

No. 41742-1

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

JOHN M. ZORN, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Judge Toni A. Sheldon

No. 10-1-00329-1

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR

1. The sentencing court erred when it ordered Zorn not to possess alcohol as a condition of community custody.
2. The sentencing court did not err when it ordered Zorn to submit to a mental health evaluation and to complete any treatment recommended by the evaluator as a condition of community custody.
3. The trial court gave an incorrect definition of the term "reckless" when it instructed the jury in regard to the reckless infliction of substantial bodily harm as an element of assault in the second degree, but Zorn has not preserved this issue for appeal because he did not object in the trial court, and on the facts of the instant case the error was harmless beyond a reasonable doubt.

B. FACTS AND STATEMENT OF THE CASE

The State accepts Zorn's statement of facts for the purpose this appeal, but also supplements the statement of facts with the following statements and with additional statements as needed in the argument sections, below.

Zorn was convicted of assault in the second degree. RP 171. Following conviction, the trial court sentenced him to twelve months incarceration and twelve months of community custody. The

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incarceration and term of community custody were authorized by RCW 9.94A.500, .505, .702., and .703.

As a condition of community custody, the trial court ordered Zorn "not [to] possess or consume any mind or mood-altering substances, to include the drug alcohol, or any controlled substances, except pursuant to lawfully issued prescriptions." CP 17.

The court also ordered Zorn to "have a mental health evaluation within 30 days of release from custody" and to "successfully participate in and complete all recommended treatment..." CP 17.

C. ARGUMENT

1. The sentencing court erred when it ordered Zorn not to possess alcohol as a condition of community custody.

Because assault in the second degree is a "violent offense" as defined by RCW 9.94A.030(54)(viii), the sentencing court had statutory authority to impose up to one year of community custody. RCW 9.94A.702(1).

Pursuant to RCW 9.94A.703(3)(c) the sentencing court had statutory authority to require Zorn, as a condition of community custody, to "[r]efrain from consuming alcohol." The legislature has sole province

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to establish legal punishments; thus, community custody conditions must be authorized by statute. *State v. Kolesnik*, 146 Wn. App. 790, 806, 192 P.3d 937 (2008), *review denied*, 165 Wn.2d 1050 (2009).

There is no evidence in the record to indicate that alcohol was in any way connected to Zorn's crime of conviction. Therefore, the sentencing court had legal, statutory authority to require that Zorn not use alcohol, but the court lacked statutory authority to prohibit him from possessing alcohol.

The sentencing court was, on the facts of this case, required to order that Zorn "refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions," unless the trial court in its discretion exercised its statutory authority to waive this condition. RCW 9.94A.703(2)(c).

Because the prohibition against the possession of alcohol and the prohibition against the possession or use of drugs are intermingled by the language of Zorn's judgment and sentence, his judgment and sentence should be modified to remove the restriction against possession of alcohol and to state separately that he is prohibited from using or possessing controlled substances except with a valid prescription and that he is

prohibited from consuming alcohol. *State v. Jones*, 118 Wn. App. 199, 207-208, 76 P.3d 258 (2003).

2. The sentencing court did not err when it ordered Zorn to submit to a mental health evaluation and to complete any treatment recommended by the evaluator as a condition of community custody,

RCW 9.94A.703(3)(c) grants statutory authority to the sentencing court to require Zorn to "[p]articipate in crime-related treatment or counseling services" as a condition of community custody. As a term of community custody, the sentencing court ordered Zorn to submit to a mental health evaluation and to then complete any treatment that might be recommended from that evaluation. CP 17; RP 176.

No citation to the record was located where there was an inquiry into Zorn's mental health or an inquiry into whether the crime he committed was caused by or related to his mental health. At the sentencing "hearing" required by RCW 9.94A.500 the subject of Zorn's mental health did not come up at all except that the court ordered him to submit to a mental health evaluation and to then complete any recommended treatment.

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However, there are citations to the record from which it can be, and reasonably should be, inferred that a mental health issue may have contributed to his violent crime. A witness to the crime testified at trial that Zorn "was really angry and agitated, yelling loudly some -- what I thought was irrational statements...." RP 100. The same witness also testified that Zorn "was saying the F-ing police and people had called him a crack dealer and they were -- the FBI was after him and different law enforcement agencies." RP 100. Zorn exhibited this behavior when assaulting a complete stranger in a Walmart store after Zorn may have overheard the stranger refer to Zorn as a crack head. RP 103.

Another witness who saw the assault testified that, prior to the assault, Zorn was at Walmart yelling "something about the government hacking into his computer and his cell phone and how he was going to talk to a CEO or the FBI or somebody...." RP 118.

The sentencing court did not unconditionally require Zorn to submit to mental health treatment or counseling based upon this testimony. Instead, at sentencing, the court only required Zorn to submit to a mental health evaluation. CP 17. Treatment or counseling was only required if it were recommended after an evaluation. CP 17.

Zorn cites RCW 9.94B.050((5)(c) and *State v. Brooks*, 142 Wn. App. 842, 851-52, 176 P.3d 549 (2008) for his assertion that the court erred when it required a mental health evaluation and follow-up treatment. Appellant's Brief, p. 5. The State counters that *Brooks* does not apply to Zorn's case because it analyzes repealed or inapplicable statutes, such as RCW 9.94B.050, which does not apply because it is applicable only to offenses that were committed before July 1, 2000. The statute that is now relevant, and that is relevant to Zorn, is RCW 9.94A.703, and specifically subsections (3)(c) and (d). Thus, the reference in *Brooks* to RCW 71.24.025 and the requirements of that statute do not apply to Zorn.

Instead, RCW 9.94A.703(3)(c) grants the sentencing court statutory discretion to impose "crime-related treatment or counseling services." Crime-related community custody conditions are reviewed for an abuse of discretion. *State v. Autrey*, 136 Wn. App. 460, 466-67, 150 P.3d 580 (2006).

In the instant case, witnesses testified about Zorn's behavior at the time of the assault that he committed, and from this behavior the sentencing court could reasonably infer a potential mental health contributor to Zorn's criminal behavior. Unless a mental health evaluation was otherwise available to the court -- because Zorn had sought a capacity

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defense or because competency was brought into issue and a competency evaluation was ordered, neither of which occurred in this case -- the court then has no way of determining whether there is a mental health link to Zorn's criminal behavior. Thus, it is reasonable and an appropriate use of the court's discretion to order as a condition of community custody that Zorn submit to a mental health evaluation. Zorn is not required to submit to treatment unless the evaluation reveals information that leads to a recommendation of follow-up treatment.

In general, "[n]o causal link need be established between the condition imposed and the crime committed, so long as the condition relates to the circumstances of the crime." *State v. Llamas Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). Zorn's behavior when he committed the assault that led to his conviction of assault in the second degree might have been stimulated by a mental health condition. The only way to determine this connection is to conduct a mental health evaluation. The State respectfully asserts that on the facts of this case, it was not an abuse of discretion for the trial court to order Zorn to submit to a mental health evaluation as a condition of his community custody.

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3. The trial court gave an incorrect definition of the term "reckless" when it instructed the jury in regard to the reckless infliction of substantial bodily harm as an element of assault in the second degree, but Zorn has not preserved this issue for appeal because he did not object in the trial court, and on the facts of the instant case the error was harmless beyond a reasonable doubt.

In his supplemental brief, Zorn correctly points out that the jury in his case was given an instruction on the definition of recklessness that was identical to one that was found erroneous in this court's recent opinion in *State v. Harris*, 2011 WL 4944038 (No. 40089-8-II, Oct. 18, 2011). However, the State responds in good faith that there are important distinctions between the instant case and the facts and circumstances addressed in *Harris*, and the State, therefore, respectfully asks that the court sustain Zorn's conviction.

First, Zorn did not object to the recklessness instruction that was given to his jury. Generally, failure to object to an instruction precludes challenge on appeal. *State v. Bailey*, 114 Wn.2d 340, 345, 787 P.2d 1378 (1990). "[D]efects in instructions not called to the trial court's attention will not be considered when raised for the first time on appeal." *State v. Theroff*, 95 Wn.2d 385, 391, 622 P.2d 1240 (1980). However, Zorn may raise this issue for the first time on appeal if the error is manifest constitutional error and Zorn can show actual prejudice from the error.

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State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); RAP 2.5(a).

In the instant case, Zorn's jury was correctly instructed by an additional instruction, Instruction No. 6, that "[a] person commits assault in the second degree when he or she intentionally assaults another person and thereby recklessly inflicts substantial bodily harm." RP 148; CP 35. The language clearly instructs the jury that the term "recklessly" relates to "inflicts," which in turn relates to "substantial bodily harm." On review, jury instructions are reviewed de novo, while "examining the effect of a particular phrase in an instruction by considering the instructions as a whole and reading the challenged portions in the context of all the instructions given." *State v. Harris*, 2011 WL 4944038 (No. 40089-8-11, Oct. 18, 2011), para. 14, citing *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

Additionally, *Harris* involved facts where the defendant shook his baby and thereby caused great bodily harm to the baby, but the facts were such that there was a reasonable question whether the defendant was aware of the risk of great bodily harm. *Harris* at para. 23. Thus, instructing the jury in *Harris* that the defendant need only be aware that his assault created the risk of some undefined "wrongful act" was error.

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because there was demonstrated prejudice to the defendant. Still more, the defendant in *Harris* actively sought to advance the defense that he did not act recklessly because he was unaware of the risk of great bodily harm, but both the jury instruction and the court, in response to objections from the State, prohibited the defendant from arguing his theory of the case to the jury. *Harris* at para. 19. 23-24.

In the instant case, however, Zorn did not advance a defense that he did not act recklessly. In closing argument, Zorn argued the question of recklessness in the context of whether he knew his assault would cause a broken bone. RP 166. In his rebuttal closing argument, the prosecutor responded as follows: "When you look at No. 9, would -- knows of and disregards a substantial risk that a wrongful act -- here, the substantial bodily harm would occur -- may occur -- may occur..." RP 168.¹

On the facts of this case, Zorn can not show that any actual prejudice resulted from the erroneous instruction at issue. "Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case." *State v. Bland*, 128 Wn. App. 511, 515, 116 P.3d 428 (2005), quoting *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). Thus,

¹ Other citations to the record where recklessness was discussed are at RP 155, 157, 159, 165, 166, and 168.

the court should deny review of this issue because it was not preserved by an objection at trial. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); RAP 2.5(a). See also, *State v. Grimes*, 2011 WL 6018399 (No. 40392-7-II, Dec. 2, 2011).

Additionally, "an erroneous jury instruction that omits an element of the charged offense or misstates the law is subject to harmless error analysis." *State v. Thomas*, 150 Wn.2d 821, 844-845, 85 P.3d 970, 982 (2004), citing *Neder v. United States*, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). "To find an error harmless beyond a reasonable doubt, an appellate court must find that the alleged instructional error did not contribute to the verdict obtained." *State v. Grimes*, 2011 WL 6018399, p.7 (No. 40392-7-II, Dec. 2, 2011), citing *State v. Brown*, 147 Wn.2d 330, 344, 58 P.3d 889 (2002).

If Zorn would have argued or otherwise asserted that he was unaware of the risk of substantial bodily harm when he assaulted the victim, and if the prosecutor would have argued to the jury that recklessness might include some "wrongful act" that was something other than substantial bodily harm, as in *Harris*, then the erroneous instruction would not have been harmless. See, e.g., *State v. Peters*, 163 Wn. App. 836, 851, 261 P.3d 199, 207 (Sep. 19, 2011). But in the instant case, the

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prosecutor correctly argued in closing arguments that substantial bodily harm to the victim was the "wrongful act" at issue in the definition of recklessness, and Zorn was not prohibited by either the court or the instructions from arguing that he was unaware of the risk of substantial bodily harm. Still more, the evidence presented at trial supported a finding that Zorn acted intentionally when he caused substantial bodily harm to the victim. As such, the State respectfully asserts that the erroneous instruction in this case was harmless beyond a reasonable doubt.

D. CONCLUSION

The sentencing court erred when without statutory authority it prohibited Zorn from possessing alcohol, and his judgment and sentence should be modified to remove this condition of his community custody.

The sentencing court did not err when as a condition of community custody it ordered Zorn to submit to a mental health evaluation and to complete any follow up treatment. There was good cause shown from the testimony at trial for the court to order a mental health evaluation, and treatment was only required if it were recommended by the evaluation.

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The trial court gave a defective jury instruction to the jury when it instructed the jury that a person is reckless when the person disregards a substantial risk that a "wrongful act" will occur, rather than specifying that on the facts of Zorn's case the wrongful act was "substantial bodily harm." However, Zorn did not object to the instruction, and he has not, and on the facts of this case, can not, show actual prejudice from the error. Therefore, Zorn has not preserved the issue and on these facts he should be prohibited from raising the issue for the first time on appeal.

Finally, the erroneous jury instruction is harmless error on the facts of this case.

The State respectfully and in good faith requests that the court sustain Zorn's conviction but return the matter to the trial court to modify the judgment and sentence to remove the prohibition against the possession of alcohol.

DATED: December 9, 2011.

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

STATE OF WASHINGTON,)	
)	No. 71742-1-II
Respondent,)	
)	DECLARATION OF
vs.)	FILING/MAILING
)	PROOF OF SERVICE
JOHN M. ZORN,)	
)	
Appellant,)	
_____)	

I, TIM HIGGS, declare and state as follows:

On MONDAY, DECEMBER 9, 2011, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached, BRIEF OF RESPONDENT, to:

Thomas E. Doyle
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I, TIM HIGGS, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 9th day of December, 2011, at Shelton, Washington.



Tim Higgs (25919)

MASON COUNTY PROSECUTOR

December 09, 2011 - 4:41 PM

Transmittal Letter

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