IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27892-1-III**
	)	**Consolidated with**
Respondent,	)	**No. 28206-6-III**
v.	)	
	)	**Division Three**
TORREY DESHAWN BAKER,	)	
	)	
Appellant.	)	
_____	)	**UNPUBLISHED OPINION**
In re Personal Restraint Petition of:	)	
	)	
TORREY DESHAWN BAKER,	)	
	)	
	)	
Petitioner.	)	

Brown, J.—Torrey Deshawn Baker appeals his conviction of felony violation of a domestic violence no-contact order for an incident involving his girl friend, Billie Breymier. Mr. Baker contends portions of the State's closing argument were improper, the trial court erred in giving certain limiting instructions, and that his sentence improperly exceeds the statutory maximum permitted by law. We also consider Mr.

Baker's consolidated personal restraint petition (PRP). We affirm, rejecting Mr. Baker's contentions, and deny his PRP. However, we remand for sentencing clarification.

FACTS

Mr. Baker and Ms. Breymier dated and lived together. A no-contact order prevented Mr. Baker from having contact with Ms. Breymier. Early on April 27, 2008, Sarah Depner received a telephone call from Ms. Breymier. According to Ms. Depner, Ms. Breymier asked Ms. Depner to come and pick her up, and she told her: "[Mr. Baker] just beat the shit out of me." 2 Report of Proceedings (RP) (Feb. 4, 2009) at 319. Ms. Depner picked up Ms. Breymier at a neighbor's house and drove her to the hospital. According to Ms. Depner, Ms. Breymier was covered in blood, and had cuts on her face and under her chin. Ms. Breymier told Ms. Depner that Mr. Baker had attacked her, and that she stabbed him with a pair of scissors in order to get away.

The physical examination of Ms. Breymier at the hospital by Dr. Michael Sicilia revealed lacerations of her face and lip, and facial bruising. Ms. Breymier told Dr. Sicilia that her boyfriend hit her.

The State charged Mr. Baker with felony violation of a domestic violence no-contact order, unlawful imprisonment, and second degree assault. The State alleged that Mr. Baker violated the no-contact order by "knowingly violating the restraint provisions therein, and . . . did intentionally assault another in a manner that does not

amount to an assault in the first or second degree and/or engaged in conduct that was reckless and created a substantial risk of death or serious physical injury to [Ms. Breymier]," in violation of RCW 26.50.110(4). Clerk's Papers (CP) at 1.

On direct examination, Mr. Baker acknowledged he had been convicted of assaulting Ms. Breymier twice and that he was aware of the no-contact order, but he denied hitting Ms. Breymier on the charged date. Mr. Baker claimed self-defense.

Ms. Breymier recanted her earlier statements incriminating Mr. Baker. She related that she initially attacked Mr. Baker with the scissors. On cross-examination, Ms. Breymier agreed she had spoken to Mr. Baker about the case since the incident, accepting telephone calls from him. The trial court permitted the State to play several of the taped telephone conversations for the jury. Prior to playing the tapes, the trial court gave a limiting instruction without objection:

> This evidence will be played in court and has been admitted in this case only for a limited purpose. This evidence consists of portions of telephone conversations and can be considered by you only for the purposes of impeachment of a witness. You may not consider it for any other purpose. Any discussion of this evidence during your deliberations must be consistent with this limitation.

3 RP (Feb. 5, 2009) at 619. Mr. Baker proposed a similar concluding instruction.

The jury was instructed on self-defense; Jury Instruction 24 partly stated:

> It is a defense to . . . the assault and reckless conduct alternative element of [felony violation of a domestic violence no-contact order] that the force used was lawful as defined in this instruction.
>
> The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable

> doubt, it will be your duty to return a verdict of not guilty.

CP at 168.

Further, the jury was instructed:

> You may consider evidence that a witness has been convicted of a crime only in deciding what weight or credibility to give to the testimony of the witness, and for no other purpose.

CP at 161.

In its rebuttal closing argument, the State argued:

> The State doesn't argue, and it would be improper for you as jurors, to say, well, if the defendant did this in the past, then this. That's not . . . what the State is arguing, but [Mr. Baker] is claiming that everything he did on the 27th was in self-defense, and, yet, his history rebuts that very claim because in September of '07. . . . he testified that he pled guilty to assaulting [Ms.] Breymier. [Mr. Baker] testified in December of '07, he was arrested for assaulting [Ms.] Breymier, and then [Mr. Baker] testified that in . . . June of '08, he was found guilty of assaulting [Ms.] Breymier, but he wants you to believe that he acted in self-defense.
>
> So does that testimony - - when you look at that testimony and the State has to prove beyond a reasonable doubt that he did not act in self-defense, does his testimony hold water?

3 RP (Feb. 5, 2009) at 725-26. Mr. Baker unsuccessfully objected to this argument as "shifting the burden." 3 RP (Feb. 5, 2009) at 726.

The jury found Mr. Baker solely guilty of felony violation of a domestic violence no-contact order. The jury returned a special verdict, finding that "the conduct that

constituted a violation of the court order [was] an assault which did not amount to an assault in the first or second degree . . . [and] [was] reckless and did . . . create a substantial risk of death or serious physical injury to another person." CP at 172. The court sentenced Mr. Baker to 60 months' confinement and community custody "for the longer of . . . the period of early release. RCW 9.94A.728(1)(2)" or 9 to 18 months. CP at 180; 3 RP (Feb. 11, 2009) at 758. Mr. Baker appealed. His CrR 7.8 motion to modify or correct his judgment was transferred here for consideration as a PRP. We consolidated the direct appeal and the PRP.

ANALYSIS

A. Rebuttal Closing Argument

The issue is whether the portion of the State's rebuttal closing argument addressing Mr. Baker's prior assault convictions recited above improperly shifted the burden of proof.[1]

A criminal defendant bears the initial burden of providing some evidence of self-defense. *State v. Walden,* 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Once the defendant produces some evidence of self-defense, the burden shifts to the State to disprove self-defense beyond a reasonable doubt. *Id.* Here, in its rebuttal closing argument, the State correctly stated that it had the burden to prove, beyond a

[1] Mr. Baker also alleges a violation of ER 405(a). Appellant's Br. at 6-7. However, he concedes that the evidence of his prior assaults of Ms. Breymier was properly considered by the jury. Appellant's Br. at 9. Therefore, because this argument concerns admission of evidence, it is not addressed.

reasonable doubt, that Mr. Baker did not act in self-defense. The State argued, "when you look at that testimony and the State has to prove beyond a reasonable doubt that he did not act in self-defense, does his testimony hold water?" 3 RP (Feb. 5, 2009) at 726. Further, the self-defense instructions placed the burden on the State. We presume a jury follows the court's instructions. *State v. Swan*, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990). Accordingly, the State's rebuttal closing argument did not shift the burden of proof on self-defense.

Mr. Baker argues the State committed misconduct by arguing the jury could not find that he acted in self-defense because of his prior assaults against Ms. Breymier. "To prevail on a claim of prosecutorial misconduct, the defendant must show both improper conduct by the prosecutor and prejudicial effect." *State v. O'Donnell,* 142 Wn. App. 314, 327, 174 P.3d 1205 (2007) (quoting *State v. Munguia,* 107 Wn. App. 328, 336, 26 P.3d 1017 (2001)). "[T]he defendant bears the burden of proof on both issues." *Id*. at 328 (citing *Munguia,* 107 Wn. App. at 336). Further, "[m]isconduct is prejudicial when, in context, there is a substantial likelihood that the misconduct affected the jury's verdict." *Id*. (internal quotation marks omitted) (quoting *State v. Stith*, 71 Wn. App. 14, 19, 856 P.2d 415 (1993)). "This court reviews the prosecutor's remarks in the context of the total argument, the issues in the case, the evidence, and the instructions provided by the trial court." *State v. Barajas*, 143 Wn. App. 24, 37, 177 P.3d 106 (2007), *review denied*, 164 Wn.2d 1022 (2008) (citing *State v. Russell*, 125 Wn.2d 24,

85-86, 822 P.2d 747 (1994)).

Here, the State partly argued Mr. Baker's history of assaults rebutted his self-defense claim. Arguably, Mr. Baker is correct that the latter argument was improper. "Arguments concerning questions of law must be confined to the instructions given by the court." *State v. Papadopoulos,* 34 Wn. App. 397, 400, 662 P.2d 59 (1983), *abrogated on other grounds by State v. Brown,* 36 Wn. App. 549, 555-56, 676 P.2d 525 (1984). Even so, Mr. Baker fails to establish any prejudicial effect, considering the jury was instructed on the law of self-defense and on how to consider Mr. Baker's prior convictions: "You may consider evidence that a witness has been convicted of a crime only in deciding what weight or credibility to give to the testimony of the witness, and for no other purpose." CP at 161. We presume a jury follows the court's instructions. *Swan*, 114 Wn.2d at 661-62. Accordingly, reviewing the State's argument in context, Mr. Baker fails to show a substantial likelihood that the argument affected the verdict. *See O'Donnell,* 142 Wn. App. at 327 (citing *Stith*, 71 Wn. App. at 19).

B. Limiting Instruction

Mr. Baker contends, for the first time on appeal, that the limiting instruction for the taped telephone conversations was improper under *State v. Cook*, 131 Wn. App. 845, 129 P.3d 834 (2006).[2]

Where a defendant does not object to a limiting instruction given at trial, he may not challenge the instruction for the first time on appeal. *See State v. Fitzgerald*, 39

[2] *State v. Magers*, 164 Wn.2d 174, 189 P.3d 126 (2008) holds otherwise.

Wn. App. 652, 662, 694 P.2d 1117 (1985) (challenge to limiting instruction regarding rebuttal testimony of prior bad acts could not be raised for the first time on appeal). Further, Mr. Baker proposed the jury instruction given by the trial court containing similar language to the oral limiting instruction. The invited error doctrine precludes review of a jury instruction proposed by the defense. *State v. Carter*, 127 Wn. App. 713, 716, 112 P.3d 561 (2005) (citing *State v. Studd*, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999)). In sum, we decline review.

We note in passing that even if we were to address the matter, Mr. Baker's reliance on *Cook* is inapposite. C*ook* addressed the propriety of a limiting instruction given regarding admission of the defendant's prior assaults of a recanting victim. *See Cook*, 131 Wn. App. at 853-54. Here, the limiting instruction addressed impeachment evidence, not evidence of Mr. Baker's prior assaults of Ms. Breymier.

C. Sentencing

The issue is whether Mr. Baker's sentence exceeds the statutory maximum punishment for felony violation of a domestic violence no-contact order. Mr. Baker contends the trial court exceeded the statutory maximum by imposing 60 months' confinement plus 9 to 18 months' community custody.

"'We review a sentencing court's application of the community custody provisions of the Sentencing Reform Act of 1981, chapter 9.94A RCW, de novo.'" *State v. Torngren*, 147 Wn. App. 556, 565, 196 P.3d 742 (2008) (quoting *State v. Motter*, 139

Wn. App. 797, 801, 162 P.3d 1190 (2007), *review denied*, 163 Wn.2d 1025 (2008)).

The trial court sentenced Mr. Baker to 60 months' confinement and community custody "for the longer of . . . the period of early release. RCW 9.94A.728(1)(2)" or 9 to 18 months. CP at 180. Felony violation of a domestic violence no-contact order is a class C felony. RCW 26.50.110(4). The statutory maximum is 60 months. *See* RCW 9A.20.021(1)(c) (setting forth the maximum sentence for a class C felony). Further, a sentence for this crime must include community custody "for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer." Former RCW 9.94A.715(1) (2008); *see also* RCW 9.94A.701(1)(c). The community custody range for felony violation of a domestic violence no-contact order is 9 to 18 months. WAC 437-20-010.

Generally, "[A] court may not impose a sentence providing for a term of confinement or community custody that exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW." RCW 9.94A.505(5). However, "a trial court may sentence a defendant to the statutory maximum, including community custody." *Torngren*, 147 Wn. App. at 566 (citing *State v. Hibdon*, 140 Wn. App. 534, 538, 166 P.3d 826 (2007)). "The sentence is valid when the judgment and sentence 'set[s] forth the statutory maximum and clearly indicate[s] that the term of community [custody] does not extend the total sentence beyond that maximum.'" *Id*. (alterations in original)

(quoting *Hibdon*, 140 Wn. App. at 538). "Where the judgment and sentence does not so indicate an appropriate remedy is to remand for clarification of the sentence." *Hibdon*, 140 Wn. App. at 538 (citing *State v. Sloan*, 121 Wn. App. 220, 224, 87 P.3d 1214 (2004)). An alternative remedy is a remand for resentencing. *Id*. (citing *State v. Zavala-Reynoso*, 127 Wn. App. 119, 124, 110 P.3d 827 (2005)).

Here, Mr. Baker was sentenced to the statutory maximum, plus community custody, but the judgment and sentence does not indicate the community custody term does not extend the sentence beyond the statutory maximum of 60 months. Accordingly, we remand for clarification of the sentence. *See Hibdon*, 140 Wn. App. at 538 (citing *Sloan*, 121 Wn. App. at 224). On remand, the judgment and sentence must be amended to indicate the community custody term does not extend the total sentence beyond the statutory maximum of 60 months. *See Torngren*, 147 Wn. App. at 566 (citing *Hibdon*, 140 Wn. App. at 538).

D. Personal Restraint Petition

In his PRP Mr. Baker, as in his direct appeal, contends his sentencing exceeds the statutory maximum. Generally, we do not review issues previously raised and resolved on direct review. *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 389, 972 P.2d 1250 (1999). This issue was addressed and decided above. Therefore, we deny Mr. Baker's PRP.

Affirmed, PRP denied, and remanded for sentence clarification.

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.

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Brown, J.

WE CONCUR:

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Kulik, C.J.

_____
Korsmo, J.