

No. 46632-5-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Anthony Tolman,**

Appellant.

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Pierce County Superior Court Cause No. 14-1-02363-6

The Honorable Judge K.A. van Doorninck

**Appellant's Reply Brief**

Jodi R. Backlund  
Manek R. Mistry  
Attorneys for Appellant

**BACKLUND & MISTRY**  
P.O. Box 6490  
Olympia, WA 98507  
(360) 339-4870  
backlundmistry@gmail.com

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## ARGUMENT

**I. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. TOLMAN OF ATTEMPTING TO ELUDE.**

Mr. Tolman rests on the argument set forth in his Opening Brief.

**II. THE AMENDED INFORMATION WAS LEGALLY AND FACTUALLY INSUFFICIENT.**

A. The Amended Information did not allege that Mr. Tolman “withheld or appropriated” the stolen vehicle to the use of someone other than its true owner.<sup>1</sup>

A criminal Information charging possession of a stolen vehicle must allege that the accused person withheld or appropriated the vehicle to the use of someone other than the true owner. *State v. Satterthwaite*, -- Wn. App.--, 344 P.3d 738, 740 (Wash. Ct. App. 2015). In this case the Amended Information failed to include this element. CP 9.

The charging document omitted an essential element, and thus failed to charge a crime. *Id.* The conviction for Count II must be reversed and the charge dismissed without prejudice. *Id.*

Respondent acknowledges the deficiency. Response to Supplemental Brief, p. 2. This concession requires reversal of the conviction and dismissal of the charge. *Id.*

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<sup>1</sup> The Amended Information also failed to allege an element of the eluding charge. As to this deficiency, Mr. Tolman rests on the argument set forth in his Opening Brief.

Reference to a statutory citation cannot cure deficiencies in an Information. *State v. Zillyette*, 178 Wn.2d 153, 162, 307 P.3d 712 (2013). Nevertheless, Respondent relies on the inclusion of a statutory citation to cure the deficiency here. Response to Supplemental Brief, p. 4.

Such reliance is misplaced. *Id.* The statutory reference does not substitute for the missing element. *Id.* *Satterthwaite* compels reversal and dismissal without prejudice. *Satterthwaite*, -- Wn. App. --, 344 P.3d at 740.

As Respondent notes,<sup>2</sup> the Court of Appeals should only overrule a prior decision “upon a clear showing that the rule it announced is incorrect and harmful.” Brief of Respondent, p. 10 (citing *State v. W.R., Jr.*, 181 Wn.2d 757, 768, 336 P.3d 1134 (2014)). Respondent does not argue that *Satterthwaite* is incorrect or harmful, but implies that the case should be overruled nonetheless. Response to Supplemental Brief, pp. 3-4. Indeed, Respondent fails to even mention the “incorrect and harmful” standard when discussing *Satterthwaite*. Response to Supplemental Brief, pp. 3-4. *Satterthwaite* is neither incorrect nor harmful; it should not be overruled.

Even under the liberal post-verdict standard for challenges to a charging document, reversal is required unless the missing facts can be

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<sup>2</sup> In its discussion of *State v. Pittman*, --- Wn. App. ---, 341 P.3d 1024, 1028 (2015).

found “by fair construction” in the charging language. *Satterthwaite*, -- Wn. App. --, 344 P.3d at 739; *see Zillyette*, 178 Wn.2d at 161. Respondent suggests that the “withheld or appropriated” element is satisfied by an allegation that Mr. Tolman knew the car was stolen. Response to Supplemental Brief, pp. 3-4. Respondent’s argument does not satisfy the “fair construction” standard. *Satterthwaite*, -- Wn. App. --, 344 P.3d at 739.

Without any explanation, Respondent claims that the language alleging knowledge that property is stolen “makes it clear that defendant was not a person attempting to return known stolen property.” Response to Supplemental Brief, pp. 4-5. Respondent’s argument makes no sense.

A person may possess stolen property knowing it is stolen (as alleged here) without withholding or appropriating it to the use of someone other than the true owner. Such conduct is not illegal, as the *Satterthwaite* court pointed out. *Satterthwaite*, -- Wn. App. --, 344 P.3d at 739.

Mere knowledge does not imply that a person withheld or appropriated stolen property to the use of someone other than the true owner. Here, as in *Satterthwaite*, the Information omitted an essential element. The conviction for possessing a stolen vehicle must be reversed and the charge dismissed without prejudice. *Id.*

B. The U.S. Supreme Court has not overruled *Russell*; it is controlling authority and requires reversal and dismissal without prejudice.

A charging document must include sufficient facts to protect the defendant against double jeopardy. *Russell v. United States*, 369 U.S. 749, 763-64, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962). The Supreme Court has not overruled *Russell*. It is therefore controlling authority.

To overcome *Russell*, Respondent cites a treatise on criminal procedure, cases from other jurisdictions, and decisions of the federal circuit courts. Respondent suggests that this court should not follow *Russell*. Brief of Respondent, p. 12.

No matter how persuasive these authorities, they cannot overturn U.S. Supreme Court precedent. Furthermore, contrary to Respondent's claims, *Russell's* continuing vitality has been affirmed by recent federal decisions. See, e.g., *United States v. Verrusio*, 762 F.3d 1, 13 (D.C. Cir. 2014).

In Washington, the sufficiency of a charging document must be evaluated by examining the elements that may be found "on the document's face." *Satterthwaite*, -- Wn. App. --, 344 P.3d at 739.

Respondent seeks to rely on the declaration of probable cause to supply the missing elements. Brief of Respondent, p. 13. This is improper.

Any critical facts “must be found within the four corners of the charging document.” *City of Seattle v. Termain*, 124 Wn. App. 798, 803, 103 P.3d 209 (2004). The document must apprise the accused person “of the elements of the charged crime *and* the conduct of the defendant which is alleged to have constituted the crime.” *Id.* (emphasis in original).

Here, the face of the charging document does not include critical facts within its four corners. As to the eluding charge, the Information does not name the pursuing police officer, specify the kind of signal given, describe the location of the offense, or outline the specific conduct constituting the offense. CP 8. Nor does it identify the bystander Mr. Tolman allegedly endangered. CP 8.

As to the stolen vehicle charge, the Information does not name the owner of the vehicle or identify the car in any way. CP 8-9.

The Amended Information is constitutionally insufficient. The critical facts cannot be found by any fair construction. *Zillyette*, 178 Wn.2d at 158. The convictions in counts one and two must be reversed and the charges dismissed without prejudice. *Zillyette*, 178 Wn.2d at 158.

**III. THE TRIAL COURT’S INSTRUCTIONS IMPROPERLY DIVERTED THE JURY’S ATTENTION AWAY FROM THE REASONABLENESS OF ANY DOUBT, AND ERRONEOUSLY FOCUSED IT ON WHETHER JURORS COULD PROVIDE A REASON FOR ANY DOUBTS.**

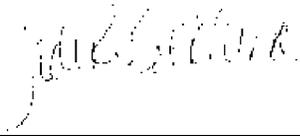
Mr. Tolman rests on the argument set forth in his Opening Brief.

**CONCLUSION**

For the foregoing reasons and those set forth in Mr. Tolman's Opening Brief, the convictions must be reversed.

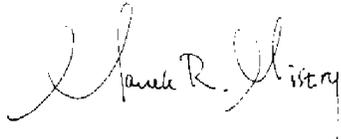
Respectfully submitted on May 13, 2015,

**BACKLUND AND MISTRY**



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Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant



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Manek R. Mistry, WSBA No. 22922  
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Anthony Tolman, DOC #845341  
Coyote Ridge Corrections Center  
PO Box 769  
Connell, WA 99326

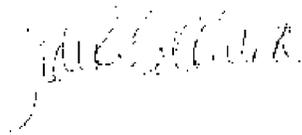
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Pierce County Prosecuting Attorney  
pcpatcecf@co.pierce.wa.us

I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 13, 2015.



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Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

**BACKLUND & MISTRY**

**May 13, 2015 - 11:27 AM**

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