

No. 63697-9-I

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

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STATE OF WASHINGTON,

Respondent,

v.

BRIAN LEROY SIERS,

Appellant.

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FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2010 APR 15 PM 4:25

ON APPEAL FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable James Rogers

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REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ARGUMENT ..... 1

DISMISSAL OF COUNT II IS THE PROPER  
REMEDY FOR THE DEFECTIVE INFORMATION ..... 1

B. CONCLUSION..... 3

TABLE OF AUTHORITIES

FEDERAL CASES

*Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)..... 2

*Blakely v. Washington*, 542 US. 296, 124. S.Ct. 2531, 159 L.Ed.2d 403 (2004) ..... 2

WASHINGTON CASES

*State v. Powell*, 167 Wn.2d 672, 223 P.3d 493 (2009)..... 2

*State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008) ..... 2

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

A. ARGUMENT

DISMISSAL OF COUNT II IS THE PROPER  
REMEDY FOR THE DEFECTIVE INFORMATION

While the State concedes the information failed to properly allege all of the elements of second degree assault with a “Good Samaritan” aggravating factor, the State disputes that the proper remedy is the dismissal of that count without prejudice. Brief of Respondent at 4-12. Mr. Siers contends that under existing precedent, the proper remedy is dismissal of count II.

Initially, the State argues there was no harm because the trial court did not impose an exceptional sentence based upon the “Good Samaritan” aggravator. Brief of Respondent at 4. While the State is correct, the trial court did not impose an exceptional sentence, the trial court did use the “Good Samaritan” aggravator to impose a sentence at the top end of the standard range. 5/4/09RP 90 (“I think the State’s taking the right position in this case in not requesting an exceptional sentence given the facts, but I do think in order to give some weight to the jury’s finding of a good samaritan aggravator that I will impose the high end of the range”). Thus, The aggravating factor was an essential factor in the trial court’s sentencing decision.

While the State agrees that the Supreme Court's decision in *State v. Powell*, 167 Wn.2d 672, 223 P.3d 493 (2009), holds that the aggravating factor must be alleged in the Information, the State disputes that *Powell* holds that aggravating factor are essential elements of the offense, thus requiring reversal of count II. Brief of Respondent at 6-12. In *Powell*, the three dissenting justices coupled with the two justice concurrence resulted in a five justice majority holding that under *Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *State v. Recuenco*, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008), aggravating factors are essential elements of the underlying offense. 163 Wn.2d at 689-96 (Stevens, Johnson, JJ, concurring)(Owens, Sanders, Chambers, JJ., dissenting). Thus, where an essential element of the offense is omitted from the information, and the omission of that element is challenged before the verdict, the remedy is reversal of the conviction without prejudice. See *State v. Vangerpen*, 125 Wn.2d 782, 791, 888 P.2d 1177 (1995) (if a charging document does not on its face state an offense, the document is unconstitutional and must be dismissed without prejudice to the State's right to recharge).

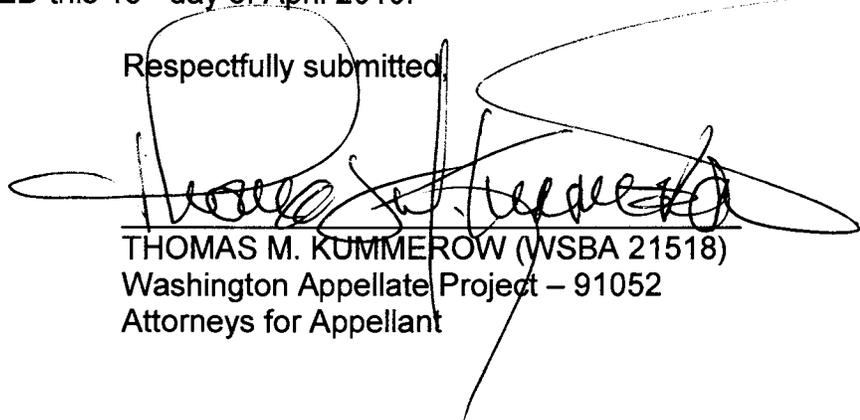
Here, Mr. Siers repeatedly objected to the omission of the “Good Samaritan” aggravating factor in the Information. As a result, this Court should follow the holding of *Powell* and *Vangerpen* and reverse Mr. Siers’ conviction in count II.

B. CONCLUSION

For the reasons stated in the instant brief as well as the previously filed Brief of Appellant, Mr. Siers submits this Court must reverse his conviction in count II of the information.

DATED this 15<sup>th</sup> day of April 2010.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over the typed name and extends across the typed address.

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15<sup>TH</sup> DAY OF APRIL, 2010, I CAUSED THE ORIGINAL **REPLY 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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**SIGNED** IN SEATTLE, WASHINGTON THIS 15<sup>TH</sup> DAY OF APRIL, 2010.

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