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NO. 67229-1-I

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

REC'D
JAN 27 2012
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

MALCOLM R. HOLLINGSWORTH,

Appellant.

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

The Honorable Regina S. Cahan, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Trial counsel deprived Malcolm R. Hollingsworth of his constitutional right to effective assistance by failing to argue the felony harassment and promoting prostitution offenses were the same criminal conduct.

2. The information is defective because it fails to include the "true threat" element of the felony harassment charge.¹

3. The trial court exceeded its statutory sentencing authority by imposing a 120-month, statutory maximum sentence for promoting prostitution *and* a 12-month community custody term.

Issues Pertaining to Assignments of Error

1. Was trial counsel ineffective for failing to argue the acts used by the state to obtain convictions for felony harassment and promoting prostitution, all of which occurred during the same continuing course of events against the same complainant, constituted the same criminal conduct?

¹ This issue is pending in the Washington Supreme Court in State v. Allen, 161 Wn. App. 727, 755, 255 P.3d 784, review granted, 172 Wn.2d 1014 (2011).

2. Is reversal of the felony harassment conviction required where the state failed to allege the "true threat" element in the information?

3. Did the trial court exceed its statutory sentencing authority by imposing a 120-month, statutory maximum sentence for promoting prostitution and a 12-month community custody term?

B. STATEMENT OF THE CASE

Richard Larsh (Larsh) was asleep early one morning at a residence he shared with his 70-year-old mother. 3RP 84, 90.² His 19-year-old daughter, Desiree Larsh, awakened him when she opened his bedroom door and said she was going to use his cell phone. 3RP 84, 87. When he heard Desiree crying and saw that she was upset, he got out of bed and asked her what was wrong. She walked away from him while arguing with someone on the phone. 3RP 85.

After a few minutes, Larsh heard Desiree tell the person with whom she was speaking not to come over. 3RP 87-88. Larsh heard the unknown person yell at Desiree and call her "the 'B' word." When he

² Hollingsworth cites to the verbatim report of proceedings as follows: 1RP – 12/20/10, 4/19/11; 2RP – 4/20/11; 3RP – 4/21/11; 4RP – 4/25/11; 5RP – 4/26/11; 6RP – 4/27/11; 7RP 4/28/11; 8RP – 5/20/11.

heard the person say, "I am going to kill you[,]"" Larsh called 911. 3RP 90.

King County Sheriff's deputies McDonald and Nishimura responded to Larsh's residence. 3RP 4-6, 37-40. Nishimura arrived first and saw Desiree in the carport as he approached the home. 3RP 22, 41-42. She appeared nervous and was looking around as she walked toward Nishimura's car. 3RP 42-43. As they spoke, Larsh came outside and milled around while Nishimura and Desiree sat inside the police car and continued their conversation. 3RP 43-46. Desiree continued to look around; Nishimura described her as "fearful." 3RP 44-46.

She told the officer that she and Malcolm R. Hollingsworth had been dating for more than four years and that she was pregnant with Hollingsworth's child. 3RP 62. Before the officers arrived she had been arguing on the phone with Hollingsworth. The argument escalated and Hollingsworth said he would kill her and her baby, and if he were charged with a crime he would kill her father and grandmother. 3RP 44, 64-65. Desiree said Hollingsworth, a "known pimp," forced her into prostitution, including well into her pregnancy by abusing her physically and emotionally. 3RP 48, 64-65, 68. Specifically, she said Hollingsworth

broke her nose in July 2009, choked her to the point of unconsciousness, dislocated her shoulder, and poured boiling water on her. 3RP 64-65.

Meanwhile, Deputy McDonald arrived and spoke with Larsh, who gave a written statement. 3RP 17-20, 69, 102-03.

Hollingsworth was arrested later that morning. 3RP 67-68; 4RP 90. Two days later, on November 24, 2010, a King County District Court entered an order prohibiting Hollingsworth from contacting Desiree. 3RP 29; Ex. 6. On December 6, 2010, another no-contact order issued from the King County Superior Court. 3RP 29; Ex. 5. Hollingsworth nevertheless called Desiree numerous times from jail through December 30, urging her to continue earning money through prostitution. He also directed her not to come to court or to cooperate with the State. 4RP 24-41, 91-99, 102-04; 5RP 11-18; 6RP 4-6, 12; Exs. 13b through 15b.³

As a result of these incidents, the State charged Hollingsworth with felony harassment, first degree promoting prostitution, two counts of violating a no-contact order (one for each order), and two counts of witness tampering (one naming Desiree and one her father). CP 10-13.

³ The exhibits are CDs made by jail staff that contained more than three hours of recorded telephone conversations between Hollingsworth and Desiree. 4RP 25-28. The trial court admitted the recordings over Hollingsworth's contention the State failed to authenticate them. CP 17-18; 1RP 45-47; 4RP 60-63, 67-69.

Desiree did not cooperate in the prosecution of Hollingsworth. Supp. CP __ (sub. no. 33, State's Trial Memorandum, at 15-20, filed 4/19/2011); 1RP 26, 34-45. Her statements came in through Deputy Nishimura as excited utterances. 1RP 63-67.

Larsh testified he had met with Hollingsworth five or six times for a few brief moments. 3RP 107-08, 110. He had spoken with Hollingsworth one time on the telephone. 3RP 109-10. He testified he was not sure it was Hollingsworth he heard yelling at Desiree on the phone. 3RP 92-93. He acknowledged, however, that he told Deputy McDonald it was Hollingsworth he heard. 3RP 92, 101-02. He did not recall telling McDonald that Desiree had been dating Hollingsworth for about three years. 3RP 94-95. Nor did he remember saying he believed Hollingsworth may be capable of following through on a threat to kill. 3RP 98. Larsh said he last saw Desiree about one month before trial, and did not know where she was. 3RP 105-06.

McDonald testified Larsh told him it was Hollingsworth who called Desiree a bitch and told her he was going to kill her. 4RP 14-15.

After the lunch recess on the day the State planned to rest its case, Desiree unexpectedly appeared in the courtroom. 5RP 17, 20-21. She testified she came to help Hollingsworth because she did not want her

infant daughter to be without her father. 5RP 26-27, 49. She was 20 years old and met Hollingsworth when she was 15. 5RP 27-28, 63. She went no further than the eighth grade in school. 5RP 61. She and Hollingsworth were best friends and did not have sex until she turned 19. 5RP 28-29, 48, 63-64. She had not spoken with him in several months. 5RP 41. Hollingsworth never told her to lie in court about the nature of their telephone conversation. 5RP 41, 67. Neither Hollingsworth nor anyone else told her to come to court. 5RP 60, 72.

Desiree slept "from couch to couch" at her brother's residence, with friends, with her mother, and at her grandmother's home in a retirement community. 5RP 30-31, 53-54, 70-71. She was irritated with her father because he was overprotective and "very nosey." 5RP 34-35. There was no reason for him to call the police when he did because he "jumped to conclusions" after trying to snatch the phone out of her hand. 5RP 37-39. Desiree did not recall Hollingsworth threatening to kill her, her then-unborn child, and her grandmother. 5RP 38, 49.

She spoke with an officer in his car because she did not want her grandmother awakened. 5RP 38-39. She kept looking back to make sure her grandmother was not awake. 5RP 39. She was also frightened and nervous because if neighbors saw the police, her grandmother could get

kicked out of her house. 5RP 68-69. She told the officer she had a misunderstanding with Hollingsworth on the telephone. Her father jumped to conclusions and should not have called 911. 5RP 42-43. The officer gave her a piece of paper with writing on it and told her to sign it and write that she made the statement freely, without threats or promises. 5RP 43-44, 59. She did not read the document. 5RP 46, 59.

Desiree spoke with Hollingsworth in the days after his arrest. He directed her to collect money that people owed him for DVDs he sold them. 5RP 50-53, 55. She worried that when she collected the debts, police officers would think she was engaging in prostitution, which she had been doing for several years to have places to stay at night. Hollingsworth was mad when he learned she prostituted herself and wanted her to stop and change her life. 5RP 54-55, 64-65. He told her she could get killed prostituting. 5RP 65. On the night her father called police, Hollingsworth again told her to quit being a prostitute because she was going to get killed. 5RP 66.

Hollingsworth never assaulted her. 5RP 55-56. Desiree denied saying the things Deputy Nishimura testified she said. 5RP 56-59. She had her nose broken and suffered a dislocated shoulder during a fight with

a girl. 5RP 62-63. She saw a man tie up a girl and pour water on her during a television show she had watched. 5RP 65, 74.

The following day, the prosecutor learned Hollingsworth called Desiree from jail the night before she testified. During the call, Hollingsworth directed Desiree to come to court and told her what to say. 6RP 6-7, 19, 22. The trial court admitted the recording of the conversation over Hollingsworth's authentication objection. 6RP 20; Ex. 17.

A King County jury found Hollingsworth guilty of felony harassment, first degree promoting prostitution, two counts of violating a domestic violence no-contact order, and tampering with a witness (Desiree). The jury acquitted him of tampering with Larsh. CP 30-36. The trial court imposed maximum concurrent standard range sentences totaling 120 months. CP 201-212; 8RP 17-18.

C. ARGUMENT

1. HOLLINGSWORTH'S HARASSMENT AND PROMOTING PROSTITUTION CONVICTIONS INVOLVED THE "SAME CRIMINAL CONDUCT" FOR SENTENCING PURPOSES.

Hollingsworth was sentenced with an offender score of 9, which included his other current felony convictions. CP 201-09. The felony harassment and promoting prostitution were based on the same criminal conduct, but defense counsel did not make the argument. Because such a

claim would have resulted in a lowered offender score and concomitant standard range, Hollingsworth received ineffective assistance of counsel.

a. Ineffective assistance of counsel

Article I, section 22 and the Sixth Amendment guarantee criminal defendants effective representation. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); In re Personal Restraint of Woods, 154 Wn.2d 400, 420, 114 P.3d 607 (2005). Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007).

The presumption of competent performance is overcome by demonstrating the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. State v. Crawford, 159 Wn.2d 86, 98, 147 P.3d 1288 (2006). Failure to preserve error can constitute ineffective assistance and justifies examining the error on appeal. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980); see State v. Jackson, 150 Wn. App. 877, 892, 209 P.3d 553 (2009) (failing to raise same criminal conduct before sentencing court waives argument challenging offender score), review denied, 167 Wn.2d 1007 (2009); State v. Allen, 150 Wn. App. 300, 316-17, 207 P.3d 483 (2009) (reaching

ineffective assistance claim where attorney failed to raise same criminal conduct issue during sentencing), review denied, 170 Wn.2d 1014 (2010); State v. Saunders, 120 Wn. App. 800, 825, 86 P.3d 232 (2004) ("counsel's decision not to argue same criminal conduct as to the rape and kidnapping charges constituted ineffective assistance of counsel").

b. Same criminal conduct

“[W]henver a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score” unless the crimes involve the “same criminal conduct.” RCW 9.94A.589(1)(a). "Same criminal conduct,' . . . means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." Id.

The test is objective; a court must consider how closely related the crimes committed are, and whether the criminal goals substantially changed between the crimes charged. State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990). Another question is whether one crime furthered the other. Id. The issue is reviewed for an abuse of discretion or

misapplication of the law. State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994).

i. Same victim, time and place

Desiree was the named victim of the felony harassment and promoting prostitution charges against Hollingsworth. CP 10-11. The felony harassment was based on a telephone call made November 22, 2010. CP 10; 3RP 36-50. Hollingsworth allegedly compelled Desiree to engage in prostitution between July 1, 2009, and December 27, 2010. CP 11. As charged and proved, promoting prostitution was a continuing course of conduct. See State v. Elliott, 114 Wn.2d 6, 14, 785 P.2d 440 (1990) (two counts of promoting prostitution, involving two different women and two different one-year charging periods, were two continuing courses of conduct), cert. denied, 498 U.S. 838 (1990); State v. Barrington, 52 Wn. App. 478, 481, 761 P.2d 632 (1988) (incidents of prostitution victim described illustrated nature of three-month prostitution enterprise rather than separate distinct acts or transactions between victim and defendant), review denied, 111 Wn.2d 1033 (1989). The felony harassment and promoting prostitution thus occurred at the same time.

The crimes also occurred at the same place. Desiree testified she stayed in various places during the charging period of the promoting

prostitution charge, including her grandmother's home. She received the felony harassment telephone call at her grandmother's house. There was no evidence Hollingsworth had a place of business or headquarters for the prostitution enterprise. Under the circumstances and unusual nature of a continuing crime like promoting prostitution, the two offenses occurred at the same place. See State v. Lewis, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990) ("the same time and place analysis applies . . . when there is a continuing sequence of criminal conduct.").

ii. Same objective intent

The harassment and promoting prostitution also involved the same intent. "The standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next." State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). In this context, "intent" is not the mens rea element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime. State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144, review denied, 114 Wn.2d 1030 (1990). Factors include whether one crime furthered the other, whether one remained in progress when the other occurs, and whether the offenses were part of the same scheme or plan. State v. Calvert, 79 Wn. App. 569, 578, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005 (1996); State v. Edwards, 45

Wn. App. 378, 382, 725 P. 2d 442 (1986), overruled in part on other grounds, State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987).

Several cases demonstrate what is meant by "same intent" in this context. In State v. Taylor, the two defendants assaulted the driver of a car as he stepped out to buy gasoline. The defendants climbed into the car and, with a rifle pointing at the passenger's head ordered the driver to take them to a park. When they arrived at the park, the defendants robbed the passenger, left the car, and crossed the street. 90 Wn. App. 312, 315, 950 P.2d 526 (1998).

At issue was whether the charges of second degree assault and first degree kidnapping against the passenger arose from the same criminal conduct. More specifically, the question was whether Taylor's objective intent was the same when committing the two offenses. Taylor, 90 Wn. App. at 321. The court found it was:

The evidence established that Taylor's objective intent in committing the kidnapping was to abduct Murphy by the use or threatened use of the gun and that his objective intent in participating in the second degree assault was to persuade Murphy, by the use of fear, to not resist the abduction. The assault began at the same time as the abduction, when Taylor and Nicholson entered the car. It ended when the kidnappers exited the car and the abduction was over.

Taylor, 90 Wn. App. at 321. Notably, the court found that where two crimes are committed continuously and simultaneously, "it is not possible

to find a new intent to commit a second crime after the completion of the first crime." Id. at 321-322.

The question in State v. Saunders was whether instances of rape and kidnapping involved the same criminal conduct. 120 Wn. App. at 824-25. Saunders and his friend, Williams, were drinking in Saunders' living room with a third woman when Saunders requested the woman to engage in a sexual threesome. Saunders, 120 Wn. App. at 806-07. After the woman refused, Saunders bound the woman with handcuffs and leg shackles. At some point, Saunders tried to force the woman to perform oral sex on him but she refused. Saunders then went into the kitchen for a knife. When he came back into the living room, Williams was raping the woman. Saunders, 120 Wn. App. at 807.

On review, the court found the kidnapping and rape were the same criminal conduct, reasoning the kidnapping was committed in furtherance of the rape. Saunders, 120 Wn. App. at 825. The court also found Williams' main motivation for raping the woman was to dominate her and to cause pain and humiliation, an intent similar to the motivation for the kidnap. Saunders, 120 Wn. App. at 825.

As in Saunders, Hollingsworth's objective in committing the harassment was – like the numerous emotional and physical assaults

Desiree disclosed to Deputy Nishimura – to dominate Desiree so she would continue to prostitute herself at Hollingsworth's behest. This objective did not change between the two crimes.

Furthermore, to prove harassment, the State had to show Hollingsworth knowingly threatened to cause bodily injury immediately or in the future to Desiree and that Desiree was placed in reasonable fear that Hollingsworth would carry out the threat. RCW 9A.46.020(1)(a)(i). To prove promoting, the State had to show Hollingsworth knowingly advanced or profited from prostitution by compelling Desiree by threat or force to engage in prostitution. RCW 9A.88.070(1).

The threat required to prove harassment furthered the compulsion by threat or force required to prove first degree promoting prostitution. Moreover, the compulsion Hollingsworth used helped the State prove Desiree's fear of bodily injury, i.e., death, was reasonable. The prosecutor emphasized this during closing argument:

Again, we know how scared she is, because she explained to us everything that she had to bear witness to: Being choked unconscious, being routinely beaten, assaulted, boiling hot water, the fact that she knows he carries weapons, knives, the fact she's ducking down in a police car in fear that the defendant might be the one in a car approaching.

6RP 47.

"While laws may proscribe 'all sorts of conduct' the same is not true of speech." State v. Kilburn, 151 Wn.2d 36, 42, 84 P.3d 1215 (2004) (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, 515 U.S. 557, 579, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995)). Speech protected by the First Amendment may not be criminalized. Kilburn, 151 Wn.2d at 42. RCW 9A.46.020, the statute defining the crime of harassment, criminalizes pure speech if read literally. Id. at 41. To avoid unconstitutional infringement on protected speech, the harassment statute and the threat-to-kill provision of RCW 9A.46.020 must therefore be read to prohibit only "true threats." State v. Schaler, 169 Wn.2d 274, 284, 236 P.3d 858 (2010).

"A true threat is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life of another person." Schaler, 169 Wn.2d at 283 (quoting Kilburn, 151 Wn.2d at 43) (internal quotation marks omitted). The true threat standard "requires the defendant to have some mens rea as to the result of the hearer's fear: simple negligence." Schaler, 169 Wn.2d at 287.

The information accused Hollingsworth of committing felony harassment as follows: "That the defendant . . . on or about November 22, 2010, knowingly and without lawful authority, did threaten to cause bodily injury immediately or in the future . . . by threatening to kill . . . and the words or conduct did place said person in reasonable fear that the threat would be carried out[.]" CP 10.

The information fails to allege Hollingsworth made a "true threat." This Court has held the "true threat" allegation need not be included in the charging document because it is definitional rather than an essential element. State v. Tellez, 141 Wn. App. 479, 484, 170 P.3d 75 (2007) (telephone harassment under RCW 9.61.230(2)(b)); State v. Atkins, 156 Wn. App. 799, 802, 236 P.3d 897 (2010) (felony harassment under RCW 9A.46.020); State v. Allen, 161 Wn. App. 727, 755, 255 P.3d 784, review granted, 172 Wn.2d 1014 (2011).

Those decisions cannot be reconciled with the Supreme Court's decision in Schaler and established precedent. The Supreme Court in Schaler pointedly declined to determine whether Tellez was correctly decided because the issue of whether a true threat was an element of harassment was not before it. Schaler, 169 Wn.2d at 289 n.6. The Court did reaffirm, however, that the State must prove "a reasonable person in

the defendant's position would foresee that a listener would interpret the threat as serious." Id. That statement accords with Kilburn, where the Court held a harassment conviction must be reversed if the State fails to prove a "true threat." Kilburn, 151 Wn.2d at 54.

The elements of a crime are commonly defined as "[t]he constituent parts of a crime — [usually] consisting of the actus reus, mens rea, and causation — that the prosecution must prove to sustain a conviction." State v. Peterson, 168 Wn.2d 763, 772, 230 P.3d 588 (2010) (quoting State v. Fisher, 165 Wn.2d 727, 754, 202 P.3d 937 (2009)). "An 'essential element is one whose specification is necessary to establish the very illegality of the behavior' charged." State v. Feeser, 138 Wn. App. 737, 743, 158 P.3d 616 (2007) (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)), review denied, 163 Wn.2d 1007 (2008). As Schaler and Kilburn make clear, the State cannot convict someone of harassment unless it proves the existence of a true threat. Schaler, 169 Wn.2d at 286-87, 289 n.6; Kilburn, 151 Wn.2d at 54. Schaler establishes a "true threat" is necessary to prove the mens rea of the crime of felony harassment. Schaler, 169 Wn.2d at 286-87, 289 n.6.

Following Schaler and Kilburn, a "true threat" must be deemed an element of felony harassment. The State's information is deficient because

it lacks this element. "If the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it." State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995). Because the necessary element of "true threat" is neither found nor fairly implied in the charging document, this Court must presume prejudice and reverse. McCarty, 140 Wn.2d at 425.

3. THE TRIAL COURT ERRED WHEN IT SENTENCED HOLLINGSWORTH BEYOND THE STATUTORY MAXIMUM TERM.

Under RCW 9.94A.701(9) the trial court is required to reduce the term of community custody whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime. Hollingsworth's sentence was illegal because the term of confinement combined with the term of community custody exceeds the statutory maximum term. His sentence should be reversed.

"[I]llegal or erroneous sentences may be challenged for the first time on appeal." State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452, 454 (1999). This rule applies to a challenge to the sentencing court's authority to impose a sentence. State v. Hunter, 102 Wn. App. 630, 633-34, 9 P.3d 872 (2000), review denied, 142 Wn.2d 1026 (2001). A sentencing court

derives its authority strictly from the Legislature. State v. Gronnert, 122 Wn. App. 214, 226, 93 P.3d 200 (2004).

The trial court imposed a 12-month term of community custody for a crime against a person as required by RCW 9.94A.701(3)(a). CP 205. First degree promoting prostitution is a crime against a person. RCW 9.94A.411. It is also a class B felony. RCW 9A.88.070(2). A class B felony is punishable by a maximum of 10 years imprisonment. RCW 9A.20.021(1)(b). The trial court imposed a maximum 120-month sentence for promoting prostitution. CP 204.

RCW 9.94A.701(9) provides:

The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

This provision took effect July 26, 2009. State v. Franklin, 172 Wn.2d 831, 836-37, 263 P.3d 585 (2011).

In Franklin, the issue was whether RCW 9.94A.701(9) required “a trial court to reopen sentencing proceedings and retroactively reduce a previously imposed term of community custody whenever the combination of the standard range term and the community custody term exceeds the statutory maximum for the crime.” Franklin, 172 Wn.2d at 840. The

Court ruled it did not. It held that for those sentenced to community custody before the effective date, the Department of Corrections had the obligation to reset the termination date of community custody consistent with the statute. Id., 172 Wn.2d at 840-41. RCW 9.94A.701(9) applies "when a sentencing court is imposing a sentence pursuant to RCW 9.94A.701 in the first instance." Id. at 842.

Hollingsworth, who was sentenced May 23, 2011, was sentenced under RCW 9.94A.701 "in the first instance." Under the plain language of RCW 9.94A.701(9) and the holding in Franklin, the trial court could not impose a 120-month standard range, statutory maximum confinement term *and* a 12-month community custody term.

"When a trial court exceeds its sentencing authority under the SRA, it commits reversible error." State v. Hale, 94 Wn. App. 46, 53, 971 P.2d 88 (1999). The remedy for erroneous sentencing is remand to the trial court for resentencing. State v. Ross, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004). This Court should reverse Hollingsworth's sentence and remand for resentencing.

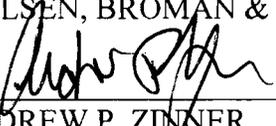
D. CONCLUSION

For the reasons set forth above, this court should reverse Hollingsworth's felony harassment conviction and remand for a new trial. Alternatively, this Court should vacate the felony sentences and remand for resentencing under a lower offender score, or to reduce or remove the 12-month community custody term.

DATED this 27 day of January, 2012.

Respectfully submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 67229-1-I
)	
MALCOLM HOLLINGSWORTH,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 27TH DAY OF JANUARY 2012, 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] MALCOLM HOLLINGSWORTH
NO. 848409
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

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STATE OF WASHINGTON
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SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF JANUARY 2012.

x Patrick Mayovsky