IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. WAYNE RICHARD KNAPP, Appellant.	No. 38769-7-II UNPUBLISHED OPINION

Penoyar, J. — Wayne Richard Knapp appeals his conspiracy to commit first degree robbery and first degree unlawful possession of a firearm convictions. He claims that the information failed to inform him of all requisite elements of the conspiracy charge and that imposition of a firearm enhancement on the conspiracy conviction violated his double jeopardy rights. In his statement of additional grounds (SAG), Knapp argues that the State failed to provide requisite notice of its intent to seek an exceptional sentence. We find no merit to these contentions and affirm.

Facts

A week or two after Willard Derouen lost his job at Pellegrino's restaurant in Tumwater, he and Knapp devised a plan to rob the restaurant when it counted its till at the end of the day. They went to the restaurant on September 25, 2008, but decided against robbing it that day, as there were too many people present.

They returned the next evening, driving separate cars and parking at the end of an alley that led to the restaurant. With ski masks, gloves, and a firearm, they walked down the alley separately toward the restaurant. When Derouen neared the back entrance, he saw more

employees present than he had anticipated and turned back toward his car.

Unbeknownst to Knapp and Derouen, a hairstylist and cleaning service worker had seen the men park their vehicles in the dark alley across from their business. The hairstylist, Carmen Berg, became alarmed when she saw Knapp remove a ski mask from his head. She called 911.

Responding, Tumwater police officer Tygh Hollinger was standing next to Derouen's car when Derouen came up the alley. Derouen said that he parked there because there was no parking at Pellegrino's, that he was alone, and that he did not know who owned the pickup truck parked next to his car.

Tumwater police officer Carlos Quiles arrived while Hollinger was talking with Derouen. Quiles was familiar with Pellegrino's and its hours and went down the alley to find out if Derouen's story was true. As Quiles walked down the alley, Knapp approached from the shadows, saying he was looking for a friend. He pointed toward Derouen. Quiles took Knapp to Hollinger and then walked back down the alley, where he eventually discovered the ski masks, a second pair of gloves (the officers seized the first pair from Derouen), and a firearm.

Derouen eventually pleaded guilty to conspiracy to commit first degree robbery and unlawful possession of methamphetamine, agreeing to testify against Knapp in exchange for the State dropping a charged weapons enhancement. A jury acquitted Knapp of unlawful possession of methamphetamine, but it returned guilty verdicts on charges of conspiracy to commit first degree robbery and first degree unlawful possession of a firearm. It also found by special verdict that Knapp was armed with a firearm during commission of the robbery.

The sentencing court imposed consecutive sentences, finding that Knapp's high offender score resulted in his actions going otherwise unpunished. Knapp appeals.

analysis

I. Information Charging Conspiracy

Knapp first argues that the second amended information was fatally defective because it failed to allege the essential element of an agreement to commit the offense. He claims that because even a liberal interpretation of the information does not reveal this element, he need not show prejudice and his conviction must be reversed.

Both the state and the federal constitutions require the State to inform an accused person of the nature and cause of the charges against them. U.S. Const. amend. VI, Wash. Const. art. 1, § 22. A charging document adequately informs the defendant if it lists (1) the elements of the crime charged and (2) a description of the specific conduct that constituted the crime. *City of Auburn v. Brooke*, 119 Wn.2d 623, 629-30, 836 P.2d 212 (1992).

The primary goal of this "essential elements" rule is to give notice to an accused of the nature of the crime that he must be prepared to defend against. *State v. Kjorsvik*, 117 Wn.2d 93, 101, 812 P.2d 86 (1991) (citing 2 W. LaFave & J. Israel, *Criminal Procedure* § 19.2, at 446 (1984); 1 C. Wright, *Federal Practice* § 125, at 365 (2d ed. 1982)). All essential elements of the crime charged, including nonstatutory elements, must be included in the charging document so that a defense can be properly prepared. *Kjorsvik*, 117 Wn.2d at 103; *but see Kjorsvik*, 117 Wn.2d at 102-11 (different standard of review applies when charging document is challenged for first time on appeal); *State v. Hopper*, 118 Wn.2d 151, 822 P.2d 775 (1992).

When, as here, the adequacy of the information is challenged for the first time after verdict or on appeal, we must apply a two-prong analysis: (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 was nonetheless actually prejudiced by the inartful language that caused a lack of notice. *Kjorsvik*, 117 Wn.2d at 105-06.

> RCW 9A.28.040, which defines criminal conspiracy, provides:
>
> (1) A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, *he or she agrees with one or more persons to engage in or cause the performance of such conduct*, and any one of them takes a substantial step in pursuant of such agreement.

(Emphasis added.) The second amended information charged:

> COUNT I - CONSPIRACY TO COMMIT ROBBERY IN THE FIRST DEGREE, WHILE ARMED WITH A DEADLY WEAPON - RCW 9A.56.200(1), RCW 9A.28.040, RCW 9.94A.602 AND RCW 9.94A.533(3) - CLASS B FELONY:
>
> In that the defendant, WAYNE RICHARD KNAPP in the State of Washington, on or about September 26, 2008, acting with intent that conduct constituting the crime of Robbery in the First Degree be performed, to wit: the unlawful taking personal property from a person, against such person's will, by use or threatened use of immediate force, violence, or fear of injury to such person or their property, or the property of another, with the intent to commit theft of the property, and in the commission of or immediate flight therefrom the accused was armed with a deadly weapon; and he did take a substantial step toward commission of this crime. It is further alleged that during the commission of this offense, the defendant or an accomplice was armed with a deadly weapon, to-wit: a firearm.

Clerk's Papers at 14.

The State concedes that the information lacks the explicit statutory language that Knapp "agrees with one or more persons to engage in [robbery]," but it argues nonetheless that a liberal reading of the information informs the defendant of this requirement. The State urges us to focus on the terms "conspiracy" in the heading and "accomplice" in the body to read the existence of an agreement into the information.

We agree that using the term "conspiracy," along with the citation to RCW 9A.28.040, in

the information gave Knapp sufficient notice. In *State v. McCarthy*, 140 Wn.2d 420, 427, 998 P.2d 296 (2000), the court addressed whether the term "conspiracy" in the information was sufficient to apprise a defendant charged with a conspiracy to deliver controlled substances.[1] Notably, the court observed:

> Nothing in the conclusory language of the information, however liberally construed, could imply anything more than a simple conspiracy - an agreement between two or more people to commit a crime. RCW 9A.28.040(1). Although the use of the term "conspiracy" implies the involvement of two or more people, in the context of delivery of a controlled substance, it does not imply involvement of a party acting outside the incident of delivery.

140 Wn.2d at 427. Here, the conspiracy involved only Knapp and Derouen and thus the term "conspiracy" necessarily alleged that Knapp did not act alone but acted in tandem with an accomplice.

Knapp claims no prejudice; nor could he. Knapp knew that he was charged with conspiracy, that Derouen was going to testify about their plan and his active involvement in it, and the trial court's instructions to the jury contained the agreement requirement. The jury's verdict was clearly based on the correct statutory elements.

II. Double Jeopardy and The Weapons Enhancement

After the parties submitted their briefs in this case, our Supreme Court issued *State v. Kelley*, 168 Wn.2d 72, 226 P.3d 773 (2010), which affirmed the court's earlier holdings that the State may convict a defendant of using a firearm during the commission of a crime and additionally impose a firearm enhancement. Thus, Knapp's double jeopardy claim fails.

[1] *See State v. Valdobinos*, 122 Wn.2d 270, 285, 858 P.2d 199 (1993) (it is impossible to engage in a conspiracy to deliver cocaine without knowing what one is doing).

III. Statement of Additional Grounds

A. Notice of Exceptional Sentence

Knapp argues that the State failed to notify him that it was seeking an exceptional sentence as RCW 9.94A.537 requires, and thus we must reverse his exceptional sentence.

RCW 9.94A.535, however, allows the sentencing court to impose an exceptional sentence based on criminal history without invoking RCW 9.94A.537: "Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537."

The sentencing court's basis for imposing the exceptional sentence was that Knapp's offender score of 22 left his firearm conviction unpunished. Thus, the sentencing court based its finding on Knapp's prior convictions and hence the notice provision in RCW 9.94A.537 does not apply. *See State v. Newlun*, 142 Wn. App. 730, 176 P.3d 529 (2008) (sentence under RCW 9.94A.535(2)(c) upheld even though defendant did not have notice).

B. Community Custody

Knapp also argues that the sentencing court could not impose 10 years of community custody. He simply asserts that he knows this is illegal but trusts us to recognize why.

The sentencing court did not impose 10 years of community custody. Rather, it imposed the statutory maximum of 10 years. RCW 9.94A.701(2) authorizes a sentencing court to impose up to eighteen months of community custody for a violent offense that is not a serious violent offense. Knapp's conspiracy conviction is a violent offense as defined in RCW 9.94A.030. Thus, the sentencing court was making it explicit that the combination of Knapp's 120 month sentence and his 18 months of community custody could not exceed the statutory 120 month maximum

sentence.

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 pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Hunt, J.

Van Deren, J.