69059-1

69059-1

NO. 69059-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

RYAN STEPHENSON,

Appellant.

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

The Honorable Alan Hancock, Judge

BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR 1

Issues Pertaining to Assignments of Error 1

B. STATEMENT OF THE CASE 2

1. Procedural Facts 2

2. Substantive Facts 3

(a) Relevant Trial Testimony & Exhibits 3

(b) Jury Instructions & Closing Argument 8

C. ARGUMENTS 10

1. THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON SECOND DEGREE ASSAULT REQUIRES REVERSAL OF THE FIRST DEGREE ASSAULT CONVICTION. 10

2. IF DEFENSE COUNSEL FAILED TO PROVIDE SUPPORT FOR THE SECOND DEGREE ASSAULT INSTRUCTION, STEPHENSON WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL. 14

3. THE TRIAL COURT ERRED BY ORDERING A 60-YEAR MINIMUM TERM OF CONFINEMENT. 16

D. CONCLUSION 20

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re Mota
114 Wn.2d 465, 788 P.2d 538 (1990) 17

In re West
154 Wn.2d 204, 110 P.3d 1122 (2005) 16, 17, 18, 19

In re Williams
121 Wn.2d 655, 853 P.2d 444 (1993) 17

State v. Berlin
133 Wn.2d 541, 947 P.2d 700 (1997) 11

State v. Fernandez-Medina
141 Wn.2d 448, 6 P.3d 1150 (2000) 10, 14

State v. Foster
91 Wn.2d 466, 589 P.2d 789 (1979) 12

State v. Kyllo
166 Wn.2d 856, 215 P.3d 177 (2009) 15

State v. Parker
102 Wn.2d 161, 683 P.2d 189 (1984) 14

State v. Peterson
133 Wn.2d 885, 948 P.2d 381 (1997) 11

State v. Thomas
109 Wn.2d 222, 743 P.2d 816 (1987) 15, 16

State v. Young
22 Wash. 273, 60 P. 650 (1900) 14

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

Beck v. Alabama
447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980) 11

Strickland v. Washington
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 15

RULES, STATUTES AND OTHER AUTHORITITES

Former RCW 9.94A.150 17

RCW 9.94A.507 19

RCW 9.94A.540 ..... 18, 19

RCW 9.94A.589 2

RCW 9.94A.728 18

RCW 9.94A.729 17

RCW 9A.36.011 12

RCW 9A.36.021 12

RCW 10.61.006 10

Wash. Const. Amend. VI 15

U.S. Const. art. I, § 22 15

A. ASSIGNMENTS OF ERROR

1. The trial court erred by refusing to instruct the jury on second degree assault as an inferior degree offense to first degree assault.

2. If the trial court did not err by refusing to instruct the jury on second degree assault because defense counsel failed to articulate the correct legal theory upon which it was warranted, then Appellant was deprived of his constitutional right to effective assistance of counsel.

3. The trial court erred by stating on the judgment and sentence, "60 year [sic] minimum ordered by court." CP 6.

Issues Pertaining to Assignments of Error

1. Did the trial court commit reversible error by refusing Appellant's request to instruct the jury on second degree assault as an inferior degree offense to the charge of first degree assault of a child when Appellant admitted assaulting the child, but there was affirmative evidence he lacked the requisite intent required for first degree assault?

2. If the trial court did not err by refusing to instruct the jury on second degree assault because defense counsel failed to articulate the correct legal theory upon which it was warranted, was Appellant deprived of his constitutional right to effective assistance of counsel?

3. Should the statement on the judgment and sentence, "60 year [sic] minimum ordered by court" be stricken because it unlawfully

precludes the Department of Corrections from awarding earned early release credits during the 60-year term?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Island County Prosecutor charged appellant Ryan Stephenson with first degree rape and first degree assault of a child, claiming that on May 27, 2011, he raped and assaulted the 21-month-old "ERJ". Supp. CP __ (sub No. 144, Fourth Amended Information, 4/2/12). The State also alleged: (1) the child was under 15 at the time of the rape; (2) Stephenson abused a position of trust in assaulting ERJ; and (3) ERJ was particularly vulnerable to the rape and assault. Id. .

Stephenson was convicted as charged, and the jury found the special allegations and aggravating factors proved. CP 32-37.

The trial court imposed exceptional sentences of 35 years to life for the rape, and 25 years for the assault. CP 5-6; 9RP 32. Finding the offenses "arose from distinct and separate criminal conduct," the court ordered the sentenced served consecutively under RCW 9.94A.589(1)(b). CP 4, 6-7; 9RP 27, 32. The judgment and sentence provides, "60 year [sic] minimum ordered by court", which reflects the court's decision at sentencing that, "The total minimum confinement will be 60 years." CP 6; 9RP 32.

2. Substantive Facts[1]

(a) Relevant Trial Testimony & Exhibits

Stephenson met Sarah Johnson in 2002, and they began an "[o]ff and on" romantic relationship over the following eight to nine years. 8RP 124. During that time they lived together three or four times, the longest being for about one year. 8RP 125. They had a son, OEJ, in March 2006. 8RP 122-23.

When OEJ was about two, Johnson had a brief romantic relationship with Sean Turner. 8RP 126. Johnson and Turner had a daughter, ERJ, on August 9, 2009. 8RP 122-23, 127.

Johnson and her children lived in an apartment in Oak Harbor. 8RP 129. Johnson and Stephenson again began living together in March 2011, but the relationship soured and Johnson expected Stephenson to move out on May 27. 8RP 129-30, 136-38, 157-58. On that day, Johnson left the children with Stephenson for the morning while she attended an appointment. 8RP 138. The children were eating breakfast when Johnson

[1] There are fourteen volumes of verbatim report of proceedings referenced as follows: **1RP** - 9/15/11; **2RP** 10/17/11; **3RP** 1/27/12; **4RP** 2/3/12; **5RP** - two-volume, consecutively paginated set for the dates of 2/10/12 & 2/13/12; **6RP** - 2/14/12; **7RP** - 4/9/12; **8RP** - five-volume, consecutively paginated set for the dates of 4/10/12, 4/11/12, 4/12/12, 4/16/16 & 4/17/12; and **9RP** - 6/15/12.

left and she was not worried about leaving them with Stephenson. 8RP 138-39, 152.

During her appointment, Johnson received a phone call from a frantic Stephenson. 8RP 140. He said ERJ was hurt and bleeding, that he had nothing to do with it, and that she needed to arrange for ERJ to go to the hospital. 8RP 141. Stephenson explained he had "heard a bunch of banging and thud [sic] and jumping" coming from OEJ's room, but when he checked on the children they appeared fine. When he changed ERJ's diaper, however, he discovered she was bleeding. 8RP 141.

Johnson called her parents about 9:30 a.m. and arranged for them to take ERJ to the hospital. 8RP 35, 142. , When the parents arrived at about 10 a.m., they saw ERJ on the floor with her head on a pillow. 8RP 35, 47-48. She was pale, panting and lethargic. The child's hands were cold, and when they checked her diaper they discovered bloody wash clothes inside and that she was bleeding. 8RP 35-36, 48.

When they asked Stephenson what happened, he said ERJ and OEJ had been upstairs "playing real hard." 8RP 37. When he heard ERJ scream, he went to check on them and saw blood in ERJ's diaper. 8RP 37, 48. Stephenson said something like "they will try to pin this on me." 8RP 49.

The Johnsons took ERJ to the hospital. Stephenson stayed behind with his son. 8RP 49-50.

Emergency room doctor Helene Lhamon examined ERJ and concluded she was abused and may have suffered "nonaccidental trauma." 8RP 183. ERJ had bruising and tearing of the vaginal area and rectum. 8RP 183. Dr. Lhamon suspected sexual assault. 8RP 183.

ERJ was airlifted to Harborview Medical Center. 8RP 186. She received surgery to repair fourth degree perineal lacerations and penetrating trauma. 8RP 294, 296, 298. ERJ was discharged on June 1, 2011, and she and her brother were placed in the care of their maternal aunt. 8RP 99, 157, 803.

Detectives Anthony Slowik and Carl Seim went to Johnson's apartment shortly after noon on the day of the incident. 8RP 193-94, 394. Stephenson said he was expecting them and agreed to talk. 8RP 196.

Stephenson initially said OEJ told him he put something into his sister's rectum. 8RP 207. When Slowik replied "that wasn't possible[,]" Stephenson responded that he did not know how ERJ got hurt, and suggested maybe she fell on something. 8RP 208. Stephenson also offered that he had been playing with ERJ that morning, tossing her in the air and letting her land on his lap, and wondered whether that might have caused the injuries. 8RP 398. Stephenson also said he had been having

ERJ do the splits and wondered whether that could have been the cause, noting he accidentally over-stretched her legs at one point. 8RP 399.

When another officer arrived and told Stephenson she knew he had something to do with ERJ's injuries, Stephenson responded that "he was pretty sure it was of his doing. He just didn't know how." 8RP 415. He said he was willing to admit he "somehow" hurt her, even sexually, but not on purpose. 8RP 420. When asked if he was willing to take a polygraph, Stephenson said he just wanted to be alone. 8RP 421. He was instead arrested and transported to the police station. 8RP 423.

At the station Stephenson admitted he had gotten angry with ERJ for playing with some DVDs, and spanked her seven to nine times. 8RP 426. When asked to elaborate, Stephenson explained he punched her in her "bottom area" between 12 and 20 times. 8RP 427. He eventually sent ERJ upstairs, and when he checked on her later she was laying face down on the floor and appeared to be sleeping. 8RP 434. When she would not get up and walk downstairs, Stephenson said he picked her up and carried her down, and then punched her in the "butt" another 20 to 30 times. 8RP 434-35. In a written statement, however, Stephenson described only a single punching incident. 8RP 435, 438; Ex. 126.

During an interview on June 1, Stephenson said he became angry at ERJ because she was taking so long to finish her breakfast. He punched

her in the "butt" to the point that she defecated. 8RP 476. After he changed her diaper, Stephenson folded ERJ's legs, put her inside OEJ's backpack, and zipped it closed. He then swung the pack around and tried to toss her onto the couch. 8RP 477-78. The backpack hit the edge of the couch and fell to the floor, at which point Stephenson kicked the pack several times as hard as he could. 8RP 478. He then released ERJ and sent her upstairs to her brother's room. 8RP 480.

When he later went to check on ERJ, Stephenson found her lying face down on the floor as if sleeping. 8RP 480-81. This angered him, so when ERJ did not respond fast enough to his command to go downstairs, he carried her down, again put her over his leg, and repeatedly punched her in the "butt area." 8RP 481. When he then changed her diaper, Stephenson saw she was bloody and injured. 8RP 481.

Stephenson ended the interview at that point, but asked to retrieve a written statement from his jail cell. 8RP 481. Stephenson's written description of events was generally consistent with what he said during the interview, although the statement provides he kicked the pack "a couple of times" without indicating how hard. Ex. 127. Stephenson also wrote that when he discovered ERJ's injuries he realized he had "gone too far[.]" Ex. 127. He called the event "a major accident" and said he was "mentally

and emotionally scared" by what he did to "an innocent little girl." Ex. 127.

(b) Jury Instructions & Closing Argument

Stephenson's counsel requested a second degree assault instruction as a lesser offense to the charge of first degree child assault. CP 70-77, 79-81. The prosecutor conceded Stephenson could satisfy the legal prong of the standard for a lesser degree instruction, but disputed he could meet the factual prong. Supp. CP __ (sub no. 154A, State's Response to Defendant's Motion for Second Degree Assault Instruction, 4/16/12). During an initial colloquy, the parties reiterated the positions set forth in their briefs and responded to questions from the court, but the matter was never resolved. 8RP 383-91.

Following the prosecution's case-in-chief, defense counsel moved to dismiss both charges for lack of evidence. 8RP 568-70. The prosecutor explained the assault charge was based on a theory that Stephenson used force sufficient to cause great bodily injury when he kicked the backpack, not that great bodily injury resulted from the kicking. 8RP 571-72.

The court denied the motion as to both counts. 8RP 570, 573-75. With respect to assault, the court concluded the State produced sufficient evidence to show Stephenson acted with the requisite intent to inflict great bodily harm. 8RP 574.

The parties then addressed the propriety of a second degree assault instruction. 8RP 579-94. The prosecutor again said it was relying solely on "the kicking" for the assault charge. 8RP 594. The trial court refused the lesser degree instruction, concluding the facts failed to support a rational inference Stephenson "committed only the inferior degree offense to the exclusion of the greater offense[.]" 8RP 613 (emphasis in original). The court cited to child abuse specialist Dr. Rebecca Wiester's testimony that an adult male who places a 21-month-old child in a backpack and repeatedly kicks the pack uses "force likely to cause serious permanent disfigurement" or even death. 8RP 556-57, 614-15.

During closing argument the prosecutor acknowledged that to convict Stephenson of first degree assault the jury had to find he intended to produce great bodily harm when he tossed and kicked the backpack with ERJ inside. 8RP 631-32. And in rebuttal the prosecutor reminded the jury, "You don't have to find any injury for assault in the first degree in this case. The assault in the first degree in this case is proved by the force used and the defendant's intent while he was doing it." 8RP 653.

Conversely, defense counsel argued the prosecution failed to prove the intent necessary to convict Stephenson of first degree assault, noting Stephenson eventually "recognized he went too far, called for help, did not

run away. He did not have the intent to inflict that level of bodily harm. He intended to punish her and he went too far." 8RP 644-45, 647.

C. ARGUMENTS

1. THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON SECOND DEGREE ASSAULT REQUIRES REVERSAL OF THE FIRST DEGREE ASSAULT CONVICTION.

There was affirmative evidence Stephenson lacked the intent to inflict great bodily harm against ERJ when he kicked the backpack. It is thus reasonably possible that one or more jurors would have voted to convict Stephenson of second degree assault instead of first degree assault of a child. The trial court's refusal to instruct the jury to allow for this possibility deprived Stephenson of the full benefit of the reasonable-doubt standard and his ability to argue his theory of the case. This Court should therefore reverse Stephenson's first degree assault conviction.

RCW 10.61.003 provides:

> Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

The accused is entitled to have the jury instructed on his theory of the case where the instructions are supported by the evidence. State v. Fernandez-Medina, 141 Wn.2d 448, 453, 461, 6 P.3d 1150 (2000).

Instructing the jury as to an inferior degree offense is proper when (1) the statutes for the charged and proposed inferior degree offense outlaw just one offense; (2) the proposed crime is an inferior degree of the charged offense; and (3) there is evidence the accused committed only the inferior offense. State v. Peterson, 133 Wn.2d 885, 891, 948 P.2d 381 (1997). When determining if the evidence is sufficient to support an inferior degree instruction, courts must view the supporting evidence in the light most favorable to the party requesting the instruction. Fernandez-Medina, 141 Wn.2d at 455-56.

This rule serves several purposes. First, it ensures the defendant receives constitutionally adequate notice of all possible charges. State v. Berlin, 133 Wn.2d 541, 545, 947 P.2d 700 (1997). Second, it allows the defendant to present his theories of the case to the jury. 133 Wn.2d at 545, 548. Third, it affords the jury the benefit of a third option, in addition to conviction or acquittal on the charged offense. By doing so, "it accord[s] the defendant the full benefit of the reasonable-doubt standard." Beck v. Alabama, 447 U.S. 625, 633-34, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). The Beck Court noted the potential unfairness that arises "[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction." 447 U.S. at 634.

Second degree assault is an assault that does not amount to first degree assault. RCW 9A.36.021(1). Second degree assault is, by definition, an inferior degree offense to first degree assault. State v. Foster, 91 Wn.2d 466, 472, 589 P.2d 789 (1979). Thus, the only issue is whether there was evidence Stephenson committed only second degree assault.

To convict Stephenson of first degree assault of a child as charged and tried, the jury had to find beyond a reasonable doubt that, (1) he committed the crime of first degree assault against ERJ when he kicked the backpack, (2) Stephenson was 18 years of age or older and ERJ was under 13 years of age, and (3) the acts occurred in Island County. CP 58 (Instruction 18); Supp. CP __ (sub no. 144, supra). Elements (2) and (3) were undisputed.

To find the first element, the jury had to find Stephenson assaulted ERJ with intent to inflict great bodily harm when he kicked the backpack, and did so in a manner likely to produce great bodily injury or death. CP 54 (Instruction 14, Appendix); 8RP 631-32; RCW 9A.36.011(1)(a). Stephenson did not dispute that he kicked the backpack. Stephenson did, however, dispute whether he did so with the "intent to inflict great bodily harm" or death. 8RP 644.

There was evidence to support a conclusion Stephenson lacked the requisite intent for first degree assault when he kicked the pack. For example, during his initial interview at the apartment, Stephenson conceded he may have "hurt her even sexually. Purposely no." 8RP 420. This statement provides affirmative evidence that Stephenson never intended *any* injury to ERJ, much less great bodily injury.

And in his written statement, Stephenson described kicking the pack "a couple of times" without indicating how hard. Ex. 127. More importantly, Stephenson wrote he had "gone too far, She wasn't suppose[d] to be hurt like this". Ex. 127. The statement concludes by describing the event as "a major accident and now I am mentally and emotionally scared by the vision of what I did to an innocent little girl." Ex. 127. Like his first verbal statement that he did not purposefully hurt her, his written statement that "[s]he wasn't suppose[d] to be hurt like this" constitutes affirmative evidence that Stephenson lacked the requisite intent to commit first degree assault.

Similarly, during his second interview, Stephenson explained he did not know what part of ERJ's body his kicks were striking, only that he was thinking of ERJ's father as he did so. 8RP 478-79. From this evidence a reasonable juror could conclude Stephenson lacked the intent to inflict great bodily harm to ERJ because his thoughts were not on

hurting ERJ, but instead on her father, Sean Turner. When coupled with his comments that he did not purposefully hurt ERJ and that she "wasn't suppose[d] to be hurt like this", there was evidence a juror could have relied on to find Stephenson guilty of second degree assault to the exclusion of first degree assault.

Defendants have an unqualified right to a lesser offense instruction if there is "'even the slightest evidence'" that only the lesser was committed. State v. Parker, 102 Wn.2d 161, 163 64, 683 P.2d 189 (1984) (quoting State v. Young, 22 Wash. 273, 276 77, 60 P. 650 (1900)). Reversal is required when a trial court refuses to give a supported lesser offense instruction. Parker, 102 Wn.2d at 163-64 (defendant need not show prejudice where trial court failed to give valid lesser offense instruction); Fernandez-Medina, 141 Wn.2d 462 (failing to give appropriate lesser degree instruction is reversible error). Because Stephenson was denied that right, his assault conviction must be reversed.

2. IF DEFENSE COUNSEL FAILED TO PROVIDE SUPPORT FOR THE SECOND DEGREE ASSAULT INSTRUCTION, STEPHENSON WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

The State may argue defense counsel's failure to articulate the proper legal and/or factual basis for the second degree assault instruction constitutes a waiver of that issue for appeal, despite a record showing the

trial court was aware of the intent element necessary to prove first degree assault of a child. See 8RP 574 (trial court refers to this element specifically when denying the defense motion to dismiss the assault charge). Assuming, arguendo, this Court agrees with the State, Stephenson was deprived of his constitutional right to effective assistance of counsel and reversal of the assault conviction is still required.

A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and Article I, Section 22 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).

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; Thomas, 109 Wn.2d at 225-26.

Here, although counsel requested a second degree assault instruction, he arguably never specified the legal and factual bases supporting the instruction. That is, counsel did not specifically argue Stephenson's statements that he did not purposefully hurt ERJ and that she "wasn't suppose[d] to get hurt like this" constituted affirmative evidence

that he lacked the requisite intent for first degree assault. To the extent counsel had such a duty, counsel's failure constitutes deficient performance.

Stephenson was prejudiced by counsel's deficient performance because there is a reasonable probability that but for counsel's failure the court would have given the inferior degree offense instruction and, had it done so, there is a reasonable probability Stephenson would not have been convicted of first degree assault. Stephenson's first degree assault conviction should therefore be reversed. Thomas, 109 Wn.2d at 229.

3. THE TRIAL COURT ERRED BY ORDERING A 60-YEAR MINIMUM TERM OF CONFINEMENT.

Because the trial court's handwritten notation providing for a "60 year [sic] minimum ordered by court" is part of the judgment and sentence, it carries "the imprimatur of the trial court." In re West, 154 Wn.2d 204, 207, 110 P.3d 1122 (2005). The Department of Corrections (DOC) will therefore likely "consider itself bound by the trial court's writing and read[] it to prohibit the application of early release time." Id. To the extent the notation undermines the DOC's authority to award earned early release time, it is unlawful and must be stricken.

A trial court commits reversible error when it exceeds its sentencing authority. West, 154 Wn.2d at 211. Faced with a first degree

robbery charge, West pleaded guilty to the reduced charge of first degree theft in exchange for a stipulation to a 10-year exceptional sentence and waiver of earned early release time. Id. at 207. The trial court sentenced West to 10 years and wrote on the judgment and sentence that "defendant stipulates to flat time -- no earned early release." Id. at 208.

The Supreme Court found the judgment and sentence invalid. It held that under former RCW 9.94A.150(1), only correctional agencies have authority to calculate an offender's earned early release time. 154 Wn.2d at 212-13. That statute provided that a sentence

> may be reduced by earned early release time in accordance with procedures that shall be developed and promulgated by the correctional agency having jurisdiction in which the offender is confined. The earned early release time shall be for good behavior and good performance, as determined by the correctional agency having jurisdiction.

Former RCW 9.94A.150(1).[2]

The West Court found that former RCW 9.94A.150 provided no authority for the superior court to grant or deny early release time. 154 Wn.2d at 212 (citing In re Mota, 114 Wn.2d 465, 478, 788 P.2d 538 (1990)). It also found the purpose of good time or earned early release time serves important disciplinary goals. Id. (citing In re Williams, 121 Wn.2d 655, 661, 853 P.2d 444 (1993)). After considering the plain

---

[2] The current version of the statute, RCW 9.94A.729(1)(a), includes the identical language.

language of the statute as well as the purpose for earned early release time, the Court held a sentencing court has no authority to limit the awarding of such time. Id. at 213. Because the sentencing court lacked the authority to restrict the imposition of earned early release time, West's judgment and sentence was fundamentally defective and justified collateral relief. Id. at 213. The Court remanded for correction of the invalid judgment and sentence.

The handwritten notation on Stephenson's judgment and sentence is similar to the erroneous notation discussed in West. By setting a "minimum" term of 60 years, the court memorialized its oral proclamation that Stephenson's "total minimum confinement will be 60 years." CP 6; 9RP 32. This could be read as a prohibition on earned early release time. As in West, this was error.

It is true that Stephenson cannot earn earned early release on the first five years of his sentence for the first degree rape conviction. RCW 9.94A.540(1)(c) & (2) (requires five year minimum term of "total confinement" which is not subject to reduction of any kind, including earned early release credits); RCW 9.94A.728(9)(must serve entire minimum term of total confinement imposed under RCW 9.94A.540). And although the jury found ERJ was under age 15, which mandated a 25-year "minimum term," no corresponding restriction on earned early release

time applies. See RCW 9.94A.507(c)(2) (setting minimum term for first degree rape of a victim under age 15 at 25 years, with no limiting language similar to RCW 9.94A.540(2)).

Likewise, Stephenson's 25-year sentence for assault carries no applicable statutory minimum terms of "total confinement." The authority to impose an aggravated exceptional sentence does not include the authority to restrict the DOC's ability to award earned early release credits for good performance and behavior. See RCW 9.94A.535 (lacks a provision similar to RCW 9.94A.540(2)). This makes sense in light of the important disciplinary goals that the ability to awards such credits serves for DOC. West, 154 Wn.2d at 212.

As in West, by eliminating the DOC's ability to award Stephenson early release credits, the court exceeded its sentencing authority. This Court should remand for the trial court to strike the offending provision.

D. CONCLUSION

The trial court's refusal to instruct Stephenson's jury on second degree assault requires reversal of the assault conviction. Alternatively, Stephenson was denied his right to effective assistance of counsel as to that charge and therefore it must be reversed.

In addition, trial court exceeded its sentencing authority by designating on the judgment and sentence, "60 year [sic] minimum ordered by court." CP 6. This Court should remand with direction to strike that provision.

DATED this 16th day of January 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

CHRISTOPHER H. GIBSON
WSBA No. 25097
Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 69059-1-I
	)	
RYAN STEPHENSON,	)	
	)	
Appellant.	)	

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 16TH DAY OF JANUARY, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ISLAND COUNTY PROSECUTING ATTORNEY
P.O. BOX 5000
COUPEVILLE, WA 98239

[X] RYAN STEPHENSON
DOC NO. 325274
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF JAUARY, 2013.

X Patrick Mayovsky