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COURT OF APPEALS
DIVISION II

Court of Appeals No. 36639-8-II

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STATE OF WASHINGTON
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**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

LARRY ALLEN DAY,

Defendant/Appellant.

OPENING BRIEF OF APPELLANT

**Appeal from the Superior Court of Pierce County,
Cause No. 06-1-02286-8
The Honorable Frederick Fleming, Presiding Judge**

**Sheri L. Arnold
Attorney for Appellant
WSBA No. 18760**

**P. O. Box 7718
Tacoma, Washington 98417
email: slarnold2002@yahoo.com
(253)759-5940**

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I. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to convict Mr. Day of attempted assault in the second degree.
2. There was insufficient evidence to support a jury finding that the attempted second degree assault was a crime of domestic violence.
3. There was insufficient evidence to support a jury finding that the reckless burning was a crime of domestic violence.
4. Mr. Day's sentence is clearly excessive on the facts of this case.
5. Error is assigned to Finding of Fact for Exceptional Sentence No. IV, which reads:

The jury returned unanimous verdicts of guilty on the attempted murder charges, (Counts I-III.) On the Arson charge (Count IV) the jury found the defendant not guilty of the crime of Arson in the First Degree but found unanimously that the defendant was armed with a firearm at the time of the crime and answered the domestic violence questions in the affirmative.

The jury also found the defendant guilty of Attempted Assault in the Second Degree (Count V) and found that the defendant was armed with a firearm at the time he committed that crime. The jury also answered the domestic violence questions on this count in the affirmative.

Finally the jury found the State had proved beyond a reasonable doubt that the defendant violated a protection order. (Count VI.)

II. ISSUES PRESENTED

1. Did the State present sufficient evidence to convict Mr. Day of attempted assault where the evidence does not support the inference that Mr. Day took a substantial step towards committing second degree assault? (Assignment of Error No. 1)
2. Did the State present sufficient evidence to establish that the attempted second degree assault was a crime of domestic violence where there was not an ongoing pattern of abuse and the crime was not executed with deliberate cruelty? (Assignment of Error No. 2)
3. Did the State present sufficient evidence to establish that the reckless burning was a crime of domestic violence where there was not an ongoing pattern of abuse and the crime was not executed with deliberate cruelty? (Assignment of Error No. 3)
4. Was Mr. Day's sentence clearly excessive? (Assignments of Error Nos. 2, 3, 4 & 5)

III. STATEMENT OF THE CASE

A. Procedural History

On May 22, 2006, Mr. Day was charged with three counts of attempted murder in the first degree while armed with a firearm, arson in the first degree, and attempted assault in the second degree while armed with a firearm. CP 1-4.

On April 24, 2007, Mr. Day moved to suppress all evidence found subsequent to the warrantless entry and search of his residence by police. CP

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8-59. Mr. Day further moved to suppress the contents of the cassette tape found in the cassette recorder on Mr. Day when he was arrested. CP 8-59. Mr. Day also moved to suppress the evidence obtained pursuant to the search warrant for his garage and vehicle on various grounds. CP 8-59.

On May 21, 2007, the charges were amended to add a domestic violence aggravating factor to the attempted murder, first degree arson, and attempted second degree assault charges and to add the charge of violation of a protection order. CP 61-63.

On May 29, 2007, the charges were again amended to exclude the domestic violence aggravating factor on the two attempted murder charges. CP 135-139. On June 6, 2007, the charges were once more amended to include one count of attempted murder in the first degree while armed with a firearm with a domestic violence aggravating factor, two counts of attempted first degree murder while armed with a firearm, one count of first degree arson with a domestic violence aggravating factor, one count of attempted assault in the second degree while armed with a firearm with a domestic violence aggravating factor, and one count of violation of a protective order. CP 143-147.

A Criminal Rule 3.5/3.6 hearing was held on May 23, 2007, and May

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24, 2007. RP 78-313. Mr. Day conceded that his statements to the police were admissible RP 264. The trial court suppressed the contents of the tape recorder found on Mr. Day when he was arrested. RP 283. The trial court denied the motion to suppress the tapes which were found in Mr. Day's Honda. RP 289-291. The trial court also denied Mr. Day's motion to suppress the evidence discovered pursuant to the warrantless search of his home and property. RP 293-298.

Jury trial began on May 30, 2007. RP 356. At the close of the State's case, Mr. Day moved to dismiss the domestic violence aggravating factor from all the charges. RP 834-841. The trial court denied the motion. RP 841. Mr. Day additionally moved to dismiss the deadly weapon enhancement on the arson charge. RP 841-846. The trial court denied that motion as well. RP 846.

Over Mr. Day's objection, the trial court declined to instruct the jury on attempted fourth degree assault as a lesser included crime of attempted second degree assault. RP 874, CP 239-299. The trial court also declined to give Mr. Day's proposed jury instruction regarding the deadly weapon enhancement. RP 874, CP 282-299. Mr. Day also objected to jury instruction number 49. RP 874-875, CP 303-304.

The jury found Mr. Day not guilty of all counts of attempted first degree murder and not guilty of all counts of the lesser included crime of attempted second degree murder. RP 966-968, CP 363-376. The jury also found Mr. Day not guilty of the crime of first degree arson (RP 968, CP 377). The jury did find Mr. Day guilty of the lesser included crime of reckless burning. RP 968, CP 379. The jury found that the crime of reckless burning was a domestic violence crime. RP 968-969, CP 380. The jury additionally found Mr. Day guilty of attempted assault in the second degree and found that Mr. Day was armed with a firearm when the assault was committed. RP 969, CP 381-382. The jury also found that the attempted assault was a domestic violence crime. RP 969-970, CP 383. Finally, the jury found Mr. Day guilty of violation of a protective order. RP 970, CP 384.

After considering letters submitted by Ms. Johnson's family over objection of defense counsel (RP 983-999, CP 472-517), the trial court imposed an exceptional sentence of five years each for the reckless burning and attempted assault charges, to run consecutively, as well as the statutorily mandated 18 month firearm enhancement. CP 518-530. The court also ordered 18 to 36 months of community custody for both the reckless burning and attempted assault charges. CP 518-530. The court imposed a sentence

of 365 days on the charge of violation of a protection order. CP 531-535.

Notice of appeal was filed on August 8 and August 17, 2007. CP 539, 543.

B. Factual Summary

On May 19, 2006, police responded to a 911 call reporting a suspicious vehicle in the 2400 block of 91st Street East. RP 360. The caller reported seeing a smaller older car drive into the cul-de-sac with its headlights off and drive down a overgrown path near the caller's residence. RP 360. Sergeant Longtine and Officer Rice responded to the area. RP 361. Sergeant Longtine shone his flashlight down the overgrown path and saw a shotgun leaning against a bush along the path. RP 361. Sergeant Longtine picked up the shotgun and discovered it was loaded. RP 361.

Sergeant Longtine spoke to Melissa and Scott Cleary, the owners of the property next to where the shotgun was found. RP 364. Mr. Day is the father-in-law of both Melissa and Scott Cleary. RP 448, 480. Ms. Cleary is the daughter of Ms. Johnson, who is Mr. Day's wife. RP 480-481, 515. The police asked Mr. Cleary if he had any idea who would want to put the shotgun next to his house. Mr. Cleary responded that his family had been having problems with Mr. Day. RP 458. Mr. Cleary further advised the

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police officers that a restraining order was supposed to have been served on Mr. Day. RP 458.

Sergeant Longtine then went to the Bonney Lake police department and reviewed the no-contact order which restrained Mr. Day from contacting Ms. Johnson. RP 365. The no-contact order had been served on Mr. Day on May 18, 2006. RP 366, 619-620. Sergeant Longtine proceeded to Mr. Day's residence to attempt to contact Mr. Day. RP 365. Sergeant Longtine was accompanied by Officers Boyle, Morrow, and Rice. RP 365.

Upon arriving at Mr. Day's residence, Sergeant Longtine observed an older model Honda Prelude parked under a carport. RP 367. Sergeant Longtine felt the hood of the Honda and found it to be warm to the touch. RP 367.

Sergeant Longtine and Officer Morrow knocked on the door of the residence while Officers Rice and Boyles stayed in the yard. RP 367. Sergeant Longtine received no response. RP 367-368. Sergeant Longtine then opened the front door and yelled into the home to try and get a reply from anyone inside. RP 369. Still, Sergeant Longtine received no response. RP 368.

Upon opening the door, Sergeant Longtine immediately smelled the

odor of petroleum products. RP 368. Sergeant Longtine gathered all of the officers who entered the home and searched the residence for Mr. Day. RP 368. In the front room of the house, the officers observed a pile of items covered in what appeared to be used motor oil. RP 368. The entire residence had been “torn apart” and “ransacked.” RP 370. Near the front door, officers found a garden sprayer filled with gasoline. RP 370.

The officers left Mr. Day’s home and proceeded to search a greenhouse and a detached garage on Mr. Day’s property. RP 370-371. In the garage, police found another pile of items covered with motor oil as well as a shotgun and two rifles. RP 371-374. The shotgun and rifles were loaded. RP 375.

While the officers were searching Mr. Day’s property, Sgt. Longtine had been advised by dispatch that Mr. Day had called Ms. Johnson twice. RP 379.

The police called the fire department to come to Mr. Day’s property and ventilate the garage and the residence. RP 379-380. Shortly after the firefighters arrived, Mr. Day’s house caught on fire. RP 380-381. The firefighters found Mr. Day on the side of the house with two zip-ties secured around his neck. RP 383-384, 553-554, 624-625.

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The police arrested Mr. Day and advised him of his *Miranda* rights. Sergeant Longtine proceeded to question him. RP 384-385. Mr. Day admitted to setting his house on fire and to leaving the shotgun next to the Cleary residence. RP 385. A lighter and a cell phone were found on the ground next to where Mr. Day was initially found by firefighters. RP 554, 807.

Mr. Day was transported to the precinct and was further interrogated by Officer Larsen. RP 556, 679-681. Mr. Day told Officer Larsen he and Ms. Johnson had an argument on May 10, 2006. RP 681. Mr. Day said that he felt Ms. Johnson was distancing herself from him due to her recent diagnosis of cancer. RP 682. Mr. Day advised Officer Larsen that when he was served with the protective order he had “snapped” and couldn’t bear the thought of Ms. Johnson leaving him. RP 682-683.

Mr. Day told Officer Larsen that after he was served with the protective order he placed Ms. Johnson’s personal belongings and family heirlooms in a pile. He then drove to Ms. Cleary’s house and put a shotgun next to her house to get Ms. Johnson’s attention. RP 683-685. Mr. Day told Officer Larsen that he intended to aim the shotgun at Ms. Johnson to make her listen but left when the police arrived. RP 685-686. Mr. Day told Officer

Johnson that there was no particular reason the shotgun was loaded, and that he did “not really” have an intent to harm anyone. RP 728-729.

Mr. Day told Officer Johnson that he returned to his home, saw that police were there as well, snuck into his home after the police had searched it, poured gasoline in his home, and then lit the home on fire. RP 686-688. Mr. Day told Officer Larsen that he called Ms. Johnson as his house was burning. RP 688-689.

Mr. Day further told Officer Larsen that he felt rejected by Ms. Johnson and that he could not bear the thought of losing his house and the only person he loved. RP 732-733. Mr. Day stated that after setting the house on fire he wanted to kill himself and tried to do so by putting the zip-ties around his neck. RP 733-734. Mr. Day proclaimed that when he failed to kill himself using the zip-ties he tried to kill himself another way. RP 734. During the course of the interview, Mr. Day asserted that Officer Larsen could kill him right then. RP 734.

IV. ARGUMENT

- 1. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. DAY OF ATTEMPTED SECOND DEGREE ASSAULT WHERE THE STATE PRESENTED INSUFFICIENT EVIDENCE THAT MR.**

**DAY TOOK A SUBSTANTIAL STEP TOWARDS
COMMITTING SECOND DEGREE ASSAULT.**

In a criminal sufficiency claim, the defendant admits the truth of the State's evidence and all inferences that may be reasonably drawn from them. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Evidence is reviewed in the light most favorable to the State. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068.

In a criminal matter, the State must prove every element of the crime charged. *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004); *In re Winship*, 397 U.S. 358, 362-363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

Under RCW 9A.28.020, A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.”

In order to be found guilty of an attempt to commit a crime, the defendant must take a substantial step toward commission of that crime. A person does not take a substantial step unless his conduct is “strongly corroborative of the actor’s criminal purpose.” Mere preparation to commit a crime is not a substantial step.

State v. Townsend, 147 Wn.2d 666, 679, 57 P.3d 255 (2002).

Here, it is unclear from the charging documents and jury instructions exactly what acts performed by Mr. Day on May 18-19, 2006, constituted the substantial step towards committing attempted second degree assault. CP 5-7, 143-147. However, a review of the State's closing argument reveals that the State's theory of the case was that Mr. Day's action of placing the shotgun in the bushes was the substantial step for both the attempted first degree murder charge *and* the attempted second degree assault charge against Ms. Johnson. RP 894 ("the same evidence that supports the convictions on the attempted murder support the conviction on the second degree assault.").¹

At best, Mr. Day's act of placing the shotgun next to the Cleary residence can be considered mere preparation to commit the crime. His intent was to return to the area and lay in wait for Ms. Johnson to exit the house. Had Mr. Day returned to the shotgun, retrieved it, and secreted himself in the bushes, those actions would constitute the first substantial step in committing the assault. Mr. Day's action of placing the shotgun in the bushes and leaving was simply preparation to commit the ultimate crime of second degree assault. The criminal act of second degree assault would have occurred when Mr. Day stepped out of the bushes and pointed the shotgun at

¹ It is interesting to note that, had Mr. Day been convicted of the attempted first degree murder of Mr. Johnson, a conviction for attempted second degree assault based on the same act would have violated double jeopardy.

Ms. Johnson. Placing the shotgun in the bushes was simply preparation for committing the crime.

Even viewing all the facts in the light most favorable to the State, the State presented insufficient evidence to establish that Mr. Day's act of placing the shotgun in the bushes was anything more than preparation for the commission of the crime of second degree assault. As such, the State presented insufficient evidence to establish that Mr. Day took a substantial step towards committing second degree assault against Ms. Johnson.

If the reviewing court finds insufficient evidence to prove the added element, reversal is required. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Retrial following reversal for insufficient evidence is "unequivocally prohibited" and dismissal is the remedy. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

This court should reverse Mr. Day's conviction for attempted second degree assault and remand for dismissal of the charge against him with prejudice.

2. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO ESTABLISH THAT THE ATTEMPTED SECOND DEGREE ASSAULT WAS A CRIME OF DOMESTIC VIOLENCE WHERE THAT WAS NOT AN ONGOING PATTERN OF ABUSE AND THE CRIME WAS NOT EXECUTED WITH DELIBERATE CRUELTY.

As discussed above, Mr. Day's act of placing the shotgun in the bushes next to the Cleary residence is insufficient evidence to establish that Mr. Day attempted to assault Ms. Johnson. Should this court find, however, that it is sufficient evidence, the State presented insufficient evidence to establish that the crime met the definition of a crime of domestic violence under RCW 9.94A.535.

Due process places on the State the burden of proving all elements of a crime beyond a reasonable doubt. U.S. Const. amends VI, XIV; *Jackson v. Virginia*, 443 U.S. 307, 309, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

The charges against Mr. Day included the allegation that the crime of attempted second degree assault was a crime of domestic violence contrary to RCW 9.94A.535(3)(h) and RCW 10.99.020. CP 143-147. RCW 10.99.020(5)(b) provides that second degree assault is a crime of domestic violence "when committed by one family or household member against another." RCW 9.94A.535(3)(h) provides that a "domestic violence" aggravating factor may be found by a jury where an offense is a domestic violence offense, as defined in RCW 10.99.020, and (a) the offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time, or (b) the offender's conduct during the commission of the current offense

manifested deliberate cruelty or intimidation of the victim.

The State alleged that the domestic violence aggravating factor applied to the charged of attempted second degree assault because the crime either was part of an ongoing pattern of abuse or manifested deliberate cruelty towards the victim. CP 143-147. Under RCW 9.94A.537, the State bears the burden of proving aggravating factors to the jury beyond a reasonable doubt.

- a. *The State presented insufficient evidence to establish that the crime of attempted assault in the second degree was part of an ongoing pattern of abuse of Ms. Johnson manifested by multiple incidents over a prolonged period of time.*

At trial the State presented evidence that Mr. Day and Ms. Johnson had been involved in two incidents of domestic violence between the early 1990s and May 19, 2006. The first incident occurred in the mid-1990s. RP 524. During that first incident, Mr. Day got very drunk and began waving a handgun around, threatening to kill himself. RP 531. Eventually, Mr. Day passed out, and Ms. Johnson took the gun out of Mr. Day's lap and left it at a neighbor's home. RP 531-532. Mr. Day eventually woke up and asked where the gun was. RP 532. Ms. Johnson told Mr. Day that she had removed the gun and Mr. Day became angry and sat on top of Mr. Johnson on the floor and pinned her wrists down and would not let her go. RP 532.

The next incident of domestic violence alleged by the State occurred on May 9, 2006, roughly ten years after the first incident of domestic

violence. RP 533-537. Ms. Johnson and Mr. Day got into an argument about Ms. Johnson's breast cancer, Mr. Day's poor relationship with the rest of Ms. Johnson's family, and the fact that Ms. Johnson had been invited to the her daughter's home in Oregon for Mother's Day weekend and Mr. Day was not invited. RP 533-537.

After arguing for two hours, Ms. Johnson told Mr. Day that she would call her daughter and tell her daughter that she was not going to go to Oregon. RP 536. Ms. Johnson got the telephone, but Mr. Day told her that she was not going to call her daughter. RP 536. Shortly after that, Ms. Johnson went to use the bathroom while still holding the phone. RP 536. Mr. Day entered the bathroom, told Ms. Johnson that he wasn't going to go to jail and that Ms. Johnson wasn't going to call anybody and to give him the phone. RP 536. Mr. Day then grabbed the phone from Ms. Johnson, threw it out of the bathroom, kicked the bathroom door closed, grabbed Ms. Johnson by the throat and lifted her off the toilet. RP 536. Mr. Day was screaming that he would kill Ms. Johnson and her girls. RP 536.

Ms. Johnson got free from Mr. Day once, but Mr. Day grabbed her by the throat again and slammed her into the towel bar. RP 536. Ms. Johnson began hitting Mr. Day in the face and he let go of her. RP 536-537. Eventually, Mr. Day let Ms. Johnson out of the bathroom and the two had a discussion about Ms. Johnson leaving, but Mr. Day said she would not leave.

RP 537. Later that day, Mr. Day left for work and Ms. Johnson left Mr. Day and moved in with her daughter. RP 537-538.

The incident on May 9, 2006, was the first time that Ms. Johnson had seen Mr. Day become that violent. RP 538.

In *State v. Barnett*, 104 Wn.App. 191, 16 P.3d 74 (2001), Division III of the Court of Appeals interpreted the definition of “ongoing pattern of abuse” for the purpose of establishing the aggravating factor of domestic violence under RCW 9.94A.390, recodified as RCW 9.94A.535. Division III held,

Cases from this state suggest that years are required. *State v. Schmeck*, 98 Wn.App. 647, 651, 990 P.2d 472 (1999) (threats over a period of three years constitute a prolonged period of time and demonstrate a “pattern of psychological abuse manifesting deliberate cruelty or intimidation”); *State v. Duvall*, 86 Wn.App. 871, 877, 940 P.2d 671 (1997) (two-year period of abuse occurring in Oregon and Washington sufficient to demonstrate pattern of abuse); *State v. Quigg*, 72 Wn.App. 828, 841, 866 P.2d 655 (1994) (sexual abuse over a period of three days is insufficient to demonstrate an “ongoing pattern”).

We conclude a “pattern of abuse” requires multiple incidents over a substantial period of time-more than two weeks.

Barnett, 104 Wn.App. at 203 16 P.3d 74 (emphasis added). In other words, a defendant must have been consistently abusing a domestic violence victim for over two weeks before there is a “pattern of abuse” for purposes of RCW 9.94A.535(3)(h).

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Here, the acts of domestic violence alleged by the State do not establish an ongoing pattern of abuse. The first incident occurred in the mid-1990s, ten years prior to the incidents at issue in this case. The next incident of abuse alleged by the State occurred in May of 2006, making the mid 1990s incident far too remote in time to be considered part of an ongoing pattern of abuse.

The incidents on May 9, 2006 and May 18-19, 2006, two events in a one week period, are insufficient both in number and in total length of time in which they occurred to meet the legal definition of a “pattern of abuse” set forth in *Barnett*. Even considering all the incidents alleged by the State together, three incidents of domestic violence spread over ten years does not establish a pattern of abuse.

The State presented insufficient evidence to establish that Mr. Day’s actions in placing the shotgun in the bushes was part on an ongoing pattern of abuse.

b. *The State presented insufficient evidence to establish that Mr. Day’s conduct during the commission of the attempted assault in the second degree manifested deliberate cruelty or intimidation of Ms. Johnson.*

Deliberate cruelty has been defined as gratuitous violence or other conduct that inflicts physical, psychological, or emotional pain as an end in itself. *State v. Scott*, 72 Wn.App. 207, 214, 866 P.2d 1258 (1993), *aff’d*, 126 Wn.2d 388, 894 P.2d 1308 (1995). Further, the cruelty must be “of a kind not usually associated with the commission of the offense in question.” *State v. Goodman*, 108 Wn.App. 355, 362, 30 P.3d 516, *review denied*, 145 Wn.2d

1036, 43 P.3d 20 (2001). To constitute a legal justification for imposing an exceptional sentence, the deliberate cruelty must be atypical of the crime. *State v. Atkinson*, 113 Wn.App. 661, 707, 54 P.3d 702 (2002), *review denied*, 149 Wn.2d 1013, 69 P.3d 874 (2003).

- i. The aggravating factor of deliberate cruelty based on infliction of physical or psychological pain does not apply to an inchoate assault since the victim does not suffer any pain.

Appellate counsel was unable to find any authority discussing whether the aggravating factor of deliberate cruelty could apply to an attempted assault where the victim never saw and was never touched by the defendant and therefore suffered no pain.

In interpreting a statute, the court looks for the legislature's intent; if a statute's meaning is plain on its face, the court follows that plain meaning without resorting to rules of statutory construction. *Lee's Drywall Co., Inc. v. State, Dept. of Labor & Industries*, ___ Wn.App. ___, 173 P.3d 934, 937 (2007). RCW 9.94A.535(3)(h)(iii) authorizes the imposition of an aggravating factor based on domestic violence where "the offender's conduct **during the commission of the current offense** manifested deliberate cruelty or intimidation of the victim." (emphasis added). The plain meaning of RCW 9.94A.535(3)(h) indicates that the legislature intended the domestic violence aggravating factor to apply only to crimes where the victim actually

suffered deliberate cruelty or intimidation *during the commission of the crime.*

Here, the crime was an *attempted* assault, **not** a completed assault. During the commission of the attempted assault, Ms. Johnson neither suffered any cruelty nor was intimidated.

As discussed above, the aggravating factor of deliberate cruelty is intended to punish a defendant who commits a crime by means of gratuitous violence *that inflicts pain* with the commission of that violence as an end in itself. The imposition of an exceptional sentence based on deliberate cruelty therefore requires that the victim of the crime (a) suffer pain, and (b) that the pain suffered was greater than that usually suffered by a victim of the crime or inflicted in a manner crueler than is typical when that crime is committed.

Put another way, the defendant is not punished more severely for the intent to commit the crime, the defendant is punished more severely for his commission of the crime in a certain manner.

In this case, unlike a case of attempted murder where the crime is charged as an attempt because harm was inflicted but the victim did not die, the assault was charged as an attempt because the assault never occurred and no harm was inflicted on the “victim” of the crime. In fact, Ms. Johnson never came into contact with Mr. Day and Mr. Day never had the opportunity to carry out the crime of second degree assault. Thus, the requirement that

Ms. Johnson suffer pain is not met and the aggravating factor of deliberate cruelty based on the infliction of physical or psychological pain does not apply.

The aggravating factor of deliberate cruelty may only be applied where the victim actually suffers pain. Without the victim suffering pain, the factual basis supporting the imposition of the aggravating factor does not exist and there are insufficient facts to support the imposition of an exceptional sentence based on that aggravating factor.

- ii. The facts of this case do not support the conclusion that the attempted assault in the second degree was committed with deliberate cruelty.

Even if the aggravating factor of deliberate cruelty does apply to a case where the victim suffers no pain as a result of an attempt, the facts of this case do not support the conclusion that the second degree assault was committed with deliberate cruelty.

In discussing what constitutes deliberate cruelty, this court has held that, “The threshold for deliberate cruelty is high. *See State v. Baird*, 83 Wn.App. 477, 488, 922 P.2d 157 (1996) (rendering victim unconscious and mutilating her face was deliberate cruelty), *review denied*, 131 Wn.2d 1012, 932 P.2d 1256 (1997); *and State v. Falling*, 50 Wn.App. 47, 55, 747 P.2d 1119 (1987) (defendant who raped victim was deliberately cruel by

threatening to kill or injure victim and calling her a “bitch”).” *State v. Zatkovich*, 113 Wn.App. 70, 82 n.8, 52 P.3d 36 (2002).

Again, Mr. Day never even saw Ms. Johnson on the night in question. Even if the second degree assault had taken place, the manner in which the assault was to have been accomplished was not a manner beyond the manner a typical second degree assault is committed. Indeed, the definition of second degree assault that Mr. Day is charged with violating is RCW 9A.36.021(1)(c): “(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree...[a]ssaults another with a deadly weapon.” Mr. Day told police that his intent was simply to point the shotgun at Ms. Johnson to get her to listen to him and that he did not intend to hurt her. RP 728. Mr. Day’s manner of performing the second degree assault would not have been in a manner atypical of other second degree assaults with a deadly weapon.

The facts of this case do not rise to the level of facts necessary to establish that Mr. Day committed the crime of attempted assault with deliberate cruelty, such as those in *Baird* and *Falling*.

- iii. The aggravating factor of deliberate cruelty based on intimidation of the victim does not apply to an inchoate assault since the victim is not intimidated.

As stated above, if a statute’s meaning is plain on its face, the court

follows that plain meaning. RCW 9.94A.535(3)(h)(iii) authorizes the imposition of an aggravating factor based on domestic violence where “the offender’s conduct *during the commission of the current offense* manifested deliberate cruelty or intimidation of the victim.” (emphasis added). Similar to the aggravating factor of domestic violence exhibiting deliberate cruelty, the statutory language indicates that the aggravating factor applies only where the crime is actually committed and the victim is actually intimidated.

The purpose of the aggravating factor is to punish acts of domestic violence done with the purpose to intimidate the victim. The defendant is punished because he intimidated the victim. Where no intimidation occurs, no basis exists to impose an exceptional sentence under RCW 9.94A.535(3)(h)(iii). Further, the intimidating must be manifested during the commission of the offense. If no assault was committed, then no intimidation occurred.

Here, Ms. Johnson was entirely unaware of Mr. Day’s actions of placing the shotgun in the bushes. Ms. Johnson was not intimidated by Mr. Day during his completion of the attempted assault. The State presented insufficient evidence to establish that Mr. Day’s behavior during the attempted second degree assault manifested intimidation of Ms. Johnson.

Even when viewed in a light most favorable to the State, the evidence presented by the State was insufficient to establish that the crime of attempted

second degree assault was a crime of domestic violence as defined under RCW 9.94A.535(3)(h).

3. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO ESTABLISH THAT THE RECKLESS BURNING WAS A CRIME OF DOMESTIC VIOLENCE WHERE THERE WAS NOT AN ONGOING PATTERN OF ABUSE AND THE CRIME WAS NOT EXECUTED WITH DELIBERATE CRUELTY.

For the same reasons that there was insufficient evidence for the jury to find that the charge of attempted second degree assault was a crime of domestic violence under RCW 9.94A.535(3)(h), there was insufficient evidence to establish that the crime of reckless burning was a crime of domestic violence under RCW 9.94A.535(3)(h).

As discussed above, there was insufficient evidence of past acts of domestic violence to establish an ongoing pattern of abuse. Further, similar to the attempted assault charge, the manner in which the reckless burning was committed did not manifest deliberate cruelty or intimidation of Ms. Johnson. Ms. Johnson was not present when the house was burned and her property would have been burned if the house caught on fire regardless of the manner in which the house was set on fire.

The State presented insufficient evidence to prove that the reckless burning was a crime of domestic violence under RCW 9.94A.535(3)(h).

4. MR. DAY'S SENTENCE WAS CLEARLY EXCESSIVE ON THE FACTS OF THIS CASE.

To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

RCW 9.94A.585(4).

The Supreme Court construed this statute to create a 3-prong test to be applied when reviewing an exceptional sentence. *State v. Alexander*, 125 Wn.2d 717, 722, 888 P.2d 1169 (1995). A reviewing court examines (1) whether the record supports the findings of fact used to justify the exceptional sentence, (2) whether each factual finding constitutes a substantial and compelling reason for departing from the standard range as a matter of law, and (3) whether the sentence imposed was clearly excessive or clearly too lenient. *Alexander*, 125 Wn.2d at 722-23, 731.

When considering the first prong, a reviewing court reviews the trial court's finding of facts to determine whether the findings are clearly erroneous. *Alexander*, 125 Wn.2d at 723.

As to the second prong, the trial court's reasons "may not take into account factors already considered in computing the presumptive range for the offense." *State v. Pascal*, 108 Wn.2d 125, 135-36, 736 P.2d 1065 (1987).

- a. *The facts of the case do not support the findings of fact used to justify Mr. Day's exceptional sentence.*

In Finding of Fact for Exceptional Sentence number IV, the trial court indicated that it based the imposition of Mr. Day's exceptional sentence on the jury's special verdicts that the crimes of first degree reckless burning and attempted second degree assault were crimes of domestic violence and that Mr. Day was armed with a firearm during the commission of these crimes. CP 549-554.

As discussed above, the facts of this case were insufficient to establish that either crime was a crime of domestic violence under RCW 9.94A.535(3)(h).

Further, the jury **did not** find that Mr. Day was armed with a firearm during the commission of the reckless burning charge. In fact, the jury was not even asked to decide if Mr. Day was armed during the commission of the reckless burning. CP 143-147.

Finding of Fact for Exceptional Sentence number IV is not supported by the facts of this case.

- b. *No factual finding constituted a substantial and compelling reason for departing from the standard range as a matter of law.*

The only aggravating factor found by the jury was that the crimes were crimes of domestic violence under RCW 9.94A.535(3)(h). As

discussed above, the facts introduced at trial were insufficient to support the jury's finding that the crimes were crimes of domestic violence. Therefore, no findings constituted a substantial and compelling reason to depart from the standard range sentence.

Even if this court finds that the facts introduced at trial did support the conclusion that the crimes were crimes of domestic violence, the sentence imposed by the court, the statutory maximum of five years for each crime **and** consecutive sentences, was not warranted by the facts of this case. The only physical harm which came from Mr. Day's action was purely property damage. Ms. Johnson was never physically confronted by Mr. Day or placed in physical danger by his actions. Given Mr. Day's minimal criminal history, and the fact that only property was harmed during the commission of these crimes, Mr. Day's acts of burning down his own house and placing a shotgun in the bushes near the house where he thought his wife was living simply do not warrant imprisoning Mr. Day for ten years.

No finding of fact constituted a substantial and compelling reason to impose such a harsh sentence.

- c. *The trial court abused its discretion in relying on an aggravating factor not supported by the facts of this case to impose an exceptional sentence and the sentence imposed was clearly too excessive and shocks the conscience.*

“In determining whether an exceptional sentence is clearly

excessive, [a reviewing court] asks whether the trial court abused its discretion by relying on an impermissible reason or unsupported facts, or whether the sentence is so long that, in light of the record, it shocks the conscience of the reviewing court.” *State v. Halsey*, 140 Wn.App. 313, 324, 165 P.3d 409 (2007).

A trial court abuses its discretion when its decision is “manifestly unreasonable or based on untenable grounds.” *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn.App. 92, 99, 38 P.3d 1040 (2002). A court’s decision is manifestly unreasonable

if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

Grandmaster Sheng-Yen Lu, 110 Wn.App. at 99, 38 P.3d 1040.

Mr. Day was convicted of first degree reckless burning and attempted second degree assault. Mr. Day’s offender score was 1, making his standard range sentence for the reckless burning charge 0-90 days and the standard range sentence for the attempted assault charge 4.5-9 months. CP 518-530. The firearm enhancement on the attempted assault charge carried a mandatory sentence enhancement of 18 months. CP 518-530.

Despite Mr. Day’s low offender score and the very short standard

range sentences, the trial court imposed a total sentence of 10 years. CP 518-530. Had the jury not found that the crimes were crimes of domestic violence, the trial court would have lacked a basis to impose both exceptional sentences and consecutive sentences. Under RCW 9.94A.589(1)(a), Mr. Day's sentences would have run concurrently, giving him a maximum sentence of 27 months, including the firearm enhancement.

Even if the jury was correct in finding that these crimes were domestic violence crimes in violation of RCW 9.94A.535(3)(h), the facts of the case, at most, would support either imposing the statutory maximum sentence of five years or sentencing Mr. Day to serve the sentences consecutively, *not* both.

Sentencing a 63 year old man with an offender score of one (based on the current charges) to ten years in prison for burning down his own house and placing a shotgun in some bushes near where he thought his wife was living shocks the conscience.

At sentencing, over objection of Mr. Day, the trial court considered numerous letters provided to the court by the State (RP 999) in which the authors express their disappointment with the jury's verdict and ask the court to impose the harshest sentence possible and ignore the fact that the jury found Mr. Day not guilty of many of the crimes charged and guilty of a lesser

degree of one of the crimes charged. RP 981-999, CP 389-517.²

The trial court's Findings of Fact for Exceptional Sentence do not indicate that the trial court considered the letters in determining Mr. Day's sentence, but the unusually Draconian sentence received by Mr. Day strongly suggests that the trial court did consider the letters. Any such consideration of or reliance on the letters in imposing Mr. Day's sentence would have violated RCW 9.94A.530.

RCW 9.94A.530 provides, in pertinent part,

In determining any sentence above the standard sentence range, the court shall follow the procedures set forth in RCW 9.94A.537. Facts that establish the elements of a more serious crime or additional crimes may not be used to go outside the standard sentence range except upon stipulation or when specifically provided for in RCW 9.94A.535(2)(d), (e), (g), and (h).

RCW 9.94A.537 mandates that facts used to support an exceptional sentence must be proven to a jury beyond a reasonable doubt. Here, the jury found that Mr. Day had not committed any attempted murder or arson, but the letter writers asked to court to impose an exceptional sentence as if Mr. Day *had* been found guilty of those crimes. Further, the letter writers asked the court to impose a harsh sentence on Mr. Day based on the letter writer's

² The letters were attached to the State's Sentencing Brief at CP 389-471. Mr. Day objected to the letters and set out the specific reasons for the objections in his Sentencing Memorandum found at CP 472-517. Argument regarding the letters is found at RP 981-999.

vague belief that Mr. Day was a violent individual who posed a threat to the community. Basing Mr. Day's sentence on these grounds would have been contrary to RCW 9.94A.530 since those facts had not been proven to a jury beyond a reasonable doubt.

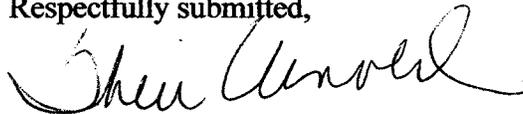
V. CONCLUSION

The State presented insufficient evidence to establish that Mr. Day committed the crime of attempted second degree assault. Further, the State presented insufficient evidence that Mr. Day committed any crime of domestic violence in violation of RCW 9.94A.535(3)(h).

This Court should vacate Mr. Day's conviction for attempted second degree assault, vacate the jury's special verdict that the crimes were crimes of domestic violence, vacate the trial court's exceptional sentence, and remand this case to the trial court for resentencing within the standard range on the charges of reckless burning and violation of a protective order with the sentences to be served concurrently.

DATED this 15th day of February, 2008.

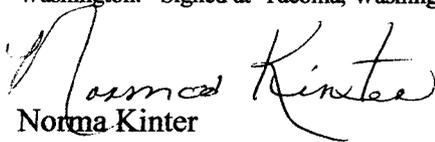
Respectfully submitted,



Sheri Arnold, WSBA No. 18760
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on February 15, 2008, I hand delivered to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave. South, Tacoma, Washington 98402, and by U. S. Mail to appellant, Larry Allen Day, DOC 307673, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, Washington 98520, true and correct copies of this Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on February 15, 2008.


Norma Kinter