

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.

---

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

The Honorable James E. Rogers

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BRIEF OF APPELLANT

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FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2010 JAN 29 PM 4:54

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A. SUMMARY OF ARGUMENT

Brian Siers was convicted of two counts of second degree assault and the court imposed deadly weapon enhancements for the two counts as well. Over defense objection and at the State's request, the jury found an aggravating factor on the second count. The aggravating factor was not charged in the information. The court decided to impose a standard range sentence but did not strike the aggravating factor.

On appeal, Mr. Siers contends the conviction on the second count must be reversed as the aggravating factor was not alleged in the information. Mr. Siers also contends the enhancements must be stricken because they violate double jeopardy as the deadly weapon was also an element of second degree assault.

B. ASSIGNMENTS OF ERROR

1. The omission of the aggravating factor from the information violated Mr. Siers' Sixth Amendment and article I, section 22 rights to notice of all essential elements of the offense.

2. Imposition of the deadly weapon enhancement where use of a deadly weapon was an element of the underlying offense violated double jeopardy.

### C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution require the State to include all essential elements of the offense be in the information. Aggravating factors are elements of the underlying offense which are required to be in the information. Here the jury found the aggravating factor that the victim in Count II was acting as a Good Samaritan when he was assaulted, an element which was not included in the information. Is Mr. Siers entitled to reversal of Count II?

2. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution bars multiple punishments for the same offense. Did Mr. Siers' convictions for second degree assault predicated on the use of a deadly weapon and imposition of a deadly weapon enhancement violate the Fifth Amendment's prohibition against double jeopardy?

### D. STATEMENT OF THE CASE

Brian Siers was charged with stabbing Jesse Hoover and Daniel Whitten during a fight at the Jai Thai restaurant in Seattle. CP 8-9. The State was also seeking a deadly weapon enhancement on each count as well. CP 8-9.

Prior to submitting the case to the jury, the State noted it was seeking a sentence enhancement for Count II (Mr. Whitten), alleging Mr. Whitten was acting as a Good Samaritan. 4/20/09RP 8. Mr. Siers objected to the Good Samaritan aggravator on the basis that it was not alleged in the information, and objected to the court's instructions and special verdict regarding the aggravating factor. 4/30/09RP 141-42, 160, 5/4/09RP 7. The trial court overruled Mr. Siers' objections and submitted the aggravating factor to the jury. CP 60-63. The jury found Mr. Siers guilty as charged of both counts, found the enhancements to be proven as well, and found the special verdict. CP 22-27; 5/4/09RP 54-56.

At sentencing, the trial court did not impose an exceptional sentence pursuant to the aggravating factor but cited the enhancement in imposing a high end sentence.

I could impose an exceptional sentence because of the good samaritan aggravator. 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.

5/4/09RP 90.

E. ARGUMENT

1. THE INFORMATION FAILED TO ALLEGE ALL OF THE ESSENTIAL ELEMENTS THUS VIOLATING MR. SIERS' CONSTITUTIONALLY PROTECTED RIGHT TO NOTICE

- a. All elements of the offense are constitutionally required to be charged in the information. The Sixth Amendment to the United States Constitution and Article I, § 22 of the Washington Constitution require a charging document include all essential elements of a crime--statutory and nonstatutory--so as to inform a defendant of the charges against him or her and to allow preparation for the defense. *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590 (1974); *State v. Kjorsvik*, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991); *Leonard v. Territory*, 2 Wash.Terr. 381, 392, 7 P. 872 (1885). "Therefore an accused has a right to be informed of the criminal charge against him so he will be able to prepare and mount a defense at trial." *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). 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. *State v. Vangerpen*, 125 Wn.2d 782, 791, 888 P.2d 1177 (1995).

We have repeatedly and recently insisted that a charging document is constitutionally adequate only if all essential elements of a crime, statutory and non-statutory, are included in the document so as to apprise the accused of the charges against him or her and to allow the defendant to prepare a defense. This “essential elements rule” has long been settled law in Washington and is based on the federal and state constitutions and on court rule. Merely citing to the proper statute and naming the offense is insufficient to charge a crime unless the name of the offense appraises the defendant of all of the essential elements of the crime.

(Internal citations omitted.) *Vangerpen*, 125 Wn.2d at 787-88.

The standard of review for charging documents turns on when the information is challenged. *State v. Grant*, 104 Wn.App. 715, 720, 17 P.3d 674 (2001). When an accused challenges the sufficiency of the information prior to verdict, the charging document is strictly construed to determine whether all the elements of the crime are included. *Vangerpen*, 125 Wn.2d at 788. Where the defendant challenges the sufficiency of the information on appeal, the information is more liberally construed in favor of validity than if raised before the verdict is rendered. *Kjorsvik*, 117 Wn.2d at 103.

b. Aggravating factors for an exceptional sentence are elements of the offense and must be pleaded in the information.

In *Apprendi*, the Court held: “Other than the fact of a prior conviction, any fact which increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); accord *Blakely v. Washington*, 542 US. 296, 300-01, 124. S.Ct. 2531, 159 L.Ed.2d 403 (2004). These “facts” extending the sentence beyond the maximum authorized by the jury’s verdict are elements of an aggravated version of the crime. *Harris v. United States*, 536 U.S. 545, 557, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2003).

Those facts, *Apprendi* held, were what the Framers had in mind when they spoke of “crimes” and “criminal prosecutions” in the Fifth and Sixth Amendments: A crime was not alleged and a criminal prosecution not complete, unless the indictment and the jury verdict included all the facts to which the legislature had attached the maximum punishment. Any “fact that . . . exposes the criminal defendant to a penalty exceeding *the* maximum he would receive if punished according to the facts reflected in the jury verdict alone,” the Court concluded, would have been, under the prevailing historical practice, an element of an aggravated offense.

(Emphasis and internal citation omitted.) *Harris*, 536 U.S. at 563.

The Washington Supreme Court has ruled that the aggravating factors enumerated in RCW 9.94A.535 are essential elements of the underlying offense that must be pleaded in the information and proved beyond a reasonable doubt. *State v. Powell*, \_\_\_ Wn.2d \_\_\_, WL 4844354 at 15 (No. 80496-6, December 17, 2009) (Johnson, C., dissenting).<sup>1</sup> In *Powell*, the State provided notice of its desire to seek an exceptional sentence based upon a jury finding of a statutory aggravating factor but failed to include the aggravating factor in the information. A majority of the Court ruled the failure to include the aggravating factor in the information violated the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. *Id.*

Here, Mr. Siers repeatedly objected to the State's failure to include the aggravating factor in the information prior to the verdict, and objected to the court's inclusion of the aggravating factor in the court instructions to the jury, and objected to the special verdict for the aggravating factor. RP 4/23/09RP 141-42, 5/4/09RP 7. The

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<sup>1</sup> The four justices dissenting coupled with the concurrence of Justice Stephens agreeing with the dissenting justices on this point provided a majority for this proposition.

omission of the aggravating factor violated Mr. Siers' Sixth Amendment and article I, section 22 rights to notice.

c. Reversal of the conviction is required. The remedy for an insufficient charging document is reversal and dismissal of the charges without prejudice. *Vangerpen*, 125 Wn.2d at 792-93.

The defense challenged the sufficiency of the information prior to the trial court instructing the jury. 4/30/09RP 142, 160; 5/4/09RP 7. Since the sufficiency of the information was challenged prior to the verdict, the charging document must be strictly construed to determine whether all the elements of the crime are included. *Vangerpen*, 125 Wn.2d at 788.

The amended information failed to allege all of the elements of the aggravating factors. Since the aggravating factor was an element of the charge of second degree assault in Count II involving Mr. Whitten, the amended information was constitutionally defective and Mr. Siers is entitled to reversal of Count II.

2. MR. SIERS' CONVICTIONS FOR SECOND-DEGREE ASSAULT PREDICATED ON THE USE OF A DEADLY WEAPON AND THE IMPOSITION OF A SENTENCE ENHANCEMENT BASED ON THE SAME DEADLY WEAPON VIOLATED DOUBLE JEOPARDY.<sup>2</sup>

The double jeopardy clause of the United States Constitution provides that no individual shall “be twice put in jeopardy of life or limb” for the same offense. U.S. Const. amend. V. The Washington Constitution also provides that no individual shall “be twice put in jeopardy for the same offense.” Const. art I, § 9. The double jeopardy prohibition protects against (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *State v. Gocken*, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995). Certainly the prosecution may charge and the jury may consider multiple charges arising from the same criminal conduct. However, the court may not enter multiple convictions, nor in turn impose multiple punishments, for the same criminal offense. *State v. Freeman*, 153 Wn.2d 765, 770-71, 108 P.3d 753 (2005).

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<sup>2</sup> This issue is currently pending in the Washington Supreme Court: *State v. Aguirre*, No. 82226-3, argued October 29, 2009.

While several antiquated Court of Appeals cases held that a “sentence enhancement” for an offense committed with a weapon does not violate double jeopardy even where the use of the weapon was an element of the crime,<sup>3</sup> *Apprendi v. New Jersey* and *Blakely v. Washington* have reoriented our understanding of what constitutes an “element.” Because the United States Supreme Court has contemporaneously noted that there is “no principled reason to distinguish” what constitutes an offense for purposes of the Sixth Amendment and Fifth Amendment,<sup>4</sup> these standards must alter the calculus of how the Court conceives of “sentencing facts” in the double jeopardy context, where the identical facts were already found by the jury in reaching its underlying verdict.

The Court has made clear that the relevant determination of what is an “element” does not turn on what label a particular fact has been given by the Legislature or its placement in the criminal or sentencing code. Instead, the question is whether that fact exposes the accused to a greater maximum sentence. *Apprendi*, 530 U.S. at 494.

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<sup>3</sup> See *State v. Pentland*, 43 Wn.App. 808, 811-12, 719 P.2d 605 (1986); *State v. Caldwell*, 47 Wn.App. 317, 320, 734 P.2d 542 (1987); *State v. Horton*, 59 Wn.App. 412, 418, 798 P.2d 813 (1990).

<sup>4</sup> *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003).

With regard to double jeopardy, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to determine whether there are two offenses or only one is whether each provision requires proof of a fact the other does not. *United States v. Dixon*, 509 U.S. 688, 696-97, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993); *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932); *State v. Calle*, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995).

Here, the State prosecuted Mr. Siers for assault in the second degree under two alternate theories: either (1) Mr. Siers assaulted the victims with a deadly weapon, or (2) Mr. Siers intentionally assaulted the victims and recklessly inflicted substantial bodily harm. RCW 9A.32.050(1)(a), (c).

The State also sought to increase Mr. Sier' sentence by adding a deadly weapon enhancement, pursuant to RCW 9.94A.533(4) and RCW 9.94A.602. CP 8-9. The jury found by special verdict that Mr. Siers was armed with a deadly weapon, which was the same weapon used in the commission of the underlying assaults. CP 23-24.

In essence, therefore, Mr. Siers was punished twice for the same offense, namely, his use of a deadly weapon to commit the

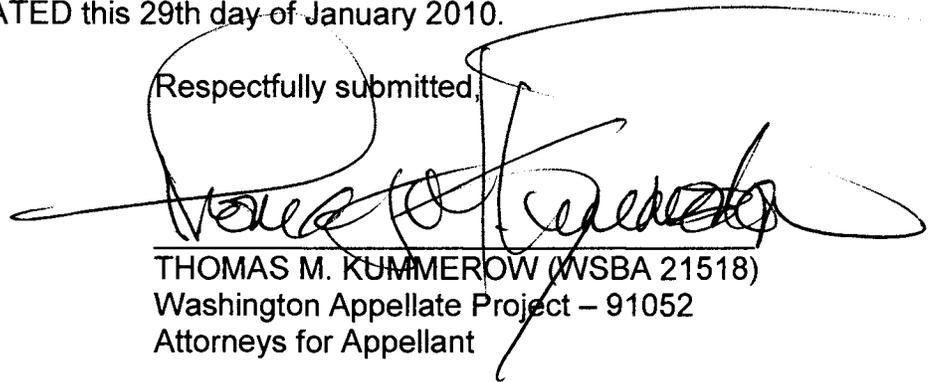
assaults. This Court should conclude the multiple convictions violate double jeopardy, and strike the deadly weapon enhancements.

F. CONCLUSION

For the reasons stated, Mr. Siers submits this Court must reverse his conviction on Count II and/or strike the deadly weapon enhancements for a violation of double jeopardy.

DATED this 29th day of January 2010.

Respectfully submitted,

A large, stylized handwritten signature in black ink, written over a horizontal line. The signature is cursive and appears to read 'Thomas M. Kummerow'. It is positioned above the typed name and address.

THOMAS M. KUMMEROW (WSBA 21518)  
Washington Appellate Project – 91052  
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
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 v. ) NO. 63697-9-I  
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 BRIAN SIERS, )  
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 Appellant. )

FILED  
COURT OF APPEALS DIV #1  
STATE OF WASHINGTON  
2010 JAN 29 PM 4: 54

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29<sup>TH</sup> DAY OF JANUARY, 2010, 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:

- |  |                   |                                     |
|--|-------------------|-------------------------------------|
| [X] KING COUNTY PROSECUTING ATTORNEY<br>APPELLATE UNIT<br>KING COUNTY COURTHOUSE<br>516 THIRD AVENUE, W-554<br>SEATTLE, WA 98104 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [X] BRIAN SIERS<br>21317 52 <sup>ND</sup> AVE W<br>F-134<br>MOUNTLAKE TERRACE, WA 98043  | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 29<sup>TH</sup> DAY OF JANUARY, 2010.

X \_\_\_\_\_ 

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RICHARD D. JOHNSON,  
Court Administrator/Clerk

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*Seattle*  
98101-4170

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NOTICE TO APPELLANT RE:  
STATEMENT OF ADDITIONAL  
GROUND FOR REVIEW

COURT OF APPEALS DIVISION I OF THE STATE OF WASHINGTON

Re: Case No: **63697-9-I, State v. Siers**

Dear Appellant:

Your attorney has filed a proof of service indicating that you were mailed a copy of the opening brief in your appeal. If, after reviewing that brief, you believe there are additional grounds for review that were not included in your lawyer's brief, you may list those grounds in a Statement of Additional Grounds for Review. RAP 10.10.

Because the Statement of Additional Grounds for Review is not a brief, there is no required format and you may prepare it by hand. No citations to the record or legal authority are required, but you should sufficiently identify any alleged error so that the appellate court may consider your argument. A copy of the rule is enclosed for your reference.

Your Statement of Additional Grounds for Review must be sent to the Court within 30 days. It will be reviewed by the Court when your appeal is considered on the merits.

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

DATE **February 1, 2010**  
**Washington Appellate Project**



RULE OF APPELLAGE PROCEDURE 10.10  
STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

(a) Statement Permitted. A defendant/appellant in a review of a criminal case may file a pro se statement of additional grounds for review to identify and discuss those matters which the defendant/appellant believes have not been adequately addressed by the brief filed by the defendant/appellant's counsel.

(b) Length and Legibility. The statement, which shall be limited to no more than 50 pages, may be submitted in handwriting so long as it is legible and can be reproduced by the clerk.

(c) Citations; Identification of Errors. Reference to the record and citation to authorities are not necessary or required, but the appellate court will not consider a defendant/appellant's statement of additional grounds for review if it does not inform the court of the nature and occurrence of alleged errors. Except as required in cases in which counsel files a motion to withdraw as set forth in RAP 18.3(a)(2), the appellate court is not obligated to search the record in support of claims made in a defendant/appellant's statement of additional grounds for review.

(d) Time for Filing. The statement of additional grounds for review should be filed within 30 days after service upon the defendant/appellant of the brief prepared by defendant/appellant's counsel and the mailing of a notice from the clerk of the appellate court advising the defendant/appellant of the substance of this rule. The clerk will advise all parties if the defendant/appellant files a statement of additional grounds for review.

(e) Report of Proceedings. If within 30 days after service of the brief prepared by defendant/appellant's counsel, defendant/appellant requests a copy of the verbatim report of proceedings from defendant/appellant's counsel, counsel should promptly serve a copy of the verbatim report of proceedings on the defendant/appellant and should file in the appellate court proof of such service. The pro se statement of additional grounds for review should then be filed within 30 days after service of the verbatim report of proceedings. The cost for producing and mailing the verbatim report of proceedings for an indigent defendant/appellant will be reimbursed to counsel from the Office of Public Defense in accordance with Title 15 of these rules.

(f) Additional Briefing. The appellate court may, in the exercise of its discretion, request additional briefing from counsel to address issues raised in the defendant/appellant's pro se statement.

[December 5, 2002]