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WA State Court of Appeals, Division III

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

THE STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 36835-1-III
	)	
v.	)	
	)	
MATTHEW EVAN MARKHAM,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

KORSMO, J. — Matthew Markham appeals his Ferry County conviction for attempting to elude a pursuing police vehicle. He contends the charging information was constitutionally insufficient because it omitted an essential element of the crime. The State concedes error. We accept the concession and reverse and remand for the trial court to dismiss the conviction without prejudice.

FACTS AND PROCEDURE

On the evening of October 28, 2018, sheriff's deputy Benjamin Cosby was in his patrol vehicle and observed a car pass another car in a no passing zone at 80 to 90 m.p.h. The deputy gave chase and the driver continued to speed away. The car eventually went over a cattle guard and rolled into a field. The deputy arrested Matthew Markham at the scene.

The State charged Mr. Markham with attempting to elude a pursuing police vehicle. The information was filed under the 1983 version of RCW 46.61.024(1). It alleged:

> On or about the day of October 28, 2018, in the County of Ferry, State of Washington, the above-named Defendant, as a driver of a motor vehicle, did willfully fail or refuse to immediately bring his or her vehicle to a stop and did drive his or her vehicle in a manner indicating a wanton or willful disregard for the lives or property of others while attempting to elude a pursuing police vehicle, after having been given a visual or audible signal to bring the vehicle to a stop, said signal having been given by hand, voice, emergency light, or siren by a uniformed police officer whose vehicle was appropriately marked showing it to be an official police vehicle; contrary to former Revised Code of Washington 46.61.024 (Laws of 1983, ch. 80, § 1).

Clerk's Papers at 1-2.

The case proceeded to a jury trial. Mr. Markham's defense was that another man was driving and escaped by running away in the field. The jury convicted Mr. Markham of attempting to elude.[1] He appeals.

ANALYSIS

For the first time on appeal, Mr. Markham contends the charging document omitted an essential element of attempting to elude. Specifically, he argues the document failed to notify him that the pursuing "vehicle shall be equipped with lights and sirens,"

[1] He was also charged and convicted of misdemeanor third degree driving while license suspended. That charge is not at issue in this appeal.

as required under the version of RCW 46.61.024(1) in effect at the time of the incident. He asserts that, without that language, the document does not afford him his constitutional right to adequate notice under the Sixth Amendment and article I, § 22 of the Washington Constitution. He contends prejudice is presumed and the conviction must be reversed. The State concedes Mr. Markham's arguments and we agree.

For an information to be constitutionally adequate, all essential elements of the crime must be included in the charging document. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). The essential elements rule is grounded in the Sixth Amendment to the United States Constitution and article I, § 22 of the Washington State Constitution. *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013).

"'An essential element is one whose specification is necessary to establish the very illegality of the behavior charged.'" *Id.* (internal quotation marks omitted) (quoting *State v. Ward*, 148 Wn.2d 803, 811, 64 P.3d 640 (2003)). The essential elements rule exists "to apprise the accused of the charges against him or her and to allow the defendant to prepare a defense." *State* v. *Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). We review the adequacy of a charging document de novo. *State v. Johnson*, 180 Wn.2d 295, 300, 325 P.3d 135 (2014).

When, as here, the defendant challenges the sufficiency of the information 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 at 161 (citing *State v. Kjorsvik*, 117 Wn.2d at

105). Liberal construction requires determining whether "the necessary elements appear in any form, or by fair construction, on the face of the document and, if so," whether "the defendant [can] show he or she was actually prejudiced by the unartful language." *Id.* at 162 (citing *Kjorsvik*, 117 Wn.2d at 105-06). If the necessary elements are not found or fairly implied, we presume prejudice and reverse without reaching the question of prejudice. *Id.* at 162-63. When the information proves insufficient the charge is dismissed without prejudice. *State v. Johnson*, 180 Wn.2d at 300-01.

As stated above, Mr. Markham's charging information used the language of the 1983 version of the attempting to elude statute. *See* former RCW 46.61.024 (1983). The statute was amended in 2003. LAWS OF 2003, ch. 101, § 1.[2] As written in 2010 (and currently in effect) the attempting to elude statute provides, in part:

> Any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a *reckless manner* while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be *equipped with lights and sirens*.

RCW 46.61.024(1) (emphasis added).

In the 2003 amendment, the phrase "shall be equipped with lights and sirens" replaced the words "appropriately marked showing it to be an official police vehicle."

[2] The statute was again amended in 2010, solely to make technical corrections to gender-based terms. LAWS OF 2010, ch. 8, § 9065.

LAWS OF 2003, ch. 101, § 1(1). As this court observed in *Naillieux*, case law defined an "appropriately marked" police vehicle as a vehicle bearing insignia identifying it as a police vehicle, like a vehicle with the police department's name on it. *State v. Naillieux*, 158 Wn. App. 630, 645, 241 P.3d 1280 (2010) (citing *State v. Argueta*, 107 Wn. App. 532, 538, 27 P.3d 242 (2001)). Its definition did not include lights and sirens. *Id*. at 645 (citing *Argueta*, at 538-39). The court, then, cannot infer the "lights and sirens" phrase from the "appropriately marked" phrase. *Id.* The legislature's addition of "equipped with lights and sirens" makes it an essential element of attempting to elude. *Id.*

The 2003 amendment to RCW 46.61.024(1) also replaced the phrase "manner indicating a wanton or willful disregard for the lives or property of others" with the words "reckless manner." LAWS OF 2003, ch. 101, § 1. This change removed the willful and wanton standard from the eluding statute. *State v. Ratliff*, 140 Wn. App. 12, 15, 164 P.3d 516 (2007). And "reckless manner" does not mean a "willful or wanton disregard for the lives or property of others." *Id*. It means "'a rash or heedless manner, with indifference to the consequences.'" *Id*. at 16 (internal quotation marks omitted) (quoting *State v. Roggenkamp*, 153 Wn.2d 614, 622, 106 P.3d 196 (2005)). The court, then, cannot infer "reckless" from "willful and wanton." *State v. Naillieux*, 158 Wn. App. at 644.

The State concedes Mr. Markham's information omitted two essential elements of eluding a police vehicle—equipped with lights and sirens and reckless manner. We

agree. We presume prejudice and reverse Mr. Markham's conviction. *State v. Zillyette*, 178 Wn.2d at 162-63; *State v. Naillieux*, 158 Wn. App. at 645.

The conviction for attempting to elude a pursuing police vehicle is reversed and remanded for the superior court to enter an order dismissing that count without prejudice.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Siddoway, J.