NO. 73945-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KEVIN HUTTON,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Kevin Eugene Hutton was convicted of multiple counts in violation of double jeopardy, without his jury being instructed on self-defense, and after prejudicial and propensity evidence was admitted.

B. ASSIGNMENTS OF ERROR

1. The convictions for second-degree assault and felony violation of a no-contact order violate double jeopardy because they are based on the same single act of assault.

2. The trial court erred in failing to provide requested instructions on self-defense as to counts one and two.

3. The trial court abused its discretion by overruling Mr. Hutton's objections to the repeated admission of irrelevant and highly prejudicial evidence regarding the presence of Shamicia Jones's children.

4. The trial court abused its discretion by overruling Mr. Hutton's objections and repeatedly admitting evidence of uncharged prior conduct that was highly prejudicial to the charged counts.

5. To the extent defense counsel failed to object to subsequent admissions of the ER 403 and ER 404(b) evidence, Mr. Hutton was denied the effective assistance of counsel.

6. Cumulative error denied Mr. Hutton his due process right to a fair trial.

7. Counts one and two should count as a single offense in Mr. Hutton's offender score under the same criminal conduct analysis.

8. The trial court acted improperly when it imposed $600 in legal financial obligations and entered a boilerplate finding on Mr. Hutton's ability to pay but received no evidence related to Mr. Hutton's ability to pay.

9. The judgment and sentence improperly includes an aggravator that was withdrawn based on intervening case law.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The constitutional prohibition of double jeopardy requires that if a jury finds a defendant guilty of multiple counts for the same conduct, the trial court must only enter a judgment on the greater offense. Do the second-degree assault and felony violation of a no-contact order convictions for the single act of punching Shamicia Jones violate double jeopardy?

2. If requested, the trial court should instruct the jury on self-defense as long as there is some evidence that, viewed from the defendant's perspective, the jury could find he was acting in self-

defense. Where evidence showed Shamicia Jones was acting aggressively toward Mr. Hutton before he hit her, did the trial court err in failing to provide the requested self-defense instruction to counts one and two?

3. Did the trial court abuse its discretion by admitting evidence that was irrelevant, more prejudicial than probative, and involved prior uncharged acts, without the State providing any proper purpose for the evidence?

4. Did Mr. Hutton receive ineffective assistance of counsel where trial counsel objected to most, but not all, of the evidence admitted in violation of ER 403 and ER 404(b)?

5. Multiple errors may combine to deprive an accused person of a fundamentally fair trial, in violation of the due process clauses of the Washington and federal constitutions. In light of the cumulative effect of the errors assigned above, was Mr. Hutton denied a fundamentally fair trial?

6. Offenses that occur at the same time and place, against the same victim, and with the same objective intent count as a single offense in the offender score calculation. Should the second-degree assault and felony violation of a no-contact order convictions count as a

single offense where they are based on Mr. Hutton's single punch to Shamicia Jones at her house on September 14, 2014?

7. RCW 10.01.160 mandates the waiver of costs and fees for indigent defendants. "[A] trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015). While the trial court recognized Mr. Hutton is indigent, the court imposed legal financial obligations (LFOs) without mention of his inability to pay. Should this Court remand with instructions to strike LFOs?

8. If the State is the substantially prevailing party on review, should the Court decline to award appellate costs in favor of the State?

9. Should this Court remand to the trial court to correct the improper inclusion of a withdrawn aggravator in the judgment and sentence?

D. STATEMENT OF THE CASE

Kevin Hutton and Shamicia Jones have known each other for many years. RP 347-49, 418-19. On September 14, 2014, Mr. Hutton was at Ms. Jones's home in Seattle, where she lived with her mother, Patricia King, and her three young children. RP 344-46, 352-54, 415-

19. Mr. Hutton was drinking alcohol and showing its effects. RP 237-38, 242-43, 355-57, 402-03, 423. Ms. King called 911 around 4:45 p.m., reporting Mr. Hutton had punched her daughter and then punched Ms. King, before walking away. RP 188-95, 368-75; Exhibit 1; *see* RP 285-89, 349-51, 362.

The police located Mr. Hutton a couple blocks away, sitting in the passenger seat of a parked vehicle, about 45 minutes later. RP 210-15, 262-63. Mr. Hutton kicked at the doors and windows of Officer Mazziotti's patrol car during the ride to the police station. RP 216-18. When Officer Mazziotti pulled over and opened the door, Mr. Hutton reportedly kicked Officer Mazziotti. RP 218-35, 238-39, 250-51; Exhibit 14.[1]

On the date of these incidents, there were no-contact orders in effect between Mr. Hutton and Ms. Jones and between Mr. Hutton and Ms. King. Exhibit 15.

The State charged Mr. Hutton with felony violation of a no-contact order (domestic violence) as to Shamicia Jones based on assault

[1] The State introduced in-car video from a police vehicle as Exhibit 5; however, the Exhibit 5 on record with the trial court contains four files, none of which show the purported kick or conduct. Trial counsel is working on settling the record with a copy of the video shown to the jury. Mr. Hutton will supplement this brief if any additional error arises once the record is settled.

or reckless conduct that created a substantial risk of death or serious injury (count one), assault in the second-degree (domestic violence) as to Shamicia Jones (count two), felony violation of a no-contact order (domestic violence) as to Patricia King based on assault (count three), and assault in the third-degree for kicking Officer Mazziotti. CP 1-10. After Mr. Hutton called Shamicia Jones from jail, the State charged three additional counts of misdemeanor violation of a no-contact order. CP __ (Sub # 115 (amended information)); Exhibits 16 & 23.[2]

The trial court denied Mr. Hutton's request for a self-defense instruction on counts one, two and three, but granted the request as to count four, assault three against Officer Mazziotti. CP __ (Sub # 113 (defense proposed instructions)); CP 72-112; RP 436-45, 487-88, 494-99, 505-06.

A jury acquitted Mr. Hutton of count three, the felony violation of a no-contact order protecting Patricia King. CP 55. Mr. Hutton was convicted of the remaining counts. CP 51, 53, 56-59. Although the State initially charged an aggravator, it withdrew it at sentencing due to intervening case law. CP 1-10; RP 671-77, 681. Mr. Hutton was

[2] A supplemental designation of clerk's papers has been filed for documents cited by subfolder number and for exhibits.

sentenced to serve all counts concurrently for a total of 84 months. CP 127-38.

Additional facts are set forth in the relevant argument sections below.

E. ARGUMENT

1. The convictions for second-degree assault and felony violation of a no-contact order, counts one and two, violate double jeopardy.

The double jeopardy clauses of the federal and state constitutions prohibit the imposition of multiple punishments for the same criminal conduct. *State v. Turner*, 169 Wn.2d 448, 454, 238 P.3d 461 (2010).[3] Whether punishment of a single act as two crimes violates double jeopardy is a question of law reviewed de novo. *State v. Womac*, 160 Wn.2d 643, 649, 160 P.3d 40 (2007). If a jury finds a defendant guilty of multiple counts for the same conduct, the trial court "'should enter a judgment on the greater offense only and sentence the defendant on that charge without reference to the verdict on the lesser

[3] The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." Article I, Section 9 of the Washington State Constitution provides that "[n]o person shall . . . be twice put in jeopardy for the same offense." The two clauses provide the same protection. *In re Personal Restraint of Borrero*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007); *State v. Weber*, 159 Wn.2d 252, 265, 149 P.3d 646 (2006).

offense.'" *Turner*, 169 Wn.2d at 463 (quoting *State v. Trujillo*, 112 Wn. App. 390, 411, 49 P.3d 935 (2002)).

It is constitutional to convict an individual of both felony violation of a no-contact order and assault, only if the felony violation of a no-contact order is predicated on an act other than that forming the basis of the assault conviction. *State v. Leming*, 133 Wn. App. 875, 891, 138 P.3d 1095 (2006). Under RCW 26.50.110(4), the penalty for an assault violation of a no-contact order increases from a misdemeanor to a felony when the assault does not amount to first or second degree assault or when the conduct is reckless and creates a substantial risk of death or physical injury to another person. RCW 26.50.110(4). If a defendant is convicted of second-degree assault, that conviction cannot serve as the basis to elevate a violation of a no-contact order to a felony. *State v. Olsen*, 187 Wn. App. 149, 156, 348 P.3d 816 (2015) (citing *State v. Ward*, 148 Wn.2d 803, 812, 64 P.3d 640 (2003); *State v. Azpitarte*, 140 Wn.2d 138, 141, 995 P.2d 31 (2000)).

Here, only a single act underlies the assault and the felony violation of a no-contact order convictions, counts one and two. Although the State encouraged the jury to convict Mr. Hutton under the reckless conduct alternative after convicting him of assault in the

second degree, the jury had but one act to consider for both charges. RP 565. The evidence showed Mr. Hutton punched Shamicia Jones once. RP 349-51, 360, 401 (testimony of Patricia King); RP 420-21 (testimony of Shamicia Jones). This punch formed both the basis of the assault conviction and the felony violation of a no-contact order conviction under the reckless conduct alternative. Thus, punishing Mr. Hutton for the two convictions violates double jeopardy.

Our courts have upheld separate punishments for felony violation of a no-contact order and assault in the first or second-degree only where separate conduct underlies each conviction. For example, in *Olsen*, the State presented evidence of assault with a large hunting knife and subsequently by beating with a bat. 187 Wn. App. at 150-51. On appeal, this Court upheld the separate convictions because the felony violation of a no-contact order was predicated on the reckless conduct alternative, conduct different from the assault conviction. *Id*. at 157-58. In *Leming*, the second-degree assault charge was based on the defendant's intent to commit felony harassment. 133 Wn. App. at 882. The conviction for assault was thus based on a verbal threat the defendant uttered, whereas the violation of a no-contact order was elevated to a felony based on the defendant's physical conduct. *Id*. at

885; *see id.* at 891 (discussing separate conduct). Due to this distinct evidence, the dual convictions did not constitute double jeopardy. *Id.* at 887.

Azpitarte presents another salient example of the rule that a single assault cannot form the basis for second-degree assault and felony violation of a no-contact order convictions. 140 Wn.2d 138. The State charged Mr. Azpitarte with both crimes, and evidence of two distinct assaults was presented at trial—a second-degree assault and an (uncharged) fourth-degree assault. *Id*. at 139-40. The State explained it would rely on the fourth-degree assault to elevate the violation of a no-contact order to a felony. *Id*. at 140. However, in closing, the State encouraged the jury to rely on either assault for the felony violation of a no-contact order count, and the jury convicted of both counts. *Id*. Our Supreme Court reversed because the jury may have relied on the same assault conduct to find Mr. Azpitarte guilty of second-degree assault and felony violation of a no-contact order. *Id*. at 141-42.

Unlike *Leming* and *Olsen*, Mr. Hutton's two convictions are predicated on a single punch. Like *Azpitarte*, the felony violation of a no-contact order conviction must be reversed. Because a single act of assault, the same conduct, underlies the second-degree assault and

felony violation of a no-contact order convictions here, the felony violation of a no-contact order conviction (count one) must be vacated. *See State v. League*, 167 Wn.2d 671, 672, 223 P.3d 493 (2009) ("When two convictions violate double jeopardy principles, the proper remedy is to vacate the lesser conviction and remand for resentencing on the remaining conviction.").

2. The trial court erred and denied Mr. Hutton his constitutional right to present a defense by refusing to instruct the jury on self-defense for counts one and two.

Mr. Hutton requested accurate self-defense instructions for counts one and two.[4] The trial court erroneously denied the requested instructions because a "trial court is justified in denying a request for a self-defense instruction only where no credible evidence appears in the record to support a defendant's claim of self-defense." *State v. McCullum*, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983).

[4] Mr. Hutton also requested a self-defense instruction for count three (assault of Ms. King). Because he was acquitted of that count, the error is not raised here. However, the court's ruling that no evidence supported the instruction for count threeis belied by the record. RP 351 ("I came in the house over her, and this is my exact words to Kevin [before he hit me] is, I ain't paying you shit I owe you. I'm not paying you shit."); RP 400-02, 404-05 (King was mad and wanted to fight Hutton).

The right to self-defense is broadly-recognized, basic, deeply rooted, and fundamental to our concept of liberty. *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 130 S. Ct. 3020, 3036, 177 L. Ed. 2d 894 (2010); *State v. Sieyes*, 168 Wn.2d 276, 292, 225 P.3d 99 (2010); U.S. Const. amends. II, XIV; Const. art. I, § 24.

A person does not have to be in actual danger to act in lawful self-defense. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). The long-recognized "right of the defendant" to act in defense of himself or others exists when a person has a good faith belief there is apparent danger to himself or another person. *State v. Carter*, 15 Wash. 121, 123, 45 P. 745 (1896). It is viewed from the perspective of the defendant, based on the situation as it appeared to him. *Id*. A person is entitled to defend himself if he reasonably believes he is in danger of imminent harm, and uses an appropriate degree of force in response to that threat. *Riley*, 137 Wn.2d at 909.

Mr. Hutton not only had the right to act in self-defense, but he also had the due process right to have the jury instructed on self-defense. The constitutional due process right to fully defend against the charges entitles an accused person to a jury instruction on self-defense if there is <u>some</u> evidence of self-defense. *State v. Werner*, 170

Wn.2d 333, 336-37, 241 P.3d 410 (2010). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); U.S. Const. amend. XIV; Const. art. I, § 3. The right to due process entitles the accused to have the jury fully instructed on the defense theory of the case. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). When requested, the trial court must provide an instruction that supports the defense theory, as long as the instruction is an accurate statement of the law and is supported by the evidence. *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977).

There was at least some evidence that Mr. Hutton acted in self-defense, particularly when viewed from his perspective. *Wanrow*, 88 Wn.2d at 234-26; *McCullum*, 98 Wn.2d at 488; *State v. Ellis*, 30 Wash. 369, 373, 70 P. 963 (1902) ("The jury are [sic] entitled to stand as nearly as practicable in the shoes of defendant, and from this point of view determine the character of the act."). As to the counts regarding Shamicia Jones, she testified that she got angry immediately before Mr. Hutton hit her. She said, "I got angry and I said something about it." RP 424. "I said something that pissed him off even more." RP 425.

Because this evidence is to be viewed from Mr. Hutton's perspective, it is important to note the evidence showed he was intoxicated to an extent likely to have affected his perception. RP 237-38, 242-43, 354-57. Before being hit, Ms. Jones aggressively approached a visibly intoxicated Mr. Hutton. There was enough evidence to put the self-defense issue before the jury.

Because there was at least some evidence upon which to base a claim of self-defense, the court erred in denying Mr. Hutton's requested instructions. *See State v. Adams*, 31 Wn. App. 393, 395-96, 641 P.2d 1207 (1982).

3. The trial court abused its discretion by admitting multiple instances of prejudicial evidence, which was either irrelevant and should have been excluded under ER 403, or involved uncharged conduct that should have been excluded under ER 404(b).

The trial court abused its discretion when it allowed, over several objections, highly prejudicial and irrelevant evidence about Shamicia Jones's young children being present for and highly upset by the fight. The trial court likewise abused its discretion in admitting repeated testimony during the guilt phase indicating that there was a history of abuse between Mr. Hutton and Ms. Jones where the aggravator portion of the trial was bifurcated. *See State v. Atsbeha*, 142

Wn.2d 904, 913-14, 16 P.3d 626 (2001) (evidentiary errors reviewed for abuse of trial court's discretion).

a. Evidence that the young children witnessed the fight was highly prejudicial and irrelevant.

The State did not charge the presence of minors as an aggravator to the instant charges. CP __ (Sub # 115 (amended information)); *see* RCW 9.94A.535(2)(h)(ii). The presence of Shamicia Jones's children during the fight was not relevant to any element the State had to prove. Nonetheless, over objection and without an on-the-record analysis, the court allowed evidence that Ms. Jones's three children under the age of eight were present for the fight, reacted negatively to it, and were psychologically affected by what they witnessed. RP 365-67, 415-16, 512-13.

Patricia King testified that her grandchildren were running around and playing while their mother was fighting with Mr. Hutton and that at least the two youngest witnessed Ms. Jones being hit. RP 365-66. Ms. King told the jury the kids then probably went and hid "Because when they fight. They hide. They like get out the way." RP 366. The trial court overruled defense counsel's ER 403 objection without elaboration. RP 366.

When the objection was overruled, the prosecutor repeated "that the children were present" and asked Ms. King to tell the jury "what was their reaction?" RP 366-67. She testified the young children were "Scared, crying. Crying." RP 367. Defense counsel renewed his objection, which was again overruled without explanation. RP 367.

The jury also heard Shamicia Jones tell Mr. Hutton, on a recorded call from jail, that the children are "having nightmares and shit . . . you fucked them up." RP 512-13; Exhibit 17 (track 1 at 1:57 to 2:02). Defense counsel again objected, but the court admitted this portion of the recording. RP 470; *see* RP 461-73 (redactions to recording discussed).

At the conclusion of the prosecutor's opening statement, he argued to the jury that Mr. Hutton's conduct harmed "three generations of this family. Ms. King, the grandma; Ms. Jones, the daughter; and then there's three boys. All of them are affected by his actions." RP 580. If the trial court had properly excluded the evidence regarding Ms. Jones's children, the prosecutor could not have made this argument in closing.

Only relevant evidence is admissible at trial. ER 402. Evidence is relevant if it has the "tendency to make the existence of any fact that

is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. The presence of children does not bear on whether an event occurred or not or even how it proceeded. However, even if minimally relevant, the evidence was inadmissible because it is substantially more prejudicial than probative. ER 403. The evidence tends to garner sympathy for the young children and their mother and grandmother, while heightening negative sentiments toward Mr. Hutton. By describing the children and their purported reactions, the jury likely felt sympathy for these vulnerable minors. The jury was likely to convict based on the emotional injury to the children, rather than any physical injury to the named victim. The evidence runs the high risk that the jurors were swayed by emotion rather than the State's proof of the elements of each crime.

b. <u>The repeated testimony indicating a history of abuse should have been excluded under ER 404(b).</u>

In response to Mr. Hutton's pretrial motion in limine, the State indicated it would not offer ER 404(b) evidence of uncharged crimes, wrongs or acts, unless Mr. Hutton testified and opened the door. RP 48-50. However, the State was ultimately allowed to present

cumulative evidence of a history of violence between Mr. Hutton and Ms. Jones.

Patricia King testified, "I'm just . . . fed up with the fighting and stuff. I'm just tired of it." RP 376. The trial court did not rule on defense counsel's ER 404(b) objection, but simply told the prosecutor, "Let's ask another question." *Id*.

The court also allowed the State to present Mr. Hutton's recorded apology for the past, "I'm sorry babe of all the things I've done to you." Exhibit 17 (track 1 at 3:52 to 3:57). Because this evidence strongly suggests a history of domestic violence, defense counsel objected under ER 404(b) outside the presence of the jury while redactions to the jail calls were before the court. RP 472-73. The trial court overruled the objection without explanation. *Id*.

The jury also heard Patricia King's testimony that the children had witnessed the couple's behavior before the day of the charged incidents: "Because when they fight. They hide. They like get out the way." RP 366. Although defense counsel did not raise an ER 404(b) objection, it is clear the trial court's ruling would have been the same quick overruling as on defense counsel's other objections. The trial

court also overruled counsel's ER 403 objection to this testimony, as discussed above.

In addition, Ms. King testified, without objection, "I'm just fed up with him getting away with doing what he's doing. I'm just tired of it. I'm just tired of it." RP 368.

The admission of this evidence was an abuse of discretion because the court failed to adhere to the settled requirements of ER 404(b). *State v. Thang*, 145 Wn.2d 630, 642, 41 P3.d 1159 (2002); *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). Propensity evidence has no place in a criminal trial. "ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). This rule has no exceptions. *Id.* at 421; *State v. Gunderson*, 181 Wn.2d 916, 922-23, 337 P.3d 1090 (2014). Therefore, the trial court should have put the State to its "substantial burden" to show admission of prior conduct is appropriate for a purpose other than propensity. *State v. DeVincentis*, 150 Wn.2d 11, 18-19, 74 P.3d 119 (2003). Before a trial court admits evidence of prior misconduct under ER 404(b), it must (1) find by a preponderance of the evidence that the

prior misconduct occurred, (2) identify the purpose for admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value of the evidence against its prejudicial effect. *E.g.*, *Gunderson*, 181 Wn.2d at 923. Moreover, close cases must be resolved in favor of exclusion. *Thang*, 145 Wn.2d at 642. The court did not undergo any of these analyses on any of the above evidence.

c. Trial counsel objected to, and was overruled on, almost every instance of inadmissible testimony, but was ineffective to the extent he failed to renew the objection on a few occasions.

The federal and state constitutions guarantee a criminal defendant the right to counsel. U.S. Const. amends. VI, XIV; Const. art. I, § 22; *Faretta v. California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *State v Heddrick*, 166 Wn.2d 898, 909-10, 215 P.3d 201 (2009). The right to counsel necessarily includes the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

When reviewing a claim that trial counsel was not effective, appellate courts utilize the two-part test announced in *Strickland*. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). The appellate court must determine (1) was the attorney's performance

below objective standards of reasonable representation, and, if so, (2) was the defendant prejudiced by counsel's errors. *Strickland*, 466 U.S. at 688, 694; *Thomas*, 109 Wn.2d at 226.

Ineffective assistance of counsel is a mixed question of law and fact reviewed de novo. *Strickland*, 466 U.S. at 698; *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

Counsel's performance is deficient where he or she fails to lodge an evidentiary objection. *State v. Hendrickson*, 138 Wn. App. 827, 831-33, 158 P.2d 1257 (2007) (failing to object to hearsay admitted in violation of defendant's confrontation clause rights constituted deficient performance), *aff'd on other grounds*, 165 Wn.2d 474 (2009). As discussed above, the trial court should have sustained an objection to the ER 403 and ER 404(b) evidence elicited at trial. Counsel's failure to object, on occasion, was therefore deficient. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998); RP 368, 580. Further, because defense counsel objected on all the occasions enumerated above, counsel's failure to object on a few subsequent occasions cannot be considered strategic.

As set forth above, the deficient conduct was prejudicial because the trial court should have sustained the objections and

excluded the ER 403 and ER 404(b) evidence. As discussed below, the admission of this evidence on multiple occasions prejudiced the result.

d. Reversal is required because there is a reasonable probability this evidence affected the jury's verdicts.

These errors can only be found harmless if there is no reasonable possibility that the inadmissible evidence was used to reach the guilty verdict. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). The State's evidence was far from airtight. Patricia King presented conflicting testimony on the details of the alleged assaults. RP 394-99; Exhibit 22; *see* RP 554 (prosecutor acknowledges discrepancies in closing). The jury acquitted Mr. Hutton of the count against Ms. King. CP 155. Demonstrating the jury felt the need to carefully examine the evidence, it asked four questions during the course of its deliberations. CP 113-21.

Moreover, the inadmissible evidence was quite prejudicial. In error, the court allowed in testimony that Mr. Hutton and Ms. Jones have a history of domestic violence. This evidence allowed the jury to be swayed to convict based on the impermissible basis of propensity. The court also allowed the jury to hear that, beyond any harm allegedly caused to Ms. King or Ms. Jones, three young children were emotionally scarred by the State's witnesses' allegations. Moreover,

both types of inadmissible evidence were admitted on multiple occasions. There is at least a reasonable probability that this evidence affected the verdicts.

4. Cumulative trial errors denied Mr. Hutton his constitutional right to a fair trial.

Each of the above trial errors independently requires reversal. In the alternative, however, the aggregate effect of these trial court errors denied Mr. Hutton a fundamentally fair trial.

Under the cumulative error doctrine, even where no single trial error standing alone merits reversal, an appellate court may nonetheless find that together, the combined errors denied the defendant a constitutionally fair trial. U.S. Const. amend. XIV; Const. art. I, § 3; *e.g.*, *Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) (considering the accumulation of trial counsel's errors in determining that defendant was denied a fundamentally fair proceeding); *Taylor v. Kentucky*, 436 U.S. 478, 488, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (holding that "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Venegas*, 153 Wn. App. 507, 530, 228 P.3d 813 (2010). The cumulative error doctrine mandates

reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

Viewed together, the errors addressed above created a cumulative and enduring prejudice that likely materially affected the jury's verdict.

5. Mr. Hutton's offender score is miscalculated because the assault and felony violation of a no-contact order convictions are the same criminal conduct.

To the extent the Court does not find a double jeopardy violation for the second-degree assault and felony violation of a no-contact order convictions, the offender score should be recalculated based on same criminal conduct.

A person's offender score may be reduced if the court finds two or more of the current offenses constitute the same criminal conduct. RCW 9.94A.589(1)(a). Same criminal conduct "means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." *Id*. Thus, when determining same criminal conduct for purposes of calculating an offender score, courts look for the concurrence of intent, time and place, and victim. *E.g.*, *State v. Chenoweth*, __ Wn.2d __, 2016 WL

1063228, *1 (Mar. 17, 2016); *State v. Bickle*, 153 Wn. App. 222, 229-30, 234, 222 P.3d 113 (2009). As part of this inquiry, courts examine whether the defendant substantially changed the nature of his criminal objective from one offense to another and whether one crime furthered the other. *Bickle*, 153 Wn. App. at 229-30.

Shamicia Jones was the victim of both the second-degree assault and the violation of a no-contact order convictions in counts one and two. Both crimes occurred at Ms. Jones's house at the same time. In fact, as discussed in Section 1, *supra*, the same single act underlies each count.

Mr. Hutton's intent was also necessarily the same for both counts: he intended to punch Ms. Jones. In intending to punch Ms. Jones, he committed an assault and he elevated the violation of a no-contact order to a felony through reckless conduct. In determining whether the criminal intent prong of the same criminal conduct analysis is satisfied, the question is whether the defendant's criminal intent, objectively viewed, changed from one crime to the next. *State v. Tili*, 139 Wn.2d 107, 123, 985 P.2d 365 (1999); *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987), *amended by* 749 P.2d 160 (1988). Here, a single act underlies both counts. There was no

opportunity for Mr. Hutton to change intent. His singular intent forms the basis of each count.

Because counts one and two encompass the same victim, occurred at the same time, occurred at the same place, and were based on the same objective criminal intent (to hit another person), the two convictions constitute the same criminal conduct and should count as a single crime for purposes of Mr. Hutton's offender score.[5]

6. The Court should strike the legal financial obligations because Mr. Hutton lacks the ability to pay.

a. <u>The trial court found Mr. Hutton unable to pay legal costs, yet imposed legal financial obligations without analyzing his ability to pay those obligations.</u>

At sentencing, the court imposed a $500 victim penalty assessment and a $100 DNA fee. CP 129. Although no evidence was presented at sentencing, the findings reflect a boilerplate statement that "Having considered the defendant's present and likely future financial

[5] The State may argue Mr. Hutton waived this argument by not presenting it below. However, a same criminal conduct argument may be made for the first time on appeal unless the defendant affirmatively agreed to the offender score calculation below. *In re Pers. Restraint of Shale*, 160 Wn.2d 489, 494-95, 158 P.3d 588 (2007). Defense counsel did not affirmatively agree to the offender score below. Defense counsel's acknowledgement that Mr. Hutton's standard range was 63-84 months does not waive the same criminal conduct analysis, because Mr. Hutton's offender score exceeds a nine, and thus his range remains the same, even if counts one and two are considered the same criminal conduct. *See* RP 686.

resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed." CP 129.

Within days, the court signed an order of indigency for appeal, based on Mr. Hutton's declaration that he was unemployed and entirely lacking in assets. CP ___ (Sub. # 104-05).

b. The relevant statutes and rules prohibit imposing LFOs on impoverished defendants, reading these provisions otherwise violates due process and the right to equal protection.

Our Legislature mandates that a sentencing court "shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). The Supreme Court recently emphasized this means "a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015); *accord State v. Marks*, __ Wn.2d __, 2016 WL 743944, *1 (Feb. 25, 2016).

Imposing LFOs on indigent defendants causes significant problems, including "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." *Blazina*, 182 Wn.2d at 835. When a defendant owes the State money, it causes background checks to reveal an "active

record," producing "serious negative consequences on employment, on housing, and on finances." *Id.* at 837. All of these problems lead to increased recidivism. *Id*. at 837. Thus, a failure to consider a defendant's ability to pay not only violates the plain language of RCW 10.01.160(3), but also contravenes the purposes of the Sentencing Reform Act, which include facilitating rehabilitation and preventing reoffending. *See* RCW 9.94A.010. Further, it proves a detriment to society by increasing hardship and recidivism. *Blazina*, 182 Wn.2d at 837.

The appearance of mandatory language in the statutes authorizing the costs imposed here does not override the requirement that the costs be imposed only if the defendant has the ability to pay. *See* RCW 7.68.035 (penalty assessment "shall be imposed"); RCW 36.18.020(2)(h) (convicted criminal defendants "shall be liable" for a $200 fee); *State v. Lundy,* 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013). These statutes must be read in tandem with RCW 10.01.160, which requires courts to inquire about a defendant's financial status and refrain from imposing costs on those who cannot pay. RCW 10.01.160(3); *Blazina*, 182 Wn.2d at 830, 838. Read together, these

statutes mandate imposition of the above fees upon those who can pay, and require that they not be ordered for indigent defendants.

When the Legislature means to depart from this presumptive process, it makes the departure clear. The restitution statute, for example, not only states that restitution "shall be ordered" for injury or damage absent extraordinary circumstances, but also states that "the court *may not* reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount." RCW 9.94A.753 (emphasis added). This clause is absent from other LFO statutes, indicating that sentencing courts are to consider ability to pay in those contexts. *See State v. Conover*, 183 Wn.2d 706, 355 P.3d 1093, 1097 (2015) (the Legislature's choice of different language in different provisions indicates a different legislative intent).[6]

More than 20 years ago, the Supreme Court stated that the Victim Penalty Assessment was mandatory notwithstanding a defendant's inability to pay. *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992). *Curry*, however, addressed a defense argument that the

[6] The Legislature did amend the DNA statute to remove consideration of "hardship" at the time the fee is imposed. *Compare* RCW 43.43.7541 (2002) *with* RCW 43.43.7541 (2008). But it did not add a clause precluding waiver of the fee for those who cannot pay it at all. In other words, the Legislature did not explicitly exempt this statute from the requirements of RCW 10.01.160(3).

VPA was *unconstitutional*. *Id.* at 917-18. The Court simply assumed that the statute mandated imposition of the penalty on indigent and non-indigent defendants alike: "The penalty is mandatory. In contrast to RCW 10.01.160, no provision is made in the statute to waive the penalty for indigent defendants." *Id.* at 917 (citation omitted). That portion of the opinion is arguable dictum because it does not appear petitioners argued that RCW 10.01.160(3) applies to the VPA, but simply assumed it did not.

To the extent they are inconsistent *Blazina* supersedes *Curry*. The Court in *Blazina* repeatedly described its holding as applying to "LFOs," not just to a particular cost. *See Blazina*, 182 Wn.2d at 830 ("we reach the merits and hold that a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs."); *id.* at 839 ("We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs."). If the Court were limiting its holding to only certain of the LFOs imposed, it presumably would have made such limitation clear.

Indeed, it does not appear that the Supreme Court has ever held that the DNA fee and "criminal filing fee" are exempt from the ability-to-pay inquiry. Although this Court so held in *Lundy*, it did not have the benefit of *Blazina*, which now controls. *Compare Lundy*, 176 Wn. App. at 102-03 *with Blazina*, 182 Wn.2d at 830-39.

It is also problematic to impose costs on Mr. Hutton, due to the disparities in imposition and administration of LFOs across this State. *Cf. Blazina*, 182 Wn.2d at 857 (noting significant disparities in administration of LFOs across counties). This means the relevant statutes are ambiguous regarding whether courts must consider ability to pay before imposing the cost. Accordingly, the rule of lenity applies, and the statutes must be construed in favor of waiving the fees for indigent defendants. *See Conover*, 183 Wn.2d at 712 ("we apply the rule of lenity to ambiguous statutes and interpret the statute in the defendant's favor"). To do otherwise would not only violate canons of statutory construction, but would be fundamentally unfair. *See Blazina*, 182 Wn.2d at 834 (reaching LFO issue not raised below in part because "the error, if permitted to stand, would create inconsistent sentences for the same crime"); *see also id.* at 837 (discussing the "[s]ignificant disparities" in the administration of LFOs among different counties);

and see RCW 9.94A.010(3) (stating that a sentence should "[b]e commensurate with the punishment imposed on others committing similar offenses").

General Rule 34, which was adopted at the end of 2010, also supports Mr. Hutton's position. That rule provides in part, "Any individual, on the basis of indigent status as defined herein, may seek a waiver of filing fees or surcharges the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief from a judicial officer in the applicable court." GR 34(a).

The Supreme Court applied GR 34(a) in *Jafar v. Webb*, 177 Wn.2d 520, 303 P.3d 1042 (2013). In *Jafar*, a mother filed an action to obtain a parenting plan, and sought to waive all fees based on indigence. 177 Wn.2d at 522. The trial court granted a partial waiver of fees, but ordered Jafar to pay $50 within 90 days. *Id.* at 523. The Supreme Court reversed, holding the court was required to waive all fees and costs for indigent litigants. *Id.* This was so even though the statutes at issue, like those at issue here, mandate that the fees and costs "shall" be imposed. *See* RCW 36.18.020.

Our Supreme Court noted that both the plain meaning and history of GR 34, as well as principles of due process and equal

protection, required trial courts to waive all fees for indigent litigants. *Id.* at 527-30. If courts merely had the discretion to waive fees, similarly situated litigants would be treated differently. *Id.* at 528. A contrary reading "would also allow trial courts to impose fees on persons who, in every practical sense, lack the financial ability to pay those fees." *Id.* at 529. Given Ms. Jafar's indigence, the Court said, "We fail to understand how, as a practical matter, Jafar could make the $50 payment now, within 90 days, or ever." *Id.* That conclusion is even more inescapable for criminal defendants, who face barriers to employment beyond those others endure. *See Blazina*, 182 Wn.2d at 837; CP 49.

Although GR 34 and *Jafar* deal specifically with access to courts for indigent civil litigants, the same principles apply in criminal cases. Indeed, the Supreme Court discussed GR 34 in *Blazina*, and urged trial courts in criminal cases to reference that rule when determining ability to pay. *Blazina*, 182 Wn.2d at 838.

Furthermore, to construe the relevant statutes as precluding consideration of ability to pay would raise constitutional concerns. U.S. Const. amend. XIV; Const. art. I, § 3. Specifically, to hold that mandatory costs and fees must be waived for indigent civil litigants but

may not be waived for indigent criminal litigants would run afoul of the Equal Protection Clause. *See James v. Strange*, 407 U.S. 128, 92 S. Ct. 2027, 32 L. Ed. 2d 600 (1972) (holding Kansas statute violated Equal Protection Clause because it stripped indigent criminal defendants of the protective exemptions applicable to civil judgment debtors). Equal Protection problems also arise from the arbitrarily disparate handling of the "criminal filing fee" across counties. *See Jafar*, 177 Wn.2d at 528-29; *Blazina*, 182 Wn.2d at 857.

The fact that some counties view statewide statutes as requiring waiver of the fee for indigent defendants and others view the statutes as requiring imposition regardless of indigency is not a fair basis for discriminating against defendants in the latter type of county. *See Jafar*, 177 Wn.2d at 528-29 (noting that "principles of due process or equal protection" guided the court's analysis and recognizing that failure to require waiver of fees for indigent litigants "could lead to inconsistent results and disparate treatment of similarly situated individuals"). Indeed, such disparate application across counties not only offends equal protection, but also implicates the fundamental constitutional right to travel. *Cf. Saenz v. Roe*, 526 U.S. 489, 505, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999) (striking down California statute

mandating different welfare benefits for long-term residents and those who had been in the state for less than a year, as well as different benefits for those in the latter category depending on their state of origin).

Treating the costs at issue here as non-waivable would also be constitutionally suspect under *Fuller v. Oregon*, 417 U.S. 40, 45-46, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974). There, the Supreme Court upheld an Oregon costs statute that is similar to RCW 10.01.160, noting that it required consideration of ability to pay before imposing costs, and that costs could not be imposed upon those who would never be able to repay them. *See id.* Thus, under *Fuller*, the Fourteenth Amendment is satisfied if courts read RCW 10.01.160(3) in tandem with the more specific cost and fee statutes, and consider ability to pay before imposing LFOs.

Although the Court in *Blank* rejected an argument that the Constitution requires consideration of ability to pay at the time appellate costs are imposed, subsequent developments have undercut its analysis. *See State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997). The *Blank* Court noted that due process prohibits *imprisoning* people for inability to pay fines, but assumed that LFOs could still be *imposed*

on poor people because "incarceration would result only if failure to pay was willful" and not due to indigence. *Id.* at 241. This assumption was not borne out. As significant studies post-dating *Blank* recognize, indigent defendants in Washington are regularly imprisoned because they are too poor to pay LFOs. Katherine A. Beckett, Alexes M. Harris, & Heather Evans, Wash. State Minority & Justice Comm'n, The Assessment and Consequences of Legal Financial Obligations in Washington State, 49-55 (2008) (citing numerous accounts of indigent defendants jailed for inability to pay); *see Blazina*, 182 Wn.2d at 836 (discussing report by Beckett et al. with approval).[7] The risk of unconstitutional imprisonment for poverty is very real – certainly as real as the risk that Ms. Jafar's civil petition would be dismissed due to failure to pay. *See Jafar*, 177 Wn.2d at 525 (holding Jafar's claim was ripe for review even though trial court had given her 90 days to pay $50 and had neither dismissed her petition for failure to pay nor threatened to do so). Thus, it has become clear that courts must consider ability to pay at sentencing in order to avoid due process problems.

Finally, imposing LFOs on indigent defendants violates substantive due process because such a practice is not rationally related

[7] Available at: http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf.

to a legitimate government interest. *See Nielsen v. Washington State Dep't of Licensing*, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013) (citing test). Mr. Hutton concedes that the government has a legitimate interest in collecting the costs and fees at issue. But imposing costs and fees on impoverished people like him is not rationally related to the goal, because "the state cannot collect money from defendants who cannot pay." *Blazina*, 182 Wn.2d at 837. Moreover, imposing LFOs on impoverished defendants runs counter to the Legislature's stated goals of encouraging rehabilitation and preventing recidivism. *See* RCW 9.94A.010; *Blazina*, 182 Wn.2d at 837. For this reason, too, the various cost and fee statutes must be read in tandem with RCW 10.01.160, and courts must not impose LFOs on indigent defendants.

c. <u>This Court should reverse and remand with instructions to strike legal financial obligations.</u>

This Court should apply a remedy in this case, notwithstanding that the issue was not raised in the trial court. In *Blazina*, the Supreme Court exercised discretionary review under RAP 2.5(a) because "[n]ational and local cries for reform of broken LFO systems demand" it. 182 Wn.2d at 835. This case raises the same concern. *See also Blazina*, 182 Wn.2d at 841 (Fairhurst, J. concurring) (arguing RAP 1.2(a), "rules will be liberally interpreted to promote justice and

facilitate the decision of cases on the merits," counsels for consideration of the LFO issue for the first time on appeal).

Blazina clarified that sentencing courts must consider ability to pay before imposing LFOs. Because the record demonstrates Mr. Hutton's indigence, this Court should remand with instructions to strike legal financial obligations, and to strike the boilerplate finding that Mr. Hutton has the ability to pay.

7. The Court should not impose costs against Mr. Hutton on appeal.

In the event the State is the substantially prevailing party on appeal, this Court should decline to award appellate costs. *See* RAP 14; *see also* RAP 1.2(a), (c); RAP 2.5. As set forth above, the imposition of costs on an indigent defendant is contrary to the statutes and constitution. The presumption of indigence continues on appeal pursuant to RAP 15.2(f). *State v. Sinclair*, __ Wn. App. __, 2016 WL 393719 (Jan. 27, 2016). The Court can also exercise its discretion not to impose appellate costs against Mr. Hutton. RAP 1.2(a), (c); RAP 2.5; *Blazina*, 182 Wn.2d at 835; *id*. at 841 (Fairhurst, J. concurring).

8. A clerical error in the judgment and sentence should be corrected on remand.

The Court should remand on the additional ground that the trial court should correct a clerical error in the judgment and sentence. At sentencing, the State withdrew the charged aggravating circumstance due to intervening case law and asked only for a sentence at the high end of the range. RP 681; *see* RP 672-77 (sentencing continued for State to determine how to proceed); *State v. Brush*, 183 Wn.2d 550, 353 P.3d 213 (2015) (holding jury instruction defining "prolonged period of time" for domestic violence aggravator is unconstitutional comment on the evidence); CP __ (Sub # 115 (amended information)). The judgment and sentence nonetheless refers to the charged aggravating circumstance. CP 128. It should be corrected.

F. CONCLUSION

Because the second-degree assault and violation of a no-contact order convictions are premised on the same conduct, the lesser offense must be vacated. The remaining convictions should be reversed and remanded for a new trial because the court failed to instruct the jury on self-defense, and due to the evidentiary and cumulative errors described above.

In the alternative, the legal financial obligations should be stricken and the improperly marked aggravator should be corrected on remand.

DATED this 31st day of March, 2016.

Respectfully submitted,

s/ Marla L. Zink
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Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 73945-0-I
v.	)	
	)	
KEVIN HUTTON,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF MARCH, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY [paoappellateunitmail@kingcounty.gov] APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
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SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF MARCH, 2016.

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