Received
Washington State Supreme Court
SEP 24 2015
Ronald R. Carpenter
Clerk

No. 916021

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON

vs.

JOSHUA DAVID CHARLES RHOADES

PETITION FOR REVIEW

JOSH RHOADES
PRO-SE
1830 Eagle Crest Way
CLALLAM BAY, WA
98326

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Washington Practice SeriesTM. Volume 12. Criminal practice and procedure with forms part IV. Motions Practice Chapter 18 Continuance §1810 Absence of witness or evidence- Competency and materiality of expected evidence.

I. IDENTITY OR PETITIONER

JOSHUA D.C. RHOADES, petitioner, acting Pro-Se in this regard respectfully asks the Washington State Supreme Court to accept review of the court of appeals decisions in this matter.

II. COURT OF APPEALS DECISIONS

Petitioner seeks review of the Court of Appeals unpublished opinion terminating review of only the issues raised in his S.A.G., to wit; Abuse of Discretion & Prosecutorial Misconduct entered on February 3, 2015 and order denying motion for reconsideration entered on April 24, 2015. Case #45083-6-II

III. ISSUES PRESENTED FOR REVIEW

(1) The Court of Appeals erred in ruling that the Superior Court Judge did not abuse his discretion when he denied the Petitioner a continuance when Defense counsel was clearly not ready to proceed to trial.

(2) Court of Appeals erred when it dismissed Petitioners S.A.G. of Prosecutorial Misconduct stating that he was relying on matters outside of the record.

IV. STATEMENT OF THE CASE

Petitioner was charged with Second Degree Assault on 2-1-13. He was taken into custody and released on bail on 3-8-2013. He attended every court appearance and maintained

weekly contact with his Attorney's office and his Bond Agency. On 4-16-2013, at trial confirmation, He was taken into custody and held at the Lewis County Jail without bail throughout his trial which started only SIX days later on 4-24-2013. Petitioner was not allowed to call His Attorney due to the State Barring Him from utilizing the Jail's phone system in any capacity and preventing Him from preparing for trial with his Attorney (Rp. 4-24-13 pg 7-8 & Rp 4-24-13)

Petitioners Defense counsel initially requested a continuance at trial confirmation on 4-16-13 stating that he could not confirm and was not ready for trial. (Rp 4-16-13 pg 1-9), but the request for a continuance was denied. Defense Counsel again requested a continuance on 4-24-13 because Defense Counsel was not ready to proceed to trial, but was forced to go on with the disputed trial date. Petitioners Attorney had not supoena'd anyone or made any moves to prepare for trial such as key witness interviews, investigate or prepare a defense.

Petitioner was convicted following a Jury trial. He timely Appealed (Exhibit 1). His Appeal was affirmed in part and reversed in part (Exhibit 2). Petitioner filed a Motion to Reconsider on Two of His S.A.G. issues (Exhibit 3) and was denied (Exhibit 4). Petitioner now seeks review of them Two issues by this Court.

Petitioner Does Not seek review of the issues remanded for a new sentence.

ISSUE I

Abuse of Discretion, Denial of Continuance

The Court of Appeals erred when it ruled that the trial Court acted properly when it forced Rhoades to go into trial completely unprepared, over Defense objections.

ARGUMENT

Petitioner seeks review because the Court of Appeals decision is in direct conflict with the United States Supreme Court's decision in Unger v. Sarafite, 376 U.S. 575, 84 S.Ct.841 (1964), the 9th Circut case in U.S. v. Flynt 756 F.2d 1352 (1985), along with the Washington State Supreme Court Case in State v. Blackwell, 120 Wash.2d 822, 830, 845 P.2d 1017 (1993), and is in direct conflict with the Constitution of the United States, U.S.C.A. Const. Amend 14, violating his due process rights and violating His 6th Amendment right to Counsel.

Logic tells us that it is time to stop reciting the accepted standard of review for court orders denying defendants a continuance when it's clearly established in open court that they are not ready to proceed to trial. It's time to actually look at the underlying reasons and facts of the case as to why defendants are forced to go into trial completely unprepared, with no witnesses subpoenaed, key material witnesses interviewed or any type of defense built. The trial court unfortunately

abused it's discretion when it denied Rhoades the opportunity to confer, consult and prepare a defense with his Counsel. Rhoades was out on bail and then Defense Counsel was blind sided when the State invented some bold lies to have the Judge revoke his bond and force him to go to trial the very next week when speedy trial was not set to expire for another 2 weeks on 5-18-13 (Rp 4-18-13).

Rhoades' Attorney Christopher Baum, had told two seperate Judges multiple times that he wasn't ready to proceed to trial and requested a continuance two separate times but was denied (Rp 4-18-13 &Rp 4-24-13). Rhoades' trial Attorney, Chris Baum, is a nighly overworked and underpaid public defender who rarely takes a case to trial. When Mr. Baum told the Judge at trial confirmation that he wasn't ready to proceed or confirm, hadn't interviewed anyone and hadn't subpoenaed anyone, the Judge should have listened, Especially with the case load imposed upon these public defender's. The reality is that when an overworked Public Defender tells the Court that he is not ready for trial, the Court should listen.

In Unger v. Sarafite, 376 U.S. 575, 845 S.Ct 941 (1964), the Supreme Court said;

> The matter of a continuance is traditionally within the discretion of the Trial Court Judge and it's not every denial of a request for more time that violates Due Process even if the party fails to offer evidence or is compelled to defend without counsel. Avery v. Alabama, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed 377. Contrarwise a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality"

Continued..
Chandler v. Fretag, 348 U.S. 3, 75 S.Ct 1, 99 L.Ed.4,
"There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate Due Process, The answer must be found in the circumstances presented to the trial Judge at the time the request is denied."
Nilva v. U.S., 352 U.S. 385, 77 S.Ct. 431, 1 L.Ed 2d 415;
Torres v. U.S., 270 F.2d 252 [376 U.S. 590] (CA.9th Cir);
U.S. v. Arlen, 252 F.2d 491.

In State v. Blackwell, 120 Wash.2d 822,830,845 P.2d 1017(1993)

The Court ruled that:

"Discretion is abused if the discretionary decision is not based on tenable grounds or tenable reasons."

In this case No reasonable person would demand that a criminal Defendant proceed into trial completely unprepared over Defense Counsel's objections. Especially when the Defense specified the need for the continuance and why; Securing material witness testimony that he was unable to secure due to the Prosecutor Maliciously withholding witness contact information and violating discovery rules. (Rp 4-10-13 & 4-24-13)

It is completely ridiculous to send someone to defend their liberty unprepared. The justice system is geared to put the defense at every dis-advantage. A poor man with negar resources is forced to fight the whole State of Washington and the entire United States with their unlimited resources. A reasonable person would see this. A reasonable person would listen when the lawyer for the Defendant states seveeal different times that he is not ready to proceed to trial. A reasonable person would give the Defendant a chance to defend his Liberty. A reasonable person would demand that a man be afforded Due process. The Petitioner was clearly not afforded the common

sense right to properly prepare for trial and defend himself against false allegations.

According to Washington Practice Series TM Vol.12. Criminal Practice and Procedure with forms part IV. Motions practice Chapter 18. Continuance §1810 absence of witness or evidence...

"Competency and materiality of expected evidence: a trial will be continued for the purpose of obtaining evidence or the attendance of a witness only if it is established that the evidence or testimony will be competently relevant and material to determine the guilt or innocence of the accused. State v. Musselman, 101 Wash. 330 172 P.346 (1918) A continuance should ordinarily be granted where the application complies with relevancy requirements and the evidence supports a defendants alibi, is corroborative of testimony given by the Defendant where there is no other evidence on the point in question or where there is conflict in the evidence to which the absent witness is expected to testify."

It is undisputed that the witness in question, Ashley Huner is a material witness as admitted by the prosecutor in open court and prior to trial. (Rp 4-24-13 Pg 9)

In State v. Hartwig, 36 Wn.2d 598, 219 P.2d 564 (1950) the court recognized the "Constitutional right of the Appellant to have Counsel and an attorney to represent him. It then became the duty of the Court to allow the appointed attorney a reasonable time within which to consult his client and make adequate preparation for trial. The Constitutional right to have the assistance of counsel Art. 1 § 22, carries with it a reasonable time for consultation and preparation and denial is more than a mere abuse of discretion; It's a denial of Due Process of law in contravention of Art I § 3 of our Constitution." Jones v. Common wealth of Kentucky, 6th Cir, 97 F.2d 335; 14 Am. Jur 886, Criminal law § 172; 16 C.T.S. Constitutional law p.1187, § 591; Annotation 84 ALR 544.

Although it may have been made to appear to the Court that the issues of fact and law were comparatively simple, and hence a continuance was not needed, nevertheless it was the duty of

appointed counsel to make a full and complete investigation of both the facts and law in order to advise his client and prepare adequately and efficiently any defenses he might have to the charges against the defendant. No sufficient time was allowed for such purpose.

The HARTWIG case was reversed and remanded for a new trial as should the case before you today. The argument is comparatively the same. The State's failure to disclose witness contact information (Rp 4-18-13) and violating discovery rules prevented the defendants attorney from making a full and complete investigation of both the facts and the law so he could advise his client and adequately prepare a defense.

> "A matter of granting continuances in criminal cases because of absence of witnesses is largely within the discretion of the trial court and generally it will not be disturbed; however the Supreme Court will reverse where manifest injustice has resulted and a fair trial has been denied"
> State v. Watson, 69 Wash. 645, 419 P.2d 789 (1966)

In the present case, no prior continuances had been given and speedy trial did not expire for another two weeks on 5-18-13 (Rp 4-18-13).

The Defendant has a Constitutional right to present material witnesses to defend himself against the allegations. Especially since the State even agreed that Ms. Huner was a material witness (Rp 4-24-13 pg 9). A clear manifest injustice has resulted and a fair trial denied when Rhoades was forced to go into trial completely unprepared and without the only testimony to defend himself against the allegations.

In a 1976 case out of the Fifth Circuit:

U.S. v. Fessel, 531 F.2d 1275

That Court held that "The denial of a continuance to secure materials necessary to such defense constituted an abuse of discretion warranting reversal."

In that case as is apparent here, the Texas Court said that

"The result of this refusal to grant a continuance was to deprive the accused of the only testimony potentially effective to his defense." Fessel, 531 F.2d at 1280.

That Court went on to say that in the case as is true in this one that "We have no douot Fessel's motion for a continuance was made for the legitimate purpose of securing additional testimony and records necessary for his defense, moreover in light of his counsel's failure to secure such information before trial (despite Fessel's request) or to request additional assistance through a court appointed psychiatrist (In Rhoades' case a Private Investigator); The material took on critical significance. We conclude therefore that the trail (courts) Judges failure to grant the continuance to permit the Defendant time to secure such information denied Fessel a fair trial and constituted an abuse of discretion warranting reversal." Fessel, 531 F.2d 1275.

That case is similar because Rhoades was asking for a continuance that was legitimate. He really needed that time to secure witness testimony. The Prosecutor even agreed that Ms. Runer was a material witness (Rp 4-24-13 Pg 9) and the Judges denial of that requested continuance was a clear abuse of discretion.

As discussed in U.S. v. Flynt 756 F.2d 1352 (1985), the Courts review in accordance with four Salient Factors that Appellate Courts have considered when reviewing denials for continuances.

First consideration: Is the extent of appellants dilligence in his efforts to ready his defense prior to the date set for hearing.

Defendant's attorney Christopher Baum, met with the Prosecutor Joley O'Rourke several time attempting to obtain contact information for the alleged victim and witnesses (Rp 4-10-13) or to set up a meeting in case Mrs.O'Rourke claimed the need of the prosecution at any disposition or hearing. Mr. Baum was continously given the run-around by O'Rourke, He was at least attempting to do his job, while he was being hindered by the State at every turn.

Second consideration; How likely it is that the need for continuance could have been met if the continuance had been granted.

Mr. Baum told the Court in advance of trial that he needed a continuance. Everybody on the witness list list are local people or work for the local Police Department and would be in and around the courthouse on a daily basis. Since this is a very small community it would not have been an inconvenience to anyone and could have been handled with a few phone calls from the secretary.

Third consideration: The extent to which granting the continuance would have inconvenienced the Court and the opposing party, including witnesses.

As discussed in the Second Consideration, this is a small community where everyone involved lived and worked in the general vicinity of the Courthouse. It's not likely any major or even minor problems would have ensued had the court not abused it's discretion and refused Rhoades a continuance.

Fourth consideration: The extent to which the appellant might have suffered harm as a result of the courts denial.

The extent the appellant suffered here is massive, because of the denial, Rhoades was forced to go into trial completely unprepared resulting in a guilty verdict because he couldn't present any of his evidence. That harm resulted in a complete miscarriage of justice.

Although there is no mechanical test for deciding the abuse of discretion, the noteworthy ones described above give some guidance and all point to Rhoades being prejudiced by not being granted a continuance. The Judge could have easily given Rhoades a continuance of a week or two as his speedy trial expiration was not until 5-10-13. (Rp 4-18-13 pg 9).

The State alleged that they had tried to contact material witness Ashley Huner, although they have never provided any proof in that. The petitioner later received the return of service on the subpoena's and all the state did was talk to Huner's grandmother whom had not spoken to Huner in months and did not know where she was living. In reality, Huner was in Okanogan County Jail on unrelated charges and the defendant's attorney could have sent a private investigator to interview

and subpoena her and file a transport order and she would have been there with bells on.

The fact is that we can sit here all day and quote case law saying that the Judge abused his discretion, but it all comes down to a case by case inquiry. We humoly ask that the court do an en banc review and see that Rhoades was hoodwinked and forced to go into trial unprepared and over the objections of trial counsel. (See Exhibit #3 motion to reconsider pgs 5-10).

CONCLUSION OF ISSUE I

The Court of Appeals erred in it's decision. It's decision conflicts with precedent including Ungar v. Sarafite, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed 2d 921 (1964), U.S. v. Flynt, 756 F.2d 1352 (1985), U.S. v. Fessel, 531 F.2d 1275, State v. Blackwell, 120 Wash. 2d 822, 830, 845 P.2d 1017 (1993), and State v. Watson, 69 Wash.2d 545, 419 P.2d 789 (1966).

Rhoades was denied Due Process and the Judge abused his discretion by forcing him to go to trial completely unprepared.

This Court should grant review.

ISSUE II

PROSECUTORIAL MISCONDUCT

The Court of Appeals erred when it dismissed Rhoades' SAG issue of Prosecutorial Misconduct by saying that he was relying on matters outside of the record to prove his Prosecutorial Misconduct claim of the prosecutor willfully and maliciously withholding alleged victim and witness contact information and not making them available for interviews until being compelled to do so by the court at trial confirmation.

FACTS RELEVANT TO ISSUE II

Petitioner was charged with Assault in the Second Degree on 4-1-13, stemming from an incident the night before in Centralia Washington. He was appointed Christopher Baum to represent him on the case. Defense Counsel was given partial discovery and was provided falsified contact information for the alleged victim. (Rp 4-18-13) Defendants counsel tried for months to obtain this information so that he could begin preparing a defense. (Rp 4-16-13). At trial confirmation on 4-16-13, since no credible information was ever given to the Defense Counsel, and a continuance was denied, the court compelled the State to make the alleged victim and other witnesses available before trial was to start. (Rp 4-16-13)

The State complied with this ONLY for the alleged victim and co-defendant turned States witness. After those interviews

Defense Counsel told the Judge that he was not ready to proceed to trial because there is a material witness that he needs to call as a witness, and as far as he can tell wasn't going to be at trial. (Rp 4-24-13). Defense Counsel also stated at trial confirmation on 4-18-13 that he wasn't ready to confirm or proceed to trial as he needed time to prepare and to go over newly provided police reports (in violation of CrR 4.5 & 4.7) and secure material witness interviews (Rp 4-18-13) in violation of Omnibus Order (Exhibit 5)

ARGUMENT

The prosecutor willfully and maliciously violated discovery rule CrR 4.7, Omnibus order CrR 4.5 (Exhibit 5) and continuously gave the defense counsel the run around about contact information in it's possession (Rp 4-18-13) causing prejudice as the defense attorney was never able to prepare his case.

The Trial court judge also abused his discretion in this matter, almost blending it with the other issue here today (abuse of discretion, Denial of Continuance). Although these two issues do intertwine, this barely educated, indigent and wrongfully convicted prisoner will do his best to keep them seperate.

Petitioner was unable to build or present his defense because of the prosecutors extremely late disclosure of contact information, police reports and Co-Defendant's plea agreement (Rp 4-18-13 & 4-24-13) which was in deliberate violation of CrR 4.5 and CrR 4.7, which has a mutual discovery deadline of

Ten (10) days prior to trial. (Exhibit 5). Although the defense attorney was attempting to do his job, the prosecution was doing it's part to hinder him in direct violation of Brady v. Marayland

The elements of a Brady prosecutorial misconduct claim are:

1. Evidence must be favorable to the accused because it is

(1) Exculpatory or because it is impeaching;

(2) Evidence must have been suppressed by the state either willfully or inadvertently; and

(3) Prejudice must have ensued.

BLACKS LAW DICTIONARY 9th Edition page 637 defines Exculpatory Evidence as; "Evidence tending to establish a criminal defendant's innocence" Fed.R.Crim.P.16 "The Prosecution has a duty to disclose exculpatory evidence in it's possesion or control when the evidence may be material to the outcome of the case."

Brady v. Maryland 373 U.S. 83, 10 L.Ed 2d 215, 83 S.Ct 1194 (1963

The language in BRADY SAYS "May be material to the outcome of the case." It's undisputeable that Police Reports and Witness interviews are material to the outcome of the case. Material because once the Counsel is given this, it is how they start to put together a defense, it takes more than a few days to prepare a defense. Defense Counsel did not even have a chance to file and serve subpoena's. The alleged victim's testimony was what the entire proceedings relied upon. When the Prosecutor decided to play games with the defense counsel and not provide legitimate contact information or full discovery which they

were obligated to do so no later than 10 days prior to trial in accordance with the Omnibus Order entered on 2-20-13 (Exhibit 3).

The Evidence was clearly willfully suppressed by the state. Brady says willfully or inadvertently, so however someone chooses to believe, it is undisputable that the prosecutor did not disclose victim/witness contact information and did not disclose all the discovery in time to prepare a defense.(Rp 4-10&2 4-19)

PREJUDICE (1ST)

Due to the prosecutor playing games by not giving the defense correct contact information or full discovery in a timely manner and in accordance with CrR 4.7 and the Court ordered Omnibus order entered on 2-20-13 (Exhibit 3), Defense counsel was unable to prepare a defense. Evidence of this can be found on the record in (Rp 4-18-13 & 4-24-13), when defendant's attorney Chris Baum told two separate judges Judges that he was not ready to proceed to trial. Defense counsel did not employ a Private Investigator or Subpoena a single witness. He told the Judge that he needed more time to secure a material witness, Ashley Gunner (Rp 4-24-13). This was all because of the prosecutors clear misconduct of not disclosing information and violating the Omnibus order.

Under CrR 4.5 and CrR 4.7 Discovery rules (a) prosecutors obligations (1) Except as otherwise provided by protective

orders or matters not subject to disclosure, the prosecutor shall disclose to the defendants attorney the following material and information within the prosecuting attorneys possession or control no later than the Omnibus hearing; (i) The names and addresses of persons whom the prosecutor intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witnesses.

In Rhoades' Omnibus order dated 2-20-13, signed and entered by the prosecutor. The prosecutor expressly agreed to mutual discovery 10 days prior to trial. (Exhibit 5) Rhoades' attorney was never provided with the information promised to him by that court order. It should be noted that there were no protective orders at all.

It was clear and deliberate misconduct on the prosecutors part. It is a well established rule in CrR 4.7 and a Court order that the State WILLFULLY Violated. Rhoades' attorney should have put up more of a fight, but instead just kept asking for a continuance. (Rp 1-17 & 1-24 2013)

The Appellate Court's decision conflicts with precedent in State v. Cannon, 130 Wash.2d 313, 922 P.2d 1293 (1996). That case says "The purpose of discovery rules in criminal prosecution is to protect a defendant from being prejudiced by suprise, misconduct or arbitrary action by the government."

The Court's decision also conflicts with:

State v. Boheme, 71 Wash.2d 621, 430 P.2d (1967) certiorari denied 88 S.Ct. 1259, 390 U.S. 1013, 20 L.Ed 2d 164 (1968).

"Rules of discovery in criminal proceedings are designed to enhance the search for the truth, with a trial Judge regulating the two way exchange of information in a manner which will ensure a fair trial to all concerned neither affording to one party unfair advantage nor placing the other at a disadvantage."

The trial Court Judge broke that rule when he did not truly regulate the two way exchange of information so that Rhoades would be afforded a fair trial. This is plain error. Prosecutorial Misconduct is a major problem in todays justice system and Rhoades was prejudiced by it.

The Appellate Court also failed to consider that the Constitution Guarantees a defendant the opportunity to present a Defense, which includes an opportunity to interview and subpoena witnesses as well as prepare a defense. By the prosecutor not making the witness and police reports available she committed misconduct and denied the defendant the right to present a defense as described in:

Bernandez v. Holland, 750 F.3d 843 (2014) and Crane v. Kentucky, 476 U.S. 683, 690-91, 106 S.Ct. 2142, 90 L.Ed 2d 636 (1986).

Lets get back to the Brady elements of prosecutorial misconduct for a minute here. We've established that witness contact information is favorable to the accused because it is exculpatory and possibly impeaching. The Second prong is that the evidence must have been suppressed either willfully or

inadvertently. The court records clearly show in the trial transcripts at the trial confirmation hearing held on 4-18-13 that the defense was not given the court ordered information, either willfully or inadvertently, whichever way the Court choose to view it.

The third prong is prejudice must have ensued. Prejudice is clear in this because Rhoades did not get the contact information and was not able to prepare his defense and was not afforded the necessary time to subpoena witnesses or do anything at all to prepare for trial. (Rp 4-24-13) Prejudice is clear as he was wrongfully convicted because he did not have the opportunity to prepare a meaningful defense.

CONCLUSION OF ISSUE II

Review should be granted to resolve this issue, Review is also warranted because it involves significant Constitutional questions and presents an issue of public importance. Rap 13.4 (b)(3)(4).

I declare under the penalty of perjury under the laws of the State of Washington that everything in this petition is true and correct.

9-15-2015

Josh Rhoades Pro-Se

EXHIBIT #1

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 OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Mr. Rhoades's constitutional right to notice was violated when the jury was instructed on an aggravating factor that was different from the aggravator alleged in the information.

2. The erroneous jury instruction defining the element of "recklessness" relieved the State of its constitutional burden to prove all of the elements of the crime.

B. STATEMENT OF THE CASE

On January 31, 2013, at around 11 p.m., Joshua Rhoades was riding in a green Ford Taurus in Centralia with his friends Michael Daily, Aurora Contreras, and Ashley Huner. RP 226. They drove by a group of three young men—Dustin McLean, Caleb Capo, and Blake Markva—who stared into their car. RP 275. Mr. Rhoades yelled something at the men, and they yelled back. RP 275. There was an exchange of profanity. RP 275. Mr. Rhoades then asked Ms. Contreras, who was driving, to circle back around and stop the car. RP 227. When she did, he got out and walked toward the three men. RP 228. Ms. Huner and Mr. Daily followed him. RP 228, 232.

According to Mr. McLean, as Mr. Rhoades walked toward him, he asked, "Do you know who I am?" RP 122. He then identified

himself as "Spooker" and said he was an "LVL."[1] RP 122. He asked Mr. McLean if he was a "Norteno."[2] RP 123. Mr. McLean said he was not. RP 123. The two men did not know each other. RP 124.

Mr. McLean said that as Mr. Rhoades came toward him, he saw a shiny knife in his hand. RP 125. It was a pocket knife but the blade was closed. RP 125. Mr. Rhoades held the knife in his closed fist and hit Mr. McLean in the face and side about five or six times. RP 125, 145, 188. Mr. McLean fell to the ground and Mr. Rhoades kicked him in the side. RP 126. Ms. Huner and Mr. Daily also hit and kicked Mr. McLean. RP 127, 241. Mr. Capo then got involved and kicked Mr. Rhoades and hit Mr. Daily and chased him down the road. RP 129, 185. Mr. Rhoades, Mr. Daily and Ms. Huner got back into their car and drove away. RP 185, 235. Mr. McLean got up off of the ground and he and his friends began walking back toward home. RP 150.

The entire altercation was brief, lasting only about 30 or 40 seconds. RP 138, 191, 245. The knife was never opened during the fight. RP 144.

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[1] "LVL" stands for "Little Valley Lakotes," which is an active street gang in Lewis County. RP 337; CP 20. It is a subdivision of the larger "Sureno" gang. RP 338.

[2] The "Nortenos" are a rival gang of the "Surenos." RP 339.

An unidentified bystander called 911 and police officers were soon dispatched to the scene. RP 285, 318. Mr. McLean told an officer that he did not want medical attention but she insisted that he go to the hospital. RP 150, 293. He was at the hospital for about an hour and a half and was released in good condition, with no specific follow-up instructions and no prescriptions for medicine. RP 362-63.

Police officers soon stopped the Ford Taurus. RP 235, 318. A knife was recovered during the stop but no weapon was found on Mr. Rhoades. RP 320-21, 327. The knife was taken into evidence and the blade measured to be three and one-quarter inches long. RP 314. Mr. McLean said it was the knife that Mr. Rhoades was holding in his hand during the fight. RP 379.

Mr. Rhoades was charged with one count of second degree assault under two alternatives, RCW 9A.36.021(1)(a) and/or (c). CP 1. The information alleged that Mr. Rhoades intentionally assaulted Mr. McLean and recklessly inflicted substantial bodily harm and, in the alternative, that he intentionally assaulted Mr. McLean with a deadly weapon. CP 1. The information also alleged the following statutory aggravating factor: 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.

At the jury trial, Mr. McLean testified that he lost consciousness briefly during the altercation and felt "fuzzy" and had a headache for a little while afterward. RP 130-32. He also had a scrape on his cheek, bruises on his head, and "road rash" on his back. RP 130-31. His whole body felt sore. RP 130-31. But he did not need stitches and had no scar. RP 131.

The physician who treated Mr. McLean at the hospital testified that he had a minor abrasion by his eye but no serious injury. RP 365-71. A CT scan of his head showed no internal bleeding or fracture. RP 357. Mr. McLean denied losing consciousness. RP 367. The physician could not say whether he suffered a concussion. RP 377.

The jury was instructed, by special verdict, on an aggravating factor different from the one alleged in the information.[3] The jury was instructed to find "[w]hether the 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, its

[3] The jury instructions are set forth more fully in the relevant argument sections below.

reputation, influence, or membership." CP 50. The information was never amended to include this aggravating factor.

The jury was instructed it need not be unanimous as to which of the two charged alternative means of committing second degree assault were proved, as long as each juror found that either alternative was proved beyond a reasonable doubt. CP 47. The jury found Mr. Rhoades guilty of second degree assault as charged. CP 61. The jury also answered "yes" to the question on the special verdict form regarding the aggravating factor. CP 64.

Relying on the jury's special verdict finding, the court imposed an exceptional sentence above the standard range. CP 72; RP 471.

C. ARGUMENT

1. **Mr. Rhoades's constitutional right to notice was violated when the jury was instructed on an aggravating factor different from the one alleged in the information**

a. Mr. Rhoades had a constitutional right to pretrial notice of the aggravating factor

It is a fundamental principle of criminal procedure, embodied in the state and federal constitutions, that a defendant in a criminal case must receive adequate notice of the nature and cause of the accusation. State v. Siers, 174 Wn.2d 269, 277, 274 P.3d 358 (2012); Const. art. I,

§ 22 ("[i]n criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him"); U.S. Const. amend. VI ("[i]n all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation").

In Washington, the well-established means of ensuring adequate notice is through application of the "essential elements rule." The essential elements rule requires that "[a]ll essential elements of a crime, statutory or otherwise, . . . be included in a charging document." State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). "The primary goal of the 'essential elements' rule is to give notice to an accused of the nature of the crime that he or she must be prepared to defend against." Id. at 101.

Statutory aggravating factors that are necessary to impose an exceptional sentence above the standard range are "the functional equivalent of an element of a greater offense." State v. Gordon, 172 Wn.2d 671, 678, 260 P.3d 884 (2011) (internal quotation marks and citation omitted). Like an essential element, a statutory aggravator, "'other than the fact of a prior conviction, . . . must be submitted to a jury, and proved beyond a reasonable doubt.'" Id. (quoting Apprendi v.

New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 435 (2000)).

Just as a defendant must be given adequate notice of all of the essential elements of the crime, he must also be given notice, prior to trial, of aggravating factors that the State intends to rely upon. Siers, 174 Wn.2d at 277. "The 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." Id. at 278. Because aggravating circumstances are not *strictly* elements of a crime, they need not be set forth in the charging document pursuant to article I, section 22. Id. But an accused must nonetheless receive pretrial notice of aggravating circumstances as a matter of constitutional due process.[4] Id. Like the essential elements rule, the purpose of the right to pretrial notice of statutory aggravators is "to allow the defendant to mount an adequate defense against an aggravating circumstance." Id. at 281.

[4] 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.").

b. Mr. Rhoades could not be tried for an aggravator that was not charged

A necessary corollary to the constitutional requirement that an accused receive advance notice of the charge is the fundamental requirement that the accused be tried only for the offense charged. "It is fundamental that under our state constitution an accused person must be informed of the criminal charge he or she is to meet at trial, and cannot be tried for an offense not charged." State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988). This rule prohibiting trial of the defendant for offenses not charged is subject to only two narrow exceptions. A defendant may be convicted of a lesser included offense of the offense charged and may also be convicted of an offense which is a crime of an inferior degree to the offense charged. Id.

In Irizarry, the defendant was charged with aggravated first degree murder. After the conclusion of the State's case in chief, the prosecutor asked for a jury instruction on felony murder as an included offense. The jury convicted the defendant of the "included offense" of felony murder. The Washington Supreme Court reversed the conviction, holding felony murder was not a lesser included offense of aggravated first degree murder because commission of a felony, which was a necessary element of felony murder, was not also an element of

aggravated first degree murder. Id. at 594. The court held it was prejudicial error, and a violation of the defendant's constitutional right to notice, to instruct the jury and obtain a conviction on an uncharged offense that was not a lesser offense of the crime charged. Id. at 596.

Similarly, in State v. Vangerpen, 125 Wn.2d 782, 791, 888 P.2d 1177 (1995), the State intended to charge attempted first degree murder but inadvertently omitted the essential element of premeditation and therefore charged only the crime of attempted second degree murder. Nonetheless, the trial court instructed the jury on the elements of attempted first degree murder and the jury found the defendant guilty of that crime.[5] Id. at 786. Again the supreme court reversed. Id. at 791-92. As in Irizarry, instructing the jury on the uncharged crime, which was not a lesser crime of the offense charged, violated the defendant's constitutional right to advance notice of the charge. Id.

Thus, Irizarry, Vangerpen, and subsequent cases, establish the fundamental rule that the constitutional right to advance notice of the

[5] The State attempted to amend the information to include the crime of attempted first degree murder but did not do so until after it had rested its case. Vangerpen, 125 Wn.2d at 785-86. The late amendment did not cure the constitutional defect because it violated the well-established rule that "[t]he State may not amend a criminal charging document to charge a different crime after the State has rested its case in chief unless the amended charge is a lesser degree of the same charge or a lesser included offense." Id. at 787.

charge carries with it the right to have the jury instructed only on the elements of the crime that was actually charged, or any lesser-included offense. These principles should apply equally to statutory aggravating factors, which are the "the functional equivalent of an element of a greater offense." Gordon, 172 Wn.2d at 678. As with essential elements, a defendant has a constitutional right to advance notice of any aggravating factor the State intends to rely upon. Siers, 174 Wn.2d at 277-78. Also as with essential elements, the defendant has a constitutional right to jury instructions that "'properly inform the jury'" of any aggravators that are charged. Gordon, 172 Wn.2d at 677, 679-80 (citation omitted). Together, these principles lead to the conclusion that a constitutional violation occurs when the jury is instructed on an aggravator that is different from the aggravator actually charged.

When a defendant is convicted of a crime not charged, a manifest constitutional error occurs that may be challenged for the first time on appeal. State v. Nguyen, 165 Wn.2d 428, 434, 197 P.3d 673 (2008); RAP 2.5(a)(3). Thus, Mr. Rhoades may raise his challenge to the jury's verdict on the aggravating factor for the first time on appeal.

c. Mr. Rhoades's constitutional right to notice was violated

In the information, the State charged Mr. Rhoades with "committ[ing] 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)."[6] CP 2. But the jury was instructed on a different statutory aggravator. The special verdict form instructed the jury to find "[w]hether the 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, its reputation, influence, or membership." CP 50. Thus, the jury was instructed on the aggravator set forth in RCW 9.94A.535(3)(aa),[7] not the charged aggravator, which is set forth in RCW 9.94A.535(3)(s).

[6] The charging language copied the statute verbatim. The statute provides that an exceptional sentence may be imposed if the jury finds "[t]he defendant 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." RCW 9.94A.535(3)(s).

[7] RCW 9.94A.535(3)(aa) provides an exceptional sentence may be imposed if the jury finds "[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."

The information was never amended to include the new aggravator. Thus, because the jury was instructed on an aggravator different from the one charged, Mr. Rhoades's constitutional right to notice was violated. Irizarry, 111 Wn.2d at 596; Vangerpen, 125 Wn.2d at 791-92.

d. The exceptional sentence must be reversed without prejudice to the State's ability to refile the charge

The well-established remedy that applies when the jury is instructed on an element not charged is reversal and dismissal of the charge without prejudice to the State's ability to refile the charge. Vangerpen, 125 Wn.2d at 792-93. Thus, the jury's finding must be reversed and the charge dismissed without prejudice to the State's ability to refile the charge.

2. **The erroneous instruction defining "recklessness" relieved the State of its burden to prove the elements of the crime**

a. The jury instructions misstated an element of the crime

In a criminal case, constitutional due process requires the State to prove the elements of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. It is reversible error to

instruct the jury in a manner that would relieve the State of its burden of proof. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

A defendant may raise a claim of error that the jury instructions relieved the State of its burden of proof for the first time on appeal. State v. Peters, 163 Wn. App. 836, 847, 261 P.3d 199 (2011); RAP 2.5(a)(3).

In this case, Mr. Rhoades was charged with second degree assault under RCW 9A.36.021(1)(a). CP 1. The State was required to prove beyond a reasonable doubt that he "[i]ntentionally assault[ed] another and thereby recklessly inflict[ed] substantial bodily harm." RCW 9A.36.021(1)(a).

Two jury instructions are at issue. In instruction 11, the "to convict" instruction, the jury was instructed:

> To convict the defendant of the crime of Assault in the Second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about January 31, 2013, the defendant:
>
> (a) intentionally assaulted Dustin Patrick McLean and thereby recklessly inflicted substantial bodily harm; or
>
> (b) intentionally assaulted Dustin Patrick McLean with a deadly weapon; and
>
> (2) That this act occurred in the State of Washington.
>
> If you find from the evidence that element (2) and either alternative element (1)(a) or (1)(b) have been

> proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (1)(a) or (1)(b) has been proved beyond a reasonable doubt, as long as each juror finds that either (1)(a) or (1)(b) has been proved beyond a reasonable doubt.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to either element (1) or (2), then it will be your duty to return a verdict of not guilty.

CP 47.

In instruction 8, the jury was instructed on the definition of "recklessness":

> A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a ***wrongful act*** may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.
>
> When recklessness as to a particular result is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly as to that result.

CP 44 (emphasis added).

Together, these jury instructions relieved the State of its burden to prove the element of "recklessness" because they told the jury it need find only that Mr. Rhoades was aware of and disregarded a substantial risk that a "wrongful act" could occur, rather than informing the jury it must find he was aware of and disregarded a substantial risk

that "substantial bodily harm" could occur. State v. Johnson, 172 Wn. App. 112, 133, 297 P.3d 710 (2012), review granted, 178 Wn.2d 1001, 308 P.3d 642 (2013); State v. Harris, 164 Wn. App. 377, 387-88, 263 P.3d 1276 (2011); Peters, 163 Wn. App. at 849-50.

In State v. Peters, Peters was convicted of first degree manslaughter, which required the State to prove beyond a reasonable doubt that Peters "***recklessly cause[d] the death*** of another person." Peters, 163 Wn. App. at 847. Division One concluded that the jury instructions relieved the State of its burden to prove the element of "recklessness." Id. at 849-50. The criminal code defines "recklessness" as

> A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

RCW 9A.08.010(1)(c).

The Peters Court held the recklessness element required the State to prove beyond a reasonable doubt "that Peters knew of and disregarded a substantial risk that ***death*** may occur." Peters, 163 Wn. App. at 849-50 (emphasis added). But the definitional instruction stated that the State need prove only that Peters "knew of and

disregarded 'a substantial risk that a ***wrongful act*** may occur,' rather than 'a substantial risk that ***death*** may occur.'" Id. at 849-50 (emphasis added). The jury instructions relieved the State of its burden of proof because they allowed the jury to convict Peters only upon a finding that he knew of and disregarded a substantial risk that a "wrongful act" may occur. Id.

Peters relied upon the Washington Supreme Court's decision in State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005). Peters, 163 Wn. App. at 848-49. In Gamble, the court addressed the recklessness element of manslaughter in the first degree in the context of analyzing whether manslaughter in the first degree is a lesser-included offense of felony murder in the second degree based on the predicate offense of second degree assault. Gamble, 154 Wn.2d at 462. The court held that manslaughter is not a lesser-included offense of felony murder. Id. at 468. The court explained:

> [T]o prove manslaughter the State must show Gamble "[knew] of and disregard[ed] a substantial risk that a [*homicide*] may occur." On the contrary, to achieve a felony murder conviction here, the State was required to prove only that Gamble acted intentionally and "disregard[ed] a substantial risk that [*substantial bodily harm*] may occur." Significantly, the risk contemplated per the assault statute is of "substantial bodily harm," not a homicide as required by the manslaughter statute. As such, first degree manslaughter requires proof of an

> element that does not exist in the second degree felony murder charge the State brought against Gamble. It is thus unamenable to a lesser included offense instruction on the offense of manslaughter.

Id. at 467-68 (citations and footnotes omitted). In distinguishing the elements of the two crimes and the State's burden of proof, the court held that the "wrongful act" for purposes of manslaughter in the first degree requires proof beyond a reasonable doubt that the defendant knew of and disregarded a substantial risk that death may occur. Id.

In State v. Harris, 164 Wn. App. at 387, Division Two agreed with Division One's analysis in Peters and extended it to the charge of first degree assault of a child, which required the State to prove the defendant "[r]ecklessly inflict[ed] great bodily harm." Id. at 383; RCW 9A.36.120(1)(b)(i). The definition for "recklessness" in the jury instruction was the same as the instruction in Peters.[8] Harris, 164 Wn. App. at 384. The Harris Court concluded that the definition for "recklessness" misstated the law because it stated "wrongful act" instead of "great bodily harm." Id. at 387-88.

[8] The instruction defining "recklessness" in Harris stated "A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that *a wrongful act* may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation." Harris, 164 Wn. App. at 384.

Finally, in State v. Johnson, 172 Wn. App. at 131-33, Division One extended its holding in Peters to the crime of second degree assault. As in this case, the charge required the State to prove the defendant "intentionally assault[ed] another and recklessly inflict[ed] substantial bodily harm." Id. at 118. Also like this case, the jury instructions defined recklessness as

> A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that ***a wrongful act*** may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.
>
> When recklessness as to a particular fact or result is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly as to that fact or result.

Id. at 130 (emphasis in original). Division One held the jury instructions relieved the State of its burden to prove the element of recklessness because "the definition of 'reckless' included the same general 'wrongful act' language as in Peters and Harris. The definition should have used the more specific statutory language of 'substantial bodily harm,' not 'wrongful act.'" Id. at 133.

Peters, Harris, and Johnson compel the conclusion that the jury instructions relieved the State of its burden to prove the element of recklessness in this case. The definition of "recklessness" in the

instructions included the same "wrongful act" language as in those three cases. CP 44. The definition should have used the more specific statutory language of "substantial bodily harm" rather than "wrongful act." Johnson, 172 Wn. App. at 133.

b. The conviction must be reversed

A jury instruction that misstates an element of the crime is harmless only if the element is supported by uncontroverted evidence. Peters, 163 Wn. App. at 850; State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). The State bears the burden to show the error is harmless beyond a reasonable doubt. Peters, 163 Wn. App. at 850. The question is whether the Court can conclude beyond a reasonable doubt that the jury verdict would have been the same without the error. Peters, 163 Wn. App. at 850; Brown, 147 Wn.2d at 341.

The question in this case is whether there was uncontroverted evidence that Mr. Rhoades knew of and disregarded a substantial risk that "substantial bodily harm" could occur. See Peters, 163 Wn. App. at 850. "Substantial bodily harm" means "bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function or any bodily part or organ, or that causes a fracture of any bodily part." CP 46; RCW

9A.04.110(4)(b). The term "substantial bodily harm" signifies "a degree of harm that is considerable and necessarily requires a showing greater than an injury merely having some existence." State v. McKague, 172 Wn.2d 802, 806, 262 P.3d 1225 (2011).

The uncontroverted evidence does not establish that Mr. Rhoades knew of and disregarded a substantial risk that "substantial bodily harm" could occur. The witnesses testified that the entire altercation was very brief, lasting only about 30 to 40 seconds. RP 138, 191, 245. Witnesses said Mr. Rhoades hit Mr. McLean in the face and side with his fist about five or six times. RP 125, 145, 188. Although Mr. Rhoades allegedly held a pocket knife in his hand during the fight, the knife was never opened. RP 144. This evidence does not establish beyond a reasonable doubt that Mr. Rhoades knew of and disregarded a substantial risk that his actions could cause "substantial bodily harm."

Indeed, the evidence that Mr. McLean actually suffered "substantial bodily harm" was highly equivocal and far from uncontroverted. The physician who treated him at the hospital soon after the incident testified he had a small abrasion on his face but no sign of serious injury. RP 354, 371. Although Mr. McLean testified that he briefly lost consciousness during the fight, he denied loss of

consciousness to the treating physician. RP 130-32, 367. A CT scan showed Mr. McLean had no internal bleeding, fracture, or other physical manifestation of a head injury. RP 357-58.

In sum, the evidence is not uncontroverted that Mr. Rhoades knew of and disregarded a substantial risk that substantial bodily harm could occur. Therefore, the jury instructions relieved the State of its burden to prove the element of recklessness and were not harmless. The conviction must be reversed. Harris, 164 Wn. App. at 387-88; Peters, 163 Wn. App. at 850-51.

D. CONCLUSION

Mr. Rhoades's constitutional right to due process was violated when the jury was instructed on an aggravating factor not charged in the information. The jury's finding on the aggravator must be reversed and the charge dismissed without prejudice. In addition, the jury instructions relieved the State of its constitutional burden to prove the elements of the crime, requiring reversal of the conviction.

Respectfully submitted this 25th day of November, 2013.

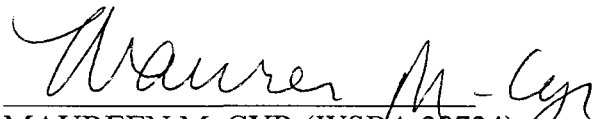

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EXHIBIT #2

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STATE OF WASHINGTON
BY
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOSHUA DAVID CHARLES RHOADES, Appellant.	No. 45083-6-II UNPUBLISHED OPINION

BJORGEN, A.C.J. — Joshua David Charles Rhoades appeals from his conviction and exceptional sentence, following a jury trial, for second degree assault. Rhoades argues that (1) the trial court's jury instruction on an aggravating circumstance, different from that alleged in the information, violated his due process right to notice of the nature and cause of the accusation, and (2) the court's recklessness instruction relieved the State of its burden on an essential element of the crime. Rhoades also submits a statement of additional grounds for review under RAP 10.10, arguing that the trial court erred by (3) denying him a continuance, (4) improperly admitting gang evidence, and (5) allowing certain venire members to serve on the jury. Rhoades also argues in his statement of additional grounds that (6) he received ineffective assistance of counsel and (7) prosecutorial misconduct deprived him of a fair trial.

Because Rhoades did not receive constitutionally adequate notice of the specific aggravating circumstance on which the State sought an exceptional sentence, we reverse the exceptional sentence and remand for resentencing within the standard range. We otherwise affirm.

FACTS AND PROCEDURAL HISTORY

The State charged Rhoades with second degree assault, based on conduct against Dustin McLean, under two alternative prongs of the assault statute: that Rhoades intentionally assaulted McLean and recklessly inflicted substantial bodily harm, and/or that he assaulted McLean with a deadly weapon. As an aggravating circumstance, the State alleged in the information that 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)." Clerk's Papers (CP) at 2.

I. PRETRIAL PROCEEDINGS

Prior to trial, the State moved to admit "evidence relating to [Rhoades's] gang affiliation . . . as proof of motive" under ER 404(b). CP at 9-13. The trial court granted the State's motion in part, ruling evidence of Rhoades's gang affiliation admissible, as well as "[e]xpert testimony regarding gang culture and background relating to LVL,"[1] but excluding "[e]vidence specifically related to defendant's prior bad acts in association with his gang affiliation." CP at 20-21; Verbatim Report of Proceedings (VRP) (Apr. 3, 2013) at 6-10.

At a hearing one week before trial began, Rhoades declined to confirm the trial date and requested a continuance on the grounds that he had not had the opportunity to interview McLean, had just learned that one of Rhoades's associates would testify against him as part of a plea deal, and had just received additional police reports concerning the case. The court denied the request to postpone the trial, but ordered the State to make McLean available for an interview.

[1] LVL are the initials for "Lil Valley Lokotes," the gang to which the State alleged Rhoades belonged.

Rhoades again moved for a continuance immediately before voir dire, stating that, in light of his interview with McLean, Rhoades wished to obtain the testimony of an additional witness, Ashley Huner.[2] The court denied the motion on the ground that delay would prejudice the State because some of its witnesses were in protective custody.

During voir dire, one member of the venire acknowledged knowing the investigating officer "well enough to have an opinion at least about her truthfulness." 1 VRP at 39. When asked if he or she could "weigh [the officer's] testimony just as you could weigh anybody else's testimony," the venire member replied, "I don't really know." 1 VRP at 39. When the trial court asked whether the member "would . . try to do that," the venire member replied, "Yeah." 1 VRP at 39. Another member of the venire acknowledged having had a personal experience "as a victim, witness, or as a defendant with a similar or related type of case," but answered "no" when asked whether that experience would affect his or her consideration of Rhoades's case. 1 VRP at 40. Both of these individuals ultimately served as jurors.[3]

II. Evidence at Trial

At trial, the State presented evidence that Rhoades assaulted McLean, that Rhoades identified himself as "Spooker," an "LVL," and had asked if McLean were affiliated with a rival gang, which McLean denied. 1 VRP at 122-23; 2 VRP at 337-38. Holding a folding knife in his fist with the blade closed, Rhoades then punched and kicked McLean several times, knocking him to the ground. One of McLean's friends and two people accompanying Rhoades joined the fight, which lasted less than a minute.

[2] The State had included Huner, a participant in the fight giving rise to the charge against Rhoades, on its witness list, but had been unable to locate her.

[3] The record does not disclose whether Rhoades challenged either of these jurors for cause.

The police soon stopped the car carrying Rhoades and his friends and arrested Rhoades. Although Rhoades had no weapons, an officer found a folding pocket knife with a blade three and one-quarter inches long[4] on one of the other people in the car. McLean identified it as the same knife Rhoades held in his fist during the assault.

The defense called no witnesses. After offering one photo showing an injury Rhoades allegedly sustained during the fight, which the trial court admitted by stipulation, the defense rested.

III. Jury Instructions and Closing Argument

The court instructed the jurors that if they found Rhoades guilty of second degree assault, they must also decide whether he

> 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, its reputation, influence, or membership.

CP at 50. The jury received a corresponding special verdict form.

Also in its instructions to the jury, the trial court defined "recklessness" as follows:

> A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

CP at 44. The court also submitted a special verdict form asking whether Rhoades was armed with a deadly weapon during the commission of the offense. Rhoades did not object to any of the instructions given or to the special verdict forms used.

Defense counsel argued in closing that the jury should acquit Rhoades of second degree assault because the State had proved neither that Rhoades had been armed with a deadly weapon

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[4] For purposes of the deadly weapon enhancement, a deadly weapon includes any knife having a blade longer than three inches. RCW 9.94A.825.

during the attack nor that McLean suffered substantial bodily harm. Defense counsel also argued that the jury should not find the aggravating circumstance present because the State had failed to prove that Rhoades believed the crime would elevate his status in LVL.

IV. VERDICT AND SENTENCE

The jury returned a guilty verdict, and answered "yes" to both special verdict form questions. CP at 61-64. The court entered judgment on the verdict and imposed an exceptional sentence of 110 months' confinement and 10 months' community custody. Rhoades timely appeals.

ANALYSIS

I. THE LACK OF ADEQUATE NOTICE OF THE AGGRAVATING CIRCUMSTANCE ON WHICH THE JURY WAS INSTRUCTED

Rhoades claims that the trial court violated his right to adequate notice of the nature and cause of the accusation against him. This is so, Rhoades contends, because (1) the court submitted to the jury an aggravating circumstance instruction, that Rhoades committed the crime with the intent to benefit a criminal street gang[5] ("gang aggravator"), which differed from the circumstance alleged in the information, that Rhoades committed the crime to obtain or maintain membership or advance his position in an identifiable group;[6] and (2) the State did not notify him before trial that it intended to seek an exceptional sentence based on the gang aggravator. Rhoades maintains that this amounted to a manifest constitutional error that he may raise for the first time on appeal under RAP 2.5(a)(3). Rhoades is correct in these contentions.

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[5] RCW 9.94A.535(3)(aa).

[6] RCW 9.94A.535(3)(s).

A. Manifest Error Affecting a Constitutional Right

RAP 2.5 allows appellate courts to refuse to address claims of error not raised in the trial court, with the exception that RAP 2.5(a)(3) allows a party to raise a "manifest error affecting a constitutional right" for the first time on appeal. In applying RAP 2.5(a)(3), we must first decide whether, assuming the truth of the appellant's allegations, the error "implicates a constitutional interest as compared to another form of trial error," and if so, whether the error is "manifest." *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

The threshold test under RAP 2.5(a)(3) often overlaps with the analysis of the merits of the claimed error. *See State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001) (stating that in determining whether an error is manifest, the appellate court "previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed"). A "manifest" error results in "actual prejudice," namely "practical and identifiable consequences" at trial. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011) (internal quotation marks omitted) (quoting *O'Hara*, 167 Wn.2d at 99).

In *O'Hara*, however, our Supreme Court clarified that "to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review." 167 Wn.2d at 99-100. "Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error." *O'Hara*, 167 Wn.2d at 100.

The Washington and federal constitutions entitle criminal defendants to adequate notice of the nature and cause of the accusation, so that they may prepare a defense. *State v. Siers*, 174 Wn.2d 269, 277, 274 P.3d 358 (2012). To comport with these requirements, the defendant must

receive notice that the State seeks to prove an aggravating circumstance prior to the proceeding in which the State seeks to establish that circumstance. *Siers*, 174 Wn.2d at 277. The Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, specifies that the State may give notice that it intends to seek a sentence above the standard range "[a]t any time prior to trial or entry of the guilty plea," and that "[t]he notice shall state aggravating circumstances upon which the requested sentence will be based." RCW 9.94A.537(1). As discussed, the record here establishes that at trial the State relied on an aggravating circumstance different from that alleged in the information. The alleged error plainly "affect[s] a constitutional right" within the meaning of RAP 2.5(a)(3).

RCW 9.94A.537(1) required the State to notify Rhoades before trial that it would seek an exceptional sentence based on the gang aggravator. The *Siers* decision clearly articulated this as a requirement prior to Rhoades's trial. 174 Wn.2d at 277. The record here contains no evidence that the State gave Rhoades notice before trial of its intent to seek an exceptional sentence based on the RCW 9.94A.535(3)(aa) gang aggravator. Additionally, the record contains no evidence that Rhoades waived his right to receive such notice, and we may not presume waiver of important constitutional rights from a silent record. *See State v. Rinier*, 93 Wn.2d 309, 315, 609 P.2d 1358 (1980); *State v. Williams*, 87 Wn.2d 916, 921, 557 P.2d 1311 (1976); *State v. McFarland*, 84 Wn.2d 391, 401, 526 P.2d 361 (1974) (Stafford, J. dissenting).

Thus, the record makes the alleged error sufficiently obvious to warrant appellate review since it establishes that, "given what the trial court knew at that time, the court could have corrected the error." *O'Hara*, 167 Wn.2d at 100. The error Rhoades alleges affects a constitutional right and is "manifest" within the meaning of RAP 2.5(a)(3). We turn to the merits of the claim.

B. The Right to Adequate Notice of the Charges

We review de novo a claim that a criminal defendant received inadequate notice of the nature and cause of the accusation. *Siers*, 174 Wn.2d at 273-74. It is well established that all essential elements of a crime must be included in a charging document "'to give notice to an accused of the nature of the crime that he or she must be prepared to defend against.'" *State v. Zillyette*, 178 Wn.2d 153, 158-59, 307 P.3d 712 (2013) (quoting *State v. Kjorsvik*, 117 Wn.2d 93, 101, 812 P.2d 86 (1991)). Our Supreme Court has held, though, that "an aggravating factor is not the functional equivalent of an essential element and need not be charged in the information." *Siers*, 174 Wn.2d at 282.

The *Siers* court instead held that "so long as a defendant receives constitutionally adequate notice . . . , 'the absence of an allegation of aggravating circumstances in the information [does] not violate [the defendant's] rights under'" the federal and Washington constitutions. *Siers*, 174 Wn.2d at 276-77 (quoting *State v. Powell*, 167 Wn.2d 672, 687, 223 P.3d 493 (2009) (plurality opinion)). To receive adequate notice of an aggravating circumstance, the court held that the defendant need only "receive notice prior to the proceeding in which the State seeks to prove those circumstances to a jury." *Siers*, 174 Wn.2d at 277 (citing *State v. Schaffer*, 120 Wn.2d 616, 620, 845 P.2d 281 (1993)). Because "Siers's attorney acknowledged that the State had provided notice to Siers prior to trial that it intended to prove an aggravator that could result in an exceptional sentence," the court reinstated Siers's conviction. *Siers*, 174 Wn.2d at 277, 282-83.

Thus, under *Siers*, 174 Wn.2d at 276-77, we must reject Rhoades's argument that the trial court erred in submitting the gang aggravator to the jury because the State did not include it in the information. The facts in *Siers* make clear, however, that the State had notified Siers prior to

trial of its intent to rely on the same aggravating circumstance that the trial court actually submitted to the jury. *Siers*, 174 Wn.2d at 272-73 & n.1. The question remains, then, whether the State's inclusion in the information of a circumstance other than the gang aggravator, combined with its pretrial motion to introduce evidence of Rhoades's gang affiliation for the purpose of establishing motive, gave Rhoades constitutionally sufficient notice that the State would seek an exceptional sentence based on the gang aggravator.

The notice requirement serves to ensure that criminal defendants have the opportunity to prepare an adequate defense against the State's allegation of an aggravating circumstance. *Siers*, 174 Wn.2d at 277. Although the two aggravators at issue share certain similarities, the manner in which one might defend against them could differ substantially. Of greatest significance here, the aggravator alleged in the information focuses on benefit to the defendant: whether in committing the crime the defendant aimed 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." RCW 9.94A.535(3)(s). The gang aggravator, in contrast, focuses on benefit to the gang: whether the defendant intended "to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang . . . , its reputation, influence, or membership." RCW 9.94A.535(3)(aa).

Evidence that a criminal act did not tend to improve the defendant's status in a gang would not necessarily bear on whether the act might have benefitted the gang itself, and vice versa. On its face, then, the substitution of one aggravator for the other resulted in inadequate notice that likely prejudiced the defendant's ability to prepare a defense.

That Rhoades knew the State intended to introduce evidence that his gang affiliation motivated the attack on McLean does not cure this prejudice. While establishing motive is a

proper purpose for the admission of gang evidence, such motive is not actually an element of second degree assault. *State v. Yarbrough*, 151 Wn. App. 66, 83-87, 210 P.3d 1029 (2009). Here, the defense strategy focused on disputing whether the defendant was armed with a deadly weapon or inflicted substantial bodily harm. Given that strategy, and without any other indication that the gang aggravator would be pursued, defense counsel may well have seen little point in contesting whether the attack was gang motivated. Indeed, defense counsel plainly sought in cross examination and closing argument to dispute that the attack tended to elevate Rhoades's status in LVL, consistently with the charged aggravator; but never disputed that Rhoades was a member of the gang or that he intended the attack to benefit it.

For these reasons, Rhoades's knowledge that the State would introduce evidence of gang affiliation did not give him notice that the State would pursue an aggravator other than that charged in the information. For these reasons also, that lack of notice prejudiced the preparation of Rhoades's defense.

Because Rhoades did not receive adequate notice prior to trial that the State intended to seek an exceptional sentence based on the gang aggravator, and the lack of notice prejudiced him in preparing a defense, the submission of that aggravator to the jury amounted to constitutional error. *See Siers*, 174 Wn.2d at 276-77. The State, which bears the burden of proving constitutional error harmless beyond a reasonable doubt, *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013), presents no harmless error argument in its brief. Regardless, this type of error is not susceptible to constitutional harmless error analysis. *State v. Recuenco*, 163 Wn.2d 428, 441-42, 180 P.3d 1276 (2008). We reverse Rhoades's exceptional sentence.

II. The Trial Court's Recklessness Instruction

Rhoades argues that the trial court's jury instruction defining recklessness, which informed the jury that "'[a] person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that *a wrongful act* may occur,'" relieved the State of the burden of proving an essential element of second degree assault. Br. of Appellant at 12-21 (quoting CP at 44) (emphasis added). That is, the jury could have relied on Rhoades's disregard of a substantial risk that any wrongful act might occur, instead of the actual prohibited result, substantial bodily harm. We disagree.

In *State v. Johnson*, our Supreme Court addressed the exact question presented here:

> Taken in their entirety, the instructions in this case were sufficient. The "to convict" instruction properly laid out the elements of the crime. It identified the wrongful act contemplated by Johnson as "substantial bodily harm." Separately providing a generic definition of "reckless" did not relieve the State of its burden of proof. The "to convict" instructions are the primary "yardstick" the jury uses to measure culpability, and here they were accurate.

180 Wn.2d 295, 306, 325 P.3d 135 (2014). Here, the to-convict instruction also correctly identified substantial bodily harm as the prohibited result. Under *Johnson*, the instructions were not erroneous.

III. Denial of Rhoades's Requests for a Continuance

In his statement of additional grounds (SAG), Rhoades contends that the trial court erred in denying two defense requests for a continuance. Specifically, Rhoades argues that the error denied him the right to present a defense because it prevented his attorney from locating a key witness, properly interviewing the State's witnesses, and otherwise adequately preparing for trial. Because the trial court based its decision on proper grounds, supported by the record, and Rhoades fails to make a sufficient showing of prejudice, we reject the claim.

We review the denial of a motion for continuance under the abuse-of-discretion standard. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). To prevail on such a claim, a party must "make[] 'a clear showing'" that the trial court's exercise of discretion was "'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Downing*, 151 Wn.2d at 272-73 (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

The factors a trial court may consider in ruling on a motion for a continuance include "surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure." *Downing*, 151 Wn.2d at 273 (citing *State v. Eller*, 84 Wn.2d 90, 95, 524 P.2d 242 (1974)). A party establishes that the trial court abused its discretion in denying a continuance motion by showing "that the accused has been prejudiced and/or that the result of the trial would likely have been different had the continuance not been denied." *Eller*, 84 Wn.2d at 95. "[T]here are no mechanical tests for deciding when the denial of a continuance violates due process, inhibits a defense, or conceivably projects a different result," but "the answer must be found in the circumstances present in the particular case." *Eller*, 84 Wn.2d at 96.

Rhoades first requested a continuance at the trial confirmation hearing, one week before trial commenced. The State acknowledged at the hearing that it had not given McLean's contact information to defense counsel, because it wanted to protect McLean from alleged attempts at intimidation. Defense counsel also represented at the trial confirmation hearing that he had only recently learned that a witness, one of the participants in the fight who had been in the car with Rhoades, would testify for the State as part of a plea deal. Rhoades's attorney stated that he had not had an opportunity to interview the witness, who was represented by counsel, and had not seen the plea deal.

At the same hearing, the defense attorney also stated that "there's some new police reports that have come in I haven't had a chance to review it, came in yesterday." VRP (April 18, 2013) at 2. The court denied the request for a continuance, ordered Rhoades taken into custody, and confirmed the trial date, but also ordered the State to make McLean and the other witness available for interviews.

On the first day of trial, Rhoades asked again for a continuance. Based on the interview with McLean, Rhoades wished to call an additional witness, Huner, another participant in the fight. The State had included Huner on its witness list, but never managed to locate her. Defense counsel stated that he had not sought to contact Huner because he expected her testimony to "cut[] both ways," but that, given what he had heard from McLean, Rhoades thought Huner's testimony would do more good for the defense than harm. 1 VRP at 7-8.

The prosecutor acknowledged that Huner qualified as a material witness, but opposed the motion on the grounds that (1) Rhoades would have no better chance of locating her than the State, which had devoted considerable resources to the effort without avail, and (2) a continuance would prejudice the State because its witnesses were "terrified" of Rhoades and "a lot of times this is used as a strategy to continue things so that witnesses disappear." 1 VRP at 9-11. The court denied the motion for the reasons articulated by the prosecutor, pointing out that certain "witnesses for the State . . . are in protective custody." 1 VRP at 13.

To decide whether denial of the continuances in these circumstances was an abuse of discretion, we turn first to *State v. Oughton*, 26 Wn. App. 74, 612 P.2d 812 (1980). There, the State learned during trial that a witness would give additional incriminating testimony not disclosed to the defense, but did not inform defense counsel. *Oughton*, 26 Wn. App. at 78. Upon hearing this testimony, Oughton requested a continuance for the purpose of obtaining

evidence to rebut it, which the court denied. *Oughton*, 26 Wn. App. at 78. Even though (1) the undisclosed evidence did not directly implicate Oughton, (2) Oughton never articulated what evidence he hoped to offer in rebuttal, and (3) his defense was implausible at best, we held that the trial court had abused its discretion in denying the requested continuance and that reversal was warranted. *Oughton*, 26 Wn. App. at 75, 76, 79-80, 85. We noted that, "no matter how incredible a given defendant's story may sound, due process entitles him to a fair chance to get his version of the events before the jury so that they may make an unprejudiced decision." *Oughton*, 26 Wn. App. at 75.

Rhoades's argument would appear at first glance to have some force under *Oughton* because the perceived need for Huner's testimony apparently did not arise until the State made McLean available for an interview. A number of facts distinguish this case from *Oughton*, however.

Perhaps most importantly, Rhoades does not show that the denial of a continuance prejudiced him. Rhoades did not explain how he could have located Huner when the State could not and acknowledged that her testimony would have "cut[] both ways." 1 VRP at 8. Since Huner was apparently also a suspect and likely faced charges, it is doubtful at best that Rhoades could have secured her testimony.

Further, delay would be more prejudicial to the administration of justice here than it was in *Oughton*. Nothing indicates that witnesses were being held in custody in that case, nor were there allegations there that the defendant or his associates were seeking to intimidate witnesses, as the State alleged here.

In denying the continuances, the trial court relied on the sort of considerations approved by *Downing*, 151 Wn.2d at 273, for that purpose. Further, Rhoades fails to show that the denial

of a continuance prejudiced his defense, a central consideration in *Eller*, 84 Wn.2d at 95-96. Thus, the trial court did not abuse its discretion in denying the continuances.

IV. Admission of Gang Evidence

Rhoades also contends that the trial court erred in permitting Detective Patrick Fitzgerald to testify concerning gangs generally and Rhoades's gang affiliation in particular. Specifically, Rhoades argues that, because the trial court refused to rule that Fitzgerald qualified as an expert on street gangs, much of the detective's testimony concerning gangs in general was improper. Rhoades further argues that Fitzgerald's testimony exceeded the scope of the trial court's ruling on the State's motion in limine and invaded the province of the jury.

As noted, in its order on the State's motion to admit gang evidence, the trial court permitted evidence of Rhoades's gang affiliation offered to show motive, intent, and/or res gestae, as well as expert testimony regarding gang culture and background relating to LVL. The order prohibited evidence specifically related to Rhoades's prior bad acts in association with his gang affiliation.

After inquiring into Fitzgerald's gang-related training and experience at trial, the State asked the court to rule that he qualified as "an expert in the area of street gangs." 2 VRP at 334. The defense objected as follows: "I think that's improper, so I'll object to that. But I'm not opposed to what he has to say." 2 VRP at 334. The trial court responded, "You can just ask the witness your questions. I'm not going to make that ruling." 2 VRP at 334. Fitzgerald proceeded to describe, without objection, the culture and activities of gangs generally and LVL in particular.

The State also asked whether Fitzgerald was familiar with Rhoades in particular, and Fitzgerald replied affirmatively. Fitzgerald proceeded to testify to his knowledge of Rhoades's

affiliation with LVL, including Rhoades's allegedly gang-related tattoos. Finally, Fitzgerald gave the opinion that "the assault on Mr. McLean . . . was in association with a gang . . . [g]iven the [verbal] interaction that transpired before the actual assault." 2 VRP at 344. The defense did not object to any of this testimony.

Rhoades does not show that he is entitled to raise this issue for the first time on appeal. Because the First Amendment right of association protects gang affiliation, just as it does "membership in a church, social club, or community organization," Rhoades has at least a plausible argument that the alleged error affects a constitutional right within the meaning of RAP 2.5(a). *State v. Scott*, 151 Wn. App. 520, 526, 213 P.3d 71 (2009) (citing *Dawson v. Delaware*, 503 U.S. 159, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992)). Rhoades points to nothing in the record, however, establishing that any error occurred, let alone "manifest" error, as RAP 2.5(a)(3) would require.

Although Washington courts recognize that gang affiliation evidence inherently poses a risk of unfair prejudice, courts may nonetheless properly admit it to show motive or intent where the proponent establishes "a nexus between the crime and the gang."[7] *State v. Embry*, 171 Wn. App. 714, 731-32, 287 P.3d 648 (2012), *review denied*, 177 Wn.2d 1005 (2013); *accord Yarbrough*, 151 Wn. App. at 81-89; *Scott*, 151 Wn. App. at 526-29. Thus, in order to admit such evidence, the trial court must

> (1) find by a preponderance of the evidence that misconduct occurred; (2) identify the purpose for which the evidence is sought to be introduced; (3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value against the prejudicial effect.

[7] Because aggravating circumstances that support a sentence beyond the standard range are the functional equivalent of elements of a greater crime, *Ring v. Arizona*, 536 U.S. 584, 604-05, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), *Blakely v. Washington*, 542 U.S. 296, 304-05, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), this nexus plainly exists where the State alleges a gang aggravator. ER 401.

Embry, 171 Wn. App. at 732. We will not reverse a trial court's ruling under "ER 404(b) . . . absent a manifest abuse of discretion such that no reasonable judge would have ruled as the trial court did." *State v. Mason*, 160 Wn.2d 910, 933-34, 162 P.3d 396 (2007).

Here, the trial court held a hearing on the matter and concluded that, based on Rhoades's statements to McLean at the beginning of the fight, the evidence was admissible and offered for proper purposes. The evidence plainly had some tendency to make more likely the existence of a fact of consequence to the determination of the action, and was thus relevant. ER 401. The court explicitly considered the risk of unfair prejudice and concluded that the probative value of the gang evidence outweighed it, nonetheless excluding evidence of specific "prior bad acts in association with his gang affiliation." CP at 20. Fitzgerald's testimony generally conformed to the trial court's ruling.

To the extent that certain testimony regarding Rhoades's gang membership may have exceeded the scope of the court's order, any error is not "so obvious on the record that the error warrants appellate review." *O'Hara*, 167 Wn.2d at 99-100. That is, "given what the trial court knew at that time," it is not reasonable to expect the court to have corrected any such error absent a timely and specific objection. *O'Hara*, 167 Wn.2d at 100.

Thus, even assuming Rhoades raises an error truly of constitutional magnitude, it did not have "practical and identifiable" consequences at trial as articulated by the *O'Hara* court, 167 Wn.2d at 99, and would therefore not qualify as "manifest" within the meaning of RAP 2.5(a)(3). We decline to address the issue further.

V. JUROR BIAS

Rhoades contends that the trial court erred in allowing two venire members to serve on the jury. Because the record does not establish whether Rhoades challenged either juror for cause, we decline to reach the claim.

One of the allegedly biased jurors knew one of the investigating officers and the other juror acknowledged having had a personal experience with a similar or related crime. The court sought to rehabilitate the first juror as follows:

> THE COURT: Anything about that acquaintanceship that would cause you to place any more weight or any less weight on her testimony? Would that impact you in any way?
> JUROR NO. 19: I think it would. You know, I know her well enough to have an opinion at least about her truthfulness or, you know. . . .
> THE COURT: All right. Is that something that you could bring into the mix, you could weigh that and weigh her testimony just as you could weigh anybody else's testimony?
> JUROR NO. 19: I don't really know.
> THE COURT: I'll ask you this: would you try to do that?
> JUROR NO. 19: Yeah.

1 VRP at 39. The court also asked the second juror if anything about the juror's personal experience with a related crime would affect his or her consideration of the case, to which the juror replied, "No, sir." 1 VRP at 40.

The record does not disclose whether Rhoades challenged either juror for cause. In *State v. Reid*, we held that "[a] party accepting a juror without exercising its available challenges cannot later challenge that juror's inclusion." 40 Wn. App. 319, 322, 698 P.2d 588 (1985) (citing *State v. Jahns*, 61 Wash. 636, 112 P. 747 (1911)). Thus, we cannot reach the challenges to either juror without delving into matters outside the record before us. We therefore decline to address them further. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

Rhoades further contends that his trial attorney rendered ineffective assistance, depriving Rhoades of his right to counsel. Specifically, Rhoades argues that defense counsel's performance was deficient because the attorney (1) failed to interview witnesses, maintain communication with Rhoades, or otherwise conduct an adequate pretrial investigation, (2) did not make an opening statement, (3) failed to request an instruction on third degree assault as an included offense, (4) referred to Rhoades by his alleged gang moniker during the trial, (5) failed to object to the State's request for an instruction on accomplice liability, and (6) represented Rhoades despite the fact the attorney, a former Lewis County Deputy Prosecutor, previously prosecuted other alleged LVL members and represented the State in a trial at which McLean also testified. Regarding the sentencing hearing, Rhoades further contends that his attorney (7) called no witnesses, (8) failed to argue that Rhoades did not have the ability to pay legal financial obligations, (9) "barely argued for the low range," and (10) requested $2,400 in attorney fees despite having done little or no trial preparation. SAG at 8-9.

We review claims of ineffective assistance de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on such a claim, a defendant must show both deficient performance by defense counsel and prejudice caused by the deficiency. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Courts apply "a strong presumption that defense counsel's conduct is not deficient." *Reichenbach*, 153 Wn.2d at 130. A defendant may rebut that presumption by showing "no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

Establishing prejudice requires that the defendant show a reasonable possibility that the outcome of the proceeding would have differed absent counsel's purportedly deficient conduct.

Reichenbach, 153 Wn.2d at 130. A "reasonable probability" in this context is one "sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Rhoades's arguments concerning his attorney's alleged conflicts of interest and lack of trial preparation depend on matters outside the record. We therefore decline to reach them. *McFarland*, 127 Wn.2d at 335.

The record does reveal that defense counsel continuously referred to Rhoades as "Spooker" in the presence of the jury while cross-examining McLean. 1 VRP at 138, 140, 144, 146, 149-150, 161, 164-166, 171. Given that McLean also repeatedly referred to Rhoades by that name, and the State called several other witnesses who also testified to Rhoades's alias, this was a conceivably legitimate tactic to "take the sting out" of the alleged gang moniker.

The record discloses that Rhoades's attorney did not give an opening statement. Our Supreme Court has held, however, that defense counsel's waiver of opening statement does not constitute deficient performance, even in a capital trial. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 715, 101 P.3d 1 (2004).

The record also shows that defense counsel did not object to the State's request for an accomplice liability instruction. As Rhoades's attorney noted during the jury instruction discussion, the evidence showed that two other people from the car carrying Rhoades also participated in the fight, creating an adequate basis for such an instruction. Further, courts do not consider accomplice liability an element of or alternative means of committing a crime and it thus need not appear in the information. *State v. Teal*, 117 Wn. App. 831, 838, 73 P.3d 402 (2003). For these reasons, the trial court would surely have overruled an objection to the requested accomplice liability instruction. Thus, his attorney's failure to object was not

unreasonable, and Rhoades could not show prejudice in any event. *See McFarland*, 127 Wn.2d at 337 n.4.

The record supports Rhoades's allegation that his attorney did not request an instruction on third degree assault as an included offense, but instead requested only a fourth degree assault instruction, which instruction the court gave without objection. As an initial matter, this may well have qualified as a legitimate tactical decision. *See State v. Grier*, 171 Wn.2d 17, 44-45, 246 P.3d 1260 (2011) (holding that failure to request included-offense instruction did not necessarily establish deficient performance and compiling cases).

More importantly, Rhoades was not entitled to such an instruction. To create a duty to instruct the jury on an included offense, the evidence must raise an inference that the defendant committed only the included offense and not the charged offense. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000); *State v. Workman*, 90 Wn.2d 443, 447-49, 584 P.2d 382 (1978). Thus, to convict Rhoades of third degree assault under the facts presented here, the jury would needed to have found that he acted only with criminal negligence, not intent. RCW 9A.36.031(d), (f). All the witnesses to the fight testified that Rhoades intentionally punched and kicked McLean, so there was no evidence giving rise to a reasonable inference that Rhoades acted only with criminal negligence. Defense counsel did not perform deficiently by failing to request an instruction to which Rhoades was not entitled.

The record further establishes that Rhoades's attorney did not call witnesses at the sentencing hearing or argue that Rhoades would be unable to pay legal financial obligations. The decision whether to call witnesses is generally recognized as a matter of trial strategy left to the discretion of defense counsel, American Bar Association, *Standards for Criminal Justice: Defense Function*, std. 4-5.2(b), at 200 (3d ed. 1993), and Rhoades does not explain what

testimony his attorney should have offered or why. The trial court found that Rhoades had the ability to pay the legal financial obligations "through employment in [the] Department of Corrections." VRP (July 10, 2013) at 472. Rhoades points to nothing in the record that his attorney could have used to undermine this finding. Since Rhoades is 34 years old, and would appear from the facts of this case to be able-bodied, the record adequately supports the court's finding.

Rhoades fails to make a sufficient showing from the record on review that counsel's performance was deficient or that any alleged deficiency was prejudicial. His claims of ineffective assistance therefore fail.

VII. PROSECUTORIAL MISCONDUCT

Rhoades contends that prosecutorial misconduct deprived him of a fair trial. Specifically, Rhoades contends that the prosecutor (1) failed to make McLean available for an interview until ordered to do so shortly before trial, (2) improperly instructed jail staff to suspend all of Rhoades's phone privileges, preventing him from contacting his attorney during a critical stage of trial preparation, and (3) failed to disclose that one of the State's witnesses testified in exchange for a plea bargain. Because the merit of each of these contentions depends on matters outside the record, we decline to address them. *McFarland*, 127 Wn.2d at 335.

CONCLUSION

The State did not provide constitutionally sufficient notice of its intent to seek an exceptional sentence based on the RCW 9.94A.535(3)(aa) gang aggravator. Therefore, we reverse Rhoades's exceptional sentence and remand for resentencing within the standard range.

We reject Rhoades's other claims and otherwise 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 in accordance with RCW 2.06.040, it is so ordered.

Bjorgen, A.C.J.
BJORGEN, A.C.J.

We concur:

Maxa, J.
MAXA, J.

Melnick, J.
MELNICK, J.

EXHIBIT #3

FILED
COURT OF APPEALS
DIVISION II
2015 FEB 20 PM 2:16
STATE OF WASHINGTON
BY
DEPUTY

IN THE APPELLATE COURT OF WASHINGTON, DIVISION II

STATE OF WASHINGTON

V.

JOSHUA DAVID CHARLES RHOADES

CASE # 45083-6-II

MOTION TO RECONSIDER

JOSH RHOADES, PRO-SE

IDENTITY OF MOVING PARTY

Joshua Rhoades, Defendant, acting Pro-Se in this regard respectfully submits this motion to reconsider in good faith and within the time limit prescribed in the relevant R.A.P's.

STATEMENT OF RELIEF SOUGHT

Defendant respectfully requests that this court reconsider and modify its opinion on case #45083-6-II, Dated 2-3-15, in which the court partially granted and partially rejected Defendant's appeal.

CITATION TO THE COURTS DECISION

The Court's decision is offered as Exhibit 1, Dated 2-3-15, in which the court errored when it said that

(1) The trial Court Judge did not abuse his discretion when he denied the defendant a continuance, when the defense was clearly not ready to proceed to trial.

(2) that the defendant relied on matters outside of the record to prove his prosecutorial misconduct claim.

ISSUES PRESENTED FOR REVIEW

(1) This court erred when it thought that the defendant was relying on matters outside the record to prove his Prosecutorial Misconduct claim.

FACTS

In the Court's ruling, Pg 22, (Exhibit 1) under the heading "VII Prosecutorial Misconduct" Defendant stated that the Prosecutor failed to make McLean available for an interview until ordered to do so by the court shortly before trial.

Defendant raises the same type of claim on page 12 of the Court's opinion, under his abuse of discretion argument. There this Court clearly acknowledges that "The State acknowledged at the trial confirmation hearing that it had not given Mclean's contact information to defense counsel, because it wanted to protect Mclean from alleged attempts at intimidation".

Defendant is clearly not relying on facts outside the record on this particular issue, Defendant is on point on both of those issues, but we will speak about the misconduct first.

Defendant's claim that the prosecutor was acting maliciously was right on point and indisputable. The State has a continuing duty to disclose all information to the defense

in it's possession or care. The state knew very well where McLean was the entire time and was in constant contact with him. McLean was not in any sort of protective custody and had not requested any sort of anonymity in this case. He was and is a wiling participant in the entire proceedings, the State was simply acting maliciously by not disclosing any and all information to the defense. Regardless of any of the falsified statements or arguments conjured up by the state, the Defendant made no attempts to intimidate or harass the witness in any way, and the record does not show anything different.

ARGUMENT

The State indeed has a duty to disclose all information about the case in its care to the defense, including contact information for witnesses that the state intends to call prior to the omnibus hearing. here the state had not even disclosed this information until after trial confirmation and only after being ordered to do so by the court. It was the State's duty to make the witness available to the defense.

The State's flagrant and ill-intentioned actions were prejudicial, the state has a duty to assure that a criminal defendant has a fair trial and a duty to not conduct a trial by ambush or surprise. The State's failure to make this witness

available for interview was akin to trial by surprise, by the late disclosure, it denied the Defendant his right to properly cross examine and rebut the testimony of McLean.
Had the State acted properly, it would have given the defense the opportunity to get a statement from the witness and possible impeach him with a prior inconsistent statement. It is imparitive in any criminal defense to know what witnesses that the state has the intention to call and what they may say, so you can prepare any rebuttal witness' to contradict the states version of events,

The Constitution guarantees a defendant a meaningful opportunity to present a complete defense, which includes an opportunity to interview a witness and prepare a defense. By the Prosecutor not making this witness available, he committed misconduct and denied the defendant a complete defense as described in HERNANDEZ v. HOLLAND, 750 F.3d 843 (2014) and CRANE v. KENTUCKY, 476 U.S. 683, 690-91, 106 S.Ct. 2142 90 L.Ed 2d 636 (1986).

As a result, this case should be remanded for a new trial.

ISSUE PRESENTED FOR REVIEW

This court might not have fully considered the magnitude of the Judge abusing his discretion in this particular case. The Defendant believes that because of his inadequate knowledge of the law and it's processes, he was unable to convey the entirety of the situation. Defendant attempts to reiterate what he already brought before the court, with a little more knowledge

When the Defendant appeared in court on 4-18-13, the Attorney, Christopher Baum, Informed the court that He was not ready to proceed to trial. He had not interviewed any witnesses, had not reviewed police reports, had not prepared a defense, had not supoena'd any witnesses, and had not investigated any witnesses backgrounds to properly cross examine and possibly impeach them. (VRP 4-18-13) Basically, the Attorney informed the court that he had not done anything to present a complete defense so he could subject the State's case to a meaningful adversarial testing. He further informed the court before trial, that he was still not ready in any way for trial.

ARGUMENT

It's ironic that this court relied on STATE v. DOWNING, 151 Wn.2d 265, 87 P.3d 1169 and STATE v. ELLER, 84 WASH.2d at 95, 524 P.2d 242. Because the cases

both state;

> "A trial court's denial of a request for a continuance may violate a defendant's state and federal constitutional right to the compulsory process, if the denial prevents the defendant from presenting a witness material to his defense."
> United States Constitution Amend. 6, WASHINGTON STATE CONSTITUTION ARTICLE 1 §22. See also STATE V. DOWNING, 151 Wn.2d 265, 87 P.3d 1169.

Under the abuse of discretion standard of review, a court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; It is based on untenable grounds if the factual findings are unsupported by the record; Or it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the correct standard.

This court was correct when it said that each denial of a continuance requires a case-by-case inquiry. Defendant believes that this court errored when it relied on the state's blatent lies and misrepresentations instead of the real facts supported by the actual record.

The factors a trial court may consider when ruling on a motion to continue include; "SURPRISE, DILIGENCE, REDUNDANCY, DUE PROCESS, MATERIALITY, AND MAINTENANCE OF ORDERLY PROCEDURE."

DOWNING, 151 Wn.2d at 273.

This case has most of those factors; The State's late plea bargains, The late disclosure of witness' contact info,

The late disclosure of police reports and the state's complete failure to uphold it's continuing duty to disclose, all constitute surprise, and as every court has ruled, It is improper to conduct a trial by surprise or ambush.

Due Process requires that a defendant have a meaningful opportunity to present a complete defense. Which includes the

> "Right to present witnesses that is material and favorable to their defense and complies with the rules of evidence." See Crane v. Kentucky, 476 U.S. 633 690-91, 106 S.Ct. 2142 90 L.Ed.2d 636 (1986). see also U.S. v. TURNING BEAR, 357 F.3d 730,733 (2004).

The testimony of Huner was material as admitted by the state in the court's opinion, (Page 13, Exhibit 1). The defense informed the court of their need to call Huner to testify. The state, who has every reason to not want Huner to testify, claimed that the Defendant's Due Process rights should be violated because the state was ready for trial and allegedly had a witness in protective custody.

The defendant was being held captive in the Lewis County Jail and had no access to the telephone (RP), so any actual or mythical need for the state to hold anyone in any sort of protective custody is based on untenable reasons. It is indisputable that the state will do and say anything possible to ensure a conviction of someone that they imagine is guilty, so anything outside of an actual, factual record should not ever be considered when the state alleges it.

Had Huner been contacted by the state, she would have testified to the real version of events, That the Defendant was in fact the victim, not the aggressor in the case, and would have given the jury tenable reasons to find in favor of self-defense. Defendant was prejudiced when he was not able to call Huner to verify his version of events. By the Judge Abusing his Discretion, he left the jury to believe that the defense is based on unsupportable grounds. This is a clear prejudical effect.

The State doesn't even show how they even claimed to have attempted to contact Huner. In fact, all the state did was send a letter to an old address no longer visited by Huner. Had the defense been given a continuance, they would have used the old fashioned way to contact her, the telephone, or the more reliable way these days, social media. The defendant is a long time associate of Ms. Huner and could have pointed the defense lawyer in the right direction at anygiven moment. The defense could have even driven over to the current address of Huner and spoke to her. It was in the state's best interest if Huner did not testify, and they knew it. That is why they did nothing more than make a sorry, half-hearted attempt to locate her.

The Judge also abused his discretion when he failed to maintain an orderly procedure as well. The Judge well knew that

the defendant was not ready for trial, it was argued several times, he was fully aware that the defense lawyer had done no work on the case. It is all on the record, and an orderly procedure requires that the Judge ensure both sides a right to present their case. He failed to do that.

This court was correct in looking to STATE v. OUGHTEN for guidance, in OUGHTON, the court noted that;

> "No matter how incredible a defendant's story may sound, Due Process entitles him to a fair chance to get his version of events before the jury so that they may make an unprejudiced decision"
> OUGHTON, 26 Wn.App. at 75.

Had Huner, who was actually not charged in this case as this court incorrectly believed, testified, she would have given the defense credibility. She would have more likely than not changed the outcome of the proceedings.

This Court also erred when it said that delay would have been prejudical to the administration of justice. First off, the mere allegation that a delay of any sorts would be prejudical to the state is ridiculous. There is no evidence that the defense was ever attempting to do anything but prepare the defense. The state may have made some bold lies, but in fact fails to show how long any alleged witness was in "Protective Custody", the reality is that this "Protective Custody" was merely the state providing a motel for a witness that simply drove in from out of the area to testify.

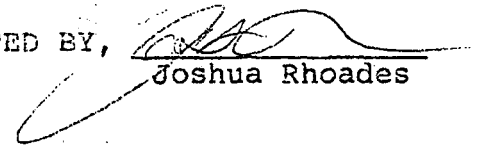
The State made a bunch of bold allegations to make sure that the Defendant went into trial completely unprepared, and this court erred when it believed the state's lies. The Defendant asks that the court reconsider it's position in this case and remand this case back to the superior court for a new trial in which the Defendant will have ample opportunity to prepare his defense.

CONCLUSION

For the reasons stated above, this court should reconsider and modify it's opinion.

DATED THIS 17th DAY OF February, 2015.

RESPECTFULLY SUBMITTED BY,



Joshua Rhoades

JOSHUA RHOADES #798276
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA
98326

EXHIBIT #4

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOSHUA DAVID CHARLES RHOADES, Appellant.	No. 45083-6-II ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION TO PUBLISH

APPELLANT moves for reconsideration and publication of the Court's **February 3, 2015** opinion. Upon consideration, the Court denies the motions. Accordingly, it is

SO ORDERED.

PANEL: Jj. Bjorgen, Melnick, Maxa

DATED this 24th day of April, 2015.

FOR THE COURT:

Bjorgen, A.C.J.
ACTING CHIEF JUDGE

cc: Maureen Marie Cyr

CC STATE BY 2015

EXHIBIT #5

Received & Filed
LEWIS COUNTY, WASH
Superior Court

FEB 28 2013

Kathy A. Brack, Clerk
By _____ Deputy

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR LEWIS COUNTY

STATE OF WASHINGTON

Plaintiff,

v.

Joshua David Charles Rhoades
Defendant.

NO. 13-1-076-2

OMNIBUS ORDER

1. DISCOVERY STIPULATION: The State, represented by the undersigned deputy prosecuting attorney, and the defendant, represented by the undersigned attorney, except for any disputed motions and/or other matters noted below in Section #5, hereby stipulate that both parties have complied with, and will continue to comply with, the discovery checklists set forth in CrR 4.5 consistent with the requirements of CrR 4.7.

2. THE DEFENDANT GIVES THE FOLLOWING NOTICE:
a. The defendant will assert the following defenses at trial:
[X] General Denial [ ] Alibi [X] Self Defense/Defense of Others
[ ] Insanity [ ] Diminished Capacity [ ] Intoxication
[ ] Entrapment [ ] Others: _____.

b. [ ] The defendant stipulates to the following prior convictions:
None

3. THE PROSECUTION GIVES THE FOLLOWING NOTICE:
[X] The State intends to use the following prior convictions to impeach the defendant pursuant to ER 609: Intimidating Witness (2000)

[X] State will rely on prior acts pursuant to ER 404(b). State will provide notice of specific acts by: _____.
[ ] There is evidence in the plaintiff's possession favorable to the defendant on the issue of guilt, and it has been disclosed.

[ ] Child hearsay (RCW 9A.44.120) exists. The State intends to offer at trial statements of

LEWIS COUNTY
PROSECUTING ATTORNEY
345 W. Main Street, 2nd Floor
Chehalis, WA 98532
360-740-1240 (Voice) 360-740-1497 (Fax)

CAUSE # 13-1-076-2

[ ] An informant was involved and
[ ] will/[ ] will not be a witness at trial.
[ ] State invokes informant privilege.
[ ] Name of Informant: _____.

4. MUTUAL DISCOVERY DEADLINE: 10 days prior to trial or _____. Both parties shall complete discovery, including names, and all required information pertaining to witnesses (including conviction data), by this deadline date.

5. DISPUTED ITEMS, MOTIONS, AND HEARINGS REQUESTED:

[X] CrR 3.5 [ ] CrR 3.6 [ ] Suppress ID [ ] Child Hearsay
[ ] Motion to Dismiss, grounds: _____
[ ] Discovery Issues: _____
[ ] Other: _____

6. ORDER SETTING HEARINGS: The defendant must personally be present at the following court hearings and report to the Lewis County Superior Court, Chehalis, WA:

[X] CrR 3.5 Hearing, nondispositive on the morning of the first day of trial.
[X] Hearing for 404(b) Date: 4/3/13 Time: 9:30 AM Dept 3
[ ] Hearing for _____ Date: _____ Time: _____

7. BRIEFING SCHEDULE:

Defendant's brief due: _____ Time: _____

State's brief due: _____ Time: _____

8. The trial in this matter should last about 3 days.
[ ] The defendant [ ] Attorney for defendant [X] The State waives his right to be present at the jury draw.

9. The attorney for the defendant and the deputy prosecuting attorney shall appear before the Court on the Thursday Criminal Calendar the week before trial. At this hearing, the attorneys shall inform the court of their readiness for trial and the availability of their anticipated witnesses.

10. Other Matters: _____

APPROVED this 28 day of Feb, 2013.

Defendant

Attorney for Defendant
WSBA # 32219

Deputy Prosecuting Attorney
WSBA # 40348

JUDGE

LEWIS COUNTY
PROSECUTING ATTORNEY
345 W. Main Street, 2nd Floor
Chehalis, WA 98532
360-740-1240 (Voice) 360-740-1497 (Fax)

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document ***Pro se* Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 91602-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Sara Beigh, Lewis County Prosecuting Attorney [appeals@lewiscountywa.gov]

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: Septemb