

No. 49620-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

KONSTANTIN STATOVOY

REPLY BRIEF OF APPELLANT

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A. Argument in Reply

The State's primary argument is that the issue Mr. Statovoy raises cannot be raised for the first time on appeal. The State concedes that manifest errors affecting a constitutional right may be raised for the first time on appeal. RAP 2.5. Any error that increases the maximum sentence, including any error that increases the standard range for the offense, is manifest error affecting a constitutional right. *State v Blakely*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)

Although the Brief of Appellant cited the case of *State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005) (*Recuenco I*), *reversed on other grounds Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) (*Recuenco II*), *reaffirmed State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008) (*Recuenco III*), the State makes no mention of it. The *Recuenco I* case addressed similar issues. In *Recuenco I*, the defendant was sentenced by special verdict to a deadly weapon enhancement. The court sentenced him for possessing a firearm, however, not a deadly weapon. On appeal, he argued he was sentenced to the wrong enhancement. The State's first rebuttal argument was that it was invited error. The Supreme Court disagreed, holding that the issue was properly before the court. Similarly, Mr. Statovoy's issue is properly before the court.

where elements are redundant but must be separately proved. For instance, in a prosecution for multiple counts of violation of a no contact order, the jury must find separately for each count that a valid no contact order existed. As the Supreme Court stated in a slightly different context, “The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt—not that the jury’s actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough.” *Sullivan v Louisiana*, 508 U.S. 275, 280, 113 S.Ct. 207, 8124 L Ed.2d 182 (1993) (emphasis in original).

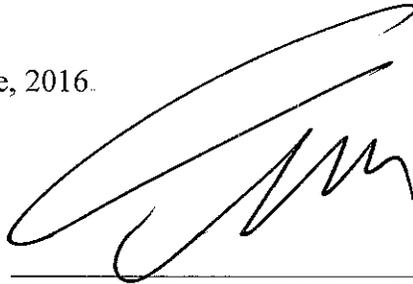
The State cites two older cases for the proposition that domestic violence is not an element and need not be proved to the jury. *State v. Goodman*, 108 Wn.App. 355, 30 P.3d 516 (2001); *State v. O.P.*, 103 Wn.App. 889, 13 P.3d 1111 (2000). The analysis in *Goodman* and *O.P.*, however, is no longer good law in light of the recently amended RCW 9.94A.535(21). When a prosecutor seeks to enhance a sentence based upon the fact the crime occurred against a family or household member, the State must plead and prove both the instant offense and the criminal history offense meets the definition of domestic violence. *State v. Kozey*, 183 Wn.App. 692, 334 P.3d 1170 (2014). In this case, while the State properly pleaded the enhancement, the specific verdict from the jury does

not allow a reviewing court to determine for which of several counts the enhancement applies.

B. Conclusion

This Court should remand for resentencing without the domestic violence enhancements.

DATED this 22nd day of June, 2016.

A handwritten signature in black ink, appearing to read 'T. Weaver', is written over a horizontal line.

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