

NO. 36639-8

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

LARRY ALLEN DAY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frederick Fleming, Presiding Judge

No. 06-1-02286-8

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. Was there sufficient evidence for a trier of fact to find defendant guilty of attempted assault in the second degree when defendant took a substantial step toward the crime? .. 1

2. Was there sufficient evidence for a trier of fact to find the crimes of attempted assault in the second degree and reckless burning were crimes of domestic violence where a pattern of abuse could be shown? 1

3. Was there sufficient evidence for a trier of fact to find the crime of reckless burning was a crime of domestic violence where defendant committed the crime with deliberate cruelty? 1

4. Was defendant’s sentence excessive where the trier of fact found aggravating factors present and the judge sentenced defendant within the statutory maximum? 1

B. STATEMENT OF THE CASE. 1

1. Procedure..... 1

2. Facts 4

C. ARGUMENT..... 9

1. THE EVIDENCE AGAINST DEFENDANT WAS SUFFICIENT FOR A JURY TO FIND HIM GUILTY OF ATTEMPTED ASSAULT IN THE SECOND DEGREE AND TO FIND THAT BOTH THAT CRIME AND THE CRIME OF RECKLESS BURNING WERE CRIMES OF DOMESTIC VIOLENCE 9

2. DEFENDANT’S SENTENCE WAS NOT EXCESSIVE
GIVEN IT WAS WITHIN THE STATUTORY
MAXIMUM AND WAS BASED ON THE JURY
FINDINGS ON THE DOMESTIC VIOLENCE
AGGRAVATORS.....20

D. CONCLUSION.23

Table of Authorities

State Cases

<i>In re Mayer</i> , 128 Wn. App. 694, 701-702, 117 P.3d 353 (2005).....	23
<i>State v. Aumick</i> , 126 Wn.2d 422, 426 n.12, 894 P.2d 1325 (1995).....	11
<i>State v. Baird</i> , 83 Wn. App. 477, 487, 922 P.2d 157 (1996)	20
<i>State v. Barnett</i> , 104 Wn. App. 191, 16 P.3d 74 (2001)	13
<i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....	10
<i>State v. Gerber</i> , 28 Wn. App. 214, 217, 622 P.2d 888 (1981)	9
<i>State v. Goodman</i> , 108 Wn. App. 355, 362, 30 P.3d 516 (2001), <i>review denied</i> , 145 Wn.2d 1036, 43 P.3d 20 (2002)	17, 18
<i>State v. Green</i> , 94 Wn.2d 216, 221, 616 P.2d 628 (1980)	9
<i>State v. Lubers</i> , 81 Wn. App. 614, 619, 915 P.2d 1157 (1996)	9
<i>State v. Rangel-Reyes</i> , 119 Wn. App. 494, 499, 81 P.3d 157 (2003).....	9
<i>State v. Richie</i> , 126 Wn.2d 388, 394, 894 P.2d 1308 (1995).....	21
<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)	9
<i>State v. Scott</i> , 72 Wn. App. 207, 214, 866 P.2d 1258 (1993)	17, 20, 21
<i>State v. Strauss</i> , 54 Wn. App. 408, 418, 773 P.2d 898 (1989)	17
<i>State v. Theroff</i> , 25 Wn. App. 590, 593, 608 P.2d 1254 (1980).....	9
<i>State v. Townsend</i> , 147 Wn.2d 666, 57 P.3d 255 (2002).....	11
<i>State v. Workman</i> , 90 Wn.2d 443, 451, 584 P.2d 382 (1978).....	11

Statutes

RCW 10.99.020(5) 13

RCW 9.94A.53520

RCW 9.94A.535(3).....12

RCW 9.94A.535(3)(h).....13

RCW 9.94A.535(3)(h)(i) 13, 21

RCW 9.94A.535(3)(h)(iii)..... 13, 21

RCW 9.94A.537(3).....13

RCW 9.94A.537(6).....20

RCW 9.94A.585(4).....20

RCW 9A.20.02120

RCW 9A.28.020(1).....10

RCW 9A.36.021 (a) and (c).....11

Rules and Regulations

CrR7.8(a)23

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was there sufficient evidence for a trier of fact to find defendant guilty of attempted assault in the second degree when defendant took a substantial step toward the crime?
2. Was there sufficient evidence for a trier of fact to find the crimes of attempted assault in the second degree and reckless burning were crimes of domestic violence where a pattern of abuse could be shown?
3. Was there sufficient evidence for a trier of fact to find the crime of reckless burning was a crime of domestic violence where defendant committed the crime with deliberate cruelty?
4. Was defendant's sentence excessive where the trier of fact found aggravating factors present and the judge sentenced defendant within the statutory maximum?

B. STATEMENT OF THE CASE.

1. Procedure

On May 22, 2006, defendant Larry Day was arraigned on three counts of attempted murder, one count of arson in the first degree, and one count of attempted assault in the second degree. CP 1-4. The attempted murder counts and attempted assault count had firearm enhancements. CP

1-4. The charges were amended on May 21, 2007, to add the domestic violence aggravator language to all five counts and to add the count of violation of a protection order. CP 61-63.

The case was assigned out for trial on May 22, 2007, and the CrR 3.5 and 3.6 motions were heard on May 24, 2007. RP 4, 78-313. The charges were amended a second time on May 29, 2007. CP 61-63. The State removed the domestic violence enhancement from the two attempted murder counts that involved Melissa and Scott Cleary and corrected the domestic violence aggravator language. CP 61-63, RP 320-1.

Jury trial began on May 29, 2007, before the Honorable Frederick Fleming. RP 330. A third amended information was filed on June 6, 2007. CP 143-147. However, the court denied the filing of the third amended information as being prejudicial to defendant. RP 797. The court then ordered the State to prepare jury instructions consistent with the current information, effectively increasing the State's burden on the arson charge. RP 796-9. At the close of the State's case, defense moved to have the domestic violence aggravators dismissed. RP 834. The court ruled

that the domestic violence aggravators would go to the jury. RP 841. The parties also argued about a firearm enhancement on the arson charge and the judge ruled it could go to the jury. RP 841-6.¹

The jury found defendant not guilty of all three counts of attempted murder as well as the lesser included crimes of attempted murder in the second degree. RP 966-8. The jury found defendant not guilty of the crime of arson in the first degree, but did find defendant guilty of the lesser included crime of reckless burning. RP 968. The jury also found defendant guilty of attempted assault in the second degree while armed with a firearm. RP 969. The jury found that the reckless burning and attempted assault counts were crimes of domestic violence and answered yes to the aggravator language on both. RP 968-70. Finally, the jury found defendant guilty of violation of a protection order. RP 970.

The court held sentencing on July 20, 2007. Defendant's offender score of 1 gave him a range of 0-90 days on the reckless burning charge, 4.5-9 months on the attempted assault, plus 18 months flat time for the firearm sentencing enhancement and the violation of the protection order

¹ It should be noted that the State did not actually allege a firearm enhancement on the arson charge at any time. The jury was not asked to decide a firearm enhancement on the arson charge.

was a gross misdemeanor. CP 518-530, RP 980. The statutory maximum on each felony count was five years. CP 518-530. The court sentenced defendant to 60 months on the reckless burning charge, and 60 months on the attempted assault charge, with the counts to run consecutive. RP 1015-6, CP 518-530. The court ran the protection order count concurrent to the felony counts. RP 1015-6, CP 531-535. Finding of Facts and Conclusions of law as to the exceptional sentence were filed on October 19, 2007. CP 549-554. Defendant filed this timely appeal. CP 539, 543.

2. Facts

On May 19, 2006, at approximately 12:42am, police were alerted to a suspicious vehicle in the 2400 block of 91st Street East in Bonney Lake. RP 360. A resident of the area had reported seeing a small, older vehicle drive into the cul-de-sac with its headlights off. RP 360, 723-5. The car then proceeded down an overgrown path near the caller's residence. RP 360. Police arrived on scene and used a flashlight to look down the path. RP 361. A shotgun was leaning against a bush on the path. RP 361. The shotgun was loaded with three shotgun shells. RP 361-2. Scott and Melissa Cleary lived in the residence next to the bushes. RP 364. Melissa Cleary's mom is Elizabeth Johnson. RP 480-1, 517. Elizabeth Johnson is married to defendant, Larry Day. RP 449, 516.

The officers spoke with the Clearys. RP 457. The Clearys had gone out of town with Ms. Johnson because they were concerned for their

well-being. RP 458-9. The officers asked Mr. Cleary if he knew who would put a shotgun outside his home. RP 458. Mr. Cleary indicated there had been problems with defendant and indicated that a restraining order was supposed to have been served on defendant. RP 458.

Sgt. Longtine confirmed the existence of a no-contact order that protected Elizabeth Johnson from defendant. RP 365. The order had been served on defendant the day before, on May 18, 2006. RP 366, 619. The order stemmed from a domestic violence incident that had occurred between defendant and Ms. Johnson on May 9, 2006. RP 533-8. Defendant and the Clearys had been estranged for over a year and half. RP 493-4, 510.

Sgt. Longtine, along with Officers Boyle, Morrow and Rice, went to defendant's residence. RP 366. An older, smaller Honda prelude was parked at defendant's house. RP 367. The hood of the vehicle was warm to the touch. RP 367. The officers tried to contact defendant but received no answer. RP 366-7. Sgt. Longtine then opened the door to try and get a response from defendant. RP 368. Immediately he could smell petroleum products, like used motor oil. RP 368. The sergeant could also see that the house had been ransacked with furniture and other items in piles. RP 368. The piles were covered in what appeared to be motor oil. RP 368. The officers then began to search the residence to locate defendant. RP 368. The entire house had been ransacked or torn apart. RP 370. A

garden sprayer with a liquid that smelled like gasoline was located just inside the door. RP 370.

Once outside the residence, the officers proceeded to search a shed and garage on the property. RP 370-1. The garage had the same odor of gasoline and there were more piles of books, clothing and other items. RP 371-4. The piles were also covered in what appeared to be motor oil. RP 371. A shotgun and two rifles were also visible in the garage. RP 374. The guns were loaded. RP 375-7.

While the officers were searching defendant's residence, defendant made two phone calls to Ms. Johnson. RP 379, 546. The phone calls were made after midnight. RP 546. Ms. Johnson let the calls go to her voicemail. RP 546. The messages indicated that defendant had destroyed all her memories. RP 546.

The officers were concerned about the danger from the petroleum products and called the fire department to vent the property. RP 379. As the fire department arrived, the house started on fire. RP 381. The fire was more dangerous than normal due to the use of accelerants. RP 419, 430, 656, 667-8. It was determined that accelerants were used, that the fire was started by a lighter and flammable liquid, and that the evidence was consistent with defendant starting the fire. RP 430, 437, 441, 444-5.

Defendant was found on the side of the house with zip ties around his neck. RP 383-4, 625. Defendant was read his *Miranda* rights and was interviewed both at the scene and after being taken into custody. RP 385,

680. Defendant admitted going to the Cleary's house to drop off the shotgun. RP 685. Defendant said he was going to use the gun to get his wife's attention. RP 385, 406, 685, 728. Defendant was planning to approach Ms. Johnson with the gun when she went out to smoke her cigarette. RP 686. Defendant was aware of Ms. Johnson's smoking habits. RP 545, 686. Defendant thought if he pointed the gun at her she would listen to him and not run away. RP 729. Defendant could not explain why the gun was loaded. RP 729. Defendant walked back to the Cleary's house after dropping his car back at his house. RP 686. Defendant realized police were at the Cleary's and the gun was gone. RP 686. Defendant stated he "knew he was fucked and that he might as well make fireworks." RP 687.

Defendant was asked if he had snuck back into the house after the officers had checked it and started the fire. RP 385. Defendant nodded his head in the affirmative. RP 385. Defendant stated that he snapped when he got the protection order. RP 683. He could not bear the thought of Ms. Johnson leaving him and there was no way he was going to get kicked to the curb after 25 years. RP 683. After getting served with the protection order, he placed all of Ms. Johnson's belongings and "stuff that was important to her" in a pile. RP 684. Defendant stated he had put a bunch of gas and oil in the house and lit it with a candle lighter. RP 632, 688. He also indicated that he smelled like gas because he had "dumped five gallons of gas in the damn house." RP 633, 688. When asked why he

had done such things, defendant stated that he did not want “her” to have anything “so she was not going to get it.” RP 634.

After he lit the house on fire, defendant ran out of the house, lay down and watched the house burn. RP 688. Defendant then called Ms. Johnson. RP 688. Defendant told her what he had done and that he was watching everything she owned go up in ashes. RP 689. A lighter, shotgun, tape recorder and cell phone were found on defendant. RP 385, 392, 554-5. Defendant’s truck, loaded with furniture, was found at a neighbor’s house. RP 559, 730-1.

The Clearys went to the residence after the fire to try and recover Ms. Johnson’s possessions. RP 461. Mr. Cleary noted that none of defendant’s good tools were in the garage, Ms Johnson’s DVDs were not in the house, her computer was missing and no TV’s could be located. RP 462-4. Ms. Cleary confirmed the absence of the computer and DVDs and noted that only 1 or 2 of her mother’s dolls could be located. RP 507-8. Defendant’s generators, fishing equipment and other personal items of defendant also could not be located. RP 462. Only one lawn mower in bad shape was found even though defendant owned more than one lawn mower. RP 473.

C. ARGUMENT.

1. THE EVIDENCE AGAINST DEFENDANT WAS SUFFICIENT FOR A JURY TO FIND HIM GUILTY OF ATTEMPTED ASSAULT IN THE SECOND DEGREE AND TO FIND THAT BOTH THAT CRIME AND THE CRIME OF RECKLESS BURNING WERE CRIMES OF DOMESTIC VIOLENCE.

When reviewing sufficiency of the evidence, the court must view the evidence in the light most favorable to the prosecution and determine if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Rangel-Reyes*, 119 Wn. App. 494, 499, 81 P.3d 157 (2003), *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Challenging the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from the evidence. *State v. Gerber*, 28 Wn. App. 214, 217, 622 P.2d 888 (1981), *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). All reasonable inferences from the evidence must favor the State and must be interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Both circumstantial and direct evidence are equally reliable. *State v. Lubers*, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996). In the case of conflicting evidence or evidence where reasonable minds might differ, the jury is the one to weigh the evidence, determine credibility of witnesses and decide disputed questions of fact. *Theroff*, *supra*, at 593. Credibility determinations are for the trier of fact and not

subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Defendant raises three challenges to the sufficiency of the evidence. Defendant contends the evidence was insufficient to find that he took a substantial step toward the crime of assault in the second degree. Defendant also contends that there was insufficient evidence to find that the crime of attempted assault in the second degree was a crime of domestic violence through a showing of either a pattern of ongoing violence or deliberate cruelty. While he doesn't challenge the sufficiency of the evidence on the crime of reckless burning, defendant contends that there was insufficient evidence to find it was a crime of domestic violence through a showing of either a pattern of ongoing violence or deliberate cruelty. The evidence was sufficient for the jury to find defendant guilty of the attempted assault and to find the two crimes were crimes of domestic violence.

- a. There was sufficient evidence for the jury to find defendant had taken a substantial step toward committing assault in the second degree.

“A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.” RCW 9A.28.020(1). To constitute a “substantial step,” the conduct must be “strongly corroborative of the actor's criminal purpose.” *State v. Townsend*, 147 Wn.2d 666, 57

P.3d 255 (2002); *State v. Workman*, 90 Wn.2d 443, 451, 584 P.2d 382 (1978)). Mere preparation to commit a crime is not a substantial step. *Workman*, 90 Wn.2d at 449-50.

A person commits assault in the second degree, in pertinent part, when he 1) intentionally assaults another and thereby recklessly inflicts substantial bodily harm, or 2) assaults another with a deadly weapon. RCW 9A.36.021 (a) and (c). The term “assault” is not statutorily defined, so Washington courts apply the common law definition to the crime. *State v. Aumick*, 126 Wn.2d 422, 426 n.12, 894 P.2d 1325 (1995). An assault is an attempt, with unlawful force, to inflict bodily injury upon another, whether or not the victim is actually harmed. *Id.* at 422.

It is clear from the jury instructions and the testimony what acts by defendant constituted a substantial step towards committing the crime of assault in the second degree. The jury was instructed in accordance with the case law. The jury was instructed, “A substantial step is conduct, which strongly indicates a criminal purpose and which is more than mere preparation.” CP 305-62, Instruction 13. Further, the jury was directed that, “a person commits the crime of assault in the second degree when he or she assaults another with a deadly weapon.” *Id.*, Instruction 34. The jury was instructed as to the elements they would have to find in order to convict defendant of attempted assault in the second degree. *Id.*, Instruction 37. Element number three stated, “That the defendant intended to assault Elizabeth Johnson with a deadly weapon.” *Id.*, Instruction 37.

It is clear these instructions dealt with the gun in the bushes at the Cleary home, and not with the fire at the Johnson/Day household.

Further, the testimony showed that defendant took a substantial step in committing the crime of assault in the second degree. Defendant strategically placed the shotgun in an area he was familiar with as defendant had done the landscaping in the Cleary's yard. RP 685. Defendant knew Ms. Johnson's habits and knew she would come outside to smoke. RP 545, 686. His act of placing the gun close to where she would smoke was not accidental. He intended to confront Ms. Johnson with the gun. RP 385, 405, 685-6, 728. Further, the gun was not merely placed, but was loaded and ready for use. RP 361-2, 729. Defendant did not just leave the gun in the bushes; defendant came back to the scene only to leave when he realized the cops were there. RP 686-7. Defendant had come back to carry out his plan. The actions of defendant show more than mere preparation to commit a crime, they constitute a substantial step toward assaulting Ms. Johnson with a deadly weapon.

- b. There was sufficient evidence for the jury to find defendant's crimes were crimes of domestic violence thus requiring them to answer yes on both domestic violence aggravators.

RCW 9.94A.535(3) details the aggravating circumstances that must be considered by a jury in order for a court to be able to impose a sentence above the standard range. Domestic violence is one of those

circumstances. RCW 9.94A.535(3)(h). Domestic violence applies to crimes “when committed by one family or household member against another.” RCW 10.99.020(5). A jury must find at least one of three circumstances in order to find a domestic violence aggravator. RCW 9.94A.535(3)(h). Two of those circumstance are pertinent here: 1) that “the offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incident over a prolonged period of time,” or 2) that defendant’s “conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.” RCW 9.94A.535(3)(h)(i) & (iii). The State has the burden of proving these facts to a jury beyond a reasonable doubt. RCW 9.94A.537(3).

- c. There was sufficient evidence for the jury to find defendant had engaged in a pattern of domestic violence over many years thus requiring them to answer yes on the domestic violence aggravator.

The definition of “ongoing pattern of abuse” is defined in *State v. Barnett*, 104 Wn. App. 191, 16 P.3d 74 (2001). The court determined a pattern of abuse is established by multiple incidents over a prolonged period of time and that period of time must involve years. *Id.* at 203.

The relationship between the defendant and Ms. Johnson extends over twenty years. RP 516. Defendant and Ms. Johnson met in 1982. RP 516. They lived together and got married in 1996. RP 516, 583.

The pattern of abuse by the defendant stretches back to the 1990's. In 1995, Defendant was mad at Ms. Johnson's daughter over an alarm clock. RP 524, CP 581-530. Defendant got very drunk and started to waive a handgun around. RP 531. Defendant then threatened to kill himself. RP 531. When defendant passed out, Ms. Johnson took the gun away to a neighbor's house. RP 531-2. When defendant woke up, he got angry and pinned Ms. Johnson down on the floor. RP 532. Defendant would not let her go. RP 532. Ms. Johnson was fearful of her safety. RP 524.

Ms. Johnson was diagnosed with breast cancer in April of 2006. RP 523. The diagnosis made her realize that she didn't want to spend the rest of her life arguing and fighting with defendant. RP 523-4. Defendant was not supportive after the diagnosis, but instead was angry because he believed Ms. Johnson knew more about her diagnosis than she was telling him. RP 532-3. Defendant was primarily concerned with himself. RP 534, 615. Ms. Johnson had to turn to other members of her family for support. RP 535.

Ms. Johnson had insurance policies through her work. RP 519, 541. The beneficiaries of those policies were, and always had been, her children. RP 519. Defendant went through the drawers in her home office and looked at the policies. RP 542. Defendant was upset the beneficiaries were her children and not him. RP 542.

There were frequent arguments about Ms. Johnson's relationship with her children. RP 597. Defendant and the Clearys had had a falling out and been estranged for a year and half. RP 597. Defendant was not allowed at the Cleary's house. RP 597.

On May 9, 2006, defendant again accused Ms. Johnson of not giving him answers about her breast cancer. RP 534. Defendant also accused Ms. Johnson of not being willing to fix his relationship with the Clearys. RP 534. Defendant was angry that Ms. Johnson was going on a Mother's Day trip with the Clearys. RP 534-5. Defendant was not invited to go on the trip. RP 535. Ms. Johnson finally said she would not go on the trip, but when she went to call her daughter, defendant told her she couldn't call her daughter. RP 536. When Ms. Johnson went to the bathroom a short time later, she took the phone with her. RP 536. Defendant barged into the bathroom and told her that "he wasn't going to jail." RP 536. Defendant demanded the phone and told Ms. Johnson she wasn't going to call anyone. RP 536. Defendant grabbed Ms. Johnson by the throat, lifted her off the toilet, and threw the phone out of the room. RP 536. Defendant then said he was going to kill her and then go kill her girls. RP 536. Ms. Johnson got away and as she was trying to pull her pants up, defendant grabbed her by the throat again, slammed her into the towel bar and repeated that he was going to kill her. RP 536-7. Defendant grabbed her throat to keep her from calling the police. RP 683. Defendant finally let her go and Ms. Johnson agreed not to leave. RP 537. Ms.

Johnson testified that she was afraid of what defendant would do if she told him she was leaving. RP 537.

The next morning, after defendant left for work, Ms. Johnson left her house. RP 537. She didn't take anything with her because she was afraid defendant might be outside and see her removing stuff from the house. RP 537-8. Ms. Johnson testified that she was concerned for her life and the life of her daughters. RP 538.

Ms. Johnson has some swelling, red markings and bruises after the attack. RP 582. A bruise on her shoulder developed within a day. RP 582. Defendant told her not to tell anyone about the incident and to make sure the marks didn't show at work or around her kids. RP 582-3.

Looking at the evidence in the light most favorable to the State, the jury had sufficient evidence to find an ongoing pattern of abuse. The incidents of abuse that are reported total three: the incident in 1995, the incident on May 9th and the current incident on May 19th. However, these are only the reported incidents. Ms. Johnson's was scared for her life and the life of her daughters. RP 538. She felt that had defendant pointed the gun at her, he would have killed her. RP 803. She was so afraid of what defendant would do to her, that she left her home with nothing but the clothes on her back. RP 537-8. She testified that the cancer diagnosis made her realize that she didn't want to live like this anymore. RP 523-4. The breast cancer diagnosis was prior to the two most recent incidents, indicating that more had transpired than those

reported incidents. Defendant's actions in going through her belongings, accusing her of withholding information, and directing that she hide the bruises and not discuss what happened show defendant as a controlling and angry man. The jury could infer from the testimony that the reported incidents are not the only incidents that could be labeled as domestic violence. There was sufficient evidence for them to find an ongoing pattern of abuse.

- d. There was sufficient evidence for the jury to find defendant had exhibited deliberate cruelty on the reckless burning charge thus requiring them to answer yes to the domestic violence aggravator.

Deliberate cruelty is defined as “gratuitous violence, or other conduct which inflicts physical, psychological or emotional pain as an end in itself. *State v. Scott*, 72 Wn. App. 207, 214, 866 P.2d 1258 (1993), *State v. Strauss*, 54 Wn. App. 408, 418, 773 P.2d 898 (1989). “The cruelty must be of a kind not usually associated with the commission of the offense in question.” *State v. Goodman*, 108 Wn. App. 355, 362, 30 P.3d 516 (2001), *review denied*, 145 Wn.2d 1036, 43 P.3d 20 (2002).

In *Goodman*, the defendant moved out of the house he shared with his wife after she obtained a protection order. *Id.* at 358. The victim wife continued to live at the house after the defendant moved out. *Id.* Defendant burned down the house to keep his wife from living with

another man. *Id.* The fire killed his wife's dog. *Id.* The defendant knew the dog was in the house and killed the dog to hurt his wife emotionally. *Id.* at 361. The court stated that defendant, "did more than than destroy community property. Intending to cause emotional harm, he destroyed her home and killed her pet." *Id.*

The instant case is similar to *Goodman*. Defendant burned down the house that he and his wife shared. RP 385. The items of value that had been in the house, including the TV, Ms. Johnson's computer and her jewelry, had been removed prior to the fire. RP 462-4, 507-8, 588. Defendant indicated to Ms. Johnson that he had taken her jewelry and computer to Wenatchee for leverage. RP 588. Defendant had also moved his personal items out of the house prior to the fire. RP 462. Defendant's good tools and good lawnmower had been removed. RP 462-4, 473. Defendant was seen prior to the fire with his truck full of items taken from the house. RP 559, 730-1.

The house was more than just community property. Ms. Johnson testified that she had worked on that house for 25 years and it was her home. RP 520. "I just enjoyed it. It was mine, and I liked being there." RP 520. Her son had laid the tile in the entryway for her Mother's Day present, and that was special to her. RP 520-1. Ms. Johnson had a doll collection and bell collection in the house. RP 522. In addition, she had some china, silver and furniture that had been passed down from her mother. RP 522. Prior to the fire, Ms. Johnson requested the return of

some specific items of hers, including things given to her by her mother and father and things her children had given her. RP 513, RP 542-4. Defendant did not return the items she asked for. RP 513, 542-4. Instead, he boxed up other items that she seldom used. RP 513, 542-4. Defendant did give his own daughter some of her childhood photos. RP 854. A piano that belonged to Ms. Johnson's daughter remained in the house. RP 589.

Ms. Johnson's belongings were the items that were piled up in the house, soaked with oil, and used to start the house on fire. RP 368, 684. Specifically, defendant placed Ms. Johnson's family heirlooms and things that were important to her in those piles. RP 684. Defendant called Ms. Johnson to make sure she knew that he was burning her memories. RP 546. Defendant didn't just want her to know that the house was on fire, but that her personal belongings were being destroyed. RP 689. Defendant meant to cause emotional harm to Ms. Johnson. The manner in which the fire was started and defendant's actions show he acted with deliberate cruelty.

2. DEFENDANT’S SENTENCE WAS NOT EXCESSIVE
GIVEN IT WAS WITHIN THE STATUTORY
MAXIMUM AND WAS BASED ON THE JURY
FINDINGS ON THE DOMESTIC VIOLENCE
AGGRAVATORS.

Once the jury finds that the facts alleged by the State support an aggravated sentence, the court may sentence the defendant to the maximum sentence allowed by statute. RCW 9.94A.537(6). For a class C felony, that is five years. RCW 9A.20.021. RCW 9.94A.535 provides “the court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.” In order to reverse an exceptional sentence, the court must find that either: 1) the reasons relied on by the sentencing court are not supported by the record or the reasons do not justify the exceptional sentence, or 2) the sentence was “clearly excessive or clearly too lenient.” RCW 9.94A.585(4).

“An exceptional sentence is clearly excessive only if it is clearly unreasonable, i.e., exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would have taken.” *State v. Baird*, 83 Wn. App. 477, 487, 922 P.2d 157 (1996), *Scott, supra*, at 219. As the aggravators here have been declared by the Legislature to provide substantial and compelling reasons for an exceptional sentence the court is left to review whether the reasons were supported by the record and

whether the sentence defendant received was clearly excessive. *Id.*, RCW 9.94A.535 (3)(h)(i) & (iii). The court does not need to state reasons to justify the *length* of the sentence. *State v. Richie*, 126 Wn.2d 388, 394, 894 P.2d 1308 (1995)(emphasis added). The length of an exceptional sentence is reviewed for abuse of discretion. *Scott, supra*, at 219.

The jury found beyond a reasonable doubt that the domestic violence aggravating circumstance applied to the attempted assault in the second degree crime. RP 969, CP Special Verdict Form². The jury also found beyond a reasonable doubt that the domestic violence aggravating circumstance applied to the reckless burning crime. RP 968, 983-4, CP Special Verdict Form.

Defendant had an offender score of one with the current charges. CP 518-530. A previous misdemeanor conviction for domestic violence assault was not counted in his score, but was part of defendant's criminal history. CP 518-530. Defendant's range on the reckless burning charge was 0-90 days, 4.5-9 months on the attempted assault, plus 18 months flat time for the firearm sentencing enhancement, and the violation of the protection order was a gross misdemeanor. CP 518-530, RP 980. Both crimes are class C felonies. CP 518-530. If defendant was sentenced to the high end on both crimes, with the enhancement on the assault,

² From the information provided in the index for the clerk's papers, the State is unable to determine which page number is assigned to each verdict form. The domestic violence verdict forms are numbered 378, 383, 368, 380, and 365.

defendant would be sentenced to 30 months (2 and ½ years), plus one year for the misdemeanor charge.

Both sides presented numerous letters to the court prior to sentencing, not just the victim and her supporters. RP 983, 986, CP 389-471, 472-517. The State asked the court to base the sentence on the jury's findings and not on the letters. RP 986. The court indicated that it had read all of the letters filed with the court, from both sides, and was not impressed with either side trying to play on the court's emotions. RP 989-90. The court ruled that the letters could all be filed, but that the court would follow the law and impose a fair sentence in a "detached, unemotional, unpressured manner." RP 990-1. Neither the oral record nor the findings of fact support the appellant's assertion that the court based the exceptional sentence on the letters presented. RP 1016, CP 549-554.

The court based its sentencing decision on the jury's verdict. RP 1015, CP 549-554. The court indicated that the jury found aggravating factors and that it was now the court's responsibility "to give full force and effect to those decisions, including the aggravating factors, and impose an exceptional sentence." RP 1015. The court then sentenced defendant to five years on the reckless burning charge, and five years on the attempted assault charge. RP 1016. The two felony counts would run consecutive for a total of ten years. RP 1016. The court made it clear that it was basing the sentence on "those aggravating decisions and the findings of the jury." RP 1016. The court did not follow the State's

recommendation of eleven years, but chose to run the one year on the misdemeanor count concurrent. RP 1016.

Defendant is correct that the findings of fact err by stating defendant was convicted of a firearm enhancement on the reckless burning charge. Opening Brief of Appellant, page 26. However, both the record and the judgment and sentence in this case make it clear that it was not presented to the jury, considered by the court or included in defendant's sentence. RP 980, 1016-7, CP 518-530. This mistake in the written findings is a scrivener's error. The oral findings are sufficient to see what the court considered and what was ordered. Reversal based on the scrivener's error is not the remedy.³ If the court chooses, it can remand for correction of the findings of fact that comport with jury findings and the courts ruling.

The jury found that two of the crimes committed were committed either with deliberate cruelty or involved a pattern of abuse. RP 968-9, 983-4, CP Special Verdict Forms. These aggravating circumstances are substantial and compelling. The two crimes were distinct, involving two separate locations and two very different courses of action. The jury found that both crimes had been committed with aggravating

³ See *In re Mayer*, 128 Wn. App. 694, 701-702, 117 P.3d 353 (2005) (A clerical or scrivener's error in the judgment and sentence does not render the document invalid, but may be corrected by the court at any time.) See also, CrR7.8(a) (clerical mistakes in judgments, orders, or other parts of the record may be corrected by the court at any time)

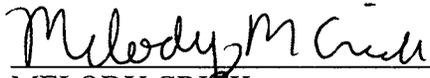
circumstances. The court's sentence was within the statutory maximum for each crime. The court considered argument and input from both sides. RP 1015. The court weighed what would be fair and what the jury had authorized him to do. RP 1015-6. Ultimately the court did sentence defendant to an exceptional sentence of ten years. RP 1016, CP 518-530. There is nothing to show the court abused its discretion in sentencing defendant.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests the Court to affirm the conviction and sentence below.

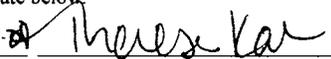
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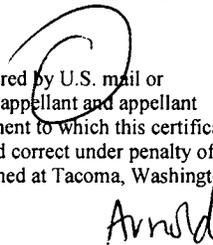
GERALD A. HORNE
Pierce County
Prosecuting Attorney


MELODY CRICK
Deputy Prosecuting Attorney
WSB # 35453

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5-21-08 
Date Signature



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