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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY
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No. 37580-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JESSE C. GOULEY,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

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

BRIEF OF RESPONDENT

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 1. THE TRIAL COURT DID NOT ERR IN ALLOWING
 GOULEY TO BE FOUND GUILTY OF POSSESSION OF A
 STOLEN MOTOR VEHICLE BECAUSE:

 (a) THE AMENDED INFORMATION CONTAINED
 ALL THE ESSENTIAL ELEMENTS OF RCW
 9A.56.068(1);

 (b) THE JURY WAS PROPERLY INSTRUCTED BY
 THE “TO CONVICT” INSTRUCTION NO. 19;

 (c) CHARGING DOCUMENTS THAT ARE NOT
 CHALLENGED UNTIL AFTER A VERDICT WILL
 BE MORE LIBERALLY CONSTRUED IN FAVOR
 OF VALIDITY; AND

 (d) IF ANY ERROR OCCURRED, IT WAS
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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 that statutory maximum.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in allowing Gouley to be found guilty of possession of a stolen motor vehicle when: (a) the information contained all the essential elements of RCW 9A.56.068(1); (b) the jury was properly instructed by the “to convict” instruction no. 19; (c) charging documents that are not challenged until after a verdict will be more liberally construed in favor of validity; and (d) if error occurred, it was harmless?

C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as “RP.” The Clerk’s Papers shall be referred to as “CP.”

D. STATEMENT OF THE CASE

1 & 2. Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts Gouley’s recitation of the procedural history and facts.

3. Summary of Argument

The State agrees with Gouley that the “to-convict” instruction for count three, unlawful possession of a firearm in the first degree, should have contained the essential element of knowledge. This renders Gouley’s assignments of error 1, 2, 4 and 5 moot, and his conviction and sentence for count three should be vacated.

No error occurred, however, when Gouley was found guilty of possession of a stolen motor vehicle, because: (a) the information contained all the essential elements of RCW 9A.56.068(1); (b) the jury was properly instructed by the “to convict” instruction no. 19; (c) charging documents that are not challenged until after a verdict will be more liberally construed in favor of validity; and (d) if any error occurred, it was harmless.

Gouley cannot be allowed to “sandbag” the administration of justice by claiming for the first time on appeal this alleged error, when his mention of it at trial would have prompted the State to possibly amend its information and correct any potential error or omission. Through the “to convict” instruction no. 19, the jury was properly instructed on all the essential elements of this crime. If any error occurred, it was harmless.

The State respectfully requests that the Court affirm Gouley’s conviction for possession of a stolen motor vehicle and remand his case for re-sentencing on counts I, II and IV: unlawful possession of a controlled substance-methamphetamine; possession of a stolen motor vehicle; and false reporting, respectively.

E. ARGUMENT

1. THE TRIAL COURT DID NOT ERR IN ALLOWING GOULEY TO BE FOUND GUILTY OF POSSESSION OF A STOLEN MOTOR VEHICLE BECAUSE:
 - (a) THE AMENDED INFORMATION CONTAINED ALL THE ESSENTIAL ELEMENTS OF RCW 9A.56.068(1);
 - (b) THE JURY WAS PROPERLY INSTRUCTED BY THE “TO CONVICT” INSTRUCTION NO. 19;
 - (c) CHARGING DOCUMENTS THAT ARE NOT CHALLENGED UNTIL AFTER A VERDICT WILL BE MORE LIBERALLY CONSTRUED IN FAVOR OF VALIDITY; AND
 - (d) IF ANY ERROR OCCURRED, IT WAS HARMLESS.

The trial court did not err in allowing Gouley to be found guilty of possession of a stolen motor vehicle because: (a) the amended information

contained all the essential elements of RCW 9A.56.068(1); (b) the jury was properly instructed by the “to convict” instruction no. 19; (c) charging documents that are not challenged until after a verdict will be more liberally construed in favor of validity; and (d) if any error occurred, it was harmless.

Sufficiency of the Information

Under article 1, section 22 of the Washington Constitution, “the accused shall have the right...to demand the nature and cause of the accusation against him.” State v. Berrier, 143 Wash.App. 547, 553-554, 178 P.3d 1064 (2008). This requires that “[a] criminal defendant is to be provided with notice of all charged crimes.” Berrier, 143 Wash.App. at 554. Our state and federal constitutions require only that a criminal defendant be provided notice of the charges sufficient to allow the defendant to prepare a defense. Berrier, 143 Wash.App. at 555-556.

Although a defendant may challenge the sufficiency of the information for the first time on appeal, the document is liberally construed in favor of its validity. State v. Laramie, 141 Wash.App. 332, 337, 169 P.3d 859 (2007). In determining the validity of an information, a two-prong test is applied: (1) whether the necessary facts appear in any form, or by fair construction can be found in the charging document; and if so, (2) whether the defendant nonetheless suffered actual prejudice as a

result of the inartful, vague or ambiguous charging language. Laramie, 141 Wash.App. at 338.

If the necessary elements, however, are not found or fairly implied, prejudice is presumed and reversal occurs. State v. McCarty, 140 Wash.2d 420, 425, 998 P.2d 296 (2006). Such liberal construction prevents what has been described as “sandbagging,” insofar as it removes any incentive to refrain from challenging a defective information before or during trial, when a successful objection would result only in an amendment to the information. Laramie, 141 Wash.App. at 338.

Moreover, it reinforces the “primary goal” of the essential elements rule, which is to provide constitutionally mandated notice to the defendant of the charges against which he or she must be prepared to defend. The goal of notice is met where a fair, commonsense construction of the charging document “would reasonably apprise an accused of the elements of the crime charged.”

It has never been necessary to use the exact words of a statute in a charging document, as it is sufficient if words conveying the same meaning and import are used. State v. Kjorsvik, 117 Wash.2d 93, 108, 812 P.2d 86 (1991). This same rule applies to nonstatutory elements. Juries are presumed to follow the trial court’s instructions. State v. Daniels, 160 Wash.2d 256, 264, 156 P.3d 905 (2007).

Harmless Error

In evaluating whether an error is harmless, the “overwhelming untainted evidence” test is applied. State v. Flores, 164 Wash.2d 1, 18, 186 P.3d 1038 (2008). Under this test, when the properly admitted evidence is so overwhelming as to necessarily lead to a finding of guilt, the error is harmless. State v. Flores, 164 Wash.2d at 19. Evidence that is merely cumulative of overwhelming untainted evidence is harmless.

Gouley’s case presents an example of what the Court of Appeals in Laramie termed “sandbagging,” in that Gouley waited until his appeal to raise this issue because he knew that any mention of it during the trial might have prompted the State to possibly clarify its information through amendment. Through instruction no. 19, the jury was properly instructed that:

To convict the defendant of the crime of possession of a stolen motor vehicle in the first degree as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about January 12, 2008, the defendant knowingly possessed a stolen motor vehicle. CP 24.

Instruction no. 14 defined knowledge, and Gouley’s first amended information contained the essential elements of RCW 9A.56.068(1): “A person is guilty of possession of a stolen vehicle if he or she possess [possesses] a stolen motor vehicle.” CP 24, 15.

As the original information and amended informations were filed on January 15 and March 12, 2008 respectively, Gouley was aware of the charge pending against him before he went to trial on March 13, 2008, and had time to either: (a) request a continuance so that he could prepare a defense; and/or (b) object to the phrasing of this particular charge. CP 5, 15; RP 17: 12-19. The record does not show that Gouley took either action. Because the amended information contained all the essential elements of RCW 9A.56.068(1), it was sufficient and no error occurred.

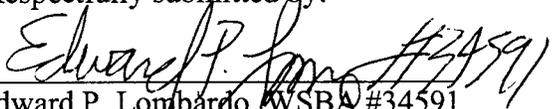
If any error did occur it was harmless, as Gouley was arrested: (a) after becoming angry with and swearing at Officer Birklid when he asked him (Gouley) for identification; while (b) he was found sitting in a suspicious vehicle that had no license plates; (c) a set of keys to that car was taken from him in a search incident to arrest; and (d) the legal owner of the car testified that he did not know Gouley and had not given him permission to drive his car. RP 91: 18-19; 90: 9-10; 98: 21-25; 99: 1; 139: 16-22. Under the overwhelming untainted evidence test, this evidence admitted at trial would necessarily lead a jury to find Gouley guilty of possessing a stolen motor vehicle.

F. CONCLUSION

The State respectfully requests that the Court affirm Gouley's conviction for possession of a stolen motor vehicle and remand his case for re-sentencing on counts I, II and IV: unlawful possession of a controlled substance-methamphetamine; possession of a stolen motor vehicle; and false reporting, respectively.

Dated this 7TH day of NOVEMBER, 2008

Respectfully submitted by:


Edward P. Lombardo, WSBA #34591
Deputy Prosecuting Attorney for Respondent
Gary P. Burlison, Prosecuting Attorney
Mason County, WA

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 JESSE C. GOULEY,)
)
 Appellant,)
 _____)

No. 37580-0-II

DECLARATION OF
FILING/MAILING
PROOF OF SERVICE

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DIVISION II
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STATE OF WASHINGTON
DEPUTY

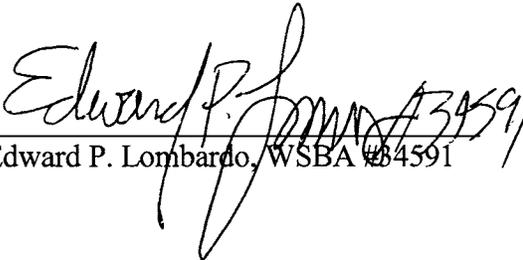
I, EDWARD P. LOMBARDO, declare and state as follows:

On FRIDAY, NOVEMBER 7, 2008, I deposited in the U.S. Mail,
postage properly prepaid, the documents related to the above cause number
and to which this declaration is attached, BRIEF OF RESPONDENT, to:

Patricia A. Pethick
PO Box 7269
Tacoma, WA 98417

I, EDWARD P. LOMBARDO, declare under penalty of perjury of
the laws of the State of Washington that the foregoing information is true
and correct.

Dated this 7TH day of NOVEMBER, 2008, at Shelton, Washington.


Edward P. Lombardo, WSBA #34591