No. 83682-5

CHAMBERS, J. (concurring in part and dissenting in part) — "In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him." Const. art. I, § 22. The central question in this case is whether the State has to give adequate notice of the acts a person is accused of committing that will result in punishment. Ordinarily, our state constitution provides greater protections than the federal constitution. The United States Supreme Court has established a new floor of constitutional protection with the rule that any fact (other than criminal history) that will increase punishment beyond the statutory maximum must be pleaded and proved to a jury beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 301-02, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). Our jurisprudence has long distinguished between—and established different standards for—elements, enhancements, aggravators, and predicate crimes. We must reexamine the reasons for these distinctions in light of *Blakely* and its progeny. The majority hews to very old case law and fails to reexamine the rationales behind those cases in light of the current trend to require greater notice of facts that will increase punishment. While the majority's opinion is consistent with some of our older cases, it reduces our notice jurisprudence to a series of technicalities without any consistent underlying rationale. Although I find

the majority's resolution of both of these consolidated cases unsatisfying, I concur with the result in Theodore Kosewicz's case because it is dictated by a recent opinion of this court. *State v. Siers*, __ Wn.2d __, 274 P.3d 358 (2012). However, I would reverse Robert Brown's conviction and, therefore, I dissent from the majority in his case.

A. Essential Elements

When the State charges a person with a crime, that person is entitled to notice of exactly what crime he or she is accused of committing. *See State v. Kjorsvik*, 117 Wn.2d 93, 98, 812 P.2d 86 (1991); Const. art. I, § 22. That means in the charging document the State must charge all the "essential elements" of a crime. *Id.* at 101-02. This "essential elements" rule "requires that the defendant be apprised of the elements of the crime charged and the conduct of the defendant which is alleged to have constituted that crime." *Id.* at 98 (citing *State v. Leach*, 113 Wn.2d 679, 782 P.2d 552 (1989)). If the State fails to do so, the defendant's constitutional rights of notice and due process are violated and a new trial is required. *See id.* at 97, 107-08. But, according to the majority's reasoning, if another crime appears in the information as an element of the charged crime, the defendant is *presumed to know* the essential elements of the other crime. Majority at 9-10. In other words, the majority acknowledges that not informing the defendant of the elements of a crime is a notice violation so fundamental it requires a new trial to remedy. *Id.* at 8. But then, with what I think is inconsistent reasoning, the majority concludes that if another crime is one of the elements of the charged crime, the defendant is

presumed to know not only all the elements of that other crime, but also which specific elements the State intends to try. *Id.* at 9.

I cannot find an intellectually satisfying reason to treat crimes that are elements of another crime differently for notice purposes than crimes that are charged. The State, of course, "must prove the elements of the predicate felony to prove the offense of felony murder." *State v. Gamble*, 154 Wn.2d 457, 466, 114 P.3d 646 (2005); *see also State v. Carter*, 154 Wn.2d 71, 80, 109 P.3d 823 (2005) ("in order for a person to be found guilty of felony murder, the State must prove that he or she committed or attempted to commit a predicate felony"); *State v. Wanrow*, 91 Wn.2d 301, 311, 588 P.2d 1320 (1978) ("The intent necessary to prove the felony-murder is the intent necessary to prove the underlying felony. That intent must be proved by the State as a necessary element of the crime, and the question whether it was present is presented to the jury."[1]). These cases make clear the jury must be instructed on and the State must actually prove each element of a predicate felony in felony murder. It follows that to prepare an adequate defense the defendant must be notified of what elements the State intends to prove. *See State v. Royse*, 66 Wn.2d 552, 556, 403 P.2d 838 (1965) (expressly connecting what must

[1] A close reading of this statement from *Wanrow* actually disposes of the central question in this case because it inescapably states that the elements of the underlying predicate felony are "necessary element[s]" of felony murder. *Wanrow*, 91 Wn.2d at 311. *Wanrow* is arguably distinguishable because it concerned the elements as they must be proved to a jury rather than elements as they must be charged in the information. *Id.* However, an element that is essential (or "necessary") for purposes of proof to a jury beyond a reasonable doubt logically is also essential for purposes of notifying the defendant what crime she is accused of committing. If the point of notice in this context is to prepare a defense, the defendant should be apprised of what the State is going to try to prove to the jury.

be alleged with what must be proved).

B. Robert Brown's Felony Murder Conviction

The majority cites a single Court of Appeals case for its remarkable proposition that when a crime becomes an element of another crime, it takes on mystical properties that notify the defendant of all its elements. Majority at 9 (citing *State v. Hartz*, 65 Wn. App. 351, 354, 828 P.2d 618 (1992)). That case in turn cites three cases from this court. *Id.* But the cases from this court to which the Court of Appeals cites are all over 70 years old, trace back to a single decision in 1908, and rely on notice principles long abandoned by this court.

This court first held elements of the predicate felony in a felony murder charge need not appear in the information in *State v. Fillpot*, 51 Wash. 223, 228, 98 P. 659 (1908). In *Fillpot*, the court concluded that the specific elements of the predicate felony need not be laid out in a felony murder charge because "[t]he [predicate] crimes of robbery and burglary . . . are elsewhere defined in the criminal code" and they therefore have "a well-defined and legal meaning." *Id.* It was sufficient, according to the court, to merely state in the information the terms "robbery" or "burglary" as used in the felony murder statute because it met the *statutory* requirement that a person of ordinary understanding could know what was intended by going and looking up their elements elsewhere in the code. *Id.*

In 1908, criminal law was far less complex than today. The modern notice requirement of the essential elements rule is not merely statutory but is "based on constitutional law and court rule." *Kjorsvik*, 117 Wn.2d at 97 (citing Const. art. I, §

22 (amend. 10); U.S. Const. amend VI; CrR 2.1(b), *recodified as* CrR 2.1(a)(1)).[2] We have expressly rejected the idea that defendants must search for the rules or regulations they are accused of violating. *Id.* at 101 (citing *State v. Jeske*, 87 Wn.2d 760, 765, 558 P.2d 162 (1976)). Rather, both our state and federal constitutions require that "*all* essential elements of an alleged crime must be included in the charging document in order to afford the accused notice of the nature of the allegations so that a defense can be properly prepared." *Id.* at 101-02. Given these developments in our case law, the majority's determination that the State in a felony murder charge need not notify a defendant of which elements of the predicate felony it intends to try is not reconcilable with modern due process and notice jurisprudence.

The other cases cited by the majority are similarly a few steps behind the past several decades of case law. In the 1941 case, *State v. Anderson*, 10 Wn.2d 167, 180, 116 P.2d 346 (1941),[3] the most recent case cited by the majority, the court offered the following rationale for the majority's rule:

> Nor is [the information] defective in not stating in specific detail the facts and elements of the burglary or robbery upon which the crime of murder in the first degree is charged . . . . The state's case was necessarily based upon and built around the confession and admissions of appellant. We cannot conceive of any fact which the state, by way of bill of particulars or by way of making the information more definite and certain, could have furnished him that was not already locked up in his own breast.

[2] Fundamental due process concerns also underpin the rule. *Leach*, 113 Wn.2d at 690.
[3] The third case from this court relied on by the majority simply cites *Fillpot* without further analysis. *State v. Ryan*, 192 Wash. 160, 164-65, 73 P.2d 735 (1937).

In other words, when a charge is based on the admissions of the defendant, the State need not provide proper notice in charging because the defendant has all the notice he needs "locked up in his own breast." *Id.* But that is not the standard by which we judge the adequacy of the information today. To say no notice is needed because the defendant himself knows what he did is antithetical to modern principles of fairness and due process. Nor are those principles satisfied by a charge that lists an underlying crime as an essential element of another crime but fails to inform the defendant which elements of that underlying crime the State intends to try.

Federal cases applying the same constitutional principles conflict with the majority's analysis. The Ninth Circuit Court of Appeals specifically addressed the issue of notifying the defendant of the elements of a predicate felony while interpreting Washington law in the context of second degree felony murder predicated on a second degree assault charge:

> [The defendant] was presented with the dilemma of preparing a defense to the second degree assault upon which the felony murder was founded without knowing whether the State would proceed on the theory that the second degree assault was founded on the "intent to injure" under [former RCW 9.11.020(1) (1909)[4]] or "to enable or assist himself . . . to commit any crime" under [former RCW 9.11.020(2)]. To allow the State to charge in such nebulous terms and proceed to trial on either of these theories would in itself be violative of the principle of fundamental fairness on which due process of law is bottomed. The practical inquiry as to the sufficiency of the information . . . reveals that on this basis alone, [the defendant] would not have received the

[4] Title 9 RCW was in effect during the 1973 trial in this case. It was repealed effective July 1, 1976.

requisite notice to adequately prepare his defense.

Kreck v. Spalding, 721 F.2d 1229, 1233 (9th Cir. 1983) (citation omitted). The fact that this analysis is dicta renders it no less potent an indictment of the rule in the cases relied on by the majority.

Other jurisdictions agree with the Ninth Circuit. The Supreme Court of Hawai'i expressly disapproved of *Hartz*, and held that "where one offense requires the actual commission of a second underlying offense, in order to sufficiently charge the offense, it is incumbent on the State to allege the essential elements of the underlying offense; identification of the offense by name or statutory reference will not suffice." *State v. Israel*, 78 Haw. 66, 75, 890 P.2d 303 (1995). And the Illinois Court of Appeals has likewise held that "where the commission of an underlying offense is a requisite for the commission of a second offense, the information must also contain the elements of the underlying offense." *People v. Miles*, 96 Ill. App. 3d 721, 725, 422 N.E.2d 5 (1981).

The unfairness of a rule contrary to that endorsed by the Ninth Circuit and other jurisdictions becomes evident when applied in a context outside that of felony murder. In fact, this court soundly rejected the same arguments made by the majority in the context of second degree assault. In 1965, well after *Fillpot* and its progeny, we held that information charging second degree assault with the intent to commit a felony was insufficient. *Royse*, 66 Wn.2d at 557. There, like in *Fillpot*, the State argued that "it was sufficient in an indictment for a statutory crime to charge the crime in the language of the statute." *Id.* at 556-57. We found that was not enough because "the statute, in this instance, does not define the crime with

certainty, and the rule only applies where the statute does define the offense which it creates." *Id.* at 557. More importantly, we continued:

> [T]he information must state the acts constituting the offense in ordinary and concise language, not the name of the offense, but the statement of the acts constituting the offense is just as important and essential as the other requirements of the information, such as the title of the action and the names of the parties.

Id. Thus this court did not reverse the defendant's conviction only because the State had not named the felony that formed the basis for the second degree assault conviction. It expressly required "not the name of the offense, but the statement of the acts constituting the offense," *despite the fact* that the "offense" was not actually charged but was a predicate to the second degree assault charge. *Id.*

Felony murder is not, for this purpose, meaningfully different from a second degree assault charge predicated on the intent to commit a felony. The defendant need not be charged with the underlying felony but the felony is itself an element of second degree assault. *See* 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 35.11, at 467 (3d ed. 2008). It is incongruous to hold that the name of the offense is insufficient in the context of second degree assault but sufficient in the context of felony murder. And it is difficult to understand how a felony murder charge that refers to the predicate felony only as "robbery," "burglary," or "first degree kidnapping" comports with our requirement that the charging information "'allege facts supporting every element of the offense.'" *Kjorsvik*, 117 Wn.2d at 98 (emphasis omitted) (quoting *Leach*, 113 Wn.2d at 689).

C. Theodore Kosewicz's Aggravating Factor Verdict

Because the same analysis no longer applies to Kosewicz's aggravating factor verdict, I must concur in the majority's resolution of this case as to Kosewicz. Five justices of this court recently held that aggravating factors must appear in the charging documents in order to give adequate notice to the defendant. *State v. Powell*, 167 Wn.2d 672, 689-90, 695, 223 P.3d 493 (2009) (plurality opinion). Under *Powell*, the situation in Kosewicz's case is analogous to Brown's felony murder case. In both instances, another underlying crime is an essential element, or functional equivalent of an element, of the primary crime charged, and the State should thus be required to declare in the information the elements of an aggravating crime it intends to prove. While I agree with the analysis of the five justices concurring and dissenting in *Powell*, this court has recently overturned *Powell*'s requirement that aggravating factors appear in the charging documents to provide notice to the defendant. *Siers*, 274 P.3d at 361. Therefore, I concur with the majority that under the law as it now stands Kosewicz's conviction should be affirmed.

D. Conclusion

In my view, in order to prepare a defense, the defendant must be informed of the essential elements of all crimes that appear in the information, whether or not they are elements of another crime. The majority relies on antiquated authority for the proposition that the defendant is presumed to know the elements of predicate crimes. I believe the majority's holding may not survive federal scrutiny. I urge prosecutors to act with an abundance of caution and to specify the elements of all

crimes that appear in the information. I respectfully dissent from the majority's holding as to Robert Brown. I would reverse his conviction and remand for a new trial.

AUTHOR:
Justice Tom Chambers

WE CONCUR:

Justice Charles W. Johnson

Justice Debra L. Stephens

Justice Charles K. Wiggins