IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TERESA NADINE DUMDIE, Appellant.	No. 40395-1-II UNPUBLISHED OPINION

Hunt, J. – Teresa Nadine Dumdie appeals her sentence and jury trial convictions for four counts of second degree assault and one count of second degree assault of a child, all with accompanying firearm sentencing enhancements. She argues that (1) we should reverse counts I and V of the second degree assault charges because the trial court erred in giving a "first aggressor" instruction; (2) she received ineffective assistance when her trial counsel failed to object to the "first aggressor" instruction; (3) the trial court erred in imposing community custody "supervision" conditions 10, 11, 13, and 18; and (4) her total sentence for the second degree child assault conviction exceeds the statutory maximum.[1]

[1] In a pro se Statement of Additional Grounds for Review (SAG), RAP 10.10, Dumdie (1) argues that she has not committed any crimes and wishes to "plead not guilty," and (2) asks that we give great weight to her character witnesses. SAG. Dumdie's assertion of innocence does not warrant relief on direct appeal. And because Dumdie was the only defense witness, her claim that we should give weight to other witnesses is too vague for us to address. RAP 10.10(c).

The State concedes error as to (1) part of Dumdie's community custody condition 10 and all of conditions 11 and 18; and (2) Dumdie's total sentence for the second degree child assault conviction, which potentially exceeds the statutory maximum. We accept the State's concessions and remand for the trial court (1) to strike the relevant portion of community custody "supervision" condition 10 and conditions 11 and 18; and (2) to limit the total term of confinement on the second degree assault of a child conviction to 120 months. We otherwise affirm.

FACTS

On July 10, 2009, Teresa Nadine Dumdie purchased .22 caliber ammunition. Dezra Miller, the Wal-mart clerk who waited on Dumdie, told her that she could not return any purchased ammunition. But when Dumdie discovered that the ammunition she had purchased was the wrong type, she became angry and agitated, "flung" the ammunition onto the counter, demanded a refund, and accused Miller of stealing her money.[2] Although Miller reminded Dumdie that the ammunition was not returnable, Dumdie continued to demand her money back.

According to Miller, Dumdie was "verbally abusive" and used foul language throughout this transaction.[3] Both Miller and a nearby store employee contacted Penny Shirts, Miller's supervisor, and reported that a customer was "being verbally abusive to" Miller.[4] Shirts came to the sporting goods counter and spoke to Dumdie, who responded "in an aggressive manner,"

[2] Reporter's Transcript on Appeal (RTA) (Dec. 7, 2009) at 67, 74.

[3] RTA (Dec. 7, 2009) at 69.

[4] RTA (Dec. 7, 2009) at 69.

continued to use "foul language," and claimed that the store and Miller were "cheating her, stealing from her."[5] Nothing Shirts said calmed Dumdie, who "kept getting louder."[6] Because Dumdie had not left the counter with her purchase, however, Shirts authorized a refund, and Miller returned Dumdie's money.

Meanwhile, Anna Lester, her "adopted daughter" Catherine Wooley, Wooley's four-year-old son CH, and Wooley's boyfriend, Carlos Hernandez, were shopping near the sporting goods counter; they overheard Dumdie's swearing at the store staff. When Lester and Wooley asked Dumdie not to "cuss" in front of CH and to "watch her mouth,"[7] Dumdie responded that she could say what she wanted because it was a "free country," cursed at Lester, and threatened to beat her up.[8]

After Lester's group started to move away, Dumdie continued "getting louder," swearing, and engaging in "disruptive" behavior.[9] Shirts told Dumdie that she needed to leave the store. But Dumdie refused. Shirts called assistant managers Donald Titus and Lehman Moseley, who arrived at the sporting goods counter to find Dumdie angry, yelling, swearing, and "berating" Wooley and Lester, who were "trying to tell [her] to not use language like that in the store or

[5] RTA (Dec. 7, 2009) at 71.

[6] RTA (Dec. 7, 2009) at 91.

[7] RTA (Dec. 8, 2009) at 109.

[8] RTA (Dec. 7, 2009) at 92.

[9] RTA (Dec. 7, 2009) at 94.

around the children."[10] When Moseley politely told Dumdie to leave the store, she became angry with him, too. After threatening to call law enforcement to escort Dumdie from the store, Moseley and Titus eventually convinced her to leave.

As Moseley walked Dumdie out, they again encountered Lester's party. "There was another angry exchange of words and names and so forth"[11]: Lester's group again told Dumdie that "she just needed to stop cussing"[12]; Dumdie yelled that she was "going to defend herself against" Lester's group and that that she would "pop" them, including that "she was going to pop that brat," apparently referring to the child, CH.[13] Lester and Wooley reacted to Dumdie's threats "with squeals and screams and very much stress."[14]

Although Moseley "was able to persuade" Dumdie to keep walking, he asked a courtesy desk employee to call 911.[15] Moseley never touched Dumdie, never got closer than two feet, and never raised his voice as he walked through the store with her. Nevertheless, Dumdie accused him of "bullying" and harassing her and "told [him] that she was going to blow a hole in [him]."[16] Moseley and Titus walked Dumdie about 800 feet into the parking lot to her van, where Moseley

[10] RTA (Dec. 7, 2009) at 106-07.

[11] RTA (Dec. 7, 2009) at 109.

[12] RTA (Dec. 8, 2009) at 57.

[13] RTA (Dec. 7, 2009) at 110-11; RTA (Dec. 8, 2009) at 24.

[14] RTA (Dec. 7, 2009) at 111.

[15] RTA (Dec. 7, 2009) at 109.

[16] RTA (Dec. 7, 2009) at 110.

"encouraged her to go ahead and leave."[17] Dumdie "dared [Moseley] to keep her from Walmart [sic]," told him he could not keep her from coming to the store, continued "using bad language" and "calling [him] names."[18] Moseley again encouraged Dumdie to leave. Store security officer Lisa Nuzum arrived and also told Dumdie that she needed to leave; Dumdie responded by demanding that Nuzum "trespass"[19] her from the property and continuing to "yell vulgar things out the [van] window at the assistant managers."[20]

When Dumdie finally decided to leave, rather than drive west out of the parking lot, she drove east towards the store; at the same time, Lester's van was heading towards Dumdie, with Lester driving, Wooley sitting next to Lester, and CH sitting behind Lester. The vans stopped side by side with their driver's side windows lined up. Dumdie pulled out a gun and threatened to shoot Lester and CH. Lester tried to get out of her van, but her seatbelt restrained her. Hernandez got out of Lester's van, apparently to confront Dumdie, but Dumdie drove away.

Soon after having driven away, Dumdie turned her van around, stopped in front of Lester's van, again pointed her gun at Lester's van and also at Titus and Nuzum, and, it appeared was trying to pull the trigger. Lester turned and drove out of the parking lot. Dumdie then also left the parking lot.

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[17] RTA (Dec. 7, 2009) at 113.

[18] RTA (Dec. 7, 2009) at 113.

[19] Nuzum testified that a "trespass" is when the store has excluded someone from entering store property. RTA (Dec. 8, 2009) at 150.

[20] RTA (Dec. 8, 2009) at 149-50.

Police officers stopped Dumdie shortly thereafter. They found a loaded semiautomatic handgun with a round in the chamber and additional rounds in the magazine. The gun's safety mechanism allowed pulling the trigger without firing.

II. Procedure

The State charged Dumdie with four counts of second degree assault and one count of second degree assault of a child, alleging that she had been armed with a firearm when she committed each offense. Count I was for the assault of Lester; count II was for the second degree assault of the child, CH; count III was for the assault of Titus; count IV was for the assault of Nuzum; and count V was for the assault of Wooley.

A. Pretrial Competency Hearing

Before trial, the trial court held a competency hearing and determined that Dumdie was competent to stand trial. In its written findings of fact, the trial court acknowledged evidence that Dumdie suffered from "an adjustment disorder and a personality disorder as distinguished from a mental disorder" or that she "has a chronic paranoid schizophrenic disorder." Clerk's Papers (CP) at 77. The trial court also noted that Dumdie had been previously diagnosed with borderline personality disorder in 2007.

B. Trial Testimony

1. State

In addition to the facts described above, the State presented testimony that (1) all of the store employees involved had remained calm throughout the incident; (2) none of the store employees had physically or verbally threatened Dumdie before she pointed her gun at Lester and

CH in the parking lot; and (3) Dumdie's responses to the store employees, Lester's party, and other witnesses were disproportionate, inappropriate, "argumentative," "combative," and threatening.[21]

Lester testified that (1) she had not been "afraid" of Dumdie; (2) she did not threaten Dumdie, but merely asked her to stop swearing and abusing the cashier; (3) after Lester had started to walk away, Dumdie continued to scream at Lester to "meet . . . outside"; and (4) she, Lester, responded that she had shopping to do first and went on her way, at which point, Lester was not concerned that Dumdie would follow through on her threat to confront her (Lester) outside in the parking lot.[22] Lester also testified about the confrontations in the parking lot: When she and her group started to pull away in their van, Dumdie drove up unexpectedly and started to swear at them and to threaten to beat up Lester. When Lester responded, "whatever," Dumdie reached behind her, pulled out a gun, pointed the gun out her window, announced that she was going to kill Lester, pointed the gun at CH, and announced that she was "gonna kill that little black son of a bitch."[23] Lester then tried to get out of the van, but her seatbelt was still fastened. Lester told Dumdie that she (Dumdie) should kill her (Lester) if she wanted to kill someone because she (Lester) had "lived [her] life."[24] Dumdie drove off. When Dumdie pulled in front of them again, Dumdie was yelling and screaming and again pointed her gun at them; this

[21] RTA (Dec. 7, 2009) at 81.

[22] RTA (Dec. 8, 2009) at 67.

[23] RTA (Dec. 8, 2009) at 70.

[24] RTA (Dec. 8, 2009) at 70.

time she appeared to pull the trigger.

2. Defense

Dumdie testified that (1) the initial altercation in the store occurred after Miller rudely refused to refund her money and had "acted real rude and moved forward and tried to bully [her (Dumdie)] with her eyes"; (2) Dumdie had responded by calling Miller a thief and accusing the store of stealing from her; (3) Miller had responded with anger; and (4) she, Dumdie, had "just defended [her]self and stood up to" Miller, refusing to let Miller intimidate her.[25] Dumdie admitted that she had raised her voice and had gotten "a little bit angrier in attitude" before Miller called management and received approval for her refund.[26]

According to Dumdie, Shirts was also rude, treating her (Dumdie) as if she were someone trying to make trouble; and Miller "bullied [Dumdie] by looking at [her], glaring [her]."[27] Dumdie stated that she had felt threatened by Miller and Shirts, who were "both about at least twice [her] size," and "bullied [her] physically."[28] Dumdie admitted that she started swearing and told the two women employees that she would "defend" herself if they came out from behind the counter "and tr[ied] to attack [her] physically."[29]

Dumdie also testified that an "assistant manager blew up and had a tizzy," told her to

[25] RTA (Dec. 9, 2009) at 22, 24.

[26] RTA (Dec. 9, 2009) at 26.

[27] RTA (Dec. 9, 2009) at 29.

[28] RTA (Dec. 9, 2009) at 28.

[29] RTA (Dec. 9, 2009) at 29.

"shut up," and wanted to "kick[]" her out of the store for using "foul language."[30] Two male store employees came up and threatened to call the police. And a group of three customers, also larger than she, threatened to "beat [her] up physically" if she did not stop swearing and "shut up."[31] Dumdie further testified that (1) she told this group she had the right to defend herself by "any reasonable means necessary if I just think that my life might be in danger"; (2) started to walk, unaccompanied, out of the store; (3) encountered Lester's group a second time and they again threatened to attack her; (4) she told them she had a gun and would use it if she "need[ed] to"; and (5) when on her way out, she asked Moseley if she could leave a complaint, he responded she could not and "yanked" her cart out of her hands.[32]

When she reached her car, Dumdie tried to confront Moseley about kicking her out of the store and about why he had not attempted to obtain any "security information" from her.[33] She felt that everyone in the store had been "bullying" her "because they didn't have the right to kick [her] out."[34] Eventually, she decided to leave and drove away.

Dumdie was not sure why she had turned towards the store rather than an exit; but she asserted that (1) she "just happened" to drive up to Lester's van; (2) she "had the right to have driven that direction towards them and see if they were going to try and follow [her] and bully

[30] RTA (Dec. 9, 2009) at 30.

[31] RTA (Dec. 9, 2009) at 32.

[32] RTA (Dec. 9, 2009) at 34, 35, 37.

[33] RTA (Dec. 9, 2009) at 38.

[34] RTA (Dec. 9, 2009) at 40.

[her] or attack [her] physically and harm [her]"; (3) until she encountered Lester's group again, she (Dumdie) had not been concerned that they were planning to follow and to attack her; but (4) when Lester drove up to her, she (Dumdie) felt threatened and that they "tried to use the store situation as an excuse to attack, to bully somebody."[35]

Dumdie testified that, feeling threatened, she stopped and asked Lester's group if they were going to follow and to attack her. She had threatened them with her gun only after they said they were going to attack her and started to get out of the van. She had pointed her gun at the man who got out of the van, but she did not see the child inside the van (although she had assumed the child was with the others). After she pulled her gun, Lester's group "backed away"; so she drove away, "yell[ing] out some rude verbal stuff to them in defense of [her]self to try to cause fear in them so that they wouldn't proceed to follow [her]"; wanting them to understand that "their lives were going to be in danger if they proceeded to try and come and attack" her, she stopped and aimed her gun at the van again to ensure that they would not follow her.[36] Dumdie admitted that she had threatened Lester's party, but she denied having threatened or pointed the gun at the child. Dumdie also denied having pointed the gun at Titus and Nuzum.[37]

[35] RTA (Dec. 9, 2009) at 40-41, 42.

[36] RTA (Dec. 9, 2009) at 45.

[37] Dumdie neither called nor mentioned calling other witnesses, as character witnesses or for any other purpose.

C. Jury Instructions

The trial court instructed the jury that the assaults against Lester and CH were based solely on the incident that had occurred when the two vans were side by side. The trial court gave self-defense instructions on only the assault against Lester (count I) and the assault against Wooley (count V). The trial court also gave the State's proposed "first aggressor" instruction:

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

CP at 67 (Jury Instruction 26). Dumdie did not object.

D. Verdict and Sentencing

The jury found Dumdie guilty on all counts and returned special firearm verdicts for each count. The Department of Corrections' presentence report noted Dumdie's possible mental health issues:

> Despite Dumdie's apparent denial of having any mental health issues, it seems apparent from her irrational behavior that there is likelihood that she is so affected[.]
> . . .
> Dumdie certainly seems to have been delusional throughout this offense, despite denying any mental health issues. Her perception of the threat to her significantly affected her behavior and led to the assaults contained within this instant offense.

CP at 116. The report recommended a "supervision" condition requiring Dumdie to obtain a mental health evaluation and to comply with any recommended mental health treatment. CP at 117.

At sentencing, the trial court discussed Dumdie's mental health issues:

> All right, this is a difficult case. I think it's obvious to everyone involved in the case that mental health issues were at play in this case. And we had a hearing with regard to competency where we had two well qualified doctors indicate—come to different conclusions and the Court came to a conclusion on that issue. But certainly both of them indicated there were certainly mental health issues, they had arrived at different diagnoses as to what that would be but there's certainly some mental health issues at play here.
>
> *But it's also obvious to the Court, and after reading the [presentence] report to the [report] writer as well, that Ms. Dumdie presents a danger unless she's successfully treated for the issues that have been diagnosed*, but the Court doesn't have a whole lot of ability to do that. In fact, I don't have any except for what takes place in prison and what takes place when she gets out of prison, but the Court doesn't have a whole lot of leeway here under this particular case.

Reporter's Transcript on Appeal (RTA) (Feb. 25, 2010) at 17-18 (emphasis added).

The trial court then sentenced Dumdie as follows: 120 months of confinement[38] for the second degree child assault conviction, plus 18 months of community custody, specifying several conditions.[39] Dumdie appeals.

ANALYSIS

I. "First Aggressor" Instruction; Ineffective Assistance of Counsel

Dumdie first argues that the trial court erred in giving the State's requested "first aggressor" instruction because the evidence did not support this instruction for the assaults against Lester (count I) and Wooley (count V). Br. of Appellant at 11. Under RAP 2.5(a), we "may refuse to review any claim of error which was not raised in the trial court." Because

[38] Dumdie's total 120 months of confinement for this conviction included an 84-month standard range sentence plus a 36-month firearm special verdict sentencing enhancement.

[39] Because Dumdie does not challenge the sentences for her other convictions, we do not discuss them.

Dumdie did not object to this instruction and does not show that it is manifest error affecting a constitutional right, we do not consider this claim directly for the first time on appeal. RAP 2.5(a)(3). We do, however, indirectly address this claim in the context of her ineffective assistance of counsel argument based on trial counsel's failure to object to the "first aggressor" instruction.

We review de novo claims of ineffective assistance of counsel. To establish ineffective assistance, Dumdie must show that her "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). To demonstrate prejudice, Dumdie must show a reasonable probability that, but for her counsel's unprofessional errors, the result of the proceedings would have differed. *Thomas*, 109 Wn.2d at 226. "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Thomas*, 109 Wn.2d at 226 (emphasis omitted) (quoting *Strickland*, 466 U.S. at 694). We presume that counsel's performance was adequate, and we give "exceptional deference" to counsel's strategic decisions. *In re Pers. Restraint of Elmore*, 162 Wn.2d 236, 257, 172 P.3d 335 (2007) (citing *Strickland*, 466 U.S. at 689); *see also State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Dumdie fails to establish that her trial counsel's failure to object to the "first aggressor" instruction amounted to deficient performance.

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and, when read as a whole, properly inform the jury of the applicable law. *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). Whether jury

instructions are adequate is a question of law, which we review de novo. *Clausing*, 147 Wn.2d at 626-27. A "first aggressor" instruction is appropriate when "there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense." *State v. Riley*, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999). Although courts should use "first aggressor" instructions sparingly,[40] such instruction is appropriate where there is conflicting evidence as to whether the defendant's conduct precipitated the fight. *Riley*, 137 Wn.2d at 910. The record must demonstrate the defendant's involvement in wrongful or unlawful conduct *before* she committed the charged crimes; and "[w]ords alone do not constitute sufficient provocation." *Riley*, 137 Wn.2d at 910-11; *State v. Wingate*, 123 Wn. App. 415, 422-23, 98 P.3d 111 (2004), *rev'd on other grounds*, 155 Wn.2d 817 (2005).

Although the trial court instructed the jury that it could consider only the first parking lot contact between Dumdie and Lester to determine whether Dumdie had assaulted Lester, the State presented evidence that was sufficient to show that, even if Lester had threatened Dumdie inside the store, Dumdie intentionally drove up to Lester's van to confront her and created the situation that led to her (Dumdie's) using physical "self-defense" against Lester and the others in Lester's van, including Wooley.[41] Even if Dumdie had reasonably felt threatened after Lester attempted to get out of her van and Hernandez approached Dumdie's van, there was undisputed evidence that

[40] *Riley*, 137 Wn.2d at 910 n.2 ("'[F]ew situations come to mind where the necessity for an aggressor instruction is warranted. The theories of the case can be sufficiently argued and understood by the jury without such instruction.'" (alteration in original) (quoting *State v. Arthur*, 42 Wn. App. 120, 125 n.1, 708 P.2d 1230 (1985))).

[41] This evidence shows far more than mere verbal aggression or taunts by Dumdie.

Dumdie had already pulled her gun and aimed at Lester and CH at that point. Because the "first aggressor" instruction was appropriate and the trial court would have overruled any objection, defense counsel's decision not to challenge this instruction does not establish deficient performance. Accordingly, Dumdie's ineffective assistance of counsel claim fails.

II. Community Custody "Supervision" Conditions

Dumdie next argues that the trial court erred in imposed the following portions of "conditions of supervision" as part of her sentence:

> 10) You shall abstain from the possession . . . of alcohol[42] and remain out of places where alcohol is the chief item of sale.
> 11) You shall abstain from the possession or use of drugs and drug paraphernalia except as prescribed by a medical professional, and shall provide copies of all prescriptions to Community Corrections Officer within seventy-two (72) hours.
> . . .
> 13) You shall obtain a mental health evaluation and, if recommended, fully comply with any recommended treatment.
> . . .
> 18) You shall pay the cost of counseling to the victim that is required as a result of your crime or crimes.

CP at 19. *See* Br. of Appellant at 22, 26, 29, 33. The State concedes error as to the challenged portions of condition 10 and as to conditions 11 and 18. We accept the State's concessions and remand to the trial court to strike the objectionable portions of condition 10 and to strike conditions 11 and 18.

The State does not, however, concede error as to condition 13. Dumdie argues that the trial court erred in requiring her to obtain a mental health evaluation and to comply with any

[42] Dumdie concedes that the trial court could prohibit her from using alcohol, which is also part of condition number 10.

related treatment because it failed to follow the procedures required under RCW 9.94B.080.[43] We disagree. We review crime-related supervision conditions for abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). A trial court abuses its discretion when its decision is based on untenable grounds including those that are contrary to law. *Riley*, 121 Wn.2d at 37; *State v. Berry*, 129 Wn. App. 59, 68, 117 P.3d 1162 (2005), *review denied*, 158 Wn.2d 1006 (2006). We find no abuse of discretion here.

RCW 9.94B.080 provides:

> The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, *if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025*, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment must be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.

(Emphasis added).

Dumdie admits that the trial court considered the presentence report and the competency evaluations and that the trial court concluded that "it's obvious to everyone involved in the case that mental health issues were at play in this case."[44] But she asserts that the trial court "did not make the statutorily mandated finding that Dumdie was a 'mentally ill person' as defined by RCW 71.24.025 and that a qualifying mental illness influenced the crimes for which she was

[43] Formerly RCW 9.94A.505(9) (2006).
[44] RTA (Feb. 25, 2010) at 17.

[45] Br. of Appellant at 30.

convicted."[45] The record shows that the trial court considered the competency evaluation and the presentence report and then determined on the record that (1) Dumdie had mental health issues, (2) these mental health issues played a role in the offenses, and (3) that she presented a risk of harm if her mental health issues went unaddressed. Although the trial court did not expressly state that it found Dumdie to be a "mentally ill person as defined in RCW 71.24.025,"[46] the trial court's ruling implied this finding.

RCW 71.24.025(18) defines "mentally ill persons" as "persons . . . defined in subsections (1), (4), (27), and (28) of this section." RCW 71.24.025(27)(a) includes persons who present "a likelihood of serious harm to himself or herself or others, or to the property of others, as a result of a mental disorder." The trial court's finding that Dumdie had mental health issues and that she presented a danger if those issues were not addressed, demonstrates that the trial court found Dumdie to be a mentally ill person under RCW 71.24.025. Accordingly, we hold that Dumdie does not show that the trial court erred in imposing condition 13.

III. Potentially Excessive Sentence

Finally, Dumdie argues that (1) her combined terms of confinement and community custody for her second degree child assault conviction exceed the 120-month statutory maximum for that offense, and (2) we should remand for reduction of the community custody term to zero months. The State concedes that the combined confinement and community custody terms potentially exceed the statutory maximum; but it argues that under *In re Pers. Restraint of*

[45] Br. of Appellant at 30.

[46] Br. of Appellant at 30.

Brooks, 166 Wn.2d 664, 675, 211 P.3d 1023 (2009), clarification of the judgment and sentence to limit the total sentence to the statutory maximum of 120 months is the proper remedy.

We accept the State's concession of error. Second degree assault of a child is a class B felony with a statutory maximum of 120 months of confinement. RCW 9A.36.130(2); RCW 9A.20.021(1)(b). Dumdie's 120-month term of confinement plus her 18-month community custody term could potentially result in a sentence that exceeds this 120-month statutory maximum. Although the parties agree that this potential sentence is erroneous, they do not agree on the appropriate relief.

Dumdie argues that RCW 9.94A.701(9)[47] requires us to remand to the trial court to reduce her community custody term. Our Supreme Court recently rejected this approach in *State v. Franklin*, ___ Wn.2d ___, ___ P.3d ___, 2011 WL 4837266 (Wash. Oct. 13, 2011). The proper remedy is to remand to the trial court to amend Dumdie's sentence to clarify that the combination of confinement and community custody terms shall not exceed the statutory maximum of 120 months. *See Franklin*, 2011 WL 4837266 at *4-6; *Brooks*, 166 Wn.2d at 675.

We remand for the trial court (1) to strike supervision conditions 11 and 18 and the relevant portions of condition 10 that we have discussed above, and (2) to amend Dumdie's

[47] 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.

sentence to clarify that the combination of confinement and community custody terms for count II shall not exceed the statutory maximum of 120 months. We otherwise affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Penoyar, C.J.

Quinn-Brintnall, J.