

66850-1

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No. 66850-1-1

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

STATE OF WASHINGTON,

Respondent,

v.

ADIL MAZMANOV,

Appellant.

COMMERCIAL
SUPERIOR COURT
2011 SEP 23 PM 4:59

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by entering a judgment that Adil Mazmanov was guilty of “assault in the fourth degree – domestic violence” when the charging document did not cite legal authority or the essential facts necessary for adding punishment for a domestic violence offense. CP 5-6, 65.

2. The trial court erred by entering a judgment that Mr. Mazmanov was guilty of “assault in the fourth degree – domestic violence” in the absence of a jury finding the crime was one of domestic violence. CP 65.

3. The trial court erred by providing the jury with a verdict form that referred to the crime as “Assault in the Fourth Degree - Domestic Violence” in the absence of any instruction on the definition of domestic violence or requirement that the jury find the participants were family members. CP 36.

4. The trial court erred by denying Mr. Mazmanov’s motion to vacate the “domestic violence designation.” CP 78-80.

5. Appellant assigns error to the trial court’s finding that “the jury returned a verdict of Guilty to Assault in the Fourth Degree – Domestic Violence.” CP 78 (Finding/Conclusion 2).

6. Appellant assigns error to the trial court's conclusion that "the 'domestic violence' designation need not be proved to a jury under Blakely as it is not an element of the crime or even related to an element of the crime." CP 79 (Finding/Conclusion 7).

7. Appellant assigns error the trial court's conclusion that "Even for a defendant who faces deportation if convicted, 'domestic violence' is not an element of the crime of assault in the first degree that must be submitted to a jury." CP 79 (Finding/Conclusion 8).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The superior court lacks authority to impose punishment for an enhancement based upon a factual finding that is not included in the charging document. The State charged Adil Mazmanov by amended information with "assault in the fourth degree – domestic violence," but the charging document did not allege any factual predicate supporting a claim of domestic violence and did not cite any legal authority for imposing additional punishment based upon domestic violence. Mr. Mazmanov is a refugee from Russia, and he faces deportation based on the "domestic violence" label on the verdict form and Judgment and Sentence. Where deportation is a critical and dire consequence of Mr. Mazmanov's conviction based solely on the "domestic violence"

determination, must the designation be vacated where the charging document was insufficient to provide him notice?

2. A jury convicted Mr. Mazmanov of assault in the fourth degree, finding he assaulted another person on November 15, 2010, in the State of Washington. The jury was never asked to make a finding that there was a family relationship and thus did not determine that the crime was one of domestic violence. The crime was nonetheless referenced as “Assault in the Fourth Degree – Domestic Violence” on the verdict form and on the Judgment and Sentence. Where deportation is a critical and dire consequence of Mr. Mazmanov’s conviction solely because of the “domestic violence” determination not made by the jury beyond a reasonable doubt, must the “domestic violence” reference be vacated?

C. STATEMENT OF THE CASE

Firudin Mazmanov and his wife Raisa Charilova fled to the United States in 2005 with their adult sons Adil and Peman. 2/10/11RP 24; 2/14/11RP 6-7. The family is Turkish, and they first moved from Uzbekistan to Russia, and then from Russia to the United States.¹ 2/10/11RP 25; CP 8. They were granted refugee

¹ Adil Mazmanov testified the family came from Khabarovsk, but the prosecutor’s trial memo states they escaped from Krasnodar.

status because they face persecution in Russia due to their nationality as Meskhetian Turks. CP 8, 69; 2/9/11RP 14-15.

The family was residing in Tukwila when Adil Mazmanov's behavior caused his parents concern for his mental health and even resulted in involuntary civil commitment. CP 8; 2/9/11RP 26, 38-40; 2/10/11RP 28-30; 2/14/11RP 8-10. Adil was living with his parents on November 6, 2010, when his father got angry because Adil left unwashed dishes on the table.² Firudin pulled his son by the arm in order to force him to do the dishes. 2/10/11RP 31, 53. Adil responded by pushing Firudin away, hitting him two or three times, and leaving the apartment. 2/10/11RP 31, 37, 54. Firudin stated he was not upset, but he called the police because he was afraid Adil might hurt someone else due to his mental condition. 2/10/11RP 32, 38.

Adil began living in a car, but it was very cold. 2/10/11RP 39-40, 55. On November 25, Adil came home to see his mother and asked his parents for money so he could rent an apartment. 2/10/11RP 40, 56; 2/14/11RP 17. Adil threatened Firudin when Firudin would not give Adil money, and Adil suggested his father

² Because Adil Mazmanov and his father share the same last name, they will be referred to by their first names in this section of the brief; no disrespect for either is intended. In other sections of the brief, Adil Mazmanov is referred to as Mr. Mazmanov.

call the police because he would rather be in jail than living in the car. 2/10/11RP 40-44, 46, 57.

The King County Prosecutor therefore charged Adil with felony harassment for the November 25 incident and added a charge of fourth degree assault when Adil did not agree to resolve the case in mental health court.³ CP 1-2, 5-6; 2/9/11RP 13-15. The amended information accused Adil of “Assault in the Fourth Degree – Domestic Violence” for intentionally assaulting Firudin on November 6, referencing RCW 9A.36.041 but not the domestic violence statutes. CP 5-6.

The Honorable Mariane Spearman did not instruct the jury as to the definition of “domestic violence” or ask the jury to determine if the parties were family members. CP 40-60. The general verdict form for fourth degree assault, however, referred to the crime as “Assault in the Fourth Degree – Domestic Violence.” CP 36. The jury convicted Adil of fourth degree assault but was unable to reach a verdict for the felony harassment charge. CP 36, 39.

Prior to sentencing, Adil moved for partial arrest of judgment, asking the court to remove the domestic violence designation from

³ Adil did not believe he was mentally ill. 2/18/11RP 16.

the jury verdict form, as the jury had not been instructed as to the definition of domestic violence or asked to determine if the crime was one of domestic violence. CP 61-63. Defense counsel pointed out that her client faced deportation as a result of the domestic violence designation and it was thus a “severe penalty intimately tied to the criminal proceedings.” CP 62 (citing Padilla v. Kentucky, 130 S.Ct. 1473 (2010)). The State claimed the jury did find the crime was one of domestic violence, that the court was not required to provide a specific jury instruction for the jury to make that finding, and the court could itself make a finding that the crime was one of domestic violence. 2/10/11RP 3-5 (citing State v. Hagler, 150 Wn.App. 196 (2009)). The court denied Adil’s motion but suggested defense counsel file a motion for reconsideration if, upon further research, she deemed it appropriate. 2/10/11RP 6-7.

The court gave Adil a suspended 364-day sentence, with credit for the time he had already served in jail, on the condition that he obtain a mental health evaluation and participate in recommended treatment. CP 65-67, 81; 2/10/11RP 13; 3/18/11RP 6. At the request of Adil’s parents, the court recalled existing no-contact orders and did not include a no-contact order with either parent as a sentencing requirement. CP 64, 66; 2/10/11RP 13.

Adil filed a motion for reconsideration, explaining that he was subject to deportation because of the conviction for fourth degree assault with a domestic violence finding, but he would not be subject to deportation based upon the fourth degree assault conviction alone. CP 68-74. The State did not contest the information Adil provided about the immigration consequences of the domestic violence designation for the fourth degree assault conviction. Instead, the State argued that relief was not appropriate under CrR 7.4 or CrR 7.8 and the matter should therefore be “reserved for the Court of Appeals.” CP 75-77.

The court denied the motion for reconsideration without oral argument, holding that the “domestic violence” designation was not an element of the crime and therefore did not need to be found by a jury. CP 78-80. Adil appeals. CP 82-89.

D. ARGUMENT

Under current immigration law, “[t]he ‘drastic measure’ of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes.” Padilla v. Kentucky, ___ U.S. ___, 130 S.Ct. 1473, 1478, 176 L.Ed.2d 284 (2010) (quoting Fong Haw Tan v. Phelan, 333 U.S. 6, 10, 68 S.Ct. 374, 92 L.Ed.2d 433 (1948)). The Padilla Court therefore recognized that while

deportation is a civil penalty, it is “nevertheless intimately related to the criminal process” because the laws have “enmeshed criminal convictions and the penalty of deportation for nearly a century.” Id. at 1481.

[R]ecent changes in our immigration law have made removal nearly automatic result for a broad class of noncitizen offenders. Thus, we find it “most difficult” to divorce the penalty from the conviction in the deportation context. Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult.

Id. (internal citations omitted).

Given the close connection between the criminal and deportation processes, the Padilla Court found it difficult to classify deportation as either a direct or indirect consequence of a criminal conviction, and did not reach the issue. Padilla, 130 S.Ct. at 1482. Instead, the court determined the any distinction was simply irrelevant, as not providing accurate advice as to the immigration consequences of a guilty plea constituted deficient performance under the two-part Strickland test for ineffective assistance of counsel under the Sixth Amendment.⁴ Id. at 1482-84. The Washington Supreme Court came to a similar conclusion in State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011), where it held that

⁴ Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

misadvice as to the inevitability of deportation constituted ineffective assistance of counsel.

Mr. Mazmanov faces deportation as a result of the domestic violence designation entered by the court without a jury finding. The jury convicted Mr. Mazmanov of assault in the fourth degree. CP 36, 55. Deportation is not authorized for the crime of assault in the fourth degree when the sentence is less than a year, as it is not an aggravated felony crime of violence or a crime of moral turpitude. 8 U.S.C. 1227(a)(2)(A)(i), (iii); 8 U.S.C. 1101(a)(43)(F); Fernandez-Ruiz v. Gonzales, 468 F.3d 1159, 1165-66 (9th Cir. 2006). Any offense designated by the state as a crime of domestic violence, however, is grounds for deportation. 8 U.S.C. 1227 (a)(2)(E)(i); Tokatly v. Ashcroft, 371 F.3d 613, 619 (9th Cir. 2004).

The immigration court will look only at the facts set forth on documents such as the verdict form and judgment. Tokatly, 371 F.3d at 620-21 (9th Cir. 2004). Thus, because the verdict form and judgment state Mr. Mazmanov committed a crime of domestic violence, he faces removal proceedings.

1. THE DOMESTIC VIOLENCE LABEL MUST BE REMOVED FROM THE JUDGMENT AND SENTENCE AND VERDICT FORM BECAUSE THE DOMESTIC VIOLENCE WAS NOT ALLEGED IN THE CHARGING DOCUMENT

a. The charging document must provide notice of the legal and factual elements of the charged offense. Due process requires the State to properly inform an accused person of the charges against him.⁵ U.S. Const. amends. V, VI, XIV; Const. art. I, § 22. A charging document must contain “[a]ll essential elements of a crime.” State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); see CrR 2.1(a)(1) (charging document “shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged.”). The purpose of the essential elements requirement is to provide defendants notice of the crime charged and to allow defendants to prepare a defense. Id. at 101.

The information must contain the statutory and non-statutory elements of the crime. Kjorsvik, 117 Wn.2d at 1001. The “essential elements” required in the charging document are not only the elements of the crime but also “the conduct of the defendant which is alleged to have constituted that crime.” Id.; see Leonard v.

⁵ Article I, section 22 provides, in relevant part, “In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him, to have a copy thereof”

Territory, 2 Wash.Terr. 381, 392, 7 P. 872 (1885) (“Under our laws an indictment must be direct and certain, both as regards the crime charged and as regards the particular circumstances thereof, when they are necessary to constitute a complete crime.”); State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989) (“essential elements” rule requires that a charging document *allege facts supporting every element of the offense*, in addition to adequately identifying the crime charged.” (emphasis in original)).

The essential-elements rule requires the State to allege in the information every fact necessary to impose enhanced punishment, not only the predicate offense. State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008) (Recuenco III). Thus, where a weapon enhancement is alleged, the information must specify the type of weapon enhancement and allege the facts necessary to establish it. Id. at 436. Recuenco III concluded the rule was violated where the information alleged only that the defendant was armed with a “deadly weapon” as opposed to a “firearm” but the trial court nonetheless imposed the longer firearm enhancement. Due to the increase in confinement which results from the firearm as opposed to deadly weapon verdict, the State

was required to allege the specific fact that supported that increase. Recuenco III, 163 Wn.2d at 436.

Mr. Mazmanov was charged with and convicted of “Assault in the Fourth Degree – Domestic Violence.” CP 5-6. The allegation of “domestic violence” subjected Mr. Mazmanov to enhanced punishment that would not be authorized absent that allegation and finding, as it subjects him to deportation. But the charging document was devoid of any legal or factual support for this allegation, and therefore provided insufficient notice as dictated by the state and federal constitutions. State v. Quismundo, 164 Wn.2d 499, 503, 192 P.3d 342 (2008); Kjorsvik, 117 Wn.2d at 97-98.

b. The charging document contains no support for the domestic violence claim or the additional punishment it mandates. When challenged for the first time on appeal, a charging document is construed liberally. Kjorsvik, 117 Wn.2d at 102-05. This liberal construction requires the court to first determine whether the necessary facts appear in any form in the charging document. Id. at 105-06. Only after the court finds the necessary information could be inferred from the face of the charging document will the court require the defendant to show he or she had been actually prejudiced from the inartful language. Id.

The amended information charged Mr. Mazmanov of:

Assault in the Fourth Degree – Domestic Violence,
... committed as follows:

That the defendant ADIL F. MAZMANOV in King County, Washington on or about November 6, 2010, did intentionally assault Firudin Mazmanov;

Contrary to RCW 9A.36.041, and against the peace and dignity of the State of Washington.

CP 5-6.

The information did not allege a family or household relationship between the parties. It did not cite to the domestic violence statutes, RCW 10.99. It did not mention that if proven, Mr. Mazmanov would face deportation. CP 5-6.

In Recuenco III, the court ruled that the facts necessary to support the increased punishment stemming from the possession of a firearm are subject to the essential-elements rule and must be alleged in the information with specificity. Recuenco III, 163 Wn.2d at 434. The allegation of firearm possession increases the maximum sentence beyond that authorized by statute. Id. It therefore acts as an element of the underlying crime, and “Washington law requires the State to allege in the information the crime which it seeks to establish.” Id.

Washington's domestic violence statute, RCW 10.99, does not create a offense, but is simply designed to remind courts that crimes should be fairly enforced without regard to whether the involved parties are family members, in a relationship, or reside in the same home. RCW 10.99.010; State v. Goodman, 108 Wn.App. 355, 359, 30 P.3d 516 (2001), rev. denied, 145 Wn.2d 1036 (2002); State v. O.P., 103 Wn.App. 889, 891-92, 13 P.3d 1111 (2000). This Court has therefore held that a domestic violence allegation is not an "element" of a crime that must be alleged in the information where its purpose is simply to signal the importance of the offense and it does not affect the punishment imposed. O.P., 103 Wn.App. at 892, 13 P.3d 1111 (2000). Mr. Mazmanov, however, faces the severe penalty of deportation based upon the court's determination he committed a crime of domestic violence, and the charging document thus had to include both facts and citation to legal authority to support the domestic violence label.

c. This Court must vacate the domestic violence designation. The State did not charge Mr. Mazamov with a crime of domestic violence because the information was did not include nay supporting legal citation or a factual basis for a domestic violence finding. The court thus lacked authority to add a domestic violence

label to Mr. Mazamov's Judgment or the verdict form. Recuenco III, 163 Wn.2d at 441-42. The unauthorized domestic violence label must be vacated from the information, jury verdict form and Judgment and Sentence.

2. THE DOMESTIC VIOLENCE LABEL MUST BE VACATED FROM THE JUDGMENT AND VERDICT FORM BECAUSE IT WAS NOT BASED UPON A JURY FINDING THAT THE CRIME WAS ONE OF DOMESTIC VIOLENCE AND IT EXPOSES MR. MAZMANOV TO DEPORTATION

The close relationship between criminal convictions and deportation from the United States described by the Padilla Court is possible only because of the due process protections provided in our criminal courts. When relying upon a criminal conviction to deport a noncitizen, immigration authorities may be confident that the defendant was convicted after a fair trial in which the government proved every element of the crime beyond a reasonable doubt or pled guilty. See 8 U.S.C. 1101(a)(48)(A) (definition of "conviction"). This is not true of the domestic violence designation in Mr. Mazmanov's case. Given the harsh immigration consequences that Mr. Mazmanov faces, the domestic violence designation on the verdict form and Judgment and Sentence must

be vacated as they are not based upon a jury finding that the assault was a crime of domestic violence.

a. Due process requires the jury find beyond a reasonable doubt any fact that increases the defendant's potential punishment.

The due process clause of the United States Constitution ensures that a person will not suffer a loss of liberty without due process of law.⁶ U.S. Const. amend. XIV. The Sixth Amendment also provides the defendant with a right to trial by jury. U.S. Const. amends. VI, XIV. Thus, it is axiomatic that a criminal defendant has the right to a jury trial and may only be convicted if the government proves every element of the crime beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 303-04, 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). The constitutional rights to due process and a jury trial “indisputably entitle a criminal defendant to ‘a jury determination that [he] is guilty of every element of the crime beyond a reasonable doubt.’” Apprendi, 530

⁶ The Sixth Amendment provides in pertinent part, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .”

The Fourteenth Amendment provides in part, “. . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .”

U.S. at 476-77 (quoting United States v. Gaudin, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995)).

This principle applies to every fact that increases the maximum penalty faced by the defendant. Blakely, 542 U.S. at 303. The dispositive question is one of substance, not form. “If a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.” Ring v. Arizona, 536 U.S. 584, 602, 122 S.Ct. 2428, 153 Ed.2d 556 (2002) (citing Apprendi, 530 U.S. at 482-83). Thus, a judge may only impose punishment within the maximum term justified by the jury verdict or guilty plea. Blakely, 542 U.S. at 303-04.

Washington’s Constitution also protects these due process rights and provides even greater protections for jury trials than the federal constitution.⁷ Const. art. I §§ 21, 22; State v. Williams-Walker, 167 Wn.2d 889, 895-86, 225 P.3d 913 (2010); Recuenco III, 163 Wn.2d at 440. Under the Washington Constitution, the

⁷ Article I, section 21 provides in part, “The right of trial by jury shall remain inviolate.”

Article I, section 22 provides, in part, “In criminal prosecutions the accused shall have the right . . . to have a speedy and public trial by an impartial jury of the county in which the offense is charged have been committed . . .

court is bound by the jury's factual determinations. Williams-Walker, 167 Wn.2d at 897. The court cannot substitute its judgment by imposing sentence based upon a different factual finding, even if it is supported by the evidence presented at trial or even the jury's finding on the elements of the underlying crime. Id. at 888-90. When the court does so, the error cannot be harmless, as it is never harmless for the court to sentence the defendant for a crime not found by the jury. Id. at 899-900; Recuenco III, 163 Wn.2d at 442.

In Recuenco III, the defendant was convicted of second degree assault, and the jury was provided a special verdict form asking if he was armed with a deadly weapon. Recuenco III, 163 Wn.2d at 431-32. The court, however, imposed a 36-month enhancement for committing a crime with a firearm rather than the 12-month enhancement authorized by the jury's deadly weapon finding. Id. The Court found that the trial court lacked authority to sentence Recuenco for the addition two years that corresponded to the firearm enhancement in the absence of a jury finding that the defendant was armed with a firearm. Id. at 440.

The error in this case occurred when the trial judge imposed a sentence enhancement for something the State did not ask for and the jury did not find. The

trial court simply exceeded its authority in imposing a sentence not authorized by the charges.

Id. at 442.

b. The trial court unconstitutionally added the term “domestic violence” to Mr. Mazmanov’s crime on the verdict form and the Judgment and Sentence in the absence of a jury finding.

Mr. Mazmanov was charged with assault in the fourth degree, and the jury was informed that, in order to convict Mr. Mazmanov, it had to find only two elements of the crime beyond a reasonable doubt: (1) that Mr. Mazmanov assaulted Firudin Mazmanov on November 6, 2010, and (2) that the acts occurred in Washington. CP 55; RCW 9A.36.041. The jury was never instructed that it had to find Mr. Mazmanov and his father met the definition of family or household members in order to find the crime was one of domestic violence.⁸ CP 40-60; RCW 10.99.020(3), (5). In fact, the words “domestic violence” are not found anywhere in the court’s instructions to the jury. CP 40-60.

The court nonetheless provided the jury with a verdict form that referred to the offense as “Assault in the Fourth Degree –

⁸ A pattern special verdict form asking the jury if the defendant and the alleged victim were family members is easily accessible. Washington Supreme Court Committee on Jury Instructions, 11A Washington Practice: Washington Pattern Jury Instructions Criminal, WPIC 190.11 (2008).

Domestic Violence.” CP 36. The jury found Mr. Mazmanov guilty of that crime, but had no way of knowing that the term “domestic violence” had a legal meaning. Instead, by finding Mr. Mazmanov guilty, the jury was finding beyond a reasonable doubt that he assaulted Firudin Mazmanov on November 16, 2010, in the State of Washington, as it had been instructed in the “to convict” instruction. CP 55 (Instruction 12); see State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005) (“to convict” instruction carries great weight because it is the jury’s “yardstick” in measuring the evidence to determine guilt or innocence; State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997); State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)). Although the jury placed “guilty” in the verdict form, it made no finding that the crime was one of domestic violence as it was not instructed to do so.

As mentioned above, Washington’s domestic violence statute, RCW 10.99, is designed to remind courts that crimes involving family members should be enforced in an even-handed manner. RCW 10.99.010; O.P., 103 Wn.App. at 891-92. The court is required to identify on “docket sheets” the cases that purportedly arise from an act of domestic violence. RCW 10.99.040(1)(d); O.P., 103 Wn.App. at 892. The court may also issue a no-contact

order prior to arraignment prior to trial, and upon conviction. RCW 10.99.040(2), (3); RCW 10.99.050(1); O.P., 103 Wn.App. at 892. The statute does not require or even authorize a court to find sua sponte that the defendant committed a crime of domestic violence, as was done in Mr. Mazmanov's case.

The trial court refused to delete the "domestic violence" phrase from the verdict form and included the phrase on the front page of the Judgment and Sentence to describe the crime of conviction. CP 65, 78-80; 2/18/11RP 5-7. The court reasoned that the jury did not need to make the determination that the crime was one of domestic violence pursuant to State v. Hagler, 150 Wn.App. 196, 208 P.3d 32, rev. denied, 167 Wn.2d 1007 (2009). CP 79; 2/18/11RP 5-6. In Hagler, this Court found that it was not necessary or even advisable to inform the jury that the charged crime was designated a domestic violence offense by the prosecutor or the court. Hagler, 150 Wn.App. at 198, 202. The court reasoned that domestic violence was not an element of the crime or relevant to prove an element of the crime and could prejudice the defense, but did not directly address the issue. Id. at 202.

In other cases, this Court has ruled that the federal constitution does not require the jury make a domestic violence finding beyond a reasonable doubt because the finding does not authorize an exceptional sentence or increase potential punishment. State v. Winston, 135 Wn.App. 400, 406, 144 P.3d 363 (2006); State v. Felix, 125 Wn.App. 575, 578-81, 105 P.3d 427, rev. denied, 155 Wn.2d 1003 (2005). In those cases, however, the punishment the appellant cited could have been imposed by the court even without the domestic violence designations or was not actually a punishment. Winston, 135 Wn.App. at 406 (no-contact order, reduced opportunity for early release, domestic violence evaluation and treatment, and a DV fine were not increased punishment that triggered Sixth Amendment protections); Felix, 125 Wn.App. at 578-81 (no contact order, loss of right to carry a firearm not increased punishment), rev. denied, 155 Wn.2d 1003 (2005); see O.P., 103 Wn.App. at 892-93 (increased stigma already present because information already designated crime victim as respondent's mother and therefore domestic violence need not be alleged in information). The court, for example, has authority to impose no contacts orders whether or not the crime is one of

domestic violence.⁹ Felix, 125 Wn.App. at 580 (RCW 10.99.050 does not authorize no-contact orders that could not otherwise be imposed). Other prohibitions, such as the prohibition against possession of a firearm, are not considered punishment. State v. Schmidt, 143 Wn.2d 658, 23 P.3d 462 (2001) (firearm statutes create disability but are not punishment).

Deportation, however, is a punishment inextricably intertwined with the defendant's conviction for a domestic violence offense, but not for assault in the fourth degree alone. Mr. Mazmanov's life will be much more profoundly and negatively impacted by deportation to a country where he has no family or resources than it will be impacted by the jail sentence and mental health counseling required by the superior court. See Padilla, 130 S.Ct. at 1483 (citing Immigration and Naturalization Service v. St. Cyr, 533 U.S. 289, 323, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001)).

In Williams-Walker, the trial court imposed a firearm enhancement even though the jury found the defendants were armed with a deadly weapon, not specifically a firearm, even though there was evidence that the defendants were armed with firearms. Williams-Walker, 167 Wn.2d at 901. The court

⁹ In felony cases, no contact orders are authorized by RCW 9.94A.505(8). State v. Armendariz, 160 Wn.2d 106, 156 P.3d 201 (2007);

emphasized that the court must look to the jury's findings to determine the applicable enhancement, and "if the jury makes no finding, no sentence enhancement may be imposed." Id. at 901-02. While a domestic violence designation is not a sentencing enhancement under the Sentencing Reform Act, it did lead to a significant increased punishment in Mr. Mazmanov's case. The trial court thus violated the federal and state constitutions by including domestic violence designations in the verdict form and Judgment when the jury may no such factual finding.

c. This Court must vacate the domestic violence designations on the verdict form and Judgment. The jury was asked to decide if Mr. Mazmanov committed fourth degree assault, but it was never asked if the parties were family members or the crime one of domestic violence. The trial court therefore erred by entering a factual finding that the crime was one of domestic violence on the Judgment and Sentence and including the words "domestic violence" on the general verdict form.

The trial court is bound by any finding or lack of finding made by the jury. Williams-Walker, 167 Wn.2d at 901-02. When the trial court exceeds the sentencing authority granted by the jury's factual findings, "error occurs that may never be harmless." Id. at 902.

This Court must vacate the domestic violence designations on the general verdict form and Mr. Mazmanov's Judgment and Sentence.

E. CONCLUSION

The trial court improperly designated Mr. Mazmanov's fourth degree assault a crime of domestic violence when (1) the State did not allege a domestic relationship in the information, (2) the State did not request the jury be instructed on the definition of domestic violence, and (3) the jury was not asked to determine if the crime was one of domestic violence. The trial court thus imposed a sentence not alleged in the information or supported by the jury's guilty verdict in violation of Mr. Mazmanov's constitutional rights to be informed of the charged against him and to a jury trial, which places Mr. Mazmanov in jeopardy of deportation. Williams-Walker, 167 Wn.2d at 900-02; Recuenco III, 163 Wn.2d at 439-42. The designation must be vacated.

DATED this 26th day of September 2011

Respectfully submitted,



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

STATE OF WASHINGTON,)

Respondent,)

v.)

ADIL MAZMANOV,)

Appellant.)

NO. 66850-1-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF SEPTEMBER, 2011, 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:

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