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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

Div. III COA No. **331423**

COURT OF APPEALS DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON. Respondent,

v.

EVAN WAYNE SULLIVAN, Appellant

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I.	Introduction.....	1
II.	Assignments of Error and Issues Presented	2
III.	Statement of the Case	4
IV.	Summary of Argument	17
V.	Argument	
	1. The Information was constitutionally defective in that the State failed to allege all essential elements of the crime charged.	20
	2. The Court erred in allowing a telephone recording of Mr. Sullivan and a Detective into evidence in violation of the Fifth Amendment.	28
VI.	Conclusion	33

TABLE OF AUTHORITIES

Table of Cases

<i>Doe v. United States</i> , 487 U.S. 201 (1988)	29
<i>State v. Naillieux</i> , 158 Wn. App. 630, 241 P.3d 1280 (2010) ..	19, 25
<i>State v. Borrero</i> , 147 Wn.2d 353, 58 P.3d 245 (2002)(en banc) ..	17, 22, 23
<i>State v. Burke</i> , 163 Wn.2d 204, 181 P.3d 1 (2008)(en banc) ..	19, 30
<i>State v. Easter</i> , 130 Wn.2d 228, 922 P.2d 1285 (1996)(en banc) ..	29, 30, 32
<i>State v. Hopper</i> , 118 Wn.2d 151, 822 P.2d 775 (1992) ..	22
<i>State v. Ibsen</i> , 98 Wn. App. 214, 989 P.2d 1184 (1999) ..	28
<i>State v. Johnson</i> , 119 Wn.2d 143, 829 P.2d 1078 (1992)(23, 25, 28
<i>State v. Kjorsvik</i> , 117 Wn.2d 93, 812 P.2d 86 (1991)(en banc) ..	passim
<i>State v. Laramie</i> , 141 Wn. App. 332, 169 P.3d 859 (2007) ..	17, 25
<i>State v. Naillieux</i> , 158 Wn. App. 630, 241 P.3d 1280 (2010) ..	19, 25
<i>State v. Taylor</i> , 140 Wn.2d 229, 996 P.2d 571 (2000) ..	17, 23
<i>State v. Vangerpen</i> , 125 Wn.2d 782, 888 P.2d 1177 (1995)(en banc) ..	passim

Statutes

RCW 10.99.020	20
RCW 9.94A.535(3)(b)	20
RCW 9A.36.021	21, 25
RCW 9A.36.021(1)(a)	20, 21
RCW 9A.36.130(1)(a)	20
RCW 9A.36.130(1)(b)	20

Constitutional Provisions

U.S. Const. Amend V.	28
U.S. Const. amend. VI;	21
Wash. Const. Art. I § 9.	29
Wash. Const. art. I §22 (amend. 10);	21

Treatises

2 C. Torcia, Wharton on Criminal Procedure § 238, at 69 (13th ed. 1990). 22

2 W. LaFave & Israel, Criminal Procedure §19.2, at 448-52 (1984). 22

I. Introduction

Evan Sullivan and Gabrielle Gingrich had a daughter born in late 2012 by the name of Aurora. Some time before the birth of the child, Mr. Sullivan and Ms. Gingrich ended their romantic relationship. Gabrielle Gingrich briefly relocated to South Dakota while Evan Sullivan continued to live in Richland, Washington. Ms. Gingrich relocated back to Richland, Washington sometime in March 2013 eventually moving in with her grandparents, Leslie and Darlene Gingrich. On the morning of May 5, 2013, Gabrielle Gingrich spent some time with her grandparents and six month old child including taking a home video of the child learning to crawl. Later in the day, Gabrielle Gingrich, accompanied by her grandmother Darlene Gingrich, brought Aurora over to the home of Evan Sullivan for a visitation. Aurora was with Mr. Sullivan from 3:00 p.m. to 7:00 p.m. that day. In the evening, Ms. Gingrich, accompanied by her grandfather Leslie Gingrich, picked up Aurora from Evan Sullivan's residence. After arriving home, the Gingrich family noticed the baby was acting strangely and noticed some bruising on her head. They took her to the Kadlec Medical Center

in Richland, Washington where Doctor Crabtree, an emergency physician, was on duty. Dr. Crabtree conducted an examination and determined that Aurora had a skull fracture and broken tibia. Aurora was transported to Spokane for further medical treatment where Doctor Messer further treated the child.

Richland Police investigated the injuries to the child. Police contacted Evan Sullivan and recorded interviews were made of those contacts. Ultimately, Mr. Sullivan was charged with Assault of a Child Second Degree. Mr. Sullivan proceeded to trial and was convicted by jury.

II. Assignments of Error and Issues Presented

A. Assignments of Error

1. The Information was constitutionally defective in that the State failed to allege all essential elements of the crime charged.
2. The trial court erred in denying the 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 error became clear when the jury requested to

listen to the recording during deliberations and was denied the chance to listen to the exhibit.

B. Issues Pertaining to Assignments of Error

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 objected to the Information and moved to dismiss at the close of the State's presentation of evidence. The motion was renewed after the jury returned a verdict of guilty. The trial court denied the motion to dismiss. Is the Information constitutionally defective under the article I, section 22 of the State of Washington and under the Sixth Amendment to the United States Constitution? (Assignment of Error 1.)
2. The trial court admitted a recording, exhibit 17, between Mr. Sullivan and Detective Clark of the Richland Police Department without objection. Later in the proceedings, Mr. Sullivan objected to the recording on Fifth Amendment grounds and moved to dismiss. The trial court denied the motion. During deliberations, the jury requested to hear the recording. The trial court recognized the impact to Mr.

Sullivan's Fifth Amendment Right to refuse to incriminate himself and did not allow the jury to hear the evidence that had been admitted. Was it error of constitutional magnitude to allow exhibit 17, a recorded request for an interview between the Detective and Mr. Sullivan, to be admitted into evidence? (Assignment of Error 2.)

III. Statement of the Case

Evan Sullivan was charged by Information filed on February 25, 2014 by the State of Washington, Benton County with one Count of Assault of a Child in the Second Degree with a Domestic Violence Allegation in violation of RCW 9A.36.130(1)(b) and RCW 10.99.020. [CP 1.] Mr. Sullivan was mailed a summons to appear; however he did not appear on the date requested and a bench warrant was issued. Mr. Sullivan appeared shortly thereafter on a Motion and an Order Quashing Bench Warrant was issued. Mr. Sullivan ultimately was arraigned on March 20, 2014. Nothing of note for appeal purposes occurred in pretrial proceedings other than the filing of the First Amended Information on December 18, 2014. [CP 30.] The First Amended Information changed the

statute of charge from RCW 9A.36.130(1)(b) to RCW 9A.36.130(1)(a) and RCW 9A.36.021(1)(a) and RCW 10.99.020. On January 12, 2015, the State filed a Second Amended Information in which nothing was changed from the First Amended Information other than the addition of Aggravating Circumstance Allegation of Victim Vulnerability as provided by RCW 9.94A.535(3)(b). [CP 32.] The Second Amended Information was filed on the morning of the commencement of trial, January 12, 2015.

Mr. Sullivan filed Motions in Limine prior to trial. [CP 33, RT Vol. I p.4.]¹ The trial court noted that the remedy that Mr. Sullivan was seeking was not clear and the exclusion of a recording was discussed; however this was not the same recording that was later admitted into evidence. [RT Vol. I p. 4; and Vol. III p. 292.] The trial court ultimately ruled that the recording would be admitted with redactions. [RT Vol. I p.8.] A second Motion in Limine was requested seeking to exclude “police officer’s opinion that Mr. Sullivan was hesitant to be interviewed by them.” [CP 33, RT Vol. I

¹CP is designated as Clerk’s Papers and RT is designated as the Record of Transcript followed by the volume and page number.

² The transcript was included in the court file and discussed among the parties as being available for appellate review. It is attached as

p. 10.] The trial court ruled that it would grant that motion noting that Mr. Sullivan would have a Fifth Amendment Right to completely decline to be interviewed and a hesitation could be because of that in reliance upon that right. [CP 33, RT Vol. I p. 10.]

Trial commenced and several witnesses were called by the State including the mother of the injured child, the grandparents of the child, several law enforcement officers, and Doctors who examined the child. Mr. Sullivan called one witness, the current girlfriend of Mr. Sullivan.

The State offered evidence that on May 13, 2013, Gabrielle Gingrich was staying at the home of her grandparents, Darlene and Leslie Gingrich, with her six-month-old daughter Aurora. [RT Vol. II p. 69.] On the morning of May 5, 2013, Darlene and Leslie Gingrich both testified that they spent time with Aurora and observed no injuries to the child. [RT Vol. II p.69-72; 97.] Darlene Gingrich testified that she was retired and had been occupied as a nurse's aide prior to retirement. [RT Vol. II p. 63.] Darlene Gingrich testified that a video was taken of Aurora crawling on the morning of May 5, 2013 prior to her being taken to Mr. Sullivan for visitation. [RT Vol. II p. 81, exhibit 1.] Darlene Gingrich testified that she

drove Gabrielle Gingrich and the baby to Mr. Sullivan's house around 3:00 p.m. on May 5th for a scheduled visitation and the baby was not injured at that time. [RT. Vol. II, p. 72.] Ms. Gingrich testified that her husband, Leslie, drove Gabrielle Gingrich to pick up the baby around 7 p.m. and they arrived home shortly thereafter. [RT Vol. II p. 73-74.] Ms. Gingrich testified that shortly after they arrived home, her husband asked her to come look at the baby because he believed there was something wrong with the baby. [RT Vol. II p. 74.] Ms. Gingrich testified that the baby was crying and shaking and was still in the car seat/carrier. [RT Vol. II p. 74.] Ms. Gingrich testified that they took the baby out of the carrier and she observed bruising around her head and a "goose egg" above her ear that was beginning to swell. [RT Vol. II p. 74-76.] Ms. Gingrich testified that none of these injuries were present when she had seen Aurora in the morning. [RT Vol. II p. 76.] Ms. Gingrich testified that they put the baby back in the car carrier and drove her to the hospital for treatment. [RT Vol. II p. 76.]

Leslie Gingrich testified to much of the same information. Mr. Gingrich testified that it was he who drove Gabrielle Gingrich to Mr. Sullivan's home to pick up Aurora around 7:00 p.m. on the

evening of May 5, 2013. [RT Vol. II p. 99.] Mr. Gingrich testified that when the baby was brought out to the car she was in her carrier and he noticed that the baby was bleeding from a cut on her mouth. [RT Vol. II p. 100.] Mr. Gingrich testified that when they arrived home, Gabrielle took the baby out of the carrier and that is when he observed that the baby was shaking and he believed that something was wrong with the baby. [RT Vol. II p. 100-101.] Mr. Gingrich testified that shortly thereafter, they took the baby to the hospital and ultimately drove to Spokane once the baby was transferred there for treatment. [RT Vol. II p. 102.]

Gabrielle Gingrich, the mother of the child, testified to much of the same information as her grandparents. Ms. Gingrich testified that she had dated Mr. Sullivan starting in November 2011 and became pregnant. [RT Vol. II p. 109-110.] Ms. Gingrich testified that her and Mr. Sullivan ended the relationship, and she moved to South Dakota to be with her parents. [RT Vol. II p. 110.] Ms. Gingrich testified that she returned to Richland, Washington in March 2013 because she wanted the baby to meet Mr. Sullivan. [RT Vol. II p. 110-111.] Ms. Gingrich testified that she had taken a

video on the morning of May 5th that showed the baby prior to being at Mr. Sullivan's home. [RT Vol. II p. 114-115, exhibit 1.]

Ms. Gingrich testified that when she picked the baby up from Mr. Sullivan at 7:00 p.m. on the evening of May 5th, the baby was still in the car seat and she did not notice anything unusual save a small cut on the baby's lip. [RT Vol. II p. 120.] Ms. Gingrich testified Mr. Sullivan appeared flustered or upset when she arrived to pick up the baby. [RT Vol. II p. 120.] When they arrived home, Ms. Gingrich testified she noticed the baby was acting fussy so she took her out of her car seat and the baby started crying excessively and shaking. [RT Vol. II p. 122.] Ms. Gingrich testified that her grandmother came in, they examined the baby, and noticed bruising. [RT Vol. II, p. 122-124.] Ms. Gingrich testified that they went to the hospital in Richland and ultimately ended up in Spokane after Aurora was diagnosed with a skull fracture and broken leg. [RT Vol. II p. 122-129.] Ms. Gingrich testified that the only prior injury like this she had observed on Aurora had occurred when Mr. Sullivan had the baby and a black eye had occurred in March 2013. [RT Vol. II. p. 122-127, exhibit 2.]

Officer Jason Crouch testified to responding to the scene at the Kadlec Medical Center on the evening on May 5, 2013 on a call of assault of a child. [RT Vol. II, p. 144.] Officer Crouch testified that he observed bruising on the child and took several photographs of the child that were introduced as exhibits in trial. [RT. Vol. II p. 144-154, exhibits 3-16]. Officer Florence testified to much of the same information. [RT Vol. II p. 156-165.]

Detective Dean Murstig testified next on behalf of the State, indicating he had initially been assigned as the lead detective in the investigation. [RT Vol. II p. 168.] Detective Murstig testified as to the organization of the investigation and his role in administering questionnaires to the individuals who had contact with the child in the relevant time period. [RT Vol. II, p. 168-175.]

Doctor Brent Crabtree was next called as a witness. Doctor Crabtree is an emergency physician at the Kadlec Medical Center in Richland and was the first to treat Aurora on the night of May 5, 2013. [RT Vol. II p. 175 -177.] Doctor Crabtree described the findings of his medical examination, and detailed that he ordered a CAT Scan which was performed at Kadlec. [RT Vol. II p. 180-182.] Doctor Crabtree testified that after the discovery of the skull

fracture, he determined to have the child transferred to a more advanced facility in Spokane, Washington. [RT Vol. II p. 185].

Doctor Crabtree opined that it would be highly unlikely for injuries of this type to be caused accidentally. [RT Vol. II p. 188-189.] Doctor Crabtree further testified that the tibia fracture that was discovered later was not discovered in his examination and it was not uncommon for an injury like that to go undetected since a child of six months does not walk. [RT Vol. II p. 189-192.] Doctor Crabtree testified that the injuries could be dated within a week of the discovery but could not provide an exact time frame for causation. [RT Vol. II p. 199-203.] Doctor Crabtree further could not say whether the tibia fracture was caused at the same time as the skull fracture. [RT Vol. II p. 206-207.] Doctor Crabtree testified that during his examination of Aurora she did not appear to be in any distress and her skin tone was normal. [RT Vol. II p. 205.]

Detective Benson testified that he examined cell phones in this matter and preserved the video that was offered as exhibit one. [RT Vol. II. p. 215-225.]

Detective Athena Clark concluded the testimony for the State. Detective Clark testified that she was tasked with getting in

touch with Evan Sullivan as part of the investigation. [RT Vol. III p. 252.] Detective Clark testified that she called Mr. Sullivan at his place of business, and he returned the call. [RT Vol. III p. 252.] Detective Clark testified that she requested permission to record the call and Mr. Sullivan consented to the recording. [RT Vol. III p. 252-253.] Detective Clark described the process for the recording and exhibit 17, a recording of the phone call between Mr. Sullivan and Detective Clark, was admitted. [RT Vol. III p. 256-257.]

Of note for this appeal procedurally: Exhibit 17 was offered into evidence by the State through Detective Athena Clark without objection. [RT Vol. III p. 256.] Prior to Detective Clark's testimony, there was a discussion outside the presence of the jury between the parties and the trial court that the State would not offer the recording that had been the subject of Mr. Sullivan's Motion in Limine but rather offer this other recording. [RT Vol. III p. 244-246.] It was discussed that the audio recording would be the official record and the Court Reporter would not transcribe the audio. [RT Vol. III p. 245.] The transcript of the audio was not admitted into evidence but it was discussed among the parties it would be made

a part of the court file for appellate review. [RT Vol. III p. 244-246, 361.]²

Detective Clark further testified to an in-person interview that she had with Mr. Sullivan that was also recorded where Mr. Sullivan was asked to fill out a survey. [RT Vol. III p. 257-268.] The survey was not admitted into evidence nor was the recording of this interview.

After the recording was admitted as evidence, Mr. Sullivan moved to dismiss stating that the motion in limine relating to the State introducing evidence of Mr. Sullivan's hesitancy to be interviewed by police was violated by the introduction of exhibit 17. [RT Vol. III p. 290-294.] The Court denied the motion to dismiss. [RT. Vol. III p. 292.] The State called one additional witness after this motion to dismiss and then rested. [RT Vol. III p. 332.]

The State's final witness was Doctor Michelle Messer, a doctor in Spokane, Washington that treated Aurora. Doctor Messer testified that she reviewed the case materials, examined the child, and was asked to give an opinion as to what happened. [RT Vol. III

² The transcript was included in the court file and discussed among the parties as being available for appellate review. It is attached as Appendix; however the original exhibit remains with the trial court.

p. 299-300.] Doctor Messer testified that the child looked very well when she examined her. [RT Vol. III p. 303.] Doctor Messer testified that the bruising was hard to see without brushing back the hair of the baby. [RT Vol. III p. 304-305.] Doctor Messer also examined a picture taken by Gabrielle Gingrich in March of an black eye to the baby, and she opined this was an abnormal injury for a child of that age. [RT Vol. III p. 319.] Doctor Messer testified that it was her opinion that the injuries to Aurora were not typical of a child of that age without someone causing the injuries. [RT Vol. III p. 319-320.] Doctor Messer further testified that the injuries could not be dated with any specificity. [RT Vol. III p. 319-322.] Doctor Messer further testified that Gabrielle Gingrich testified about the picture taken in March regarding the black eye that she had taken that picture for her own protection so no one could say she caused the injuries. [RT Vol. III p. 328.]

After the State rested, Mr. Sullivan moved to dismiss stating that the Information was lacking the element of recklessness. [RT Vol. III p.335-338]. After some discussion, the Court denied the motion. There were additional motions and discussion about Defendant's proposed witnesses relating to potential drug use of

Gabrielle Gingrich, though the trial court ruled that testimony inadmissible. [RT Vol. III p. 339-356.] After a break in the proceedings, the State offered an amended information; however, the State withdrew that motion when the trial court indicated it would need guidance in whether it could permit the amendment after the State had rested. [RT Vol. III p. 364-365.] The Information was not amended at that time.

Mr. Sullivan called one witness then rested. Megan Buchanan testified that she was a former girlfriend of Evan Sullivan. [RT Vol. III p.370.] Ms. Buchanan testified that she had been present with Mr. Sullivan when he had Aurora for visitation in the past but was not present on May 5th. [RT Vol. III p. 371-373.] Ms. Buchanan also testified that Ms. Gingrich had told Ms. Buchanan that Mr. Sullivan would not continue to have visitation with his daughter if Ms. Buchanan and Mr. Sullivan continued to have a relationship; and Ms. Gingrich appeared hostile towards Mr. Sullivan on the occasions she dropped off the child. [RT Vol. III p. 375.] Mr. Sullivan did not testify and no other witnesses were called for the Defense.

After the jury began deliberations, the jury sent a question to the trial court requesting to hear the audio recording of the conversation between the Detective and Mr. Sullivan. [CP 43; RT Vol. III p. 417-422.] Mr. Sullivan objected to the jury hearing the recording a second time. The trial court determined the jury should not hear the recording a second time. [RT Vol. III p.421.] The Jury returned a verdict of guilty and found Mr. Sullivan guilty of the special verdicts as well. [CP44-46.]

On February 13, 2015, the trial heard a motion to dismiss prior to the scheduled sentencing hearing. [CP 52, 53; RT Vol. IV p. 437-444.] The motion to dismiss raised again the issue of an element being absent in the Information. The trial court denied the motion. [RT Vol. IV p. 442-444.] Mr. Sullivan was sentenced to an exceptional sentence outside the standard range of fifty months incarceration, with legal financial obligations and restitution. [CP 57-58, 63; RT Vol. IV. p. 458-463]. Mr. Sullivan moved the trial court for an appeal bond, which was granted. Mr. Sullivan remains out of custody.

IV. Summary of Argument

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. The Second Amended Information, filed January 12, 2015, omitted the element of “recklessly” in its allegation. The manner of committing an offense in an element, and the defendant must be informed of this element in the information. *State v. Laramie*, 141 Wn. App. 332, 342-43, 169 P.3d 859 (2007). A charging document must include all essential elements of a crime. *State v. Borrero*, 147 Wn.2d 353, 359, 58 P.3d 245 (2002)(en banc)(citing, *State v. Taylor*, 140 Wn.2d 229, 236, 996 P.2d 571 (2000)). The essential elements rule is grounded in federal and state constitutional requirements. *Id.* When an information is challenged before the verdict the charging language must be strictly construed. *Id.* Here, the Information omitted the essential element of “recklessly” inflicts substantial bodily harm. An objection was made before verdict thus the Information must be strictly construed. *See, Borrero*, 147 Wn.2d at 360. The appropriate remedy for a conviction based on a defective information is dismissal without prejudice to the State refiling the

information. *State v. Vangerpen*, 125 Wn.2d 782, 793, 888 P.2d 1177 (1995)(en banc).

2. The trial erred in denying the 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. Mr. Sullivan made a motion in limine to not allow officers to testify regarding any hesitation to be interviewed by police, which was granted by the trial court. [RT Vol. I p. 10]. Mr. Sullivan did not take the stand and testify in his defense. However, a recording was admitted into evidence that took place between Mr. Sullivan and Detective Clark. [RT Vol. III p. 251-257, exhibit 17.] Detective Clark interviewed Mr. Sullivan over the phone without providing *Miranda* warnings and near the end of the call, Mr. Sullivan hesitated regarding coming to the Richland Police Station for an interview with police. [Exhibit 17.] Mr. Sullivan later moved to dismiss as an impermissible comment on his Fifth Amendment Right to remain silent. [RT Vol. III p. 290.] The Court did not grant the Motion to Dismiss. [RT Vol. III p. 292.] 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.] 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.] Our constitutions protect the right of the accused to remain silent. *State v. Burke*, 163 Wn.2d 204, 206, 181 P.3d 1 (2008)(en banc). Mr. Sullivan did not testify so the recording had no impeachment value. *See State v. Burke*, 163 Wn.2d 217, 181 P.3d 1. Even if it were to be argued that Mr. Sullivan failed to timely object to the introduction of this evidence, this error was a manifest constitutional error that affected the fairness of the proceedings. *See State v. Naillieux*, 158 Wn. App. 630, 241 P.3d 1280 (2010).

V. Argument

1. The Information was constitutionally defective in that the State failed to allege all essential elements of the crime charged.

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 5th day of April, 2013, and the 5th 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.

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.]

In every prosecution, the defendant must be informed of the nature and cause of the accusation. U.S. Const. amend. VI; Wash. Const. art. I §22 (amend. 10); *and see, State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991)(en banc). Washington Constitution Article I section 22 provides in part: "In criminal prosecutions the accused shall have the right...to demand the nature and cause of the accusation against him..." U.S. Constitution Amendment 6 provides in part: "In all criminal prosecutions, the accused shall...be informed of the nature and cause of the accusation..." Criminal Rule 2.1(b) provides in part: "the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." "All essential elements of a crime...must be included in the charging document so as to apprise the defendant of the charges against him and to allow him to prepare his defense" *State v. Borrero*, 147 Wn.2d at 359, *citing, State v. Hopper*, 118 Wn.2d 151, 155, 822 P.2d 775 (1992).

Indictments have been held invalid for failing to allege the element of intent even though the statute was cited and that element was either included in the statute or apparent from

decisions interpreting the statute. *State v. Kjorsvik*, 117 Wn.2d at 100, *citing*, 2 W. LaFave & Israel, Criminal Procedure §19.2, at 448-52 (1984). If the statute omits an essential element, such as mens rea, then that element must be added to the pleading. *Id.* “The constitutional right of the accused to be informed of the nature and cause of the accusation against him requires that every material element of the offense be charged with definiteness and certainty.” *Id.*, *citing*, 2 C. Torcia, Wharton on Criminal Procedure § 238, at 69 (13th ed. 1990).

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 at 360, 58 P.3d 245, *citing*, *State v. Taylor*, 140 Wn.2d at 237, 996 P.2d 571. When an information is challenged *before* the verdict, the charging language must be strictly construed. *Id.* (emphasis in original). The *Johnson* Court, expanding on the standard of review for challenging the information pretrial noted:

The charging documents in these cases are not to be examined to determine whether the missing elements appear in any form, or by fair construction can be found, and the language must not be ‘inartful or vague’ with respect to the elements of the crime. Rather, due to the context of a

pretrial challenge, we construe the charging language strictly.

State v. Borrero, 147 Wn.2d at 360, 58 P.3d 245, citing *State v.*

Johnson, 119 Wn.2d 143, 149-50, 829 P.2d 1078 (1992)(quoting

Kjorsvik, 117 Wn.2d at 106, 812 P.2d 86). Omission of an essential statutory element cannot be considered a mere technical error.

State v. Vangerpen, 125 Wn.2d 782, 790, 888 P.2d 1177 (1995)(en

banc). While errors in charging documents may be mere oversights

in omitting an element of a crime, sound policy reasons in rooted in

the state and federal constitutions require adherence to the

essential elements rule. *Id.* In *Vangerpen*, the court noted the

proper remedy for an insufficient charging document is reversal and

dismissal of charges without prejudice to the State's ability to refile

the charges. *Id.*, at 792.

In *Vangerpen*, the State had intended to charge Vangerpen

with attempted murder in the first degree; however the State failed

to allege premeditation in the Information. *State v. Vangerpen*, 125

Wn.2d 782, 790, 888 P.2d 1177. The defendant moved to dismiss

after both the State and Defense rested based on the insufficiency

of the information, and the prosecuting attorney agreed that

premeditation should have been alleged and moved to amend the Information. *Id.*, at 785. The trial court permitted a late amendment of the Information. *Id.* The Court held that the state may not amend a criminal charging document to charge a different crime after the State has rested its case unless the amended charge is a lesser degree of the same charge or a lesser included offense. *Id.*, at 787. The Court further held that the essential elements rule as well as the challenging of the Information prior to verdict required reversal of the conviction and dismissal of the charge without prejudice. *Id.*

The instant matter is similar to the proceedings in *Vangerpen*. Here, the information left out the term “recklessly”. Assault in the Second Degree can be charged in alternative means including intentionally assaults another and thereby recklessly inflicts substantial bodily harm. RCW 9A.36.021. Recklessly is an essential element of second degree assault. *See State v. Nailleux*, 158 Wn.App. 630, 644, 241 P.3d 1280 (2010), *State v. Laramie*, 141 Wn.App. 332, 169 P.3d 859 (2007), *and, State v. Johnson*, 180 Wn.2d 295, 325 P.3d 135 (2014). The objection was made prior to the verdict. [RT Vol. III, p. 335]. The State considered amending

the information; however it was after the State had rested and withdrew its motion to amend. [RT Vol. III p. 364-66]. During the motion to dismiss, the State conceded it had made an error:

I have to point out that I have made an error. 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 tiling 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.]

When the State did bring the proposed Third Amended Information to the trial court in the proceedings, it still omitted the word “recklessly” according to discussion held on the record. [RT Vol. III p. 364.]

During the motion to dismiss held before verdict, the parties and the trial court could not recall the standard to be applied when a motion to dismiss for an insufficient information is made at the time the plaintiff rests. [RT Vol. III p. 336-37.] The State argued, inaccurately, that the standard should be if there is any way to read into the information the elements the information is sufficient. [RT Vol. III p. 336-37.] The trial court noted it could not recall the

standards to be applied on the motion depending on the timing of the motion. [RT Vol. III p. 336-37.] Counsel for Mr. Sullivan likewise was not aware of the standard to apply for his motion. [RT Vol. III p. 337]. After this discussion, the trial court improperly 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.]

Mr. Sullivan challenged the Information at a motion for arrested judgment [CP 52.] The State argued erroneously that the 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 erroneously 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 erroneously 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.]

Here, much like *Vangerpen*, the sufficiency of the Information was challenged prior to verdict and therefore the liberalized standard of review does not apply. *See State v. Vangerpen*, 125 Wn.2d at 788, 888 P.2d 1177, *citing State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86. When the information is challenged before the verdict, as it was here, the strict standard applies and all the elements of the crime must be present on the face of the document. *State v. Ibsen*, 98 Wn. App. 214, 216, 989 P.2d 1184 (1999), *citing State v. Johnson*, 119 Wn.2d at 149-50, 829 P.2d 1078. The essential element of recklessly was not included in the information and the omission of an essential statutory element cannot be considered a mere technical error. *See, State v. Vangerpen*, 125 Wn.2d at 790, 888 P.2d 1177. The proper remedy is reversal of the conviction and dismissal of the charges without prejudice for the State to refile. *See Id.*, at 793. The conviction must be reversed and the charges dismissed.

2. The trial court erred in denying the 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 Fifth Amendment to the U.S. Constitution states, in part, no person "shall...be compelled in any criminal case to be a witness against himself." U.S. Const. Amend V. Washington State Constitution Article I section 9 states: "no person shall be compelled in any criminal case to give evidence against himself." Wash. Const. Art. I § 9. 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 unring." *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.

Our Supreme Court in *State v. Burke* 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). The *Burke* Court noted as well that the cases that have permitted testimony about the defendant's silence have only done so for the limited purpose of impeachment after the defendant has taken the stand, and not as substantive evidence of guilt when the defendant has not testified. *State v. Burke*, 163 Wn.2d at 218, 181 P.3d 1 (citing *Easter*, at 237, 922 P.2d 1285). If evidence of silence comes in to show guilt in the State's case in chief, then a defendant may be forced to testify to rebut such a reference. *Id.*, (further citation omitted). As the *Burke* Court noted:

Silence in these circumstances is ambiguous because an innocent person may have many reasons for not speaking. Among those identified are a person's "awareness that he is under no obligation to speak or the natural caution that arises from his knowledge that anything he says might later be used against him at trial, a belief that efforts at exoneration would be futile under the circumstances or because of explicit instructions not to speak from an attorney...In most cases it is impossible to conclude that a failure to speak is more consistent with guilt than innocence.

State v. Burke, 163 Wn.2d at 218-19, 181 P.3d 1 (further citation omitted). Finally, the *Burke* Court noted that unlike the Sixth Amendment Right to Counsel, the Fifth Amendment right of silence requires no magic words. *Id.*

Here, Mr. Sullivan made a motion in limine to restrict the comment on silence. [CP 33, RT Vol. I p. 10.] The Court granted that motion noting that "[Mr. Sullivan] has a Fifth Amendment [sic] to completely decline to be interviewed and hesitation could be because of that in reliance upon that right." [RT Vol. I p. 10.] After exhibit 17 was played for the jury, Mr. Sullivan moved to dismiss noting that it was an extension of the Motion in Limine and noting that the State played a different recording than had been discussed during pretrial motions. [RT Vol. III p. 290.] The trial court denied that motion. [RT Vol. III p. 292.]

The State made arguments twice in its closing argument regarding the statements: 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.] As noted by the *Easter* court, once the bell is rung, it cannot be unring. *State v. Easter*, 130 Wn.2d at 238, 992 P.2d 1285.

VI. 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 2nd day of December 2015

Respectfully submitted,



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