Supreme Court No._____

Court of Appeals No. 31866-4-III

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

THOMAS MITZLAFF, Petitioner

APPEAL FROM THE WALLA WALLA

COUNTY SUPERIOR COURT

HONORABLE DONALD W. SCHACHT

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner, Thomas Mitzlaff, the appellant below, asks this Court to accept review of the following Court of Appeals' decision terminating review.

II. COURT OF APPEALS DECISION

Mr. Mitzlaff seeks review of the Division Three, Court of Appeals' Commissioner's Ruling filed November 25, 2014, which affirmed his convictions. A copy of the Commissioner's Ruling is attached hereto as Appendix A. A copy of the Order Denying Motion to Modify the Commissioner's Ruling filed March 4, 2015, is attached as Appendix B. This petition for review is timely.

III. ISSUES PRESENTED FOR REVIEW

1. Is it ineffective assistance of counsel requiring a new trial where trial counsel fails to request a definitional instruction of the technical term "great bodily harm" thereby depriving the jury of the necessary information to apply the law?

IV. STATEMENT OF THE CASE

A jury found the defendant, Thomas Mitzlaff, guilty of first-degree assault domestic violence, with a deadly weapon, and felony harassment, domestic violence. (CP 59-61). The jury was given standard "to convict" instructions for both the assault in the

first degree and harassment. (CP 43;48). The court also gave a jury instruction for assault in the second degree. (CP 45-46).

At trial, Mr. Mitzlaff's grandmother, Marilee Topel, testified that one evening her grandson, Mr. Mitzlaff, got up from the dinner table, grabbed her hair, and put the dull edge of a knife against her throat. The only words she heard him say were, "See how easy it would be?" (RP 26-32). When he pulled her hair, the chair rolled, her head struck the wall two or three times, and a potted plant fell off of a shelf onto her. (RP 27). A neighbor standing outside the home testified she heard him say, "I'm going to fucking kill you". (RP 37-38).

On appeal, Mr. Mitzlaff raised three errors: insufficiency of the evidence for both convictions, and ineffective assistance of counsel for failure to request a definitional instruction of "great bodily harm." The Commissioner affirmed the convictions. *Slip Op.* at 4-5.

Addressing the argument of ineffective assistance of counsel for failure to request a jury instruction defining the term "great bodily harm", the Commissioner reasoned "Great bodily harm is injury to the body. *State v. Van Woerden,* 93 Wn.App. 110, 967 P.2d 14 (1998)." *Slip Op.* at 6. The Commissioner found that Mr. Mitzlaff's

action left no confusion about the term "great bodily harm." *Slip Op.* at 6. Without analysis of the different types of "bodily harm" defined in WPIC, The Commissioner concluded that even if a definitional instruction was warranted, any error was harmless. *Slip Op.* at 6.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Petitioner believes this Court should accept review of this issue because it involves a significant question of law under the Constitution of the United States: whether failure to request a jury instruction on a statutorily defined technical term element violates a defendant's Sixth Amendment right to effective assistance of counsel. (RAP 13.4(b)(3).

RCW 9A.04.110 defines the types of bodily injury or harm: "(4)(a): Bodily injury, physical injury, or bodily harm means physical pain or injury, illness, or an impairment of physical condition; (4)(b): Substantial bodily harm means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part; (4)(c): Great bodily harm means bodily injury which creates a probability of death, or which causes significant serious permanent

disfigurement, or which causes a significant permanent loss or impairment of any bodily part or organ."

Similarly, the Washington Pattern Jury Instructions provides the definition for great bodily harm and cautions legal practitioners to *not* use the definition of great bodily harm to define "bodily injury", "bodily harm", "substantial bodily harm," or "great personal injury" as each of the terms has a very distinct definition. 11 Washington Pattern Jury Instructions: Criminal ("WPIC") (2.04)(3d ed. 2014). "Great bodily harm entails a greater degree of harm than does 'serious bodily harm'" Fine and Ende, 13A Washington Practice, Criminal law with Sentencing Forms § 303 (2d ed.).

Relying on *Van Woerden,* the Commissioner failed to distinguish between the various statutory definitions of bodily harm. Moreover, the ruling did not address the specific risk contemplated by the term "great bodily harm" in a first-degree assault context. The specific issue in *Van Woerden* court was whether posttraumatic stress disorder (PTSD) could be considered an impairment of a physical condition, i.e. bodily injury. The court concluded that PTSD was not an impairment of a physical condition and that the term 'bodily injury' included only physical illness. *Van Woerden,* 93 Wn.App. at 117. The *Van Woerden* court did not, as

suggested by the Commissioner's ruling, consolidate all statutory definitions of 'bodily injury."

One of the differences between first and second-degree assault is the requisite intent to inflict a particular degree of injury. While first-degree assault requires proof of intent to inflict *great bodily harm*, second-degree assault requires proof of an intentional assault that recklessly inflicts *substantial bodily harm*. The jury in this case was instructed on both degrees of assault, but was not given the applicable legal definition for the two types of harm. Definitions of technical terms are considered under the "technical term rule," to ensure that criminal defendants are not convicted by a jury that misunderstands the applicable law." *State v. Scott,* 110 Wn.2d 682, 690, 757 P.2d 492 (1988).

Mr. Mitzlaff had the right to effective assistance of counsel at trial. U.S. Const. amend. VI; Wash. Const. Art. 1,§22. To substantiate his claim, he must show counsel's performance fell below an objective standard of reasonableness and he was thereby prejudiced. If there is a reasonable probability that the outcome of the proceedings would have been different, prejudiced is demonstrated. He must also show the absence of legitimate

strategic or tactical reasons for challenged conduct. *State v. McFarland,* 127 Wn.2d 322, 334-36, 899 P.2d 1251 (1995).

Counsel's performance fell below an objective standard of reasonableness. The definition of great bodily harm is statutory and the WPIC recommends it be used in an assault first-degree instruction. WPIC 35.02. The distinguishing features between first and second-degree assault are intent and degree of harm. Without the recommended and proper instruction for the terms, the jury had no idea that the State was required to prove beyond a reasonable doubt that Mr. Mitzlaff specifically intended to inflict such severe injuries that only death could be the next logical step. *State v. Stubbs,* 170 Wn.2d 117, 128, 240 P.3d 143 (2010).

The fact was that Mr. Mitzlaff's grandmother had at most minor injuries from the encounter, and none from the knife. Her injuries do not suggest an intent to inflict injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of any bodily part or organ. There can be no tactical or strategic reason for failure to request the instruction: the jury was left to cobble together its own definition of the degree of harm contemplated by the statute.

Because Mr. Mitzlaff's actions fell well within the definition of second degree assault[1], had the jury been fully instructed, the outcome of the case might very well have been different. Where a defendant has been prejudiced by trial counsel's failure to request a definitional instruction, the larger question is whether the error was so serious as to deprive the defendant of a fair trial, one whose result is reliable. *State v. Gordon,* 172 Wn.2d 671, 681, 260 P.3d 884 (2011).

In the context of a jury instruction on self-defense, distinguishing between great bodily harm and great personal injury, Washington courts have held that it is "imperative" that trial courts use the correct language. *State v. Woods,* 138 Wn.App. 191, 200-201, 156 P.3d 309 (2007). *See State v. Corn,* 95 Wn.App. 41, 975 P.2d 520 (1999). The *Woods* court dealt with a jury that was wrongly instructed on the type of anticipated injury necessary to justify self-defense. The court noted that the distinction between great bodily harm and great personal injury was significant, and the distinction between great bodily harm and mere injury is even more

[1] RCW 9A.36.021 provides in pertinent part: A person is guilty of assault in the second degree if he, under circumstances not amounting to assault in the first degree: (a) intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or (c) assaults another with a deadly weapon.

so. *Woods,* 95 Wn.App. at 201. The appellant there was entitled to a new trial.

While the jury here was not wrongly instructed, the *Woods* court observation underscores the need for technical terms to be properly defined for the jury. Instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kyllo,* 166 Wn.2d 856, 864, 215 P.3d 177 (2009). Where counsel does not request a statutory definition of a technical term for a jury instruction, and the definition of the term is imperative for distinguishing between different degrees of a crime, it is ineffective assistance of counsel to fail to request such a jury instruction. And, as here, where the defendant's actions caused mere injury and not great bodily harm, defendant was prejudiced by counsel's failure to request a definitional instruction.

VI. CONCLUSION

For the reasons stated, Petitioner asks this Court to reverse and remand the matter for a new trial.

Respectfully submitted on April 3, 2015.

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PROOF OF SERVICE (RAP 18.5(b))

I, Marie Trombley, do hereby certify under penalty of perjury that on April 3, 2015, I mailed to the following, by USPS first class mail, postage prepaid, or provided email service by prior agreement (as indicated) a true and correct copy of Mr. Mitzlaff's Petition for Review and Appendices A and B:

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APPENDIX A

The Court of Appeals
of the
State of Washington
Division III

NOV 25 2014

STATE OF WASHINGTON,
Respondent,
v.
THOMAS JOSEPH MITZLAFF,
Appellant.

COMMISSIONER'S RULING
NO. 31866-4-III

Mr. Mitzlaff appeals his Walla Walla County Superior Court convictions of first degree assault domestic violence with a weapon and felony harassment, domestic violence. He contends that: (1) the evidence was insufficient to sustain his conviction of felony harassment because the State did not present any evidence that the complaining witness heard the threat or was in reasonable fear that the threat would be carried out; (2) there was insufficient evidence to prove he intended to inflict great bodily harm; and (3) he did not receive effective assistance of counsel because his attorney failed to request a jury instruction defining the technical term "great bodily harm." The State of Washington's motion on the merits is granted.

Mr. Mitzlaff was living with his grandmother. While she was eating her dinner she told him several times to do something with his life. He appeared to snap. He got up from the table grabbed her by the hair, hit her head against the wall two or three times causing a potted plant to fall and hit her on the head. Mr. Mitzlaff then held a knife to her throat and said, "See how easy this would be?" (RP 26-27).

The next door neighbor heard Mr. Mitzlaff yelling several times at his grandmother that he was going to kill her. The neighbor could also see through the window Mr. Mitzlaff shaking his grandmother by her hair and that she was covered in sod. The neighbor also heard the grandmother screaming for help and saw Mr. Mitzlaff kicking his grandmother in the corner of the room. The neighbor called 911 and then knocked on the door and yelled "open up, open up." (RP 38). The grandmother tried to pull the knife from her neck, but released it when she felt its sharpness. Mr. Mitzlaff stopped the assault after hearing the knocking at the door; his grandmother then went to the door and the neighbor led her to safety. The grandmother appeared afraid to the neighbor and in fact told the neighbor she was scared and that Mr. Mitzlaff had done this before, but not as bad.

When the police arrived, the grandmother was crying and hysterical, she was in pain, reported bruising, and had a red mark on her neck from the knife. The police located the knife on the kitchen floor; chairs were strewn about, the table tipped, and fragments of the plant pot and glass were shatter everywhere.

Mr. Mitzlaff was charged with first degree assault domestic violence with a deadly weapon and felony harassment, domestic violence. Mr. Mitzlaff was convicted as charged and he appeals.

First, Mr. Mitzlaff contends that there is insufficient evidence to support his conviction for felony harassment because there was no evidence that his grandmother heard the threat or was in reasonable fear that the threat would be carried out.

The standard of review for determining sufficiency of the evidence is whether, when examining the evidence in the light most favorable to the State, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Treat*, 109 Wn. App. 419, 426, 35 P.3d 1192 (2001). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). This Court views both circumstantial and direct evidence as equally reliable and does not review credibility determinations on appeal because we defer to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence." *State v. Paulson*, 131 Wn. App. 579, 586, 128 P.3d 133 (2006).

To convict a defendant of felony harassment, each of the following elements must be proved beyond a reasonable doubt: (1) without lawful authority, (2) the defendant knowingly threatens to kill the person threatened or any other person, immediately or in the future, and (3) the words or conduct place the person threatened

in reasonable fear that the threat will be carried out. RCW 9A.46.929(1)(a)(b), (2)(b)(ii). Thus, the State must show not only that the person was aware of the threat, but, also establish that the person threatened was placed in reasonable fear that the threat to kill would be carried out. *State v. C.G.*, 150 Wn.2d 604, 610, 80 P.3d 594 (2003).

Here, while the grandmother did not testify that she heard Mr. Mitzlaff's threats that he was going to kill her, she did testify that while Mr. Mitzlaff was holding the knife to her throat, she heard him say to her "see how easy this would be." (RP 27). From this statement, coupled with her testimony and that of her neighbor that she was "scared," and that Mr. Mitzlaff pulled her hair, banged her head against the wall, and held a knife to her throat, the jury could easily infer that Mr. Mitzlaff's statement that his grandmother did hear was a verbal threat and that she felt threatened. Furthermore, drawing a reasonable inference from all the evidence in favor of the State and deferring to the jury's factual determination, the State introduced sufficient evidence to support the conviction of felony harassment.

Second, Mr. Mitzlaff contends that there was insufficient evidence introduced at trial to support his conviction of first degree assault because there is nothing in the record to show he intended to cause a probability of death or significant and serious injury to his grandmother.

RCW 9A.36.011(1) provides that a "person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm: (a) assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or

death."

Mr. Mitzlaff asserts that even though he held a knife to his grandmother's throat and threatened to kill her he did not intend to kill or seriously injure her because he held the blunt side of the knife to her throat, he released her when the neighbor knocked on the door, and she was his grandmother and they lived together. However, there is sufficient evidence in the record to support the jury's decision. The jury, as the triers of fact, heard the witnesses' testimony and believed otherwise. This Court will not interfere with the jury's factual determination.

Finally, Mr. Mitzlaff contends that he was denied effective assistance of counsel because his attorney failed to request a jury instruction defining "great bodily harm."

Effective assistance of counsel is constitutionally guaranteed to any defendant. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). Appellate review of this issue is *de novo*. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prove ineffective assistance of counsel, a defendant must show by a preponderance of the evidence that his counsel's performance was objectively unreasonable and that the deficient performance prejudiced him. *Strickland*, 466 U.S. at 687-88. Since the *Strickland* test is conjunctive, the petitioner must show both deficient performance and prejudice. *Id.* at 697. "Because of the difficulties inherent in making [this] evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. A showing of prejudice is

made when a reasonable probability exists that, but for counsel's errors, the result of the trial would be different. *Grier*, 171 Wn.2d at 34; *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

The trial court need not define words and expressions that are of ordinary understanding or self-explanatory. *State v. Brown*, 132 Wn.2d 529, 611-12, 940 P.2d 546 (1997). Whether words used in an instruction require definition is necessarily a matter of judgment for the trial court. *State v. Young*, 48 Wn. App. 406, 415, 739 P.2d 1170 (1987). The trial court exercises its discretion in determining the appropriateness of acceding to a request that words of common understanding be specifically defined and failure to give a definitional instruction is not failure to instruct on an essential element. *Brown*, 132 Wn.2d at 612. An instructional error is harmless if this Court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *Young*, 48 Wn. App. at 417.

Here, Mr. Mitzlaff was charged with assaulting his grandmother with a deadly weapon with the intent to inflict great bodily harm. Great bodily harm is injury to the body. *State v. Van Woerden*, 93 Wn. App. 110, 967 P.2d 14 (1998). The evidence is clear that Mr. Mitzlaff slammed his grandmother's head against the wall more than once and held a knife to her throat while threatening to kill her. There was no confusion which would require a definitional instruction. But even if the trial court erred by failing to give such instruction such error was harmless as this Court is convinced beyond a reasonable doubt that the jury would have reached the same result if the instruction

were given.

In light of this, it cannot be said that Mr. Mitzlaff's trial counsel was ineffective as he has failed to show any prejudice resulting from counsel's performance at trial.

The State of Washington's motion on the merits is granted and the decision of the trial court is affirmed.

November 25, 2014.

Joyce J. McCown
COMMISSIONER

APPENDIX B

FILED
March 24, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. THOMAS JOSEPH MITZLAFF, Appellant.	)	No. 31866-4-III ORDER DENYING MOTION TO MODIFY

THE COURT has considered appellant's motion to modify the Commissioner's Ruling of November 25, 2014, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion to modify is hereby denied.

DATED: March 4, 2015

PANEL: Judges Fearing, Siddoway, Lawrence-Berrey

FOR THE COURT:

LAUREL H. SIDDOWAY, Chief Judge