

FILED

APR 21, 2015

Court of Appeals
Division III
State of Washington

NO. 33234-9-II

**COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JASON HERNANDEZ, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Garold Johnson

No. 13-1-02943-1

AMENDED RESPONDENT'S RESPONSE TO SUPPLEMENTAL BRIEF

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the Information in this case is constitutionally sufficient because it contains the statutory citation to RCW 9A.56.140, which provides a definition that includes the elements withhold or appropriate?

B. STATEMENT OF THE CASE.

1. Procedure

On July 25, 2013, the State charged Jason Hernandez (hereinafter “defendant”) by Information with unlawful possession of a stolen vehicle.

CP 1. The Information stated:

That JASON PAUL JOSEPH HERNANDEZ, in the State of Washington, on or about the 24th day of July, 2013, did unlawfully and feloniously knowingly possess a stolen motor vehicle, knowing that it had been stolen, contrary to RCW 9A.56.068 and 9A.56.140, and against the peace and dignity of the State of Washington.

CP 1.

C. ARGUMENT.

1. THE INFORMATION IN THIS CASE CONTAINS A STATUTORY CITATION THAT MAKES IT DISTINGUISHABLE FROM *SATTERTHWAITE*.

The State acknowledges that the Court recently held as a matter of first impression that “withhold or appropriate” is an essential element of possession of a stolen motor vehicle. *State v. Satterthwaite*, ___ Wn. App. ___, 344 P.3d 738 (2014) (citing RCW 9A.56.068). However, the Information in the case at bar differs from *Satterthwaite* because it includes the phrase “knowing that it was stolen,” and also includes both a statutory citation to both RCW 9A.56.068 and also RCW 9A.56.140. CP 8-9.

An Information is constitutionally sufficient if it includes all essential elements of a crime. *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). An “essential element” is an element whose specification is necessary to establish the very illegality of the act charged. *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013). Requiring all statutory and non-statutory elements in the charging document provides the accused of fair notice of the charges against him to afford him the opportunity to prepare a defense. *Vangerpen*, 125 Wn.2d at 787.

If the Information is challenged initially on appeal, it will be construed quite liberally. *State v. Hopper* 118 Wn.2d 151, 156, 822 P.2d

775 (1992). “A Court should be guided by common sense and practicality in construing the language. Even missing elements may be implied if the language supports such a result.” *State v. Campbell*, 125 Wn.2d 797, 801, 888 P.2d 1177 (1995)(quoting *State v. Hopper*, 118 Wn.2d 151, 822 P.2d 775 (1992)).

Although essential elements are required to make an Information constitutionally sufficient, the State need not include definitions of the elements. *State v. Johnson*, 180 Wn.2d 295, 302, 325 P.3d 135 (2014). In *Johnson*, the Information alleged the defendant “did knowingly restrain [J.J.], a human being.” *Id.* at 301 (alteration in original). The defendant challenged the Information because it did not define “restrain,” as “to restrict a person’s movements without consent and without legal authority in a manner which interferes substantially with his liberty,” which he argued was an essential element. The Court rejected this argument, reaffirming that definitions of elements do not need to be included in the Information to make it constitutionally sufficient. *Id.* at 302.

The present case presents an issue similar to that addressed in *Johnson*. The Information alleged that defendant “did unlawfully and feloniously knowingly possess a stolen motor vehicle, knowing it had been stolen.” CP 1. *Satterthwaite* requires that the Information define “possess” as requiring that a defendant “withhold or appropriate

[possessed stolen property] to the use of any person other than the true owner or person entitled thereto.” *Satterthwaite*, 344 P.3d 738 (quoting RCW 9A.56.140(1)) (alteration in original). Requiring the definition of an essential element is contrary to the Supreme Court’s holding in *Johnson* that no such definition is required.

In addition, the Information in this case contained a citation to RCW 9A.56.140. RCW 9A.56.140(1) includes the definition, “‘Possessing stolen property’ means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.” In *Satterthwaite*, the Court noted that “[t]he charging document did not mention withholding or appropriating the stolen vehicle to the use of a person other than the owner, *and did not cite RCW 9A.56.140.*” *Satterthwaite*, 344 P.3d 738 (emphasis added). In the case at bar, the Information specifically includes RCW 9A.56.140. This makes the case distinguishable from *Satterthwaite*. The information is sufficient because the withhold or appropriate elements are included by fair construction and defendant’s conviction should be upheld.

Further, the inclusion of the phrase “knowing it was stolen” in the Information further distinguishes this case from *Satterthwaite*. *Satterthwaite* is premised on the notion that the withholding or appropriation of the stolen item is what “ultimately makes the possession illegal, thus differentiating between a person attempting to return known stolen property and a person choosing to keep, use or dispose of known stolen property.” *Satterthwaite*, 344 P.3d 738. The phrase “knowing it was stolen” makes it clear that defendant not only knowingly possessed the stolen car, but also that he possessed the car knowing it was stolen. The inclusion of this phrase makes it clear that defendant was not a person attempting to return known stolen property. The language arguably implies that the defendant withheld or appropriated the item from the true owner. *See, e.g., State v. Moavenzadeh*, 135 Wn.2d 359, 364, 956 P.2d 1097 (1998)(“...the term “theft” is arguably adequate to convey an intentional, wrongful taking of the property of another.”)

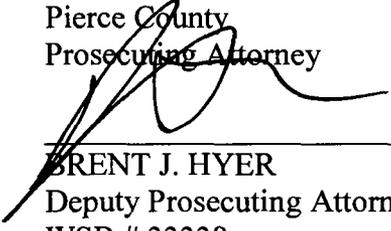
D. CONCLUSION.

The Information in this case contains a statutory citation to RCW 9A.56.140, which distinguishes it from the charging document in *Satterthwaite*. This statutory citation includes the necessary element of

withhold or appropriate making the Information sufficient. The Court should uphold defendant's conviction.

DATED: April 21, 2015.

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Certificate of Service:

The undersigned certifies that on this day she delivered by ES mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4-21-15 Theresa Kat
Date Signature

PIERCE COUNTY PROSECUTOR

April 21, 2015 - 11:11 AM

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