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**COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON**

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Div. III COA No. ~~012200~~

COURT OF APPEALS DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON. Respondent,

v.

EVAN WAYNE SULLIVAN, Appellant

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REPLY BRIEF OF APPELLANT

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**I. Issues Presented in Reply**

1. The Information failed to allege an essential element of the crime of Assault of a Child in the Second Degree with a Domestic Violence Allegation. Appellant did not engage in sandbagging as the record indicates the State had intended to file an amended Information and admitted to a mistake in not filing it prior to trial. The objection was made prior to the close of trial and should be strictly construed.
2. Even if the liberal standard of review for the charging document is used, the Information failed to allege a crime as it missed an essential element, the mens rea, of the offense. As such, the Information was defective even under a more liberal construction rule challenging the sufficiency of the Information.
3. It was error to allow exhibit 17, a recorded request for an interview between the Detective and Mr. Sullivan, to be admitted into evidence. While it was objected to late, the issue was preserved and also is one of constitutional magnitude.

## **II. Argument**

### **1. The State was not “sandbagged” as it acknowledged during argument that it had intended to file Amended Information and had not done so.**

Mr. Sullivan was initially charged by Information filed on February 25, 2014 with the crime of Assault of a Child in the Second Degree with a Domestic Violence Allegation, RCW 9A.36.130(1)(b) and RCW 10.99.020. [CP 1.] A First Amended Information was filed on December 18, 2014 changing the statute Mr. Sullivan was charged from RCW 9A.36.130(1)(b) to RCW 9A.36.130(1)(a) and added RCW 9A.36.021(1)(a) and still included RCW 10.99.020. [CP 30.] The body of the First Amended Information under Count One continued to cite to the RCW 9A.36.130(1)(b) although the section previous to that section cited to 9A.36.130(1)(a).

The Second Amended Information was filed on January 12, 2015 prior to the commencement of trial. [CP 32.] The Second Amended Information added an Aggravating Circumstance Allegation of Victim Vulnerability under RCW 9.94A.535(3)(b) and changed the statute of charge in the body of Count One to

9A.36.130(1)(a). The Second Amended Information stated in pertinent part:

that the said Evan Wayne Sullivan in the County of Benton, State of Washington, during the time intervening between the 5<sup>th</sup> day of April, 2013, and the 5<sup>th</sup> day of May, 2013, in violation of RCW 9A.36.130(1)(a) and RCW 9A.36.021(1)(a) being eighteen years of age or older and with intent to assault A.K.G., (D.O.B.: 10/25/2012) a child under the age of thirteen, did assault said child and thereby inflicted substantial bodily harm, to wit: inflicted trauma to head and/or leg resulting in a skull fracture and/or tibia fracture, contrary to the form of the Statute and in such case made and provided and against the peace and dignity of the State of Washington. [CP 32.]

RCW 9A.36.021(1)(a) states in pertinent part:

A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:  
(a) Intentionally assaults another and thereby **recklessly** inflicts substantial bodily harm. (emphasis added).

The Assault in the second-degree statute contains seven alternative means of committing an assault in the second degree.

RCW 9A.36.021 (2011). The Second Amended Information omitted the word "recklessly". [CP 32.]

Appellant moved to dismiss at the close of the State's case because the Information lacks the essential element of recklessly.

[RT Vol. III p. 335]. The Motion to Dismiss was made just after a Motion was made to Dismiss for insufficient evidence. [RT Vol. III p. 333]. During the consideration of the Motion to Dismiss for insufficient evidence, the Court stated, "I'm looking at the elements of assault in the second degree, and the only one that would be in question is whether or not the first element there wasn't assault in the second degree and why can I not find it? There it is. "When a person intentionally assaults another and thereby recklessly inflicts substantial bodily harm." [RT Vol. III p. 334]. The Court then denied the Motion to Dismiss for insufficient evidence. [RT Vo. III p. 335].

Appellant then made its Motion to Dismiss because the Information lacks an essential element of reckless. [RT. Vol. III p. 335]. The State first stated that the "actual language of the statute is an assault amounting to a second degree assault, but anyway, I don't think that's really—I think that's certainly implied that the assault would be reckless or the infliction of the injuries would be reckless." [RT Vol. III p. 335]. The Court asked, "You don't believe that is an element?" [RT. Vol. III p. 335]. The Court noted that there are different standards to be applied to the motion depending

on when it is brought. [RT Vol. III p. 336]. It was then that the State noted it had “made an error”:

I have to point out that I have made an error frankly. I know that I emailed Mr. Harms an amended information I think it was last Friday, and that information is actually accurate and then I just did not file the correct information that I wanted to, but the information that I told Mr. Harms we were filing as of last Friday was just saying that the defendant committed the crime, namely an assault and that that assault was against a child and amounted to assault in the second degree. [RT Vol. III p. 337.]

Sandbagging, as described by Professor LaFave, is a defense practice “wherein the defendant recognized a defect in the charging document but forgoes raising it before trial when a successful objection would usually result only in an amendment of the pleading.” *State v. Phillips*, 98 Wn. App. 936, 940, 991 P.2d 1195 (2000) (citing 2 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 19.2, at 442 & n.36 (1984)). Here, that is an inaccurate description of what happened, where the State clearly had intended to file a different amended Information than that which it ultimately filed. The Information was challenged after the State rested but prior to verdict. As the Washington Supreme Court cases have noted that considered this issue, “The standard of review for

evaluating the sufficiency of a charging document is determined by the time at which the motion challenging its sufficiency is made.” *State v. Borrero*, 147 Wn.2d 353, 360, 58 P.3d 245 (2002)(en banc) (citing, *State v. Taylor*, 140 Wn.2d 229, 237 996 P.2d 571 (2000)). When a charging document is challenged for the first time *after* the verdict, it is to be “liberally construed in favor of validity.” *Id.*, (citing *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991) (emphasis in original)). In contrast, however, when an information is challenged *before* the verdict...the “charging language must be strictly construed.” *Id.*, (citing *Taylor*, 140 Wn.2d at 237, 996 P.2d 571).

The Washington Supreme Court in *Borrero* noted that the “two distinct standards of review encourage prosecuting attorneys to file sufficient complaints, and also encourage defendants to make timely challenges to “defective charging documents to discourage ‘sandbagging’”. *Id.*, (citing, *Taylor* at 237, n. 32, 996 P.2d 571.

The Washington Supreme Court, in yet another case to consider this issue, stated that:

[a]lthough this court has recently liberalized the standard of review for charging documents which are first challenged on appeal, no decision has questioned the constitutionally mandated rule that all essential elements of a charged crime must be included in the charging document. In this case, the sufficiency of the Information was challenged prior to verdict and therefore the liberalized standard of review announced in *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991) does not apply.

*State v. Vangerpen*, 125 Wn.2d 782, 788, 888 P.2d 1177 (1995)(en banc). Using this strict construction rule, it is clear that the Information is missing the element of reckless and as such is deficient.

At trial, during the Motion to Dismiss made after the State rested, the trial court used the more liberal construction in favor of validity, but did acknowledge it could be wrong, as it was a close call. [RT Vol. III p. 338].

Appellant challenged the Information a second time at a motion for arrested judgment after the trial was concluded. [CP 52]. The State argued that it was not required to allege a specific prong of the second assault statute nor was it required put the term recklessly in the Information. [RT Vol. IV p. 439-441.] The State argued that because it had correctly cited the statute, that was sufficient. [RT Vol. IV p. 439-441]. The State further argued that

the standard to be applied was the more liberal interpretation about whether the information is sufficient and a required showing of prejudice. [[RT Vol. IV p. 439]. The trial court concluded that recklessness was an essential element and the State therefore should have included it in the information; however the trial court concluded that the liberal standard of construction should apply and that the defendant was not prejudiced by the lack of its inclusion in the Information. [RT Vol. IV p. 442-43].

**2. Even if the liberal standard of review for the charging document is used, the Information failed to allege a crime as it missed an essential element, the mens rea, of the offense.**

The State seems to argue that it was not essential to put the mens rea of reckless in the Information. “The Sixth Amendment to the United States Constitution and Article I Section 22 (amendment 10) requires that a charging document include all essential elements of a crime, statutory and nonstatutory, so as to inform the defendant of the charges against him and allow him to prepare his defense.” *State v. Mendoza-Solorio*, 108 Wn.App. 823, 829, 33 P.3d 411 (2001) (*citing, State v. Phillips*, 98 Wn.App. 936, 939, 991 P.2d 1195 (2000)(further citation omitted)). “Every material element

of the charge, along with all the essential supporting facts, must be put forth with clarity.” *Id.*, (citing, *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000) (citing CrR 2.1(a)(1); *Kvorsvik*, 117 Wn.2d at 97, 812 P.2d 86)). “An information omitting essential elements charges no crime at all.” *Id.*, (citing *State v. Sutherland*, 104 Wn.App. 122, 130, 15 P.3d 1051 (2001)(further citation omitted). “[M]erely citing to the proper statute and naming the offense is insufficient to charge a crime unless the name of the offense apprises the defendant of all the essential elements of the crime.” *State v. Vangerpen*, 125 Wn.2d at 787, 888 P.2d 1177.

The State cites *State v. Killiona-Garramone* in support of its position that if a defendant moves to dismiss an allegedly insufficient charging document after a point when the State can no longer amend the information, such as when the State has rested its case, the information should be construed liberally in favor of validity. *State v. Killiona-Garramone*, 166 Wn. App. 16, 23, 267 P.3d 426 (2011). While this case is at odds with Washington Supreme Court precedent stating the correct standard is pre-verdict challenges should be strictly construed, cited in *Vangerpen*, *Johnson*, and *Kjorsvik*, nevertheless, the Information at issue here

does not pass scrutiny even under the more liberal construction standard of *Kjorsvik*. See, *State v. Killiona-Garramone*, 166 Wn. App. at 23, 267 P.3d 426; and, *State v. Phillips*, 98 Wn. App. 936, 941, 991 P.2d 1195 (2000).

Under the more liberal standard, the reviewing court applies a two-prong analysis: “(1) do the necessary elements appear in any form, or by fair construction can they be found, in the information; and if so, (2) can the defendant nonetheless show he or she was actually prejudiced by the inartful language which caused a lack of notice?” *State v. Kjorsvik*, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991)(en banc). The first prong of the test—the liberal construction of the charging documents language—looks to the face of the charging document itself. *Id.* The second prong—allowing the defendant to show that actual prejudice resulted from inartful or vague language—affords an added layer of protection to the defendant even where the issue is first raised after verdict on appeal. *Id.* “If the necessary elements are not found or fairly implied, however, we presume prejudice and reverse without reaching the question of prejudice.” *State v. Mendoza-Solorio*, 108 Wn.App. at 830, 33 P.3d 411 (further citation omitted).

As noted by the *Mendoza-Solorio* Court, “*Kjorsvik* and its progeny universally state that, under the first prong of the liberal construction test, the reviewing court must find the essential element on the face of the charging document itself. *Id.*, at 833, (further citation omitted). In *Mendoza-Solorio*, the Court concluded that an Information was constitutionally defective where it failed to allege a necessary third party in a conspiracy to deliver a controlled substance charge even under a liberal construction test. *Id.*

There is a distinction between charging documents that are constitutionally deficient—i.e. documents that fail to allege sufficient facts supporting each element of the crime charged—and those that are merely vague. *State v. Winings*, 126 Wn. App. 75, 84, 107 P.3d 141 (2005)(citing, *State v. Leach*, 113 Wn.2d 679, 686, 782 P.2d 552 (1989)). A charging document that states each statutory element of a crime, but is vague as to some other significant matter, may be corrected under a bill of particulars. *Id.* A defendant may not challenge a charging document under vagueness on appeal if he or she failed to request a bill of particulars. The State argues that Appellant did in fact fail to ask for a bill of particulars but this misses the distinction between a statutory element of a crime (a

deficiency) and merely vague charges. *See State v. Winings*, 126 Wn. App. 75, 85, 107 P.3d 141 (2005), and *State v. Laramie*, 141 Wn. App. 332, 339, 169 P.3d 859 (2007). Failure to allege specific facts in an information may render the charging document vague but it is not constitutionally defective. *State v. Laramie*, 141 Wn. App. at 340, 169 P.3d 859 (further citation omitted). The State argues it was not required to allege the specific elements of Assault in the Second Degree, which elevates the crime to Assault of a Child in the Second Degree. [Brief of Respondent, p. 12]. Here, the State failed to allege an essential element of the offense of Second Degree Assault rendering the Information constitutionally defective.

The State has argued that the Information is not deficient because it cited the correct statute and included sufficient facts. "Citing the correct statute is not enough." *State v. Naillieux*, 158 Wn. App. 630, 645, 241 P.3d 1280 (2010). "[T]he correct rule is that *all* essential elements of an alleged crime must be included in the charging document." *Id.*, (citing, *Kjorsvik*, 117 Wn.2d at 101, 812 P.2d 86)(emphasis in original). In *Naillieux*, the Court considered a challenge to the Information made on appeal for the

first time thus it was considered under the more liberal standard. *Id.*, at 643, 241 P.3d 1280. The Court found that even though the correct statute was cited and it was raised for the first time on appeal, the information omitted two essential elements of eluding a police vehicle—reckless manner and lights and sirens. *Id.*, at 645, 241 P.3d 1280. The Court presumed prejudice and reversed the conviction for eluding a pursuing police vehicle. *Id.*

Second Degree Assault on a Child incorporates the elements of Second Degree Assault. RCW 9A.36.130(1)(a); *and see, State v. Esters*, 84 Wn. App. 180, 183, 927 P.2d 1140 (1996). A person is guilty of Second Degree Assault if he or she “intentionally assaults another and thereby recklessly inflicts substantial bodily harm.” RCW 9A.36.021(1)(a); *and see, State v. Esters*, 84 Wn. App. at 183, 927 P.2d 1140. A person acts “intentionally when he acts with an objective or purpose to accomplish a result which constitutes a crime.” *State v. Esters*, 84 Wn. App. at 185, 927 P.2d 1140 (*quoting*, RCW 9A.08.010(1)(a)). A person acts “recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such a substantial risk is a gross deviation from the conduct that a

reasonable man would exercise in the same situation.” *State v. Esters*, 84 Wn. App. at 185, 927 P.2d 1140 (quoting, RCW 9A.08.010(1)(c)). Recklessly causing harm is not the same as intentionally causing harm. *Id.* Thus, second degree assault by battery requires an intentional touching that recklessly inflicts substantial bodily harm. *Id.* The manner of committing an offense is an element, and the defendant must be informed of this element in the information. *State v. Laramie*, 141 Wn. App. 332, 342, 169 P.3d 859 (2007).

Likewise, the Washington Criminal Jury Instruction for Assault in the Second Degree Substantial Bodily Harm lists the elements as follows:

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 (date) the defendant intentionally assaulted (name of person),
- (2) That the defendant thereby recklessly inflicted substantially bodily harm on (name of person); and
- (3) That the crime occurred in the State of Washington.

11 Wash.Prac., Pattern Jury Instr. Crim. WPIC 35.13 (3<sup>rd</sup> Ed)(2014). The Note on Use instructs that along with this instruction, use WPIC 10.01 (Intent-Intentionally-Definition), WPIC

10.02 (Knowledge-Knowingly-Definition), WPIC 10.03 (Recklessness-Definition), WPIC 2.03.01 (Substantial Bodily Harm-Definition) and WPIC 35.50 (Assault-Definition). The Comment further notes that “the wording of this instruction combined with the definitions of “intent” and “reckless” properly instructs the jury that “second degree assault by battery requires an intentional touching that recklessly inflicts substantial bodily harm.” 11 Wash.Prac., Pattern Jury Instr. Crim. WPIC 35.13 (3<sup>rd</sup> Ed)(2014)(comment).

The State argues it was sufficient to charge that “in violation of RCW 9A.36.130(1)(a) and RCW 9A.36.021(1)(a) being eighteen years of age or older and with intent to assault A.K.G. (D.O.B. 10/25/2012) a child under the age of thirteen, did assault said child and thereby inflicted substantial bodily harm, to wit:... Under the charging document, it is clearly missing the element of recklessly which defines how the substantial bodily harm has been inflicted. The charging document is deficient even under the more liberal construction standard of *Kjorsvik* and its progeny that states, under the first prong of the liberal construction test, the reviewing court must find the essential element on the face of the charging document itself.

The Trial Court found that the State had to include the element of reckless in its information and that that reckless was an essential element. [RT. Vol. IV p. 443]. The Trial Court further agreed that it could not be inferred from the particular information even applying the liberal construction. [RT. Vol. IV p. 443]. However, the Trial Court thought that prejudice was also required to be shown. [RT. Vol. IV p. 443]. Because the Information was insufficient on its face and could not be inferred, missing an essential element, prejudice is presumed and reversal is mandated without reaching the question of prejudice.” See, *State v. Mendoza-Solorio*, 108 Wn.App. at 830, 33 P.3d 411.

**3. It was error to allow exhibit 17, a recorded request for an interview between the Detective and Mr. Sullivan, to be admitted into evidence.**

The State attempts to mischaracterize Appellant’s argument as to the issue of the recording of the interview between Detective Athena Clark and Appellant. EX. 21 and 17. Appellant assigned error in its Opening Brief to denying a motion to dismiss made after Mr. Sullivan made a late objection to exhibit number 17 as violating Mr. Sullivan’s Fifth Amendment Right to remain silent. The State

claims this Motion to Dismiss was not properly preserved for appellate review and characterizes the Motion to Dismiss as not an objection to the tape being played. As noted, the objection to play the tape came late. It was not objected to at the time of the offering. However, Appellant did make Motions in Limine that addressed the same issue, with a separate recording, as well as made a Motion to Dismiss once the recording was played, and objected to the re-playing of the recording of the recording to the jury during the jury's deliberations after the recording was admitted to evidence. It is somewhat disingenuous to characterize these series of Motions and an objection to the tape being replayed as not an objection, especially in light of the fact that counsel for Appellant used the word "objection" during the question presented by the jury. [RT Vol. III p. 417].

The chronology of events was as follows: Counsel for Appellant requested a Motion in Limine to exclude officers' opinions that Appellant was hesitant to be interviewed discussed pretrial. [RT Vol. I p. 9-10]. In addition to that motion, there was discussion requesting to "exclude the recording" of an interview that was conducted at the Richland Police Department. [RT Vol. I p. 4-5].

The entire discussion involving recordings in the Motions in Limine involved the recording of the actual interview between Richland Police and Appellant. The Court granted the motion in limine to exclude officers' opinions that Appellant was hesitant to be interviewed by police. [RT. Vol. I p. 10]. As to the recording, there was discussion about redaction of portions of the recording regarding allegations of prior misconduct. [RT. Vol. I p. 6-8]. As part of the Motion regarding the Appellant's hesitancy to be interviewed by police the Court noted, "I'll grant that. He does have a Fifth Amendment to completely decline to be interviewed and hesitation could be because of that in reliance upon that right. So, I'll grant that motion." [RT Vol. I p. 10].

The State never offered the recording that had been the subject of this discussion. Instead, the State offered a telephone call recording between Appellant and Detective Clark that took place prior to the recording that had been the subject of pretrial discussion. [RT Vol. III p. 254-25]. As noted in Appellant's opening brief, Appellant failed to object at that time. However, when the issue of jury instructions came up the next morning after exhibit 17 had been played for the jury, counsel for Appellant noted that the

recording that had been discussed pretrial was not offered and rather this other recording was offered and moved to dismiss for prosecutorial misconduct. [RT Vol. III p. 290-92]. Counsel for Appellant noted that he was not provided assurances that the recording would not be admitted and acknowledged that he did not object due to not wanting to draw emphasis to the recording. [RT Vol. III p. 291-93]. The Trial Court did deny the motion to dismiss at that time.

The State made arguments twice in its closing argument regarding the recording: first, the State argued during closing argument that the phone call between the Detective and Mr. Sullivan was significant due to his reaction of merely saying “huh” when told his daughter was injured. [RT Vol. III 309-310]. The State invited the jury to listen to the recording again. [RT Vol. III 309-310]. The State commented that it was a mild reaction and commented on whether it was “telling”. [RT Vol. III 309-310]. During rebuttal argument, the State again invited the jury to listen to the recording to evaluate the tone of the Detective. [RT Vol. III p. 407]. The error became clear when the jury requested to listen to the recording during deliberations and was denied the chance to

listen to the exhibit because the trial court was concerned allowing the jury to hear the recording again would allow the jury to focus on Mr. Sullivan's decision and his hesitancy to meet with police. [RT Vol. III p. 421]. Counsel used the following words regarding the recording when the jury requested to listen to it again: "Well, I would object to it mainly because it touches on my client's right to remain silent. It's going to reinforce that really." [RT Vol. III p. 417]. Counsel for Appellant notes that there is a Fifth Amendment issue involving the recording and again notes that "I would object". [RT Vol. III p. 420]. The Court did not allow the jury to listen to the recording due to concern that the Appellant "hems and haws over going to the police station, I think, would—could allow the jury to just focus on the defendant's decision and his hesitancy to do that when he has a Fifth Amendment right to decline to go in and give a statement, and it's a real close call here, but I don't want to create a situation where we unnecessarily create error." [RT Vol. III p. 421].

The right against self-incrimination is liberally construed. *State v. Easter*, 130 Wn.2d 228, 235-35, 922 P.2d 1285 (1996)(en banc). It is intended to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents

of his mind, or speak his guilt. *Id.*, citing, *Doe v. United States*, 487 U.S. 201, 210-12 (1988). The Fifth Amendment applies before the defendant is in custody or is the subject of suspicion or investigation. *Id.* at 238, 922 P.2d 1285. If the State is allowed to comment an accused did not speak up prior to an arrest, the accused effectively has lost the right to silence: a “bell once rung cannot be unrung.” *Id.*, at 238-39, 922 P.2d 1285. The State cannot in its case in chief call attention to the jury of the accused’s pre-arrest silence to imply guilt. *Id.*, at 243, 922. Silence used for impeachment is not at issue when the defendant did not testify at trial and credibility is not an issue. *See State v. Easter*, 130 Wn.2d at 237, 922 P.2d 1285.

Appellant submits that this issue is one of manifest constitutional error even if improperly objected to in trial. Manifest constitutional error can be reviewed even if the appellant did not object or except in the trial court. *State v. Nailleux*, 158 Wn. App. at 635, 241 P.3d 1280. The appellant must show the error that is manifest in the record and constitutional in magnitude. *Id.* Reviewing for manifest error involves four steps: (1) the reviewing court must make a cursory determination as to whether the alleged

error in fact suggests a constitutional issue; (2) the court must determine whether the alleged error is manifest and it is essential to that determination that there is a plausible showing by the defendant that the asserted error has practical and identifiable consequences in the trial of the case; (3) if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue; and finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis. *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). The issue here was definitely a constitutional issue, both the admission of the recording and the State's arguments as to its significance in closing arguments. Second, the error was manifest and had practical and identifiable consequences in the trial of the case. After the recording was played, the jury was encouraged by the State to listen to the recording in their deliberations to evaluate whether the defendant's statements were telling. [RT Vol. III 309-310]. The jury then asked to hear the recording again, and did not get to do so precisely because the trial court recognized the constitutional issues surrounding the recording. [RT Vol. III p. 421]. As such

Appellant requests that this issue be reviewed on its merits. The error was not harmless as Washington Courts have noted that numerous authorities have concluded that prearrest silence is not admissible because of its low probative value and high potential for undue prejudice. *State v. Burke*, 163 Wn.2d 204, 214, 181 P.3d 1 (2008)(en banc)(citing *Easter*, at 235, 922 P.2d 1285). In this instance, the State exacerbated the error by encouraging the jury to listen to the recording, arguing that the Defendant's silence and "huh" was telling, all occurring after the Appellant made the motion to dismiss. When the jury actually wanted to listen to the recording, the trial court did not permit it due to the exact problem, yet there was not a way to "unring the bell" after the jury had heard the recording and the arguments of the State.

### **III. Conclusion**

For the reasons contained herein, Mr. Sullivan respectfully requests that this Court reverse the conviction for Assault of a Child in the Second Degree and dismiss the Information without prejudice.

Dated this 4<sup>th</sup> day of April, 2016.

Respectfully submitted,



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Roger J. Peven  
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