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DIVISION II

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STATE OF WASHINGTON
BY [Signature]
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NO. 37580-0-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

JESSE GOULEY,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
MASON COUNTY

The Honorable James B. Sawyer II, Judge
Cause No. 08-1-00025-7

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in giving Instruction No. 23, the to-convict instruction, as it is an inaccurate statement of the law that relieved the State of its burden of proof of the essential element of knowledge for the crime of unlawful possession of a firearm in the first degree (Count III).
2. The trial court erred in allowing Gouley to be represented by counsel who provided ineffective assistance in failing to object to instruction No. 23 as it is an inaccurate statement of the law that relieved the State of its burden of proof of the essential element of knowledge for the crime of unlawful possession of a firearm in the first degree (Count III).
3. The trial court erred in allowing Gouley to be found guilty of possession of a stolen vehicle (Count II) where the information was defective in that it failed to allege all the essential elements of the crime.
4. The trial court erred in sentencing Gouley as the court imposed a sentence including community custody in excess of the statutory maximum.
5. The trial court erred in allowing Gouley to be represented by counsel who provided ineffective assistance in failing to argue at sentencing that the sentence imposed exceeded the statutory maximum.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in giving Instruction No. 23, the to-convict instruction, as it is an inaccurate statement of the law that relieved the State of its burden of proof of the essential element of knowledge for the crime of unlawful possession of a firearm in the first degree? [Assignments of Error Nos. 1 and 2].
2. Whether the trial court erred in allowing Gouley to be found guilty of possession of a stolen vehicle (Count II) where the information was defective in that it failed to

allege all the essential elements of the crime? [Assignment of Error No. 3].

3. Whether the trial court erred in sentencing Gouley as the court imposed a sentence including community custody in excess of the statutory maximum? [Assignment of Error No. 4].
4. Whether the trial court erred in allowing Gouley to be represented by counsel who provided ineffective assistance in failing to argue at sentencing that the sentence imposed exceeded the statutory maximum? [Assignment of Error No. 5].

C. STATEMENT OF THE CASE

1. Procedure

Jesse Gouley (Gouley) was charged by amended information filed in Mason County Superior Court with one count of unlawful possession of a controlled substance (Count I), one count of possession of a stolen vehicle (Count II), one count of unlawful possession of a firearm in the first degree (Count III), and one count of false reporting—a gross misdemeanor (Count IV). [CP 58-59].

Prior to trial, no motions regarding 3.5 or 3.6 were made or heard. Gouley was tried by a jury, the Honorable James B. Sawyer II presiding. Gouley stipulated to having a prior offense that precluded his possession of a firearm for purposes of Count III (unlawful possession of a firearm in the first degree). [CP 57; RP 108-109]. Gouley had no objections and

took no exceptions to the instructions. [RP 142]. The jury found Gouley guilty as charged on all counts. [CP 22-25; RP 179-181].

The court sentenced Gouley based on undisputed offender scores to a standard range sentence of 24-months on Count I; to a standard range sentence of 57-months on Count II; to a standard range sentence of 116-months on Count III; and to a sentence of 365-days on Count IV (a gross misdemeanor) with all sentences running concurrently. [CP 5-21; RP 189-191]. The court also imposed 9 to 12-months community custody/probation. [CP 5-21; RP 189-191].

Timely notice of appeal was filed on April 7, 2008. [CP 4]. This appeal follows.

2. Facts

On January 12, 2008, Mason County deputies responded to 91 Salish Court regarding a stolen car being located. [RP 56, 66, 70-71]. While at the scene, the deputies were dispatched to a report of a stabbing with serious injuries. [RP 63, 73, 89, 125-126]. Upon arriving at the place where the stabbing had been reported, the officers could find no one. [RP 63-64, 89-90]. While investigating the non-existent stabbing, a report was dispatched by another officer that he was following a suspicious vehicle near the scene where the stolen car had been found and would be conducting a traffic stop. [RP 64-65, 79, 90, 127].

A traffic stop was conducted on the suspicious vehicle that contained a number of people none of whom were wearing their seatbelts. [RP 79-80, 90-91, 127, 129-131]. One of the passengers, later identified as Gouley, became belligerent during the traffic stop resulting in his arrest for obstructing a public servant. [RP 91-92]. A search incident to Gouley's arrest revealed on his person a residue encrusted smoking pipe that eventually was determined by the Washington State Patrol Crime Lab to contain methamphetamine, a set of car keys for a Toyota Avalon, and a cell phone. [RP 40, 92-96]. While these items, after being taken into evidence, were being placed in the trunk of a patrol car, Gouley's cell phone rang and an officer answered it only to discover that it was 911 dispatch call back the number that had reported the non-existent stabbing. [RP 96-97, 132].

The officers, having taken Gouley into custody, returned to the stolen car where the car keys found on Gouley's person were used on the stolen car. [RP 82, 99-100]. The car keys unlocked the door of the stolen car. [RP 100]. An inventory search of the now unlocked stolen car revealed a firearm on the driver's side of the car as well as a packet of pictures of Gouley found in the glove compartment. [RP 81-83, 100-104].

Jim Johnston, the owner of the stolen car, testified that his car had been stolen on the morning of January 7th or 9th while he had been in a

convenient store getting a cup of coffee. [RP 136-139]. He further testified that he did not know Gouley, had never given Gouley permission to drive his car, and that he did not own the firearm that was found in his car. [RP 139-140].

Gouley did not testify.

D. ARGUMENT

- (1) THE TRIAL COURT ERRED IN GIVING INSTRUCTION NO. 23, THE TO-CONVICT INSTRUCTION FOR UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE (COUNT III), AS IT IS AN INACCURATE STATEMENT OF THE LAW THAT RELIEVED THE STATE OF ITS BURDEN OF PROOF ON THE ESSENTIAL ELEMENT OF KNOWLEDGE.

A criminal defendant has the right to have the jury base its decision on an accurate statement of the law applied to the facts of the case. State v. Miller, 131 Wn.2d 78, 90-92, 929 P.2d 372 (1997). The omission from an instruction of an element of the crime at issue produces a “fatal error” by relieving the State of its burden of proving every essential element beyond a reasonable doubt. State v. Eastmond, 129 Wn.2d 497, 502-504, 919 P.2d 577 (1996). Failure to instruct on each essential element of the crime charged constitutes manifest error of constitutional magnitude that can be raised for the first time on appeal under RAP 2.5(a). State v. Eastmond, 129 Wn.2d at 502. The failure to instruct on an element of an

offense is “automatic reversible error.” State v. Smith, 131 Wn.2d 258, 265, 930 P.2d 917 (1997).

Under our State Supreme Court’s decision in State v. Anderson, 141 Wn.2d 357, 5 P.3d 1247 (2000), knowledge is an essential element of unlawful possession of a firearm in the first degree. The trial court was required to instruct the jury on this element and failed to do so. In instruction No. 23, the court instructed the jury as follows:

To convict the defendant of the crime of unlawful possession of a firearm in the first degree as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the January 12, 2008, the defendant had a firearm in his possession or control;
- (2) That the defendant had previously been convicted of a serious offense; and
- (3) That the possession or control of the firearm occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

[CP 51].

Nowhere in this instruction is the jury instructed that in order to convict Gouley of unlawful possession of a firearm in the first degree that

they must find that he knowingly possessed the firearm. Absent the jury being instructed on this element Gouley's conviction cannot stand as it cannot be said the jury found all the essential elements of the crime charged beyond a reasonable doubt.

While the invited error doctrine may preclude review of any instructional error—including, as here, one of constitutional magnitude—where the instructions is proposed by the defendant, State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996), *citing*, State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995).

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d

223, 225, 500 P.2d 1242 (1972), *citing*, State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Since the trial court's Instruction No. 23 [CP 51] omits the essential element of knowledge and Gouley's attorney failed to object to this instruction [RP 142], both elements of ineffective assistance of counsel have been established. Counsel's failure to exercise due diligence in failing to object to this instruction, which fails to contain an essential element of the crime charged, falls below an objective standard of reasonableness and was prejudicial in that it allowed Gouley to be convicted on proof of less than all the elements of the crime. This court should reverse Gouley's conviction for unlawful possession of a firearm in the first degree.

- (2) A CONVICTION FOR POSSESSION OF A STOLEN VEHICLE (COUNT II) 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....” State v. 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?

State v. 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.” State v. 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.56.068 provides, in relevant part:

A person is guilty of possession of a stolen vehicle if he or she possesses a stolen motor vehicle.

It has long been the law in Washington that the essential elements of possession of stolen property/[a motor vehicle] are: (1) actual or constructive possess of the stolen property/[motor vehicle]; and (2) knowledge of actual or constructive possession of stolen property/[motor vehicle]. [Emphasis added]. See State v. Couet, 71 Wn.2d 773, 775, 430 P.2d 974 (1967); State v. Jennings, 35 Wn. App. 216, 219, 666 P.2d 381, *review denied*, 100 Wn.2d 1024 (1983). The fact that “knowledge” that

the vehicle is stolen and possession with that knowledge is an essential element of the crime of possession of a stolen vehicle needs no further argument in light of Court's Instruction No. 19, [CP 47], the to-convict instruction for Count II, which specifically states "that the defendant acted with knowledge that the motor vehicle had been stolen."

However, here, the first amended information charging Gouley with this offense did not allege the element of "knowledge" of the possession of a stolen motor vehicle or that the motor vehicle was in fact stolen:

In the County of Mason, State of Washington, on or about the 12th day of January, 2008, the above-named defendant, JESSE C. GOULEY, did commit POSSESSION OF A STOLEN MOTOR VEHICLE, a class B Felony, in that said defendant did possess a stolen motor vehicle, to-wit: a green 1996 Toyota Avalon bearing Washington License 144-MRH; contrary to RCW 9A.56.068 and against the peace and dignity of the State of Washington.

[CP 58-59].

This information failed to apprise Gouley of the nature of the charge. It did not allege that he knowingly possessed a stolen motor vehicle in fact it contains a total absence of any mental element. "(S)ince both charging documents and jury instructions must identify the essential elements of the crime for which the defendant is charged [information] and tried [jury instructions](,)" State v. McCarty, 140 Wn.2d 420, 426 n.1,

998 P.2d 296 (2000), the information is defective, and the conviction obtained on this charge must be reversed and dismissed. State v. Kitchen, 61 Wn. App. 911, 812 P.2d 888 (1991). Gouley 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.

- (3) THIS MATTER SHOULD BE REMANDED FOR RESENTENCING WHERE THE COURT IMPOSED A SENTENCE INCLUDING COMMUNITY CUSTODY THAT EXCEEDED THE STATUTORY MAXIMUM.

Where a defendant’s presumptive sentence exceeds the statutory maximum, the statutory maximum will be the presumptive sentence. *See* former RCW 9.94A.310 and current RCW 9.94A.510 and 9.94A.533. To hold otherwise would be a violation of RCW 9.94A.505. Under these principles, a defendant’s sentence including the time period required by community custody/placement as well as any sentence enhancement imposed on any count subject to a single sentencing cannot exceed the statutory maximum for the greatest offense for which guilt was found. *See* State v. Thomas, 150 Wn.2d 666, 671 and 674, 80 P.3d 168 (2003); State v. Sloan, 121 Wn. App. 220, 223-224, 87 P.3d 1214 (2004).

Here, Gouley was given a sentence of 114-months (on a class B felony). [CP 5-21]. Gouley was also sentence to 9 to 12-months of

community custody/probation. [CP 5-21]. Thus, Gouley's sentence was actually 123 to 126-months. However, a class B felony has a statutory maximum of 120-months. Under the principles set forth above, the court could only lawfully order community custody of 6-months. As the court failed to do so and the sentence actually imposed by the court exceeds the statutory maximum of 120-months, this court must remand for resentencing with directions that 120-months is the maximum sentence the trial court can impose to include the underlying sentences, and community custody/probation.

- (4) GOULEY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO ARGUE THAT HIS TOTAL SENTENCE EXCEEDED THE STATUTORY MAXIMUM.

Should this court find that trial counsel waived or invited the error claimed and argued in the preceding section of this brief (section 4) by failing to object to a sentence that exceeds the statutory maximum, then both elements of ineffective assistance of counsel have been established. In order to avoid needless duplication the law regarding ineffective assistance of counsel set forth in section 1 of this brief is hereby adopted and incorporated by reference.

First, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to allow his client to

be sentenced beyond the statutory maximum, and had counsel done so, the trial court would not have imposed a sentence with or at the statutory maximum.

Second, the prejudice is self evident. Again, for the reasons set forth in the preceding sections, had counsel objected to a sentence exceeding the statutory maximum, the trial court would have imposed a lawful sentence.

E. CONCLUSION

Based on the above, Gouley respectfully requests this court to reverse and dismiss his convictions and/or remand for resentencing.

DATED this 11th day of September 2008.

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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 11th day of August 2008, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

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Signed at Tacoma, Washington this 11th day of September 2008.

Patricia A. Pethick
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