

NO. 37425-1-II
COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

Respondent,

vs.

CHARLES CARROLL HARTZELL IV,

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
The Honorable Chris Wickham, Judge
Cause No. 07-1-01831-3

STATEMENT OF ADDITIONAL GROUNDS

Charles C. Hartzell #810910
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Airway Heights, Wa 99001-1839

CHARLES C. HARTZELL
Appellant, Pro Se

ISSUES ADDRESSED IN ADDITIONAL GROUNDS.

01. The sentencing court lacked authority to impose any sentence enhancement under RCW 9.94A.533 because the State did not charge the defendant with or notify the defendant of any sentence enhancement in the charging information.

02. The defendant's right to trial by jury was violated when the jury was not instructed that the element of 'knowledge' must be found in order to convict the defendant of Unlawful Possession of a Firearm in the First Degree.

03. The defendant's right to trial by jury was violated when the jury was not instructed that the element of 'intent' must be found in order to convict the defendant of Assault in the Second Degree While Armed With a Deadly Weapon.

ISSUE: The defendant's right to trial by jury was violated and the sentencing judge exceeded his authority when he imposed a 36 month sentence enhancement for the use of a firearm in the commission of a crime, that was neither charged by the State nor found by the jury.

Introduction.

The charging information certified by Deputy Prosecuting Attorney David Bruneau, charged the defendant in part with, assault in the second degree while armed with a deadly weapon. The Prosecutor went on to allege that the crime was committed while the defendant or an accomplice was armed with a deadly weapon, a firearm. The prosecutor cited RCW 9A.36.021(1)(c), RCW 9.94A.535 and RCW 9.94A.602 in the assault charge but failed to cite or reference RCW 9.94A.533(or subsections). This rendered the information constitutionally deficient in regards to later seeking any sentence enhancement under RCW 9.94A.533(or subs) because the defendant was never notified that the State may be seeking any enhancements.

The State was therefore prohibited from seeking, and the sentencing judge was prohibited from imposing, any sentence enhancement for the use of a deadly weapon or a firearm during the commission of a crime under the uncited and unreferenced RCW 9.94A.533(or subs.).

Argument.

In Mr. Hartzell's case the information did not allege a firearm's or deadly weapon's sentencing enhancement. It simply charged Mr. Hartzell with the "further allegation that the defendant or an accomplice was armed with a deadly weapon, a firearm", under RCW 9.94A.602. This was inadequate. RCW 9.94A.602 defines the elements of a deadly weapon special verdict but did not give Mr. Hartzell a notice of any sentence enhancement.

The Supreme Court of Washington has distinguished between a constitutionally defective information and one which is merely deficient due to vagueness as to some other matter. The omission of any statutory element of a crime in the charging document is a constitutional defect that may result in the dismissal of the criminal charges. State v. Bonds, 98 Wn.2d 1, 16, 653 P.2d 1024 (1982), cert. denied, 464 U.S. 83(1983).

Both the Washington Constitution, article I, section 22, amendment 10, and the Sixth Amendment to the United States Constitution require that all essential elements of a crime, statutory or otherwise, be included in

a charging document to give notice to the accused of the nature of the accusation. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991)

Merely citing to the proper statute and naming the offense is insufficient unless the name of the offense apprises the defendant of all of the essential elements of the crime. State v. Vagerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995)(citation omitted). The primary goal of the essential elements rule is to give notice to the accused of the nature of the crime that he or she must be prepared to defend against. Kjorsvik, 117 Wn.2d at 101.

In State v. Recuenco, 163 Wn.2d⁴²⁵, the Supreme Court of Washington found that, a charging document alleging that the defendant committed an offense "while armed with a deadly weapon, to wit: a handgun" provides notice that the defendant's sentence may be enhanced for being armed with a deadly weapon in the commission of the offense but does not provide notice that the defendant's sentence may be enhanced for being armed with a firearm. However in the case against Mr. Hartzell, there was no notification at all under RCW.9.94A.533(or subs.) that the State would be seeking any enhancement to the defendant's sentence. The allegation that the defendant or an accomplice was "armed with a deadly weapon, a firearm" was an element of the charged assault in the second degree while armed with a deadly weapon, and should not be interpreted as notification that the State would be seeking any sentence enhancement under RCW 9.94A.533.

Also in State v. Recuenco supra., the Supreme Court found that, "The State has the authority and responsibility for bringing charges against a person, in that regard, the State possesses wide discretion to choose the charges it wants to pursue, if any.

In Mr. Hartzell's case the State chose to not charge any sentence enhancement under RCW 9.94A.533(or subs). Further quoting Recuenco supra., "... Our cases have required the State to include in the charging documents the essential elements of the crime alleged. The essential elements rule requires a charging document allege facts supporting every element of the offense and identify the crime charged. 'Elements' are the facts that the State must prove beyond a reasonable doubt to establish that the defendant committed the crime charged.

The purpose of the essential elements rule is to provide the defendants with notice of the crime charged and to allow defendants to prepare a defense.... sentencing enhancements, such as a deadly weapon allegation must be included in the information. When the term 'sentence enhancement' describes an increase beyond the maximum authorized statutory sentence, it becomes equivalent of an 'element' of a greater offense than the one covered by the jury's verdict.. ." (Internal Citations omitted).

In the case against Mr. Hartzell, the State did not mention RCW 9.94A.533(or subs) in the charging information. The defendant, acting pro se, notified both the Court and the State of the deficiency of the information in a motion for a bill of particulars that was filed on January 8th 2008. In the motion, the defendant moved the court for an order requiring the prosecution to provide a bill of particulars setting forth the facts it expected the testimony to show in a plain, concise and definite statement of the essential facts constituting the offense charged. For the following reasons: to aid in the preparation of a proper defense. The State argued against providing the bill of particulars and further argued that their information was sufficient.

The State effectively waived any right to now argue that any mistake was unintentional or that the Court of Appeals should interpret their information liberally. There can be no debate that the State did not mention RCW 9.94A.533 in it's information. In State v. Johnstone 96 Wn. App 839, 982 P.2d 119 (1999), the Appeals Court found that "Where an information is challenged under the 'essential elements' rule before trial, as here, we strictly construe the language, ie we do not attempt to find the missing elements by construing the wording of the document. And the language must not be inartful or "'vague'" in setting out the elements of the crime.

In the case against Mr. Hartzell the jury was not given any facts supporting a firearm's enhancement nor given instructions to determine if it was applicable in the case. The only instruction given to the jury dealt with a deadly weapon's special verdict. The court did not give 11 WPIC 190.02, Special Verdict Form-Firearm. The State was given the opportunity to fix any errors in their information or to clarify any 'special enhancements' and chose not to. The State should now be held accountable for their haste in prosecuting and their disregard for Mr. Hartzell's request for clarification.

The State was provided with opportunity to amend their information on multiple occasions but failed, in fact refused, to do so.

The State failed to every notify the defendant or charge the defendant with a firearm's or deadly weapon enhancement. However the Court gave WPIC 190.01 SPECIAL VERDICT FORM-DEADLY WEAPON, and the jury found that the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime. The Trial Court did not give 11 WPIC 190.02 SPECIAL VERDICT FORM-FIREARM. Even disregarding the State's failure to charge or notify the defendant of a deadly weapons or firearm enhancement, the reasoning in State v. Recuence supra. would still require the Court to now find that the State chose to send to the jury the lesser enhancement of being armed with a deadly weapon during the commission of the crime, not the never charged, notified and improperly imposed firearm's enhancement.

The Washington Supreme Court has specifically held that an information which is constitutionally defective because it fails to state every statutory element of the crime cannot be cured by a jury instruction which itemizes those elements. State v. Unosawa, 29 Wn.2d 578, 188 P.2d 104 (1948) Further a jury instruction cannot cure a deficient information where the instruction did not purport to amend the information. State v. Brathwaite, 92 Wn.2d 624, 600 P.2d 1260 (1979).

It was only after the unlawful verdict of the jury for an uncharged crime that the prosecutor requested the three year mandatory enhancement for use of a firearm. The sentencing judge, Hon. Chris Wickham, then committed error by imposing this enhancement, a sentence that was outside his authority, that was never charged by the State, not authorized by the jury's finding.

Summation.

Mr. Hartzell had, and has the constitutionally guaranteed right to trial by jury. He further has the right to be informed of all the charges and their elements brought against him. This is a fundamental right of any criminal defendant and should not be infringed in any way. The charging information certified to by the State was constitutionally defective because it failed to inform the defendant of the essential elements of the charges against him. The defendant acting pro se, notified the State and the Court of the deficiency and defectiveness of the information and the State declined to correct or amend the information.

The State effectively waived any right to now assert that the information was unintentionally deficient. The State had multiple chances up until the time of a verdict to amend the information. It chose not to and I submit, should be held accountable for not doing so.

Conclusion.

Based on the arguments presented herein and on the merits of these arguments, this defendant respectfully requests the court to reverse the sentencing court's sentence of the 36 month firearm's enhancement and remand for sentencing based only on the charges properly brought by the State and properly found by the jury.

ISSUE: The defendant's right of trial by jury was denied when the State was relieved of its burden of proving beyond a reasonable doubt every element of the crime in count III, Unlawful Possession of a Firearm in the First Degree.

Introduction.

The Trial Court improperly instructed the jury in both the Court's Instruction No. 20, the definition of the charge of unlawful possession of a firearm instruction, and Court's Instruction No. 21, the 'to-convict' instruction for the same offense. In both instructions the Trial Court failed to instruct the jury that the State must prove, and the jury must find, that the defendant or an accomplice [knowingly] possessed or had under his control a firearm.

Argument.

The court's instruction No. 20 reads: "A person commits the crime of unlawful possession of a firearm in the first degree when he has previously been convicted of a serious offense and owns or has in his possession or control any firearm."

This instruction follows 11 WPIC 133.01, Unlawful Possession of a Firearm-First Degree-Definition, except that the court's instruction given to the jury failed to include the word 'knowingly' from the phrase "A person commits the crime of unlawful possession of a firearm in the first degree when he has previously been convicted of a serious offense and [knowingly] owns or has in his possession or control any firearm".

The trial court further erred in giving court's instruction No. 21, the 'to-convict' instruction for the unlawful possession of a firearm charge. (11 WPIC 130.02). The court again omitted the word 'knowingly' from the language of its instruction. The court's instruction reads in part, "To convict the defendant Charles Carroll Hartzell, IV of the crime of unlawful possession of a firearm in the first degree as charged in count III each of the following elements of the crime must be proved beyond a reasonable doubt: (1) That on or about April 7, 2007 the defendant [knowingly] had a firearm in his possession or control."... (The bracketed 'knowingly' was omitted in the court's instruction)

The trial court erred in omitting or removing the word 'knowingly' from the definition of unlawful possession of a firearm instruction and from the 'to-convict' instruction. Knowing possession is an essential element of the charged crime, while unwitting possession is an affirmative defense. Therefore, the omission of this key element of 'knowledge' cannot be considered to be a harmless error. The Instruction as given to the jury, instructed the jury that it could convict the defendant of the charge of unlawful possession of a firearm in the first degree without first finding that he or an accomplice 'knowingly' owned, possessed or had under his dominion or control a firearm. The word 'knowingly' is not an optional adverb in either the definition of the crime instruction or the 'to-convict' instruction, but an essential element of each. Further, the word 'knowingly' is included in both 11 WPIIC 133.01 and 133.02. The jury in the case should have been required to find that the defendant had 'knowledge' that he or an accomplice possessed a firearm in order to convict him for that charge. They were not, and this is "plain error".

In a similar case, State v. Anderson, 141 Wn.2d 357, 5 P.3d 1247, the Washington State Supreme Court found that the omission of an essential element of a charged offense from the 'to-convict' instruction given at trial, requires reversal of the conviction. In Anderson, as in Hartzell's case the jury was given a 'to-convict' instruction that omitted the word 'knowingly' from its text. The Supreme Court found that unlawful possession of a firearm in the second degree was not a strict limitation crime and that 'knowledge', even though not included in the RCW, was an essential element of the crime. It would seem to this defendant that the same crime of a higher degree is not a "strict limitation" crime either, and that 'knowledge' is an essential element.

Conclusion.

The right of the defendant to a trial by jury shall remain inviolate. Wash. Const. I, §21. Under the US. Const. 14th Amend., Wash Const. I, §22, The defendant had the right to have a jury find each and every essential element of the crimes charged. The State had the burden of proving each and

every element of the crimes charged to the jury. In removing the word 'knowledge', the court improperly instructed the jury as to the law and effectively relieved the State of that burden of proof, beyond a reasonable doubt, that the defendant 'knew' that he or an accomplice was armed with a deadly weapon at the time of the crime.

'Elements' are facts that the State must prove beyond a reasonable doubt to establish that the defendant committed the crime charged. State v. Johnstone, 96 Wn. App. 839, 844, 982 P.2d 119 (1999). The State failed to meet its burden of proving the crime when the jury did not find that the defendant 'knowingly' owned or possessed a firearm as charged in the information.

Based on the arguments presented herein the defendant is respectfully requesting the court to reverse the trial court's decision and remand for further proceeding if necessary.

ISSUE: The defendant's right to trial by jury was denied when the State was unlawfully relieved of its burden to prove every element of the charge of assault in the second degree while armed with a deadly weapon.

Introduction.

The Trial Court erred in improperly instructing the jury in Court's Instruction No. 12 the 'to convict' instruction for the crime of assault in the second degree as charged in count one. The information filed by Deputy Prosecuting Attorney David Bruneau charged the defendant in count 1 with, Assault In The Second Degree While Armed With A Deadly Weapon. The specific allegation was "In that the defendant, CHARLES CARROLL HARTZELL, IV in the State of Washington, on or about April 7, 2007, did intentionally assault another person with a deadly weapon. ..."

In the 'to convict' instruction the Trial Court omitted or removed the word 'intentionally' from the first element of the charge, The instruction reads in part, "(1) That on or about April 7, 2007, the defendant [intentionally] assaulted another person with a deadly weapon; and "... (bracketed 'intentionally' omitted in the Court's Instruction).

Argument.

There can be no dispute that 'intent' is an essential element of the crime of assault. The charging information includes the word 'intentionally' in its allegation. The jury was required to find that the defendant had the 'intent' to commit the crime of assault in the second degree. The State had a duty to prove each and every element of each crime it charged against the defendant. The constitutionally defective and deficient jury instruction removed the duty of the State to prove 'intent' and this effectively denied the defendant the right to trial by jury. This right is protected by both the Washington State Constitution, article I, section 22, amendment 10 and the Sixth Amendment to the United States Constitution. The element of 'intent' cannot be omitted from the 'to-convict' instruction. It is a key element and its omission cannot therefore be harmless error.

In State v. Anderson, 141 Wn.2d 357, 5 P.3d 1247, the Washington State Supreme Court found that the omission of an essential element of a

charged offense from the 'to-convict' instruction given at trial, requires reversal of the conviction. In the case against Hartzell, the trial court failed to ask and the State failed to prove that the defendant 'intentionally' assaulted anyone. The State failed to meet the burden of proof. 'Elements' are facts that the State must prove beyond a reasonable doubt to establish that the defendant committed the crime charged. State v. Johnstone, 96 Wn. App. 839, 844, 982 P.2d 119 (1999).

Conclusion.

The right of the defendant to trial by jury shall remain inviolate. Wash. Const. I, §21. Under the U.S. Const. 14th Amend., Wash Const. I, §22, the defendant has the right to have a jury find each and every essential element of the crimes charged by the State. The State has the burden of proving each and every element of the crimes it alleges. In removing the key element of 'intent' from the 'to-convict' instruction the trial court instructed the jury improperly as to the law and effectively relieved the State of its burden of proving guilt beyond a reasonable doubt. Accordingly, this defendant respectfully requests that the verdict for Count I, Assault In The Second Degree While Armed With A Deadly Weapon be reversed and dismissed.

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COURT OF APPEALS
DIVISION II

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BY [Signature]
DEPUTY

THE STATE OF WASHINGTON
COURT OF APPEALS, II

STATE OF WASHINGTON,)
)
RESPONDENT,)
)
v.)
)
CHARLES C. HARTZELL, IV)
APPELLANT.)

No: 37425-1-II

**DECLARATION OF SERVICE
BY MAILING**

I, Charles C. Hartzell IV, APPELLANT, in the above entitled cause, do hereby declare that I have served the following documents; Statement of Additional Grounds. (RAP 10.10)

Upon: THURSTON COUNTY PROSECUTING ATTORNEY 2000 LAKERIDGE DR S.W. BLDG 2 OLYMPIA, WA 98502	Court of Appeals Division II 450 Broadway, Ste 300 Tacoma, WA 98402-4454	THOMAS E. DOYLE P.O. Box 500 HANVILLE, WA 983400510
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I deposited with the N-Unit Officer Station, by processing as *Legal Mail*, with first-class postage affixed thereto, at the Airway Heights Correction Center, P.O. Box 1839, Airway Heights, WA 99001-1839.

On this 9TH day of DECEMBER, 2008.

I certify under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Respectfully Submitted,
C.C. Hartzell IV
Petitioner

ISSUE: The defendant was denied his 6th Amendment right to counsel under US Const. and Wash. Const. art. I§22, when he was forced to proceed pro se or waive his speedy trial as a direct result of ineffective assistance of counsel.

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STATE OF WASHINGTON
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COUNTY OF KING
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Introduction.

The defendant (Hartzell) was forced to proceed pro se after his court appointed counsel, Larry Jefferson, failed to prepare for trial and informed the court that, "...I do believe that at this time I would need a continuance to do some of the investigation on the case, based on the information I have." And, in response to inquiry from the Court as to why no investigation had been done, " Your Honor, I guess I would still need a continuance, despite the fact of when I recieved the file. Based on the information that I have, I would want to hire an investigator on this particular case, and I would be asking for that continuance." Upon inquiry as to why this had still not been done even though counsel had been assigned to the case for months, "(Jefferson) Your Honor, I have been busy on a lot of other matters, and I also was on a vacation, and I've handled a number of other cases..." (RP Janauary 10, 2008)

It is apparent from this exchange that Mr. Jefferson had not acted with due diligence in preparing for Hartzell's case that was scheduled for trial in less than three weeks.

Arguement.

Hartzell requested to proceed pro se only after hearing from Mr. Jefferson that he had taken no action in preparing for his trial. The defendant had previously notified counsel on several occasions that he would not be waiving his right to a speedy trial and wanted to proceed to trial within the 60 day time limit.

Hartzell did not waive his right to counsel willingly or unequivocally as he was forced to choose between ineffective assistance of counsel or waiving his speedy trial right. In effect, he had to choose between one constituional right or the other.

A review of the colloquy at Hartzell's motion to proceed pro se hearing, clearly illustrates the equivocal nature of the "waiver" of counsel and also clearly demonstrated that Hartzell did not make the "waiver" willingly but that he was forced to make the choice because of the admitted ineffective assistance from his court appointed counsel. When asked by the Court, "Why don't you want an attorney? Why do you want to represent yourself?", Hartzell answered in part, "It's not so much that I don't want an attorney. I don't want to talk about Mr. Jefferson, but I think it would be safe to say we've had a communication problem..." This clearly expressed not Hartzell's unequivocal demand to proceed without counsel, but instead his frustration with Jefferson's inability, for whatever reasons, to act with due diligence in representing him.

The trial court erred in allowing Hartzell to proceed pro se as his request was neither willingly made nor unequivocally requested. This is further evidenced by the State's comments during this same hearing, that, "...I'm certainly not quibbling with the Court's determination, but I understand that the request to proceed pro se has to be based it has to be made unequivocally by the defendant. And based upon what the defendant has said in open court today and the pleading that he has filed, there may down the line be a question about the unequivocal nature of his request to proceed pro se." While this may be the only time that Hartzell and prosecutor Bruneau are in agreement, it should not detract from the fact that the request was not, in light of the proceeding facts, unequivocal or willingly made.

In a similar case, State v. Price, 94 Wn.2d 810, 620 P.2d 994, The Supreme Court of Washington said that "[I]t is possible either a defendant's right to a speedy trial or his right to be represented by counsel who has sufficient opportunity to adequately prepare a material part of his defense, may be impermissibly prejudiced." In Hartzell's case, this is exactly what transpired and no distinction should be made

between a case such as in Price Supra, where the fault lied squarley on the State for forcing the unlawful choice and in the case presently before you where it was the failure of the court appointed counsel to act with due diligence that caused the same choice as result. Again refering to the colloquy in Hartzell's motion to proceed pro se hearing, the COurt stated, "...I do admit that all Assigned Counsels have a very heavy caseload, as do the prosecutors, you would need additional time, in your view, to investigate things of concern to Mr. Hartzell."(RP January, 10th 2008 pg. 18) But this should not be any reason for the COurt of Appeals to find that the proper remedy would have been to force Hartzell to waive his speedy trial rights. That reasoning would undermine the spirit of CrR 3.3 and would in effect grant the right to a speedy trial only to those defendants who could afford to hire private counsel who aren't burdened with "very heavy caseloads".

Conclusion.

Based on the preceeding arguements, it cannot be reasonably asserted that Hartzell waived his right to counsel either willingly or unequivocally as required by law prior to granting a motion to proceed pro se. Despite the Court's colloquy, and in the face of the equivocal and unwilling "waiver" of counsel due to Mr. Jefferson's failure to act with due diligence and admitted failure to prepare any defense, that resulted in Hartzell having to make an unlawful choice between choosing which constitutional right he would assert, this defendant respectfully requests the Court of Appeals to reverse the trial court's verdict and remand for a new trial.

