SUPREME COURT NO. 89850-2
NO. 43235-8-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MAXIMUS MASON,

Petitioner.

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

The Honorable Linda CJ Lee, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Maximus Mason, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mason seeks review of the Court of Appeals decision entered on December 31, 2013, a copy of which is attached hereto as an appendix.

C. ISSUE PRESENTED FOR REVIEW

Should this Court accept review under RAP 13.4(b)(3) to determine whether trial counsel was ineffective for failing to object to a defective jury instruction that lowered the State's burden of proof?

D. STATEMENT OF THE CASE

Cheryl Miller Mason married the appellant, Maximus Mason, in 1998. The couple has two sons together. 1RP 76-77.[1] They separated in November 2010 at Miller Mason's request. 1RP 78. They each rented houses on the same block in Tacoma. 1RP 143, 389. The boys lived with Miller Mason, but Mason was permitted to visit the boys. 1RP 79-80.

[1] The verbatim report of proceedings is cited as follows: 1RP -- six sequentially paginated volumes covering 2/27, 2/29, 3/1, 3/5, 3/6, 3/7; 2RP -- 2/28; 3RP -- 3/9; 4RP -- 3/16/2012.

Mason was evicted from his residence in April 2011. 1RP 143-44. He moved back in with Miller Mason for a few weeks, during which time the couple shared a bed. 1RP 144, 391-92, 395. Mason sought to reunite but Miller Mason told him she was not interested. 1RP 80-82, 145.

One night during this period the couple argued about Miller Mason's whereabouts. According to Miller Mason, Mason kicked her door in and pushed her. Miller Mason asked him to leave, which he did. 1RP 82, 85. Miller Mason no longer permitted Mason to visit unannounced. 1RP 85-86.

The following May, Miller Mason and Mason agreed to initiate dissolution proceedings. 1RP 87. By then, Miller Mason was romantically involved with Maurice Taylor. 1RP 87-88. On the night of May 4, 2011, Miller Mason and Taylor had consensual sex in Miller Mason's bed. 1RP 89-91, 224-27. As the two lay in bed, Miller Mason's dog began to bark. Miller Mason got out of bed, looked out a window, and saw Mason walking in her front yard. 1RP 91-94. Miller Mason alerted Taylor to Mason's presence, threw on a football jersey, closed her bedroom door, and came out into the living room. 1RP 95-99, 229.

According to Miller Mason, Mason kicked the door in and approached his wife. He had a gun in his hand. 1RP 99-100. Taylor,

meanwhile, was frantically getting dressed in the bedroom. He could not identify who came into the house, but did see the person had a handgun. 1RP 230-32, 243-44. Taylor saw Miller Mason backing away from a man toward the back of the house. 1RP 232-33. When they passed the bedroom doorway, Taylor ran toward the door to get out of the house. 1RP 236-37, 243-45. He saw a silhouette approaching him, and the person told him not to go to his car. 1RP 232-34. Taylor ran off. 1RP 247.

After running for about a block, Taylor stopped and called police. 1RP 61-63, 235-36, 264-68. Taylor told police that in addition to the command not to go to his car, the man with the gun also said, "I should fucking shoot you." 1RP 267-68.

Meanwhile, Miller Mason said Mason grabbed her throat with both hands and backed her into the kitchen very quickly. Miller Mason's head slammed into the kitchen wall and she temporarily lost consciousness. 1RP 102-04, 159-60. She quickly awakened, at which point Mason punched her several times in the face. 1RP 108, 113-14.

Mason briefly went outside while Miller Mason got up and went into her bedroom. 1RP 104-05, 160-62. Mason reentered the house, with gun still in hand. He was angry Miller Mason had sex with another man in their bed. 1RP 105-06. Mason grabbed Miller Mason by the hair and

said, "'I should kill you right now.'" 1RP 107-08, 158-59. According to Miller Mason, Mason then vaginally raped her twice. 1RP 116, 120-21, 171, 269-70.

Police arrived and Mason opened the door while holding what an officer said was a semiautomatic pistol. 1RP 126-27, 360-62, 368-70. Mason slammed the door and ran into Miller Mason's bedroom in the back of the house. 1RP 65, 68, 126-27, 360-62. The incident ended when Mason opened the door and surrendered. 1RP 46-47, 68, 74, 272, 362-63. An officer found a handgun under a dresser in Miller Mason's bedroom. 1RP 278-79, 331-32, 341-42.

Miller Mason went to the hospital, where she was examined by an emergency room nurse and a forensic nurse examiner. 1RP (2/29) 175-78, 206-08.[2] She told the emergency room nurse that Mason sexually assaulted her and hit her in the face. 1RP 207-08. Her face was bruised and swollen and she complained of a headache. 1RP 209-10. She had bruises on her forearms, ankles, thighs and wrists. Miller Mason also complained of pain in her genital area. 1RP 216-17. After a CT scan, she

[2] There is an overlap the transcripts for the February 29 and March proceedings. The former ends at page 197, while the latter begins at page 166. To avoid confusion regarding portions contained within the overlap, the particular volume is identified.

was diagnosed with a concussion syndrome. 1RP 134, 211. Miller Mason said the facial pain and swelling lasted two weeks. 1RP 135, 37.

The forensic nurse examiner collected samples from Miller Mason's overall genital area, anal area, and inside her vagina. 1RP 134, 137-38, (3/1) 179-80. Taylor's DNA was found in each sample. Mason was excluded as a contributor. 1RP (3/1) 195-200. Contrary to her other reports, Miller Mason told the nurse examiner her perpetrator penetrated her anus with his penis. 1RP (2/29) 189.

The State charged Mason with first degree rape, first degree burglary, unlawful imprisonment, felony harassment, second degree assault by reckless infliction of substantial bodily harm, third degree malicious mischief, and witness tampering.[3]

Mason testified he owned a gun for protection because the family garage had twice been burglarized. 1RP 392-95. Miller Mason gave him a house key when he moved back in April 2011. 1RP 396. Throughout the separation period and after moving back in, Mason took the boys to and from school. 1RP 389-90, 397, 405-07.

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[3] Because the jury found Mason not guilty of tampering with Miller Mason, the facts related to that charge have been omitted. CP 233.

Mason admitted that when he moved back in with his wife, they often argued about the "back-and-forth nature" of their marriage. 1RP 400-02, 443-44. Because of the arguments, Mason decided to temporarily move out of Miller Mason's home and stayed with a friend. 1RP 402-03. He still had a key to her house and continued to come over. 1RP 406-07.

On May 4, 2011, Mason used Miller Mason's car with her permission. 1RP 407-08. The agreement was that Mason would return the car that night, which he did. 1RP 408-10. He parked in front of the house and saw his wife and Taylor having sex in Miller Mason's bedroom. 1RP 414., 1RP 410-13. Mason was hurt and upset. 1RP 417. He decided to confront Miller Mason and Taylor. He kept his gun in his pocket. 1RP 415.

Mason opened the front door with the key, but the chain kept the door from opening more than about 12 inches. 1RP 415-16, 447. When he pushed the door with his shoulder, it flew open. 1RP 417. Unbeknownst to him, Miller Mason was standing behind the door. 1RP 417-19. According to Mason, the door hit Miller Mason's face and caused the bruising and swelling. 1RP 448.

An argument ensued, but Mason's focus turned to Taylor. 1RP 419. Mason told Taylor to leave. The gun remained in his pocket. Taylor

walked out and Mason followed him to the porch. Fearful Taylor may have a weapon in the car, Mason told him not to get into it. 1RP 420-22. Taylor walked away. 1RP 422.

Mason went back inside the house and he and his wife resumed their argument. He decided to retrieve some of his belongings because at that point, he was "done with everything." 1RP 422-23. Miller Mason was getting in his way, so he pushed her and the back part of her head hit and dented the kitchen wall. 2RP 423-24, 447-49.

Mason made at least two trips to the car with items he had gathered up. 1RP 427-29. As he collected more belongings, he took the gun out of his pocket and put it under a dresser. 1RP 430-31. He had not brandished the gun during the incident. 1RP 452-53. When Mason opened the door to leave, he saw police officers in the front yard. 1RP 432-33. One officer had his gun drawn and trained on him. He became scared and closed the door. 1RP 432-34. When an officer called for him to come out, he did. He was immediately arrested. 1RP 434-35.

The jury found Mason guilty of first degree criminal trespass, harassment, second degree assault against Miller Mason, and third degree malicious mischief. CP 225-33. The jury also found Mason was armed with a firearm during commission of the trespass, harassment and assault.

CP 235, 238, 240. Finally, the jury found each crime involved domestic violence. CP 234, 237, 239, 241.

The trial judge sentenced Mason to a standard range term of 12 months for second degree assault, plus 36 months for the firearm enhancement for a total of 48 months. The court imposed 18 months of community custody. CP 245-58; 4RP 11. For the remaining counts, all misdemeanors, the trial court imposed concurrent terms of 364 days in jail, all of which were suspended for two years. CP 259-63; 4RP 12.

Mason raised three issues on appeal, including an assertion the trial court gave an erroneous instruction defining recklessness and trial counsel was ineffective for failing to object to the instruction. Brief of Appellant (BOA) at 12-28. He specifically argued the instruction should have referenced his knowledge of and disregard of a substantial risk of inflicting substantial bodily harm, rather than a substantial risk that a "wrongful act" may occur. BOA at 12-19. The Court of Appeals rejected each argument.

The Court's decision involves a significant legal question under the state and federal constitutions. RAP 13.4(b)(3). This Court should accept review.

E. ARGUMENT

THE TRIAL COURT GAVE AN INCORRECT JURY INSTRUCTION ON RECKLESSNESS AND DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT.[4]

The trial court's instruction defining "recklessness" misstated the law, thereby relieving the State of its burden of proving an essential element of the crime of assault. Reversal of the assault conviction is required because counsel was ineffective in failing to take exception to the flawed instruction.

a. The Jury Instruction Defining Recklessness Misstated The Law And Relieved The State Of Its Burden Of Proof.

Under RCW 9A.36.021(1)(a), a person commits second degree assault if he "[i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm." The conduct at issue for second degree assault is Mason's act of grabbing Miller Mason by the neck, shoving her head into the kitchen wall, and allegedly punching her in the face. 1RP 102-04, 108,

[4] This issue is identical to the issue raised in State v. Johnson, 172 Wn. App. 112, 297 P.3d 710 (2013), review granted in part, 178 Wn.2d 1001 (2013). The Court of Appeals in Johnson found the instruction improper. It also found, however, that counsel performed competently because the defective instruction was based on WPIC 10.03, which at the time of trial had not been found improper. 172 Wn. App. at 134-35.

113-14, 159-60, 564.[5] The "to convict" instruction for second degree assault provides:

> To convict the defendant of the crime of assault in the second degree as charged in count V, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about May 4, 2011, the defendant intentionally assaulted C.M.;
>
> (2) That the defendant thereby recklessly inflicted substantial bodily harm on C.M.; and
>
> (3) That this act occurred in the State of Washington.

CP 197 (Instruction 40).

RCW 9A.08.010(1)(c), in addressing general levels of culpability, states, "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 his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation."

Instruction 42 defined "recklessness" as follows:

> 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

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[5] The prosecutor specifically elected these acts for the second degree assault charge. 1RP 564.

> deviation from conduct that a reasonable person would exercise in the same situation.
>
> When recklessness as to a particular result is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly as to that result.

CP 199 (emphasis added).

The italicized portion of Instruction 42 misstates the law. It does not adequately convey the mental state required to convict Mason for second degree assault under RCW 9A.36.021(1)(a). To accurately hold the State to its burden of proof, the instruction should have substituted the term "substantial bodily harm" for the term "a wrongful act."

In State v. Harris, the defendant was charged with first degree assault of a child, which required the State to prove "the person . . . [i]ntentionally assaults the child and . . . [r]ecklessly inflicts great bodily harm." State v. Harris, 164 Wn. App. 377, 383, 263 P.3d 1276 (2011), (quoting RCW 9A.36.120(1)(b)(i)). The first paragraph of the instruction defining recklessness was identical to the one used in Mason's case. Harris, 164 Wn. App. at 384.

To convict for first degree assault of a child, the jury needed to find Harris recklessly disregarded the substantial risk that "great bodily harm" would occur as a result of his actions under RCW 9A.36.120(1)(b)(i), not

that "a wrongful act" would occur. Harris, 164 Wn. App. at 385. The instruction defining recklessness relieved the State of its burden to prove Harris acted with disregard that a substantial risk of great bodily harm would result when he shook the child. Harris, 164 Wn. App. at 387.

A jury instruction defining the recklessness requirement must account for the specific risk contemplated under that statute, i.e., "great bodily harm" rather than some undefined "wrongful act." Harris, 164 Wn. App. at 386 (citing State v. Gamble, 154 Wn.2d 457, 468, 114 P.3d 646 (2005)) ("the risk contemplated per the assault statute is of 'substantial bodily harm'").

Consistent with Gamble, the court in State v. R.H.S. recognized the subjective component of recklessness for second degree assault under RCW 9A.36.021(1)(a) is actual knowledge of the likelihood of substantial bodily harm. 94 Wn. App. 844, 847-48, 974 P.2d 1253 (1999). In State v. Keend, the court addressed the crime of second degree assault under RCW 9A.36.021(1)(a) and concluded "the mens rea of intentionally relates to the act (assault), while the mens rea of recklessly relates to the result (substantial bodily harm)." 140 Wn. App. 858, 866, 166 P.3d 1268 (2007), review denied, 163 Wn.2d 1041 (2008).

The court in State v. Johnson extended Harris to second degree assault as charged in Mason's case. 172 Wn. App. at 133. The court explicitly held the instruction defining recklessness "should have used the more specific statutory language of 'substantial bodily harm', not 'wrongful act'". 172 Wn. App. at 133. The Court concluded the trial court erred in giving the instruction. Id.

Instruction 42 in Mason's case is flawed for the same reason. It needed to account for the specific risk contemplated by the second degree assault statute, i.e., "substantial bodily harm" as opposed to a generic "wrongful act." The instruction relieved the State of its burden of proving Mason acted with a disregard that a substantial risk of substantial bodily harm would result when he grabbed C.M. by the neck, shoved her head into the wall, and allegedly punched her face.

b. Defense Counsel Was Ineffective For Failing to Object to the Instruction.

Article I, section 22 and the Sixth Amendment guarantee criminal defendants effective representation. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); In re Personal Restraint of Woods, 154 Wn.2d 400, 420, 114 P.3d 607 (2005). Defense counsel is ineffective where (1) the attorney's performance was deficient

and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007).

Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Prejudice occurs if, absent the deficient performance, it is reasonably probable the verdict would have differed. In re Personal Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

Mason's counsel did not take exception to the trial court's jury instruction defining "recklessness." 1RP 500-09, 527-33. Counsel performed deficiently in failing to object to an instruction that lessened the State's burden of proof.

Counsel has an obligation to research the relevant law. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); State v. Brown, 159 Wn. App. 366, 371, 245 P.3d 776, review denied, 171 Wn. 2d 1025 (2011). Mason's trial commenced more than four months after this Court issued its decision in Harris. As well, Division One issued its opinion in Johnson, which involved the identical issue Mason raises, nearly three months before Mason's trial began. Had Mason's counsel researched

relevant law, he would have known about these cases. Counsel performed deficiently by failing to do a minimally competent degree of research.

Counsel's deficient performance prejudiced Mason because there is a reasonable probability the jury's verdict would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Cienfuegos, 144 Wn. 2d 222, 229, 25 P.3d 1011 (2001) (citing Strickland, 466 U.S. at 694). By relieving the State of its burden of proof on the recklessness element of second degree assault, the flawed instruction undermines confidence in the outcome.

The defense to second degree assault was that Mason committed a lesser degree of assault. CP 201-06 (lesser included assault instructions); 1RP 593-94. Mason committed third degree assault if he, under circumstances not amounting to assault in the second degree, "[w]ith criminal negligence, cause[d] bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering[.]" RCW 9A.36.031(1)(f). He committed fourth degree assault if, "under circumstances not amounting to assault in the . . . second or third degree, or custodial assault, he or she assault[ed] another." RCW 9A.36.041(1).

Mason was entitled to the lesser offense instructions because substantial evidence supported the conclusion that a rational jury could

find he committed only the lesser offense.[6] See State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000) (jury instruction on inferior degree offense should be given if substantial evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater).

Under the facts of Mason's case, the difference between second degree and third degree assault or fourth degree assault is small. Both Miller Mason and Mason testified Mason pushed her and she hit her head on the wall. 1RP 102-04, 422-24. But Miller Mason testified Mason grabbed her by the throat with both hands and forced her "really so strong and so fast" that she "plunged" her head into the wall. 1RP 102-03.

Mason, in contrast, testified he pushed her in the chest with one hand because she was getting in his way while retrieving his belongings. 1RP 423. Mason also denied punching Miller Mason in the face. 1RP 436. He said she must have received the bruises to her face from the door when he first entered the house. 1RP 417-19, 448. Under these facts, which are open to differing interpretations regarding culpability as to

[6] The State did not object to the lesser assault instructions. 1RP 500-09, 528-33.

result, a rational jury could find Mason acted with negligence or less rather than recklessness.

There is no question a "wrongful act" occurred here in some general sense of the term. Any result from pushing a person's head into a wall could be considered wrong. And therein lay the critical problem. Instruction 42 allowed the jury an easy way to find guilt based on Mason knowing and disregarding a substantial risk that a "wrongful act" may occur as opposed to holding the State to its more difficult burden of proving Mason knew of and disregarded a substantial risk that "substantial bodily harm" may occur.

Review is warranted because the ineffective assistance claim raises a significant question of constitutional law. RAP 13.4(b)(3); Strickland, 466 U.S. at 685-86. It is important for this Court to clarify when defense counsel will be found deficient in proposing a pattern instruction that misstates the law because pattern instructions are used in every criminal case and the issue is bound to recur.

F. CONCLUSION

Mason respectfully requests that review be granted because the Court of Appeals decision involves a significant constitutional question. RAP 13.4(b)(3).

DATED this 29 day of January, 2014.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MAXIMUS DWAYNE MASON, Appellant.	No. 43235-8-II UNPUBLISHED OPINION

HUNT, J. – Maximus Dwayne Mason appeals his jury trial convictions for second degree assault, first degree criminal trespass, harassment, and third degree malicious mischief. He argues that (1) his trial counsel provided ineffective assistance in failing to object to the jury instruction defining "recklessness," which he asserts misstated the law and relieved the State of its burden of proving an essential element of second degree assault; (2) the charging information omitted the "true threat" element of harassment; and (3) the trial court erred in excluding as irrelevant two photographs that showed he and the victim were still on affectionate terms. We affirm.

FACTS

I. THE CRIMES

Maximus Dwayne Mason and CM[1] married in 1998; they had two children together. They separated in November 2010 and moved into separate nearby houses. When Mason was

[1] Because the original charges involved allegations of a sexual nature, we use CM's initials to protect her privacy.

evicted in April 2011, CM let him move in to her home for a few weeks, during which time they shared CM's bed. According to CM, she had no intention of reconciling with Mason, but he tried to reconcile with her.

A few weeks later, Mason and CM had an altercation. CM told their children not to let Mason inside. But Mason kicked down CM's front door, entered her home, pushed CM, and questioned her about where and with whom she had spent the evening. CM told Mason to leave. Mason moved in with a friend, taking with him his smaller personal items and leaving his larger property at CM's house and in her garage; according to CM, Mason may have had a key to her garage, but he did not have a key to her house. CM no longer permitted Mason to enter her home without her permission and told him he could not come by unannounced.

Soon thereafter, CM began dating Terrell (Maurice) Taylor. On the evening of May 4, Taylor and CM were in CM's bedroom having sex. Hearing the dog bark, CM looked outside, saw Mason "storming" toward the house, and warned Taylor that Mason was outside. 2 Verbatim Report of Proceedings (VRP) at 95. Mason kicked open the front door, entered carrying a gun, and approached CM in the living room. Taylor ran out of the house, hearing someone tell him not to get into his car.

Inside the house, Mason threw CM's cellular telephone to the floor, grabbed her by the neck, pulled off two of her necklaces, and pushed her into the kitchen wall so hard that her head made a "depression" in it. 4 VRP at 330. According to CM, she briefly lost consciousness and awoke on the kitchen floor. When she got up to look for Taylor, she found no one in the living room or in her bedroom. Still carrying the gun, Mason returned to the front door; pulled her hair;

"grabb[ed]" her; "shov[ed] her; "curs[ed]" at her; told her, "'I should kill you right now'"[2]; grabbed and dragged her by her hair; hit her on the side of her face; picked her up; threw her on her bed[3]; and hit her once with a fraternity paddle.

Still holding the gun, Mason pulled CM outside toward her car. When CM started screaming, Mason took her back inside the house and then went outside alone. CM grabbed her cellular telephone, went upstairs, and started to call 911[4] when Mason returned with the gun and started to "rambl[e]." 2 VRP at 125. Alerted by the dog's bark and still holding the gun, Mason opened the front door, saw that the police were there, "screamed," "slammed" the door shut, and ran into the bedroom. 2 VRP at 67. When an officer knocked, Mason, now unarmed,[5] opened the door, and officers took him into custody.

When the officers entered the house, they found CM inside "very scared" and crying; the left side of her face was "severely swollen" and her hair was in "disarray," as if "it had been pulled on or grabbed." 3 VRP at 273. The officers took CM to the hospital, where she was examined in the emergency room and someone took photographs of her face. CM also suffered bruising to her forearms, left knee, ankles, left thigh, and left ear; she was diagnosed with "concussion syndrome" and a cervical sprain. 3 VRP at 211. The facial bruising lasted two weeks.

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[2] 2 VRP at 105, 107.

[3] According to CM, Mason also raped her. The jury, however, later found that the State had failed to prove this charge beyond a reasonable doubt.

[4] An officer later testified that the call did go through.

[5] Officers later found the gun under a bedroom dresser.

II. PROCEDURE

The State charged Mason with first degree burglary, unlawful imprisonment, felony harassment, second degree assault of CM,[6] third degree malicious mischief, and witness tampering.[7] The case proceeded to a jury trial.

A. Testimony

The State's witnesses testified as described above.[8] Mason testified that after he moved back into CM's house, they occasionally engaged in sexual relations. He characterized their relationship as a "back-and-forth" relationship. 5 VRP at 401. He had wanted to maintain the relationship, but CM had wavered between wanting to continue the relationship and wanting to end it. Because they had been arguing, he decided to leave and had moved out in April 2011 so they could "cool off" and "give each other a break"; he had kept a key to the house. 5 VRP at 403. Mason admitted that he had broken the front door before he moved out, but he denied having kicked it in and claimed that he had broken the door when he ran into it while playing with his sons and the family dog.

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[6] The State also charged Mason with first degree rape, but the jury acquitted him of that charge. The State originally charged Mason with second degree assault with a deadly weapon or, in the alternative, second degree assault based on the reckless infliction of substantial bodily harm. Before instructing the jury, the trial court dismissed the deadly weapon alternative means of committing second degree assault, leaving intact only the intentional assault/recklessly inflicting substantial bodily harm alternative means.

[7] The State also alleged that (1) other than the witness tampering offense, each offense was a domestic violence offense; and (2) other than the third degree malicious mischief and witness tampering offenses, Mason had committed each offense while armed with a firearm. Mason does not challenge either the resultant domestic violence findings or the firearm sentencing enhancements.

[8] At time of trial, Mason and CM were still married.

Mason further testified that he had returned CM's car on May 4 and was "going around the side of the house" to check on the house and his belongings in the garage "like [he] always [did]." 5 VRP at 410. When he saw CM having sex with Taylor, he (Mason) "turned and headed towards the front door," planning to "confront [CM] and Mr. Taylor." 5 VRP at 415. Mason testified that he had unlocked the door with his key, but he admitted that when a security chain kept the door from opening, he had "pushed" the door open with his shoulder. 5 VRP 415. CM was behind the door when it flew open, and the door hit her in the face.

Mason also admitted to having (1) told Taylor not to access his car and to come back for it later because he (Mason) did not want to risk Taylor's having a gun in the car; (2) argued with CM; (3) pushed CM into the kitchen wall hard enough that her head left a dent in the wall, because CM was "getting in his way"[9] as he attempted to collect some of his belongings[10]; (4) ripped two necklaces off CM's neck; (5) broken CM's cellular telephone; (6) kept a gun in his back pocket during most of the incident; and (7) placed the gun under the bedroom dresser before he knew the police had arrived. Mason denied, however, having (1) grabbed or struck CM, (2) threatened to kill CM or threatened Taylor, (3) noticed that CM had lost consciousness after her head hit the kitchen wall, (4) removed the gun from his back pocket except for placing it on a table when he and CM had calmed down and were sitting in the living room talking, (5)

[9] 5 VRP at 423.

[10] Mason testified that he had merely pushed her in the chest with one hand.

had the gun in his hand when he opened the front door and saw the police,[11] or (5) hidden the gun after seeing the police.

B. Motion To Exclude Evidence

After the State's final witness, the State moved to exclude two photographs depicting Mason and CM in affectionate poses during Mason's December 20, 2010 birthday party, which photographs Mason had just disclosed to the State. The trial court granted the State's motion because (1) the photographs were not relevant because they had been taken several months before the incident; and (2) Mason had not timely disclosed the photographs, which untimeliness caused additional problems, (a) admitting the photographs might require the State to present additional rebuttal testimony, from which the jury might wrongfully infer that the State had failed to disclose the photographs, and (b) no lesser sanction for the untimely disclosure was adequate.

C. Jury Instructions

The trial court's second degree assault "to convict" instruction stated:

> To convict the defendant of the crime of assault in the second degree as charged in count V, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about May 4, 2011, the defendant intentionally assaulted C.M.;
>
> (2) That the defendant thereby *recklessly inflicted substantial bodily harm* on C.M.; and
>
> (3) That this act occurred in the State of Washington.
>
> If you find form the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

[11] Instead, Mason claimed that he had been holding some black lingerie that he had purchased for CM.

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

Clerk's Papers (CP) at 197 (Jury Instruction 40) (emphasis added). The court also defined the term "recklessly" as follows:

> 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.
>
> When recklessness as to a particular result is required to establish and element of a crime, the element is also established if a person acts intentionally or knowingly as to that result.

CP at 199 (Jury Instruction 42) (emphasis added). Mason neither objected to these jury instructions nor proposed alternative wording.

D. Closing Arguments and Verdict

In closing, the State argued that (1) Mason had "recklessly inflicted substantial bodily harm" on CM when he hit her in the face, pushed her head "through the wall," and put his hands on her throat; (2) the assault had disfigured CM's face and had give her a concussion; and (3) "the assault was more than reckless infliction of harm, but that it was intentional." 6 VRP at 564. In his closing argument, Mason admitted that he had committed fourth degree assault by pushing CM into the kitchen wall. But he argued that CM's face was bruised because the door hit her in the face and that a concussion did not amount to "substantial bodily harm" because it did not result in disfigurement.

The jury found Mason guilty of the lesser included offense of first degree criminal trespass, the lesser included crime of harassment, second degree assault, and third degree malicious mischief.[12] Mason appeals these convictions.

ANALYSIS

I. INEFFECTIVE ASSISTANCE OF COUNSEL: RECKLESSNESS INSTRUCTION

Mason first argues that his trial counsel provided ineffective assistance in failing to object to the trial court's jury instruction defining "recklessly." He contends that this instruction misstated the law and relieved the State of its burden of proving an essential element of second degree assault. More specifically, he argues that the instruction should have referenced his knowledge of and disregard of a substantial risk of inflicting substantial bodily harm, rather than a substantial risk that a "wrongful act" may occur.[13] Br. of Appellant at 13.

A. Standards of Review

To prove ineffective assistance of counsel, Mason must show both that (1) his counsel's performance was deficient, and (2) this deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). To establish deficient performance, he must demonstrate that his counsel's actions fell below an objective standard of reasonableness. *State v. Townsend*, 142 Wn.2d 838, 843-44, 15 P.3d 145 (2001). To demonstrate prejudice, Mason

[12] The jury returned special verdicts finding domestic violence and firearm possession, which are not before us in this appeal. The jury also found Mason not guilty of (1) first degree rape, (2) first degree burglary or the lesser included offense of residential burglary, (3) unlawful imprisonment, (4) felony harassment, and (5) witness tampering.

[13] Mason does not argue that we can review this issue directly under RAP 2.5(a).

must demonstrate a reasonable probability that the outcome would have been different absent the deficient performance. *Townsend*, 142 Wn.2d at 844. Because we hold that Mason fails to demonstrate prejudice, we do not address the first, deficient performance prong of the test.

We review challenged jury instructions de novo. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Jury instructions must inform the jury that the State bears the burden of proving each essential element of a criminal offense beyond a reasonable doubt. *State v. Peters*, 163 Wn. App. 836, 847, 261 P.3d 199 (2011). It is reversible error "to instruct the jury in a manner" that would relieve the State of this burden. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996). As a general rule, "jury instructions are sufficient when, read as a whole, they accurately state the law, do not mislead the jury, and permit each party to argue its theory of the case." *State v. Teal*, 152 Wn.2d 333, 339, 96 P.3d 974 (2004).

B. No Prejudice

To establish prejudice here, Mason must demonstrate a "reasonable probability" that the trial's outcome (a verdict of guilty on the second degree assault charge) would have been different had the trial court instructed the jury that a person acts recklessly when he knows of and disregards a substantial risk that *substantial bodily harm* may occur. *Townsend*, 142 Wn.2d at 844. "Reasonable probability" means "sufficient to undermine the confidence in the outcome." *Strickland*, 466 U.S. at 694. We hold that Mason does not establish prejudice.

The trial court's "to convict" instruction specifically required the jury to find that Mason had "recklessly inflicted substantial bodily harm on C.M,"[14] thus, relating the "wrongful act" of the "reckless" definitional instruction[15] (slamming CM's head into the wall and hitting her in the face) to the "substantial bodily harm" element of second degree assault set forth in the "to convict" instruction.[16] Even if the trial court had instructed the jury that it must find that Mason knew of and disregarded a substantial risk that his actions may cause *substantial bodily harm*, there is no reasonable probability that the jury would have rendered a different verdict because the evidence was uncontroverted that Mason slammed CM's head into the wall hard enough to leave a dent in the wall and to cause CM to lose consciousness. Any reasonable person would understand that this type of physical force is likely to result in substantial bodily harm.[17] Because Mason fails to show that there is a reasonable probability that the outcome of the trial could have been different had the trial court given the instruction that he now advocates the trial court should have given, he does not establish prejudice; and his ineffective assistance of counsel claim fails. *Townsend*, 142 Wn.2d at 844.

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[14] CP at 197 (Jury Instruction 40).

[15] CP at 199 (Jury Instruction 42).

[16] CP at 197 (Jury Instruction 40).

[17] RCW 9A.04.110 defines substantial "bodily harm" as follows:

> "Substantial bodily harm" means bodily injury which involves a temporary but substantial disfigurement, or which cause a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.

A loss of consciousness is clearly a temporary but substantial loss or impairment of the function of any bodily part.

II. INFORMATION

Mason next argues that the information was deficient because it omitted the "true threat" element of harassment. Br. of Appellant at 20. We disagree. In *State v. Allen*,[18] our Supreme Court held that "true threat" is not an essential element that the State is required to include in the information and that a charging document alleging felony harassment is sufficient if it alleges that the defendant knowingly threatened the victim. 176 Wn.2d 611, 627, 630, 294 P.3d 679 (2013). Here, the information specifically alleged that Mason knowingly threatened CM.[19] Thus, under *Allen*, the information was sufficient.

III. EXCLUSION OF PHOTOGRAPHS

Finally, Mason argues the trial court erred in excluding two photographs on grounds that they were not relevant and not timely provided in discovery. Holding that the trial court did not err in ruling that the photographs were irrelevant, we do not address the trial court's alternative discovery violation ground for excluding them.

We review a trial court's admission of evidence for abuse of discretion. *Pirtle*, 127 Wn.2d at 648. "'A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds.'" *State v. Perrett*, 86 Wn. App. 312, 319, 936 P.2d 426 (1997)

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[18] Our Supreme Court filed *Allen* a few weeks after Mason filed his opening brief in this appeal.

[19] The information stated in part:

> That MAXIMUS DWAYNE MASON, in the State of Washington, on or about the 4th day of May, 2011, without lawful authority, did unlawfully, *knowingly threaten* C.M. to cause bodily injury, immediately or in the future, to that person or to any other person, and by words or conduct place the person threatened in reasonable fear that the threat would be carried out[.]

CP at 21 (emphasis added).

(quoting *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 168, 876 P.2d 435 (1994)), *review denied*, 133 Wn.2d 1019 (1997). Generally, we give deference to the trial court's exercise of its discretion in regard to evidentiary matters. *See State v. French*, 157 Wn.2d 593, 605, 141 P.3d 54 (2006) (citing *State v. Luvene*, 127 Wn.2d 690, 706-07, 903 P.2d 960 (1995)). Mason has the burden of proving abuse of discretion. *State v. Hentz*, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), *rev'd on other grounds*, 99 Wn.2d 538, 663 P.2d 476 (1983).

The trial court excluded these photographs—of Mason and CM sharing affectionate moments several months before the May 4 incident—because they were not relevant under ER 401. ER 401 defines "relevant" evidence as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Under ER 401, evidence is not considered relevant unless it has a tendency to prove or disprove a fact that is of some consequence in the context of the other facts and the applicable substantive law. 5D KARL B. TEGLAND, WASHINGTON PRACTICE: COURTROOM HANDBOOK ON WASHINGTON EVIDENCE, Rule 401 at 212–13 (2012–13 ed.) (citing *State v. Sargent*, 40 Wn. App. 340, 698 P.2d 598 (1985)). Stated another way, evidence is relevant if "a logical nexus exists between the evidence and the fact to be established." *State v. Burkins*, 94 Wn. App. 677, 692, 973 P.2d 15 (1999), *review denied*, 138 Wn.2d 1014 (1999). The threshold for evidentiary relevance is low: "Even minimally relevant evidence is admissible." *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

Mason argued to the trial court that these photographs were admissible because they showed that, despite their separation and CM's claim that she was finished with the relationship as early as November 2010, he and CM were still on affectionate terms when these photographs

were taken the following month in December 2010. But the incidents at issue here occurred several months later, in May 2011, well after the photographs were taken and well before CM made Mason move out of the family home in April 2011. Furthermore, CM never claimed that she did not still have an affectionate relationship with Mason; on the contrary, her own testimony established that they shared a bed as late as April 2011. Thus, these December 2010 photographs were both merely cumulative and irrelevant to their relationship status as of May 2011, the time of the incident at issue here.[20] Deferring to the trial court's exercise of discretion in making evidentiary rulings, we hold that the trial court did not abuse its discretion when it excluded this evidence.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Worswick, C.J.

Penoyar, J.

[20] We also disagree with Mason's assertion these photographs were relevant to whether CM had given him a key to her house. We see no abuse of discretion by the trial court in rejecting his argument that photos showing him and CM being affectionate during his birthday celebration were relevant to whether CM was or was not willing to give Mason a house key several months later.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	SUPREME COURT NO._____
v.	)	COA NO. 43235-8-II
	)	
MAXIMUS MASON,	)	
	)	
Petitioner.	)	

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 29TH DAY OF JANUARY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MAXIMUS MASON
DOC NO. 356713
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF JANUARY 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

January 29, 2014 - 2:21 PM

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Court of Appeals Case Number: 43235-8

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