripped the dash apart.” The damage to the vehicle was in excess of \$1,500.
11. When Westfall caught up to him, the defendant admitted that he said “I’ll cut you, don’t fucking touch me or I’ll cut you.” He said that he had a knife in his right hand, the stereo in his left hand (exhibit 14, page 4, lines 1-4). The defendant dropped the car

stereo only in an effort to confront Westfall and threaten him with the knife.

12. Besides the knife used in the foregoing (exhibit 10), the defendant was found to be carrying a 4 “butterfly” knife (exhibit 12) and another folding knife (exhibit 11). The blade on exhibit 10 – the knife used to commit the removal and theft of the stereo, and the knife carried thereafter by the defendant – was three inches.
13. The testimony of the three victims was credible. The testimony of the defendant was not credible. Obviously, he was not relating events as they transpired, but he prepared for this trial and prepared his own testimony. Moreover, he admitted to lies during his cross-examination.
14. The foregoing events occurred in the State of Washington.
15. These facts are sufficient to prove the crimes alleged – Attempted Robbery in the First Degree While Armed with a Deadly Weapon, and Malicious Mischief in the First Degree While Armed with a Deadly Weapon – beyond a reasonable doubt.

Based on these findings, the Court made the following:

II. CONCLUSIONS OF LAW

1. Generally, robbery requires theft from the person of another or in the presence against his will by the use or threatened use of force or violence. Such force must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the

taking. This is the so-called “transactional” view of robbery followed in the State of Washington. State v. Handbrugh, 119 Wn.2d 284, 290, 830 P.2d 641 (1992).

2. In State v. Johnson, 155 Wn.2d 609, 121 P.3d 91 (2005) the court ruled that a robbery conviction could not be sustained when the force used (by the defendant) was to escape, after, the (formally) peaceably – taken property was abandoned. The decision in Johnson, supra, draws a line between when a “transaction” ends and when an escape begins, and that appears to be the moment the property is abandoned.
3. Essentially, the defendant testified that he abandoned the stolen car stereo and was attempting to escape. The court did not find this testimony credible. Rather, the evidence proves that insofar as the defendant relinquished the stereo, or dropped it, he did so in an effort to confront Donald Westfall in order to retain possession of the stolen property or to overcome resistance to the taking of the property.
4. The conduct of the defendant constituted a substantial step towards the commission of Robbery in the First Degree. The defendant attempted to take personal property from the person of another, or in his presence, against his will, by the threatened use of immediate force, violence, or fear of injury to that person or the person of anyone. Said force was used in an attempt to retain possession of said property (the car stereo) or to prevent or overcome resistance to the taking. Furthermore, at the time of the commission of the aforesaid, the defendant was armed with a deadly weapon. Accordingly, the

defendant is guilty of the crime of Attempted Robbery in the First Degree as charged in Count I.

5. The defendant was armed with exhibit 10 during the commission of the crime alleged in count I. The weapon, used by the defendant, carried by the defendant in his right hand, was readily available for offensive or defensive use. Considering the nature of the crime, the weapon itself, and the circumstances, the court is convinced, beyond a reasonable doubt, that the defendant was armed with a deadly weapon as proscribed by RCW 9.94A.602.
6. The defendant smashed his way into Ryan Johnson's vehicle and pried the car stereo from the dashboard and damaged the car in a dollar amount in excess of \$1,500. He was aware of what he was doing. The defendant acted knowingly and maliciously at the this time. Accordingly, the defendant is guilty of Malicious Mischief in the First Degree as charged in count II.
7. Furthermore, the knife used in the commission of the crime in Count II was deadly weapon as proscribed by RCW 9.94A.602. The evidence has proved, beyond a reasonable doubt, that there was a connection between the defendant and the weapon, the weapon was easily accessible and readily available for offensive and defensive use, and there was a connection between the weapon and the crime.
8. As to both the deadly weapon special findings of Count I and II, the knife – exhibit 10 – was an implement or instrument that had the capacity to inflict death and,

from the manner in which it was used, was likely to produce or may easily produce death.

Based upon the foregoing findings of fact and conclusions of law, the verdicts of the court are:

1. The defendant is guilty of the crime of Attempted Robbery in the First Degree as charged in Count I.
2. The defendant is guilty of the crime of Malicious Mischief in the First Degree as charged in Count II.
3. The defendant was armed with a deadly weapon at the time of the commission of the crime in Count I.
4. The defendant was armed with a deadly weapon at the time of the commission of the crime in Count II.

[CP 30-34].

Peterson was sentenced within his standard range and timely notice of this appeal followed. [CP 22, 35-43].

02. Substantive Facts

According to Deputy Ivanovich, Donald Westfall, Sr. heard threats made by Peterson but “didn’t remember what was said at all.” [RP 04/12/06 15]. The blade of the knife used in the incident measured to be no more than 3 three inches. [RP 04/12/06 30].

Donald Westfall, Sr. explained that he and Peterson eventually got into a "wrestling match, and I wrestled him to the ground." [RP 04/12/06 44]. "I don't know what he was yelling at me." [RP 04/12/06 45]. "I could see the blade in his right hand." [RP 04/12/06 47].

At some point, he dropped the stereo, tossed it down on the ground. His hand were - - one hand was out, I remember that. Like I said, it was very quick. I know that I grabbed, I grabbed both of his wrists and held them away from our bodies as I brought him down to the ground.

[RP 04/12/06 44]. RP 04/12/06

I don't exactly remember when he dropped the stereo, so I can't remember at that point if he threw it down. I believe he had it in his hands when I got out of the truck, but it was lying, it was laying there in the ditch.

[RP 04/12/06 54].

Q. You mentioned that he came out of the bushes. Do you recall him having a stereo in his hand when he came out of the bushes?

A. I do not recall when I saw him drop, specifically, when he dropped the - - when he dropped the stereo.

Q. When he came out of the bushes, did you see a stereo in his hands?

A. He was with his back to the bushes. At some point he tossed the stereo down.

[RP 04/12/06 58].

Westfall, Sr. remembered telling the police that Peterson had thrown the radio in the bushes before the two of them got into a tussle. [RP 04/12/06 59-60]. Westfall's son heard Peterson tell his dad that he had a knife and that he would cut him, "or something like that." [RP 04/12/06 72].

Peterson told Deputy Mark Holden: "I had the knife in my right hand and the stereo in my left hand." [RP 04/12/06 109]. He testified that he had dropped the stereo when he was running away, prior to his encounter with Westfall. [RP 04/12/06 107, 109]. When questioned about his statement to Holden, he explained: "I was trying to recall what had happened, and when I was running away, that is when I had that." [RP 04/12/06 109].

D. ARGUMENT

01. A CONVICTION FOR MALICIOUS MISCHIEF IN THE FIRST DEGREE PURSUANT TO AN INFORMATION THAT FAILS TO ALLEGE ALL OF 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 9A.48.070(1)(a) provides that a person is guilty of malicious mischief in the first degree if he knowingly and maliciously:

(a) Causes physical damage to the property of another in an amount exceeding one thousand five hundred dollars.... [Emphasis added].

Peterson was charged in the first amended information as follows:

In that the defendant, RONNIE ADAM TYLER PETERSON, in the State of Washington, on or about the 28th day of December, 2005, did knowingly and maliciously cause physical damage in excess of \$1,500 while armed with a deadly weapon; That at the time of the commission of said crime, the defendant was armed with a deadly weapon as proscribed by RCW 9.94A.602.

[CP 18].

The amended information failed to appraise Peterson of all of the elements of malicious mischief in the first degree. The information did

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

02. THERE WAS INSUFFICIENT EVIDENCE TO UPHOLD PETERSON’S SENTENCE ENHANCEMENT FOR ARMED WITH A DEADLY WEAPON AT THE TIME OF THE COMMISSION OF THE CRIME OF MALICIOUS MISCHIEF IN THE FIRST DEGREE.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638,

618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

RCW 9.94A.602 provides, in relevant part:

For purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, or any weapon containing poisonous or injurious gas. [Emphasis added].

As the blade on the knife used in the incident measured to be no more than 3 inches [RP 04/12/06 30](,) as acknowledged by the trial court [RP 04/12/06 145-46], it did not come within the statutory list of deadly weapons, and thus required extrinsic evidence that it was used in a manner "likely to produce or may easily and readily produce death." The State did not carry its burden of proving this, offering no evidence of the use of the knife in this context vis-à-vis the malicious mischief charge, with the result that it was error to enhance Peterson's sentence for malicious mischief in the first degree based on this factor.

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03. THERE WAS INSUFFICIENT EVIDENCE TO UPHOLD PETERSON'S CONVICTION FOR ATTEMPTED FIRST DEGREE ROBBERY.¹

A person commits robbery by unlawfully taking property from another or in his presence against his will by the use or threatened use of force to take or retain the property.

Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial.

RCW 9A.56.190.

A person commits first degree robbery if during the commission of the robbery, or in immediate flight therefrom, he or she is armed with a deadly weapon or displays what appears to be a deadly weapon. RCW 9A.56.200(1)(i)(ii). And a person commits attempted first degree robbery when he or she takes a substantial step toward the commission of robbery in the first degree. RCW 9A.28.020.

The transactional view of robbery as reflected in Washington's robbery statute requires that the force be used to either obtain or retain property or to overcome resistance to the taking. State v. Johnson, 155 Wn.2d 609, 611, 121 P.3d 91 (2005).

¹ The test relating to the sufficiency of the evidence previously set forth herein, supra at 15-16, is hereby incorporated by reference for the sole purpose of avoiding needless duplication.

Here, Peterson testified that he had dropped the stereo when he was running away, prior to his encounter with Westfall [RP 04/12/06 107, 109], and no witness testified to the contrary, with Westfall stating that he didn't remember when Peterson had dropped the stereo [RP 04/12/06 54], which is consistent with the trial court's oral finding that "there is a chase" and "at some point the defendant releases his grip on the stereo but maintains his grip on the knife." [RP 04/12/06 142]. Concomitantly, under these facts, given that Peterson was not attempting to retain the stereo during his encounter with Westfall, and had in fact abandoned the property before using force to avoid apprehension, the State failed to carry its burden of proving that the force used by Peterson in his struggle with Westfall related to the taking or retention of the stereo, either as force used directly in the taking or retention or as force used to prevent or overcome resistance, with the result that his conviction for attempted first degree robbery must be reversed and dismissed.

E. CONCLUSION

Based on the above, Peterson respectfully requests this court to reverse and dismiss his convictions consistent with the arguments presented herein.

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DATED this 9th day of August 2006.

Respectfully submitted,

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CERTIFICATE

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

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