

FILED
SUPREME COURT
STATE OF WASHINGTON
4/8/2019 3:21 PM
BY SUSAN L. CARLSON
CLERK

No. 96599-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

ARNOLD MAFNAS CRUZ,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. INTRODUCTION 1

B. ISSUE..... 2

C. STATEMENT OF THE CASE..... 3

D. ARGUMENT 4

**The Court of Appeals followed settled law in reversing
where the information omitted three essential elements. 4**

1. An information is constitutionally deficient if it fails to set
forth every element of the crime charged. 4

2. *Intent* to hinder, *knowledge* of another’s crime, and
concealing evidence are each elements of the crime that
were omitted from the information. 6

3. The Court of Appeals properly followed this Court’s
opinion in *Budik*. 9

4. The Court of Appeals’ opinion is consistent with this
Court’s opinions in *Porter* and *Johnson*. 10

5. The Court of Appeals properly applied the statute. 12

E. CONCLUSION 18

TABLE OF AUTHORITIES

Washington Supreme Court Cases

Auburn v. Brooke, 119 Wn.2d 623, 836 P.2d 212 (1992)..... 5, 16

State v. Ackles, 8 Wash. 462, 36 P. 597 (1894) 5

State v. Brown, 169 Wn.2d 195, 234 P.3d 212 (2010) 6

State v. Budik, 173 Wn. 2d 727, 272 P.3d 816 (2012)..... 2, 7, 9, 10, 15, 17

State v. Johnson, 180 Wn.2d 295, 325 P.3d 135 (2014)..... 10, 11

State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991)..... 5, 16

State v. McCarty, 140 Wn.2d 420, 998 P.2d 296 (2000)..... 5, 6

State v. Merritt, ___ Wn.2d ___, 434 P.3d 1016 (2019)..... 10, 13

State v. Moavenzadeh, 135 Wn.2d 359, 956 P.2d 1097 (1998)..... 12

State v. Pelkey, 109 Wn.2d 484, 745 P.2d 854 (1987) 5

State v. Porter, 186 Wn.2d 85, 375 P.3d 664 (2016)..... 10, 11, 12

State v. Quismundo, 164 Wn.2d 499, 192 P.3d 342 (2008)..... 4

State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177, 1180 (1995)..... 9

State v. Zillyette, 178 Wn.2d 153, 307 P.3d 712 (2013)..... 9, 13, 16

Washington Court of Appeals Cases

State v. Witherspoon, 171 Wn. App. 271, 286 P.3d 996 (2012), *aff'd*, 180 Wn. 2d 875, 329 P.3d 888 (2014)..... 15

Constitutional Provisions

Const. art. I, § 22..... 5

Statutes

9A.56.190..... 13, 15
RCW 9A.40.040..... 11
RCW 9A.56.200..... 14
RCW 9A.56.210..... 14
RCW 9A.76.050..... 2, 7, 8, 13, 15, 17
RCW 9A.76.070..... 2, 6, 7, 8, 15

A. INTRODUCTION

It is undisputed that all essential elements of a crime must be included in a charging document. Here, the charging document alleged only that Mr. Cruz “rendered criminal assistance to a person who had committed or was being sought for any class A felony.” It omitted three essential elements of the crime – two *mens rea* elements and the *actus reus* element. The missing elements were: (1) **knowledge** of the other’s crime; (2) **intent** to hinder apprehension of the other; and (3) taking one of the six types of **actions** specified in the statute (here, concealing evidence). Applying settled law, the Court of Appeals reversed the conviction and remanded for dismissal of the charge without prejudice to the State’s ability to refile.

This Court should reject the prosecutor’s claim that the essential elements of the crime are not elements at all but are merely “definitions.” They are elements because they are necessary to establish the illegality of the behavior. Rendering is not a strict liability crime; two different mental states are required, both of which are essential elements. Indeed, in the cases the prosecutor relies on, this Court endorsed the charging documents because they **included** the *mens rea* elements. Because the Court of Appeals correctly applied settled law, this Court should affirm.

B. ISSUE

A charging document is constitutionally deficient if it fails to set forth every element of the crime charged, and the remedy for a violation of this “essential elements” rule is reversal of the conviction and dismissal of the charge without prejudice to the State’s ability to refile. The elements of rendering criminal assistance are: (1) knowledge that the other person committed a crime; (2) intent to prevent, hinder or delay apprehension of the other person; and (3) undertaking one of six specified actions (here, concealing evidence). RCW 9A.76.050; *State v. Budik*, 173 Wn.2d 727, 734, 272 P.3d 816 (2012). A fourth element, that the other’s crime was a class A felony, raises the crime to rendering in the first degree. RCW 9A.76.070.

The charging document in this case alleged only that Mr. Cruz “rendered criminal assistance to a person who had committed or was being sought for any class A felony.” It omitted the elements of knowledge, intent, and concealment. Did the Court of Appeals properly hold the charging document was constitutionally deficient, requiring reversal of the conviction and dismissal of the charge without prejudice to the State’s ability to refile?

C. STATEMENT OF THE CASE

Robert Pry and Joshua Rodgers Jones beat and robbed 89-year-old Archie Hood. Mr. Hood eventually died of his injuries. RP (5/9/16) 1393; RP (7/6/16) 5280-83. Arnold Cruz had nothing to do with these events.

Mr. Pry subsequently enlisted the help of Robert Davis and others to attempt to break into Mr. Hood's bank accounts. RP (5/18/16) 2420; RP (6/9/16) 4036. Arnold Cruz had nothing to do with these efforts.

When Mr. Pry became concerned about the possibility of law enforcement discovering Mr. Hood's remains, he sought assistance in disposing of the evidence. Detectives suspected that Mr. Pry asked Mr. Cruz, whom he viewed as an "uncle," for help. RP (5/23/16) 2756-58. After police discovered Mr. Hood's remains, Mr. Cruz was one of many people whose names and faces were released to the press as being sought in connection with the crimes. CP 733-46.

Mr. Cruz immediately turned himself in. RP (3/15/16) 490; RP (5/10/16) 1552-53. The State charged Mr. Cruz with the felony of first-degree rendering criminal assistance, and the misdemeanor of concealing a deceased body. CP 578-80. Mr. Cruz was tried with Mr. Pry, who was convicted of murder and other crimes, and Mr. Davis, who was convicted of identity theft. RP (7/6/16) 5280-83.

Mr. Cruz was convicted of rendering and concealment as charged.¹ RP (7/6/16) 5284. The State sought an exceptional sentence, which the court imposed over Mr. Cruz's objection.

Mr. Cruz appealed and argued the charging document was constitutionally deficient and the exceptional sentence was improper.² The Court of Appeals agreed with the first argument so it did not reach the second. Because the State omitted three of the four essential elements of the crime from the information, the court reversed the rendering conviction and remanded for dismissal of the charge without prejudice to the State's ability to refile. Slip Op. at 34-43. This Court granted the prosecutor's petition for review.

D. ARGUMENT

The Court of Appeals followed settled law in reversing where the information omitted three essential elements.

1. An information is constitutionally deficient if it fails to set forth every element of the crime charged.

“Under our state constitution, it is a constitutionally mandated rule that all essential elements of a charged crime must be included in the charging document.” *State v. Quismundo*, 164 Wn.2d 499, 503, 192 P.3d

¹ The concealment conviction is not at issue on appeal.

² The appeal was consolidated with the appeals of Pry and Davis, whose convictions the Court of Appeals affirmed.

342 (2008) (internal quotations omitted); Const. art. I, § 22. The charging document must contain: (1) the elements of the crime charged, and (2) a description of the specific conduct of the defendant which allegedly constituted that crime. *Auburn v. Brooke*, 119 Wn.2d 623, 630, 836 P.2d 212 (1992). “This doctrine is elementary and of universal application, and is founded on the plainest principle of justice.” *State v. Pelkey*, 109 Wn.2d 484, 488, 745 P.2d 854 (1987) (quoting *State v. Ackles*, 8 Wash. 462, 464-65, 36 P. 597 (1894)).

Where, as here, the issue is raised for the first time on appeal, the standard of review set forth in *Kjorsvik* applies. *State v. Kjorsvik*, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). This Court asks: (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? *Id.* If the answer to the first question is “no,” reversal is required without reaching the second question. *State v. McCarty*, 140 Wn.2d 420, 425-28, 998 P.2d 296 (2000).

Here, the Court of Appeals correctly concluded the answer to the first question was “no,” and therefore reversal was required without reaching the second question. Slip Op. at 34. The State, in contrast, believes the information included the elements of the crime –

even if “vague” – so it moves on to the second prong of the *Kjorsvik* test and argues there was no prejudice in light of the probable cause statement. Petition at 10-13. But as explained below, 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.” *State v. Brown*, 169 Wn.2d 195, 198, 234 P.3d 212 (2010); *accord McCarty*, 140 Wn.2d at 425-28; Slip Op. at 37, 43.

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

The State acknowledges the essential elements rule, but avers it correctly alleged the elements of rendering criminal assistance. Petition at 5. The State is wrong. In holding the information was deficient, the Court of Appeals properly applied the statute and this Court’s case law. Slip Op. at 37-43.

The statute at issue provides, in relevant part:

As used in RCW 9A.76.070, 9A.76.080, and 9A.76.090, a person “renders criminal assistance” if, with **intent** to prevent, hinder, or delay the apprehension or prosecution of another person who he or she **knows** has committed a crime or juvenile offense or is being sought by law enforcement officials for the commission of a crime or juvenile offense or has escaped from a detention facility, he or she:

- (1) Harbors or conceals such person; or
- (2) Warns such person of impending discovery or apprehension; or

- (3) Provides such person with money, transportation, disguise, or other means of avoiding discovery or apprehension; or
- (4) Prevents or obstructs, by use of force, deception, or threat, anyone from performing an act that might aid in the discovery or apprehension of such person; or
- (5) **Conceals, alters, or destroys any physical evidence** that might aid in the discovery or apprehension of such person; or
- (6) Provides such person with a weapon.

RCW 9A.76.050 (emphases added).

This Court has described the essential elements consistent with the statute: “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.**”

Budik, 173 Wn. 2d at 734 (emphases added); *see also id.* at 738

(describing RCW 9A.76.050 as setting forth the “essential element[s]”).³

³ An additional element raises the crime to rendering in the first degree: “A person is guilty of rendering criminal assistance in the first degree if he or she renders criminal assistance to a person who has committed or is being sought for murder in the first degree or any class A felony or equivalent juvenile offense.” RCW 9A.76.070(1).

All three of these elements were missing from the amended information. The information included only the name of the crime and the single element elevating the crime to rendering in the first degree:

Count I
Rendering Criminal Assistance in the First Degree [Non-Relative]

On or about or between December 17, 2015 and December 30, 2015, in the County of Kitsap, State of Washington, the above-named Defendant, rendered criminal assistance to a person who had committed or was being sought for any class A felony; contrary to the Revised Code of Washington 9A.76.070(1).

CP 578.⁴

Thus, the Court of Appeals properly reversed under RCW 9A.76.050 and *Budik*. Slip Op. at 38-40.

⁴ This problem does not appear to be widespread. For example, in another case the defendant was properly charged with rendering:

That the defendant JERRY ALLEN FLUKER in King County, Washington, on or about August 12, 2015, with intent to prevent, hinder or delay the apprehension or prosecution of Marque Deandre Fluker, did render criminal assistance to Marque Deandre Fluker, a person who he knew committed Murder in the Second Degree, a Class A felony, or Assault in the First Degree, a Class A felony, by providing such person with transportation, disguise, or other means of avoiding discovery or apprehension; Contrary to RCW 9A.76.070(1), (2)(a) and 9A.76.050, and against the peace and dignity of the State of Washington.

State v. Fluker, Court of Appeals No. 74859-9-I, at CP 92-93.

3. The Court of Appeals properly followed this Court's opinion in *Budik*.

The State argues that *Budik* is inapplicable because it evaluated the sufficiency of the evidence to support a conviction, rather than the sufficiency of an information. Petition at 9. The Court of Appeals rightly rejected this claim. Slip Op. at 38-40.

Budik applies because this Court determined the essential elements of the crime in order to evaluate whether the State had presented sufficient evidence to support each element. As this Court explained, “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). “An essential element is one whose specification is necessary to establish the very illegality of the behavior charged.” *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013) (internal quotations omitted). In the context of determining the sufficiency

of a charging document, this Court has described “essential elements” as “those facts that must be proved beyond a reasonable doubt to convict a defendant of the charged crime.” *State v. Merritt*, ___ Wn.2d ___, 434 P.3d 1016, 1019 (2019) (internal quotations and emphases omitted).

Because a determination of the essential elements is required in both circumstances – whether determining the sufficiency of the evidence or the sufficiency of a charging document – the State cannot ignore *Budik*’s explication of the essential elements of rendering criminal assistance. This Court already concluded that intent, knowledge, and one of the six specified acts are essential elements of the crime. *Budik*, 173 Wn.2d at 738. The Court of Appeals properly followed this case. Slip Op. at 38-40.

4. The Court of Appeals’ opinion is consistent with this Court’s opinions in *Porter* and *Johnson*.

The prosecution alleges the Court of Appeals’ decision conflicts with *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). Petition at 5-8, 10. The State is wrong. 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, the Court of Appeals properly reversed.

In *Johnson*, the State charged the defendant with unlawful imprisonment. *Johnson*, 180 Wn.2d at 301; RCW 9A.40.040. 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 this 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). This 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 this Court did not hold the State may omit the mental state elements, and in fact, the *mens rea* elements were alleged. *See id.* at 87-94.

Because the *mens rea* elements were alleged in *Porter*, this Court distinguished an earlier case in which it had reversed a conviction for failure to allege one of the mental-state elements of the same 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); *see also Moavenzadeh*, 135 Wn.2d at 361 (“The information did not allege Moavenzadeh ‘knowingly’ possessed stolen property.”). Reversal was therefore required in that case, because all essential elements must be in the information. *Moavenzadeh*, 135 Wn.2d at 363-64. The Court of Appeals properly recognized that reversal was required in this case for the same reason. Slip Op. at 41-42 & n.13.

5. The Court of Appeals properly applied the statute.

The State’s argument is not only contrary to this Court’s case law, it also reflects 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 (“rendered criminal assistance”) and reveal the single element that increases the degree of the crime. Petition at 5. 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 establishes the degree of a crime. RCW 9A.76.050. These are essential elements because they are “necessary to establish the very illegality of the behavior[.]” *Zillyette*, 178 Wn.2d at 158.

Stated differently, the question is not whether the *title* of a statute includes the word “definition;” the question is whether the subsection in question merely provides a further description of the elements, or whether it actually sets forth the elements – those mental states and actions that render the behavior unlawful, and which the State must prove beyond a reasonable doubt. *Merritt*, 434 P.3d at 1019; *Zillyette*, 178 Wn.2d at 158.

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* the Court of Appeals held 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, the 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 forth the essential elements of the crime. RCW 9A.76.050; *see also Budik*, 173 Wn.2d at 738 (describing RCW 9A.76.050 as setting forth the “essential element[s]”). 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, and the Court of Appeals properly reversed. CP 578; Slip Op. at 35.

Brooke and *Zillyette* are instructive. In *Brooke*, this Court reversed where the charging document alleged “Disorderly Conduct” and cited “9.40.10(A)(2).” 119 Wn.2d at 636-37. This Court stated, “the recitation of no more than a numerical code section and the title of an offense does not satisfy that [essential elements] rule unless such abbreviated form

contains all essential elements of the crime(s) charged.” *Id.* at 627. The municipal code at issue set forth the following elements of the crime:

A. A person is guilty of disorderly conduct if, with a purpose to cause public danger, alarm, disorder, nuisance, or if with the knowledge that he is likely to create such public danger, alarm, disorder or nuisance, he willfully:

.....

2. Engages in fighting or in violent, threatening or tumultuous behavior; ...

Id. at 636-37. Because the elements were missing from the charging document, reversal was required without reaching the second prong of the *Kjorsvik* test. *Id.* at 638.

Similarly here, the charging document simply named the title of the crime (“rendered criminal assistance”) and revealed the single element that increased the degree of the crime. CP 578. The information did not even cite the statute that lists the main elements of the crime – it cited only the statute that raised the degree of the crime. *See id.* The information was deficient. *See Brooke*, 119 Wn.2d at 636-38.

In *Zillyette*, the State charged the defendant with controlled substances homicide by alleging that she “did unlawfully deliver a controlled substance to Austin Burrows in violation of RCW 69.50.401, which controlled substance was subsequently used by Austin Burrows, resulting in his death[.]” *Zillyette*, 178 Wn.2d at 156. This Court held the information was constitutionally deficient because it did not include the

identity or schedule of the controlled substance allegedly delivered. *Id.* at 160-61. Such specification was an essential element because not all controlled substances can be the basis for controlled substances homicide – therefore the identity or category of the drug was “necessary to establish the very illegality of the behavior[.]” *Id.* at 160. Absent this essential element, the charging document was “overinclusive;” it alleged “both criminal and noncriminal behavior.” *Id.*

The same is true here. Intent, knowledge, and taking one of the six specified actions are all necessary to establish the illegality of the behavior. Rendering criminal assistance is not a strict liability crime. A person who aids another without **knowing** the other person committed a crime is not guilty of rendering. RCW 9A.76.050. And even if the person knows the other committed a crime, he is not guilty of rendering unless he **intended** to prevent, hinder, or delay apprehension of the person. *Id.* Each of these mental states is necessary to establish illegality.

Moreover, not just any act of assistance is illegal – it must be one of the six types of acts (alternative means) specified in the statute. *Budik*, 173 Wn.2d at 734-35. For example, if a person merely cooks a meal or provides emotional support for a person he knows committed a crime, those acts are not illegal. RCW 9A.76.050. Nor is it illegal to fail to report a crime. *See Budik*, 173 Wn.2d at 735. Thus, even more than in *Zillyette*,

the information here was overinclusive because it encompasses both criminal and noncriminal behavior. The Court of Appeals properly held the information was deficient.

E. CONCLUSION

The Court of Appeals properly applied the statute and followed this Court's settled case law in reversing and remanding for dismissal without prejudice where the prosecutor omitted three essential elements of the crime from the information. Even if only one element were missing, reversal would be required – and here three elements were missing. This Court should affirm the Court of Appeals.

Respectfully submitted this 5th day of April, 2019.



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WASHINGTON APPELLATE PROJECT

April 08, 2019 - 3:21 PM

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