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

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Washington Cases

United States Supreme Court Cases

Statutes

Rules

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.

---

[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

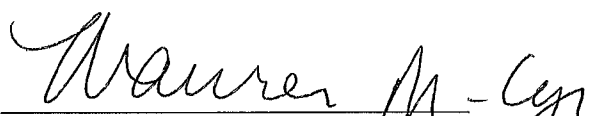
consciousness to the treating physician. RP 130-32, 367. A CT scan showed Mr. McLean had no internal bleeding, fracture, or other physical manifestation of a head injury. RP 357-58.

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.



MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

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

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25TH DAY OF NOVEMBER, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] SARA BEIGH, DPA [appeals@lewiscountywa.gov] LEWIS COUNTY PROSECUTING ATTORNEY 345 W MAIN ST FL 2 CHEHALIS, WA 98532	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-MAIL VIA COA PORTAL
[X] JOSHUA RHOADES 798276 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 25TH DAY OF NOVEMBER, 2013.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

November 25, 2013 - 4:11 PM

Transmittal Letter

Document Uploaded: 450836-Appellant's Brief.pdf

Case Name: STATE V. JOSHUA RHOADES

Court of Appeals Case Number: 45083-6

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Appellant's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: **maria@washapp.org**

A copy of this document has been emailed to the following addresses:

appeals@lewiscountywa.gov