

82699-4

No. 23247-6-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

NICHOLAS A. BAINARD,
Defendant/Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT/CROSS-APPELLANT

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<u>State v. Recuenco</u> , 154 Wn.2d 156, 110 P.3d 188 (2005), <u>cert. granted</u> , 126 S. Ct. 478, 163 L.Ed.2d 362 (2005), 126 S. Ct. 2546, 165 L.Ed.2d 466 (2006) -----	1,2,3

In an order entered by this court on or about February 17, 2006, proceedings in the Bainard case were stayed pending a decision and mandate by the United States Supreme Court in State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005), cert. granted, 126 S. Ct. 478, 163 L.Ed.2d 362 (2005), 126 S. Ct. 2546, 165 L.Ed.2d 466 (2006). The U.S. Supreme Court decided this case on June 26, 2006, and reversed the Washington State Supreme Court which vacated the sentence of the defendant Recuneco which had concluded a Blakely violation can never be harmless.

In the case decided by the U.S. Supreme Court, Justice Thomas writes that the court has recognized the commission of a constitutional error at trial alone does not entitle the defendant to an automatic reversal. Instead, "most constitutional errors can be harmless." Neder v. United States, 527 U.S. 1, 8 (1999), quoting Arizona v. Fulminante, 499 U.S. 279, 306 (1991).

In Recuenco, the prosecutor charged and the jury found the defendant guilty of assault in the second degree while armed with a deadly weapon. The judge imposed the sentence along with a three-year mandatory enhancement for use of a firearm because the evidence showed the deadly weapon to be a firearm. Further, the request to the jury was to find that the enhancement was a

deadly weapon, not the enhancement that the deadly weapon that was used was a firearm. The U.S. Supreme Court reversed the Washington State Supreme Court and found that the harmless error doctrine applied and that clearly the jury had before it the proper information to make a decision as to what the deadly weapon was. Recuenco, supra. Further, that is why the trial judge imposed the three-year mandatory enhancement in Recuenco for use of the firearm because a firearm was shown to be the deadly weapon in that case.

The issue in the Bainard matter is much more clear than that in the Recuenco case because the prosecution requested and, without exception to the instructions, the jury was given notice that the deadly weapon used in this case was a firearm, the jury instructions described what the firearm was, and the jury was requested to make a decision based upon whether or not that firearm was used. (CP 138-167). As in Recuenco, the jury in the case at bar returned a guilty verdict on the offense charged and simply answered in the affirmative to the sentencing question of whether Mr. Bainard was armed with a deadly weapon. Therefore, the jury did find Mr. Bainard guilty of each of the elements of the offenses with which he was charged. It was a complete finding of

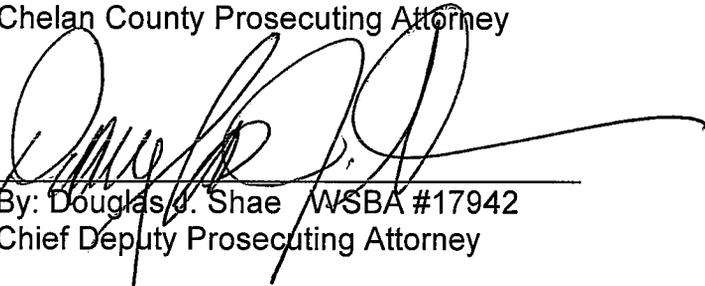
guilt, therefore, the result of the U.S. Supreme Court case applies directly with the Bainard case.

In the case at bar, as in Recuenco, the State proved all elements to establish guilt. However, if there was any error that the error was harmless. Therefore, this court should uphold the convictions of Mr. Bainard.

DATED this 5th day of September, 2006.

Respectfully submitted,

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