

**FILED**

JUL 31 2014

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: SO

**ORIGINAL**

No. 90590-8

OF APPEALS OF WASHINGTON, DIVISION III

COA Case No. 31504-5-III

---

STATE OF WASHINGTON, Respondent,

v.

GARY DON DUGGER, Petitioner.

---

PETITION FOR DISCRETIONARY REVIEW

---

**FILED**  
AUG - 7 2014  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON CRF

Gary Don Dugger  
Petitioner  
322 Daisy Street  
Soap Lake, WA 98851

## TABLE OF CONTENTS

COVER SHEET	Page 1
TABLE OF CONTENTS	Page 2
A. IDENTITY OF PETITIONER	Page 5
B. DECISION	Page 5
C. ISSUE PRESENTED FOR REVIEW	Page 5
D. STATEMENT OF THE CASE	Page 5
V. REASONS WHY REVIEW SHOULD BE ACCEPTED	Page 8
VI. ARGUMENT	Page 8
VII. CONCLUSION	Page 13

TABLE OF AUTHORITIES

**FEDERAL CASES**

Neder v. United States, 527 U.S. 1, 7, 119 S.Ct. 1827, 1832-33, 144  
L.Ed.2d 35 (1999).....Pages 7, 9-10

United States v. Gaudin,

515 U.S. 506, at 509, 115 S.Ct. 2310 (1995).....Page 10

Kungys v. United States, 485 U.S. 759, 770, 108 S.Ct. 1537, 99  
L.Ed.2d 839 (1988).....Page 10

United States v. Holland, 880 F.2d 1091, 1096 (C.A.9 1989).....10

**STATE CASES**

State v. Brown, 147 Wn.2d 330, 339-41, 58 P.3d 889, 894-95  
(2002).....Pages 7, 11-12

State v. Peters, 163 Wn. App. 836, 261 P.3d 199 (2011).....7, 12

State v. Willis, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005).....8

State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).....8

State v. Davis, 154 Wn.2d 291, 306, 111 P.3d 844 (2005).....8

In Re Pers. Restraint of Heidari, 174 Wn.2d 288, 292-94, 274 P.3d  
366 (2012).....Page 9

State v. Green, 94 Wn.2d 216, 616 P.2d 628, 639 (1980).....Page13

State v. Jones, 22 Wash.App. 447, 591 P.2d 796 (1979).....Page 13

State v. Martell, 22 Wash.App. 415, 591 P.2d 789 (1979).....Page 13

State v. Liles, 11 Wash.App. 166, 521 P.2d 973 (1974).....Page 13

State v. Jackson, 40 Or.App. 759, 596 P.2d 600 (1979).....Page 13

**OTHER AUTHORITIES**

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 35.22 (3d Ed).....6

**A. IDENTITY OF PETITIONER**

GARY DON DUGGER asks this court to accept review of the decision or parts of the decision designated in Part B of this motion.

**B. DECISION**

The Court of Appeals decision terminating review attached herewith as Appendix E.

**C. ISSUES PRESENTED FOR REVIEW**

Was it proper for the trial court to sentence the Defendant for the crime of assault of a child in the third degree when the “to convict” instruction contained only the elements of the lesser included crime of assault in the third degree?

**D. STATEMENT OF THE CASE**

The Petitioner, Gary Don Dugger, was charged by information with assault in the second degree for allegedly scalding his son in hot water. At trial, Mr. Dugger and the State entered into a stipulation that, at the time of the offense, the Defendant was over the age of eighteen and that his son was under the age of thirteen. The court gave the jury an oral instruction that read as follows:

Ladies and gentlemen, the parties have agreed that certain facts are true. You must accept as true the following facts: On or about

January 27, 2012, the defendant, Gary Don Dugger, was over the age of 18, and that [name omitted] was under the age of thirteen.

The to-convict instruction for assault of a child in the second degree correctly listed all of the elements of the charged offense that the jury would have to find, beyond a reasonable doubt, in order to convict the defendant of assault of a child in the second degree, including the elements that the defendant was eighteen years of age or older at the time of the offense, and that the victim was under the age of thirteen at the time of the offense. See Jury Instructions 5, 6, and 7, attached at Appendix B. The jury found the defendant not guilty of assault in the second degree.

The jury was next instructed, *sua sponte*, to consider the lesser degree charge of assault of a child in the third degree, but in listing the elements that the jury had to find beyond a reasonable doubt, the court actually instructed the jury as to the elements of the lesser charge of assault in the third degree. See 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 35.22 (3d Ed). Neither of the parties had requested that the jury be instructed on this offense.

The court erroneously instructed the jury that, to convict the defendant of the lesser crime of assault of a child in the third degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about January 27, 2012, the defendant caused bodily harm to [name omitted]; (2) That the physical injury was caused by an instrument or thing likely to produce bodily harm; (3) That the defendant acted with criminal negligence; and (4) That this act occurred in the State of Washington.

In effect, the court instructed the jury to find the defendant guilty of assault of a child in the third degree if it found that the elements of the lesser included crime of assault in the third degree.

Pursuant to the court's erroneous instructions, the jury returned a verdict as to the lesser offense of assault of a child in the third degree.

The defendant timely appealed his conviction, arguing that the erroneous instruction omitted one of the essential elements of the crime of which he was convicted, thereby violating his due process rights under both the State and federal constitutions.

The Court of Appeals, relying on Neder v. United States, 527 U.S. 1, 7, 119 S.Ct. 1827, 1832-33, 144 L.Ed.2d 35 (1999); State v. Brown, 147 Wn.2d 330, 339-41, 58 P.3d 889, 894-95 (2002); and State v. Peters, 163 Wn. App. 836, 850, 261 P.3d 199 (2011); affirmed the conviction, holding that the error was "harmless" since the Defendant had stipulated to the missing elements, thereby relieving the State of its burden to prove those elements beyond a reasonable doubt.

The defendant petitions for review and asks the Supreme Court to reverse the Superior Court and the Court of Appeals on the grounds that the cases relied upon are inapposite to the issues of the case at bar.

Because the trial court instructed the jury only on the elements of assault in the third degree, the Court should vacate the conviction for assault of a child in the third degree and remand for judgment and sentencing on the lesser charge of assault in the third degree.

**E. REASONS WHY REVIEW SHOULD BE ACCEPTED**

- 1) The decision of the Court of Appeals is in conflict with a decision of the Supreme Court;
- 2) A significant question of law under the Constitution of the State of Washington or of the United States is involved; and
- 3) The petition involves an issue of substantial public interest that should be determined by the Supreme Court.

**F. ARGUMENT**

**1. The jury only found the elements of assault in the third degree.**

The Court reviews alleged errors of law in jury instructions de novo. State v. Willis, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005). An instruction purporting to list all of the elements of a crime must in fact do so; when a “to convict” instruction fails to state the law completely and correctly, a conviction based on it cannot stand. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

This Court may review the alleged omission of an element in a “to convict” instruction for the first time on appeal. State v. Davis, 154 Wn.2d 291, 306, 111 P.3d 844 (2005). The “to convict” instruction reflected only the elements of third degree assault. Where the jury was instructed on a lesser degree crime and necessarily found each element of the crime in reaching that verdict, the Court can remand for sentencing on the lesser offense. In Re Pers. Restraint of Heidari, 174 Wn.2d 288, 292-94, 274 P.3d 366 (2012). The jury was essentially instructed on the offense of assault in the third degree, and the jury verdict established that each element of that offense was proved beyond a reasonable doubt. Consequently, the Court should reverse Mr. Dugger’s conviction for assault of a child in the third degree and remand for entry of judgment and sentencing for assault in the third degree.

**2. The cases relied on by the Court of Appeals are inapposite and may be distinguished from the facts of the case at bar.**

In Neder v. United States, 527 U.S. 1, 7, 119 S.Ct. 1827, 1832-33, 144 L.Ed.2d 35 (1999), the U.S. Supreme Court granted *certiorari* to resolve two separate and distinct issues: (1) whether, and under what circumstances, the omission of an element from the judge's charge to the jury can be harmless error, and (2) whether materiality is an element of the federal mail fraud, wire fraud, and bank fraud statutes.

Neder was not a case in which the jury was instructed on the elements of the wrong lesser included offense. In order to obtain a conviction on the tax offense charged, the prosecution had to prove that the defendant filed a tax return “which he does not believe to be true and correct as to every material matter.” Neder, 527 U.S. 1 at 16, citing 1626 U.S.C. § 7206(1). The court held that a false statement is material if it had “a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed.” Id. citing United States v. Gaudin, 515 U.S. 506, at 509, 115 S.Ct. 2310 (1995) (quoting Kungys v. United States, 485 U.S. 759, 770, 108 S.Ct. 1537, 99 L.Ed.2d 839 (1988)). And Neder noted that in prosecutions of this type, “any failure to report income is material.” Id., citing United States v. Holland, 880 F.2d 1091, 1096 (C.A.9 1989). Under either scenario, no reasonable jury could find that Neder's failure to report substantial amounts of income on his tax returns was not “a material matter.” Neder, 527 U.S. 16, 119 S.Ct. 1827, 1837, 144 L.Ed.2d 35 (1999).

Thus the reason that the omission of this essential element from the “to convict” instruction was deemed to be harmless error was because the Court found that no reasonable jury could find otherwise.

Neder is distinguishable from the case sub judice in that the Neder

jury was not erroneously instructed as to the essential elements of a different lesser-included offense. To put it differently, in Mr. Dugger's case, the trial court correctly instructed the jury on all of the essential elements of the original offense; so there was no issue as to one of the essential elements of the charged offense being omitted or misstated. The error in Mr. Dugger's case is that the trial court, intending to instruct the jury on one lesser-included offense, inadvertently instructed the jury on a different lesser-included offense; and the jury necessarily found all of the elements of the latter offense, to wit, assault in the third degree.

Similarly, in Brown, the trial court instructed the juries that an accomplice must have knowledge that his or her actions will promote or facilitate the commission of "a" crime rather than "the" crime. State v. Brown, 147 Wn.2d 330, 338, 58 P.3d 889, 894 (2002). The record showed that Jacob Brown struck the victim, took his personal property, and held him at gunpoint. Id. Because Brown acted as a principal in the robbery, rather than as an accomplice, the difference between "a crime" and "the crime" in the accomplice instruction was deemed to be harmless beyond a reasonable doubt. 47 Wn.2d at 341. The error in the accomplice liability instruction was truly "harmless" because there never any issue as to whether Brown only acted as an accomplice.

Brown thus dealt with a misstatement of the law of accomplice liability, which really had no bearing on the facts of his involvement in the crime. Brown did not involve a situation in which the jury was inadvertently instructed on the wrong lesser-included offense.

Finally, in Peters, the trial court erroneously instructed the jury that in order to convict Peters of manslaughter in the first degree, the State need only prove that he knew of and disregarded “a substantial risk that a wrongful act may occur,” rather than “a substantial risk that death may occur.” State v. Peters, 163 Wn. App. 836, 837-38, 261 P.3d 199, 200 (2011). The instructional error centered around the specificity requirement for the required mental state of recklessness, and the court found that the error was not harmless beyond a reasonable doubt, because “recklessly causing a death and recklessly causing [a wrongful act] are not synonymous.” Peters, 163 Wn.App. 836, quoting State v. Gamble, 154 Wash.2d 457 at 468 (2005).

As with Neder and Brown, Peters dealt with a situation in which an essential element of the original crime charged was either misstated or omitted. All three are inapposite with regard to Mr. Dugger’s situation, in which the trial court correctly instructed the jury on all of the essential elements of the original crime , but then inadvertently instructed the jury

on a different lesser-included offense than the one intended.

“In general, a remand for simple resentencing on a ‘lesser included offense’ is only permissible when the jury has been explicitly instructed thereon. Based upon the giving of such an instruction it has been held that the jury necessarily had to have disposed of the elements of the lesser included offense to have reached the verdict on the greater offense.” State v. Green, 94 Wn.2d 216, 234-35, 616 P.2d 628, 639 (1980), citing State v. Jones, 22 Wash.App. 447, 454, 591 P.2d 796 (1979); State v. Martell, 22 Wash.App. 415, 419, 591 P.2d 789 (1979); State v. Liles, 11 Wash.App. 166, 171-173, 521 P.2d 973 (1974).

“In addition, it is clear a case may be remanded for resentencing on a ‘lesser included offense’ only if the record discloses that the trier of fact expressly found each of the elements of the lesser offense. Id., citing State v. Jones, supra; State v. Jackson, 40 Or.App. 759, 596 P.2d 600 (1979).

## **G. CONCLUSION**

Mr. Dugger’s case may be distinguished from the cases relied upon by the Court of Appeals in its decision affirming his conviction for assault of a child in the third degree. Unlike the cases cited below, the jury in Mr. Dugger’s trial was properly instructed on all of the essential elements of

the original charge of assault of a child in the second degree. Instead of omitting or misstating one of the essential elements of the original offense charged, as was the case in Neder, Brown, and Peters, the Dugger trial court mistakenly instructed the jury on a different lesser-included offense than the one intended. The jury necessarily found all of the essential elements of the crime of assault in the third degree.

Because the trial court instructed the jury only on the elements of assault in the third degree, this Court should reverse the conviction for assault of a child in the third degree and remand for judgment and sentencing on the lesser charge of assault in the third degree.

DATED this 30<sup>th</sup> day of July, 2014

Respectfully submitted,



GARY DON DUGGER  
PETITIONER

APPENDIX A

Declaration of Service

DECLARATION OF SERVICE

COMES NOW DAVID BUSTAMANTE, and declares under penalty of perjury under the laws of the state of Washington that the following is true and accurate:

I am over the age of 18 and not a party to this action;

On July 30, 2014, I personally served the subjoined Petition for Discretionary Review by hand-delivering a true copy to the offices of the Grant County Prosecuting Attorney, Ephrata, Washington, 98823.

SIGNED at Ephrata, Washington, this 30<sup>th</sup> day of July, 2014

A handwritten signature in cursive script that reads "David Bustamante". The signature is written in black ink and is positioned above a horizontal line.

DAVID BUSTAMANTE  
Declarant

APPENDIX B

Jury Instructions Nos. 5, 6, and 7

INSTRUCTION NO. 5

COUNT 1: ASSAULT OF A CHILD IN THE SECOND DEGREE

To convict the defendant of assault of a child in the second degree, as charged in Count 1, the State must prove each of the following elements of the crime beyond a reasonable doubt:

1. That on or about January 27, 2012, the defendant intentionally assaulted Patrick Dugger and thereby recklessly inflicted substantial bodily harm;
2. That the defendant was eighteen years of age or older and Patrick Dugger was under the age of thirteen; and
3. That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count 1.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 6

LESSER DEGREE OF CRIME

If, after full and careful consideration of the evidence, you are not satisfied beyond a reasonable doubt that the defendant is guilty of a crime with which he is charged, then you will consider whether the defendant is guilty of a lesser degree of the crime charged.

The crime of assault of a child in the second degree, as charged in Count 1, includes the lesser degree crime of assault of a child in the third degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two degrees that person is guilty, he shall be convicted only of the lower degree.

INSTRUCTION NO. 7

LESSER DEGREE OF COUNT 1: ASSAULT OF A CHILD IN THE THIRD DEGREE

To convict the defendant of assault of a child in the third degree as a lesser degree of the crime charged in Count 1, the State must prove each of the following elements of the crime beyond a reasonable doubt:

1. That on or about January 27, 2012, the defendant caused bodily harm to Patrick Dugger;
2. That the physical injury was caused by an instrument or thing likely to produce bodily harm;
3. That the defendant acted with criminal negligence; and
4. That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to assault of a child in the third degree as a lesser degree of the crime charged in Count 1.

On the other hand, if, after weighing the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to assault of a child in the third degree as a lesser degree of the crime charged in Count 1.

APPENDIX C

Verdict Forms A and B



07-577489

**FILED**

FEB 11 2013

KIMBERLY A. ALLEN  
GRANT COUNTY CLERK

IN THE SUPERIOR COURT OF WASHINGTON  
IN AND FOR GRANT COUNTY

STATE OF WASHINGTON, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 GARY DON DUGGER, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

NO. 12-1-00386-9

VERDICT FORM A

We, the jury, find the defendant, GARY DON DUGGER, Not guilty  
of the crime of assault of a child in the second degree as charged in Count 1.

DATE: 2/8/2013

Christina Cooper  
PRESIDING JUROR



07-577488

**FILED**

FEB 11 2013

KIMBERLY A. ALLEN  
GRANT COUNTY CLERK

IN THE SUPERIOR COURT OF WASHINGTON  
IN AND FOR GRANT COUNTY

STATE OF WASHINGTON, )

Plaintiff, )

vs. )

GARY DON DUGGER, )

Defendant. )

NO. 12-1-00386-9

VERDICT FORM B

We the jury, having found the defendant not guilty of assault of a child in the second degree, as charged, or being unable to agree on that crime, find the defendant, GARY DON DUGGER, Not Guilty of the lesser degree crime of assault of a child in the third degree.

DATED: 2/11/2013

Christine Cooper  
PRESIDING JUROR

APPENDIX D

Judgment and Sentence

KEMI GRAY  
FILED

FEB 26 2013

KIMBERLY A. ALLEN  
GRANT COUNTY CLERK



**JUDGMENT #**

**Superior Court of Washington  
County of Grant**

**13-9-00316-5**

**State of Washington, Plaintiff,**

**No. 12-1-00386-9**

vs.

**Felony Judgment and Sentence --  
(FJS)**

GARY DON DUGGER,

Defendant.

**Clerk's Action Required, 2.1, 4.1, 4.3,  
5.2, 5.3, 5.5, 5.7**

**Defendant Used Motor Vehicle**

**First Time Offender**

**Jail One Year or Less**

**Exceptional Sentence**

SID: [S.I.D. NUMBER]

DOB: 04/13/1973

OIN: GCSO, 12GS01109

PCN: 925882666

**I. Hearing**

1.1 The court conducted a sentencing hearing this date and present were:

Defendant: GARY DON DUGGER

Defendant's Lawyer: David Bustamante

Deputy Prosecuting Attorney: Douglas R. Mitchell

**II. Findings**

2.1 **Current Offenses:** The defendant is guilty of the following offenses, based upon a Jury Verdict on FEBRUARY 11, 2013:

Count	Crime	RCW (w/subsection)	Class	Date of Crime
1	Assault of a Child in the Third Degree  <i>a lesser crime of Second Degree (Substantial Bodily Harm)</i>	9A.36.130(1)(a)	C	01/27/2012
1	Aggravated Circumstance- Particularly Vulnerable Victim	9.94A.535(3)(b)	SA	01/27/2012

Class: A (Felony-A), B (Felony-B), C (Felony-C), GM (gross misd), M (misd), SA (Special Allegation)

**Felony Judgment and Sentence (FJS)**  
**(Jail One Year or Less/First Time Offender)**  
**(RCW 9.94A.500, .505) (WPF CR 84.0400 (10/2011))**

*Jail*

(If the crime is a drug offense, include the type of drug in the second column.)

Additional current offenses are attached in Appendix 2.1a.

The jury returned a special verdict or the court made a special finding with regard to the following:

- The defendant used a ~~firearm~~ in the commission of the offense in Count \_\_\_\_\_, RCW 9.94A.602, 9.94A.533.
- The defendant used a ~~deadly weapon other than a firearm~~ in committing the offense in Count \_\_\_\_\_. RCW 9.94A.602, 9.94A.533.
- For the crime(s) charged in Count \_\_\_\_\_, **domestic violence** was pled and proved. RCW 10.99.020.
- Count \_\_\_\_\_ is a **criminal street gang**-related felony offense in which the defendant compensated, threatened, or solicited a **minor** in order to involve that minor in the commission of the offense. RCW 9.94A.833.
- Count \_\_\_\_\_ is the crime of **unlawful possession of a firearm** and the defendant was a **criminal street gang** member or associate when the defendant committed the crime. RCW 9.94A.702, 9.94A.\_\_\_\_\_.
- The defendant committed **vehicular assault** proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030.
- The defendant has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.
- Count \_\_\_\_\_ is a felony in the commission of which the defendant used a **motor vehicle**. RCW 46.20.285.
- Counts \_\_\_\_\_ encompass the same criminal conduct and count as one crime in determining the offender score (RCW 9.94A.589).  **Other current convictions listed under different cause numbers used in calculating the offender score are** (list offense and cause number):

	<b>Crime</b>	<b>Cause Number</b>	<b>Court (County &amp; State)</b>	<b>DV* Yes</b>
1.				

\* DV: Domestic Violence was pled and proved.

Additional current convictions listed under different cause numbers used in calculating the offender score are attached in Appendix 2.1b.

**2.2 Criminal History:**

**Does Not Apply:** The court finds that the defendant qualifies for the First Time Offender waiver of a standard range sentence (RCW 9.94A.650).

<b>Crime</b>	<b>Date of Crime</b>	<b>Date of Sentence</b>	<b>Sentencing Court (County &amp; State)</b>	<b>A or J Adult, Juv.</b>	<b>Type of Crime</b>	<b>DV* Yes</b>

1	No known prior felony convictions						
---	-----------------------------------	--	--	--	--	--	--

\* DV: Domestic Violence was pled and proved.

- Additional criminal history is attached in Appendix 2.2.
- The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.
- The prior convictions listed as numbers \_\_\_\_\_, above, or in appendix 2.2, are one offense for purposes of determining the offender score (RCW 9.94A.525).

**2.3 Sentencing Data:**

Count No.	Offender Score	Serious -ness Level	Standard Range (not including enhancements)	Plus Enhancements *	Total Standard Range (including enhancements)	Maximum Term
1	0	1 - 3 m		N/A	1 - 3 m	5 YRS

(F) Firearm, (D) Other deadly weapons, (CSG) criminal street gang involving minor.

- Additional current offense sentencing data is attached in Appendix 2.3.

**2.4  Exceptional Sentence.** The court finds substantial and compelling reasons that justify an exceptional sentence:

- below the standard range for Count(s) \_\_\_\_\_.
- above the standard range for Count(s) \_\_\_\_\_.
- The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.
- Aggravating factors were  stipulated by the defendant,  found by the court after the defendant waived jury trial,  found by jury, by special interrogatory.
- within the standard range for Count(s) \_\_\_\_\_, but served consecutively to Count(s) \_\_\_\_\_.

Findings of fact and conclusions of law are attached in Appendix 2.4.  Jury's special interrogatory is attached. The Prosecuting Attorney  did  did not recommend a similar sentence.

**2.5 Legal Financial Obligations/Restitution.** The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160). The court makes the following specific findings:

- The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

### III. Judgment

3.1 The defendant is *guilty* of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2  The court *dismisses* Counts:

	Aggravated Circumstance-Lack of Remorse as to Count 1	9.94A.535(3)(q)	SA	01/27/2013
2	Assault in the Second Degree (Substantial Bodily Harm)	9A.36.021(1)(a)	B	01/27/2012
	Aggravated Circumstance-Deliberate Cruelty as to Count 2	9.94A.535(3)(a)	SA	01/27/2012
	Aggravated Circumstance-Particularly Vulnerable Victim as to Count 2	9.94A.535(3)(b)	SA	01/27/2013
	Aggravated Circumstance-Lack of Remorse as to Count 2	9.94A.535(3)(q)	SA	01/27/2012
3	Assault in the Second Degree (Torture)	9A.36.021(1)(f)	B	01/27/2012
	Aggravated Circumstance-Deliberate Cruelty as to Count 3	9.94A.535(3)(a)	SA	01/27/2012
	Aggravated Circumstance-Particularly Vulnerable Victim as to Count 3	9.94A.535(3)(b)	SA	01/27/2012
	Aggravated Circumstance-Lack of Remorse as to Count 3	9.94A.535(3)(q)	SA	01/27/2012

The defendant was found **not guilty** by jury:

	Aggravated Circumstance-Deliberate Cruelty as to Count 1	9.94A.535(3)(a)	SA	01/27/2012
--	---	-----------------	----	------------

IV. Sentence and Order

It is ordered:

4.1 Confinement. The court sentences the defendant as follows:

(a) Confinement. RCW 9.94A.589. A term of total confinement in the custody of the county jail:

6 months on Count 1 (lesser included) months on Count
months on Count months on Count
months on Count months on Count

Actual number of months of total confinement ordered is:

All counts shall be served concurrently, except for the following which shall be served consecutively:

The sentence herein shall run consecutively with the sentence in cause number(s)

but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589.

Confinement shall commence immediately unless otherwise set forth

here: On or before 3/18/13

(b) First-Time Offender Waiver of Standard Sentence. RCW 9.94A.030, RCW 9.94A.650. The defendant is a first-time offender. The court waives imposition of a sentence within the standard sentence range and imposes the following sentence:

Confinement. The court sentences the defendant to the following term of total confinement in the custody of the county jail:

days total confinement (up to 90 days). RCW 9.94A.650.

Other:

Confinement shall commence immediately unless otherwise set forth here:

Community Restitution (Service). RCW 9.94A.650. The defendant shall perform hours of community restitution (service) as approved by the defendant's community corrections officer to be completed:

[ ] on a schedule established by the defendant's community corrections officer.

[ ] as follows:

This community restitution is in addition to the ordered total confinement.

**Partial Confinement.** The defendant may serve the sentence, if eligible and approved, in partial confinement in the following programs, subject to the following conditions: \_\_\_\_\_

work crew RCW 9.94A.725       home detention RCW 9.94A.731, .190

work release RCW 9.94A.731

**Conversion of Jail Confinement (Nonviolent and Nonsex Offenses).** RCW 9.94A.680(3). The county jail is authorized to convert jail confinement to an available county supervised community option, to reduce the time spent in the community option by earned release credit consistent with local correctional facility standards, and may require the offender to perform affirmative conduct pursuant to RCW 9.94A.

The defendant shall receive credit for time served in an available county supervised community option prior to sentencing. The jail shall compute time served.

**Alternative Conversion.** RCW 9.94A.680. \_\_\_\_\_ days of total confinement ordered above are hereby converted to \_\_\_\_\_ hours of community restitution (service) (8 hours = 1 day, nonviolent offenders only, 30 days maximum) under the supervision of the Department of Corrections (DOC) to be completed on a schedule established by the defendant's community corrections officer but not less than \_\_\_\_\_ hours per month.

**Alternatives to total confinement** were not used because of:

\_\_\_\_\_  criminal history  failure to appear (finding required for nonviolent offenders only) RCW 9.94A.680.

(c) **Credit for Time Served:** The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The jail shall compute time served.

The following firearm(s) shall be forfeited pursuant to RCW 9.41.098:

**4.2 Community Custody.** RCW 9.94A.505, .702, 650.

(A) The defendant shall serve 12 months (up to 12 months) in community custody.

The court may order community custody under the jurisdiction of DOC for up to 12 months if the defendant is convicted of a violent offense, a crime against a person under RCW 9.94A.411, or felony violation of chapter 69.50 or 69.52 RCW or an attempt, conspiracy or solicitation to commit such a crime. For offenses committed on or after June 7, 2006, the court shall impose a term of community custody under RCW 9.94A.701 if the offender is guilty of failure to register (second or subsequent offense) under RCW 9A.44.132 and for offenses after June 12, 2008 for unlawful possession of a firearm with a finding that the defendant was a member or associate of a criminal street gang. The defendant shall report to

DOC not later than 72 hours after release from custody at 229 First Ave NW, Ephrata WA 98823.

(B) While on community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while on community custody; (6) not own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; (9) obey all municipal, county, state, tribal and federal laws; and (10) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706. The defendant's residence location and living arrangements are subject to the prior approval of DOC while on community custody.

The court orders that during the period of supervision the defendant shall:

consume no alcohol.

have no contact with: \_\_\_\_\_

remain  within  outside of a specified geographical boundary, to wit: \_\_\_\_\_

participate in the following crime-related treatment or counseling services: \_\_\_\_\_

undergo an evaluation for, and fully comply with, treatment for  domestic violence  substance abuse  mental health  anger management.

comply with the following crime-related prohibitions: \_\_\_\_\_

Other conditions:

Comply with any orders in dependency proceedings relating to this victim

(C) The conditions of community custody shall begin immediately upon release from confinement unless otherwise set forth here: \_\_\_\_\_

Court Ordered Treatment: If any court orders mental health or chemical dependency treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

**First time offender only:** The defendant shall serve \_\_\_\_\_ months in community custody under the above conditions (up to 6 months unless treatment is ordered, in which case the period of community custody may include up to the period of treatment but shall not exceed one year), under the supervision of DOC.

**4.3 Legal Financial Obligations:** The defendant shall pay to the clerk of this court:

JASS CODE

PCV \$ 500.00 Victim assessment RCW 7.68.035  
 PDV \$ \_\_\_\_\_ Domestic Violence assessment RCW 10.99.080  
 CRC \$ 200.00 Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190  
     Criminal filing fee \$ 200.00 FRC  
     Witness costs \$ \_\_\_\_\_ WFR  
     Sheriff service fees \$ \_\_\_\_\_ SFR/SFS/SFW/WRF  
     Jury demand fee \$ \_\_\_\_\_ JFR  
     Extradition costs \$ \_\_\_\_\_ EXT  
     Other \$ \_\_\_\_\_  
 PUB \$ 1,750- Fees for court appointed attorney RCW 9.94A.760  
 WFR \$ \_\_\_\_\_ Court appointed defense expert and other defense costs  
     RCW 9.94A.760  
 FCM/MTH \$ \_\_\_\_\_ Fine RCW 9A.20.021; [ ] VUCSA chapter 69.50 RCW, [ ]  
     VUCSA additional fine deferred due to indigency RCW 69.50.430  
 CDF/LDI/FCDS \$ \_\_\_\_\_ Drug enforcement fund of \_\_\_\_\_ RCW 9.94A.760  
 NTF/SAD/SDI  
 CLF \$ \_\_\_\_\_ Crime lab fee [ ] suspended due to indigency RCW 43.43.690  
     \$ 100.00 DNA collection fee RCW 43.43.7541  
 FPV \$ \_\_\_\_\_ Specialized forest products RCW 76.48.140  
     \$ \_\_\_\_\_ Other fines or costs for: \_\_\_\_\_  
     \$ \_\_\_\_\_ Restitution to:  
 RTN/RJN \$ \_\_\_\_\_ Restitution to:  
     \$ \_\_\_\_\_ Restitution to: \_\_\_\_\_  
     (Name and Address--address may be withheld and  
     provided confidentially to Clerk of the Court's  
     office.)  
     \$ 2,550- **Total** RCW 9.94A.760

[X] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:  
 [ ] shall be set by the prosecutor.  
 [ ] is scheduled for \_\_\_\_\_ (date).  
 [ ] The defendant waives any right to be present at any restitution hearing (sign initials): \_\_\_\_\_.

**Restitution** Schedule attached.

Restitution ordered above shall be paid jointly and severally with:

**Name of other defendant** Cause Number (Victim's name) (Amount-\$)

RJN

The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ \_\_\_\_\_ per month commencing \_\_\_\_\_ . RCW 9.94A.760.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b).

The court orders the defendant to pay costs of incarceration at the rate of \$ \_\_\_\_\_ per day, (actual costs not to exceed \$100 per day). (JLR) RCW 9.94A.760.

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

**4.4 DNA Testing.** The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

**HIV Testing.** The defendant shall submit to HIV testing. RCW 70.24.340.

**4.5 No Contact:**

The defendant shall not have contact with FATRICK A DUGGER (name) including, but not limited to, personal, verbal, telephonic, written or contact through a third party until 2/26/2018 (which does not exceed the maximum statutory sentence), except as is permitted in dependency proceedings.

The defendant is excluded or prohibited from coming within 100 yds (distance) of:  \_\_\_\_\_ (name of protected person(s))'s  home/ residence  work place  school  (other location(s))

\_\_\_\_\_, or  
 other location \_\_\_\_\_,  
until 2/26/2018 (which does not exceed the maximum statutory sentence).

A separate Domestic Violence No-Contact Order or Antiharassment No-Contact Order is filed concurrent with this Judgment and Sentence.

**4.6 Other:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**4.7 Off-Limits Order.** (Known drug trafficker). RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections: \_\_\_\_\_

**4.8 Sentence and Order as to Misdemeanor/Gross Misdemeanor Counts**

Defendant is sentenced to imprisonment in the Grant County jail  
for a period of \_\_\_\_\_ days, with \_\_\_\_\_ days suspended for \_\_\_\_\_ years upon the terms and conditions stated below as to Count \_\_\_\_\_.  
for a period of \_\_\_\_\_ days, with \_\_\_\_\_ days suspended for \_\_\_\_\_ years upon the terms and conditions stated below as to Count \_\_\_\_\_.  
for a period of \_\_\_\_\_ days, with \_\_\_\_\_ days suspended for \_\_\_\_\_ years upon the terms and conditions stated below as to Count \_\_\_\_\_.

the term(s) in count(s) \_\_\_\_\_ is/are concurrent/consecutive  
 with each other  with count(s) \_\_\_\_\_ sentenced herein  with Cause No. \_\_\_\_\_

The defendant shall receive credit, against the sentence stated above, for early release time, if any, earned by the defendant pursuant to the policies of the Grant County jail.

**Partial Confinement** Defendant may serve the sentence, if eligible and approved, in partial confinement in the following programs, subject to the following conditions:  
\_\_\_\_\_

work crew  home detention  work release RCW 70.48.210

**Alternative Conversion.** \_\_\_\_\_ days of total confinement ordered above are hereby converted to \_\_\_\_\_ hours of community restitution (8 hours = 1 day, nonviolent offenders only, 30 days maximum) at a rate of \_\_\_\_\_ hours per month:

**Confinement shall commence**  immediately  on or before \_\_\_\_\_

You are hereby advised that you have been convicted of one or more of the following crimes committed by one family household member against another:  Fourth Degree Assault  Coercion  Stalking  Reckless Endangerment in the Second Degree  Criminal Trespass in the First Degree  Violation of a Protection Order or No-Contact Order

**As a result of the conviction marked above:**

**You may not own, use or possess any firearm unless your right to do so is restored by a Superior Court in Washington State, and by a federal court if required. You must immediately surrender any concealed pistol license.** (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047. **The prohibitions applicable under Federal Law may be different.**

**Conditions for Suspension:**

- (a) Defendant shall commit no criminal offenses.
- (b) Defendant shall report to the Superior Court Clerk's Financial Collection Officer within twenty-four (24) sentencing, or if the Defendant is currently in jail, within twenty-four (24) hours of release.
- (c) Defendant shall keep the Superior Court Clerk's Financial Collections Officer advised of his/her current physical and mailing address and telephone number, and not change his/her address without prior written notice to the collections officer. The Superior Court Clerk's Financial Collections Officer's mailing address is Grant County Clerk, POB 37, Ephrata WA 98823. The physical address is 35 C St NW in Ephrata, WA. **All notices required to be provided to the court shall be provided in the same manner to this address.**
- (d) Defendant shall timely pay all legal financial obligations and restitution as ordered herein or as subsequently set by the Superior Court Clerk's Collection Officer.
- (e) Defendant shall abide by any restraining or no-contact order entered in this case.
- (f) Defendant shall not have direct or indirect contact with the victim in this case.
- (g) Defendant shall appear at all court-ordered review hearings.
- (h) Defendant shall consume no alcohol.
- (i) Defendant shall not use, possess or deliver any controlled substance except as prescribed by a physician.
- (j) Defendant shall complete community restitution at a rate of \_\_\_\_\_ hours per month.
- (k) Defendant shall not associate with any known member of any criminal street gang, specifically, any known member of the \_\_\_\_\_ criminal street gang, as well as any other Sureno / Norteno / Other \_\_\_\_\_ street gang.
- (l) Defendant shall not be present in any area known as a criminal street gang gathering of the \_\_\_\_\_ or Surenos / Nortenos / Other \_\_\_\_\_.
- (m) Defendant shall not wear, display, use or possess any insignia, emblem, button, badge, cap, hat, scarf, bandana, jewelry, paraphernalia, or any article of clothing which may connote affiliation with, or membership in the \_\_\_\_\_ or any other Sureno / Norteno / Other \_\_\_\_\_ criminal street gang.
- (n) Defendant shall participate as follows in any crime-related treatment services:

- [ ] (o) \_\_\_\_\_
- [ ] (p) \_\_\_\_\_
- [ ] (q) \_\_\_\_\_

[ ] **Mandatory Conditions of Suspension for any Jail Time resulting from a DUI Offense:**

You have been convicted of driving under the influence of alcohol and/or actual physical control of a vehicle while under the influence of alcohol and/or drugs. You are not to:

- (i) drive a motor vehicle without a valid license to drive and proof of financial responsibility (SR 22);
- (ii) drive while having an alcohol concentration of .08 or more within two (2) hours after driving;
- (iii) refuse to submit to a test of his or her breath or blood to determine alcohol concentration upon request of a law enforcement officer who has reasonable grounds to believe the person was driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor.

Except for ignition interlock driver's license and device or alcohol monitoring requirements under RCW 46.61.5055(5), violation of any mandatory condition requires a minimum penalty of 30 days' confinement, which may not be suspended or deferred, and an additional 30-day license suspension. RCW 46.61.5055(11). Courts are required to report violations of mandatory conditions requiring confinement or license suspension to DOL. RCW 46.61.5055.

The Court's Jurisdiction with regard to the conditions applicable to DUI Offenses is Five Years.

**RIGHTS, CONDITIONS, WARNINGS, ACKNOWLEDGEMENT**

1. **PUNCTUAL APPEARANCES.** You must appear in court at any time directed by the court throughout the period of time you have been placed on a deferred sentence or suspended sentence. You must pay all fines, costs and assessments when due. You must appear at the date and time assigned by the court or jail ready to serve your commitment.
2. **ADDRESS CHANGES.** You must keep the court advised of all address changes using the address provided above. If the court orders you to appear at a hearing regarding your compliance with the deferred sentence or suspended sentence and you fail to attend the hearing, your term of supervision is tolled (the time does not count) until you appear on the record.
3. **EMPLOYMENT AND NEW VIOLATIONS.** You must keep the court informed of your employment status and any new violations of the law.
4. **PROOF OF COMPLIANCE.** In each instance where you are requested to file proof of a condition checked on the Judgment and Sentence, the proof must be in writing, signed by the person supervising the required program and written on the agency's letterhead. The proof of completion must be filed with the court.

**FAILURE TO MEET CONDITIONS.** Failure to meet any of the conditions imposed in the Judgment and Sentence or any of the conditions listed above, to appear as scheduled, and/or to pay financial obligations as scheduled may result in the filing of additional criminal charges, the issuance of a bench warrant for your immediate arrest, the revocation of your deferred sentence or

suspended sentence, the imposition of warrant costs, the suspension of your driver's license and the referral of your fines to a collection agency. If the deferred sentence or suspended sentence is revoked because of failure to meet conditions, you are subject to the imposition of the maximum sentence and fine as permitted by law or such portion thereof as the court deems appropriate. This order shall remain in effect through the period of the deferred or suspended sentence until and unless changed by further order of the court.

## V. Notices and Signatures

- 5.1 Collateral Attack on Judgment.** If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.
- 5.2 Length of Supervision.** If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).
- 5.3 Notice of Income-Withholding Action.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections (DOC) or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.
- 5.4 Community Custody Violation.**
- (a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.634.
  - (b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.714.
- 5.5 Firearms.** You may not own, use or possess any firearm, and under federal law any firearm or ammunition, unless your right to do so is restored by the court in which you are convicted or the superior court in Washington State where you live, and by a federal court if required. You must immediately surrender any concealed pistol license. (The clerk of

the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

**Delete or cross off if not applicable:**

**5.6 [ ] Offender Registration. (Unlawful Imprisonment Involving a Minor) RCW 9A.44.130, 10.01.200.**

**1. General Applicability and Requirements:** Because this crime involves unlawful imprisonment involving a minor as defined in RCW 9A.44.130, you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.

**2. Offenders Who Leave the State and Return:** If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within three business days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry on a vocation in Washington, or attend school in Washington, you must register within three business days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections.

**3. Change of Residence Within State and Leaving the State:** If you change your residence within a county, you must send signed written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send signed written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving and register with that sheriff within 24 hours of moving. You must also give signed written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move out of Washington State, you must send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington State.

**4. Additional Requirements Upon Moving to Another State:** If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

**5. Notification Requirement When Enrolling in or Employed by a Public or Private Institution of Higher Education or Common School (K-12):** If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your

intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier. If you become employed at a public or private institution of higher education, you are required to notify the sheriff for the county of your residence of your employment by the institution within 10 days of accepting employment or by the first business day after beginning to work at the institution, whichever is earlier. If your enrollment or employment at a public or private institution of higher education is terminated, you are required to notify the sheriff for the county of your residence of your termination of enrollment or employment within 10 days of such termination. If you attend, or plan to attend, a public or private school regulated under Title 28A RCW or chapter 72.40 RCW, you are required to notify the sheriff of the county of your residence of your intent to attend the school. You must notify the sheriff within 10 days of enrolling or 10 days prior to arriving at the school to attend classes, whichever is earlier. The sheriff shall promptly notify the principal of the school.

**6. Registration by a Person Who Does Not Have a Fixed Residence:** Even if you do not have a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody. Within 48 hours excluding weekends and holidays, after losing your fixed residence, you must send signed written notice to the sheriff of the county where you last registered. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report weekly in person to the sheriff of the county where you are registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. You may be required to provide a list the locations where you have stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

**7. Reporting Requirements for Persons Who Are Risk Level II or III:** If you have a fixed residence and you are designated as a risk level II or III, you must report, in person, every 90 days to the sheriff of the county where you are registered. Reporting shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. If you comply with the 90-day reporting requirement with no violations for at least five years in the community, you may petition the superior court to be relieved of the duty to report every 90 days.

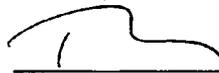
**8. Application for a Name Change:** If you apply for a name change, you must submit a copy of the application to the county sheriff of the county of your residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If you receive an order changing your name, you must submit a copy of the order to the county sheriff of the county of your residence and to the state patrol within five days of the entry of the order. RCW 9A.44.130(7).

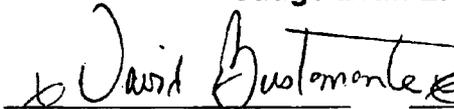
**5.7 Motor Vehicle:** If the court found that you used a motor vehicle in the commission of the offense, then the Department of Licensing will revoke your driver's license. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke your driver's license. RCW 46.20.285.

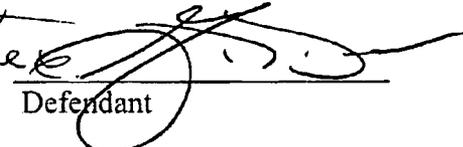
5.8 Other: \_\_\_\_\_

Done in Open Court and in the presence of the defendant this date: 2.26.13

  
Judge Evan E. Sperline

  
Deputy Prosecuting Attorney  
WSBA No. 22877  
Print Name:  
Douglas R. Mitchell

  
Attorney for Defendant  
WSBA No. 30668  
Print Name:  
David Bustamante

  
Defendant  
Print Name:  
GARY DON DUGGER

**Voting Rights Statement:** I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of DOC (not serving a sentence of confinement in the custody of DOC and not subject to community custody as defined in RCW 9.94A.030). I must re-register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financial obligations.

My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

Defendant's signature: 

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the \_\_\_\_\_ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

Interpreter signature/Print name: \_\_\_\_\_

I, KIMBERLY A. ALLEN, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action, now on record in this office.

**Witness** my hand and seal of the said Superior Court affixed this date: \_\_\_\_\_.  
Clerk of said county and state, by: \_\_\_\_\_, Deputy Clerk

**VI. Identification of the Defendant**

SID No. [S.I.D. NUMBER]  
 (If no SID complete a separate Applicant card (Form FD-258)  
 for State Patrol)

Date of Birth 04/13/1973

FBI No. 381422VA9

Local ID No. 308760

PCN No 925882666

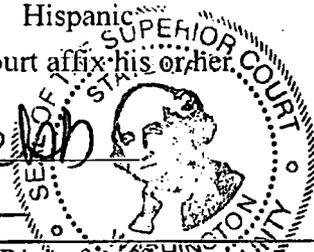
Other: DOC #     

Alias name, DOB:

<b>Race:</b>	<b>Ethnicity:</b>	<b>Sex:</b>
<input type="checkbox"/> Asian/Pacific Islander	<input type="checkbox"/> Black/African-American	<input checked="" type="checkbox"/> MALE
<input type="checkbox"/> Native American	<input checked="" type="checkbox"/> Caucasian	
	<input type="checkbox"/> Other: _____	<input type="checkbox"/> Non-Hispanic

**Fingerprints:** I attest that I saw the defendant who appeared in court affix his or her fingerprints and signature on this document.

Clerk of the Court, Deputy Clerk, Maree D. Welch  
 Dated: 2-26-13



The defendant's signature: [Signature]

Left four fingers taken simultaneously	Left Thumb	Right Thumb	Right four fingers taken simultaneously
--	------------	-------------	---



**ACKNOWLEDGMENT OF ADVICE OF RIGHT TO APPEAL  
AND TIME LIMIT FOR FILING COLLATERAL ATTACK**

The court has entered the Judgment and Sentence to which this form is attached. The undersigned, counsel for the defendant or the defendant, and a qualified or certified interpreter (where applicable) acknowledge that the defendant has read or heard, and has acknowledged understanding, the following rights:

**RIGHTS REGARDING APPEAL**

If the defendant was convicted after trial and upon the defendant's plea of not guilty or if the defendant was sentenced to a term outside the standard range for confinement, as provided in chapter 9.94A RCW:

1. The defendant has the right to appeal to the Court of Appeals.
2. Unless a notice of appeal is filed with the clerk of this court within thirty (30) days from the entry of the Judgment and Sentence, the right to appeal will be forever lost.
3. The defendant has the right to be represented by a lawyer for the purposes of appeal, including preparation and filing of the notice of appeal. If the defendant cannot afford to hire a lawyer, the court will appoint a lawyer to represent the defendant at public expense.
4. The defendant has the right to have those parts of the trial record necessary for appeal prepared at public expense if the defendant cannot afford to pay for such preparation.

**TIME LIMITS FOR COLLATERAL ATTACK**

5. No petition or motion for relief from the Judgment and Sentence may be filed after one (1) year has elapsed from the time the Judgment and Sentence becomes final.

The Judgment and Sentence becomes final on the last of the following dates:

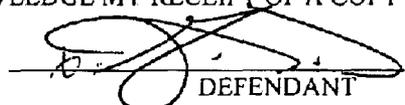
- a. when it is filed with the clerk of this court;
  - b. after a direct appeal (see rights above), when an appellate court issues its mandate disposing of such appeal,
  - c. when the United States Supreme Court denies a timely petition for certiorari to review a decision upholding the defendant's conviction on appeal. Filing a motion to reconsider denial of certiorari does not prevent the Judgment and Sentence from becoming final.
6. The time limit stated above does not apply to a petition or motion based solely on one or more of the following grounds:
    - a. newly discovered evidence, if the defendant acted with due diligence in discovering the evidence and filing the petition or motion;
    - b. that the statute the defendant is convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;
    - c. the conviction was barred by double jeopardy, under Amendment V to the United States Constitution or Article 1, Section 9 of the Washington State Constitution
    - d. the defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;

- e. the sentence imposed was in excess of the court's jurisdiction;
- f. there has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence or other order entered in a criminal or civil proceeding instituted by the state or local government, and either (1) the legislature has expressly provided that the change in the law is to be applied retroactively, or (2) a court, in interpreting a change in the law that lacks such an express legislative intent, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

DEFENDANT'S ACKNOWLEDGMENT

I HAVE READ, OR HAVE HAD READ TO ME, THE FOREGOING STATEMENT; I UNDERSTAND THE RIGHTS ENUMERATED ABOVE AND ACKNOWLEDGE MY RECEIPT OF A COPY OF THESE RIGHTS.

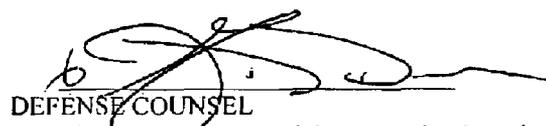
Date: 2/26/13

  
DEFENDANT

DEFENSE COUNSEL'S CERTIFICATION

I CERTIFY, AS DEFENDANT'S COUNSEL OF RECORD, THAT THE DEFENDANT HAS READ, OR HAS HAD READ TO HIM/HER, AND HAS ACKNOWLEDGED TO ME HIS/HER UNDERSTANDING OF, THE FOREGOING STATEMENT.

Date: 2/26/13

  
DEFENSE COUNSEL

**VOTING RIGHTS STATEMENT:** RCW 10.64. I acknowledge that my right to vote has been lost due to felony conviction. I am registered to vote; my voter registration will be cancelled. My right to vote may be restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 92A.84.660.

INTERPRETER'S CERTIFICATION

I AM CERTIFIED, OR HAVE BEEN FOUND BY THE COURT TO BE QUALIFIED, AS AN INTERPRETER IN THE \_\_\_\_\_ LANGUAGE, AND I HAVE TRANSLATED THE FOREGOING STATEMENT OF RIGHTS AND DEFENDANT'S ACKNOWLEDGMENT INTO THAT LANGUAGE TO THE DEFENDANT. THE DEFENDANT HAS ACKNOWLEDGED THAT HE/SHE UNDERSTANDS BOTH THE TRANSLATION AND THE SUBJECT MATTER OF THIS DOCUMENT. I CERTIFY, UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON, THAT THE FOREGOING IS TRUE AND CORRECT.

Date: \_\_\_\_\_

\_\_\_\_\_  
INTERPRETER

APPENDIX E  
Court of Appeals Opinion

**FILED**  
**July 3, 2014**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 31504-5-III
Respondent,	)	
	)	
v.	)	
	)	
GARY DON DUGGER,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

FEARING, J. — A jury convicted Gary Dugger of third degree assault of a child for bathing his 22-month-old son in scalding water. The “to convict” jury instruction omitted essential elements of the crime—that Dugger was above the age of 18 and the child was below the age of 13. Dugger contends the omission violated his due process rights because it relieved the State of proving every element beyond a reasonable doubt. Since Dugger stipulated to both these elements and relieved the State of proving these elements, we affirm his conviction.

PROCEDURE

A jury convicted Gary Dugger of third degree assault of a child for bathing his 22-month-old son, P.D., in water so hot the child’s skin stuck to his pajamas. An essential element of third degree assault of a child is that the defendant is over the age of 18 and the victim is under the age of 13. RCW 9A.36.140(1). The “to convict” instruction the

No. 31504-5-III  
*State v. Dugger*

jury received for third degree assault of a child omitted these elements.

Before the court instructed the jury, Gary Dugger stipulated to his being over the age of 18 and his child under the age of 13 at the time of the scalding. To ensure Dugger knowingly and voluntarily relieved the state of its burden to prove these elements, the court engaged in the following colloquy:

THE COURT: Mr. Dugger, would you state your name for the record?

THE DEFENDANT: Gary Don Dugger.

THE COURT: You can remain seated. Is your mind clear?

THE DEFENDANT: Yes, sir.

THE COURT: Are you under the influence of any substance?

THE DEFENDANT: No, sir.

THE COURT: And do you feel okay physically?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Dugger, you understand that you have the right to require the state to prove every element of the charge against you, including the fact that your son is under 13 and that you are over 18.

THE DEFENDANT: Yes, sir.

THE COURT: By this stipulation, you're relieving the state of the obligation to prove those two facts. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And have you had a full opportunity to consult with your attorney about this waiver?

THE DEFENDANT: Yes, sir.

THE COURT: And do you, indeed, wish to waive that right and stipulate to those two facts?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Thank you. The waiver is acceptable and is received.

Report of Proceedings (RP) at 195-96. Satisfied that Dugger's stipulation was knowing and voluntary, the court read the stipulation to the jury:

Ladies and gentlemen, the parties have agreed that certain facts are true. You must accept as true the following facts: On or about January 27, 2012, the defendant, Gary Don Dugger, was over the age of 18, and that [name omitted] was under the age of 13.

RP at 307.

### LAW AND ANALYSIS

Gary Dugger asks this court to reverse his conviction because the “to convict” instruction the jury received, omitted essential elements of third degree assault of a child—his and the child’s age. To uphold a conviction, the State must prove every essential element of a crime beyond a reasonable doubt. *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010). In a jury trial, the “to convict” instruction given to the jury is the yardstick by which this court determines whether the State proved every element of a crime. *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). In general, an instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal. *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). But, not every omission or misstatement in a jury instruction relieves the State of its burden. *Brown*, 147 Wn.2d at 339. Instead an erroneous jury instruction that omits an element of the offense is subject to harmless error analysis. *Neder v. U.S.*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); *Brown*, 147 Wn.2d at 340. Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or

No. 31504-5-III  
*State v. Dugger*

an unreliable vehicle for determining guilt or innocence. *Neder*, 527 U.S. 1 at 9.

When a to convict instruction omits an essential element of a charged crime, it is constitutionally defective and the remedy is a new trial unless the State can demonstrate that the omission was harmless beyond a reasonable doubt. *State v. Kirwin*, 166 Wn. App. 659, 669, 271 P.3d 310 (2012). A misstatement of the law in a jury instruction is harmless if the element is supported by uncontroverted evidence. *State v. Peters*, 163 Wn. App. 836, 850, 261 P.3d 199 (2011).

One illustrative decision is *State v. Baxter*, 134 Wn. App. 587, 141 P.3d 92 (2006). In *Baxter*, the trial court included the birthdate of the victim in the “to convict” instruction. *Baxter* complained that this relieved the State of proving an essential element, the child’s age. The *Baxter* court agreed that the instruction was improper, but subjected the impropriety to harmless error analysis.

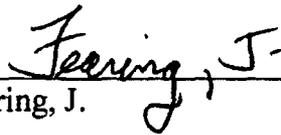
Gary Dugger’s stipulation renders any error in the “to convict” instruction harmless. The evidence that Dugger was above the age of 18 and his child below the age of 13 at the time of the crime is uncontroverted—in fact, he stipulated to these elements.

#### CONCLUSION

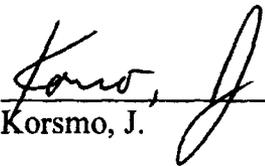
We affirm Gary Dugger’s conviction for third degree assault of a child.

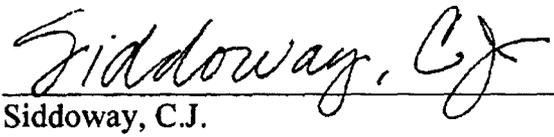
No. 31504-5-III  
*State v. Dugger*

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

  
\_\_\_\_\_  
Fearing, J.

WE CONCUR:

  
\_\_\_\_\_  
Korsmo, J.

  
\_\_\_\_\_  
Siddoway, C.J.