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Washington State
Court of Appeals
Division Two

March 21, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JASON PAUL JOSEPH HERNANDEZ, Appellant.	No. 46093-9-II UNPUBLISHED OPINION

MAXA, J. – Jason Hernandez appeals his conviction for possession of a stolen vehicle. In a previous opinion, we held based on *State v. Satterthwaite*, 186 Wn. App. 359, 344 P.3d 738 (2015), that Hernandez's charging information was required to include as an essential element a statement that the defendant withheld or appropriated the stolen vehicle to the use of someone other than the owner. *State v. Hernandez*, No. 46093-9-II, slip op. at 4-6 (Wash. Ct. App. Apr. 12, 2016) (unpublished), https://www.courts.wa.gov/opinions/pdf/46093-9.16.pdf. Because the information did not include such a statement, we reversed Hernandez's conviction for possession of a stolen vehicle. *Id.* at 6.

The Supreme Court subsequently decided *State v. Porter*, 186 Wn.2d 85, 375 P.3d 664 (2016). In *Porter*, the court disapproved of the holding in *Satterthwaite* and held that the information for the charge of possession of a stolen vehicle need not include language that the accused withheld or appropriated the stolen vehicle to the use of someone other than the true

owner. 186 Wn.2d at 92-94. Following its decision in *Porter*, the Supreme Court granted the State's petition for review in this case and remanded to this court for reconsideration in light of *Porter*. *State v. Hernandez*, 187 Wn.2d 1001, 386 P.3d 1091 (2017).[1]

We now hold that, under *Porter*, the information in this case was constitutionally sufficient even though it did not allege that Hernandez withheld or appropriated the stolen vehicle to the use of someone other than the true owner. In addition, we must now consider Hernandez's additional arguments on appeal that we did not address in our previous opinion. We hold that (1) the charging document in this case was sufficient even though it did not allege specific facts regarding the charge, (2) the to-convict instruction correctly stated the applicable law, (3) the trial court did not err in failing to give a unanimity instruction, and (4) sufficient evidence supported the jury's verdict.

Accordingly, we affirm Hernandez's conviction for possession of a stolen vehicle.

FACTS

A police officer was checking the license plates of passing cars, and the check showed that one of the cars was stolen. The officer pursued the car, but it increased its speed and the officer dropped the pursuit. Soon afterward, the vehicle crashed. The occupants of the vehicle, among them Hernandez, emerged and fled from the scene on foot. Other police officers arrived and chased the occupants, and eventually cornered and apprehended them. Hernandez was detained and arrested.

[1] In our previous decision, we also affirmed Hernandez's convictions for reckless driving and violation of his duty on striking an unattended vehicle. *Hernandez*, No. 46093-9-II, slip op. at 1-2. The Supreme Court denied review on issues Hernandez raised in his answer to the State's petition. 187 Wn.2d at 1001. Therefore, we need not address Hernandez's other convictions on remand.

The State charged Hernandez with possession of a stolen vehicle. The information did not allege that he withheld or appropriated the motor vehicle to the use of someone other than the true owner or person entitled thereto.

At trial, the owner of the stolen vehicle testified that it was taken without use of the keys, which she had in her possession. The officer who identified the vehicle as stolen testified that Hernandez was driving. And the testimony at trial confirmed that Hernandez fled after crashing the car.

The trial court gave a to-convict instruction that required the State to prove that Hernandez knowingly received, retained, possessed, or disposed of a stolen motor vehicle. The jury found Hernandez guilty of possession of a stolen vehicle.

Hernandez appeals his conviction.

ANALYSIS

A. SUFFICIENCY OF CHARGING DOCUMENT

Hernandez claims that the information filed in this case was insufficient to charge him with the crime of possession of a stolen vehicle because it failed to allege (1) that he withheld or appropriated the vehicle to the use of someone other than the true owner, and (2) the specific facts and circumstances supporting the charge. We disagree.

1. Essential Elements Rule

An information is constitutionally sufficient only if it includes all the essential elements of a crime. *Porter*, 186 Wn.2d at 89. However, an information need not contain definitions of elements of the crime. *Id.* at 91. The primary purpose of the essential elements rule is to give notice to the accused of the charges and to allow him or her to prepare a defense. *Id.* at 89.

When a defendant challenges the sufficiency of a charging document for the first time on appeal, we liberally construe the language of the charging document in favor of validity. *State v. Zillyette*, 178 Wn.2d 153, 161, 307 P.3d 712 (2013). In liberally construing the charging document, we employ the two-pronged test established in *State v. Kjorsvik*, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991): (1) do the necessary elements appear in any form, or by fair construction, on the face of the document and, if so, (2) can the defendant show he or she was actually prejudiced by the inartful language? *Zillyette*, 178 Wn.2d at 162.

2. Withhold or Appropriate Requirement

RCW 9A.56.068(1) states that a person is guilty of possession of a stolen vehicle if he or she possesses a stolen motor vehicle. RCW 9A.56.140(1) states that " '[p]ossessing 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." The information referenced both statutes, but did not expressly include the language in RCW 9A.56.140(1) about withholding or appropriating the stolen vehicle to the use of someone other than the true owner.

Hernandez argues that the information for the charge of possession of a stolen vehicle must expressly allege that the defendant withheld or appropriated the vehicle to the use of someone other than the true owner as required in RCW 9A.56.140(1). However, the Supreme Court in *Porter* expressly rejected that argument. 186 Wn.2d at 90, 94. The court held that an information with language similar to the information here contained all the essential elements of possession of a stolen vehicle and therefore was not deficient. *Id.* at 88, 94.

We apply *Porter* and hold that the information charging Hernandez with possession of a stolen vehicle was constitutionally sufficient even though it did not include a statement that he withheld or appropriated the stolen vehicle to the use of someone other than the true owner.

3. Specific Facts Regarding the Vehicle

Hernandez argues that the State was required to allege specific facts in the information supporting the charge, including a description of the stolen vehicle he was alleged to have possessed. However, Hernandez does not argue that the information failed to allege the essential elements of possession of a stolen vehicle. He only claims that the information was too vague. We distinguish between charging documents that are constitutionally deficient because of the State's failure to allege each essential element of the crime charged and those that are merely factually vague as to some other matter. *State v. Mason*, 170 Wn. App. 375, 385, 285 P.3d 154 (2012). Hernandez has not shown that he was prejudiced as a result of any vagueness in the information.

We hold that the information charging Hernandez with possession of a stolen vehicle was constitutionally sufficient even though it did not include specific facts regarding the charge.

B. TO-CONVICT JURY INSTRUCTION

Hernandez argues that the trial court erred by giving a to-convict instruction that incorporated the broader definition of possessing stolen property in RCW 9A.56.140(1) rather than including only the RCW 9A.56.068(1) definition of possession of a stolen vehicle. We disagree.

RCW 9A.56.068(1) states that a person is guilty of possession of a stolen vehicle if he or she "[possesses] a stolen motor vehicle," but does not further define that phrase. (Alteration in

original.) RCW 9A.56.140(1) states that " '[p]ossessing 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."

The to-convict instruction in this case incorporated the definition of "possessing stolen property" in RCW 9A.56.140(1). The instruction stated:

> To convict the defendant of the crime of possessing a stolen motor vehicle, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about July 24, 2013, the defendant *knowingly received, retained, possessed, or disposed of a stolen motor vehicle*;
>
> (2) That the defendant acted with knowledge that the motor vehicle had been stolen;
>
> (3) That the defendant withheld or appropriated the motor vehicle to the use of someone other than the true owner or person entitled thereto;
>
> (4) That any of these acts occurred in the State of Washington.

Clerk's Papers at 38 (emphasis added). This instruction was substantially similar to the pattern jury instruction. 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 77.21, at 178 (4th ed. 2016).

Hernandez argues that RCW 9A.56.068 does not incorporate the definition of "possessing stolen property" in RCW 9A.56.140(1). But this court held otherwise in *Satterthwaite*, concluding that RCW 9A.56.068 "implicitly incorporates RCW 9A.56.140(1)'s terms because the terms apply to other possession of stolen property offenses in the same chapter." 186 Wn. App. at 364. This holding remains good law. Although the Supreme Court in *Porter* expressly disapproved the holding in *Satterthwaite* that "withheld and appropriated"

language must be included in the information, the court did not question *Satterthwaite*'s statement that RCW 9A.56.068 incorporated the definition of possessing stolen property in RCW 9A.56.140(1). *See Porter*, 186 Wn.2d at 92. Instead, the court essentially assumed that RCW 9A.56.140(1) defined the essential element of possession under RCW 9A.56.068. *Id.* at 90.

We hold that the trial court's to-convict instruction correctly stated the applicable law regarding possession of a stolen vehicle, and therefore that the trial court did not err by issuing the instruction.

C. JURY UNANIMITY

Hernandez argues that the trial court violated his right to a unanimous verdict by instructing the jury on alternative means of committing possession of a stolen vehicle without instructing the jury that it must unanimously agree on the means underlying its verdict. We disagree because the trial court's to-convict instruction did not provide alternative means of committing possession of a stolen vehicle.

A criminal defendant has a constitutional right to a unanimous verdict. *State v. Smith*, 159 Wn.2d 778, 783, 154 P.3d 873 (2007). Where the jury is instructed on alternative means of committing a crime, a guilty verdict does not infringe on this right as long as substantial evidence supports each of the alternative means on which the State presented evidence or argument. *Id.* Where the jury is instructed only on a single means of committing a crime, the right to a unanimous verdict is not implicated. *See id.*

Hernandez relies on *State v. Hayes*, 164 Wn. App. 459, 479-81, 262 P.3d 538 (2011), for the proposition that when the State lists "receive, retain, possess, conceal, or dispose" in the to-convict instruction it must prove each alternative beyond a reasonable doubt. In *Hayes*, the to-

convict instructions for possession of a stolen motor vehicle listed each word from the definition of possessing stolen property (received, retained, possessed, concealed, or disposed of). 164 Wn. App. at 480. The court determined that because the five alternatives were listed in the to-convict instruction, the State was required to support each one with substantial evidence. *Id.* at 480-81.

However, this court in *State v. Makekau* held that "receive, retain, possess, conceal, or dispose of stolen property" is definitional language and the use of these terms in a to-convict instruction does not convert the single means crime of possessing a stolen motor vehicle into an alternative means crime. 194 Wn. App. 407, 413-14, 378 P.3d 577 (2016). In *State v. Tyler*, Division One of this court subsequently stated that *Hayes* "no longer properly states the law" because the various words listed in the to-convict instruction are "false alternative means" that are not part of the essential elements that the State must prove with sufficient evidence. 195 Wn. App. 385, 399-400, 382 P.3d 699 (2016).

Under *Makekau* and *Tyler*, there is only a single means for committing the crime of possession of a stolen vehicle. Therefore, the jury did not have to be unanimous regarding each of the terms defining "possession" listed in the to-convict instruction, and we hold that the trial court did not err in failing to give a unanimity instruction.

D. SUFFICIENCY OF THE EVIDENCE

In a statement of additional grounds (SAG), Hernandez asserts his innocence and appears to claim that insufficient evidence supported his conviction. Hernandez states,

> [T]he Element of Knowingly stoled [*sic*] a motor vehicle never existed, and therefore could not have been proven during the trial. Appellant was simply receiving a ride, had No [sic] prior knowledge the vehicle was stolen, and the state has failed to prove otherwise.

SAG at 2. In effect, Hernandez denies that he *knowingly* possessed the stolen vehicle and asserts that he does not believe the State proved its case. We construe Hernandez's statement as a challenge to the sufficiency of the evidence against him and reject that claim.

When evaluating the sufficiency of evidence for a conviction, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). We assume the truth of the State's evidence and all reasonable inferences drawn from that evidence when evaluating whether sufficient evidence exists. *Id.* at 106. We treat circumstantial evidence as equally reliable as direct evidence. *State v. Farnsworth*, 185 Wn.2d 768, 775, 374 P.3d 1152 (2016). And we defer to the trier of fact's resolution of conflicting testimony and evaluation of the persuasiveness of the evidence. *Homan*, 181 Wn.2d at 106.

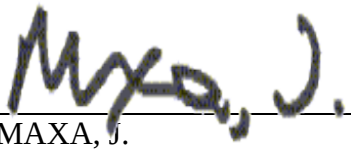
Here, an officer identified Hernandez as the driver of the vehicle, showing that he was in possession of the vehicle. And the vehicle's owner testified that the vehicle was stolen without the keys, creating an inference that Hernandez was driving on a tampered ignition. This evidence in turn created an inference that Hernandez knew that the vehicle was stolen. Further, evidence showed that Hernandez fled from police after crashing the vehicle, showing knowledge of guilt. *See State v. McDaniel*, 155 Wn. App. 829, 854, 230 P.3d 245 (2010).

A rational trier of fact could conclude beyond a reasonable doubt from this evidence that Hernandez was the driver of the vehicle and that he knew the vehicle was stolen. Therefore, we hold that the evidence was sufficient to support his conviction.

CONCLUSION

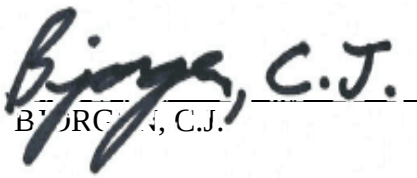
We affirm Hernandez's conviction for possession of a stolen vehicle.

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.

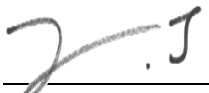


MAXA, J.

We concur:



BJORGEN, C.J.



LEE, J.