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A. ASSIGNMENTS OF ERROR

1. The trial court erred by entering Conclusion of Law No. 7, dismissing Count One-false verification of a welfare form-for each defendant, because a single word, “matter” was omitted in the informations [CP: 157].
2. The trial court erred by entering Conclusion of Law No. 8 which concludes that there was insufficient information in the remainder of the charging document to properly advise the defendants of the crime charged [CP: 157].

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err by dismissing Count One-false verification of a welfare form-for each defendant under the essential elements rule because a single word, “matter” was omitted in the informations and when read as a whole, the informations gave each defendant sufficient notice of the crime they were to defend against? [Assignments of Error Nos. 1 & 2].

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. On May 1, 2006, the State charged Nykol Killiona Garramone, James Garramone and Paula Ferrara with false verification of a welfare form and welfare fraud in the first degree. CP: 2. The State ultimately proceeded to trial on a second

amended information that was filed on May 6, 2009. CP: 134. When all three defendants waived a jury trial, a bench trial started on May 6, 2009. CP: 143.

After the State rested its case on May 29, 2009, defense moved to dismiss due to insufficient evidence, and also because the word “material” was missing from Count One-false verification of a welfare form. CP: 136; RP Vol.3 49-52. On June 3, 2009 the trial court, using a liberal standard of construction, dismissed the charges against all three defendants: Count One without prejudice because it found the information to be defective under the essential elements rule, and Count Two-welfare fraud in the first degree-with prejudice, for insufficient evidence. RP Vol.5 268-278. The State filed a timely notice of appeal on July 2, 2009.

3. Summary of Argument

The trial court erred by dismissing Count One-false verification of a welfare form-under the essential elements rule because the omission of a single word, “matter” in the informations did not preclude each defendant from having sufficient notice of the crime they were to defend against.

When read as a whole, a commonsense reading of the charging language gave each defendant both sufficient notice of the crime they were to defend against and the specific elements at issue: (a) that from March 1, 2000 through January 30, 2004, each defendant; (b) did commit

false verification of [a] welfare form, a class B felony, in that he/she; (c) being an applicant for or recipient of public assistance; (d) did willfully make and subscribe any application, statement or other paper; which (e) contained or was verified by a written declaration made under the penalties of perjury; and which (f) he [she] did not believe to be true and correct as to every material; (g) contrary to RCW 74.08.055.

The fact that a single word, “matter” was not included in the charging documents [subsection (f) above] is irrelevant, as the defendants were given proper notice of the essential elements of the crime they were to defend against. Because the original informations were filed against on May 1, 2006, and the second amended informations on May 6, 2009, all three defendants also had over three years in which to prepare their respective cases, as the charging language for Count One did not change during that time. Although the trial court correctly applied the liberal standard of construction, the State’s information was sufficient under either the liberal or strict standard of review.

The State respectfully requests the Court to reverse the trial court’s decision on Count One of the second amended information for each defendant and remand for new trial.

E. ARGUMENT

1. THE TRIAL COURT ERRED BY DISMISSING COUNT ONE-FALSE VERIFICATION OF A WELFARE FORM-UNDER THE ESSENTIAL ELEMENTS RULE BECAUSE THE OMISSION OF A SINGLE WORD “MATTER” IN THE INFORMATIONS DID NOT PRECLUDE EACH DEFENDANT FROM HAVING SUFFICIENT NOTICE OF THE CRIME THEY WERE TO DEFEND AGAINST.

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, 554, 178 P.3d 1064 (2008). Our state and federal constitutions require that a criminal defendant be provided notice of the charges sufficient to allow the defendant to prepare a defense. State v. Recuenco, 163 Wash.2d 428, 434, 180 P.3d 1276 (2008).

The standard of review for evaluating the sufficiency of a charging document is determined by the time at which the motion challenging its sufficiency is made. State v. Taylor, 140 Wash.2d 229, 237, 996 P.2d 571 (2000). When a challenge is made for the first time after¹ verdict, the

¹ The implication of Phillips is that once the State can no longer amend its information, the liberal standard of construction applies. This is the rationale that the trial court in this case employed:

The test that the Court will use as to the standard at this point will be that set out under the Phillips case. And that is the liberal standard. And this is used not only after verdict, or when it’s first being brought up on appeal, but the Phillips case makes it very clear that it is to be used when a challenge comes at a time [when] the State is not permitted to amend the Information; specifically after the

charging documents must be construed liberally in favor of validity. Taylor, 140 Wash.2d at 237. Under the liberal standard of construction, a court has “considerable leeway to imply the necessary allegation from the language of the charging document.” In contrast, when a defendant challenges the sufficiency of a charging document before verdict, the charging language must be strictly construed.

Although the trial court must strictly construe an information challenged before or during trial, unless there is substantial prejudice to the defendant, the State may amend the information to correct the defect at any time before the State rests its case. State v. Phillips, 98 Wash.App. 936, 940-941, 991 P.2d 1195 (2000).

The strict standard of construction constitutes a “bright line rule mandating dismissal” when a charging document omits an essential element of [a] crime. Phillips, 98 Wash.App. at 940. Because a charging document containing such a defect is unconstitutional, the reviewing court must dismiss the charge without prejudice to the State’s ability to refile the charges.

If the necessary elements, however, are not found or fairly implied, prejudice is presumed and reversal occurs. State v. McCarty, 140

State has rested and a proposed amendment is not a request to charge a lesser crime or a lesser degree of crime. RP Vol.5 274: 8-16

Wash.2d 420, 425, 998 P.2d 296 (2000). 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. State v. Laramie, 141 Wash.App. 332, 338, 169 P.3d 859 (2007); see State v. Chaten, 84 Wash.App. 85, 86, 925 P.2d 631 (1996).

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. State v. Davis, 119 Wash.2d 657, 661, 835 P.2d 1039 (1992). 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.” Laramie, 141 Wash.App. at 338. Under either the strict or liberal standard of construction, the words of a charging document are viewed as a whole and are construed according to common sense. State v. Kjorsvik, 117 Wash.2d 93, 109, 156 P.3d 905 (2007).

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. Kjorsvik, 117 Wash.2d at 108. This same rule applies to non-statutory elements.

Chaten is comparable to this case because even though that defendant was charged with assault in the second degree and the State did not explicitly state the necessary element of intent in the information, the Court nonetheless found the information, under the strict standard, to be sufficient.

In Chaten, the defendant was charged with assault in the second degree. Chaten, 84 Wash.App. at 85. The information which charged him with that crime did not explicitly state the necessary element of intent. Defendant Chaten argued that this omission rendered the charging document constitutionally insufficient. Applying the strict, pre-verdict standard of construction to defendant Chaten's case, the Court held that the information was sufficient because an assault is commonly understood to be an intentional act and did not omit that element. Chaten, 84 Wash.App. at 86-87. In Taylor, the State Supreme Court upheld this rationale, reasoning that "...assault in most cases is commonly understood to be an intentional act." Taylor, 140 Wash.2d at 240.

The reasoning of Taylor and Chaten apply to this case because when read as a whole, a commonsense reading of the charging language gave each defendant both sufficient notice of the crime they were to defend against and the specific elements at issue: (a) that from March 1, 2000 through January 30, 2004, each defendant; (b) did commit false

verification of [a] welfare form, a class B felony, in that he/she (c) being an applicant for or recipient of public assistance; (d) did willfully make and subscribe any application, statement or other paper; which (e) contained or was verified by a written declaration made under the penalties of perjury; and which (f) he [she] did not believe to be true and correct as to every material; (g) contrary to RCW 74.08.055. CP: 134.

Just as the Court in Chaten reasoned that assault is commonly understood to be an intentional act, a commonsense understanding of a “material” here would be an “application, statement or other paper,” or a “written declaration made under the penalties of perjury,” all or which are “matters.”² CP: 134. Put another way, the basic sentence structure of the charge in this case gave all three defendants adequate notice of the elements of the crime they were to defend against. That the solitary word “matter” was omitted is irrelevant, and had it been included, it would have been a surplusage.

In State v. Vangerpen, by contrast, the Supreme Court held that under the standard of strict construction, the State’s information for murder in the first degree was insufficient because it alleged only intent to cause death, and not premeditation. State v. Vangerpen, 125 Wash.2d 782, 791, 888 P.2d 1177 (1995). As the Court reasoned, the State failed to

charge one of the statutory elements of first degree murder and instead included only the mental element required for murder in the second degree. Vangerpen, 125 Wash.2d at 791.

Several years after Vangerpen, however, the Court revisited the issue of strict construction in State v. Borrero. In Borrero, the defendant moved to dismiss after the State had rested, arguing that the charge of attempted murder in the first degree failed to allege the “substantial step” element of that offense. Borrero, 147 Wash.2d 353, 356, 58 P.3d 245 (2002). Borrero’s motion was denied and ultimately the Supreme Court held, using a strict construction analysis, that the State’s inclusion of the word “attempted” in the information sufficiently conveyed the element of “substantial step.” Borrero, 147 Wash.2d at 363. The allegation that defendant Borrero attempted to cause the victim’s death put him (Borrero) on notice that he could defend himself by showing that he did not take a substantial step, or make an effort, to commit murder. The information sufficiently informed the defendant of the nature of the accusation against him so that he was able to prepare his defense to the crime charged.

The Supreme Court’s rationale in both Vangerpen and Borrero applies to this case, because: (a) the State did not omit a statutory element of the crime, here false verification of a welfare form; and (b) the phrasing

² Emphasis added.

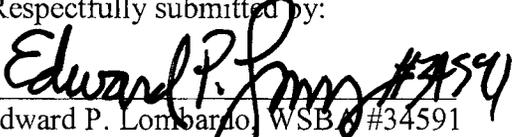
of the information itself when read as a whole, like the inclusion of the word “attempted” in Borrero, put the three defendants on notice of the crime they would defend against at trial over three years later. Under either a strict or liberal construction, the trial court erred.

F. CONCLUSION

The State respectfully requests the Court to reverse the trial court’s decision on Count One of the second amended information for each defendant and remand for new trial.

Dated this 2ND day of APRIL, 2010

Respectfully submitted by:


Edward P. Lombardo, WSB #34591
Deputy Prosecuting Attorney for Respondent
Gary P. Burleson, Prosecuting Attorney
Mason County, Washington

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

STATE OF WASHINGTON,)
)
 Appellant,)
)
 vs.)
)
 NYKOL KILONA GARRAMONE)
 JAMES GARRAMONE)
 PAULA FERRARA)
)
 Respondents,)
)
 _____)

No. 39514-2-II

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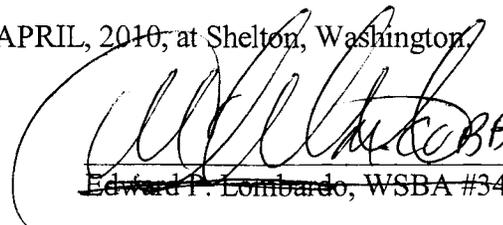
I, EDWARD P. LOMBARDO, declare and state as follows:

On MONDAY, APRIL 5, 2010, 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 APPELLANT, to:

Clifford F. Cordes c/o and David Lousteau
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2625 Parkmont Ln SW Ste B Suite 100
Olympia, WA 98502-1038 Tumwater, WA 98512-5630

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 5TH day of APRIL, 2010, at Shelton, Washington.


Edward P. Lombardo, WSBA #34591