

COA NO. 40395-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

TERESA DUMDIE,

Appellant.

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COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON  
BY  DEPUTY

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

The Honorable George L. Wood, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in giving a first aggressor instruction to the jury. CP 67 (Instruction 26).

2. Appellant was deprived of her constitutional right to the effective assistance of counsel.

3. The trial court erred in imposing certain alcohol-related prohibitions as conditions of community custody.

4. The trial court erred in imposing drug-related conditions as part of community custody.

5. The trial court erred in imposing mental health evaluation and treatment as a condition of community custody.

6. The trial court erred in imposing payment of the victims' counseling costs as a condition of community custody.

7. The combined term of confinement and community custody exceeds the statutory maximum for count II.

Issues Pertaining To Assignments Of Error

1. The only purpose of an aggressor instruction is to remove a self-defense claim from the jury's consideration. By submitting the aggressor instruction to the jury where the instruction was not supported by the evidence, did the trial court deprive appellant of her right to present

her defense and her right to have the prosecution prove every element of the charge against her beyond a reasonable doubt?

2. Was defense counsel ineffective for failing to object to the aggressor instruction where it deprived appellant of his defense?

3. Where the evidence did not show use of alcohol was directly related to the offense, did the court err when it prohibited appellant from possessing alcohol and remaining out of places where alcohol is the chief item for sale as a condition of community custody?

4. Where the evidence did not show use of drugs related to the offense, did the court err when it ordered appellant to abstain from possession or use of drugs or drug paraphernalia except as prescribed by a medical professional and to provide copies of all prescriptions to her community corrections officer?

5. Did the trial court err when it imposed mental health evaluation and treatment as a condition of community custody without following statutorily required procedures?

6. Did the court lack authority to impose the cost of counseling for the victims as a condition of community custody in the absence of a restitution hearing on the matter?

7. Where the combined term of confinement and community custody exceeds the statutory maximum for second degree child assault

(count II), should this Court remand for reduction of the community custody term for that count to zero months?

B. STATEMENT OF THE CASE

1. Procedural History

The State charged Teresa Dumdie with second degree assault against Anna Lester (count I), second degree child assault against C.H. (count II), second degree assault against Donald Titus (count III), second degree assault against Lisa Nuzum (count IV), and second degree assault against Catherine Wooley (count V), all while being armed with a firearm. CP 73-76. Dumdie received lesser offense instructions for unlawful display of a weapon for counts III, IV and V. CP 58-62. The court gave self-defense instructions for counts I and V. CP 63-66. A jury found Dumdie guilty on the assault counts and returned special firearm verdicts. CP 28-29, 33-37. The court sentenced Dumdie, who had no previous felony history, to a total of 264 months confinement. CP 9, 11. This appeal follows. CP 5.

2. State's Case

On July 10, 2009, Dumdie bought gun ammunition at a Wal-Mart store. 5RP<sup>1</sup> 65-67. Dumdie requested a refund upon discovering she

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<sup>1</sup> The verbatim report of proceedings is referenced as follows: 1RP - 10/7/09; 2RP - 10/14/09; 3RP - 10/15/09; 4RP -12/3/09; 5RP - 12/7/09;

bought the wrong kind. 5RP 67-68, 74. Cashier Dezra Miller initially refused to refund Dumdie's money. 5RP 67-68, 74. Dumdie accused Miller of being a thief and became verbally abusive. 5RP 67-69. Miller returned Dumdie's money after speaking with a manager. 5RP 68. Assistant manager Penny Shirts then spoke to Dumdie. 5RP 90-91. Shirts described Dumdie as upset and using foul language. 5RP 90-91.

Anna Lester, Catherine Wooley (Lester's daughter), four year old C.H. (Wooley's child and Lester's grandchild), and Wooley's boyfriend Carlos were near the sporting good counter at the time. 5RP 92, 99; 6RP 46, 54-55, 65, 125. The women objected to Dumdie's language and told her not to cuss in front of the baby. 5RP 92, 99; 6RP 67, 77-78. Lester told Dumdie to watch her mouth. 6RP 108-09, 124.

Dumdie responded it was a free country and she could say whatever she wanted. 5RP 92; 6RP 109, 124. Dumdie also cursed at Lester and said she would beat her. 6RP 67. Lester said "whatever" and that she was not afraid of Dumdie. 6RP 67. The women did not threaten Dumdie. 5RP 93; 6RP 109. According to Lester, Dumdie said she would meet Lester outside. 6RP 67.

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6RP - 12/8/10; 7RP - 12/9/10; 8RP - 12/10/09; 9RP - 2/11/10; 10RP - 2/25/10.

Shirts told Dumdie that she needed to leave the store. 5RP 93-94. Dumdie refused. 5RP 103. Shirts called two assistant managers, Donald Tyson and Lee Moseley, to deal with Dumdie. 5RP 94. When Moseley and Titus arrived, Dumdie was yelling and cussing at the two women. 5RP 106; 6RP 24. The women told Dumdie not to use such language. 5RP 107.

Moseley told Dumdie she needed to leave and eventually convinced her to start walking towards the door. 5RP 107-08. As she was leaving, Dumdie said she would defend herself and that she would "pop" the customers she had encountered earlier. 6RP 24-25.

Lester and Wooley maintained they only encountered Dumdie near the sporting goods department and did not meet her at another point inside the store. 6RP 79-80, 125. Others, however, testified Dumdie again encountered Lester and her group while being escorted from the store, at which point there was another angry exchange of words. 5RP 109; 6RP 26, 55. The customers asked Dumdie to quit cussing and continued on their way. 5RP 92-93, 99-100; 6RP 26. They did not threaten her, but Lester was angry and the women were encouraged to leave the store. 5RP 131; 6RP 26-27. Dumdie was a small woman. 5RP 99. Of the two women who objected, Wooley was large and Lester was average size. 5RP 99.

Moseley did not touch Dumdie but she felt bullied. 5RP 109-10. Dumdie told Moseley she was going to blow a hole in him. 5RP 110. According to Moseley, Dumdie also said she was going to pop somebody and that she was going to pop "that brat." 5RP 110-11. According to Wooley, Dumdie did not say anything about C.H. inside the store. 6RP 110-11.

Moseley and security guard Lisa Nuzum escorted Dumdie through the parking lot. 5RP 112-13; 6RP 147-49. Dumdie got back in her van. 6RP 148. Dumdie was still upset, yelling vulgar things at the assistant managers. 6RP 149-50. Nuzum told Dumdie to leave. 6RP 151. Dumdie drove toward the store instead of the parking lot exit. 5RP 114-15; 6RP 151.

Lester and her group were leaving at the same time and the vehicles passed each other. 5RP 115, 126. Lester said the encounter was unexpected. 6RP 68-69, 80. Lester was driving her van from the parking lot and stopped when Dumdie stopped her van. 6RP 160. The two vans pulled alongside one another and yelling ensued. 5RP 115, 127; 6RP 32, 62. Lester was in the driver's seat. 6RP 111. Wooley was in the front passenger seat. 6RP 112. C.H. was in the back seat behind Lester. 6RP 112. Carlos was in the back seat behind Wooley. 6RP 112.

According to Lester and Wooley, Dumdie started cussing and pulled out a gun. 6RP 70, 112. She pointed it at Lester and said she was going to blow her head off. 6RP 81, 112. It looked like Dumdie was trying to pull the trigger. 6RP 71-72. Dumdie also pointed the gun at C.H. and said she was going to kill or blow him away too. 6RP 70, 112. Dumdie was trying to shoot the gun. 6RP 113, 128-29. Wooley was scared she was going to shoot Lester and C.H. 6RP 113. Dumdie did not threaten to shoot Wooley during this initial parking lot encounter. 6RP 129. Lester thought they were all going to die. 6RP 72, 83.

Lester and her group started getting out of the van. 6RP 51. Lester opened her door and said "if you want to kill somebody kill me I've lived my life." 6RP 70. Lester left the van at one point. 6RP 155-56. Carlos opened the back door of the van and asked Dumdie what her problem was. 6RP 82. As Dumdie drove off, he emerged from the van, yelling. 6RP 32, 132, 152-53. Wooley got out too. 6RP 117. They then got back in the van. 6RP 117-18.

After the vehicles initially separated, Dumdie pulled back around in front of Lester's van. 5RP 119, 1286RP 73-74, 114. Upon stopping, Dumdie pointed her gun out the window at Titus and Nuzum. 6RP 34-35, 63, 153. It looked like Dumdie was trying to pull the trigger. 6RP 162-63.

Nuzum was scared and ducked. 6RP 154. Dumdie did not say anything. 6RP 34.

According to Lester and Wooley, Dumdie pointed the gun at Lester's van after stopping the second time and tried to pull the trigger, saying she was going to kill them all. 6RP 74, 83-84, 115-17, 133. Dumdie then drove off. 6RP 75. Lester denied threatening Dumdie. 6RP 71. Wooley was not scared for herself. 6RP 116. She was only scared for Lester and C.H. 6RP 116, 129.

A police officer took Dumdie into custody shortly after she left the parking lot. 6RP 166-71. A semiautomatic handgun containing a round in the chamber was recovered from the vehicle. 6RP 171. Additional rounds were in the magazine. 6RP 172. The gun has a safety mechanism that allows someone to pull the trigger without firing. 6RP 190.

The court instructed the jury that counts I and II applied only to the alleged assaults on Lester and C.H. when the two vans were side by side. CP 48, 55. The verdict on those counts could not be based on evidence of any other alleged assault against those two people. Id.

### 3. Dumdie's Defense

According to Dumdie, the cashier at the sporting goods counter rudely refused to refund her money and bullied Dumdie "with her eyes." 7RP 22-24, 26. Dumdie called her a thief and angry confrontation ensued.

7RP 24-26. Assistant manager Shirts intervened and was rude to her as well. 7RP 26-28, 58. Dumdie felt the need to stand up for herself and warned store personnel not to physically attack her. 7RP 28-30.

While speaking with Shirts, three customers, including a man, came over; they were twice her size. 7RP 31-32, 59. Lester told Dumdie they were going to beat her up if she did not quit using foul language. 7RP 32-33. Dumdie told Lester she had the right to defend herself. 7RP 34.

She felt bullied by the Wal-Mart employees accompanying her as she left the store. 7RP 39-40. As Dumdie was leaving, the three customers encountered her again. 7RP 35. Lester said they were going to come out and physically attack her. 7RP 35-36. Dumdie took this to mean the group would attack her. 7RP 36. Dumdie said she had a gun and would use it if they tried to physically attack her. 7RP 35, 79. She said this in defense of herself. 7RP 107.

Dumdie started to drive out of the parking lot when Lester and her companions came upon her in their van. 7RP 40-42, 65. Dumdie did not intentionally seek an encounter with them. 7RP 82-83. Dumdie stopped and asked if they were going to follow her and attack. 7RP 42, 65, 84. Lester said yes, they were going to attack her right now. 7RP 42, 44, 65,

84. At that point, Dumdie's car was adjacent to their van. 7RP 42. The man got out and was next to her window. 7RP 43.<sup>2</sup>

Dumdie grabbed her gun and aimed it at the man, who she said was coming toward her to grab her out of the window and physically attack her. 7RP 43, 65, 85. The man stepped back upon seeing the gun. 7RP 43. She did not point the gun at Lester. 7RP 86.

Dumdie never pulled the trigger. 7RP 44-45.<sup>3</sup> The vehicles separated and Dumdie yelled she was "going to shoot where you look the biggest" as she drove away. 7RP 45, 98. She said this in an attempt to dissuade them from following her. 7RP 45. Dumdie then pulled her car in front of their van and aimed her gun out the window at them. 7RP 46. One of the women screamed "she's going to fire on us." 7RP 46. Dumdie said she was not going to fire because she knew she did not have the right to do that. 7RP 46. She just wanted to frighten them so that they would not follow and attack her. 7RP 46, 98. She was aiming at the van in general, i.e., Lester, Wooley and the man. 7RP 48.

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<sup>2</sup> Dumdie testified that the man got out of driver's side slider door. 7RP 85. In rebuttal, Lester testified the van never had a driver's side sliding door. 7RP 118. Store video footage does not show the man getting out and coming towards Dumdie as she described. 7RP 66-67.

<sup>3</sup> Dumdie testified that she found out afterwards that the safety was on, so she would have been in trouble had the man tried to attack her instead of backing off. 7RP 45.

She had her finger on the trigger both times she aimed because she wanted to make them think she was able to fire. 7RP 49-50. She did not try to pull the trigger. 7RP 50.

Dumdie did not see the boy inside the van, although she assumed he was in there. 7RP 44. She did not verbally threaten the child and did not point the gun at him. 7RP 47, 86, 108. She denied pointing the gun at Titus and Nuzum. 7RP 48.

C. ARGUMENT

1. THE COURT'S IMPROPER FIRST AGGRESSOR INSTRUCTION REQUIRES REVERSAL.

Aggressor instructions are disfavored. State v. Birnel, 89 Wn. App. 459, 473, 949 P.2d 433 (1998) overruled on other grounds as noted in In re Pers. Restraint of Reed, 137 Wn. App. 401, 408, 153 P.3d 890 (2007). Courts should use care in giving an aggressor instruction because it impacts a claim of self-defense, which the State has the burden of disproving beyond a reasonable doubt. State v. Riley, 137 Wn.2d 904, 910 n.2, 976 P.2d 624 (1999). Indeed, "[f]ew situations come to mind where the necessity for an aggressor instruction is warranted." State v. Arthur, 42 Wn. App. 120, 125 n.1, 708 P.2d 1230 (1985).

Here, the State argued Dumdie was the initial aggressor because she initiated the dispute with the cashier regarding the ammunition, was

belligerent towards store personnel, and responded belligerently toward Lester and Wooley after Lester told Dumdie to stop cussing in front of the child. 8RP 23-24, 54. Reversal of counts I and V is required because the record does not support an aggressor instruction.

- a. The Prosecutor Capitalized On The Aggressor Instruction To Undermine Dumdie's Claim Of Self-Defense.

The court gave self-defense instructions in relation to count I (assault against Lester) and V (assault against Wooley). CP 63-66. The court, however, also gave a first aggressor instruction at the State's request.

Instruction 26 read:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self defense and thereupon use, offer or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the Defendant was the aggressor, and that Defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

CP 67.

In closing argument, the prosecutor exhorted the jury to reject Dumdie's self-defense claim because she was the first aggressor. 8RP 23-24. According to the prosecutor, Dumdie "created this entire situation from start to finish" because she did not need to ask for a refund and speak profanely when denied one, she did not need to struggle with Wal-Mart

employees when they told her to leave the store, and she did not have to get in her car and "provoke a confrontation completely unexpected by Lester -- Anna's -- Lester group, family. I mean, she didn't have to do that. It was completely unexpected by them, and so she's -- and Teresa Dumdie is the first aggressor, okay, so she can't utilize self-defense as a matter of law." 8RP 23-24.

Defense counsel in his closing argument denied Dumdie was the first aggressor, arguing her reaction to being initially denied a refund and using bad language did not rise to the level of an act that created a necessity for acting in self-defense: "She restrained herself, she escalated her actions, her use of force, her offer to use force to [sic] appropriate to the facts and circumstances as they appeared to her at the time." 8RP 41-42.

In rebuttal argument, the prosecutor again returned to the first aggressor theme, arguing Dumdie could have prevented the entire episode. 8RP 54.

b. The Court Erred In Giving The Aggressor Instruction Because Words Alone Do Not Justify That Instruction.

"[T]he initial aggressor doctrine is based upon the principle that the aggressor cannot claim self-defense because the victim of the aggressive act is entitled to respond with lawful force." Riley, 137 Wn.2d

at 912. An aggressor instruction should be given only where there is credible evidence from which a jury can reasonably determine the defendant provoked the need to act in self-defense. Id. at 909-10.

While an aggressor instruction is proper if it is based on aggressive conduct, words alone will not constitute sufficient provocation to warrant giving the instruction. Id. 909-11. Words alone do not constitute a sufficient provoking act because they do not give rise to a reasonable apprehension of bodily harm, and an individual faced with only words is not at liberty to respond with force. Id. at 910-11. If words alone were sufficient to justify a victim's use of force, the "victim" could respond to words with force against which the speaker could not lawfully defend. Id. at 911-12. It is error to give an aggressor instruction where words alone are the asserted provocation. Id. at 911.

Here, the court erred in giving an aggressor instruction because Dumdie's provocation consisted of words alone, not conduct.

The State asserted Dumdie did not need to ask for a refund from the Wal-mart cashier, did not need to become profane in speaking with Wal-mart employees, and did not need to struggle when told to leave. But there was no self-defense claim in relation to any Wal-mart employee. No Wal-mart employee responded with lawful force, so application of the first aggressor theory in relation to any Wal-mart employee is misplaced. The

provoking act must be directed toward the actual victim against which one is claiming self-defense, unless an act directed against someone else was likely to provoke a belligerent response from the actual victim. State v. Kidd, 57 Wn. App. 95, 100, 786 P.2d 847 (1990); State v. Wasson, 54 Wn. App. 156, 159-60, 160 n.1, 772 P.2d 1039 (1989).

There is no act here done in relation to Wal-mart employees that provoked the Lester group's threats and actions. There is no evidence of a physical struggle between Dumdie and Wal-mart employees. The evidence at best showed Dumdie was reluctant to leave, but no physical struggle occurred. The provoking act must be related to the eventual assault as to which self-defense is claimed. Wasson, 54 Wn. App. at 159. There is no evidentiary nexus between any alleged struggle between Dumdie and store personnel and the eventual assault against Lester and Wooley to support an aggressor instruction.

The State's identified instances of belligerence consisted of words, not conduct. The State maintained Dumdie did not need to use profane language in front of the Lester group inside the store. That may be true, but words do not justify an aggressor instruction. Riley, 137 Wn.2d at 910-11.

The State contended Dumdie did not need to confront the Lester group outside the store. Before Dumdie pointed her gun at them, her

confrontation with them consisted of nothing but words. The pointing of the gun cannot be considered the belligerent act entitling the State to an aggressor instruction because the provoking act cannot be the actual assault. Kidd, 57 Wn. App. at 100.

An aggressor instruction applicable to the assault against Lester (count I) was therefore inappropriate. The assault against Lester was based solely on what happened when the two cars first pulled alongside one another in the parking lot. CP 48.

An aggressor instruction was also improperly applied to the assault against Wooley (count V). The prosecutor elected Dumdie's act of pointing the gun at Lester's van after pulling around a second time in the parking lot as the basis for the alleged assault against Wooley. 8RP 30. An aggressor instruction should be given only where the defendant provoked the need to act in self-defense. Riley, 137 Wn.2d at 909-10. There was no evidence that Wooley or anyone in her group acted in self-defense *after* Dumdie pointed her gun upon first encountering Lester's van in the parking lot. Wooley and her group were not provoked into using or physically threatening to use force after Dumdie acted by pulling her gun on them. The rationale behind the aggressor instruction does not apply to the assault against Wooley. Her group's earlier use or attempt to use force was provoked only by Dumdie's words.

It is error to give an aggressor instruction when not supported by the evidence. Wasson, 54 Wn. App. at 161; State v. Brower, 43 Wn. App. 893, 901-02, 721 P.2d 12 (1986). The error is constitutional in nature and cannot be deemed harmless unless the State proves it was harmless beyond a reasonable doubt. Birnel, 89 Wn. App. at 473. Error is harmless only if it is "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997). The reviewing court must reverse unless this Court can properly conclude beyond a reasonable doubt that the jury verdict would have been the same absent the instructional error. State v. Bashaw, 169 Wn.2d 133, 147, 234 P.3d 195 (2010) (setting forth constitutional harmless error standard for improper jury instruction).

An improper aggressor instruction is prejudicial because it guts a self-defense claim. Birnel, 89 Wn. App. at 473; Brower, 43 Wn. App. 902. Here, the first-aggressor instruction negated Dumdie's claim of self defense, effectively and improperly removing it from the jury's consideration. See Birnel, 89 Wn.App. at 473 (reversal required because aggressor instruction effectively deprived Birnel of his ability to claim self-defense; his verbal confrontation with wife not enough to justify aggressor instruction where wife then attacked husband and husband

defended himself). The erroneous aggressor instruction effectively deprived Dumdie of her defense at trial by removing the question of self-defense from the State's proof and the jury's consideration. The issuance of an aggressor instruction impermissibly bolstered the State's theory of Dumdie's conduct and necessarily undermined her claim of self-defense, relieving the State of its burden of proving lack of self-defense beyond a reasonable doubt. Reversal of counts I and V is required.

c. This Challenge May Be Raised For The First Time On Appeal.

Defense counsel did not object to the aggressor instruction, but the error may be raised for the first time on appeal because it is a manifest error affecting a constitutional right under RAP 2.5(a)(3). A constitutional error is manifest under RAP 2.5(a)(3) "if it results in a concrete detriment to the claimant's constitutional rights, and the claimed error rests upon a plausible argument that is supported by the record." State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999).

A defendant has the constitutional right "to have a jury base its decision on an accurate statement of the law applied to the facts in the case." Miller, 131 Wn.2d at 90-91. In the absence of an objection at trial, "an appellate court will consider a claimed error in an instruction if giving such an instruction invades a fundamental right of the accused." State v.

Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). The aggressor instruction invaded Dumdie's fundamental right to present a complete defense and the right to hold the State to its burden of proof.

The federal and state constitutional right to due process guarantees a defendant the right to defend against the State's allegations by presenting a complete defense. State v. Wittenbarger, 124 Wn.2d 467, 474, 880 P.2d 517 (1994); Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); U.S. Const. amend. V and XIV; Wash. Const. art. 1, § 3. In this case, the right to present a complete defense encompassed Dumdie's claim of self-defense.

Due process also requires the State to prove every element of the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005); U.S. Const. amend. V and XIV; Wash. Const. art. 1, § 3. When the defendant raises the issue of self-defense, the absence of self-defense becomes another element of the offense that the State must prove beyond a reasonable doubt. State v. Woods, 138 Wn. App. 191, 198, 156 P.3d 309 (2007); State v. Acosta, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984); State v. McCullum, 98 Wn.2d 484, 488, 493-94, 656 P.2d 1064 (1983) (jury instruction improperly placed burden of proving self-defense on defendant; right to due process is implicated by instruction that improperly

shifts the burden of proof and therefore the issue could be raised for the first time on appeal).

Based on these constitutional guarantees, Dumdie had the right to have the jury fully consider her claim of self-defense. The aggressor instruction undermined that right by directing the jury to ignore her claim of self-defense if it found that she was the aggressor. This instruction had the effect of relieving the State of its burden of proving the absence of self-defense beyond a reasonable doubt by improperly permitting the jury to disregard her self-defense claim by finding her to be the aggressor. The improper aggressor instruction constitutes a manifest constitutional error.

d. In The Alternative, Defense Counsel Was Ineffective In Failing To Object To The First Aggressor Instruction.

Every criminal defendant is constitutionally guaranteed the right to the effective assistance of counsel. U.S. Const. Amend. VI; Wash. Const. art. I, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Defense counsel is ineffective where (1) counsel's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland,

466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Deficient performance is that which falls below an objective standard of reasonableness. Id. Only legitimate trial strategy or tactics constitute reasonable performance. Kyllo, 166 Wn.2d at 869. The strong presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Counsel has a duty to research the relevant law. Kyllo, 166 Wn.2d at 862. Based on Riley, counsel should have known provocative words alone do not justify an aggressor instruction and objected to the aggressor instruction on that ground.

Having raised a viable defense, there was no point in permitting the jury to disregard the theory by allowing them to receive an instruction that essentially told them the defense was unavailable. In other words, the only purpose of an aggressor instruction is to remove self-defense from the jury's

consideration, so having raised that defense, there would be no legitimate tactical reason not to object to the instruction.

There is a reasonable probability the outcome might have been different but for counsel's failure to object. As argued above, had counsel objected to the aggressor instruction, the trial court would have been required under the law and the evidence to reject it. The jury then at least would have had to evaluate the self-defense claim fully. Because counsel did not object, however, the aggressor instruction went to the jury and permitted a finding (which was urged by the prosecutor) that Dumdie provoked the entire incident and was thus not entitled to her claim of self-defense. This error undermines confidence in the outcome of the trial.

2. THE TRIAL COURT WRONGLY IMPOSED  
CONDITIONS OF COMMUNITY CUSTODY  
PERTAINING TO ALCOHOL.

As a condition of community custody, the court ordered "You shall abstain from the possession or use of alcohol and remain out of places where alcohol is the chief item of sale." CP 20. The court properly prohibited use of alcohol but lacked authority to prohibit Dumdie from possessing alcohol and remaining out of places where alcohol is the chief item for sale.

A court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). "If the trial

court exceeds its sentencing authority, its actions are void." State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). Whether a trial court exceeded its statutory authority under the Sentencing Reform Act by imposing an unauthorized community custody condition is an issue of law reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

The court's decision to impose a crime-related prohibition is reviewed for abuse of discretion. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374-75, 229 P.3d 686 (2010). "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." In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P. 2d 1362 (1997).

Under RCW 9.94A.703(3)(e),<sup>4</sup> a sentencing court may order an offender to refrain from consuming alcohol. Such a condition is authorized regardless of whether alcohol contributed to the offense. State

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<sup>4</sup> RCW 9.94A.703 took effect August 1, 2009 and applies to all offenses committed before the effective date but sentenced after August 1, 2009, unless such application would be unconstitutional. Laws of 2008 ch. 231 § 55(2).

v. Jones, 118 Wn. App. 199, 207, 76 P.3d 258 (2003) (examining former RCW 9.94A.700, which contained the same operative language as RCW 9.94A.703(3)(e)).

But the only possible authority for the remainder of the condition is RCW 9.94A.703(3)(f), which authorizes the court to impose crime-related prohibitions. A condition is "crime-related" only if it "directly relates to the circumstances of the crime."<sup>5</sup> State v. Motter, 139 Wn. App. 797, 802, 162 P.3d 1190 (2007), disapproved on other grounds, State v. Sanchez Valencia, \_\_ Wn.2d \_\_, \_\_ P.3d \_\_, No. 82731-1 at 8-9 (slip op. filed September 9, 2010) (pre-enforcement challenge to community custody prohibiting paraphernalia can be raised on vagueness grounds).

Substantial evidence must support a determination that a condition is crime-related. Motter, 139 Wn. App. at 801. Here, no substantial evidence showed alcohol played any role in contributing to Dumdie's offenses or that alcohol was in any way related to its circumstances. No affirmative evidence showed Dumdie had used alcohol or was under its influence at the time of the offenses.

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<sup>5</sup> RCW 9.94A.030(10) provides "'Crime-related prohibition' means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct."

The only reference to alcohol came from Moseley's testimony at trial. Moseley asked Dumdie if she had been drinking or taken anything, based on his belief that she was acting strangely enough to make him think she was under the influence of alcohol or drugs. 5RP 124-25. Dumdie did not respond. Id. Moseley did not indicate he smelled alcohol on Dumdie, nor did he report any physical manifestation of being under the influence of alcohol. Moseley was speculating about the cause of Dumdie's behavior.<sup>6</sup> Speculation is not substantial evidence. State v. Hutton, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). The court, for its part, did not reference Moseley's testimony or make any findings that alcohol was related to the offense.

The prohibitions on possessing alcohol and remaining out of places where alcohol is the chief item for sale are not crime-related. The statute does not authorize them. The court exceeded its sentencing authority and otherwise abused its discretion in imposing this condition.

Erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). When a sentence has been imposed for which there is no authority in law, the trial court has the power and the duty to correct the erroneous sentence upon its

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<sup>6</sup> Moseley also thought she may have been acting strangely because she was "crazy." 5RP 125.

discovery. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980); In re Pers. Restraint of Call, 144 Wn.2d 315, 334, 28 P.3d 709 (2001). This Court should therefore order the sentencing court to strike the erroneous conditions pertaining to possessing alcohol and frequenting businesses that sell alcohol.

3. THE COURT WRONGLY IMPOSED CONDITIONS OF COMMUNITY CUSTODY PERTAINING TO DRUGS.

As a condition of community custody, the court wrongly ordered: "You shall abstain from the possession or use of drugs and drug paraphernalia except as prescribed by a medical professional, and shall provide copies of all prescriptions to Community Corrections Officer within seventy-two (72) hours." CP 20.

The record lacks substantial evidence that Dumdie used or suffered from the effects of a non-prescribed drug on the day in question. The writer of the DOC report asserted "if she does not have any mental health issues, then she possibly had consumed a substance that affected her behavior." CP 116. Speculation is not substantial evidence. Hutton, 7 Wn. App. at 728. Moreover, defense counsel specifically challenged this allegation in his sentencing memorandum: "There was no evidence . . . any controlled or intoxicating substances were involved." CP 20-21.

There is no evidence a non-prescribed drug had anything to do with the offenses either.

The condition prohibiting use of such drugs is not crime related under RCW 9.94A.703(3)(f) and is therefore invalid. See, e.g., State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (under former RCW 9.94A.700(5)(e), which contained the same operative language as RCW 9.94A.703(3)(f), the prohibition on conduct must be crime-related in order to be valid).

RCW 9.94A.703(2)(c) includes a waivable condition that the court order an offender to "[r]efrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions."<sup>7</sup> But the court lacked authority to order Dumdie not to use any non-prescribed drugs. This condition is not limited to use of controlled substances and encompasses any legal drug not prescribed by a physician.

The prohibition of drug paraphernalia is also improper because it is not related to the crime. See Motter, 139 Wn. App. at 803-04 (condition forbidding Motter from possessing or using controlled substance paraphernalia valid because it related to the circumstances of the offense, which showed substance abuse). The record lacks substantial evidence

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<sup>7</sup> Its predecessor statute, former RCW 9.94A.700(4)(c), contained the same operative language.

that drug paraphernalia related to the circumstances of the offenses in any way.

The remainder of the condition requiring Dumdie to "provide copies of all prescriptions to Community Corrections Officer within seventy-two (72) hours" is also improper. CP 20. This condition requires Dumdie to perform affirmative conduct. Motter, 139 Wn. App. at 805 (court ordered that Motter "shall notify his/her community corrections officer on the next working day when a controlled substance or legend drug has been medically prescribed."). RCW 9.94A.703(3)(d) allows the court to order an offender to "perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community."<sup>8</sup>

The record lacks substantial evidence that drug abuse was related in any way to Dumdie's offense, so this condition is not authorized as affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community. See Motter, 139 Wn. App. at 805 (upholding same condition where drug abuse led to convictions and where notice of prescription medications needed to accurately assess urinalysis tests).

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<sup>8</sup> Former RCW 9.94A.715(2)(a) contained the same language.

4. THE COURT ERRED IN ORDERING MENTAL HEALTH TREATMENT AS A CONDITION OF COMMUNITY CUSTODY.

As a condition of community custody, the court erred when it ordered "You shall obtain a mental health evaluation and, if recommended, fully comply with any recommended treatment." CP 20. The court improperly imposed this condition.

Former RCW 9.94A.505(9)<sup>9</sup> provides:

The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment must be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.

RCW 9.94A.505(9) authorizes a trial court to order mental health evaluation and treatment as a condition of community custody only when the court follows specific procedures. State v. Brooks, 142 Wn. App. 842, 851, 176 P.3d 549 (2008). A court may therefore not order an offender to

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<sup>9</sup> Laws of 2006 ch. 73 § 6. This was the version in effect at the time of Dumdie's offense. This provision is currently codified at RCW 9.94B.080.

participate in mental health treatment as a condition of community custody "unless the court finds, based on a presentence report and any applicable mental status evaluations, that the offender suffers from a mental illness which influenced the crime." Jones, 118 Wn. App. at 202; accord State v. Lopez, 142 Wn. App. 341, 353, 174 P.3d 1216 (2007); Brooks, 142 Wn. App. at 850-52.

The presentence report prepared by the Department of Corrections recommended mental health evaluation and treatment as a condition of community custody. CP 118. The court, in sentencing Dumdie, referenced the mental health reports prepared in connection with a pre-trial competency proceeding and said Dumdie's "mental health issues were at play in this case."<sup>10</sup> 10RP 17-18. The court believed mental health evaluation and treatment were needed. 10RP 20. But the court did not make the statutorily mandated finding that Dumdie was a "mentally ill person" as defined by RCW 71.24.025 and that a qualifying mental illness influenced the crimes for which she was convicted. The trial court thus erred in imposing the mental health treatment condition. Jones, 118 Wn. App. at 202; Lopez, 142 Wn. App. at 353-54.

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<sup>10</sup> The court had earlier concluded Dumdie was competent to stand trial following a review of competency reports and hearing on the matter. CP 77-80.

Merely acknowledging an offender has mental health issues and believing treatment is needed is not good enough to impose this condition. The term "mentally ill person" is specifically defined under RCW 71.24.025(18) and only offenders who meet that definition are subject to mental health conditions as part of community custody under the plain language of RCW 9.94A.505(9).

At the sentencing hearing, defense counsel requested an exceptional sentence downward based on evidence provided during the competency hearing. 10RP 16. Defense counsel's remark did not authorize the court to impose the mental health condition without making the necessary finding.

"[A] defendant cannot empower a sentencing court to exceed its statutory authorization." State v. Eilts, 94 Wn.2d 489, 495-96, 617 P.2d 993 (1980); see, e.g., In re Pers. Restraint of West, 154 Wn.2d 204, 214, 110 P.3d 1122 (2005) ("even where a defendant clearly invited the challenged sentence by participating in a plea agreement, to the extent that he or she 'can show that the sentencing court exceeded its statutory authority, the invited error doctrine will not preclude appellate review.>"). Even a defendant's direct request to receive mental health treatment as part of community custody does not give the court authority to impose it. Motter, 139 Wn. App. at 801.

In Jones, defense counsel stated in open court that Jones was bipolar, that he was off his medications at the time of his crimes, and that this combination "obviously resulted" in the crimes. Jones, 118 Wn. App. at 209. The trial court nevertheless lacked authority to order Jones to participate in mental health treatment in part because it did not make the statutorily required finding that Jones was a person whose mental illness contributed to his crimes. Id.

The court likewise lacked authority here in the absence of making the statutorily mandated findings, which must be based on substantial evidence in the record. See Motter, 139 Wn. App. at 801 (substantial evidence must support factual findings underpinning imposition of community custody condition).

Sentencing errors derived from the court's failure to follow statutorily mandated procedures can be raised for the first time on appeal. Jones, 118 Wn. App. at 204. This Court should order the trial court to strike the conditions pertaining to mental health treatment. Lopez, 142 Wn. App. at 354.

5. THE COURT ERRED IN ORDERING PAYMENT OF VICTIM'S COUNSELING COSTS AS A CONDITION OF COMMUNITY CUSTODY.

As a condition of community custody, the court ordered "You shall pay the cost of counseling to the victim that is required as a result of your crime or crimes." CP 20.

RCW 9.94A.703 authorized the court to impose numerous conditions on Dumdie's community custody. But it did not authorize the court to require Dumdie to pay the costs of counseling as a condition of community custody.

Such costs can only be imposed as part of a restitution order under RCW 9.94A.753(3). There was no restitution imposed in this case. 10RP 15, 23. There was no restitution hearing. The SRA does not authorize the court to impose restitution of the victim's counseling expenses as a condition of community custody.

Statutory and constitutional safeguards surround the legitimate imposition of restitution. See In re Pers. Restraint of Sappenfield, 92 Wn. App. 729, 742, 964 P.2d 1204 (1998) (due process requires notice and a hearing before the court may imposed the obligation to pay restitution); State v. Kinneman, 122 Wn. App. 850, 860, 95 P.3d 1277 (2004) (State has the burden of establishing, by preponderance of evidence, causal connection between restitution requested and crime), aff'd, 155 Wn.2d 272, 119 P.3d

350 (2005); State v. Kisor, 68 Wn. App. 610, 620, 844 P.2d 1038 (1993) (due process requires defendant have opportunity to rebut evidence presented at restitution hearing and evidence must be reasonably reliable); RCW 9.94A.030(41) (restitution must be for specific sum of money).

Those safeguards cannot be circumvented by an order imposing counseling costs as a condition of community custody. Allowing the court to impose such costs as a condition of community custody would render the restitution statute superfluous. See Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) ("Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous."). A community custody condition cannot be imposed if it is unauthorized by statute. Motter, 139 Wn. App. at 801. The condition related to counseling costs should be stricken.

6. DUMDIE'S SENTENCE FOR COUNT II EXCEEDS THE STATUTORY MAXIMUM AND MUST BE REDUCED.

The combination of confinement and community custody for count II unlawfully exceeds the 10-year statutory maximum. RCW 9.94A.505(5). The community custody term for count II must be reduced to zero months. RCW 9.94A.701(9).

The court imposed a total of 120 months confinement on count II (second degree child assault), consisting of the mandatory 36 month firearm enhancement and 84 months of regular confinement. CP 11. The court also ordered 18 months of community custody for count II. CP 12.

The statutory maximum for second degree assault of a child is 120 months. RCW 9A.36.130(2); RCW 9A.20.021(b). With certain exceptions not relevant here, a court "may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW." RCW 9.94A.505(5).

Nor may a court impose a firearm enhancement that increases the sentence to exceed the statutory maximum. RCW 9.94A.533(3)(g) provides: "If the standard sentence range under this section exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a firearm enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced."

Total punishment for an offense, including imprisonment and community custody, must not exceed the statutory maximum. State v. Sloan, 121 Wn. App. 220, 221, 87 P.3d 1214 (2004); State v. Zavala-Reynoso, 127 Wn. App. 119, 124, 110 P.3d 827 (2005).

Dumdie's sentence for second degree assault on count II violates RCW 9.94A.505(5) because the combined term of confinement (120 months) and community custody (18 months) exceeds the 120 month statutory maximum.

Under RCW 9.94A.701(9), the proper remedy is reduction of the community custody term to zero months. RCW 9.94A.701(9), effective August 1, 2009,<sup>11</sup> provides "The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021."

Questions of statutory interpretation are reviewed de novo. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). When the meaning of a statute is clear on its face, the appellate court assumes the legislature means exactly what it says, giving criminal statutes literal and strict interpretation. State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

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<sup>11</sup> Laws of 2008 ch. 231 § 61.

The plain language of RCW 9.94A.701(9) requires the court to reduce the term of community custody when the term of confinement in combination with the term of community custody exceeds the statutory maximum. The court here imposed 10 years of confinement plus 18 months of community custody for an offense with a 10 year statutory maximum. CP 8, 11, 12. The community custody term must be reduced to zero months to comply with RCW 9.94A.701(9).

The trial court here imposed sentence on February 25, 2010. CP 8-20. RCW 9.94A.701(9) applies to Dumdie, even though her offense occurred before the effective date of August 1, 2009. Laws of 2008 ch. 231 § 55(2) provides: "Sections 6 through 58 of this act also apply to all sentences imposed or reimposed on or after August 1, 2009, for crimes committed prior to the effective date of this section, to the extent that such application is constitutionally permissible."<sup>12</sup> The statement of legislative intent affirms retroactive application.<sup>13</sup>

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<sup>12</sup> Laws of 2009 ch. 375, which amended the new community custody changes in certain respects, retained the same retroactivity requirement. Laws of 2009 ch. 375, § 20.

<sup>13</sup> Laws of 2008 ch. 231 § 6 provides "Sections 7 through 58 of this act are intended to simplify the supervision provisions of the sentencing reform act and increase the uniformity of its application. These sections are not intended to either increase or decrease the authority of sentencing courts or the department relating to supervision, except for those provisions instructing the court to apply the provisions of the current community

In Brooks, the Supreme Court held the appropriate remedy for a combined term of confinement that exceeds the statutory maximum is amendment of the sentence to explicitly state the combination of confinement and community custody shall not exceed the statutory maximum. In re Pers. Restraint of Brooks, 166 Wn.2d 664, 675, 211 P.3d 1023 (2009). Brooks, however, was issued before the statutory change applicable to Dumdie became effective. Brooks, 166 Wn.2d at 672 n.4. The Brooks remedy was only meant to "to give guidance to trial courts as they await the amendment to take effect." Id.

The amendment has since taken effect and applies to Dumdie. RCW 9.94A.701(9), not Brooks, provides the proper remedy. Mere clarification is not enough under RCW 9.94A.701(9). The court must reduce the term of community custody.

Even if RCW 9.94A.701(9) is in some sense ambiguous, the rule of lenity requires this Court to construe the statute in Dumdie's favor. In a criminal case, the rule of lenity requires "any ambiguity in a statute must be resolved in favor of the defendant." State ex rel. McDonald v. Whatcom County Dist. Court, 92 Wn.2d 35, 37-38, 593 P.2d 546 (1979).

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custody law to offenders sentenced after July 1, 2009, but who committed their crime prior to August 1, 2009, to the extent that such application is constitutionally permissible."

"The policy behind the rule of lenity is to place the burden squarely on the legislature to clearly and unequivocally warn people of the actions that expose them to liability for penalties and what those penalties are." State v. Jackson, 61 Wn. App. 86, 93, 809 P.2d 221 (1991).

This Court should order correction of the judgment and sentence to reflect zero months of community custody for Count II.

D. CONCLUSION

For the reasons stated, Dumdie requests that this Court reverse the convictions under counts I and V. In the event this Court declines to do so, the erroneous portions of the sentence should be reversed and corrected.

DATED this 10<sup>th</sup> day of September 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

  
\_\_\_\_\_  
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 40395-1-II
	)	
TERESA DUMDIE,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 10<sup>TH</sup> DAY OF SEPTEMBER, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] DEBORAH KELLY  
CLALLAM COUNTY PROSECUTOR'S OFFICE  
223 E. 4<sup>TH</sup> STREET, SUITE 11  
PORT ANGELES, WA 98823-0037
  
- [X] TERESA DUMDIE  
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BY \_\_\_\_\_  
DEPUTY

STATE OF WASHINGTON  
10 SEP 13 AM 9:47  
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COURT OF APPEALS  
DIVISION II

**SIGNED** IN SEATTLE WASHINGTON, THIS 10<sup>TH</sup> DAY OF SEPTEMBER, 2010.

x *Patrick Mayovsky*