No. 45083-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA DAVID CHARLES RHOADES,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. THE STATE'S FAILURE TO PROVIDE MR. RHOADES WITH PRETRIAL NOTICE OF THE AGGRAVATING FACTOR REQUIRES REVERSAL OF THE EXCEPTIONAL SENTENCE

The State acknowledges that constitutional due process and the authorizing statute require the State to provide the accused with pretrial notice that it is seeking an exceptional sentence and of any aggravating factors it intends to rely upon. SRB at 5, 8-9, 12. The State also concedes that the jury was instructed on an aggravating factor different from the one alleged in the information. SRB at 9. But the State contends (1) Mr. Rhoades may not raise this challenge for the first time on appeal because no "manifest" constitutional error occurred; and (2) if there was an error, it does not require reversal of the exceptional sentence. Both of these arguments are inconsistent with constitutional principles, the statute, and the relevant case law.

a. Mr. Rhoades may raise this challenge for the first time on appeal

i. A "manifest" error of constitutional magnitude occurred

It is well-established that, under the "essential elements" rule, a challenge to the constitutional sufficiency of a charging document may

be raised for the first time on appeal. State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991); State v. Leach, 113 Wn.2d 679, 691, 782 P.2d 552 (1989). In State v. Siers, the Washington Supreme Court stated that "[t]he requirement that a defendant receive notice of aggravating circumstances is similar to the requirement that a defendant be given notice of all the elements of the offense charged." State v. Siers, 174 Wn.2d 269, 278, 274 P.3d 358 (2012). Although aggravating circumstances need not be set forth in the charging document, an accused must nonetheless receive pretrial notice of aggravating circumstances as a matter of constitutional due process. Id.

Because the requirement that a defendant receive notice of aggravating circumstances is similar to the requirement that he receive notice of all elements of the underlying offense, he should similarly be able to argue for the first time on appeal that he did not receive constitutionally adequate notice of aggravating circumstances. There is no authority holding that he may *not* raise such a challenge for the first time on appeal.

Even if Mr. Rhoades must demonstrate that the asserted constitutional error is "manifest," he has done so. "A constitutional error is manifest if the appellant can show actual prejudice, i.e., there

must be a plausible showing by the appellant that the asserted error had practical and identifiable consequences in the trial of the case." State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011) (quotation marks, citations, and alterations omitted). This is not the same as requiring the appellant to show that the error was not harmless. Instead, the appellant need only show the error was "so obvious on the record that the error warrants appellate review." Id. at 676 n.2 (quotation marks and citation omitted). The burden of showing an error was harmless remains with the prosecution. Id. Once an error is addressed on the merits, the State bears the burden to show it was harmless beyond a reasonable doubt. Id. & 676 n.2; Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

The State's failure to provide Mr. Rhoades with pretrial notice of the aggravating factor is an obvious, "manifest" constitutional error that warrants review. In Siers, the Supreme Court plainly held that the Constitution requires the State to provide the accused with pretrial notice of any aggravating circumstances it intends to rely upon. Siers, 174 Wn.2d at 277. To satisfy constitutional due process, notice must be given "at some point prior to the opening statement of the trial!" See State v. McCarty, 140 Wn.2d 420, 427, 998 P.2d 296 (2000)

(rejecting notion that McCarty received adequate notice of the charge "because of statements made during opening statements, closing arguments, and jury instructions").

Washington courts have held that defendants received adequate notice of aggravating factors only in cases where the record showed the State provided the defendant with notice, prior to trial or entry of a guilty plea, of the particular aggravating factors the State intended to rely upon. In Siers, Siers's attorney indicated that Siers had received notice prior to trial of the State's intent to seek a "good Samaritan" aggravator. Siers, 174 Wn.2d at 271. Similarly, in State v. Berrier, the State filed a written notice, prior to Berrier's guilty plea, of its intent to seek an exceptional sentence based on five aggravating factors. State v. Berrier, 143 Wn. App. 547, 550, 178 P.3d 1064 (2008), abrogated on other grounds by State v. Powell, 167 Wn.2d 672, 223 P.3d 493 (2010). Likewise, in State v. Bobenhouse, the prosecutor wrote a letter to defense counsel prior to trial to notify him that the State would seek an exceptional sentence based on a particular aggravator and the lawyer acknowledged, in writing, that he received the prosecutor's notice and delivered it to the defendant. 143 Wn. App. 315, 331, 177 P.3d 209 (2008), aff'd, 166 Wn.2d 881, 214 P.3d 907 (2009).

In contrast to those cases, in this case, there is no indication in the record that the prosecutor provided Mr. Rhoades with pretrial notice that it intended to seek an exceptional sentence based on the aggravator it relied upon—that "[t]he defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership." RCW 9.94A.535(3)(aa); CP 50-51.

The State contends Mr. Rhoades received adequate notice of its intent to seek an exceptional sentence based on this aggravator when it informed him prior to trial that it would seek to prove that "the motive for the assault was based on defendant's belief that the victim was in a rival gang." CP 8; SRB at 10. A hearing was held prior to trial at which the prosecutor argued that evidence of Mr. Rhoades's gang affiliation, and his belief that the victim was in a rival gang, was admissible under ER 404(b) to prove motive and intent. 4/03/13RP 2-4. The State contends that its pretrial motion to admit "other bad act" evidence under ER 404(b), and the subsequent hearing, were sufficient to put Mr. Rhoades on notice of its intent to seek an exceptional sentence based on the aggravator provided in RCW 9.94A.535(3)(aa).

This argument does not withstand scrutiny. Nowhere in the State's ER 404(b) motion, and at no time during the ER 404(b) hearing, did the State tell Mr. Rhoades that it intended to seek an exceptional sentence based on the aggravator provided in RCW 9.94A.535(3)(aa). Providing notice of an intent to offer "other bad act" evidence at trial under ER 404(b) is not the same as providing notice of an intent to seek an exceptional sentence based on a particular aggravator. Moreover, the State had already notified Mr. Rhoades in the information that it intended to seek an exceptional sentence based on a *different* aggravator, RCW 9.94A.535(3)(s). CP 1-2. The State never notified Mr. Rhoades, prior to trial, that it would *not* seek an exceptional sentence based on the aggravator alleged in the information and would instead seek an exceptional sentence based on a different aggravator. Because constitutional due process required the State to provide pretrial notice that it intended to seek an exceptional sentence based on the aggravator provided in RCW 9.94A.535(3)(aa), the lack of such notice is a "manifest" error of constitutional magnitude that may be raised for the first time on appeal.

ii. Because the exceptional sentence was imposed without statutory authority, it is subject to challenge for the first time on appeal

The right to pretrial notice of aggravating circumstances is also guaranteed by statute. Siers, 174 Wn.2d at 277; RCW 9.94A.537(1) ("At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.").

It is axiomatic that a court's sentencing authority is derived solely from statute. See State v. Pillatos, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007). A court does not have inherent authority to impose an exceptional sentence and instead must comply with the authorizing statute. Id.

The authorizing statute "permits the imposition of an exceptional sentence *only* when the State has given notice, prior to trial, that it intends to seek a sentence above the standard sentencing range." State v. Womac, 160 Wn.2d 643, 663, 160 P.3d 40 (2007) (citing RCW 9.94A.537(1)). If "it is too late for the State to comply with that requirement," because trial has already begun or the defendant has

already pled guilty, the court is without statutory authority to impose an exceptional sentence. Id.; see also State v. Edvalds, 157 Wn. App. 517, 532, 237 P.3d 368 (2010) ("RCW 9.94A.537(1) permits the imposition of an exceptional sentence . . . only when the State has given notice, prior to trial, that it intends to seek a sentence above the standard sentencing range.").

Although the general rule under RAP 2.5 is that issues not objected to in the trial court may not be raised for the first time on appeal, it is well settled that illegal or erroneous sentences may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 427, 477-78, 983 P.2d 452 (1999); see also State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (holding erroneous condition of community custody could be challenged for first time on appeal). Specifically, a defendant may challenge, for the first time on appeal, the imposition of a criminal penalty on the ground that the sentencing court failed to comply with the authorizing statute. State v. Moen, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).[1]

[1] See also State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997) (explaining improperly calculated standard range is legal error subject to review); In re Pers. Restraint of Fleming, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (explaining "sentencing error can be addressed for the first time on appeal even if the error is not jurisdictional or constitutional"); State v. Hunter, 102 Wn. App. 630, 9 P.3d 872 (2000)

Because the State did not provide Mr. Rhoades with pretrial notice of its intent to seek an exceptional sentence based on the particular aggravator it intended to rely upon, which it was required to do by RCW 9.94A.537(1), the court acted without statutory authority in imposing an exceptional sentence based on that aggravator. Therefore, the sentence may be challenged for the first time on appeal.

b. The exceptional sentence must be reversed

i. The exceptional sentence must be reversed because the jury was instructed on an aggravator different from the one alleged in the information

The State contends it may allege a particular aggravator in the information and then instruct the jury on a different aggravator without amending the information to reflect the change. SRB at 11-12. This Court should reject that argument and hold that once the State elects a particular aggravator and includes it in the information, it is bound by that decision unless the information is properly amended.

(examining for first time on appeal the validity of drug fund contribution order); State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994) (holding "challenge to the offender score calculation is a sentencing error that may be raised for the first time on appeal"); State v. Paine, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993) (collecting cases and concluding that case law has "established a common law rule that when a sentencing court acts without statutory authority in imposing a sentence, that error can be addressed for the first time on appeal").

The purpose of requiring the State to set forth all essential elements of the crime in the charging document "is to give notice to an accused of the nature of the crime that he or she must be prepared to defend against." Kjorsvik, 117 Wn.2d at 101. The fundamental principle behind this rule is that "defendants are entitled to be fully informed of the nature of the accusations against them *so that they can prepare an adequate defense*." Id. at 101.

A corollary to this rule is that once the State sets forth its accusations in the charging document, and thus puts the defense on notice of the specific allegations it intends to prove at trial, it is bound by that choice unless the information is properly amended. See, e.g., In re Pers. Restraint of Brockie, 178 Wn.2d 532, 538, 309 P.3d 498 (2013); State v. Recuenco, 163 Wn.2d 428, 435, 180 P.3d 1276 (2008) ("unless a complaint is properly amended, once the State elects which specific charges it is pursuing and includes elements in the charging document, it is bound by that decision"). Thus, if the State chooses to allege aggravating circumstances in the charging document, it should be bound by that choice.

The case law on charging requirements for crimes with statutory alternative means provides a relevant analogy. When a statute sets

forth alternative means by which a crime can be committed, the charging document may charge none, one, or all of the alternatives, provided the alternatives charged are not repugnant to one another. State v. Noltie, 116 Wn.2d 831, 840, 842, 809 P.2d 190 (1991); State v. Severns, 13 Wn.2d 542, 548, 125 P.2d 659 (1942); CrR 2.1(a)(1). But if the information alleges a particular alternative means, it is error for the factfinder to consider uncharged alternatives, regardless of the range of evidence presented at trial. Brockie, 178 Wn.2d at 538-39; Severns, 13 Wn.2d at 548. In other words, when the information specifies a particular alternative means, the defendant's notice is limited to that means and the State may not pursue a different theory at trial unless it amends the information. Brockie, 178 Wn.2d at 538.

The Washington Supreme Court has applied this principle with equal force to sentencing enhancements. In Recuenco, for example, the court explained that if the State charges a "deadly weapon" sentence enhancement, the jury must be instructed on the deadly weapon enhancement and may not be instructed on a "firearm" enhancement. Recuenco, 163 Wn.2d at 435-36.

As with statutory alternative means, the State may charge none, one, or several aggravating factors in the charging document. Siers,

174 Wn.2d at 278. But if the information specifies a specific aggravator, the defendant's notice is limited to that aggravator. Brockie, 178 Wn.2d at 538; Recuenco, 163 Wn.2d at 435-36. The State should not be permitted to instruct the jury on a different aggravator unless the information is properly amended.

It is well-established that when the jury is instructed on an alternative statutory means of committing the crime that is different from the means alleged in the information, a constitutional error occurs that is presumed prejudicial. Brockie, 178 Wn.2d at 538-39. The State bears the burden to prove beyond a reasonable doubt that the error is harmless. Id. The error is prejudicial and requires reversal if it is possible the jury convicted the defendant under the uncharged alternative. Severns, 13 Wn.2d at 549; State v. Laramie, 141 Wn. App. 332, 343, 169 P.3d 859 (2007).

Under this standard, the error here requires reversal of the exceptional sentence. The jury was instructed on only one aggravator, which was different from the aggravator charged in the information. CP 1-2, 50-51. Mr. Rhoades's notice was limited to the aggravator charged in the information, not the aggravator in the jury instructions. Brockie, 178 Wn.2d at 538. The error in instructing the jury on the

uncharged aggravator is prejudicial and requires reversal of the exceptional sentence. See Severns, 13 Wn.2d at 549; State v. Laramie, 141 Wn. App. at 343.

ii. The exceptional sentence must be reversed because Mr. Rhoades did not receive actual pretrial notice of the aggravating factor relied upon

The State contends Mr. Rhoades was not prejudiced by the failure to include the proper aggravator in the charging document because he received actual notice of the aggravator. But the State's failure to provide proper notice is necessarily prejudicial unless Mr. Rhoades received actual notice in time for him to prepare a defense to the allegations. See, e.g., Kjorsvik, 117 Wn.2d at 106; McCarty, 140 Wn.2d at 427; State v. Hopper, 118 Wn.2d 151, 159, 822 P.2d 775 (1992). The record does not show that Mr. Rhoades received actual, timely notice of the aggravator.

In Kjorsvik, the Supreme Court noted that even if an allegation is not properly set forth in the charging document, "[i]t is possible that other circumstances of the charging process can reasonably inform the defendant in a timely manner of the nature of the charges." Kjorsvik, 117 Wn.2 at 106. But notice of the charge must be given at some point prior to opening statements. McCarty, 140 Wn.2d at 427. In McCarty,

the court rejected the notion that the defendant received actual notice of the charges due to statements made during opening statements, closing arguments and jury instructions. Id. In Hopper, by contrast, the court held the defendant received actual notice because his conviction resulted from a second trial held after the jury was unable to agree on a verdict in the first trial. Hopper, 118 Wn.2d at 159 ("the fact that an entire trial had already occurred when Hopper was preparing for this trial provides the best possible notice of precisely what was being argued").

Here, there is no indication in the record that Mr. Rhoades received actual notice before trial of the State's intent to seek an exceptional sentence based on the aggravator set forth in RCW 9.94A.535(3)(aa). The first indication in the record that Mr. Rhoades received *any* notice of the aggravator was the colloquy between the court and the parties about the jury instructions. See RP 387-89, 392. This occurred well after trial began and is not sufficient to show Mr. Rhoades received timely, actual notice.

Moreover, defense counsel's comments during closing argument suggest counsel was still under the impression that the State was seeking an exceptional sentence based on the aggravator originally

alleged in the information. The State alleged in the information that Mr. Rhoades committed the offense "to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group, contrary to RCW 9.94A.535(3)(s)." CP 2. In closing, counsel specifically argued the evidence did not show Mr. Rhoades committed the crime in order to "elevat[e] status in this gang. I don't know how that – he gets elevation in this situation." RP 442.

In sum, the record does not show Mr. Rhoades received actual, timely notice of the State's intent to seek an exceptional sentence based on the aggravator submitted to the jury. Thus, the error in failing to provide him with proper notice was not harmless and the exceptional sentence must be reversed.

iii. The exceptional sentence must be reversed because the court acted without statutory authority in imposing the exceptional sentence

A sentence in excess of statutory authority is subject to challenge and the person is entitled to be resentenced. In re Pers. Restraint of Goodwin, 146 Wn.2d 86, 869, 50 P.3d 618 (2002) (and cases cited therein). Here, the court exceeded its statutory authority in imposing an exceptional sentence because the State did not provide Mr.

Rhoades with pretrial notice of the aggravator as required by RCW 9.94A.537(1). Womac, 160 Wn.2d at 663. He is therefore entitled to be resentenced. Because it is too late for the State to comply with the statutory notice requirement, Mr. Rhoades must be resentenced within the standard range. Id.

2. THE CONVICTION MUST BE REVERSED BASED ON THE INSTRUCTIONAL ERROR

In a footnote in its brief, the State requests this Court stay any decision in Mr. Rhoades's case until after the Supreme Court issues an opinion in State v. Johnson, 172 Wn. App. 112, 133, 297 P.3d 710 (2012), review granted, 178 Wn.2d 1001, 308 P.3d 642 (2013). See SRB at 18 n.5.

This Court should reject the State's request because it was not properly made. RAP 10.4(d) provides, "A party may include in a brief only a motion which, if granted, would preclude hearing the case on the merits." The State's motion to stay consideration of this case, if granted, would not preclude hearing the case on the merits. Instead, it would merely delay consideration of the case on the merits. Therefore, the State is not permitted to raise such a motion in its brief.

In addition, there is no reasonable basis to stay this appeal. Notwithstanding the Supreme Court's grant of review in Johnson, the

case law is sufficient for this Court to render a decision in Mr. Rhoades's case. This Court already determined, in State v. Harris, 164 Wn. App. 377, 387-88, 263 P.3d 1276 (2011), that where a defendant is charged with first degree assault of a child based on allegations that he intentionally assaulted a child and recklessly inflicted great bodily harm, the jury instructions defining recklessness must expressly inform the jury that the State bears the burden to prove the defendant acted with disregard that a substantial risk of that particular kind of harm would result. In addition to Johnson, State v. Peters, 163 Wn. App. 836, 261 P.3d 199 (2011) also supports Mr. Rhoades's jury instruction argument in this case.

Because the case law is more than adequate to decide this appeal, and the State's motion to stay the appeal was not properly made, this Court should deny the request to stay the appeal.

For the reasons set forth in the opening brief, the instructional error was not harmless and the conviction must be reversed.

B. CONCLUSION

For the reasons given above and in the opening brief, the exceptional sentence must be reversed and Mr. Rhoades must be resentenced within the standard range because he did not receive

adequate notice of the aggravating factor relied upon. In addition, the conviction must be reversed due to the prejudicial instructional error.

Respectfully submitted this 27th day of March, 2014.

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 45083-6-II
v.	)	
	)	
JOSHUA RHOADES,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF MARCH, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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