No. 45048-6-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOSHUA DAVID CHARLES RHOADES,

Respondent.

Appeal from the Superior Court of Washington for Lewis County

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Respondent's Brief

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I. ISSUES

A. Did the State fail to give notice of an aggravating factor that was submitted to the jury?

B. Did the jury instruction defining recklessness relieve the State of its burden of proving all of the essential elements of the crime charged?

II. STATEMENT OF THE CASE

On January 31, 2013, 17 year old Dustin McLean and two friends, Caleb Capo and Blake Markva, were walking down Tower Avenue in Centralia, Washington, around 11:00 p.m. RP[1] 119-21, 177. Mr. McLean lives with his parents in Rochester but was staying the night at a friend's house in Centralia. RP 119-20, 203-04. Mr. McLean was wearing a black sweater and jeans. RP 121. As the three walked down Tower towards the Chevron station they saw a green Ford Taurus with only one headlight approaching. RP 120, 122, 178. The car slowed down and turned the corner, rounding the block and parking. RP 122, 179, 227-28.

Rhoades, who was 32, got out of the car, flashed gang signs, and yelled, "Do you know who I am? I'm Spooker. LVL."[2] RP 122, 180, 231, 248, 264. Rhoades then walked/ran aggressively

[1] There are several volumes of the verbatim report of proceedings. The State will cite to the trial proceedings from 4/24/13, 4/25/13, and 4/26/13 as RP. The other VRPs will be cited with RP and the date of the proceedings.

[2] LVL are the initials for Lil Valley Lokotes, a Sureño affiliated gang. RP 337-38.

towards Mr. McLean. RP 181, 232. Rhoades asked Mr. McLean if he was a Norteño and Mr. McLean replied no. RP 123.[3] Rhoades started hitting Mr. McLean. RP 125. Mr. McLean could see that Rhoades had a black handled knife in his fist, which Mr. McLean felt as Rhoades repeatedly struck him in the face, side, and all over his body. RP 125-26, 181. Mr. McLean attempted to fight back. RP 126, 181. Mr. McLean kept saying he was only 17 years old. RP 232. Rhoades also kicked Mr. McLean. RP 126. Mr. McLean ended up on his back on the ground and Rhoades was above Mr. McLean, striking him. RP 126.

At some point during the attack two other people got out of the green Taurus and joined Rhoades. RP 127, 181. Mr. McLean was knocked unconscious during the attack. RP 130, 181. Mr. Capo jumped in when he saw Mr. McLean go limp and it was clear he was unconscious. RP 185. Mr. Capo was afraid for Mr. McLean's life. RP 203. The entire fight lasted 30 to 40 seconds. RP 191.

Mr. McLean was taken to the hospital and his step-father was called. RP 204. Mr. McLean did not want to go to the hospital. RP 150-51. Mr. McLean was scared and wanted his mom. RP 150-

[3] Norteño is a street gang and rivals of the Sureños. RP 338-39.

51. Steve Carney, Mr. McLean's stepfather, arrived at the hospital to find Mr. McLean emotional, crying, and very confused. RP 204. Mr. McLean did not know where he was and Mr. Carney had to tell Mr. McLean twice that he was at the hospital. RP 205. Mr. McLean had cuts over his eye, scrape on his cheek, road rash, and bruises. RP 130-31. The injury to his face did not require stitches, lasted for about two weeks, and did not result in scarring. RP 131. The scrapes and bruises all over Mr. McLean's body lasted for about a month. RP 131. Mr. McLean also suffered from headaches as a result of Rhoades' attack. RP 132.

The police stopped the Ford Taurus after receiving a 911 call about the fight. RP 235, 285, 318. A knife was recovered during the stop but no weapons were found on Rhoades person. RP 320-23, 327. The blade of the knife measured three and one-quarter inches long. RP 314. Mr. McLean identified the knife found as the one Rhoades had in his hand while he was striking Mr. McLean. RP 379-80.

The State charged Rhoades with Assault in the Second Degree. RP 1. The State alleged that at the time of the commission of the crime Rhoades was armed with a deadly weapon, other than a firearm. CP 1. The State also alleged in the information that

Rhoades "committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group." CP 2. Prior to trial there was an ER 404(b) hearing regarding gang evidence. RP (4/3/13); CP 9-13, 14-21. The court ruled the State would be able to present gang evidence in regards to motive and intent. CP 19-21.

Rhoades elected to have his case tried to a jury. *See* RP. Rhoades was convicted of Assault in the Second Degree. CP 61. The jury also found that Rhoades was armed with a deadly weapon other than a firearm. CP 63. The jury was also asked if Rhoades "committed the offense with intent to directly cause a benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang, its reputation, influence, or membership." CP 64. The jury answered yes. CP 64.

The trial judge sentenced Rhoades to an exceptional sentence of 110 months. CP 69-79. Rhoades timely appeals his conviction and sentence. CP 80. The State will further supplement the facts as necessary in its argument below.

III. ARGUMENT

A. RHOADES DID NOT PRESERVE FOR APPEAL THE ISSUE REGARDING THE STATE'S ALLEGED FAILURE TO GIVE NOTICE OF THE AGGRAVATING FACTOR SUBMITTED TO THE JURY AND THEREFORE, CANNOT RAISE THE ISSUE ON APPEAL BECAUSE THE ERROR IS NOT MANIFEST.

Rhoades argues that his constitutional right to notice was violated because the jury was instructed on an aggravating factor different than the aggravating factor the State alleged in the information. Brief of Appellant 5-12. Rhoades argues because the aggravating factor presented to the jury was different than the one in the information he was not given notice as required by the constitution and case law.

While Rhoades is correct that the State must give notice, he fails to acknowledge that he did in fact have notice that the State was seeking the gang aggravator, there was an entire hearing held in regards to the admission of gang related evidence, and he did not object to the jury instruction or the special verdict form regarding the gang aggravator. Rhoades claim fails because he was given notice.

1. Standard Of Review

Constitutional challenges are reviewed de novo. *Lummi Indian Nation v. State*, 170 Wn.2d 247, 257-58, 241 P.3d 1220

(2010). A claim of a manifest constitutional error is reviewed de novo. *State v. Edwards*, 169 Wn. App. 561, 566, 280 P.3d 1152 (2012). Statutory interpretation is also reviewed de novo. *State v. Siers*, 174 Wn.2d 269, 274, 274 P.3d 359 (2012).

2. Rhoades Did Not Preserve The Error And Therefore Cannot Raise It For The First Time On Appeal.

An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *O'Hara*, 167 Wn.2d at 98. The exception to this rule is "when the claimed error is a manifest error affecting a constitutional right." *Id., citing* RAP 2.5(a). There is a two part test in determining whether the assigned error may be raised for the first time on appeal, "an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension." *Id.* (*citations omitted)*.

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must be assessed to make a determination of whether a constitutional

interest is implicated. *Id.* If an alleged error is found to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *McFarland*, 127 Wn.2d at 333. An error is manifest if the appellant can show actual prejudice. *O'Hara* 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.* There must be a sufficient record for the reviewing court to determine the merits of the alleged error. *Id. (citations omitted)*. No prejudice is shown if the necessary facts to adjudicate the alleged error are not part of the record on appeal. *McFarland*, 127 Wn.2d at 333. Without prejudice the error is not manifest. *Id*.

At no point during the jury instruction conference did Rhoades object to or take exception to any of the jury instructions or verdict forms given in this case. RP 383-93. Rhoades' trial counsel did object to some of the jury instructions proposed by the State and these objections were sustained and the trial court refused to give the instructions. RP 386-87. At no point in time during the instruction conference, during the reading of jury instructions, or prior to the copy of the instructions going back to the jury did Rhoades raise issue with the special verdict instruction regarding the gang aggravator or the special verdict form. Rhoades

must show that the error is of constitutional magnitude and manifest. The State agrees that the alleged error, failure to give notice of an aggravating factor, would be of constitutional magnitude. Therefore, the only question left to answer is whether the alleged error is manifest. Rhoades cannot meet his burden to show the error was manifest.

a. The State is required to give a defendant notice if it intends to seek an aggravating factor.

A criminal defendant has a constitutional right to be informed of the nature of the cause of the accusation the State is alleging. U.S. Const. amend. VI; Const. art. I, § 22. "An aggravating factor is not the functional equivalent of an essential element, and thus, need not be charged in the information." *Siers*, 174 Wn.2d at 271. The Sentencing Reform Act requires the State to give the defendant notice that it will seek an exceptional sentence. RCW 9.94A.537(1). The statute does not require a specific procedure be followed or dictate the manner in which notice shall be given. RCW 9.94A.537; *Siers*, 174 Wn.2d at 277. A defendant must receive notice of an aggravating factor prior to the proceedings in which the State will seek to prove the factor. *Siers*, 174 Wn.2d at 277. This

notice requirement gives the defendant the ability to mount an adequate defense against the aggravating factor. *Id.* at 277.

b. Rhoades had notice that the State was alleging the gang aggravating factor, regardless of what the aggravating factor was contained within the information.

Rhoades argues that the State alleged one aggravating factor in the information and the jury was instructed on a different aggravating factor without proper notice to Rhoades. Appellant's Brief 5-12. It is correct that in the information the State alleged the following aggravating factor, "the defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group." CP 2, citing RCW 9.94A.535(3)(s). It is also true that the jury was instructed on a different aggravating factor then the one contained in the information:

> If you find the defendant guilty of Assault in the Second Degree as charged in Count I, then you must determine if the following aggravating circumstances exists:
>
> Whether the defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for criminal street gang, its reputation, influence or membership.

CP 50; RCW 9.94A.535(3)(aa); WPIC 300.02. The special verdict form correlated with the aggravating factor as instructed in the Court's Instructions to the Jury. CP 50, 51, 64. Rhoades incorrectly asserts that he was never given notice that the State was alleging the gang aggravating factor, as instructed to the jury. The State gave sufficient notice that it sought to prove the motive behind Rhoades' assault on Mr. McLean was the status and reputation of Rhoades' gang, the LVL, and an attempt to influence and intimidate a perceived rival gang member. *See* CP 8-13.

There was briefing and a hearing regarding the State's request to be allowed to solicit testimony regarding Rhoades' gang status, his statements about being in a gang, and general gang culture. RP (4/3/13); CP 8-13, 19-21. The gang evidence was ruled admissible for purposes to show motive and intent. RP (4/3/13) 6-10; CP 19-21. Rhoades' trial attorney acknowledged and affirmed that they knew and understood the aggravating factor the State was alleging was the criminal street gang aggravating factor. RP 387-88. While discussing jury instruction Rhoades' trial counsel stated the following regarding the limiting instruction and gang evidence:

> Now, I propose a different instruction on this. And this was based on Judge Brosey's ruling. I thought the Court was allowing the gang evidence in. I understand the enhancement or the aggravator, but

> for the motive or intent was the purpose that Judge Brosey said it could come in for.

RP 387. Rhoades' attorney also did not object to the State's proposed instruction regarding the gang aggravating factor, the instruction as given by the court, or the special verdict form for the gang aggravating factor. RP 387-93.

Rhoades spends considerable time in his briefing arguing that he could not be tried for an aggravator that was not charged. Appellant's Brief 8-10. Rhoades cites to the line of cases that hold that a person may only be tried for offenses that were charged by the State with the exceptions of a lesser included offense or an inferior degree to the offense charge. Appellant's Brief 8-9, *citing State v. Vangerpen*, 125 Wn.2d 791, 888 P.2d (1995); *State v. Irizarry*, 111 Wn.2d 591, 763 P.2d 432 (1988). The cases cited by Rhoades deal with the crime charged by the State in the information, not an aggravating factor or sentencing enhancement. *Vangerpen*, 125 Wn.2d 791; *Irizarry*, 111 Wn.2d 591. Rhoades argue that "[t]hese principles should apply equally to statutory aggravating factors, which are 'the functional equivalent to an element of a greater offense.'" Appellant's Brief at 10, *citing State v. Gordon*, 172 Wn.2d 671, 678, 260 P.3d 884 (2011).

While notice is required, there is nothing in the case law or the statute that requires notice be given in a specific manner, such as in a charging document. The Supreme Court held in *Siers*, a case which Rhoades himself cites extensively in his briefing, that aggravating factors are not the functional equivalent to essential elements. *Siers*, 174 Wn.2d at 271. There is no requirement that the State "charge" an aggravating factor. If the State does allege an aggravating factor in the information, but then gives the defendant notice that the State is proceeding on a different aggravating factor, nowhere in the case law or statutory scheme does it require the State to instruct the jury on the abandoned aggravating factor to the exclusion of the elected aggravating factor. Notice is the key.

It would be fundamentally unfair and unconstitutional to proceed on an aggravating factor the defendant was never notified about. But that did not occur in this case. Rhoades received notice that the State was proceeding on the gang aggravating factor and the instructions to the jury were therefore proper. There was no error.

Arguendo, if there was error by the State alleging the wrong aggravating factor in the information Rhoades was not prejudiced by it because he received proper notice, as evidenced by the ER

404(b) pleadings, hearing, and his attorney's comments during the jury instruction conference. Without prejudice the error is not manifest and cannot be raised for the first time on appeal. This court should affirm Rhoades conviction and his sentence.

B. THE JURY INSTRUCTION DEFINING RECKLESSNESS DID NOT RELIEVE THE STATE OF ITS BURDEN OF PROVING ALL OF THE ELEMENTS OF THE CRIME.

Rhoades argues the jury instruction defining reckless was erroneous as it used the language "disregards a substantial risk that a wrongful act may occur" instead of "disregards a substantial risk that substantial bodily harm may occur." Appellant's Brief 12-19. Rhoades argues this error relieved the State of its burden to prove all the elements of the crime beyond a reasonable doubt and this error was not harmless. Appellant's Brief 12-21. The State was not relieved of its burden as the instruction given defining recklessness was a correct statement of the law. In the alternative, if there was error it was harmless beyond a reasonable doubt.

1. Standard Of Review.

Challenged jury instructions are reviewed de novo and evaluated in the context of the instructions as a whole. *State v. McCreven*, 170 Wn. App. 444, 461-62, 284 P.3d 793 (2012).

Constitutional violations are reviewed de novo. *State v. Irby,* 170 Wn.2d 874, 880, 246 P.3d 796 (2011).

2. Jury Instructions Must Correctly State The Law And Inform The Jury That The State Has The Burden To Prove Each Element Of The Charged Crime Beyond A Reasonable Doubt.

Jury instructions are sufficient when they are not misleading, allow a party to argue their theory of the case, and, "when read as a whole, properly inform the trier of fact of the applicable law." *State v. Harris*, 164 Wn. App 377, 383, 263 P.3d 1276 (2011). Jury instructions are read in a commonsense manner and are sufficient if they properly inform the jury of the applicable law. *State v. Bowerman*, 115 Wn.2d 794, 809, 802 P.2d 116 (1990). The instructions, "taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt." *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). An appellate court will "review the instructions in the same manner as a reasonable juror." *State v. Hanna*, 123 Wn.2d 704,719,871 P.2d 135 (1994). There are no "magic words" that must be used. State v. Coe, 101 Wn.2d 772, 787, 684 P.2d 668 (1984).

It is reversible error to instruct the jury in a manner that relieves the State of its burden of proof. *Pirtle*, 127 Wn.2d at 656.

Jury instructions that contain clear misstatements of the law are presumed to be prejudicial. *Harris*, 164 Wn. App. at 383. A defendant may raise a claim that an instructional error relieved the State of its burden of proof for the first time on appeal. *State v. Peters*, 163 Wn. App. 836, 847,261 P.3d 199 (2011).

3. This Court Should Not Follow *Johnson, Harris,* And *Peters* Because They Misapplied *Gamble*.

Where, as here, the "to convict" instruction includes all elements of assault defined in statutory terms, and recklessness is also defined in statutory terms, the instructions satisfy Due Process requirements, especially in light of the Washington State Supreme Court's clearly-stated preference for using statutory language in jury instructions. *State v. Hardwick*, 74 Wn.2d 828, 830, 447 P.2d 80 (1968); *State v. Bixby*, 27 Wn.2d 144, 170, 177 P.2d 689 (1947). No Washington case holds that failure to more particularly define recklessness in a jury instruction is a Due Process violation. Division One and Two of Court of Appeals' have misinterpreted the Supreme Court's decision in *State v. Gamble*, 154 Wn.2d 457, 114 P.3d 646 (2005). *See State v. Johnson,* 172 Wn. App. 112, 129-33, 297 P.3d 710 (2012), *reviewed granted* 178, Wn.2d 1001 (2013); *Peters*, 163 Wn. App. at 847 and *Harris*, 164 Wn. App. 377.

In *Gamble*, the Supreme Court held that manslaughter was not a lesser included offense of felony murder because the jury must find a direct connection between recklessness and death for manslaughter, but not for felony murder. *Gamble*, 154 Wn.2d at 460. The court noted that in a manslaughter case, the wrongful act recklessly disregarded is "death." Id. at 467-68. The Court's decision in *Gamble* said nothing, however, as to how jury instructions defining "recklessness" must be drafted, whether in a manslaughter case or any other case.

In *Peters*, the defendant was convicted of manslaughter in the first degree. On appeal, he claimed that the jury instructions violated his due process rights by lowering the State's burden of proof. *Peters*, 163 Wn. App. at 847. *Peters* was correct insofar as the "to convict" instruction asked the jury to find that Peters engaged in "reckless conduct" before convicting him, instead of saying that it had to find Peters "recklessly caused the death" of his victim. *Peters*, 163 Wn. App. at 847. A "to convict" instruction must contain all the elements of the crime because it "serves as a yardstick by which the jury measures the evidence to determine guilt or innocence." *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010). By failing to provide the nexus between recklessness

and death, the "to convict" instruction was constitutionally deficient. However, rather than simply identifying error in the "to convict" instruction, the *Peters* court criticized the "reckless" definition because that definition did not cross-reference the risk of death. There would be no need, however, to cross-reference the risk of death in the reckless definition if the "to convict" instruction had included that nexus.[4]

Harris applied this improper analysis to instructions for assault of a child. The "to convict" instruction in *Harris*—unlike the instruction in *Peters*—used the precise language of the charged crime and required the jury to find that the defendant "recklessly inflicted *great bodily harm.*" *Harris*, 164 Wn. App. at 384 (italics added). "Reckless" was defined using WPIC 10.03, i.e., disregarding the risk that a "wrongful act" may occur. The *Harris* court apparently failed to realize that the "to convict" instruction in *Peters* was deficient. It simply followed the holding of *Peters*, focused on the WPIC 10.03 instruction, and held that by failing to include "great bodily harm" in the definition of "reckless," the State was relieved "of its burden to prove that Harris acted with disregard of the risk that his actions would result in "great bodily harm." *Id.* at

[4] Of course, a trial judge might choose to include such a cross-reference for the sake of clarity, but the instruction would be constitutionally sufficient without it.

387. This was error. The "to convict" instruction in *Harris* specifically informed the jury that it had to find that the defendant recklessly inflicted a defined level of harm, "great bodily harm. " *Id.* at 384. Thus, there was no need to insert the phrase "great bodily harm" into the definition of recklessness.

Division One's decision in *Johnson* extends the errors in *Peters* and *Harris* to the oft-charged crime of assault in the second degree under RCW 9A.36.021(I)(a). *Johnson*, 172 Wn. App. at 129-33.[5] The Due Process violation in *Peters* occurred because the State was relieved of proving an element of the crime when the nexus between act and risk was not provided in the "to convict" instruction. In *Harris* or *Johnson*, however, the link between recklessness and harm was made clear in the "to convict" instructions. Taking the instructions as a whole, there was no Due Process violation; the "reckless" definition may simply repeat the statutory language rather than be tailored to fit each charged crime.

In this case the trial court gave the standard to-convict instruction:

[5] Due to the identical issues in the cases, the State respectfully requests this Court stay any decision in this case until after the Supreme Court rules on *Johnson*, which was argued January 21, 2014.

> To convict the defendant of the crime of Assault in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about January 31, 2013, the defendant:
>
> (a) intentionally assaulted Dustin Patrick McLean and thereby recklessly inflicted substantial bodily harm; or
>
> (b) intentionally assaulted Dustin Patrick McLean with a deadly weapon; and
>
> (2) That this act occurred in the State of Washington.
> If you find from the evidence that element (2) and either alternative element (1)(a) or (1)(b) have been proven beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of the alternatives (1)(a) or (1)(b) has been proved beyond a reasonable doubt, as long as each juror finds that either (1)(a) or (1)(b) has been proven beyond a reasonable doubt.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to either element (1) or (2), then it will be your duty to return a verdict of not guilty.

CP 47. The jury instructions included the standard WPIC for defining recklessness:

> A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.
>
> When recklessness as to a particular result is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly as to the result.

CP 44; *See* WPIC 10.03. These instructions were correct as given.

The to-convict instruction included the necessary nexus between recklessness and substantial bodily harm. This nexus renders the jury instructions constitutionally sufficient. The jury was instructed on all of the essential elements of the crime of Assault in the Second Degree and the to-convict, coupled with the reckless definition, does not relieve the State of its burden. This Court should find that the reasoning in *Peters, Harris,* and *Johnson* was flawed and that there was no error in the instructions given to the jury. Rhoades' conviction should be affirmed.

4. If The Reckless Instruction Did Relieve The State Of Its Burden, Any Error Was Harmless Beyond A Reasonable Doubt.

Arguendo, if the jury instruction defining reckless did relieve the State of its burden of proof, the error would be harmless beyond a reasonable doubt. Contrary to Rhoades' assertion, the uncontroverted evidence proved that Rhoades knew of and disregarded a substantial risk that substantial bodily harm could occur.

"An erroneous jury instruction that misstates the law is subject to a harmless error analysis." *Peters*, 163 Wn. App. at 850, *citing State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). A

misstatement of an element is harmless if that element is supported by uncontroverted evidence. *Peters*, 163 Wn. App. at 850, *citing State v. Brown,* 147 Wn.2d 330, 341, 58 P.3d 889 (2002). The State bears the burden of showing an error is harmless beyond a reasonable doubt. *Peters*, 163 Wn. App. at 850 (citations omitted). To determine an error harmless the reviewing court "must conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." *Id.* (citations omitted).

Rhoades, who was 32 years old at the time, attacked a 17 year old boy. RP 119, 125; CP 3. Rhoades was six inches taller and 65 pounds heavier than Mr. McLean. RP 119; CP 3. Rhoades attacked and assaulted Mr. McLean while armed with a deadly weapon. RP 125. Rhoades punched Mr. McLean with a closed fist on Mr. McLean's face and all over his body. RP 125. Rhoades kicked Mr. McLean in the side and attempted to kick Mr. McLean in the head. RP 126. At one point during the attack, Rhoades was on top of Mr. McLean, who was now on his back on the ground, and, with the knife in his hand, repeatedly punched Mr. McLean. RP 125-26, 181. The attack was so brutal that Mr. McLean went limp and loss consciousness, and it was at that time his friend intervened after fearing for Mr. McLean's life. RP 130, 185.

The uncontroverted evidence supported that Rhoades attacked Mr. McLean and recklessly disregarded a substantial risk that he, or his accomplices, would inflict substantial bodily harm on Mr. McLean. A grown man beating a 17 year old boy, who is substantially smaller than the grown man, could easily, in this type of scenario, inflict substantial bodily harm. Rhoades outweighed Mr. McLean by 60 pounds and was half a foot taller than him. Rhoades was armed, knocked Mr. McLean to the ground, continued to assault him and even kicked Mr. McLean. This is a gross deviation from conduct that a reasonable person would exercise in the same situation, and Rhoades knew and disregarded a substantial risk that he would inflict great bodily harm upon Mr. McLean. Any error is harmless beyond a reasonable doubt and Rhoades' conviction for Assault in the Second Degree should be affirmed.

IV. CONCLUSION

The State did not fail to give Rhoades notice of the gang aggravating factor the jury ultimately convicted him of. The jury instructions in this case did not relieve the State of its burden to prove all the essential elements of crime charged. This court should affirm Rhoades' conviction.

RESPECTFULLY submitted this 21st day of February, 2014.

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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. JOSHUA DAVID CHARLES RHOADES, Appellant.	No. 45083-6-II DECLARATION OF SERVICE

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On February 21, 2014, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Maureen M. Cyr, attorney for appellant, at the following email addresses: wapofficemail@washapp.org and Maureen@washapp.org.

DATED this 21st day of February, 2014, at Chehalis, Washington.

Teri Bryant

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

February 21, 2014 - 2:49 PM

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