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No. 96599-4

No. 77930-3-I  
*Formerly* No. 49284-9-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

ARNOLD MAFNAS CRUZ,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KITSAP COUNTY

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REPLY BRIEF OF APPELLANT ARNOLD CRUZ

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LILA J. SILVERSTEIN  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711  
lila@washapp.org

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A. ARGUMENT IN REPLY

**1. Reversal is required because the information omitted several essential elements. Contrary to the State’s claim, elements are not mere “definitions”.**

- a. Intent to hinder, knowledge of another’s crime, and concealing evidence are each elements of the crime that were omitted from the information.

As explained in the opening brief, this Court should reverse the conviction on count one and remand for dismissal without prejudice because several essential elements were missing from the charging document. In fact, both *mens rea* elements and the *actus reus* element were absent; only the name of the crime and the single element that raises the degree of the crime were included. Thus, the information is constitutionally deficient. Br. of Appellant at 5-12 (citing, *inter alia*, *Auburn v. Brooke*, 119 Wn.2d 623, 630, 836 P.2d 212 (1992); RCW 9A.76.050; *State v. Budik*, 173 Wn.2d 727, 734, 272 P.3d 816 (2012)).

In response, the prosecution refuses to concede error and instead claims that Mr. Cruz’s argument “is without merit because definitional terms are not required to be

included for an information to be constitutionally adequate.” Br. of Respondent at 77. The State avers that both *mens rea* elements and the *actus reus* element are mere “definitions” of rendering criminal assistance.

The State is wrong. Its argument is contrary to case law, and disregards the structure of criminal statutes.

b. The State’s argument is contrary to *Budik and Irish*.

The Supreme Court has stated: “a person renders criminal assistance if he or she **(1) knows** that another person (a) ‘has committed a crime or juvenile offense’ or (b) ‘is being sought by law enforcement officials for the commission of a crime or juvenile offense’ or (c) ‘has escaped from a detention facility’ and **(2) intends** ‘to prevent, hinder, or delay the apprehension or prosecution’ of that other person and **(3) undertakes one of the six specified actions.**” *State v. Budik*, 173 Wn.2d 727, 734, 272 P.3d 816 (2012) (emphases added). All three of these essential elements were missing from the information in this case. CP 578.

The State argues that *Budik* is inapplicable because it evaluated the sufficiency of the evidence to support a conviction. Br. of Respondent at 83-84. This claim is unpersuasive. “In a challenge to the sufficiency of the evidence supporting a criminal conviction, the question is whether, viewing the evidence in the light most favorable to the State, any rational fact finder could have found **the essential elements** of the crime beyond a reasonable doubt.” *Budik*, 173 Wn.2d at 733 (emphasis added; internal citation omitted). Similarly, “a charging document is constitutionally adequate only if **all essential elements** of a crime, statutory and non-statutory, are included in the document[.]” *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177, 1180 (1995). Because a determination of the essential elements is required in both circumstances, the State cannot ignore *Budik*’s explication of the essential elements of rendering criminal assistance.

This Court recognized that knowledge is an essential element of rendering that must be alleged in the information in *State v. Irish*, 186 Wash.App. 1040 (2015) (unpublished;

citing for persuasive value pursuant to GR 14.1). There, the information alleged that the defendant:

Did unlawfully and feloniously render criminal assistance to [Irish's co-defendant], a person who committed or was being sought for First Degree Assault, a Class A felony, by providing such person with ... means of avoiding discovery or apprehension, contrary to RCW 9A.76.050(3) and 9A.76.070(2)(a).

*Id.* at \*2. Unlike Mr. Cruz's information, the information in *Irish* included the *actus reus* element. *Compare id.* to CP 578. But Irish argued his charging document improperly omitted the knowledge element. *Irish* at \*2.<sup>1</sup>

This Court agreed that knowledge is an element of the crime that must be alleged in the information. *Irish* at \*3. On the facts of that case, the information properly alleged the knowledge element because "unlawfully and feloniously" is equivalent to "knowingly." *Id.* But in Mr. Cruz's case, neither the word "knowingly" nor a synonym were included in the information. CP 578. The information here is deficient. *Cf. State v. Brown*, 169 Wn.2d 195, 198, 234 P.3d 212 (2010) (reversing where information omitted the knowledge element

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<sup>1</sup> He did not argue the "intent" element was missing, so this Court had no occasion to reach that issue.

of the crime of escape, and holding that the phrase “contrary to the form of the statute” was not equivalent to “knowingly”).

c. The State’s argument is contrary to the statute.

The State’s argument is not only contrary to case law, it also betrays a misunderstanding of the structure of criminal statutes. The State argues that because Mr. Cruz was charged with rendering criminal assistance in the first degree, the information need only name the crime and reveal the single element that increases the degree of the crime. Br. of Respondent at 83. The State is wrong. The “definitional” statute discloses the essential elements of the base crime, and these elements must be alleged in addition to any element that increases the degree of a crime.

For example, like the rendering statute, the robbery “definitional” statute contains the essential elements of the crime of robbery:

9A.56.190. Robbery--Definition

A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence

against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

The subsequent statutes simply specify which *additional* elements distinguish the various degrees of the crime. For instance, a person could commit first-degree robbery by committing all of the elements of the base crime plus inflicting bodily injury. RCW 9A.56.200. If a person commits only the elements of the base crime, he is guilty of robbery in the second degree: “A person is guilty of robbery in the second degree if he or she commits robbery.” RCW 9A.56.210(1).

By the State’s logic here, the government could charge a person with second-degree robbery by alleging simply that the person “did commit robbery.” And it could charge first-degree robbery by alleging merely that a person “did commit

robbery and inflicted bodily injury.” That is not the law. The “Definition” statute contains the elements of the crime, and these essential elements must be included in the information.

For example, in *Witherspoon* this Court held that the information included the essential elements of second-degree robbery where the charging document stated:

On or about the 12th day of November, 2009, in the County of Clallam, State of Washington, the above-named Defendant, with intent to commit theft thereof, did unlawfully take personal property that the Defendant did not own from the person of another, to-wit: B. Pittario, or in said person's presence against said person's will by the use or threatened use of immediate force, violence, or fear of injury to said person or the property of said person or the person or property of another; contrary to Revised Code of Washington 9A.56.210(1) and 9A.56.190, a Class B felony.

*State v. Witherspoon*, 171 Wn. App. 271, 294–95, 286 P.3d 996 (2012), *aff'd*, 180 Wn. 2d 875, 329 P.3d 888 (2014). In concluding the information contained the essential elements of the crime, this Court cited the “definition” statute, RCW 9A.56.190. *Id.* at 295.

Like the “definition” statute for robbery, the “definition” statute for rendering criminal assistance sets for the essential elements of the crime. RCW 9A.76.050. The subsequent statutes set forth additional elements that distinguish degrees of the crime. *E.g.* RCW 9A.76.070. All essential elements, not just the element establishing the degree of the crime, must be alleged in the information. Because the information here omitted several elements, it is constitutionally deficient. CP 578.

- d. The cases the State cites support Mr. Cruz, because in those cases the charging documents included the *mens rea* elements.

In averring that the charging document here is sufficient, the prosecution relies on *State v. Porter*, 186 Wn.2d 85, 90, 375 P.3d 664 (2016) and *State v. Johnson*, 180 Wn.2d 295, 302, 325 P.3d 135 (2014). Br. of Respondent at 79-80. These cases support Mr. Cruz’s argument. Unlike in Mr. Cruz’s case, in both *Porter* and *Johnson* the State alleged the *mens rea* elements in the information. Because the information here omitted these elements, reversal is required.

In *Johnson*, the State charged the defendant with unlawful imprisonment. *Johnson*, 180 Wn.2d at 301. In addition to naming the crime in the information, the State included both the *mens rea* element and the *actus reus* element: it averred the defendant “did knowingly restrain” the victim. *Id.* The defendant argued the State was required to define “restrain” in the information, but the Court disagreed because the information need only contain the essential elements. *Id.* at 301-02. Here, unlike in *Johnson*, the information omitted the essential *mens rea* and *actus reus* elements.

Like the crime at issue here, the crime at issue in *Porter* had two *mens rea* elements. See *Porter*, 186 Wn.2d at 88. Unlike in this case, in *Porter* the State included these elements in the information. The information alleged the defendant “did unlawfully and feloniously **knowingly** possess a stolen motor vehicle, **knowing** that it had been stolen[.]” *Porter*, 186 Wn.2d at 88 (emphases added). The Court held the State was not required to allege the defendant “withheld or appropriated the vehicle for the use of a person

other than the true owner,” because this description merely defined an element. *Id.* at 87. But it did not hold that the State may omit the *mens rea*, and in fact, the *mens rea* elements were alleged. *See id.* at 87-94.

Because the *mens rea* elements were alleged in *Porter*, the Court distinguished an earlier case in which it had reversed a conviction for failure to allege one of the mental-state elements of the crime. *Porter*, 186 Wn.2d at 93 (discussing *State v. Moavenzadeh*, 135 Wn.2d 359, 956 P.2d 1097 (1998)). In *Moavenzadeh*, the information contained no language alleging the defendant knew the property was stolen. *Porter*, 186 Wn.2d at 93 (citing *Moavenzadeh*, 135 Wn.2d at 363). Reversal was therefore required in that case, because all essential elements must be in the information. *Moavenzadeh*, 135 Wn.2d at 363-64.

Reversal is required in this case for the same reason. Three essential elements are missing from the information, and even if one or two were omitted, reversal would be required. *Id.*

- e. Because the information omits essential elements, reversal is required without reaching the second prong of the *Kjorsvik* test.

Because the State believes the information includes the elements of the crime, even if “vague,” it moves on to the second prong of the *Kjorsvik* test and argues there is no prejudice in light of the probable cause statement. Br. of Respondent at 84-85 (citing *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991)). But the Court does not reach the prejudice prong here. Multiple elements are missing from the information and do not appear by any fair construction. That “end[s] the inquiry.” *Brown*, 169 Wn.2d at 198; accord *State v. McCarty*, 140 Wn.2d 420, 425-28, 998 P.2d 296 (2000). The remedy is reversal of the conviction and remand for dismissal of the charge without prejudice to the State’s ability to refile. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

**2. The exceptional sentence is improper because the plain language of the statute did not authorize consecutive sentences.**

Because reversal is required for the deficient information, this Court need not reach the sentencing issue.

If the Court reaches the issue, it should reverse the exceptional sentence. The trial court imposed an exceptional sentence on the basis that “some of the current offenses” would otherwise go unpunished. This was improper, because only one current offense failed to increase Mr. Cruz’s potential period of confinement. Br. of Appellant at 12-25.

The State’s response brief largely repeats its response in case number 77736-0-I (formerly 49264-4-II). Mr. Cruz already responded to those arguments in the opening brief. If this Court disagrees that reversal is required for the deficiencies in the information, Mr. Cruz respectfully requests that this Court reverse the exceptional sentence and remand for resentencing.

B. CONCLUSION

For the reasons set forth above and in the opening brief, the conviction on count one should be reversed and the charge dismissed without prejudice to the State's ability to refile. In the alternative, the exceptional sentence should be reversed and the case remanded for resentencing.

Respectfully submitted this 5th day of February, 2017.



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Lila J. Silverstein – WSBA 38394  
Washington Appellate Project  
Attorney for Arnold Cruz

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 77930-3-i
v.	)	
	)	
ARNOLD CRUZ,	)	
	)	
Appellant.	)	

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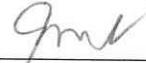
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[kcpa@co.kitsap.wa.us]	( )	HAND DELIVERY
KITSAP COUNTY PROSECUTING ATTORNEY	(X)	E-SERVICE VIA PORTAL
614 DIVISION ST., MSC 35		
PORT ORCHARD, WA 98366-4681		

[X] JENNIFER WINKLER	( )	U.S. MAIL
ATTORNEY AT LAW	( )	HAND DELIVERY
NIELSEN BROMAN KOCH, PLLC	(X)	E-SERVICE VIA PORTAL
1908 E MADISON ST		
SEATTLE, WA 98122		
[SloaneJ@nwattorney.net]		

[X] MARIE TROMBLEY	( )	U.S. MAIL
ATTORNEY AT LAW	( )	HAND DELIVERY
[marietrombley@comcast.net]	(X)	E-SERVICE VIA PORTAL
PO BOX 829		
GRAHAM, WA 98338-0829		

[X] ARNOLD CRUZ	(X)	U.S. MAIL
791749	( )	HAND DELIVERY
STAFFORD CREEK CORRECTIONS CENTER	( )	_____
191 CONSTANTINE WAY		
ABERDEEN, WA 98520		

**SIGNED** IN SEATTLE, WASHINGTON THIS 5<sup>TH</sup> DAY OF FEBRUARY, 2018.

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**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
☎(206) 587-2711

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