Supreme Court No. ____
(COA No. 58796-3-II)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JEREMY PATCHELL,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Jeremy Patchell asks this Court to accept review of the Court of Appeals decision under RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Patchell appealed his conviction for theft. The Court of Appeals affirmed. *State v. Patchell*, No. 58796-3-II, 2025 WL 469036 (Wash. Ct. App. Feb. 11, 2025).

C. ISSUE PRESENTED FOR REVIEW

The United States and Washington State Constitutions require the State to include all essential elements in the charging document. When charging a person with theft, the State may aggregate multiple acts in a single charge, and the State must then prove the existence of a common scheme or plan. In this case, the State aggregated multiple theft acts to charge Mr. Patchell with second-degree theft. The jury acquitted him of second-degree theft, but it convicted him of the lesser offense of third-degree theft, which was still based on a theory of aggregation. Because the information omitted the

essential element of a common scheme or plan, it is constitutionally deficient. The Court of Appeals decision affirming Mr. Patchell's conviction conflicts with published decisions, warranting this Court's review. RAP 13.4(b)(1), (2).

D. STATEMENT OF THE CASE

Mr. Patchell has worked in construction for nearly 30 years. 9/28/23 RP 37. When Murray Fields hired Mr. Patchell to work for his construction company, he was impressed with Mr. Patchell's work and offered him more jobs. 9/27/23 RP 154, 162-63, 165-67.

Mr. Fields employed several construction workers, and he assigned them jobs by emailing them work orders. 9/27/23 RP 157-58. He also communicated with them through phone calls and texts. 9/27/23 RP 182, 184. For all jobs, workers used their own tools and Mr. Fields provided the materials. 9/27/23 RP 159. If the workers did not have a specific tool for the job, Mr. Fields would provide it. 9/27/23 RP 159. Mr. Fields kept the tools in a storage unit. 9/27/23 RP 161.

Mr. Patchell was "not very computer friendly" and did not use email, so he and Mr. Fields communicated by text. 9/27/23 RP 182; 9/28/23 RP 57, 58. In March of 2023, Mr. Fields texted Mr. Patchell about some work and said to meet him at the storage unit. 9/28/23 RP 81-82, 88. He also emailed Mr. Patchell the work orders. 9/27/23 RP 167-68.

Mr. Fields and Mr. Patchell met at the storage unit and talked about the work Mr. Patchell was going to do. 9/27/23 RP 180. Together, they picked out the tools he needed, and then Mr. Patchell put them in his car and left. 9/27/23 RP 177, 179.

Later that day, when Mr. Fields did not receive any communication that the jobs were complete, he texted Mr. Patchell. 9/27/23 RP 183. Mr. Patchell texted back, saying he would call back. 9/27/23 RP 183-84. After that, Mr. Fields did not receive any further communication from Mr. Patchell, and he never got his tools back. 9/27/23 RP 184; 9/28/23 RP 23. Mr. Patchell testified his house burned down and he was just "trying to survive." 9/28/24 RP 44, 61. He intended to return

the tools, but his phone broke and he did not have any way to contact Mr. Fields. 9/28/23 RP 45, 50.

The State charged Mr. Patchell with second-degree theft for not returning Mr. Fields's tools. CP 3. Mr. Fields initially claimed he gave Mr. Patchell 12 tools, but later testified it was 14 tools, all brand new or in excellent condition. 9/27/23 RP 193-200; 9/28/23 RP 4-18, 24-25. Mr. Fields claimed the total value of the tools was over $1,600. 9/28/23 RP 112. Mr. Patchell testified he only borrowed 5 or 6 tools and estimated the total value was, at most, $500. 9/28/23 RP 39-40 128.

The jury acquitted Mr. Patchell of second-degree theft but convicted him of the lesser offense of third-degree theft. CP 48-49. The court sentenced Mr. Patchell to credit for time served. CP 54. The Court of Appeals concluded Mr. Patchell "cannot show prejudice" and affirmed. App. 1, 4.

E. ARGUMENT

A charging document is constitutionally deficient where it fails to include all essential elements of the offense. The Court of Appeals decision conflicts with published decisions and warrants this Court's review.

The State may aggregate multiple thefts to charge someone with a single count of theft. But aggregation necessarily requires a common scheme or plan, which is an essential element of the offense.

In this case, the State aggregated Mr. Patchell's alleged theft of each tool into one charge. The existence of a common scheme or plan was an essential element of both the charged offense (second-degree theft) and the lesser offense of conviction (third-degree theft). Because the State failed to include this essential element in the information, it is constitutionally deficient. The Court of Appeals decision affirming the conviction conflicts with published decisions, and this Court should accept review. RAP 13.4(b)(1), (2).

1. A charging document must include all essential elements of the offense.

A person accused of committing a crime has a constitutional right to be informed of the nature and cause of the charges brought against them. U.S. Const. amend. VI; Const. art. I, § 22. "This doctrine is elementary and of universal application, and is founded on the plainest principle of justice." *State v. Pry*, 194 Wn.2d 745, 751, 452 P.3d 536 (2019). The right to a constitutionally sufficient charging document is "zealously guarded." *State v. Royse*, 66 Wn.2d 552, 557, 403 P.2d 838 (1965).

To be constitutionally adequate, the State must allege "all essential elements of the crime, statutory or otherwise," in the information or charging document. *State v. Hugdahl*, 195 Wn.2d 319, 324, 458 P.3d 760 (2020). "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) (citations omitted).

If all essential elements do not "appear in any form, or by fair construction can be found, in the charging document," this Court presumes prejudice and reverses without any further analysis. *State v. Kjorsvik*, 117 Wn.2d 93, 105, 812 P.2d 86 (1991); *Zillyette*, 178 Wn.2d at 162. This Court reviews this issue de novo. *State v. Campbell*, 125 Wn.2d 797, 801, 888 P.2d 1185 (1995).

2. *Where the State aggregates multiple acts into one theft charge, the existence of a common scheme or plan is an essential element. Because the information omitted this element, it is legally deficient.*

The theft of different values of property constitutes different degrees of theft. For the crime of first-degree theft, the State must prove theft of property exceeding $5,000 in value. RCW 9A.56.030(1)(a). For second-degree theft, the State must prove theft of property exceeding $750 but not exceeding $5,000. RCW 9A.56.040(1)(a). For third-degree theft, the property cannot exceed $750. RCW 9A.56.050(1).

The State may aggregate multiple thefts into one count as "part of a criminal episode or a common scheme or plan" where "the sum of the value of all said transactions shall be the value considered in determining the degree of theft involved." RCW 9A.56.010(21)(c). Where the State prosecutes based on a theory of aggregation, "a common scheme or plan is an essential element of a crime that must be included in the information." *State v. Hassan*, 184 Wn. App. 140, 146, 336 P.3d 99 (2014).

In this case, the State aggregated multiple thefts into a single charge of second-degree theft. Without aggregation, the State could not have charged second-degree theft because no single item that Mr. Patchell allegedly took would have met the threshold amount. Therefore, the existence of a common scheme or plan is an essential element of the offense. *Id.*

But the information failed to include the common scheme or plan element. CP 3. Rather, the information simply parroted the statutory language of second-degree theft. CP 3; *see* RCW 9A.56.040(1)(a). No language in the information clearly or

impliedly notified Mr. Patchell that the State was aggregating multiple thefts as part of a common scheme or plan.

The Court of Appeals has reversed a conviction because the State failed to include the necessary element of a common scheme or plan in the information. In *State v. Rivas*, the State charged the defendant with one count of second-degree malicious mischief but aggregated the damage from two acts to meet the value threshold for that charge. 168 Wn. App. 882, 885, 278 P.3d 686 (2012). The Court of Appeals concluded a common scheme or plan was an essential element. *Id.* at 889. Because the State failed to include this element in the information, the Court of Appeals reversed. *Id*. at 890-91.[1]

Instead of reversing because the information was deficient, the Court of Appeals in this case affirmed after concluding Mr. Patchell "cannot show prejudice." App. 4. But

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[1] The Court of Appeals reversed a conviction for the same reason in another unpublished case. *See State v. Castro*, No. 45277-4-II, 2015 WL 161496 (Wash. Ct. App. Jan 13, 2015) (unpublished, cited pursuant to GR 14.1(a)).

this conflicts with decisions by this Court and the Court of Appeals holding that there is no further analysis for such an error. Instead, prejudice is presumed, and the analysis concludes. *See Pry*, 194 Wn.2d at 753; *Zillyette*, 178 Wn.2d at 162; *Rivas*, 168 Wn. App. at 890-91.

Even though the jury acquitted Mr. Patchell of second-degree theft, his conviction for third-degree theft was still based on the State's aggregation of multiple thefts. The jury presumably concluded the State did not prove the aggregated value of the tools met the threshold amount for second-degree theft. However, third-degree theft was still predicated on multiple acts of theft. Therefore, a common scheme or plan was also an essential element of third-degree theft. *See Hassan*, 184 Wn. App. at 146.

Moreover, the State relied on an aggregation theory to charge multiple acts as a single offense. The State only charged Mr. Patchell with one offense in the information, and charged it

deficiently. Mr. Patchell does not need to show any prejudice, and the Court of Appeals was wrong to conclude otherwise.

The Court of Appeals decision conflicts with published decisions. This Court should grant review. RAP 13.4(1), (2).

F. CONCLUSION

Based on the preceding, Mr. Patchell respectfully requests that review be granted pursuant to RAP 13.4(b).

This brief is in 14-point Times New Roman, contains 1,703 words, and complies with RAP 18.17.

Respectfully submitted this 28th day of February 2025.

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APPENDIX

Filed
Washington State
Court of Appeals
Division Two

February 11, 2025

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JEREMY MICHAEL PATCHELL, Appellant.	No. 58796-3-II UNPUBLISHED OPINION

VELJACIC, J. — Jeremy Patchell appeals his conviction for theft in the third degree. He argues the information and to-convict instruction failed to include an essential element of the offense. Specifically, he asserts the information and instruction failed to allege a common scheme or plan, where the State aggregated the value of the goods stolen to reach the threshold amount for theft in the second degree, and was therefore constitutionally deficient. Finding no error, we affirm.

FACTS

I. BACKGROUND

Murray Fields owned a general contracting and building company.[1] Patchell responded to one of Murray's Craigslist ads seeking employment. Fields interviewed Patchell and hired him at an hourly rate to work on a home remodel. Fields stated Patchell performed very well.

[1] It appears from trial testimony that Fields's wife, at the time, was also an owner of the company.

After this initial work, Fields offered Patchell more jobs. On March 6, 2022, Fields e-mailed Patchell several work orders that paid a flat rate upon completion of each job. Fields provided Patchell with tools to complete those jobs. On March 7, Patchell met Fields and his wife at a storage unit where Fields stored his tools. Patchell and Fields picked out the tools Patchell would need, and Patchell placed the tools into his car. Patchell was supposed to start the jobs that same day. Fields stated he told Patchell he was supposed to return the tools as soon as he was done with the jobs.

Fields stated that he never received any notifications from clients that the jobs had been completed. Fields attempted to contact Patchell to check on the status of the jobs. Patchell responded twice saying, "I'll call you back," but he never did. Rep. of Proc. (RP) (Sept. 27, 2023) at 183-84. Fields eventually had other employees complete the work. Fields sent dozens of text messages trying to contact Patchell and even went to his house. Fields also sent Patchell an e-mail stating his employment was being terminated and that he needed to return all tools and materials. Patchell never responded, and Fields reported the incident to law enforcement.

The State charged Patchell with one count of theft in the second degree. The information stated:

> That JEREMY MICHAEL PATCHELL, in the State of Washington, on or about the 7th day of March, 2022, did unlawfully, feloniously, and wrongfully obtain or exert unauthorized control over property and/or services other than a firearm or a motor vehicle, belonging to another, of a value exceeding $750, but that does not exceed $5,000, with intent to deprive said owner of such property and/or services, contrary to RCW 9A.56.020(1)(a) and 9A.56.040(1)(a), and against the peace and dignity of the State of Washington.

Clerk's Papers (CP) at 3.

II. TRIAL AND JURY INSTRUCTIONS

At trial, Fields testified he reported that eight items were stolen. Fields stated later that number was 12. However, Fields ultimately testified to 14 items being taken. According to Fields, the value per item of the tools and materials taken ranged from $8 to $600.[2]

The jury was given to-convict instructions on theft in the second degree and the lesser included theft in the third degree. The to-convict instruction for theft in the third degree contained the following elements:

> (1) That on or about March 7, 2022, the defendant wrong fully obtained or exerted unauthorized control over property of another not exceeding $750 in value
> (2) That the defendant intended to deprive the other person of the property; and
> (3) That this act occurred in the State of Washington.

CP at 35.

The jury acquitted Patchell of theft in the second degree but found him guilty of theft in the third degree. Patchell was sentenced to time already served.

Patchell appeals his conviction.

ANALYSIS

I. SUFFICIENCY OF INFORMATION

Patchell argues for the first time on appeal that the information charging theft in the second degree was deficient because it failed to include a common scheme or plan as an essential element of the offense. Patchell contends that to reach the minimum value required for theft in the second

[2] Fields testified that the following items with corresponding values were taken: Pressure washer ($400), air compressor ($150), compressor hose ($30), two valves ($25), chainsaw ($600), finish nailer ($140), nailer ($125), reciprocal saw (value unspecified), putty knife ($15), sheet of drywall ($18), box of mud ($8), tape measure ($26), hammer ($54), a key and lock set ($26).

degree, a factfinder would need to aggregate the value of the tools, and thus the State needed to charge the element of a common scheme or plan. We find no error.

A. Legal Principles

"We review challenges to the sufficiency of a charging document de novo." *State v. Rivas*, 168 Wn. App. 882, 887, 278 P.3d 686 (2012).

"An information is constitutionally adequate under the federal and state constitutions 'only if it sets forth all essential elements of the crime, statutory or otherwise, and the particular facts supporting them.'" *State v. Derri*, 199 Wn.2d 658, 691, 511 P.3d 1267 (2022) (quoting *State v. Hugdahl*, 195 Wn.2d 319, 324, 458 P.3d 760 (2020)). If an information does not include an essential element of the offense, it fails to charge a crime. *State v. Courneya*, 132 Wn. App. 347, 351, 131 P.3d 343 (2006). These requirements exist "to give the accused notice of the nature of the allegations so that a defense may be properly prepared." *Id.* "Charging documents challenged for the first time on appeal will be more liberally construed in favor of validity than those challenged before or during trial." *Id.*

Theft means to "wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services." RCW 9A.56.020(1)(a). To commit theft in the third degree, as relevant here, a person must commit "theft of property or services which (a) does not exceed seven hundred fifty dollars in value." RCW 9A.56.050.

B. Analysis

The jury acquitted Patchell of theft in the second degree, so he cannot show prejudice from any alleged deficiency in the charging language for theft in the second degree. Theft in the third degree requires no aggregation to reach a threshold amount, as there is no threshold amount. *State*

v. Tinker, 155 Wn.2d 219, 222, 118 P.3d 885 (2005); RCW 9A.56.050. Accordingly, Patchell's contention fails.

2. TO-CONVICT INSTRUCTION

Patchell also argues the to-convict instruction for theft in the third degree was deficient because it failed to include the essential element of "a common scheme or plan" when the State relied on a theory of aggregation. Br. of Appellant at 13. But Patchell proposed the instruction that the trial court gave and that he now complains of. Review of this issue is thus precluded under the doctrine of invited error. We therefore affirm.

A. Legal Principles

Challenges to to-convict instructions are reviewed "in the context of the jury instructions as a whole." *Rivas*, 168 Wn. App. at 891.

However, as the State notes, when a defendant proposes the instruction complained of on appeal, it is a classic case of invited error and our review of the instruction is precluded. *State v. Studd*, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999); *State v. Henderson*, 114 Wn.2d 867, 868, 792 P.2d 514 (1990). "A party cannot request an instruction and later complain on appeal that the instruction should not have been given." *State v. Kincaid*, 103 Wn.2d 304, 314, 692 P.2d 823 (1985). The invited error doctrine applies even to instructions that may be constitutionally infirm. *State v. Boyer*, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979).

B. Analysis

Here, Patchell's proposed to-convict instruction on theft in the third degree was adopted by the trial court and is identical the to-convict instruction the court gave to the jury.

In this instruction, Patchell got exactly what he asked from the trial court. The error Patchell complained of was invited by him, and we decline to review this issue.[3]

CONCLUSION

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Veljacic, J.

We concur:

Cruser, C.J.

Che, J.

[3] We also note that instruction included all of the essential elements of theft in the third degree.

WASHINGTON APPELLATE PROJECT

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