

NO. 43896-8-II

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

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STATE OF WASHINGTON,

Respondent,

v.

KEITH HORNADAY,

Appellant.

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

The Honorable Leila Mills, Judge

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REPLY BRIEF OF APPELLANT

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A. ISSUE IN REPLY

May the jury instruction at issue be challenged for the first time on appeal?

B. ARGUMENT IN REPLY

THE JURY INSTRUCTION MAY BE CHALLENGED FOR THE FIRST TIME ON APPEAL AS IT UNCONSTITUTIONALLY DIMINISHED THE STATE'S BURDEN OF PROOF ON AN ELEMENT OF THE CRIME.

The State does not dispute the jury was incorrectly instructed and that counsel was deficient for failing to object to the incorrect recklessness instruction. Brief of Respondent (BOR) at 14, 25.

A challenge the jury instruction defining recklessness may be raised for the first time on appeal. State v. Peters, 163 Wn. App. 836, 847, 261 P.3d 199 (2011). The Court, noting the issue could be raised for the first time on appeal, held the instruction impermissibly relieved the State of its burden of proving that Peters knew of and disregarded a substantial risk that death may occur. Instead, the instruction allowed the jury to convict based merely on disregard of a wrongful act. Id. at 844, 850.

The State, however, cites a number of cases for the proposition that failure to define a technical term is not manifest constitutional error. BOR at 16-17; see State v. Gordon, 172 Wn.2d 671, 679-80, 260 P.3d 884 (2011) (instructions that did not define “deliberate cruelty” or “particular

vulnerability” aggravators did not create manifest constitutional error); State v. O’Hara, 167 Wn.2d 91, 105-06, 217 P.3d 756 (2009) (failure to provide jury *entire* statutory definition of “malice” did not qualify as manifest constitutional error); State v. Stearns, 119 Wn.2d 247, 248, 830 P.2d 355 (1992) (where appellant charged with possession with intent, omission of personal use exception from manufacturing definition was not manifest constitutional error, in part because “personal use” exception was issue upon which appellant had burden of proof at trial); State v. Lord, 117 Wn.2d 829, 880, 822 P.2d 177 (1991) (rejecting argument that, based on the use of a computer program analyzing written information for comprehensibility, several jury instructions during both guilt and penalty phases of trial were overly complex).

As the above summaries reveal, when examined closely, none of these cases supports the State’s argument. In a nutshell, the trial court did not merely fail to define a technical term. It defined the term erroneously, in a manner that diminished the State’s burden. Peters, 163 Wn. App. at 847. The error may, therefore, be raised for the first time on appeal.

C. CONCLUSION

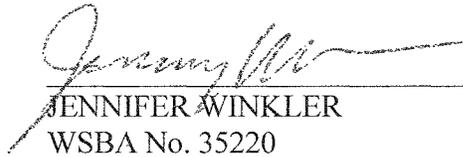
For the reasons set forth above and in Hornaday’s opening brief, his assault conviction should be reversed. In the alternative, as argued in the opening brief, the case should be remanded for resentencing consistent

with State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012) and RCW  
9.94A.701(9).

DATED this 30<sup>th</sup> day of August, 2013.

Respectfully submitted,

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KEITH HORNADAY,	)	
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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 30<sup>TH</sup> DAY OF AUGUST 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KEITH HORNADAY  
DOC NO. 875766  
AIRWAY HEIGHTS CORRECTIONS CENTER  
P.O. BOX 2049  
AIRWAY HEIGHTS, WA 99001

**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF AUGUST 2013.

X *Patrick Mayovsky*

# NIELSEN, BROMAN & KOCH, PLLC

**August 30, 2013 - 1:07 PM**

## Transmittal Letter

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