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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
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NO. 38553-8-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

BEAU E. NUGENT,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
MASON COUNTY
The Honorable Toni A. Sheldon, Judge
Cause No. 08-1-00304-3

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in giving Instruction No. 18, the to-convict instruction, as it is an inaccurate statement of the law that relieved the State of its burden of proof of all the essential elements of crime of theft of a motor vehicle as charged in Count II.

2. The trial court erred in allowing Nugent to be represented by counsel who provided ineffective assistance in failing to object to instruction No. 18 as it is an inaccurate statement of the law that relieved the State of its burden of proof on all of the essential elements of the crime of theft of motor vehicle as charged in Count II.

3. The trial court erred in allowing Nugent to be found guilty of theft of a motor vehicle (Count II) where the information was defective in that it failed to allege all the essential elements of the crime.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in giving Instruction No. 18, the to-convict instruction, as it is an inaccurate statement of the law that relieved the State of its burden of proof of all the essential elements of crime of theft of a motor vehicle as charged in Count II? [Assignments of Error Nos. 1 and 2].

2. Whether the trial court erred in allowing Nugent to be found guilty of theft of a motor 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].

C. STATEMENT OF THE CASE

1. Procedure

Beau E. Nugent (Nugent) was charged by amended information filed in Mason County Superior Court with one count of attempting to

elude a pursuing police vehicle (Count I), one count of theft of a motor vehicle (Count II), and one count of possession of a stolen vehicle (Count III). [CP 46-47].

Prior to trial, no motion regarding CrR 3.6 was made or heard, but a CrR 3.5 hearing was reserved and eventually waived. [Vol. I RP 19-39; Vol. II RP 151-153]. Nugent was tried by a jury, the Honorable Toni A. Sheldon presiding. Nugent had no objections and took no exceptions to the instructions. [Vol. II RP 207-208]. The jury found Nugent guilty as charged on all three counts. [CP 18, 19, 10; Vol. II RP 270-271].

The court sentenced Nugent, after dismissing Count III—possession of a stolen vehicle with prejudice—based on undisputed offender score to a standard range sentence of 12-months on Count I (attempting to elude a pursuing police vehicle), and to a standard range sentence of 16-months on Count II (theft of a stolen vehicle) with both sentences running concurrently for a total sentence of 16-months. [CP 6-17; Vol. II RP 274-277].

Timely notice of appeal was filed on October 27, 2008. [CP 5]. This appeal follows.

2. Facts

On July 12, 2008, Washington State Patrol Trooper Benjamin Lewis (Lewis) testified that he was on routine patrol when he noticed a

vehicle speeding with two occupants. [Vol. I RP 71-74]. Lewis activated his lights to stop the vehicle, but it did not and Lewis gave chase reaching speeds of approximately 80 MPH in a 40 PPH zone. [Vol. I RP 74-83]. Eventually, it was decided to stop the chase by laying down spike strips, but the vehicle crashed with the occupants fleeing. [Vol. I RP 83-85; Vol. II RP 172-175]. The driver, Nugent, was apprehended after he tried to flee by jumping into the water (Hood Canal) and swimming away. [Vol. I RP 85-90]. The passenger was not apprehended.

Robert Kirk testified that on July 12, 2008, he heard a commotion and saw Nugent running down his property to the water (Hood Canal) jumping in and then saw police officers giving chase whom he assisted by offering his boat to apprehend Nugent, who was swimming away. [Vol. I RP 46-55]. After his arrest, Nugent admitted that he had been driving the car and admitted that he had found the car with its steering column punched and decided to take it for a drive as he wanted to go swimming. [Vol. I RP 90-91; Vol. II RP 178, 186-188].

Jonathan Griffith (Griffith) testified that on July 10, 2008, he noticed that his, which he had left outside a bar was missing. [Vol. I RP 41-42]. He reported the theft of his vehicle to the police. [Vol. I RP 41-42]. He identified the vehicle recovered in the incident involving Nugent as his. [Vol. I RP 43-44]. Griffith further testified that he did not know

Nugent and had never given him permission to take his vehicle. [Vol. I RP 42-43].

Nugent did not testify.

D. ARGUMENT

(1) THE TRIAL COURT ERRED IN GIVING INSTRUCTION NO. 18, THE TO-CONVICT INSTRUCTION FOR THEFT OF A MOTOR VEHICLE (COUNT II), AS IT IS AN INACCURATE STATEMENT OF THE LAW THAT RELIEVED THE STATE OF ITS BURDEN OF PROOF ON ALL THE ESSENTIAL ELEMENTS OF THE CRIME.

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).

It has long been the law that knowledge of a wrongful taking of an automobile is an essential element of the offense of riding in a motor vehicle as well as knowing the same to have been taken without permission of the owner or person entitled to possession thereof (the intent to deprive the true owner). *See* State v. Couet. 71 Wn.2s 773, 775, 430 P.2d 874 (1967) (discussing the former crime of taking a motor vehicle without owner's permission—TMVOP—now theft of a motor vehicle per RCW 9A.56.065). The trial court was required to instruct the jury on these elements (that Nugent wrongfully obtained the motor vehicle and that he intended to deprive the true owner of the motor vehicle) and failed to do so. In instruction No. 18, the court instructed the jury as follows:

> To convict the defendant of the crime of theft of a motor vehicle, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 12th day of July, 2008, the defendant committed theft of a motor vehicle;
>
> (2) That the acts 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 21-44; Vol. II RP 216-217].

Nowhere in this instruction is the jury instructed that in order to convict Nugent of theft of a motor vehicle that they must find that he wrongfully obtained the motor vehicle and that he intended to deprive the true owner of the motor vehicle. No more evidence of this deficiency is needed than a review of WPIC 70.26 for this crime, which sets for the essential elements as follows:

> To convict the defendant of the crime of theft of a motor vehicle, each of the following three elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about _____, the defendant
>
> [(a) <u>wrongfully obtained or exerted unauthorized control over a motor vehicle</u>;] [or]
>
> [(b) by color or aid of deception, obtained control over a motor vehicle;] [or]
>
> [(c) appropriated a lost or misdelivered motor vehicle of another; and
>
> (2) <u>That the defendant intended to deprive the other person of the motor vehicle</u>; and
>
> (3) That this act occurred in the State of Washington....

[Emphasis added].

Absent the jury being instructed on the elements set forth in WPIC 70.26, which did not occur, Nugent's conviction for theft of a motor vehicle (Count II) cannot stand as it cannot be said the jury found all the essential elements of the crime charged beyond a reasonable doubt given

the woeful to-convict instruction (Instruction No. 18, [CP 21-44; Vol. II RP 216-217]), given in this case.

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. 18 [CP 21-44; Vol. II RP 216-217] omits the essential elements of wrongful taking of the motor vehicle and the intent to deprive the true owner of the motor vehicle and Nugent's attorney failed to object to this instruction [Vol. II RP 208], 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 all the essential element of the crime charged in Count II, falls below an objective standard of reasonableness and was prejudicial in that it allowed Nugent to be convicted on proof of less than all the elements of the crime. This court should reverse and vacate Nugent's conviction for theft of a motor vehicle (Count II).

(2) A CONVICTION FOR THEFT OF A MOTOR 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.56.065 provides, in relevant part:

> A person is guilty of theft of a motor vehicle if he or she commits theft of a motor vehicle.

It has long been the law in Washington, as set forth above, that the essential elements of theft of a motor vehicle include a knowing taking of a motor vehicle as well as the intent to deprive a person of said motor vehicle. *See* State v. Couet, supra; WPIC 70.26.

However, here, the amended information charging Nugent with this offense (Count II) did not allege either of these elements and states:

> In the County of Mason, State of Washington, on or about the 12th day of July, 2008, the above-named defendant, BEAU E. NUGENT, did commit THEFT OF A MOROR VEHICLE, a class B Felony, in that said defendant did

> commit theft of motor vehicle, to-wit: a green 1994 Honda Accord, Oregon License # CK60155, contrary to RCW 9A.56.065 and against the peace and dignity of the State of Washington.

[CP 46-47].

This information failed to apprise Nugent of the nature of the charge as to Count II—theft of a motor vehicle. It did not allege that he knowingly obtained the motor vehicle not did it allege that he intended to deprive the true owner of the motor vehicle in fact the amended information 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). Nugent 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. This court should reverse Nugent's conviction in Count II of theft of a motor vehicle.

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E. CONCLUSION

Based on the above, Nugent respectfully requests this court to reverse and dismiss his conviction for theft of a motor vehicle and remand for resentencing.

DATED this 10th day of July 2009.

Patricia A. Pethick
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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 10th day of July 2009, 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 10th day of July 2009.

Patricia A. Pethick
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