

NO. 43896-8-II

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

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STATE OF WASHINGTON,

Respondent,

v.

KEITH HORNADAY,

Appellant.

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

The Honorable Leila Mills, Judge

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BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to Assignments of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
C. <u>ARGUMENT</u> .....	5
1. THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY ON RECKLESSNESS AND DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT. ....	5
a. <u>The jury instruction defining recklessness misstated the             law and relieved the State of its burden of proof.</u> .....	5
b. <u>In the alternative, defense counsel was ineffective for             failing to object to the flawed recklessness instruction.</u> ...	11
2. BECAUSE THE COURT IMPOSED THE MAXIMUM TERM OF INCARCERATION ON COUNT 8, IT ERRED IN ALSO IMPOSING A COMMUNITY CUSTODY TERM. ....	16
D. <u>CONCLUSION</u> .....	18

**TABLE OF AUTHORITIES**

Page

WASHINGTON CASES

<u>In re Pers. Restraint of Brooks</u> 166 Wn.2d 664, 211 P.3d 1023 (2009).....	17
<u>In re Pers. Restraint of Leach</u> 161 Wn.2d 180, 163 P.3d 782 (2007).....	16
<u>State v. Barnett</u> 139 Wn.2d 462, 987 P.2d 626 (1999).....	16
<u>State v. Boyd</u> 174 Wn.2d 470, 275 P.3d 321 (2012).....	17
<u>State v. Brown</u> 147 Wn.2d 330, 58 P.3d 889 (2002).....	9, 11
<u>State v. Duncalf</u> ___ Wn.2d, ___ P.3d ___, 2013 WL 1843349 (May 2, 2013) .....	11
<u>State v. Franklin</u> 172 Wn.2d 831, 263 P.3d 585 (2011).....	16
<u>State v. Gamble</u> 154 Wn.2d 457, 114 P.3d 646 (2005).....	8
<u>State v. Guloy</u> 104 Wh.2d 412, 705 P.2d 1182 (1985).....	10
<u>State v. Harris</u> 64 Wn. App. 377, 263 P.3d 1276.....	7, 8, 9, 12, 13
<u>State v. Johnson</u> 172 Wn. App. 112, 297 P.3d 710 (2012).....	9
<u>State v. Kyлло</u> 166 Wn.2d 856, 215 P.3d 177 (2009).....	14

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Land</u>	
172 Wn. App. 593, 295 P.3d 782 (2013).....	17
<u>State v. Levy</u>	
156 Wn.2d 709, 132 P.3d 1076 (2006).....	6
<u>State v. Peters</u>	
163 Wn. App. 836, 261 P.3d 199 (2011).....	5, 6, 8, 9, 11, 12
<u>State v. Pirtle</u>	
127 Wn.2d 628, 904 P.2d 245 (1995).....	5
<u>State v. Reichenbach</u>	
153 Wn.2d 126, 101 P.3d 80 (2004).....	14
<u>State v. Thomas</u>	
109 Wn.2d 222, 743 P.2d 816 (1987).....	11, 12, 14
<u>State v. Thomas</u>	
150 Wn.2d 821, 83 P.3d 970 (2004).....	9
<u>State v. Wanrow</u>	
88 Wn.2d 221, 559 P.2d 548 (1977).....	6, 9
 <u>FEDERAL CASES</u>	
<u>Delaware v. Van Arsdall</u>	
475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).....	10
<u>In re Winship</u>	
397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....	5
<u>Neder v. United States</u>	
527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).....	9
<u>Strickland v. Washington</u>	
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	11, 14

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>Wiggins v. Smith</u> 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).....	15
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
RAP 2.5.....	6
RCW 9.94A.411 .....	16
RCW 9.94A.535 .....	4
RCW 9.94A.701 .....	16, 17
RCW 9A.04.110 .....	10
RCW 9A.08.010 .....	7
RCW 9A.20.021 .....	4, 16
RCW 9A.32.060 .....	8
RCW 9A.36.021 .....	6, 7, 14
RCW 9A.36.120 .....	7
RCW 26.50.110 .....	4, 16
U.S. Const. Amend. VI.....	11
Wash. Const. Art. I, § 22 .....	11
11 Washington Practice: Washington Pattern Jury Instructions: Criminal (WPIC) 10.03 (3d Ed).....	12, 13

A. ASSIGNMENTS OF ERROR

1. The instruction defining recklessness misstated the law and relieved the State of its burden to prove each element of second degree assault beyond a reasonable doubt.

2. In the alternative, by failing to object to the instruction, counsel provided ineffective assistance that denied the appellant a fair trial.

3. The sentencing court erred in imposing a term of confinement and community custody that exceeds the 60-month statutory maximum for count 8.

Issues Pertaining to Assignments of Error

1. The trial court instructed the jury that to convict the appellant of second degree assault, the State need only prove that the appellant knew of and disregarded “a substantial risk that a wrongful act may occur,” rather than “a substantial risk that substantial bodily harm may occur.” Did this instruction impermissibly relieve the State of its burden to prove each element of the crime beyond a reasonable doubt?

2. Was defense counsel ineffective for failing to object to this instruction?

3. The court imposed an exceptional sentence and ran count 8 consecutive to the other counts. Did the sentencing court err in failing to reduce the community custody term to ensure that the combination of

confinement and community custody on that count did not exceed the 60-month statutory maximum?

B. STATEMENT OF THE CASE<sup>1</sup>

The State charged Keith Hornaday with second degree assault – domestic violence, witness tampering, and six counts of felony violation of a no-contact order based on allegations that he assaulted Yvonne Newsted-Klepper (Klepper) and then repeatedly contacted her via phone and letter. CP 1-10, 64-73.

The second degree assault charge was based on two alternative theories, reckless infliction of substantial bodily harm and strangulation. CP 64, 93. The no-contact order violation charges were elevated to felonies based on an allegation of two previous convictions for that offense.<sup>2</sup> CP 67.

Klepper testified that she considered herself to be Hornaday's wife, although the two were not legally married. 2RP 178-79, 182. The evening of October 30, 2010, Klepper and Hornaday argued at the apartment where Klepper was staying. 2RP 183, 197, 221; 3RP 234.

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<sup>1</sup> This brief refers to the verbatim report as follows: 1RP – 4/10/2012; 2RP – 4/16/2012; 3RP – 4/17/2012; 4RP – 4/18/2012; 5RP – 4/19/2012; and 6RP – 8/3/2012.

<sup>2</sup> Hornaday stipulated to the two convictions. CP 60-62; 3RP 321-23.

Klepper struck Hornaday. 2RP 197. Klepper was later attacked from behind while walking through an alley. 2RP 184. At trial, Klepper had trouble remembering the incident but believed she was choked and punched. 2RP 185. She also lost a tooth and her glasses were damaged. 2RP 185, 197. Klepper caught a glimpse of Hornaday in the alley, but recalled few details of his involvement. 2RP 185; 3RP 293.

After the attack, Klepper ran to her brother's nearby residence. Erik McSheperd, whom she was also dating, was there. 2RP 186, 210; 3RP 238. McSheperd and some other friends later accompanied Klepper to the emergency room. 2RP 186.

Klepper believed she had trouble remembering the incident because a "plate" in her skull, the result of a childhood accident, had been broken during the attack. 2RP 185. Klepper's treating physician testified, however, that testing did not reveal a plate in her skull. 3RP 310.

The physician testified that Klepper had bruises on her face, arm and knee. She also lost a tooth. 3RP 302. Klepper complained of neck pain, but x-rays and a CT scan revealed no fractures to Klepper's neck or head. 3RP 302, 307. The physician observed bruises on Klepper's neck and some broken blood vessels consistent with strangulation, but no damage to her windpipe, a common strangulation injury. 3RP 304-06.

Klepper's tongue was bruised, which was consistent with either a blow to the jaw or a fall. 3RP 306.

Klepper reported that night that she was attacked by an ex-boyfriend she had broken up with months earlier. 3RP 299, 308. Officer Bryan Hall was dispatched to the hospital and took pictures of Klepper's injuries. 2RP 110-12.

The jury found Hornaday guilty of all charges, but indicated by special verdict that it could not agree as to the strangulation alternative of second degree assault. CP 111-14.

Based on a judicial finding that some offenses would go unpunished,<sup>3</sup> the court sentenced Hornaday to an exceptional sentence of 73 months of confinement and 18 months of community custody on the assault charge. The court ordered the witness tampering and five of the felony no-contact order violation sentences to run concurrently to that. The court ordered the final no-contact order violation sentence to run consecutively, thereby adding 60 months of confinement and 12 months of community custody to the total. RCW 26.50.110(5); RCW 9A.20.021(1)(c). The court included a notation on the judgment and

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<sup>3</sup> RCW 9.94A.535(2)(c) ("The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished."); CP 156-58 (court's findings in support of exceptional sentence).

sentence indicating the combination of confinement and community custody should not exceed the statutory maximum. CP 148.

Hornaday timely appeals. CP 159.

C. ARGUMENT

1. THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY ON RECKLESSNESS AND DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT.

The trial court's instructions misstated the law by giving the jury an incorrect definition of "recklessness," thereby relieving the State of its burden of proving an essential element of second degree assault. Reversal of the assault conviction is also required because counsel was ineffective for failing to object to the flawed instruction.

- a. The jury instruction defining recklessness misstated the law and relieved the State of its burden of proof.

“Jury instructions must inform the jury that the State bears the burden of proving each essential element of a criminal offense beyond a reasonable doubt.” State v. Peters, 163 Wn. App. 836, 847, 261 P.3d 199 (2011) (citing In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). It is reversible error to instruct the jury in a way that relieves the State of the burden of proof. Id. (quoting State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995)). Accordingly, a challenge the jury

instruction defining recklessness may be raised for the first time on appeal. Peters, 163 Wn. App. at 847 (citing RAP 2.5(a)(3)).

This Court reviews errors of law in jury instructions de novo. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). A “clear misstatement of the law” in a jury instruction is presumed prejudicial. State v. Wanrow, 88 Wn.2d 221, 239, 559 P.2d 548 (1977).

Under RCW 9A.36.021(1)(a), a person commits second degree assault if he “[i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm.” The “to convict” instruction for count 1 provided:

To convict the defendant of the crime of assault in the second degree, as charged in count I, each of the following two elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about October 30, 2011 through October 31, 2011, the defendant:

- (a) intentionally assaulted [Klepper] and thereby recklessly inflicted substantial bodily harm; or
- (b) assaulted [Klepper] by strangulation; and

(2) That this act occurred in the State of Washington.

CP 93 (Instruction 14). The court also instructed the jury that it need not be unanimous as to which alternative had been proven beyond a reasonable doubt. Id. However, the jury indicated by special verdict that it unanimously agreed as to the first alternative but not the second. CP 114.

RCW 9A.08.010(1)(c), addressing general levels of culpability, states, "A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation."

Here, Instruction 13 defined "recklessness" as follows:

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that *a wrongful act* may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

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

CP 92 (emphasis added).

The italicized portion of Instruction 13 misstates the law because it does not convey the mental state required to convict Hornaday of second degree assault under RCW 9A.36.021(1)(a). To accurately hold the State to its burden of proof, the instruction should have used the term "substantial bodily harm" rather than the term "a wrongful act."

In State v. Harris, Harris was charged with first degree assault of a child, which requires the State to prove "the person . . . [i]ntentionally assaults the child and . . . [r]ecklessly inflicts great bodily harm." 164 Wn. App. 377, 383, 263 P.3d 1276 (quoting RCW 9A.36.120(1)(b)(i)). The

State alleged that the injury resulted from shaking. Harris, 164 Wn. App. at 380. To convict for first degree assault of a child, the jury had to find Harris recklessly disregarded a substantial risk that "great bodily harm" would occur as a result of shaking the child. Id. at 384. The instruction defining recklessness thus relieved the State of its burden. Id. at 388. In reversing the conviction, this Court held that a jury instruction defining recklessness must account for the specific risk contemplated under that statute, *i.e.*, "great bodily harm" rather than some undefined "wrongful act." Id. at 387-88 (quoting State v. Gamble, 154 Wn.2d 457, 468, 114 P.3d 646 (2005) ("the risk contemplated per the assault statute is of 'substantial bodily harm'")).

In State v. Peters, Peters was convicted of first degree manslaughter, which requires the State to prove that the defendant "recklessly causes the death of another person." 163 Wn. App. at 847 (quoting RCW 9A.32.060(1)(a)). Division One of this Court concluded the jury instructions provided an improper explanation of recklessness. Peters, 163 Wn. App. 849-50. As in Harris, the instruction stated the State had to prove only that Peters "knew of and disregarded 'a substantial risk that a wrongful act may occur', rather than that a substantial risk that death may occur." Id. The Court held the instruction relieved the State of its burden of proving Peters knew of and disregarded a substantial risk that

death may occur, and allowed the jury to convict Peters based on a lesser standard. Id. at 850.<sup>4</sup>

Instruction 13 here is flawed for the same reason as the instructions in Harris and Peters. The instruction needed to account for the specific risk contemplated by the second degree assault statute, i.e., "substantial bodily harm" as opposed to a generic "wrongful act." The instruction therefore relieved the State of its burden of proving Hornaday acted with a disregard that a substantial risk of substantial bodily harm would result.

The erroneous instruction is presumptively prejudicial. Wanrow, 88 Wn.2d at 239. The instruction is, however, subject to a harmless error analysis. State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). A misstatement of the law with respect to an element is harmless if the element is supported by uncontroverted evidence. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). To determine whether the error is harmless, this Court must find beyond a reasonable

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<sup>4</sup> Division One of this Court later found a similar "wrongful act" instruction was erroneous, but declined to reverse where defense counsel proposed the instruction. The appellant's claim was thus one of ineffective assistance of counsel, but the Court denied the claim because trial occurred before Harris and Peters were decided. State v. Johnson, 172 Wn. App. 112, 297 P.3d 710, 721 (2012) (declining to find deficient performance because at the time of Johnson's trial "though incorrect, [proposing the flawed instruction] was not objectively unreasonable.").

doubt the verdict would have been the same without the error. Brown, 147 Wn.2d at 341. The State bears the burden of showing that the error is harmless beyond a reasonable doubt. Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986); State v. Guloy, 104 Wh.2d 412, 425, 705 P.2d 1182 (1985).

Here, the jury should have been required to find Hornaday knew of and disregarded a risk that the assault would result in Klepper suffering “substantial bodily harm.” That term is defined as “bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.” RCW 9A.04.110(4)(b).

Here, it is unclear what occurred in the alley to cause the harm Klepper suffered. Klepper did not remember. But other than a broken tooth, the most significant injury noted by medical staff was bruising. The level of force required to cause bruises could have been comparatively minimal. For example, the emergency room physician did not rule out the possibility that the injuries to Klepper’s mouth could have been caused by a fall, which could have resulted from a push or shove. 3RP 306.

Hornaday does not dispute that the jury was entitled to find substantial bodily harm based on Klepper’s injuries. But these injuries are

a far cry from “substantial bodily harm” at its most extreme. See, e.g., State v. Duncalf, \_\_\_ Wn.2d, \_\_\_ P.3d \_\_\_\_, 2013 WL 1843349 \*4 (May 2, 2013) (upholding exceptional sentence for second degree assault based on a severe beating).

It cannot be said that uncontroverted evidence supported this element of assault. Brown, 147 Wn.2d at 341. A proper instruction could have resulted in acquittal based on a theory that the assailant failed to appreciate the intensity of the injuries that could occur. Despite Klepper’s more outlandish claims at trial, the documented injuries are consistent with such a theory. The State cannot prove the error is harmless beyond a reasonable doubt, and reversal is required. Peters, 161 Wn. App. at 851-52.

- b. In the alternative, defense counsel was ineffective for failing to object to the flawed recklessness instruction.

The Sixth Amendment and Article I, Section 22 guarantee every criminal defendant the right to the effective assistance of counsel. 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). Counsel is ineffective where (1) his performance is deficient and (2) the deficiency prejudices the accused Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

The State proposed Instruction 13. CP 92, 178. But defense counsel did not object to it. 4RP 451. Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Both Harris and Peters had been decided at the time of Hornaday's trial. A competent attorney would have been aware Instruction 13 was flawed and would have objected to it.

The State may argue that counsel's performance cannot be deficient because Instruction 13 is based on the pattern instruction. That argument fails. Even though Instruction 13 is based on WPIC 10.03, it is not properly tailored to the charge and facts.

WPIC 10.03 provides:

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a [wrongful act] [\_\_\_\_\_] may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

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

11 Washington Practice: Washington Pattern Jury Instructions: Criminal (WPIC) 10.03 (3d Ed).

Pattern instructions are not to be applied in a mechanical manner. The WPIC committee specifically cautions lawyers that pattern instructions "provide a neutral starting point for the preparation of

instructions that are *individually tailored for a particular case*. We emphasize that they are a starting point, not an ending point. Trial judges and *attorneys must always consider appropriate modifications to fit the individual case.*" 11 Wash. Prac.: WPIC 0.10 (Introduction to Washington's Pattern Jury Instructions for Criminal Cases) (emphasis added).

This case-by-case approach includes "substituting more specific language for the necessarily general language of a pattern instruction." Id. Bracketed language in a pattern instruction, such as the "wrongful act" language in WPIC 10.03, signifies "the enclosed language may or may not be appropriate for a particular case." Id. Brackets "are inserted to alert the judge and attorneys that a choice in language needs to be made." Id. WPIC 10.03, the recklessness instruction, puts "wrongful act" in brackets immediately followed by a direction to "fill in more particular description of act, if applicable." Harris, 164 Wn. App. at 384-85 (citing 11 Wash. Prac.: WPIC 10.03, at 209 (3d ed. 2008)).

Reasonably competent counsel would have known at the time of Hornaday's trial that it was necessary to fill in the bracketed language with a more particular description of the act at issue for second degree assault. Indeed, the statutory definition of second degree assault under RCW

9A.36.021(1)(a) requires that a person "recklessly inflict[] substantial bodily harm," not recklessly inflict a "wrongful act."

Only legitimate trial strategy or tactics constitute reasonable performance. See State v. Kyllö, 166 Wn.2d 856, 869, 215 P.3d 177 (2009). The presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Counsel has a duty to know the relevant law. Kyllö, 166 Wn.2d at 862. Case law should have alerted counsel that the "wrongful act" required for a finding of recklessness in a second degree assault case is recklessness that substantial bodily harm would occur, not simply whether an undefined "wrongful act" would occur. The failure to object was objectively unreasonable.

A defendant demonstrates prejudice from such ineffective assistance by showing a reasonable probability that, but for counsel's performance, the result would have been different. Thomas, 109 Wn.2d at 226. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (quoting Strickland, 466 U.S. at 694). Hornaday "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Strickland, 466 U.S. at 693.

By relieving the State of its burden of proof on the recklessness element, the flawed instruction undermines confidence in the jury's verdict. As even the prosecutor acknowledged in closing, there were clearly issues with Klepper's credibility. 5RP 532. Klepper told emergency room staff she was choked, 4RP 401, although she could not remember that at the time of trial. And despite the physician's testimony she had *some* injuries consistent with strangulation, the jury could not agree whether Klepper was strangled. CP 114.

There is no question that a "wrongful act" occurred here. Any injury from striking or pushing a person to the ground, or the blow itself, could be considered wrongful. Instruction 13 improperly allowed the jury to find Hornaday guilty because he knew of and disregarded a substantial risk that any "wrongful act" could occur, as opposed to holding the State to its more difficult burden of proving he knew of and disregarded the risk that "substantial bodily harm" could occur. Reversal of the assault conviction is thus required because there is a reasonable probability the flawed instruction affected the verdict. See Wiggins v. Smith, 539 U.S. 510, 537, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (test for "reasonable probability" of prejudice is whether it is reasonably probable that, without the error, at least one juror would have reached a different result).

2. BECAUSE THE COURT IMPOSED THE MAXIMUM TERM OF INCARCERATION ON COUNT 8, IT ERRED IN ALSO IMPOSING A COMMUNITY CUSTODY TERM.

A court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). Statutory construction is a question of law and is reviewed de novo. In re Pers. Restraint of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007).

Under RCW 9.94A.701(3)(a), a court is directed to sentence an offender to one year of community custody if he is convicted of a “crime against persons” as defined by RCW 9.94A.411(2). A “domestic violence court order violation” is such a crime. Id. The court recognized that the 60-month prison term<sup>5</sup> combined with a 12-month community custody term exceeded the statutory maximum of 60 months, and noted on the judgment and sentence that the combination of confinement and community custody should not exceed the statutory maximum. CP 148.

The sentencing court’s notation would have been correct under former case law. See State v. Franklin, 172 Wn.2d 831, 837, 263 P.3d 585 (2011) (under earlier statutes, the Department of Corrections was allowed to recalculate community custody terms to ensure the combination of confinement and community custody did not exceed the statutory

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<sup>5</sup> Felony violation of a no-contact order is a class C felony with a statutory maximum of 60 months. RCW 26.50.110(5); RCW 9A.20.021(1)(c).

maximum); accord, In re Pers. Restraint of Brooks, 166 Wn.2d 664, 666, 211 P.3d 1023 (2009). But the legislature amended the pertinent statute in 2009, and in 2012 the Supreme Court held sentencing courts must reduce the community custody term to ensure the combination does not exceed the statutory maximum. State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012) (citing RCW 9.94A.701(9)). The proper remedy is to remand to the trial court to specify a term of community custody that does not exceed the statutory maximum. Boyd, 174 Wn.2d at 473; State v. Land, 172 Wn. App. 593, 295 P.3d 782, 786-87 (2013).

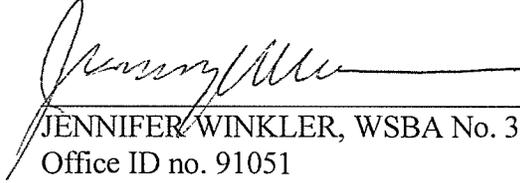
D. CONCLUSION

The court's erroneous second degree assault instruction relieved the State of its burden to prove each element of the crime beyond a reasonable doubt. Reversal is required. In any event, remand for resentencing is required because as to count 8 the court erroneously imposed a community custody term in addition to a statutory maximum term of incarceration.

DATED this 31<sup>ST</sup> day of May, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

  
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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 43896-8-II
	)	
KEITH HORNADAY,	)	
	)	
Appellant.	)	

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**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 30<sup>TH</sup> DAY OF MAY 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] KEITH HORNADAY  
DOC NO. 875766  
AIRWAY HEIGHTS CORRECTIONS CENTER  
P.O. BOX 2049  
AIRWAY HEIGHTS, WA 99001

**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF MAY 2013.

X *Patrick Mayovsky*

# NIELSEN, BROMAN & KOCH, PLLC

**May 31, 2013 - 12:40 PM**

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