

66948-6

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No. 66948-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

CLAY ERNEST BORDEN,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The information is constitutionally deficient because it omits an essential element of the crime of first degree malicious mischief.

2. The information is constitutionally deficient because it omits an essential element of the crime of attempted theft in the second degree.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. It is a constitutional requirement that a charging document in a criminal case set forth all essential elements of the crime. An essential element of the crime of first degree malicious mischief is that the value of the property damage is more than five thousand dollars. Is the information constitutionally deficient where it omits this essential element?

2. An essential element of the crime of attempted theft in the second degree is that the value of the property the accused attempted to steal was more than seven hundred fifty dollars but less than or equal to five thousand dollars. Is the information constitutionally deficient where it omits this essential element?

C. STATEMENT OF THE CASE

Timothy Zonneveld is the manager of the Firestone Tire Center located on Aurora Avenue North in Seattle. 2/17/11RP 13-14. On August 10, 2009, he arrived at work at around 6 a.m. 2/17/11RP 16. Soon after he arrived, his attention was called to the back of the store. 2/17/11RP 17. He walked to the back of the store and noticed the door leading to the mechanic's shop was not locked as usual and the double doors leading outside were open. 2/17/11RP 17-19. He caught a glimpse of a person running out the back doors but he could not identify the person. 2/17/11RP 19.

Mr. Zonneveld noticed a shopping cart full of spark plugs near the back doors. 2/17/11RP 28. The spark plugs are normally kept in a different area of the store. 2/17/11RP 32. The cart contained about 20 boxes of spark plugs, with four spark plugs to a box. 2/17/11RP 32. The store sells the spark plugs for \$15.99 each. 2/17/11RP 32.

Ten large bay windows extend across the front of the store. 2/17/11RP 35. Mr. Zonneveld noticed one of the windows was broken from the outside and shattered glass lay on the concrete. 2/17/11RP 36. Enough glass was broken that Mr. Zonneveld could have crawled through the hole in the window. 2/17/11RP 37.

Three of the doors were also damaged. 2/17/11RP 24-25, 27, 29.

The cost of repairing the windows and doors was more than \$8,000. 2/17/11RP 40-41.

Mr. Zonneveld called the police and Officer Walter Bruce soon arrived. 2/17/11RP 22. Officer Bruce noticed what appeared to be blood, hair and skin on the windowsill and the broken pieces of glass in the bay window. 2/17/11RP 63-64. He thought the person who entered the store probably cut himself while trying to get through the window. 2/17/11RP 64. Officer Bruce took sample swabs of the apparent blood, hair and skin. 2/17/11RP 64.

Brianne Huseby, a forensic scientist at the Washington State Patrol Crime Laboratory, conducted a DNA analysis of the material on one of the swabs collected from the bay window. 2/17/11RP 120-21, 131. The profile she obtained matched the reference sample of DNA taken from Mr. Borden with a cheek swab. 2/17/11RP 110; 2/22/11 RP 12-15.

Mr. Borden was charged with one count of second degree burglary, RCW 9A.52.030; one count of first degree malicious mischief, RCW 9A.48.070(1)(a); and one count of attempted theft in the second degree, RCW 9A.28.020, RCW 9A.56.040(1)(a) and RCW 9A.56.020(1)(a). CP 70-71.

The jury found Mr. Borden guilty of all counts as charged.

CP 72-74.

D. ARGUMENT

1. THE INFORMATION IS CONSTITUTIONALLY DEFICIENT BECAUSE IT OMITTS AN ESSENTIAL ELEMENT OF THE CRIME OF FIRST DEGREE MALICIOUS MISCHIEF

a. The charging document in a criminal case must set forth every essential element of the crime. It is a fundamental principle of criminal procedure, embodied in the state¹ and federal² constitutions, that the accused in a criminal case must be formally apprised of the nature and cause of the accusation before the State may prosecute and convict him of a crime. The judicially-approved means of ensuring constitutionally adequate notice is to require a charging document set forth the essential elements of the alleged crime. See State v. Taylor, 140 Wn.2d 229, 236, 996 P.2d 571 (2000). This "essential elements rule" has long been settled law in Washington and is constitutionally mandated. State v. Quismundo,

¹ Article 1, section 22 of the Washington Constitution guarantees that "In criminal prosecutions, the accused shall have the right to appear and . . . to demand the nature and cause of the accusation against him (and) to have a copy thereof."

² The Sixth Amendment to the United States Constitution guarantees that "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of accusation." In addition, the Fourteenth Amendment provides "nor shall any State deprive any person of life, liberty, or property, without due process of law."

164 Wn.2d 499, 503, 192 P.3d 342 (2008) (citing State v. Vangerpen, 125 Wn.2d 782, 788, 888 P.2d 1177 (1995)).

All essential elements of the crime must be included in the information so as to apprise the accused of the charge and allow him to prepare a defense, and so that he may plead the judgment as a bar to any subsequent prosecution for the same offense. State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991); State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). Every material element of the charge, along with all essential supporting facts, must be set forth with clarity. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000); Kjorsvik, 117 Wn.2d at 97.

The constitutional requirement that the information contain every essential element of the crime is not relaxed simply because the challenge is raised for the first time on appeal. For post-verdict challenges, however, the charging document will be construed liberally and deemed sufficient if the necessary facts appear in any form, or by fair construction may be found, on the face of the document. Kjorsvik, 117 Wn.2d at 105. But an information cannot be upheld regardless of when the challenge is raised if it does not contain all the essential elements, as "the most liberal possible

reading cannot cure it." State v. Hopper, 118 Wn.2d 151, 157, 822 P.2d 775 (1992).

A charging document is constitutionally adequate only if all essential elements are included on the face of the document, regardless of whether the accused received actual notice of the charge. Quismundo, 164 Wn.2d at 504; Vangerpen, 125 Wn.2d at 790; State v. Markle, 118 Wn.2d 424, 437, 823 P.2d 1101 (1992); State v. Pelkey, 109 Wn.2d 484, 491, 745 P.2d 854 (1987).

b. The information omits the essential element of the dollar value of the damage caused. In this case, the first degree malicious mischief charge read:

That the defendant CLAY ERNEST BORDEN, in King County, Washington, on or about August 10, 2009, did knowingly and maliciously cause physical damage in excess of \$1,500, to a building located at 12553 Aurora Avenue N., Seattle, the property of Firestone Tire Center.

CP 71 (emphasis added).

The first degree malicious mischief statute provides:

(1) A person is guilty of malicious mischief in the first degree if he or she knowingly and maliciously:

(a) Causes physical damage to the property of another in an amount exceeding five thousand dollars

.....

RCW 9A.48.070(1)(a) (emphasis added).

The statute was amended in 2009 to increase the dollar value element from one thousand five hundred dollars to five thousand dollars. See Laws 2009, ch. 431, § 4. The new statute took effect July 26, 2009, before the alleged crime in this case. Laws 2009, ch. 431, § 4. The information here reflects the dollar-value element of the old statute, not the current statute. Thus, the information omits an essential element of the crime and is constitutionally infirm.

c. The conviction must be reversed and dismissed without prejudice. If the reviewing court concludes the necessary elements are not found or fairly implied in the charging document, the court must presume prejudice. McCarty, 140 Wn.2d at 425. The remedy is reversal of the conviction and dismissal of the charge without prejudice to the State's ability to re-file the charge. Vangerpen, 125 Wn.2d at 792-93.

2. THE INFORMATION IS CONSTITUTIONALLY DEFICIENT BECAUSE IT OMITTS AN ESSENTIAL ELEMENT OF THE CRIME OF ATTEMPTED THEFT IN THE SECOND DEGREE

Like the charge for first degree malicious mischief, the charge for attempted theft in the second degree is constitutionally

infirm because it omits the essential element of the dollar value of the property Mr. Borden allegedly attempted to steal.

The charge for attempted theft in the second degree read:

That the defendant CLAY ERNEST BORDEN, in King County, Washington, on or about August 10, 2009, with intent to deprive another of property, to-wit: store merchandise, did attempt to wrongfully obtain such property belonging to Firestone Tire Center, that the value of such property did exceed \$250; attempt as used in the above charge means that the defendant committed an act which was a substantial step towards the commission of the above described crime with the intent to commit that crime.

CP 71 (emphasis added).

The second degree theft statute provides:

(1) A person is guilty of theft in the second degree if he or she commits theft of:

(a) Property or services which exceed(s) seven hundred fifty dollars in value but does not exceed five thousand dollars in value, other than a firearm as defined in RCW 9.41.010 or a motor vehicle

RCW 9A.56.040(1)(a) (emphasis added).

Similar to the first degree malicious mischief statute, the second degree theft statute was amended in 2009 to increase the dollar value element from more than \$250 to between \$750 and \$5,000. See Laws 2009, ch. 431, § 8. The new statute took effect July 26, 2009, before the alleged crime in this case. Laws 2009, ch. 431, § 8. The information here reflects the dollar-value element

of the old statute, not the current statute. Thus, the information omits an essential element of the crime and is constitutionally infirm.

As discussed, if the reviewing court concludes the necessary elements are not found or fairly implied in the charging document, the court must presume prejudice. McCarty, 140 Wn.2d at 425. The remedy is reversal of the conviction and dismissal of the charge without prejudice to the State's ability to re-file the charge. Vangerpen, 125 Wn.2d at 792-93.

E. CONCLUSION

The charges for first degree malicious mischief and attempted theft in the second degree are constitutionally deficient because they both omit the essential dollar-value elements of the crimes. Therefore, the convictions for those charges must be reversed and the charges dismissed without prejudice.

Respectfully submitted this 17th day of November 2011.



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