

NO. 44724-0-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TERESA T. MOODY,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COURT
The Honorable James J. Dixon, Judge
Cause No. 12-1-01038-6

BRIEF OF APPELLANT

THOMAS E. DOYLE, WSBA NO. 10634
Attorney for Appellant

P.O. Box 510
Hansville, WA 98340
(360) 638-2106

TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	1
C. STATEMENT OF THE CASE.....	1
D. ARGUMENT	5
01. REVERSAL OF MOODY’S CONVICTION FOR ASSAULT IN THE SECOND DEGREE IS REQUIRED WHERE SHE WAS TRIED WITH COMMITTING THE OFFENSE BY ALTERNATIVE MEANS AND A JURY INSTRUCTION PERTAINING TO ONE OF THE ALTERNATIVE MEANS RELIEVED THE STATE OF ITS BURDEN OF PROVING THE OFFENSE BY THAT MEANS BEYOND A REASONABLE DOUBT	5
02. MOODY WAS PREJUDICED BY HER COUNSEL’S FAILURE TO OBJECT TO JURY INSTRUCTION 9 THAT RELIEVED THE STATE OF ITS BURDEN TO PROVE AN ELEMENT OF AN ALTERNATIVE MEANS OF COMMITTING ASSAULT IN THE SECOND DEGREE	10
E. CONCLUSION	13

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>State of Washington</u>	
<u>State v. Brett</u> , 126 Wn.2d 136, 892 P.2d 29 (1995).....	6
<u>State v. Brown</u> , 132 Wn.2d 529, 940 P.2d 546 (1997), <u>cert. denied</u> , 523 U.S. 1007 (1998).....	5
<u>State v. Brown</u> , 159 Wn. App. 366, 245 P.3d 776, <u>reviewed denied</u> , 171 Wn.2d 1025 (2011)	12
<u>State v. Doogan</u> , 82 Wn. App. 185, 917 P.2d 155 (1996)	12
<u>State v. Early</u> , 70 Wn. App. 452, 853 P.2d 964 (1993), <u>review</u> <u>denied</u> , 123 Wn.2d 1004 (1994)	11
<u>State v. Gentry</u> , 125 Wn.2d 570, 888 P.2d 1105 (1995).....	12
<u>State v. Gilmore</u> , 76 Wn.2d 293, 456 P.2d 344 (1969).....	11
<u>State v. Graham</u> , 78 Wn. App. 44, 896 P.2d 704 (1995)	11
<u>State v. Harris</u> , 164 Wn. App. 377, 263 P.3d 1276 (2011).....	8, 12
<u>State v. Henderson</u> , 114 Wn.2d 867, 792 P.2d 514 (1990).....	11
<u>State v. Holzknrecht</u> , 157 Wn. App. 754, 238 P.3d 1233 (2010).....	6
<u>State v. Johnson</u> , 172 Wn. App. 112, 297 P.3d 710 (2012).....	8, 12
<u>State v. Leavitt</u> , 49 Wn. App. 348, 743 P.2d 270 (1987), <u>aff'd</u> , 111 Wn.2d 66, 758 P.2d 982 (1988).....	12, 13
<u>State v. Mark</u> , 94 Wn.2d 520, 618 P.2d 73 (1980)	5
<u>State v. Ortega-Martinez</u> , 124 Wn.2d 702, 881 P.2d 231 (1994)	10

<u>State v. Pirtle</u> , 127 Wn.2d 628, 656, 904 P.2d 245 (1995), <u>cert. denied</u> , 518, U.S. 1026 (1996).....	5
<u>State v. Tarica</u> , 59 Wn. App. 368, 798 P.2d 296 (1990).....	11
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	11
<u>State v. Wanrow</u> , 88 Wn.2d 221, 559 P.2d 548 (1977).....	5
<u>State v. White</u> , 81 Wn.2d 223, 500 P.2d 1242 (1972).....	11

Federal Cases

<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	11
---	----

Constitution

Sixth Amendment	11
Art. 1, § 22	11

Statutes

RCW 9.94A.533.....	2
RCW 9.94A.825.....	2
RCW 9A.36.021.....	2, 6, 7
RCW 10.998.020	2

Rules

RAP 2.5(a)	6
------------------	---

A. ASSIGNMENTS OF ERROR

01. The trial court erred in giving jury instruction 9 that incorrectly defined recklessness.
02. The trial court erred in permitting Moody to be represented by counsel who provided ineffective assistance by failing to object to jury instruction 9, which relieved the State of its burden to prove an element of an alternative means of committing assault in the second degree.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Is reversal of a second degree assault conviction required where a defendant is tried with committing the offense by alternative means and a jury instruction pertaining to one of the alternative means relieves the State of its burden of proving the offense by that means beyond a reasonable doubt? [Assignment of Error No. 1].
02. Whether the trial court erred in permitting Moody to be represented by counsel who provided ineffective assistance by failing to object to jury instruction 9, which relieved the State of its burden to prove an element of an alternative means of committing assault in the second degree? [Assignment of Error No. 2].

C. STATEMENT OF THE CASE

01. Procedural Facts

Teresa T. Moody was charged by first amended information filed in Thurston County Superior Court February 6, 2013, with assault in the second degree while armed with a deadly weapon -

domestic violence, contrary to RCWs 9.94A.533(4), 9.94A.825, 9A.36.021(1)(a) or (c), 10.99.020. [CP 68].

No pretrial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. Trial to a jury commenced February 5, the Honorable James J. Dixon presiding. Moody was found guilty, sentenced within her standard range, and timely notice of this appeal followed. [CP 97-99, 115-125, 128].

02. Substantive Facts

In the early afternoon of July 31, 2012, Lacey police were dispatched to the parking lot of a local bank, the scene of a verbal and physical altercation between Moody and Juanqita Knox [RP 82, 204, 214-15, 257],¹ who had been involved in a traffic accident before Moody pulled her car into the parking lot to deposit a check at the bank. [RP 212, 273, 280]. The front end of her vehicle was damaged. [RP 111, 128-29]. While she attended to the battery cable under the hood with a screwdriver [RP 130], Knox started “going into a panic attack.” [RP 128]. She was “discombobulated.” [RP 129]. “I was really scared, because I can’t breathe sometimes. And I’m bipolar, manic depressant, schizophrenic. And, also, I have anxiety really bad.” [RP 148].

¹ All references to the verbatim report of proceedings are to the transcripts entitled Volumes I-III.

And my nerves is getting bad. I'm arguing with her. I started - - I hopped in the car. I grabbed the keys out of the car. I grabbed her purse out of the car. I dumped her purse out. I grabbed a big wad of keys that we have. And I started - - I just started - - I started attacking her. And then I just started swinging the keys around, and that's when I accidentally hit myself in the head with the keys.

[RP 130-31]. She explained there was no blood on her until after she hit herself. [RP 144]. She described the damage to her ear as "a little bitty cut." [RP 151]. This varied with her account on the day of the incident that Moody had punched and stabbed her with a screwdriver in the head and neck area. [RP 215, 218, 223, 248]. Knox has known Moody for 18-plus years, they have resided together and have had sex together. [RP 125, 165, 167].

Witnesses said the two were screaming and yelling at each other. [RP 83]. They got "angrier and angrier with one another." [RP 50]. They were arguing about the keys to the car. [RP 55, 83]. They threw punches and objects at one another, chasing each other around the parking lot. [RP 63-64].

[T]hey were physical with each other. It was - - they were very combative with each other. The woman that was wearing all black (Moody) had the pocket that the keys were in in her hand. The woman in the vest (Knox) was retaining - - was trying to retain them. And the woman in all black was trying to get the keys from them, and they were yelling and screaming and pushing each - - at each other.

[RP 83].

Efforts to diffuse the situation failed. [RP 50, 84, 87]. Matthew Klifman, the bank manager, said Moody was attacking Knox. [RP 88].

...I saw the woman in all black coming down, kind of in a tomahawk motion, onto the woman in the black vest. And she was holding one shoulder and coming down on her like that with what I thought was a screwdriver....

[RP 87].

... And immediately I intervened and raised my voice and told her to drop the weapon and grabbed her arm halfway through one of the swings and pried the screwdriver out of her hand and retained it.

[RP 88].

“It looked as if the first couple of blows actually came down on the scalp.” [RP 97]. “...I got there within the fifth, maybe the sixth blow.”

[RP 98]. Klifman “could see the body reacting to the blows.” [RP 101].

Blood was first noticed on Knox’s neck and ear after the screwdriver was retrieved. [89-90]. “[T]hey were both very upset and very mad at each other.” [RP 104]. The cut on Knox’s ear was stitched at the hospital. [RP 150].

Moody told the police that Knox had “attempted to bait her into a - a fight.” [RP 275]. And that she chased after her to recover her property, though she didn’t remember attempting to stab Knox. [RP 275, 282].

//

D. ARGUMENT

01. REVERSAL OF MOODY'S CONVICTION FOR ASSAULT IN THE SECOND DEGREE IS REQUIRED WHERE SHE WAS TRIED WITH COMMITTING THE OFFENSE BY ALTERNATIVE MEANS AND A JURY INSTRUCTION PERTAINING TO ONE OF THE ALTERNATIVE MEANS RELIEVED THE STATE OF ITS BURDEN OF PROVING THE OFFENSE BY THAT MEANS BEYOND A REASONABLE DOUBT.

This court reviews alleged errors of law in jury instructions de novo. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), cert. denied, 518, U.S. 1026 (1996). Jury instructions are to be read as a whole, and each one is read in the context of all others given. State v. Brown, 132 Wn.2d 529, 605, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998). Jury instructions are sufficient if they properly inform jurors of the applicable law, are not misleading, and permit each party to argue his or her theory of the case. State v. Mark, 94 Wn.2d 520, 526, 618 P.2d 73 (1980). "It is reversible error to instruct the jury in a manner that would relieve the State (of its) burden" to prove "every essential element of a criminal offense beyond a reasonable doubt." State v. Pirtle, 127 Wn.2d at 656. This court presumes that a "clear misstatement of the law" in a jury instruction is prejudicial. State v. Wanrow, 88 Wn.2d 221, 239, 559 P.2d 548 (1977). And while Moody did

not object to the instruction below, this error is of constitutional magnitude and may be raised for the first time on appeal. RAP 2.5(a); State v. Holzknicht, 157 Wn. App. 754, 760-62, 238 P.3d 1233 (2010); State v. Brett, 126 Wn.2d 136, 171, 892 P.2d 29 (1995).

In relevant part, RCW 9A.36.021, defines the crime of assault in the second degree:

- (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) intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
 -
 - (c) assaults another with a deadly weapon....

The trial court’s instructions to the jury included the “to convict” instruction, jury instruction 14, for second degree assault:

To convict the defendant of the crime of assault in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about July 31, 2013, the defendant intentionally assaulted Juanqita A. Knox;
- (2) That the defendant acted by one or more of the following means or methods:
 - (a) thereby recklessly inflicted substantial bodily harm on Juanqita Knox or
 - (b) with a deadly weapon; and
- (3) That this act occurred in the State of Washington.

If you find from the evidence that element (1), (3) and either alternative elements (2)(a) or (2)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which alternatives

(2)(a) or (2)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of the elements (1), (2) or (3), then it will be your duty to return a verdict of not guilty.

[CP 91; Court's Instruction 14].

Jury instruction 9 defined "reckless":

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation. (emphasis added).

When reckless is required to establish an element of a crime, the element is also established if the person acts intentionally or knowingly.

[CP 86; Court's Instruction 9].

Defense objected to instruction 14 and to instruction 6 (definition of assault in the second degree) because of the inclusion of the alternative means of recklessly inflicting substantial bodily harm. [RP 333]. There was no objection to the reckless definition set forth in instruction 9. [RP 333-34].

Jury instruction 9 defining "reckless" is misleading and conflicts with the statutory language of RCW 9A.36.021(1)(a). The instruction defines "reckless" to mean Moody acted with disregard of a substantial risk that a "wrongful act" may occur, rather than the specific statutory

language that requires the State to prove she disregarded a substantial risk that “substantial bodily harm” may occur.

In State v. Harris, 164 Wn. App. 377, 263 P.3d 1276 (2011), where the defendant was charged with first degree assault of a child, which required proof that the defendant recklessly inflicted great bodily harm, this court held the trial court misstated the law when it instructed the jury, as here, that “[a] person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur....” Harris 164 Wn. App. at 384-85. (emphasis in the original). In State v. Johnson, 172 Wn. App. 112, 297 P.3d 710 (2012), Division I of this court applied the same reasoning to the charge of second degree assault, concluding the trial court erred in giving the same instruction. Johnson, 172 Wn. App. at 133.

The reckless instruction given in this case effectively precluded defense counsel of an opportunity to argue in closing that the State was required to prove that Moody had disregarded a substantial risk that substantial bodily harm would result from her actions, rather than the less difficult proof required to prove that “a wrongful act may occur.” [CP 86.]. The difference is significant and cannot be deemed harmless. Importantly, Moody’s counsel attempted to distinguish a wrongful act from substantial bodily harm, arguing no blood was observed on the

screwdriver that had never been submitted for testing [RP 387, 394], that Knox's injuries looked more like scratches than stab wounds [RP 391], and that there was no evidence of a gash or cut inside Knox's ear. [RP 396-97]. "[I]f she'd been stabbed there, there would have been a wound, and it would have been visible." [RP 397]. And while Knox did receive two stitches on the upper part of her ear toward the front side [RP 151], counsel argued that "nevertheless, it was two stitches, not a substantial injury, right?" [RP 397].

Critically, as noted above, Moody was charged with committing the assault by alternative means, and the jury was so instructed. [CP 68, 91]. In closing, the State argued it had satisfied its burden of proving both alternatives:

The State has proven beyond a reasonable doubt every element of Assault in the Second Degree. On or about July 31st, 2012, the Defendant intentionally assaulted Ms. Knox. She did that by recklessly inflicting substantial bodily harm on Ms. Knox. It was reckless to be hitting her with a screwdriver in the head, stabbing her. That's not the actions of a prudent person or someone who doesn't care or who cares about whether or not someone's going to be hurt. The Defendant didn't care. She wanted to hurt Ms. Knox, and she did do that.

I submit to you that the State has also proven beyond a reasonable doubt that M. Knox was assaulted with a deadly weapon. The Defendant assaulted her with a deadly weapon, the screwdriver....

[RP 373-74].

Realizing, based on the above, that Moody's conviction cannot be affirmed on the "reckless" alternative, and acknowledging there is no way to determine which alternative or combination thereof the jurors relied on in reaching their verdict, it cannot be concluded that the verdict was unanimous on the "deadly weapon" alternative, with the result that Moody's conviction for assault in the second degree must be reversed and remanded for retrial. See State v. Ortega-Martinez, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994).

02. MOODY WAS PREJUDICED BY HER COUNSEL'S FAILURE TO OBJECT TO JURY INSTRUCTION 9 THAT RELIEVED THE STATE OF ITS BURDEN TO PROVE AN ELEMENT OF AN ALTERNATIVE MEANS OF COMMITTING ASSAULT IN THE SECOND DEGREE.²

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. 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 criminal defendant claiming ineffective

² While it has been argued in the preceding section that this issue can be raised for the first time on appeal, this argument is presented only out of an abundance of caution should this court disagree with this assessment.

assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, See State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)).

Should this court find that trial counsel waived the issue set forth in the preceding section relating jury instruction 9 by failing to object to the instruction or by inviting the error by acquiescing to the instruction, then both elements of ineffective assistance of counsel have been established.

First, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to properly object to jury instruction 9 for the reasons set forth in the preceding section. Moreover, Moody's trial (02/05/13) commenced almost 16 months following issuance of this court's opinion in Harris (10/18/11) and two months after publication of Johnson (12/03/12). Skillful research would have disclosed this relevant law. See State v. Brown, 159 Wn. App. 366, 371, 245 P.3d 776, reviewed denied, 171 Wn.2d 1025 (2011).

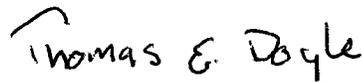
To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. This is such a case, given that instruction 9 freed the State from its burden of proof on the reckless element, and in the process sanctioned a verdict on this alternative means

based on a conclusion that Moody disregarded a substantial risk that a “wrongful act may occur” rather than the required “substantial bodily harm.”

E. CONCLUSION

Based on the above, Moody respectfully requests this court to reverse her conviction for assault in the second degree and remand for retrial.

DATED this 29th day of November 2013.

Handwritten signature of Thomas E. Doyle in black ink.

THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

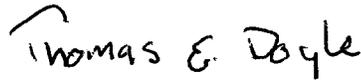
CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

Carol La Verne
paoappeals@co.thurston.wa.us

Teresa T. Moody #98131
W.C.C.C.
9601 Bujacich Road NW
Gig Harbor, WA 98332-8300

DATED this 29th day of November 2013.



THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

DOYLE LAW OFFICE

November 29, 2013 - 12:23 AM

Transmittal Letter

Document Uploaded: 447240-Appellant's Brief.pdf

Case Name: State v. Moody

Court of Appeals Case Number: 44724-0

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Thomas E Doyle - Email: **ted9@me.com**

A copy of this document has been emailed to the following addresses:

LavernC@co.thurston.wa.us