69131-7

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COA No. 69131-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY LEWIS WILLIAMS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF SNOHOMISH COUNTY

The Honorable George N. Bowden
The Honorable Linda C. Krese

REPLY BRIEF

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A. REPLY ARGUMENT

1. CONTRARY TO THE STATE'S CONTENTION, THE SPECIAL VERDICT INSTRUCTION DID "LEAVE OUT AN ESSENTIAL ELEMENT OF THE AGGRAVATING CIRCUMSTANCE," BECAUSE THE STATUTE SAYS THE JURY MUST FIND BEYOND A REASONABLE DOUBT THAT PERSONS WERE "ENDANGERED" AND THIS ELEMENT WAS ENTIRELY OMITTED.

a. The language of the special verdict form relieved the State of its burden to prove the "endangerment" element of the RCW 9.94A.834 enhancement to the jury. Instructing upon every element is required to protect the right to have the State prove every element of the crime charged beyond a reasonable doubt to the jury. BOR, at pp. 16-17; AOB, at pp. 5-9, 11-13; U.S. Const. amend. 14; Wash. Const. art. 1, §§ 3, 21, 22; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Jackson v. Virginia, 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.ed.2d 560 (1979); State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002) (a conviction cannot stand if the jury was instructed in a manner that would relieve the State of this burden).

Contrary to the Respondent's arguments, Due Process and RCW 9.94A.533(1) authorize additional incarceration as an enhancement under RCW 9.94A.834 only where there has been a finding of endangerment beyond a reasonable doubt, pursuant to

the requirements of the latter statute. RCW 9.94A.834.[1] The enhancement of .834 provides in pertinent part::

> **RCW 9.94A.834 Special allegation--Endangerment by eluding a police vehicle—Procedures**
>
> * * *
>
> (2) In a criminal case in which there has been a special allegation, the state shall prove beyond a reasonable doubt that the accused committed the crime while endangering one or more persons other than the defendant or the pursuing law enforcement officer. The court shall make a finding of fact of whether or not one or more persons other than the defendant or the pursuing law enforcement officer were endangered at the time of the commission of the crime, or if a jury trial is had, **the jury shall**, if it finds the defendant guilty, also **find a special verdict as to whether or not one or more persons** other than the defendant or the pursuing law enforcement officer **were endangered** during the commission of the crime.

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[1] RCW 9.94A.533(11) authorizes the 12+ month enhancement where the jury has found the endangerment allegation:

> (11) An additional twelve months and one day shall be added to the standard sentence range for a conviction of attempting to elude a police vehicle as defined by RCW 46.61.024, if the conviction included a finding by special allegation of endangering one or more persons under RCW 9.94A.834.

(Emphasis added.) RCW 9.94A.533(11).

(Emphasis added.) RCW 9.94A.834, subsection (2). Given this statutory language requiring the jury to find beyond a reasonable doubt that persons were "endangered," Mr. Williams respectfully asks this Court to reject the Respondent's contention that the "jury instructions did *not* leave out an essential element of the aggravating circumstance." (Emphasis added.) BOR, at p. 16.

It is beyond dispute that the special verdict instruction did not anywhere contain the "endangered" element, and instead asked the jury to find whether persons were "threatened with physical injury or harm."[2]

Respondent contends that the words used in the special verdict form "mean the same thing" as the language that is required by the statutes ("the jury shall . . . find" whether persons were "endangered"); BOR, at p. 18.

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[2] The special verdict instruction given to Mr. Williams' jury read as follows:

> Was any person, other than Anthony L. Williams or a pursuing law enforcement officer, **threatened with physical injury or harm** by the actions of Anthony L. Williams during his commission of the crime of attempting to elude a police vehicle?

(Emphasis added.) CP 43. The essential "endangered" element of RCW 9.94A.834 does not appear therein.

Respondent does not cite a case in which a "to-convict" instruction that fails outright to list the statutorily-required element of an allegation can be deemed non-erroneous under the theory that the words used in lieu of the element "mean the same thing" as the element that the statute says "shall" be found by the jury. RCW 9.94A.834(2).

Of course, one could debate *ad nauseum* the differences in meaning between "endangered" and "threatened." There is no need to do so, because the present case does not hinge on this Court concluding by complex statutory interpretation that these are different things. The Legislature has chosen to use different words, and thus on the face of the statute, different these things are.[3] The assigned error occurred.

The error is manifest and thus appealable because it is very much "plausible" that completely leaving out the element of a criminal charge had an identifiable consequence in the case which was tried to a jury that was told to use the instructions as a yardstick for what must be proved. See BOR, at p. 17; AOB, at p. 6 (citing, *inter alia*, State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415

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[3] See, e.g., In re Pers. Restraint of Dalluge, 162 Wn.2d 814, 820, 177 P.3d 675 (2008) ("When the legislature uses different words in the

(2005) (failure to require proof of an element reviewable despite absence of objection); State v. Roggenkamp, 153 Wn.2d 614, 620, 106 P.3d 196 (2005) (failure to properly instruct on an element of a charged crime is manifest constitutional error). Here, the special verdict instruction omitted the central, substantive element of the endangerment enhancement. Review may be taken by this Court. RAP 2.5(a)(3).

b. The Respondent's brief fails to meet the State's burden to prove harmlessness beyond a reasonable doubt. Finally, the Respondent fails to show harmlessness beyond a reasonable doubt, because the evidence pertinent to proof of the missing, correct statutory element was highly controverted. The Stat's arguments to the contrary ignore the substantial record and are unavailing. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 18-19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)).

The Respondent must show both overwhelming and uncontroverted evidence, which cannot be demonstrated where Mr. Williams' counsel closely cross-examined the police witnesses

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same statute, we presume the legislature intends those words to have different meanings.").

regarding the disputed questions of the dangerousness of the incident (see AOB at pp. 13-17 and citations therein to trial record); Respondent instead contends that the evidence was uncontroverted because the State relied on the dash-cam tape from the pursuing vehicle. BOR, at pp. 19-20. The State's theory appears to be something akin to 'the videotape shows what videotape shows.' But this contention ignores the significant factual litigation of the question of dangerousness in the witness testimony phase of trial and in closing argument. 6/18/12RP at 51, 6/19/12RP at 109-16. Further, the State erroneously dismisses the significance of the extensive post-trial motion to dismiss the special allegation, wherein the court re-viewed the dash-cam video. 7/10/12RP at 182-206. The physical facts portrayed by the video were highly controverted with regard to the ultimate factual question of the dangerousness to persons, if any, caused by the defendant's driving.

Even if it will be a rare case wherein "endangerment" is highly controverted, it certainly was in this case, and the judge and at least the defense lawyer thought so, correctly, below. As did the testifying defendant, who stated that he avoided other cars that were driving in the area, 6/19/12RP at 110-11, 115, and since it

was nighttime, he properly turned his headlights on. 6/19/12RP at 116. Counsel continued to controvert the State's charges through the defense closing argument, arguing that Mr. Williams drove in a reasonable manner, avoiding danger. 6/19/12RP at 148-49, 155.

Thus, the error of a missing element in the jury instructions is not harmless beyond a reasonable doubt in this case because the missing element was not supported by overwhelming uncontroverted evidence. Brown, 147 Wn.2d at 341; Neder, 527 U.S. at 18. Reversal is required, unless this Court accepts the Respondent's entreaty to substitute the State's own private, purposely identically-crafted definitions of "threatened" and endangered" and accordingly rules that the Legislature's use of different words in this statute shows an intent that such words should carry the same meaning. The State solicits what would be a ground-breaking ruling. See State v. Keller, 98 Wn. App. 381, 384, 990 P.2d 423 (1999), aff'd, 143 Wn.2d 267, 19 P.3d 1030 (2001); see also In re Pers. Restraint of Dalluge, supra, 162 Wn.2d at 820.

Absent the jury finding stated by the Legislature as required for imposition of the sentence enhancement ("endangered") under .834 and .533(11), the sentencing court had no constitutional authority to impose the additional incarceration. AOB, at p. 1

(Assignments of Error 1 and 2); U.S. Const. amend. 14; Wash. Const. art. 1, §§ 3, 21, 22; see also State v. Warnock, Court of Appeals No. 68295-4-I (Division One, April 29, 2013) (absent required court finding, court may not impose sentencing requirement).

2. THE RESPONDENT CONCEDES THAT THE INFORMATION ENTIRELY FAILS TO INCLUDE THE "ENDANGERED" ELEMENT.

a. No prejudice showing required. All essential elements of a crime, including the elements of any sentencing enhancements, must be set forth in the information. State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008); State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); CrR 2.1(a)(1); U.S. Const. amend. 6; Wash. Const. art. I, § 22.

Even under a "liberal" construction, the element of 'endangered' is not in the information in Mr. Williams' case. Kjorsvik, 117 Wn.2d at 102. The information omitted the essential element of the enhancement that persons other than the defendant or the pursuing officer were "endangered," and instead alleged simply that others were threatened with harm. Compare CP 65-67 (amended information); RCW 9.94A.834, subsection (2) ("the jury shall [find whether] persons other than the defendant or the

pursuing law enforcement officer were endangered") (Emphasis added.).

The Legislature, in a portion of the enhancement statute that essentially sets forth charging standards for this particular allegation, allows a prosecutor to file special endangerment charge where evidence exists of threat of injury caused by the Eluding crime. Subsection (1) of RCW 9.94A.834. However, one is only convicted of the allegation, and the accordant enhancement may only be added to the offender's sentence, if the fact-finder (jury here) finds by proof beyond a reasonable doubt its element, i.e., by a jury or bench trial finding that persons were endangered. Subsection (2) of RCW 9.94A.834. This is the element of the endangerment special determination, and in Mr. Williams' case, that element cannot be found in the information.

The Respondent proposes that endangerment is the same as threat. This cannot be correct where these are codified terms of art. This Court presumes, well nigh irrebuttably, that when the Legislature uses different words it intends a different meaning. State v. Roberts, 117 Wn.2d 576, 586, 817 P.2d 855 (1991) ("Where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in

legislative intent"); see also State v. Keller, supra, 98 Wn. App. at 384; In re Pers. Restraint of Dalluge, supra, 162 Wn.2d at 820.

This is as true here in issue 2 with regard to the Kjorsvik analysis of the charging document, as it is for purposes of the element missing entirely from the "to-convict" instruction and relieving the State of its Due Process burden of proof on the enhancement – issue 1. Thus this Court must reject, for purposes of both issues, the Respondent's argument that the enhancement statute

> uses both the phrase "threaten with physical injury or harm" and "endangered" to describe the circumstance that aggravates an attempting to elude a police vehicle charge.

BOR, at p. 8. This is provably wrong. The statute allows the trial court to enter judgment on the endangerment aggravator only where the jury finds the circumstance that the eluding crime *endangered* others. RCW 9.94A.834(2).

This Court must also reject the Respondent's contention that "the plain meaning of the statute indicates the terms are interchangeable." BOR, at p. 12. State v. Roberts, supra, at 586; State v. Keller, supra, at 384; In re Pers. Restraint of Dalluge,

supra, at 820. The terms, per se, do not mean the same thing – the statute says so.

And in any event, finally, Kjorsvik does not, as the State contends, establish that an essential element may be omitted from the charging document, replaceable by *any* word with a related meaning. Kjorsvik, 117 Wn.2d at 108. Here, under Kjorsvik the missing "endangered" element of RCW 9.94A.834 cannot be found anywhere in Mr. Williams' information, even "by fair construction." Kjorsvik, 117 Wn.2d at 108. Certainly, the present case is not one in which the defendant can complain merely of "vague or inartful language in the charge." Kjorsvik, 117 Wn.2d at 111; see State v. Phuong, ___ Wn. App. ___, ___, ___ P.3d ___ (2013 WL 1729562 Wash.App. Div. 1, April 22, 2013) (citing Kjorsvik analysis). To the contrary, the charging document in this case dispensed with the language of the plain title of the enhancement ("Endangerment"), excluded from the document the "endangered" element that the statute explicitly requires that the jury "shall" find, and, instead, wrote in other language, different as a matter of law and Legislative dictate from the correct element, that the drafter located in the charging standards portion of the statute (subsection (1)).

Notably, an information's citation to the *proper* statute and the naming the offense in the document can be sufficient to charge a crime, but only in the rare instance where the correct citation and title apprise the defendant of all of the essential elements of the crime. City of Auburn v. Brooke, 119 Wn.2d 623, 635, 836 P.2d 212 (1992). But Respondent cites no case that deems complete a charging document that *affirmatively* directs the accused to the *wrong* language found in an *inapplicable different* portion of the statute, while leaving out *both* the title of the allegation and the express *element* required for conviction. The opinion of the Supreme Court in State v. Kjorsvik precludes upholding an information stated by reference to the statute cited in the document, even to merely clarify the information. Kjorsvik, 117 Wn.2d at 100-01. Here, the erroneous language would at best lead an accused to the wrong part of the statute, where he would discover language that per se means something different than the language of the actual element required to be charged. Although by erroneous drafting rather than ill intent, this was an affirmatively misleading charging document, and its language was inadequate "notice" of the accusation. See U.S. Const. amend. 14; Wash. Const. art. 1, §

22. Reversal is required without any necessity of showing prejudice.

b. <u>Prejudice</u>. If the statutorily-required "endangered" element is deemed locatable in the information, but only after construing vague and merely "inartful" language, reversal is nonetheless still required, because Mr. Williams was prejudiced in his defense from the commencement of the criminal case through to its conclusion, as argued in the Appellant's Opening Brief.

B. CONCLUSION.

Based on the foregoing and on his Appellant's Opening Brief, Mr. Williams respectfully asks this Court to reverse the judgment and sentence of the Superior Court.

Dated this 1 day of May, 2013.

Respectfully submitted,

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Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 69131-7-I
	)	
	)	
ANTHONY WILLIAMS,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 1ST DAY OF MAY, 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:

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