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I. COUNTER STATEMENT OF THE ISSUES:

1. Whether the trial court committed reversible error when it gave the jury a first aggressor instruction.
2. Whether the sentencing court properly imposed conditions of supervision that pertained to mental health evaluations and treatment.
3. Whether the court imposed a sentence that potentially exceeds the statutory maximum for Assault of a Child in the Second Degree.
4. Whether the sentencing court erred when it required the defendant (1) to remain out of places where alcohol is the chief item of sale, (2) to abstain from the use of drugs and drug paraphernalia, and (3) to provide copies of all prescriptions to a community corrections officer, as conditions of supervision.
5. Whether the sentencing court erred when it required the defendant to pay the victims' counseling costs as a condition of supervision.

II. STATEMENT OF THE CASE:

FACTS

On July 10, 2009, a terrifying event unfolded at the Walmart in Port Angeles, Washington. *See e.g.* RP (12/7/2009) at 65. Ms. Teresa Dumdie, the defendant, visited the store's sporting goods counter to purchase ammunition for her handgun. RP (12/7/2009) at 66, 72-73, 80.

Ms. Dumdie inquired about the .22 caliber ammunition inside a display case – “short” and “magnum” cartridges.¹ RP (12/7/2009) at 66. Unfortunately, Ms. Dumdie did not know what kind of ammunition her handgun required. RP (12/7/2009) at 66. Ms. Dezra Miller, the sales clerk, advised Ms. Dumdie to make her selection carefully because the store did not refund ammunition purchases. RP (12/7/2009) at 65-67, 73, 80, 84, 90, 97. Ms. Dumdie purchased a box of “short” .22 cartridges. RP (12/7/2009) at 67-68, 74, 80, 84.

Ms. Dumdie spilled the bullets onto the display counter. RP (12/7/2009) at 67-68, 74, 80, 84. Immediately, Ms. Dumdie became upset, accusing the clerk of selling her the wrong ammunition and stealing her money. RP (12/7/2009) at 67-68, 74, 80, 84. According to witnesses, Ms. Dumdie was extremely combative, but the clerk remained professional throughout the ordeal. RP (12/7/2009) at 81, 84. When confronted with Ms. Dumdie’s fury, Ms. Miller called an assistant manager, Ms. Penny Shirts. RP (12/7/2009) at 68, 74-75, 90, 96-97.

When Ms. Shirts approached Ms. Dumdie, the defendant was in the middle of an amazing tirade: accusing the store of cheating her, stealing from her, and refusing to sell her ammunition. RP (12/7/2009) at

¹ The sporting good counter did not have any more “long rifle” (LR) cartridges in stock, which is the type Ms. Dumdie’s handgun required. RP (12/7/2009) at 66; RP (12/10/2009) at 56.

91, 98. Ms. Shirts instructed the clerk to return Ms. Dumdie's money. RP (12/7/2009) at 69, 78, 91, 98. While Ms. Miller returned the money, Ms. Dumdie continued her diatribe. RP (12/7/2009) at 69, 71. Ms. Dumdie repeatedly used profanity at an elevated volume. RP (12/7/2009) at 91.

Ms. Anna Lester, Mr. Carlos Hernandez, Ms. Catherine Wooley, and Ms. Wooley's four year-old son (C.H.) were shopping near the sporting goods counter during Ms. Dumdie's violent harangue.² RP (12/8/2009) at 65-66, 76, 108, 123. Ms. Lester heard Ms. Dumdie swear at the clerk and threaten to blow-up the store. RP (12/8/2009) at 65-67, 77, 108, 123. Ms. Lester asked Ms. Dumdie to keep her voice down and refrain from using profanity in front of children. RP (12/7/2009) at 92-93, 98-99, 107; RP (12/8/2009) at 67, 77, 108, 109, 123, 124.

Ms. Dumdie then directed her rant toward Ms. Lester, asking her if she wanted to take the matter outside "where she would whip her [Ms. Lester's] ass." RP (12/8/2009) at 67. The Lesters never threatened Ms. Dumdie as they passed through the sporting goods section. RP (12/7/2009) at 93, 107; RP (12/8/2009) at 109.

When efforts to calm Ms. Dumdie failed, Ms. Shirts requested assistance from other store personnel. RP (12/7/2009) at 71, 91, 93-94, 105; RP (12/8/2009) at 23. When assistant managers Mr. Lehman Moseley

² Because the members of Ms. Lester's party were together throughout the unfortunate events, the State refers to them collectively as the Lesters. The State means no disrespect.

and Mr. Donald Titus arrived, they observed Ms. Dumdie yelling, ranting, cursing, and berating staff and customers. RP (12/7/2009) at 106, 121-22; RP (12/8/2009) at 24-25. Mr. Moseley and Mr. Titus asked Ms. Dumdie to leave the store. RP (12/7/2009) at 102, 107; RP (12/8/2009) at 110. Ms. Dumdie then focused her rage and obscenities toward the two managers. RP (12/8/2009) at 150. The managers never threatened the defendant. RP (12/7/2009) at 95, 109, 113-14; RP (12/8/2009) at 110.

As Mr. Moseley and Mr. Titus accompanied Ms. Dumdie out of the store, the defendant unfortunately crossed paths with Ms. Lester's party. RP (12/7/2009) at 109; RP (12/8/2009) at 67. Again, Ms. Dumdie verbally accosted the customers. RP (12/7/2009) at 109. Additionally, Ms. Dumdie threatened to "blow a hole" in Mr. Mosely, to "pop somebody", and to "pop that brat" referencing the four year-old C.H. RP (12/7/2009) at 110, 111, 122; RP (12/8/2009) at 25.

Mr. Mosely escorted Ms. Dumdie to her vehicle. RP (12/7/2009) at 112-13, 125; RP (12/8/2009) at 28-30. Mr. Mosely asked whether Ms. Dumdie was "drunk or on drugs". RP (12/7/2009) at 124-25. However, Ms. Dumdie ignored this inquiry. RP (12/7/2009) at 124-25. When Ms. Dumdie started her vehicle, she immediately drove back toward the store rather than proceeding directly to the exit. RP (12/7/2009) at 117, 126-27.

Mr. Moseley heard patrons cry out “she’s got a gun.” RP (12/7/2009) at 117, 126-27. Mr. Titus called 911. RP (12/8/2009) at 29-30.

By sheer misfortune, the Lesters had proceeded to their vehicle at the same time Ms. Dumdie was escorted from the store. Again, the Lesters crossed paths with the defendant. RP (12/7/2009) at 119, 122, 128; RP (12/8/2009) at 32. Ms. Dumdie deliberately stopped her vehicle alongside the driver’s side of the Lester vehicle. RP (12/8/2009) at 32, 68, 77, 111-12, 127. According to Ms. Lester, Ms. Dumdie threatened to harm her party and pulled out a gun:

A: [Ms. Dumdie] started cussing [at] me, uh – first she started cussing, then she said she’s going to beat my – 4 letter word – ass. ... And, uh – then I says what’s your problem and she said the 4 letter word and she said she’s gonna (sic) whoop my ass and I says whatever, and then she reached behind her like this and pulled the gun out. And pulled the gun out and she was saying she was gonna kill my 4 letter word (inaudible), and then she pointed the gun at my grandson and said she was gonna kill that little black son of a bitch. ...

RP (12/8/2009) at 70. *See also* RP (12/8/2009) at 81-82, 112, 127-29. Ms. Dumdie tried to pull the gun’s trigger, leading the Lesters to believe they would be killed. RP (12/8/2009) at 71-72, 113, 128. Mr. Mosely, also, observed Ms. Dumdie point a gun at the vehicle. RP (12/7/2009) at 119, 122, 128. *See also* RP (12/8/2009) at 33, 137, 139-40, 143-45. The Lesters never threatened Ms. Dumdie. RP (12/8/2009) at 71, 113-14.

After the terrifying encounter, Ms. Dumdie continued through the parking lot. However, she circled back to confront the Lesters a second time. RP (12/8/ 2009) 34, 63, 73, 82, 114-16, 131-32.

A: [Ms. Dumdie] pulled the gun out, had it cocked, and was trying to pull the trigger this a way. And she was yelling and screaming something and I honest[ly] couldn't understand her. Only thing I told Cat[herine was] to get the baby down and I even ducked down because I hon – she was trying to make the gun go off. She was moving her fingers, and that's all I can say.

RP (12/8/2009) at 74. *See also* RP (12/8/2009) at 83-84, 114-17, 131-33, 153, 156-57, 161. Additionally, Ms. Dumdie aimed her gun at Mr. Titus and Ms. Lisa Nuzum, another Walmart employee. RP (12/8/2009) at 34, 63, 153, 156-57, 161. Again, Ms. Dumdie tried to pull the gun's trigger. RP (12/8/2009) at 162. Neither the Walmart staff, nor the customers in the parking lot ever threatened Ms. Dumdie. RP (12/8/2009) at 35, 71, 113-14.

When Ms. Dumdie finally exited the parking lot, she was stopped by Clallam County Sheriff Deputy Michael Backes. RP (12/8/2009) at 165, 168, 183. Ms. Dumdie exited her vehicle and refused to comply with the officer's instructions. RP (12/8/2009) at 170, 183. With the aid of a civilian, the officer placed Ms. Dumdie in a control hold and restraints. RP (12/8/2009) at 170, 181. A subsequent search of Ms. Dumdie's vehicle produced a handgun, which had a fully loaded magazine and a bullet in the

chamber. RP (12/8/2009) at 171-72. The firearm was fully operable; however, its safety mechanism allowed a person to pull the trigger without discharging a round. RP (12/8/2009) at 189-91.

PROCEDURAL HISTORY

The State charged Ms. Dumdie with multiple counts of assault: four counts of Assault in the Second Degree,³ and one count of Assault of a Child in the Second Degree.⁴ CP 73.

The trial court held a competency hearing after the defense expressed concerns regarding Ms. Dumdie's mental health. *See* RP (10/14/2009) at 3-65. The State presented the testimony of Dr. Thomas Danner, who opined Ms. Dumdie was competent to stand trial. RP (10/14/2009) at 8-9, 12, 16, 20. According to Dr. Danner, Ms. Dumdie suffered from an adjustment disorder, adult anti-social behavior, and a personality disorder with paranoia, borderline personality, and schizoid features. RP (10/14/2009) at 10-11. *See also* (10/15/2009) at 2.

In contrast, the defense presented the testimony of Dr. Brett Trowbridge. RP (10/14/2009) at 21-58. Dr. Trowbridge opined Ms. Dumdie was delusional and incompetent to stand trial. RP (10/14/2009) at 30-31, 36-38. According to Dr. Trowbridge, Ms. Dumdie suffers from

³ RCW 9A.36.021(1)(c).

⁴ RCW 9A.36.130(1)(a) and 9A.36.021(1)(c).

paranoid schizophrenia. RP (10/14/2009) at 33-36. *See also* RP (10/15/2009) at 3. Dr. Trowbridge also testified that Ms. Dumdie had previously been ordered to undergo mental health treatment. RP (10/14/2009) at 55. Despite the evidence of mental illness, the trial court found Ms. Dumdie was competent to stand trial. RP (10/15/2009) at 6-7; CP 77-80.

At trial, multiple victims and witnesses testified to the events described above. Additionally, the State provided video surveillance that captured the events that transpired in the store and the outside parking lot. *See* RP (12/8/2009) at 38-39, 44-45; Exhibits 16. *See also* RP (12/10/2009) at 58.

However, Ms. Dumdie claimed she had acted in self-defense. *See* RP (12/9/2009) at 20-115. Ms. Dumdie testified the clerk had “tried to bully [the defendant] with her eyes.” RP (12/9/2009) at 22-24. In fact, Ms. Dumdie said everyone at Walmart was bullying her. RP (12/9/2009) at 39-40, 76.

Ms. Dumdie admitted she understood the store had a policy not to refund purchased ammunition, but believed the policy to be “morally wrong”. RP (12/9/2009) at 22-23. Thus, she was forced to stand up to Ms. Miller:

A: Well, I just looked at her back, bullied her back in defense of myself by looking right back at her. Stood up to her. ... I just defended myself and stood up to her. Didn't allow her to intimidate me.

RP (12/9/2009) at 24. According to Ms. Dumdie, she used coarse language in a raised voice to assert herself. *See e.g.* RP (12/9/2009) at 24-28.

Ms. Dumdie testified the staff never threatened her physically, but believed the sales clerk was willing and able to attack:

Q: And as I understand your – is your testimony that you feared that she would physically attack you?

A: Well, at that point [I] didn't think that they would, but I felt that I needed to defend myself verbally someone threatening me that – threatening me like that in the store. Since I was in a store I felt like, you know, they wouldn't actually come and attack. But I still needed to defend it.

RP (12/9/2009) at 29-30. Additionally, Ms. Dumdie felt threatened by Ms. Lester (age 62). RP (12/9/2009) at 31, 33. However, Ms. Dumdie acknowledged she did not know what danger Ms. Lester posed. RP (12/9/2009) at 34-35.

According to Ms. Dumdie, the Lester party threatened her as she was exiting the store. RP (12/9/2009) at 35. However, Ms. Dumdie never explained what supported this wild accusation:

A: [I]t's understood that the group was going to attack – the other two people were right there supporting her.

Q: That's what you understood?

A: Yep.

Q: Why did you understand that?

A: Common sense.

Q: But based on what, what –

A: Based on common sense, that's what I saw, that's what the possible threat was.

Q: What was it that you saw that made you believe that?

A: That's what I saw, those two people were standing looking at me with her, supporting her.

RP (12/9/2009) at 36-37. Despite the accusation, Ms. Dumdie admitted the Lesters never followed her outside. RP (12/9/2009) at 37.

Outside the store, Ms. Dumdie said the Walmart employees were “bullying her from behind.” RP (12/9/2009) at 37. However, Ms. Dumdie also testified the employees were well behind her when she got into her car. RP (12/9/2009) at 37.

Ms. Dumdie explained she drove back to the store, rather than follow the most direct route out of the parking lot, to “see if they [the Lesters] were going to try and follow me and bully me or attack me physically and harm me.” RP (12/9/2009) at 40-41. However, Ms. Dumdie testified she did not believe Ms. Lester and her party was going to follow her. RP (12/9/2009) at 42. Nonetheless, she claimed she feared for her

safety when she confronted the Lesters in the parking lot. RP (12/9/2009) at 42.

When Ms. Dumdie pulled alongside the Lester vehicle, she gave the following account:

A: ... I was driving really super slow just getting – going through the parking lot, and here all of a sudden here they were, they came upon me. And their driver’s side window was also open and at that point I understood that these people are – I’m in danger, these people are going to – I’m not going to be able to sleep at night – tonight, these people are going to follow me, they’re criminals or something and attack. They just tried to use the store situation as an excuse to attack, to bully somebody.”

RP (12/9/2009) at 42. According to Ms. Dumdie, Ms. Lester told her that she was going to attack. RP (12/9/2009) at 42. Ms. Dumdie explained she drew her gun when the Lesters exited the vehicle to attack her.⁵ RP (12/9/2009) at 42-45. Ms. Dumdie said it was her intent that the Lesters “understood that any of them could have gotten a hole blown in them if they should attack.” RP (12/9/2009) at 47. However, she denied pointing the gun at the four year-old child. RP (12/9/2009) at 47.

⁵ Video surveillance does not corroborate Ms. Dumdie’s account. The members of the Lester party did not exit the vehicle until after the defendant drove past. RP (12/10/2009) at 16-17; Exhibit 16.

Additionally, Ms. Dumdie testified that members of the Lester party exited out a sliding door on the driver’s side. However, the Lester vehicle does not have a sliding door on the driver’s side. RP (12/9/2009) at 66-67, 85, 118.

Ms. Dumdie said she circled back to the vehicle “to make sure they [the Lesters] had enough fear so that they knew not to proceed with following [her].” RP (12/9/2009) at 46. Ms. Dumdie explained she aimed her gun at them to reiterate this point. RP (12/9/2009) at 46, 97-98.

At all times, Ms. Dumdie understood her firearm was capable of terminating life and she maintained she wanted to scare the Lester party.⁶ RP (12/9/2009) at 49-50, 80, 101-02. However, Ms. Dumdie maintained she never pulled the gun’s trigger. *See* RP (12/9/2009) at 44-45.

The trial court instructed the jury on self-defense with respect to count 1 (Ms. Lester) and count 5 (Ms. Wooley), reasoning only those counts permitted such a defense. RP (12/10/2009) at 3-4, CP 22. Additionally, the trial court provided the jury with a “first aggressor” instruction:

No person may, by any intentional act reasonably likely to provoke a belligerent response create a necessity for acting in self-defense and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the Defendant was the aggressor, and that Defendant’s acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

⁶ Ms. Dumdie admitted she was never afraid of Walmart staff. RP (12/9/2009) at 94.

CP 67. The defense did not object to the “first aggressor” instruction, and it only opposed the court’s decision to instruct the jury on self-defense for two counts, rather than all five. RP (12/10/2009) at 9-10.

In closing arguments, the State outlined the evidence against Ms. Dumdie with respect to each count. RP (12/10/2009) at 11-31. Additionally, the State argued Ms. Dumdie did not act in self-defense. First, it argued that Ms. Dumdie did not reasonably believe she was about to be injured by the Lesters because (1) they never threaten her, and (2) they were in their car attempting to go home.⁷ RP (12/10/2009) at 18. Second, it argued that Ms. Dumdie’s self-defense argument was specious because the physical and photographic evidence failed to corroborate her account of what transpired. RP (12/10/2009) at 20. Third, it argued that Ms. Dumdie did not employ the amount of force reasonably necessary to deter an attack, emphasizing (1) the Lesters were unarmed, (2) the Lesters did not present a physical threat, and (3) she [Ms. Dumdie] could have driven away from the scene rather than draw a loaded gun. RP (12/10/2009) at 18-19, 21-22. Finally, the State argued Ms. Dumdie was the first aggressor because she created the situation that led to her pulling her firearm, arguing (in part) that “[s]he didn’t have to get in her car and

⁷ The State also argued that self defense was not available for the counts against the Walmart employees because Ms. Dumdie never considered them a threat. RP (12/10/2009) at 30.

then turn back towards the store and provoke a confrontation[.]” RP (12/10/2009) at 23-24. *See also* RP (12/10/2009) at 55.

The defense argued that the Lesters twice threatened Ms. Dumdie with physical harm and that she needed a gun to even the odds. RP (12/10/2009) at 38. According to the defense, the Lesters were the first aggressor because they made the initial threats and reiterated those threats as Ms. Dumdie left the store. RP (12/10/2009) at 33-35, 38, 41-42, 50

The jury convicted Ms. Dumdie on all charges: four counts of Assault in the Second Degree, one count of Assault of a Child in the Second Degree. RP (2/11/2010) at 8-9; CP 7, 28-37. Additionally, the jury entered a special verdict form, finding Ms. Dumdie committed each offense with a firearm. CP 28-29

At sentencing, the parties agreed Ms. Dumdie’s offender score was an eight (8) for each offense. RP (2/25/2010) at 3-10; CP 9, 22. Ms. Dumdie’s conviction for Assault in the Second Degree carried a standard range of 53 to 70 months. RP (2/25/2010) at 3; CP 9, 22. Ms. Dumdie’s conviction for Assault of a Child in the Second Degree carried a standard range of 108 to 120 months. RP (2/25/2010) at 3, 8-9; CP 9, 22. The maximum sentence that could be imposed for each Class B felony, including any enhancements, was 120 months.

The defense recommended that the trial court impose 0 months for each baseline sentence. RP (2/25/2010) at 17. In support of its position, the defense emphasized the evidence that was introduced at the earlier competency hearing. RP (2/25/2010) at 16-17.

The court sentenced Ms. Dumdie to 53 months for each Second Degree Assault conviction and 84 months for the Second Degree Assault of a Child conviction.⁸ RP (2/25/2010) at 19; CP 10. The sentencing court, relying on *State v. Cubias*, 155 Wn.2d 549, 555, 120 P.3d 929 (2005), then ordered the five (5) mandatory firearm enhancements to run consecutively, resulting in a total confinement sentence of 264 months.⁹ RP (2/25/2010) at 9-12, 19; CP 10.

Additionally, the sentencing court imposed a period of community custody, 18 months, for each conviction. RP (2/25/2010) at 19; CP 11. The State asked the trial court to impose the same community custody

⁸ The trial court reasoned each firearm enhancement included a mandatory 36 months that should run consecutively to the base sentence and to each other for a total of enhancements of 180 months (5 x 36 = 180 months).

With respect to each Second Degree Assault conviction: the 53 month base sentence, plus the 36 month firearm enhancement, equals 89 months, which does not exceed the statutory maximum (120 months).

With respect to the Second Degree Assault of a Child conviction: the 84 month base sentence, plus the 36 month firearm enhancement, equals 120 months, which is the statutory maximum.

⁹ Because the five base sentences run concurrently, the total sentence is easily understood as 84 months, plus 180 months of mandatory consecutive enhancements, equaling 264 months (84+180=264).

conditions identified in the presentence investigation (PSI) report.¹⁰ RP (2/25/2010) at 15; CP 108.

The sentencing court imposed the following conditions of supervision:

- 10) You shall abstain from the possession or use of alcohol and remain out of places where alcohol is the chief item of sale.
- 11) You shall abstain from the possession or use of drugs and drug paraphernalia except as prescribed by a

¹⁰ The PSI recommended the following relevant conditions of supervision:

10. You shall abstain from the possession or use of alcohol and remain out of places where alcohol is the chief item of sale.
11. You shall abstain from the possession or use of drugs and drug paraphernalia except as prescribed by a medical professional, and shall provide copies of all prescriptions to Community Corrections Officer within seventy-two (72) hours.
12. During term of community custody, you shall submit to physical and/or psychological testing whenever requested by Community Corrections Officer, at your own expense, to assure compliance with Judgment and Sentence or Department of Corrections' requirements.
13. You shall obtain a mental health evaluation and, if recommended, fully comply with any recommended treatment.
- ...
18. You shall pay the costs of counseling to the victim that is required as a result of your crime or crimes.
19. You shall pay monetary obligations as set forth in the Judgment and Sentence.

CP 118-19.

medical professional, and shall provide copies of all prescriptions to Community Corrections Officer within seventy-two (72) hours.

12) During the term of community custody, you shall submit to physical and/or psychological testing whenever requested by Community Corrections Officer, at your own expense, to assure compliance with Judgment and Sentence or Department of Corrections' requirements.

13) You shall obtain a mental health evaluation and, if recommended, fully comply with any recommended treatment.

CP 19. *See* also CP 11. Additionally, the sentencing court found Ms. Dumdie's mental health did play a role in her crimes.¹¹ RP (2/25/2010) at 17-18. The court believed Ms. Dumdie presented a danger to the

¹¹ Additionally, the PSI provided the following excerpts:

It is DOC's understanding that Dumdie adamantly denies having any mental health issues. Defense counsel advised DOC that there are conflicting psychological reports about whether or not Dumdie suffers from any mental illness.

...

Despite Dumdie's apparent denial of having any mental health issues, it seems apparent from her irrational behavior that there is likelihood that she is so affected; however, if she does not have mental health issues, then she possibly had consumed a substance that affected her behavior.

...

Dumdie certainly seems to have been delusional throughout this offense, despite denying any mental health issues. Her perception of the threat to her significantly affected her behavior and led to the assaults contained within this instant offense.

CP at 116-17.

community unless she received mental health treatment.¹² RP (2/25/2010) at 18, 20.

While Ms. Dumdie's judgment and sentence requires her to pay counseling costs and other monetary obligations as a condition of her supervision, the sentencing court expressly waived all financial obligations and it did not order restitution to the victims. RP (2/25/2010) at 19-20, 23; CP 12-14, 19.

Ms. Dumdie appeals. CP 5.

III. ARGUMENT:

A. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR WHEN IT GAVE THE FIRST AGGRESSOR INSTRUCTION.

Ms. Dumdie alleges the trial court committed reversible error with respect to only two of her convictions – the second degree assaults against Ms. Lester and Ms. Wooley. *See* Brief of Appellant at 12. Ms. Dumdie, argues the record does not support a first aggressor instruction because her provocation consisted of words alone. *See* Brief of Appellant at 12. However, there is sufficient evidence of provocative threats and conduct

¹² The defense objected to the requirement Ms. Dumdie successfully complete any recommended treatment. RP (2/25/2010) at 20. However, the defense only objected because it believed Ms. Dumdie would refuse to comply with the order. RP (2/25/2010) at 20.

to support the instruction. Additionally, if there was error, the error was harmless. This Court should hold Ms. Dumdie's argument fails.

A trial court's decision regarding jury instructions is reviewable only for abuse of discretion if based on a factual dispute. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). The trial court's decision based on a ruling of law is reviewed de novo. *Id.* at 772. To determine whether there is sufficient evidence to support giving an instruction, a court views the evidence in the light most favorable to the party requesting the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). Jury instructions are sufficient if they permit the parties to argue their theories of the case and properly inform the jury of the applicable law. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

In general, the right of self-defense cannot be successfully invoked by an aggressor or one who provokes an altercation. *Riley*, 137 Wn.2d at 909. A court may give an aggressor instruction if there is credible evidence from which a jury could reasonably determine that the defendant provoked the need to act in self-defense. *Id.* at 909-10. If there is credible evidence the defendant made the first move by drawing a weapon, the evidence supports giving an aggressor instruction. *Id.* at 910. The evidence is particularly appropriate if there is conflicting evidence as to whether the defendant's conduct precipitated a fight. *Id.*

However, courts should use care when giving an aggressor instruction. *Riley*, 137 Wn.2d at 910 n. 2. Where supported by the evidence, an aggressor instruction impacts a defendant's claim of self-defense, which the State has the burden of disproving beyond a reasonable doubt. *Id.* It is prejudicial error to submit an issue to the jury that is not warranted by the evidence. *Fernandez-Medina*, 141 Wn.2d at 455.

1. There is conflicting evidence as to whether the defendant's provocative words and conduct precipitated the assaults.

The Washington Supreme Court has held that when defendant draws a gun first, the appellate courts must consider this significant event when evaluating the propriety of a first aggressor instruction. *See State v. Wingate*, 155 Wn.2d 817, 823, 122 P.3d 908 (2005); *State v. Riley*, 137 Wn.2d at 906.

In *Riley*, it was the defendant who approached the victim. 137 Wn.2d at 906. The defendant provoked the victim by calling him a "wanna-be" gang member. *Id.* When the victim threatened to shoot the defendant, the defendant pulled a gun. *Id.* The defendant subsequently shot the victim, explaining he thought he saw the victim reach for a weapon. *Id.* at 907. The Supreme Court held the first aggressor instruction was appropriate, because the defendant was the first to pull out a gun - the first act of violence beyond mere words. *Id.* at 909.

Here, Ms. Dumdie was the first aggressor because she was the first and only person to draw a gun. RP (12/8/2009) at 70, 74, 81-84, 112, 114-17, 127-29, 131-33, 153, 156-57, 161. Additionally, this violent act was preceded by a series of provocative events attributed solely to Ms Dumdie: she exhibited combative behavior with the Walmart employees, RP (12/7/2009) at 81, 84, 91, 98, 106, 121-22; RP (12/8/2009) at 24-25, 150; she threatened to blow up the store, RP (12/8/2009) at 65-67, 77, 108, 123; she accosted Ms. Lester in the sporting good department, threatening to “whip her ass”, RP (12/8/2009) at 25, 67; she threatened to “blow a hole” in Mr. Mosely, RP (12/7/2009) at 110, 122; she threatened to “pop somebody”, RP (12/7/2009) at 110; she threatened to “pop that brat [C.H.]”, RP (12/7/2009) at 111; she drove back toward the store looking for the Lester party, RP (12/7/2009) at 117, 126-27; she deliberately stopped her vehicle alongside the Lesters, engaging them in an argument, asking Ms. Lester if she wanted to take the matter “outside” the vehicle, and threatening to “whoop” her ass. RP (12/8/2009) at 32, 68, 70, 77, 111-12, 127; she circled back in the parking lot to confront the Lesters a second time, RP (12/8/2009) 34, 63, 73, 82, 114-16, 131-32.

While Ms. Dumdie claims the Lesters initiated the violent confrontation, a review of the record, at a minimum, creates a factual dispute as to whether the defendant was the first aggressor. The

combination of Ms. Dumdie’s provocative threats and conduct warranted the instruction. Thus, the trial court did not abuse its discretion. *See Riley*, 137 Wn.2d at 910 (“[a]n aggressor instruction is appropriate if there is *conflicting* evidence as to whether the defendant’s conduct precipitated a fight.”) (emphasis added).

2. If the trial court erred, the instructional error was harmless.

The right to act in self-defense is founded upon the existence of a real or apparent necessity. *State v. Kidd*, 57 Wn. App. 95, 101, 786 P.2d 847 (1990). The defendant must have acted on an honest and reasonable belief that he or she was in imminent danger of great personal injury. *Id.* *See also* RCW 9A.16.050(1)(2009). The defendant’s conduct “is to be judged by the condition appearing to [him or her] at the time, not by the condition as it might appear to the jury in the light of testimony before it.” *Id.* However, criminal culpability is not lessened when one acts in self-defense due to an honest but unreasonable belief in the need for force. *Id.* at 101-02.

Here, the record establishes beyond a reasonable doubt that Ms. Dumdie’s acts and fears were unreasonable. Ms. Dumdie’s perception of events was skewed by an unwarranted belief that Walmart personnel were “bullying her” and the Lester party threatened to attack her. However,

every witness testified that neither that staff, nor the customers physically threatened the defendant. RP (12/7/2009) at 81, 84, 93, 95, 107, 109, 113-14; RP (12/8/2009) at 35, 71, 109-10, 113-14. Additionally, the testimony, video surveillance, and photographic evidence do not corroborate Ms. Dumdie's account that the Lesters exited their vehicle and came toward her with the intent to attack. RP (12/9/2009) at 66-67, 85, 118; RP (12/10/2009) at 16-17; Exhibit 16.

Assuming, without conceding the trial court did err, the error was harmless because no reasonable jury could have found that the assaults were the acts of lawful self-defense. In such circumstances, any error related to the instructions was harmless. *Kidd*, 57 Wn. App. at 101-02.

3. The defendant received effective assistance of counsel.

The federal and state constitutions guarantee a defendant the right to effective assistance of counsel. U.S. Const. amend VI; Wash. Const. art. I, § 22; *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail on an ineffective assistance of counsel claim, Ms. Dumdie must show (1) her trial counsel's performance was deficient, and (2) this deficiency prejudiced her. *Strickland*, 466 U.S. at 687. However, the appellate courts strongly presume that counsel's

representation was not deficient. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Deficient performance is that which falls below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. To demonstrate prejudice, Ms. Dumdie must show that her trial counsel's performance was so inadequate that there is a reasonable probability that the result at trial would have been different. *Strickland*, 466 U.S. at 694. A failure to prove either element defeats her claim. *Strickland*, 466 U.S. at 700.

Here, Ms. Dumdie's attorney never objected to the trial court's decision to provide the jury with the first aggressor instruction. RP (12/10/2009) at 9-10. However, as argued above there was conflicting evidence as to whether the combination of Ms. Dumdie's provocative threats and conduct precipitated the assaults. Therefore, the instruction was proper and Ms. Dumdie cannot prevail on the first prong of the analysis.

Additionally, Ms. Dumdie cannot demonstrate a reasonable probability that the outcome at trial would have been different without the instruction. Again, every witness testified that neither the staff nor the customers ever threatened Ms. Dumdie. RP (12/7/2009) at 93, 95, 107, 109, 113-14; RP (12/8/2009) at 35, 71, 109-110, 113-14. Furthermore, the physical evidence, *i.e.* the video surveillance and photographic evidence,

does not corroborate Ms. Dumdie's testimony that the Lesters exited their vehicle to attack her. RP (12/9/2009) at 66-67, 85, 118; RP (12/10/2009) at 16-17; Exhibit 16. Finally, the jury found her guilty of the three other assaults, which Ms. Dumdie does not challenge on this appeal, despite hearing argument that she acted in self-defense. *See e.g.* RP (12/10/2009) at 31-32, 44. The jury clearly rejected the notion that Ms. Dumdie acted in self-defense. Thus, Ms. Dumdie cannot prevail on the second prong of the analysis. Ms. Dumdie ineffective assistance of counsel argument is without merit.

B. THE COURT PROPERLY IMPOSED CONDITIONS OF SUPERVISION PERTAINING TO MENTAL HEALTH EVALUATIONS AND TREATMENT.

Ms. Dumdie argues that the sentencing court erred when it ordered that she comply with any mental health evaluations and recommended treatment. *See* Brief of Appellant at 29. This argument is without merit.

The appellate courts review a crime-related community custody condition for an abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993); *State v. Brooks*, 142 Wn. App. 842, 850, 176 P.3d 549 (2008). A trial court abuses its discretion when its decision is based on untenable grounds including those that are contrary to law. *Brooks*, 142 Wn. App. at 850.

A trial court may generally order crime-related prohibitions or affirmative conduct. RCW 9.94A.505(8) (2009); *Brooks*, 142 Wn. App. at 850. A trial court may order an offender to “participate in crime-related treatment or counseling services” when imposing community custody. *Brooks*, 142 Wn. App. at 850. *See also* RCW 9.94A.700(5)(c) (2009). A trial court may order an offender to undergo mental health evaluation and treatment as a condition of community custody if it complies with certain procedures. RCW 9.94A.700(5)(c) (2009); RCW 9.94A.505(9) (2009); *Brooks*, 142 Wn. App. at 851.

First, the court must find “that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025.” RCW 9.94A.505(9) (2009); *Brooks*, 142 Wn. App. at 851. Second, the court must find this mental health condition was “likely to have influenced the offense.” RCW 9.94A.505(9) (2009); *Brooks*, 142 Wn. App. at 851.

An “order requiring mental status evaluation or treatment must be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offenders competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.” RCW 9.94A.505(9) (2009); *Brooks* 142 Wn. App. at 851.

In *State v. Jones*, this Court held that mental health treatment and counseling reasonably relates to a person's risk of reoffending and is legally valid only if the court obtains a "presentence report or mental status evaluation and finds that the offender was a mentally ill person whose condition influenced the offense." 118 Wn. App. 199, 210, 76 P.3d 258 (2003).

Here, the trial court conducted an extensive competency hearing. *See* RP (10/14/2009) at 3-65. Dr. Danner opined that Ms. Dumdie suffered from an adjustment disorder, adult anti-social behavior, and a personality disorder with paranoia, borderline personality, and schizoid features. RP (10/14/2009) at 10-11. According to Dr. Trowbridge, Ms. Dumdie suffers from paranoid schizophrenia. RP (10/14/2009) at 33-36. At sentencing, after reading the PSI, the trial court stated:

I think it's obvious to everyone involved in the case that mental health issues were at play in this case. And we had a hearing with regard to competency where we had two well qualified doctors ... both of them indicated there were certainly mental health issues, they had arrived at different diagnoses as to what that would be but there's certainly some mental health issues at play here.

But it's also obvious to the Court, and after reading the PSI report to the PSI writer as well, that Ms. Dumdie presents a danger unless she's successfully treated for the issues that have been diagnosed[.]

RP (2/25/2010) at 17-18. *See also* CP at 116-19. Thus, the sentencing court required that Ms. Dumdie undergo mental health evaluations and comply with recommended treatment. CP 19. The sentencing court did not exceed its authority when it ordered a mental health evaluation and treatment as a condition of community custody. This Court should affirm. *See Jones*, 118 Wn. App. 208-11.

C. THE SENTENCING COURT ERRED WHEN IT IMPOSED A SENTENCE THAT POTENTIALLY EXCEEDS THE STATUTORY MAXIMUM.

Ms. Dumdie argues the sentence the court imposed for count 2 – Assault of a Child in the Second Degree – exceeds the statutory maximum. The State concedes error. This Court should remand, instructing the lower court to clarify that the sentence imposed shall not exceed the statutory maximum.

A court may not impose a sentence in which the total time of confinement and supervision served exceeds the statutory maximum. RCW 9.94A.505(5) (2009). The statutory maximum for assault of a child in the second degree is 120 months. RCW 9A.36.021(2)(a); RCW 9A.36.130. Here, the court’s sentence of 84 months, plus the 36 months, coupled with 18 months of community custody potentially exceeds the

statutory maximum.¹³ RP (2/25/2010) at 9-12, 19; CP 10. This Court should remand, instructing the lower court to clarify that the combination of confinement and community custody for Ms. Dumdie's conviction for second degree assault of a child (count 2) shall not exceed the statutory maximum. *In re Pers. Restraint of Brooks*, 166 Wn.2d 664, 675, 211 P.3d 1023 (2009).

D. THE SENTENCING COURT SHOULD OMIT THE BOILERPLATE THAT PERTAINS TO CERTAIN ALCOHOL AND DRUG CONDITIONS OF SUPERVISION.

Ms. Dumdie argues the sentencing court erred when (1) it prohibited her from possessing alcohol and patroning places where alcohol is the chief item of sale, (2) it ordered her to abstain from the use of drugs and drug paraphernalia, and (3) it ordered her to provide copies of any prescribed medications to her community corrections officer. *See* Brief of Appellant at 22, 26. The State concedes error. This Court should remand, instructing the sentencing court to excise this boilerplate.

Only the legislature may establish potential legal punishments. *State v. Pillatos*, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007). Under RCW 9.94B.050, the legislature has authorized the trial court to impose crime-related prohibitions. *See State v. Zimmer*, 146 Wn. App. 405, 413, 190

¹³ Without accounting for earned early release, an 84 month base sentence + 36 months for the firearm enhancement + 18 months of community custody = 138 months.

P.3d 121 (2008) (applying RCW 9.94A.700(5)(e) recodified 9.94B.050). A “crime-related prohibition” is an order prohibiting conduct that *directly relates to the circumstances of the crime.*” *Zimmer*, 146 Wn. App. at 413 (emphasis included).

Again, this Court reviews whether a community custody prohibition is crime-related for abuse of discretion. *Zimmer*, 146 Wn. App. at 413. Additionally, this Court reviews the sentencing court’s finding that the community custody prohibition is crime-related for substantial evidence. *Id.*

In the present case, the sentencing court had the authority to order Ms. Dumdie refrain from the consumption of alcohol. *State v. Jones*, 118 Wn. App. 199, 207, 76 P.3d 258 (2003). *See also* RCW 9.94A.703(3)(e). Thus, this particular condition of supervision is proper.

However, there is no evidence to show Ms. Dumdie committed her offenses under the influence of alcohol or drugs. While Mr. Mosely did ask whether Ms. Dumdie was “drunk or on drugs,” the defendant ignored this inquiry. RP (12/7/2009) at 124-25. The State did not elicit any other testimony, or introduce any evidence purporting to show Ms. Dumdie was intoxicated at the time of her crimes. As such, the State concedes the crime related prohibitions ordering she (1) not possess alcohol, (2) not patron locals where alcohol is the chief item of sale, (3) not use drugs or

drug paraphernalia, and (4) provide copies of lawful prescriptions to her community corrections officer, are not reasonably related to the circumstances of Ms. Dumdie's offense.¹⁴ Upon remand, this Court should instruct the sentencing court to excise these crime related prohibitions.

E. THE SENTENCING COURT SHOULD OMIT THE BOILERPLATE THAT REQUIRES THE DEFENDANT TO PAY COUNSELING COSTS AND MONETARY OBLIGATIONS.

Ms. Dumdie argues the sentencing court erred when it imposed a condition that required her to make restitution to victims. *See* Brief of Appellant at 33-34. The State concedes error.

The sentencing court's authority to order restitution is derived from statute. *State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). Courts have broad discretion when determining the amount of restitution. *State v. Kinneman*, 155 Wn.2d 272, 282, 119 P.3d 350 (2005). The appellate courts review restitution orders for an abuse of discretion. *Davison*, 116 Wn.2d at 919. A sentencing court abuses its discretion when the restitution order is manifestly unreasonable, exercised on untenable grounds, or for untenable reasons. *State v. Endstone*, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999).

¹⁴ The State notes the judgment and sentence does not expressly order the contested conditions. CP 11-12. The prohibitions appeared only as boilerplate in the attached "Conditions of Supervision." CP 19.

A court is required to “determine the amount of restitution due at the sentencing hearing or within one hundred and eighty days” unless good cause is shown for continuing beyond the 180-day time period or the crime victims’ compensation act applies. RCW 9.94A.753(1) (2009).

Restitution must be based on “actual expenses incurred for treatment for injury to persons ... [and] may include the costs of counseling reasonably related to the offense.” RCW 9.94A.753(3) (2009). There is no foreseeability requirement regarding a victim’s damages, but there must be a causal connection between the victim’s damages and the crime committed. *Endstone*, 137 Wn.2d at 682.

If the defendant objects to the restitution amount, the State must prove the amount by a preponderance of the evidence at an evidentiary restitution hearing. *Kinneman*, 155 Wn.2d at 285. The amount of restitution must be established by substantial credible evidence and the court must not rely on speculation or conjecture. *State v. Kisor*, 68 Wn. App. 610, 620, 844 P.2d 1038 (1993).

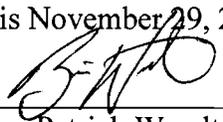
Here, the sentencing court never held a restitution hearing. While the conditions of supervision state that Ms. Dumdie “shall pay the cost of counseling to the victim that is required as result of [her] crime or crimes”, CP 19, the judgment and sentence does not order any restitution to be paid to the victims. CP 14. In fact, the sentencing court expressly stated “there

is no restitution” in the present case, and it waived all legal financial obligations. RP (2/25/2010) at 23; CP 12-13, 16. Upon remand, this Court should instruct the sentencing court to omit the boilerplate that requires Ms. Dumdie to pay any financial obligations or counseling costs.

IV. CONCLUSION:

For the foregoing reasons, the State respectfully requests that this Court (1) affirm Ms. Dumdie’s convictions for Assault in the Second Degree pursuant to counts 1 and 5; (2) affirm Ms. Dumdie’s community custody conditions that pertain to psychological testing, mental health evaluations, and recommended treatment; (3) remand for resentencing with respect to Ms. Dumdie’s sentence for Assault of a Child in the Second Degree – count 2; (4) remand to excise any unnecessary boilerplate that requires Ms. Dumdie (a) not possess alcohol or patron locals where it is the chief item of sale, (b) to abstain from use of drugs and drug paraphernalia, (c) to provide copies of medical prescriptions to her community corrections officer; and (5) remand to excise any condition that requires Ms. Dumdie to make restitution to the victims.

Respectfully submitted this November 29, 2010.



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