IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. STEPHEN LEE SHORES, Appellant.	No. 38682-8-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury entered verdicts finding Stephen Lee Shores guilty of four counts of fourth degree assault, two counts of third degree assault, and one count of second degree assault. The jury also entered a special verdict finding that Shores committed the second degree assault while armed with a deadly weapon. Shores appeals his conviction and sentence, arguing that the trial court erred (1) by failing to give a self-defense jury instruction, (2) by failing to give a unanimity jury instruction, (3) by erroneously instructing the jury on the definition of a deadly weapon for purposes of the sentencing enhancement, (4) by miscalculating his offender score at sentencing, and (5) by failing to inquire about his conflicts with his defense attorney. We affirm Shores's convictions but, because the trial court failed to properly instruct the jury on the definition of a deadly weapon for purposes of the special verdict and the error was not harmless, we remand for resentencing within the standard range.

FACTS

Background Facts

In October of 2008, Shores lived with his then girl friend, Lorina Canell-Parker, at Parker's home in Glenoma, Washington. The couple had been dating on and off for approximately four years.

On October 4, 2008, Parker approached Shores in the couple's garage and asked him if he was on drugs. Shores became angry and struck her across the back with a crowbar. That same evening, Shores struck Parker on her leg with a fireplace poker and shoved her head into a corner hutch with glass doors, causing the glass to break.

On October 6, 2008, Parker and Shores had an argument in the couple's home. Parker left the house to retrieve groceries from Shores's car when Shores came out of the house, told her to get out of the car, and said he was leaving. After Parker told him to "hold on a second," Shores slapped her across the face causing her glasses to fall off. 2 Report of Proceedings (RP) at 42. While Parker was looking for her glasses in his car, Shores went back in the house, grabbed her other pair of glasses, and threw them on the roof. Shores then took a hose and sprayed Parker with water. Shores admitted that he knew Parker had a fear of having water in her face because of a traumatic incident she had experienced as a baby. Shores went back in the house, grabbed a chainsaw, and returned to the car. Shores started the chainsaw inside the car and hit Parker on the side of her body with the chainsaw's gas tank and with his fist.

Parker and Shores went back inside the house, and Shores threatened to burn down the house with or without Parker in it. Shores drove away from the house while Parker was in the shower; her glasses and cell phone were still in his car.

Parker called the police on October 7, 2008, and officers arrested Shores that same day. Police officers located the chainsaw at the location where they arrested Shores. The State charged Shores with one count of second degree assault – domestic violence, two counts of third degree assault – domestic violence, four counts of fourth degree assault – domestic violence, second degree theft, harassment – domestic violence, and second degree malicious mischief.[1]

Procedural Facts

A. Pretrial Hearing on Defense Counsel Status

On October 23, 2008, the trial court held a hearing to address the status of Shores's defense counsel. At the hearing, Shores's defense counsel, Dan Havirco, told the trial court that he had requested the hearing because Shores previously indicated he wanted to fire him but that they had since resolved their issues. Havirco informed the trial court that Shores was frustrated because he had wanted Havirco to arrange for him to take a polygraph test, believing that the test would "very quickly exonerate him." RP (Oct. 23, 2008) at 3. Havirco told the trial court that Shores decided to keep him as his defense counsel after he explained to him that a polygraph test would not exonerate him unless the State would agree to dismiss based on the test's results, which the State refused. Havirco informed the trial court that, upon resolving his issues with Shores, he proposed striking the hearing but the court administrator wanted it to remain on that day.

[1] The second degree malicious mischief charge was dismissed prior to the conclusion of trial.

B. Exchange Between Shores and the Trial Court

A jury trial began on December 3, 2008. On the second day of trial, before opening statements and outside the presence of the jury, Shores expressed frustration with his defense counsel:

> [Shores]: Hold on. Hold on.
> THE COURT: Mr. Shores. Mr. Shores.
> [Shores]: Yes.
> THE COURT: Do you have questions before we get started?
> [Shores]: I have a lot of questions, sir, and I have a lot of evidence that ain't here and this guy won't get it for me.
> THE COURT: Mr. Havirco, you need a minute with your client?
> [Defense Counsel]: Yeah, give me a minute.
> [Shores]: I'm tired of the minutes. I need the stuff.
> THE COURT: Mr. Shores, talk to your attorney.
> (Discussion held off record.)
> THE COURT: Mr. Shores, Mr. Shores, you need to stop.
> [Shores]: I know, but I'm upset.
> THE COURT: Mr. Shores, you need to stop. You need to understand that everything you're saying, you're saying this stuff out loud, everybody can hear it, everything that you say can be used against you. Do you understand that?
> [Shores]: It's against me. Where is my evidence? It is against me. That's right. You already got that point made clear. That's why I'm in jail. Now, where is the evidence?
> THE COURT: That's what the trial is going to be about.
> [Shores]: No. I want the evidence here in court.
> . . . .
> THE COURT: The trial is going to proceed. The State will present the evidence that it has. Stop and listen to me. This is not your time to talk. This is your time to be quiet.
> [Shores]: Really?
> THE COURT: Yes. Really. Do you understand that? Be quiet.
> [Shores]: I have no rights.
> THE COURT: No. You have a lot of rights. I'm telling --
> [Shores]: Where is the evidence?
> THE COURT: I'm telling you that you need to exercise your rights. One of those is your right to remain silent.
> [Shores]: Great.
> THE COURT: Because if you don't exercise that right, the things that you say can be used against you. Do you understand that?
> [Shores]: Perfectly.

. . . .

THE COURT: That's how this is going to go. And I'm not going to have any more of these --

[Shores]: Hold on.

THE COURT: -- outbursts in front of the jury when they come in.

[Shores]: Hold on.

THE COURT: Do you understand that?

[Shores]: Hold on. Hold on. Where's my pictures? Give me --

THE COURT: No, I'm not going to try the case now. We're going to do this in front of the jury.

[Shores]: No. I asked people to have this lady arrested. She's not arrested. I'm the one arrested here, not both of us. This is a two-sided street here and only one side's being seen. I want my evidence because this lady's going to jail when we're done.

THE COURT: Mr. Shores, you are the one who's on trial here.

[Shores]: She's the one --

THE COURT: Mr. Shores, that's enough. That's enough.

[Shores]: Where's --

THE COURT: You are the one that is on trial. No one else is on trial here today.

[Shores]: Yeah.

THE COURT: Do you understand that?

[Shores]: I don't understand why.

THE COURT: That's a decision --

[Shores]: (Unintelligible.)

THE COURT. Listen to me.

[Shores]: -- to arrest that --

THE COURT: Listen to me. Listen to me. Are you listening now?

[Shores]: I've been listening.

THE COURT: No, you have not been listening.

[Shores]: Nobody's listening to me. It's me that they're not listening to.

THE COURT: Be quiet.

[Shores]: Oh. Okay. Again, once again, be quiet.

THE COURT: Yes, I want you to be quiet now.

[Shores]: Okay.

. . . .

[Shores]: I told three officers of the law to arrest that lady for what she did to me. Did any of them do it?

THE COURT: And do you understand this?

[Shores]: What?

THE COURT: That's not your call.

[Shores]: I can't tell somebody to arrest the lady?

THE COURT: Correct, you can't.

[Shores]: I can't?

THE COURT: Correct, you can't.
[Shores]: My rights aren't worth a shit, huh?
THE COURT: That's enough.
[Shores]: Thank you.
THE COURT: Okay. Are you through?
[Shores]: You got that down, my rights ain't worth nothing?
THE COURT: Are you through?
[Shores]: Uh --
THE COURT: Listen, here's how this is going to go. We're going to have this trial today. We can have this trial with you sitting here and participating or you can go down to the jail.
[Shores]: That's the problem, I'm not participating because my stuff is not here.
THE COURT: Mr. Shores --
[Shores]: I'm -- I'm not participating --
THE COURT: Okay. You've pushed this as far as you can push it. Do you understand me? You need to be quiet now --
[Shores]: Oh.
THE COURT: -- and trial is going to proceed. You need to talk through your attorney at this point. Do you understand that?
[Shores]: Sure, I understand.
THE COURT: All right.
[Shores]: I told him to get the shit and he ain't got it. That's what I do understand. Okay. Let's do it.

2 RP at 23-30.

C. Shores's Taped Statement to Law Enforcement

At trial, the State played a taped statement Shores made to Lewis County Sheriff's Deputy Michael Gallagher. When Gallagher asked Shores how the glass hutch was broken, Shores responded,

I -- I -- I -- she said, "I'm missing my keys," and I thought she threw her keys at it, you know. And -- but one broke and then the other one broke right -- you know, right after another.
. . . .
I think she hit [the glass door] with her hand.

2 RP at 106-07.

In his taped statement, Shores also told Deputy Gallagher that he and Parker engaged in a scuffle on a different day. Shores stated that the couple had been arguing and that he had told Parker he was leaving. He stated that Parker was upset that he was planning to leave and that she kept arguing, so he "snuck around the back and started loading [his] car up." 2 RP at 109-10. Later in the interview, Shores told Gallagher that he "already had all [his] stuff packed." 2 RP at 110.

Shores told Deputy Gallagher that he was ready to drive away that night but could not leave because Parker grabbed onto his car and would not let go. Shores further stated that Parker opened his door, grabbed the keys, and got on top of him with her back against the steering wheel. Shores told Gallagher that he grabbed the keys from Parker and left the car through the passenger side door. He stated that after Parker lost her glasses he attempted to give her a different pair of glasses but she refused to take them. Shores admitted that he squirted Parker with water from a hose and that he knew she was "deathly afraid of water." 2 RP at 118.

Shores's statement to Deputy Gallagher contained numerous contradictions. For example, in describing where Parker was sitting in his car and what she was doing when he sprayed her with water, he stated:

> [Shores]: I got the keys. She's in the passenger seat now. So --
> DEPUTY GALLAGHER: How's she revving up the engine?
> [Shores]: I have the keys.
> DEPUTY GALLAGHER: And how's she revving up the engine?
> . . . .
> [Shores]: The car was still running with (unintelligible) --
> DEPUTY GALLAGHER: Still running without the keys? Without the keys in the ignition --
> [Shores]: Yeah, the car's still running, with her honking the horn and me trying to leave --
> DEPUTY GALLAGHER: Mm-hmm.
> [Shores]: -- and she's on my lap and --

> DEPUTY GALLAGHER: So she's in the driver's seat right now and you just sprayed her.

2 RP at 119.

Shores admitted to Gallagher that he grabbed a chainsaw, started it in the house, and got into the passenger seat with the chainsaw still running. He denied threatening her with the chainsaw. Shores stated that Parker eventually got out of the car and then started hitting him with both hands.

At trial, Deputy Gallagher testified that Shores made a spontaneous statement to him at the courthouse prior to court convening on December 4, 2008. Gallagher testified that Shores told him he hit Parker with the fire poker, crowbar, and a flashlight on October 4, 2008, and that he wanted those items turned into evidence.

D. Shores's Testimony at Trial

Shores testified in his defense. He stated that on October 4, 2008, Parker confronted him in the garage with a crowbar and demanded that he take a drug test. He did not state that Parker assaulted him with the crowbar. Shores admitted that he eventually took control of the crowbar but he denied striking Parker with it. Shores also denied that he hit Parker with a fireplace poker and denied that he pushed her into the glass hutch. Shores testified that Parker gave him two black eyes but that he could not remember when she gave him the black eyes. Shores later admitted that he had punched himself in the face. He also testified that Parker hit him with the fireplace poker on October 1, 2008.

Shores then testified about the chainsaw incident. Shores claimed that he started the chainsaw in Parker's house to lure her out of his car. In contrast to his earlier statement to

Deputy Gallagher, Shores testified that he shut the chainsaw off, sat in the passenger seat, and placed the chainsaw on the car's floor. Shores also testified that Parker did not assault him after she left his car, contradicting his statement to Gallagher that Shores hit him after she got out of his car.

E. Jury Instructions and Verdict

Defense counsel did not propose a self-defense jury instruction or a unanimity instruction. In conjunction with Shores's second degree assault charge, the trial court instructed the jury on the definition of "deadly weapon":

> Deadly weapon means any weapon, device, instrument, substance, or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

Suppl. Clerk's Papers (CP) at 55.

The trial court provided the jury with a special verdict form asking if Shores was armed with a deadly weapon during the commission of the second degree assault as charged in count I. The trial court did not give a separate jury instruction defining "deadly weapon" for purposes of the special verdict. During deliberations, the jury asked the trial court "which weapon is involved with each [assault] charge." Suppl. CP at 43. The trial court responded, "You have all of the court's instructions." Suppl. CP at 43.

The jury entered verdicts finding Shores guilty of four counts of fourth degree assault, two counts of third degree assault, and one count of second degree assault. The jury entered verdicts finding Shores not guilty of second degree theft and harassment. The jury also entered a special verdict finding that Shores was armed with a deadly weapon when he committed the second

degree assault.

F. Sentencing

At sentencing, the State recommended that the trial court sentence Shores to 84 months plus 12 months for the deadly weapons enhancement for a total of 96 months incarceration based on his offender score of 9+. Shores signed a stipulation on prior record and offender score that included two out-of-state convictions. The stipulation stated that Shores agreed that the prior out-of-state convictions were equivalent to Washington State felony convictions, that his offender score was correct, and that none of his convictions had "washed out." The trial court sentenced Shores to a total of 96 months of incarceration as recommended by the State. Shores timely appeals his convictions and sentence.

ANALYSIS

Self-Defense Jury Instruction

Shores first argues that the trial court erred by failing to instruct the jury on the law of self-defense. As an initial matter, Shores did not request a self-defense instruction at trial as required by CrR 6.15(a).[2] Generally, a party claiming that the trial court's instructions were erroneous must have objected on the same ground below or the party has waived the right to raise the issue on appeal. CrR 6.15(c);[3] *State v. Scott*, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988). "No error

[2] CrR 6.15(a) provides in part:

> **Proposed Instructions.** Proposed jury instructions shall be served and filed when a case is called for trial by serving one copy upon counsel for each party, by filing one copy with the clerk, and by delivering the original and one additional copy for each party to the trial judge. Additional instructions, which could not be reasonably anticipated, shall be served and filed at any time before the court has instructed the jury.

[3] CrR 6.15(c) provides:

> **Objection to Instructions.** Before instructing the jury, the court shall supply

can be predicated on the failure of the trial court to give an instruction when no request for such an instruction was ever made." *State v. Kroll*, 87 Wn.2d 829, 843, 558 P.2d 173 (1976). Notwithstanding his failure to propose a self-defense jury instruction at trial, Shores contends that he may raise the issue for the first time on appeal under RAP 2.5(a)(3) because the trial court's failure to instruct the jury on self-defense violated his due process right to have the State prove all elements of the crimes charged beyond a reasonable doubt. In the alternative, Shores argues that his counsel provided ineffective assistance by failing to request a self-defense instruction. Assuming without deciding that Shores's contention is properly before us, the trial court did not err by failing to give a self-defense instruction because Shores failed to provide sufficient evidence to support it.[4]

To be entitled to a jury instruction on self-defense, the defendant must produce some evidence demonstrating self-defense; and, once the defendant produces some evidence, the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt. *State v. Walden*, 131 Wn.2d 469, 473-74, 932 P.2d 1237 (1997) (citing *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993); *State v. Acosta*, 101 Wn.2d 612, 619, 683 P.2d 1069 (1984)).

> counsel with copies of the proposed numbered instructions, verdict and special finding forms. The court shall afford to counsel an opportunity in the absence of the jury to object to the giving of any instructions and the refusal to give a requested instruction or submission of a verdict or special finding form. The party objecting shall state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused. The court shall provide counsel for each party with a copy of the instruction in their final form.

[4] Because we find that the trial court did not err by failing to give a self-defense instruction, we do not address Shores's ineffective assistance of counsel claim. *See State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (To prevail on an ineffective assistance of counsel claim, the defendant must show that his counsel's deficient performance prejudiced him.).

In Washington, "[e]vidence of self-defense is evaluated 'from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.'" *Walden*, 131 Wn.2d at 474 (quoting *Janes*, 121 Wn.2d at 238). This approach incorporates both subjective and objective elements to determine whether a defendant acted in self-defense. The subjective element requires the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him, whereas the objective element requires the jury to use this information to determine what a reasonably prudent person similarly situated would have done. *Walden*, 131 Wn.2d at 474 (citing *Janes*, 121 Wn.2d at 238).

RCW 9A.16.020 defines the lawful use of force:

> The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:
>
> . . . .
>
> (3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary.

RCW 9A.16.010(1) defines "necessary":

> "Necessary" means that no reasonably effective alternative to the use of force appeared to exist and that the amount of force used was reasonable to effect the lawful purpose intended.

Here, even if Shores's contradictory testimony were credible, it nonetheless does not support a self-defense instruction. First, concerning the October 4, 2008 assaults, Shores did not claim that he used, attempted, or offered to use force in self-defense. Rather, he denied that he struck Parker with the crowbar or fire poker and denied that he pushed her into the hutch. Moreover, Shores's nonspecific testimony that Parker assaulted him does not support a self-

defense instruction because it does not indicate that Shores acted in an objectively reasonable belief that he was about to be injured. *Janes*, 121 Wn.2d at 238; *see also State v. Dyson*, 90 Wn. App. 433, 438-39, 952 P.2d 1097 (1997) ("To establish self-defense, a defendant must produce evidence showing that he or she had a good faith belief in the necessity of force and that that belief was objectively reasonable."). Further, because Shores did not provide any evidence showing when Parker allegedly assaulted him in relation to his assaults on her, there is no indication as to whether Shores was the initial aggressor. And, in general, an initial aggressor cannot invoke the doctrine of self-defense. *State v. Riley*, 137 Wn.2d 904, 910, 976 P.2d 624 (1999); *State v. Currie*, 74 Wn.2d 197, 198-99, 443 P.2d 808 (1968). Accordingly, there is no evidence supporting a claim of self-defense for Shores's October 4, 2008 assaults.

Sufficient evidence also does not support a self-defense claim for Shores's October 6, 2008 assaults. Shores argues that the trial court should have instructed the jury on self-defense because his testimony revealed that Parker got on top of him and tried to beat him up while he was in the driver's seat of his car. But Shores claimed that he did not hit Parker while she was attacking him and that he was able to exit the vehicle through the passenger door. Thus, he cannot claim that slapping Shores and knocking off her glasses was in self-defense.

Shores admitted to spraying Parker with water and to using the chainsaw as a means to get her out of his car, but claimed that these actions were in defense of his personal property. Although RCW 9A.16.020 provides that a person can lawfully use, attempt, or offer to use force upon another in the defense of personal property, the force used cannot be more than what is necessary. Thus, in order to claim that his assaults on Parker were in self-defense, there could not have been another apparent reasonably effective alternative to using the chainsaw and water hose

as a means to get Parker out of his car. RCW 9A.16.010(1). And, by Shores's own testimony, he knew of a reasonably effective alternative to defend his personal property. On cross-examination, the State asked Shores if he used the chainsaw in an attempt to scare Parker out of the car and Shores responded, "[i]f I wanted her out of the car, I'd have drug her out of [the] car." 2 RP at 164. Because sufficient evidence did not support a self-defense claim, the trial court did not err by failing to instruct the jury on the law of self-defense.

Unanimity Jury Instruction

Next, Shores asserts for the first time on appeal that the trial court erred by failing to give a unanimity jury instruction. Shores did not propose a unanimity instruction as required under CrR 6.15. Again, assuming without deciding that the issue is properly before us, here the trial court was not required to give a unanimity instruction because the State elected a specific act to support each assault charge.

Criminal defendants in Washington have a right to a unanimous jury verdict. Wash. Const. art. 1, § 21; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). Where the State alleges multiple acts that could form the basis of one charged count, the State must either tell the jury which act to rely on in its deliberations or the trial court must instruct the jury to agree on a specific criminal act. *State v. Beasley*, 126 Wn. App. 670, 682, 109 P.3d 849 (citing *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984)), *review denied*, 155 Wn.2d 1020 (2005). If the State fails to follow one of the alternatives, it commits a constitutional error stemming from the possibility that some jurors may have relied on one act or incident while other jurors may have relied on another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988).

Here, the trial court was not required to give a unanimity jury instruction because the State clearly elected and proved each specific criminal act forming the basis for each charge in the information. The State's charging document clearly indicates that the State elected to prosecute Shores for seven counts of assault and alleged a different act for each count:

> **COUNT I – ASSAULT IN THE SECOND DEGREE – DOMESTIC VIOLENCE**
> [D]efendant on or about October 06, 2008, . . . assaulted another, . . . with a deadly weapon . . . to-wit: a chainsaw. . . .

> **COUNT II – ASSAULT IN THE FOURTH DEGREE – DOMESTIC VIOLENCE**
> [D]efendant on or about October 06, 2008, . . . did assault another . . . to-wit: did strike in the face with an open hand. . . .
> **COUNT III – ASSAULT IN THE FOURTH DEGREE – DOMESTIC VIOLENCE**
> [D]efendant on or about October 06, 2008, . . . did assault another . . . to-wit: did spray with water from a water hose. . . .
> **COUNT IV – ASSAULT IN THE FOURTH DEGREE – DOMESTIC VIOLENCE**
> [D]efendant on or about October 06, 2008, . . . did assault another . . . to-wit: did strike in the body with a closed fist. . . .
> . . . .
> **COUNT VIII – ASSAULT IN THE THIRD DEGREE – DOMESTIC VIOLENCE**
> [D]efendant on or about October 04, 2008, . . . with criminal negligence, caused bodily harm to another person . . . by means of a weapon or other instrument or thing likely to produce bodily harm, to-wit: a crowbar. . . .
> **COUNT IX – ASSAULT IN THE THIRD DEGREE – DOMESTIC VIOLENCE**
> [D]efendant on or about October 04, 2008, . . . with criminal negligence, caused bodily harm to another person . . . by means of a weapon or other instrument or thing likely to produce bodily harm, to-wit: a fire poker. . . .
> **COUNT X – ASSAULT IN THE FOURTH DEGREE – DOMESTIC VIOLENCE**
> [D]efendant on or about October 04, 2008, . . . did assault another . . . to-wit: pushed head into glass hutch.

CP at 25-28.

At trial, Parker testified as to each act that formed the basis for each assault charge. Shores asserts that the evidence at trial included more than seven incidents in support of the seven assault charges, but he does not specify the nature of that evidence or where specifically in the record it could be found. Our review of the record indicates that there was a brief mention of a possible assault with a flashlight. In his taped statement to Deputy Gallagher, Shores mentioned that he was holding a flashlight but he denied assaulting Parker with it. Additionally, Gallagher testified that on the morning of trial, Shores made a spontaneous statement to him admitting that

he "hit Ms. Parker with three items, it was a fire poker, a crowbar, and a flashlight with a stick on it." 2 RP at 135. But the State did not ask Gallagher any follow-up questions about the flashlight. More important, the State explained to the jury at closing the incidents it was relying on in support of each assault charge:

> First I'd like to talk a little bit about assault. You have two different types of -- well, actually three different types of assault in this case, assault in the second degree, assault in the third degree, and assault in the fourth degree.
>
> The assault in the second degree is based on the fact that he used a deadly weapon, this being the deadly weapon. With a blade that's designed to cut big chunks out of trees, in this case flesh. That's what he was threatening. That's a deadly weapon. That's capable of killing somebody.
>
> [Continues to explain how incident with chainsaw would form the basis for second degree assault conviction.]
>
> We also have assault in the third degree. Assault in the third degree alleges that somebody used an instrument or other weapon in a way that produces bodily injury. And that applies to two different charges in this case, the assault with the crowbar and the assault with the fire poker. . . .
>
> [Continues to explain how incidents with the crowbar and fire poker could form the basis for two separate third degree assault convictions.]
>
> We also have assault in the fourth degree. That's harmful or offensive touching. That's it. That's all it requires, harmful or offensive touching. In those cases he did a couple of other harmful and offensive things. As we talked about earlier, he struck her in the face with his open hand, knocking her glasses off. That's an assault. He punched her while he was trying to get her out of the car. Well, punching somebody, that is an assault. That's offensive touching.
>
> He also sprayed the hose on her. . . .
>
> Then you have the other assault where he took his hands after he hit her with the crowbar and the fire poker, he eventually get [sic] up on her, put his hands on her face, shoved her back into the glass, glass on the hutch, causing it to break.

2 RP at 198-201.

Here, the State designated in its charging document each incident to form the basis for each assault charge, presented evidence at trial of each incident, and outlined for the jury in closing which incident the jury could rely on to return a guilty verdict for each assault charge.

Because the State clearly elected which acts would form the basis for each assault charge, the trial court was not required to give a unanimity instruction. *Beasley*, 126 Wn. App. at 682.

Deadly Weapon Enhancement

Next, Shores asserts that the trial court violated his Sixth Amendment jury trial rights by failing to provide the jury with an instruction defining a "deadly weapon" for purposes of the special verdict.[5] The State concedes that the trial court failed to instruct the jury on the definition of a deadly weapon as it pertained to the sentencing enhancement, but argues that the error was harmless. Because the trial court erroneously instructed the jury on the definition of a deadly weapon for purposes of the sentencing enhancement and because the error was not harmless, we remand for resentencing without the enhancement.

Jury instructions, when taken as a whole, must properly inform the jury of the applicable law. *State v. Douglas*, 128 Wn. App. 555, 562, 116 P.3d 1012 (2005). An omission or misstatement of the law in a jury instruction that relieves the State of its burden to prove every element of the crime charged is erroneous. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). In *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the United States Supreme Court held that, under the Sixth Amendment, any fact which increases the penalty for a crime must be found by a jury by proof beyond a reasonable doubt. Thus, in order to increase a defendant's penalty under Washington's sentencing enhancement statutes, the State

[5] Although Shores did not object to the jury instructions at trial as required under CrR 6.15(c), we review his contention under RAP 2.5(a)(3) because enhancing a defendant's sentence based on facts not found by a jury beyond a reasonable doubt that the weapon was capable of inflicting death is a Sixth Amendment violation and is, thus, a manifest error of constitutional magnitude that we may address it for the first time on appeal. *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

must first prove to the jury beyond a reasonable doubt that the defendant engaged in the conduct proscribed under the applicable sentencing enhancement statute. Because the trial court here failed to instruct the jury on the definition of a deadly weapon for purposes of the special verdict, the State did not meet this burden.

Under former RCW 9.94A.602 (1983),[6] a trial court may increase a defendant's sentence where the defendant commits a crime while armed with a deadly weapon. For purposes of the sentencing enhancement,

> a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death.

Former RCW 9.94A.602.

This definition of a deadly weapon differs from the definition of a deadly weapon used to convict a defendant of second degree assault. Under RCW 9A.04.110(6), a "deadly weapon" is defined as

> any . . . weapon, device, instrument, article, or substance, . . . which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or *substantial bodily harm*.

(Emphasis added.)

Here, the jury entered a special verdict finding Shores committed second degree assault while armed with a deadly weapon but the trial court did not instruct the jury on the definition of a deadly weapon under the sentencing enhancement statute. Instead, the trial court only provided the jury with the definition of a deadly weapon under the statute defining second degree assault. Thus, under the court's instructions, the jury could have found that Shores was armed with a

[6] Recodified at RCW 9.94A.825.

deadly weapon when he assaulted Parker with the chainsaw, because the chainsaw was "readily capable of causing death or *substantial bodily harm*." RCW 9A.04.110(6) (emphasis added). But in order to enhance Shores's sentence under former RCW 9.94A.602, the jury was required to find that the manner in which Shores used the chainsaw made it "likely to produce or may easily and readily produce *death*." Former 9.94A.602 (emphasis added). Accordingly, we accept the State's concession that the trial court erred when it failed to instruct the jury on the definition of a deadly weapon for purposes of the sentencing enhancement.

Although the State concedes that the trial court erred by failing to instruct the jury on the definition of a deadly weapon for sentencing enhancement purposes, it argues that the error was harmless. Shores contends that the trial court's instructional error is not subject to harmless error analysis, citing *State v. Recuenco*, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008). In *Recuenco*, the State alleged a deadly weapon enhancement to the defendant's second degree assault charge for assaulting his wife with a handgun. 163 Wn.2d at 431-32. The jury found the defendant guilty of second degree assault and entered a special verdict finding that the defendant was armed with a deadly weapon when he committed the offense. *Recuenco*, 163 Wn.2d at 432. At sentencing, the trial court imposed a 36-month firearm enhancement rather than the 12-month deadly weapon enhancement charged in the information and found by the jury. *Recuenco*, 163 Wn.2d at 432. Our Supreme Court concluded that, under Washington law, "it can never be harmless to sentence someone for a crime not charged, not sought at trial, and not found by a jury." *Recuenco*, 163 Wn.2d at 442. Our Supreme Court held that the trial court's error in imposing a sentence that the State did not ask for and that the jury did not find was not subject to harmless error analysis. *Recuenco*, 163 Wn.2d at 442.

But the instructional error here is not that addressed in *Recuenco*. Here, the State alleged that Shores was armed with a deadly weapon, the trial court submitted to the jury a special verdict form asking if Shores was armed with a deadly weapon, and the trial court sentenced Shores based on the jury's special verdict. The trial court's error in failing to instruct the jury on the proper definition of a deadly weapon is subject to harmless error analysis. *See State v. Johnston*, 156 Wn.2d 355, 364, 127 P.3d 707 (2006) (instructional errors involving the elements of a crime may be harmless); *State v. Cook*, 69 Wn. App. 412, 418, 848 P.2d 1325 (1993) (applying harmless error analysis to erroneous deadly weapon jury instruction).

The error here is not harmless because, given Parker's testimony that Shores hit her with the gas tank of the chainsaw and that she was unsure whether he had activated the chainsaw blade while in the car or whether the engine was just idling, the jury might have concluded that he used the chainsaw in a manner making it readily capable of causing substantial bodily harm but not likely to produce death. Because the State cannot establish beyond a reasonable doubt that the trial court's instructional error was harmless, we remand for resentencing within the standard range. *State v. Stephens*, 93 Wn.2d 186, 607 P.2d 304 (1980).

Offender Score Calculation

Next, Shores asserts that the trial court erred at sentencing by miscalculating his offender score. Specifically, Shores argues that the trial court erred (1) by not finding that six of his prior class C felonies had washed out and (2) by including two out-of-state felonies without finding that they were comparable to Washington offenses. Because Shores stipulated to the comparability of his prior out-of-state convictions and stipulated to the fact that his prior convictions, including the out-of-state offenses, had not washed out of his offender score, the State was relieved of its

burden to prove those facts for sentencing purposes. Accordingly, Shores's stipulation waived his challenge to the allegedly invalid sentence.

A criminal defendant may challenge an illegal or erroneous sentence, including classification errors of out-of-state convictions, for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 485, 973 P.2d 452 (1999). We review a trial court's calculation of an offender score de novo. *State v. Ortega*, 120 Wn. App. 165, 171, 84 P.3d 935 (2004), *remanded*, 154 Wn.2d 1031 (2005).

In establishing the defendant's criminal history for sentencing purposes, the State must prove by a preponderance of the evidence that a prior conviction exists. RCW 9.94A.500; *State v. Ammons*, 105 Wn.2d 175, 186, 713 P.2d 719, 718 P.2d 796, *cert. denied*, 479 U.S. 930 (1986). But the trial court may rely on a defendant's stipulation or acknowledgment of prior convictions without further proof. *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 873-74, 123 P.3d 456 (2005) (citing RCW 9.94A.530(2)). "Waiver of a challenge to an allegedly invalid sentence 'can be found where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion.'" *In re Cadwallader*, 155 Wn.2d at 875 (quoting *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002)). However, a defendant cannot agree to a punishment that exceeds a sentencing court's statutory authority and, thus, cannot waive a challenge to such a sentence. *In re Goodwin*, 146 Wn.2d at 872.

Here, the record clearly shows that Shores stipulated to his criminal history, to the classification of his out-of-state convictions, and to the fact that his prior convictions had not washed out. Notwithstanding his stipulation, Shores argues that he could not acknowledge that

his prior convictions had not washed out because the question of whether his prior convictions had washed out concerns the legal effect of his factual stipulations. Although Shores could not agree to a sentence exceeding the sentencing court's statutory authority, given his stipulation that his prior convictions did not wash out, there is nothing in the record to indicate that the trial court's sentence exceeded its statutory authority.

A sentencing court determines whether a defendant's prior felony convictions wash out based on when the defendant was released from confinement for those prior felony convictions. RCW 9.94A.525(2)(c) states in part:

> [C]lass C prior felony convictions other than sex offenses shall not be included in the offender score if, *since the last date of release from confinement* (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

(Emphasis added.)

Shores's stipulation that none of his prior convictions had washed out operated as the functional equivalent of an express stipulation that he did not spend five crime-free years in the community between release from his prior convictions and his current felony conviction. *State v. Huff*, 119 Wn. App. 367, 371, 80 P.3d 633 (2003). Accordingly, Shores's stipulation supplied the necessary "facts in the record" to support the trial court's offender score calculation and sentencing. *Huff*, 119 Wn. App. at 371-72 (quoting *Ford*, 137 Wn.2d at 482); *see also State v. Foster*, 140 Wn. App. 266, 276, 166 P.3d 726 ("Foster's stipulation to the comparability of [his out-of-state] conviction to a Washington class B felony and to the fact that it had not washed out is an admission of its existence . . ., its comparability, and its continuing viability for inclusion in his offender score."), *review denied*, 162 Wn.2d 1007 (2007). Because Shores stipulated to the

facts the trial court used to calculate his offender score and there is no indication that the trial court acted outside its statutory authority in imposing Shores's sentence, Shores has waived any challenge to his offender score calculation.

Effective Assistance of Counsel

Last, Shores claims that the trial court denied his right to effective assistance of counsel by failing to inquire into Shores's requests for appointment of new counsel. Shores also claims that his defense counsel did not provide effective assistance because a conflict of interest affected his attorney's performance. We disagree.

The Sixth Amendment ensures a defendant's right to knowingly and voluntarily decline the assistance of counsel. *Faretta v. California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). "When the 'relationship between lawyer and client completely collapses, the refusal to substitute new counsel violates the defendant's Sixth Amendment right to effective assistance of counsel,' even if no actual prejudice is shown." *State v. Cross*, 156 Wn.2d 580, 606, 132 P.3d 80 (quoting *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 722, 16 P.3d 1 (2001)), *cert. denied*, 549 U.S. 1022 (2006). But there is a difference between a complete collapse and a mere lack of accord and the constitutional right to effective assistance of counsel does not require a meaningful relationship between attorney and client. *In re Stenson*, 142 Wn.2d at 725 (citing *Morris v. Slappy*, 461 U.S. 1, 3-4, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983)).

When reviewing a trial court's refusal to appoint new counsel, we consider "'(1) the extent of the conflict, (2) the adequacy of the [trial court's] inquiry, and (3) the timeliness of the motion.'" *Cross*, 156 Wn.2d at 607 (alteration in original) (quoting *In re Stenson*, 142 Wn.2d at 724). As in a request to proceed pro se, a defendant's request for new counsel must be timely and stated unequivocally. *See Cross*, 156 Wn.2d at 607 (assuming without deciding that the same test for requests to proceed pro se should be applied in the context of requests for new counsel or for conflicts of interest with counsel). We generally review trial court decisions relating to

attorney/client differences for abuse of discretion. *Cross*, 156 Wn.2d at 607.

The trial court did not abuse its discretion here because Shores did not timely and unequivocally request the trial court to substitute his defense counsel. Shores asserts that the trial court failed to inquire into his request for new counsel on three different occasions.

First, he asserts that the trial court should have inquired into his request for new counsel at the October 23, 2008 pretrial hearing. But the record shows that Shores and his defense counsel had resolved their differences and that Shores had agreed to keep his defense counsel at that time.

Next, Shores asserts that the trial court should have inquired into his request for new counsel when, on the second day of trial, he discussed his frustrations with the trial court. This claim lacks merit because, although Shores expressed to the trial court his frustrations with his defense counsel, he never requested that the court appoint him new counsel.

Last, Shores asserts that he unequivocally requested new counsel when, at a hearing to set his sentencing hearing date, he stated to the trial court, "I'd like to fire this attorney, sir." RP (Dec. 11, 2008) at 2. The trial court responded that it was not "dealing with that at the moment," but told Shores that he could request new counsel at his sentencing hearing. RP (Dec. 11, 2008) at 2. When Shores asked about the procedure for requesting new counsel, the trial court explained:

> When you're in court, [the sentencing judge will] ask you if you're ready to proceed. You tell him, I'd like to address the issue of counsel before we proceed because I'd like to have new counsel, and you go on and explain why. That's how you do it.

RP (Dec. 11, 2008) at 3.

But Shores did not raise the issue at sentencing and when asked by the sentencing court if

he had anything he wanted to say, Shores responded, "Well, there's a lot I'd like to say, but it ain't going to do no good." RP (Dec. 15, 2008) at 5. Because Shores did not make a timely and unequivocal request for appointment of new counsel, the trial court did not err by failing to inquire into his request. Shores also contends that an actual conflict of interest between him and his attorney violated his right to effective assistance of counsel. But Shores does not present any evidence of such conflict nor did he establish that the relationship between him and his attorney had completely collapsed. *In re Stenson*, 142 Wn.2d at 725.

Because the trial court failed to properly instruct the jury on the definition of a deadly weapon for purposes of the deadly weapon sentencing enhancement, we vacate Shores's sentence and remand for resentencing within the standard range. But because Shores's remaining contentions lack merit, we affirm his convictions.

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 pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

HOUGHTON, J.

VAN DEREN, C.J.