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Division I
State of Washington

NO. 73945-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KEVIN HUTTON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE MARIANE C. SPEARMAN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. By statute, an assault that amounts to a second-degree assault cannot be used to elevate a misdemeanor violation of a no-contact order to a felony offense. In regards to counts 1 and 2, that is exactly what occurred here. The State concedes that remand is required so that the felony violation of a no-contact order conviction (count 1) can be vacated, and judgment on the lesser included offense entered.

2. Did the trial court err in denying the defendant's requested self-defense instructions as to counts 1 and 2?

3. The defendant contends that his convictions should be reversed because evidence was admitted that the victim's children may have witnessed him assault their mother, and that the victim's mother said that she was fed up with the fighting between the defendant and her daughter. Has the defendant shown that this evidence was inadmissible and that it was so inherently prejudicial that his convictions must be reversed?

4. Can the defendant avail himself of the cumulative error doctrine?

5. The trial court imposed the mandatory DNA collection fee and Victim Penalty Assessment (VPA), waiving all other costs and

fees. Has the defendant shown that the prior appellate cases are incorrect in holding that a trial court is not required to conduct an individualized assessment of the defendant's future ability to pay costs before imposing the DNA fee and VPA?

6. Should this Court make an individualized assessment of the defendant's future ability to pay appellate costs?

7. Pursuant to State v. Brush,[1] the State concedes that the sentence aggravator on counts 1 and 2, that the crimes were "part of an ongoing pattern of psychological, physical, or sexual abuse of the victim," must be vacated.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was charged with the following seven counts:

Count 1: Felony Violation of a No Contact Order
V -- Shamicia Jones

Count 2: Assault in the Second Degree
V -- Shamicia Jones

Count 3: Felony Violation of a No Contact Order
V -- Patricia King

Count 4: Assault in the Third Degree
V -- Officer Ron Mazziotti

Count 5: Violation of a No Contact Order
V -- Shamicia Jones

Count 6: Violation of a No Contact Order
V -- Shamicia Jones

[1] 183 Wn.2d 550, 353 P.3d 213 (2015).

Count 7: Violation of a No Contact Order
V -- Shamicia Jones

CP 200-03. Except for count 4, each count included an allegation that the offense involved domestic violence. Id. Counts 1 and 2 included a sentence aggravator that the offenses were part of an ongoing pattern of psychological, physical or sexual abuse of the victim. Id. A jury returned guilty verdicts on all counts except for count 3. CP 51-59. In a separate proceeding, the jury found the sentencing aggravator on counts 1 and 2. CP 60-61.

At sentencing, because of the Supreme Court's decision in Brush, supra, the State did not seek an exceptional sentence despite the jury's finding of the aggravating factor. 10RP[2] at 681. The defendant received a standard range sentence of 84 months. CP 127-38.

2. SUBSTANTIVE FACTS

In September of 2014, Shamicia Jones, her three children, and her mother, Patricia King, were living together in Ms. Jones' South Seattle home. 6RP 414-17. Ms. Jones and the defendant had a lengthy on-again, off-again dating relationship. 6RP 418-19.

[2] The verbatim report of proceedings is cited as follows: 1RP—5/5/15, 2RP—5/18/15, 3RP—5/19/15, 4RP—5/20/15 (Opening Statements), 5RP—5/20/15 (trial), 6RP—5/21/15, 7RP—5/26/15, 8RP—5/27/15, 9RP—8/14/15, and 10RP—8/21/15.

Obviously a troubled relationship, the defendant stipulated that "[t]here were multiple no-contact orders issued by Seattle Municipal Court and King County Superior Court for the protection of Shamicia Jones prohibiting Kevin Hutton from contacting Ms. Jones and the orders were valid from 2013 [to] 2018." 5RP 268-69, 305-06, 316; Trial Exhibit 15.

On September 14, 2014, despite the multiple no-contact orders, an intoxicated defendant was over at Ms. Jones' house. 6RP 420, 423. According to Ms. Jones, when the defendant drinks, he gets angry. 6RP 424.

On this occasion, the defendant kept pestering Ms. Jones' three children. 6RP 424. Ms. Jones kept telling the defendant to leave the kids alone, but the defendant's harassing behavior continued. 6RP 424. Finally, Ms. Jones got angry herself and said something that made the defendant particularly angry. 6RP 424. Without warning, the defendant then punched Ms. Jones in the face so hard that she hit the wall and was knocked unconscious. 6RP 420.

The next thing Ms. Jones remembered was waking up on her porch with her kids around her and her mother on the phone with 911. 6RP 424-25. She was later transported to the hospital

for treatment. 6RP 448. Upon arrival at the hospital, Ms. Jones told the medical staff that her ex-boyfriend had punched her with his fist. 6RP 452-54.

Ms. Jones suffered a laceration to her head that required eight staples to close. 6RP 421, 450. She also suffered a complicated laceration that extended through her lower lip and into her mouth. 6RP 450-51. Surgeons first had to repair the inside of her mouth, closing the wound and aligning it properly. Id. The outside of the wound was then closed and sutured. Id. Ms. Jones now has a permanent scar, and at the time of trial, her teeth were still loose and it was painful to drink hot or cold liquids. 6RP 421.

Patricia King, Ms. Jones' mother, was present at the time of the assault and witnessed the defendant punch her daughter in the face, knocking her out. 6RP 350. Ms. King then angrily confronted the defendant, who then punched her, knocking her to the ground. 6RP 351, 366-67. The defendant then fled the scene. 6RP 351.

After being hit, Ms. King called 911. 5RP 190. She told the 911 operator that the defendant had just hit her daughter in the face, knocking her out, and that he had then hit her. 5RP 190-95; 6RP 369-75. She told the operator that the defendant was last seen fleeing on foot down the street. 5RP 190.

Officers located the defendant crouched down in the front seat of a car just a few blocks away. 5RP 187, 210-11, 215, 262. When contacted, the defendant lied and said his name was James. 5RP 213, 247. Matching the suspect's description, the defendant was held at that location until Ms. King could be driven to the scene, wherein she positively identified the defendant as her attacker. 5RP 265. The defendant was then taken into custody, handcuffed and placed into the back of Officer Ron Mazziotti's patrol car. 5RP 213, 216, 248. The defendant was described as hostile, non-cooperative and intoxicated. 5RP 238.

Officer Mazziotti had only driven a few blocks when the defendant tried to kick out the side window. 5RP 217. When Officer Mazziotti pulled over and opened the back door, the defendant was able to get out of the back seat and into a standing position. 5RP 219. Two other officers arrived to assist Officer Mazziotti. 5RP 219. As one officer tried to take control of the defendant from behind, the defendant kicked Officer Mazziotti a couple of times in the chest, knocking the wind out of the officer. 5RP 220, 235. A dash cam video that showed the assault was played for the jury. 5RP 231, 234-35. In addition, the defendant stipulated that while he was in custody he made two statements:

"[t]he bitch is going to die," and "I kicked you, yeah I admit to that." 5RP 237; Trial Exhibit 14.

Evidence was introduced that showed the phone number Ms. Jones had in the time period after the assault. 6RP 388. The State intended to introduce four phone calls made from the King County Jail to Ms. Jones – the calls constituted the acts charged under counts 5, 6 and 7. CP 200-03. To avoid the jury learning that the calls were made from the jail, the defendant stipulated that the four calls that were going to be played for the jury were made to Ms. Jones' phone number. 6RP 389; Trial Exhibit 16.

Track one was a call made on November 14, 2014, track two on November 18, 2014 at 950 hours, track three on November 18, 2014 at 1537 hours and track 4 on December 1, 2014 at 1921 hours. Id. In entering this stipulation, the defendant did not stipulate that he was the one who actually made the calls. Instead, after listening to the calls, Ms. King identified the voices as the defendant's and her daughter. 6RP 390-92. The content of the calls also served to identify the parties to the calls. 7RP 511-18.

The defendant did not testify. Additional facts are included in the sections below they apply.

C. ARGUMENT

1. THE DEFENDANT CANNOT BE CONVICTED OF FELONY VIOLATION OF A NO-CONTACT ORDER AND SECOND-DEGREE ASSAULT BASED ON THE SAME ACT

RCW 26.50.110(4) provides that "[a]ny assault that is a violation of an order issued under this chapter, chapter 7.92, 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, and ***that does not amount to assault in the first or second degree*** under RCW 9A.36.011 or 9A.36.021 is a class C felony." In interpreting this language, the Supreme Court has held that an assault that amounts to a second-degree assault cannot serve as the predicate offense that elevates a misdemeanor violation of a no contact order to a felony violation of a no contact order. State v. Azpitarte, 140 Wn.2d 138, 995 P.2d 31 (2000); accord, State v. Ward, 148 Wn.2d 803, 64 P.3d 640 (2003). That is exactly what occurred here in regards to count 1 and count 2.

In pertinent part, count 1 charged the defendant with felony violation of a no-contact order for willfully violating a no-contact order issued under RCW chapter 10.99 by "intentionally assaulting" Shamicia Jones. CP 200. The assault elevated what would

otherwise be a misdemeanor violation of a no-contact order offense to a felony offense. RCW 26.50.110(1)(a) and (4).

In pertinent part, count 2 charged the defendant with second-degree assault for intentionally assaulting Shamicia Jones and recklessly inflicting substantial bodily harm to her. CP 201.

This was a single punch case, an act of assault that caused such significant injury to Ms. Jones that it rose to the level of a second-degree assault. This assault was also the basis for elevating the misdemeanor violation of a no-contact order to a felony offense. Thus, under the plain language of the statute, the defendant's felony violation of a no-contact order cannot stand. The remedy is remand for vacation of the felony violation of a no-contact order conviction and entry of the lesser misdemeanor violation of a no-contact order offense. This is the appropriate remedy under In re Heidari,[3] and State v. Moreno.[4]

In re Heidari held that where a jury is instructed on a lesser included offense, and in finding the greater offense committed the jury necessarily found all the elements of the lesser offense, if the greater offense is vacated, entry of the lesser offense is warranted.

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[3] 174 Wn.2d 288, 274 P.3d 366 (2012).

[4] 132 Wn. App. 663, 132 P.3d 1137 (2006).

174 Wn.2d at 293-94. Moreno showed that the legislature intended that the lesser assaults -- third-degree assault and fourth-degree assault, be punished separately from felony violation of a no-contact order, i.e., there is no double jeopardy violation. 132 Wn. App. at 671.

Here, in count 1, the jury was specifically instructed that it could return a verdict on the lesser included offense of the misdemeanor violation of a no-contact order. CP 83-85 (Instructions 9, 10 & 11). In finding the defendant guilty of the greater offense, the jury necessarily had to find all of the elements of the lesser offense. See CP 82 & 85 (Instructions 8 & 11, the "to convict" instructions for each offense).[5]

2. THE TRIAL COURT PROPERLY CONCLUDED THAT THERE WAS INSUFFICIENT EVIDENCE SUPPORTING THE GIVING OF SELF-DEFENSE INSTRUCTIONS AS TO COUNTS 1 AND 2

The defendant claims that the trial court erred in denying his request to give self-defense jury instructions on counts 1 and 2, the felony violation of a no-contact order and second-degree assault

[5] Vacation of the felony violation of a no-contact order conviction in count 1 resolves another issue raised by the defendant; his alternative argument that counts 1 and 2 constitute the "same criminal conduct" for scoring purposes. See RCW 9.94A.589(1)(a). By vacating the felony conviction in count 1, the offender scores for counts 2 and 4 (the only other felony counts) must be recalculated sans the point(s) added for count 1.

charges against Shamicia Jones. This claim has no merit. The trial court correctly found that there was absolutely no evidence that the defendant acted in self-defense.

A criminal defendant is entitled to an instruction on his or her theory of the case if the evidence supports the instruction. State v. Ager, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). The refusal to give an instruction on a party's theory of the case, where there is sufficient supporting evidence for the giving of the instruction, is reversible error when it prejudices the party who proposed the instruction. State v. Werner, 170 Wn.2d 333, 337, 241 P.3d 410 (2010). At the same time, there is no right to an instruction that is not sufficiently supported by the evidence. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

In Washington, the use of force upon the person of another is not unlawful when "used by a party about to be injured ... [and] the force is not more than is necessary." RCW 9A.16.020(3).

In determining whether a defendant is entitled to an instruction on self-defense, the trial court must view the evidence from the standpoint of a reasonably prudent person who knows all the defendant knows and sees all the defendant sees. State v. Read, 147 Wn.2d 238, 242, 53 P.3d 26 (2002) (citing State v.

Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998)). Accordingly, the trial court applies both a subjective and objective test. Id. Thus, there must be evidence that (1) the defendant subjectively feared that he was in imminent danger of harm; (2) this belief was objectively reasonable; and (3) the defendant exercised no greater force than was reasonably necessary. Id.

In considering both the subjective and objective inquiries, the trial court must determine whether the defendant produced any evidence to support the claim that he subjectively believed in good faith he was in imminent danger of harm and whether this belief, viewed objectively, was reasonable. Id.; see also State v. Kyllo, 166 Wn.2d 856, 864, 215 P.3d 177 (2009) (a person is entitled to act in self-defense when he reasonably believes he is about to be injured and when the force used is not more than necessary). The trial court is justified in denying a request for a self-defense instruction where no credible evidence appears in the record to support a defendant's claim of self-defense. State v. Roberts, 88 Wn.2d 337, 346, 562 P.2d 1259 (1979).

In a situation like exists here, where the trial court found no evidence supporting the giving of a self-defense instruction, the standard of review is abuse of discretion. Read, 147 Wn.2d at 243.

A court abuses its discretion when a decision is manifestly unreasonable or based on untenable grounds State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009). To prevail on appeal, the defendant would have to prove that no reasonable person would have taken the position adopted by the trial court. State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982).

Here, in requesting self-defense instructions on counts 1 and 2, the defendant's trial counsel could not point to any evidence that the defendant actually acted in self-defense. See 6RP 439-42; 7RP 483-89, 494, 504-06. Upon inquiry from the judge, defense counsel merely stated, "it's a factual issue and it's unclear." 6RP 442. The defendant does no better on appeal.

Before this Court, the defense supports its argument with the following:

> 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 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.

Def. br. at 13-14 (emphasis added).

The defendant's argument is troubling because it asserts facts that are not in the record.

The actual full quote from Ms. Jones is as follows:

> [L]ike he was messing with my kids, you know. Like nitpicking, you know, like – just bother – you know, like picking at them. You know, just fucking with them – or messing with them. Sorry.
>
> And I got angry and I said something about it. And he got angry. And I just remember him hitting me. And that's – and then I remember coming to. And I was on the porch. And I remember my kids and I remember mom on the phone. That's all I remember.

6RP 424.

Asked if she had a clear memory of the assault, Jones responded:

> He was drinking this day. He was nitpicking. And I said stop, or I said something that pissed him off even more. I got hit. I got unconscious. I went to the hospital and needed staples and stitches. That's what I remember that day.

6RP 425.

From these passages, all that can be discerned is that the defendant was drinking and was angry at Ms. Jones. The passages provide absolutely no evidence that the defendant was in

fear of being assaulted by Ms. Jones. Still, in an apparent attempt to suggest that the defendant had reason for such fear, the defense then states to this Court that "[b]efore being hit, Ms. Jones aggressively approached a visibly intoxicated Mr. Hutton." Def. br. at 14. The problem with this statement is threefold.

First, conspicuously absent in making this factual assertion is any citation to the record.

Second, there is absolutely no evidence in the record that supports the assertion that Ms. Jones was approaching the defendant – aggressively or otherwise, when the defendant punched her in the face and knocked her out. In fact, with Ms. Jones' limited memory of how the assault occurred, and the defendant deciding not to testify, the only testimony that provided any detail of how the assault occurred came from Ms. King. Her testimony showed that the exact opposite occurred. Specifically, Ms. King testified that it was the defendant who rushed towards Ms. Jones before he punched her in the face, not the other way around.

> Then she got up [from the couch], and I – he was back in the kitchen at the time. She got up, like going out to the door, and he rushed her and he hit her. He

> just rushed from the kitchen and hit her. And that's when she just – it was over.

6RP 360.

Third, even if it were true that Ms. Jones was "aggressively approaching" the defendant, that still would not justify the giving of a self-defense instruction. There has to be some evidence that demonstrates that the defendant was actually in fear of being imminently harmed and that his belief was objectively reasonable. Facts in the record pertaining to the defendant's mental state at the time he assaulted Ms. Jones suggest that the defendant was drunk and angry and nothing more.

With the dearth of any evidence regarding the defendant's mental state and the reason -- other than anger, that he struck Ms. Jones, the defendant cannot show that the trial court abused its discretion in denying his requested self-defense instructions.

3. THE DEFENDANT'S EVIDENTIARY CLAIMS ARE WITHOUT MERIT

The defendant argues that certain evidence was admitted at trial that was so inherently prejudicial that his convictions must be reversed. Specifically, the defendant contends that the trial court should not have allowed into evidence the fact that Ms. Jones' children – potential witnesses to the assault, were present at the

scene. He additionally asserts that the trial court should not have allowed into evidence statements suggesting that there may have been prior conflicts between the defendant and Ms. Jones.

a. The Applicable Facts

Shamicia Jones was asked what led to the defendant punching her in the face. Ms. Jones testified that it began with the defendant "messing with my kids...nitpicking...you know, like picking at them." 6RP 424. Ms. Jones testified that she "got angry and I said something about it. And he got angry." Id. All she could remember after that was the defendant punching her in the face, being knocked out and then coming to "[a]nd I remember my kids and I remember my mom on the phone. That's all I remember." Id. The defendant did not object to this testimony.

Patricia King testified that at the time of the assault, she lived with her daughter, Shamicia Jones, and her three grandchildren – Ms. Jones' children. 6RP 344-46. She said that earlier that day, either the defendant or herself had fed the children and that just prior to the assault, the kids were "running around, playing." 6RP 354, 365. There was no objection to this testimony.

Ms. King was then asked if her kids actually witnessed Ms. Jones being knocked out. 6RP 366. Ms. King testified that

when she got up after being knocked down, the kids "were standing right there...they might have been in one or two, the first -- second bedroom or the third, I don't know. They were running back and forth out to the front, you know. Because when they fight, they hide. They like get out [of] the way." 6RP 366.

The defendant lodged an objection, stating, "[o]bjection, 403 as to this part of the answer ... prejudicial as to the children." Id. The objection was overruled. Id.

Asked what the kids' reaction to the incident was, Ms. King responded "scared, crying." 6RP 367. The defendant's "[s]ame objection" response was overruled. Id.

Next, Ms. King was asked "at what point during the sequence of events did you call 911?" 6RP 368. Ms. King answered this question and then added "I'm fed up with him getting away with doing what he's doing. I'm just tired of it." 6RP 368. No objection was raised to this non-responsive answer.

The recorded 911 call placed by Ms. King was then played for the jury. 6RP 369-75. Afterwards, Ms. King was asked "[w]hat was the purpose of that call?" 6RP 375. Ms. King responded, "[h]e hit me and knocked her out. I don't want to curse, but I'm just eff – fed up with the fighting and stuff. I'm just tired of it." 6RP 376.

Defense counsel responded, "[o]bjection, 404(b)." Id. The court directed the prosecutor to move on from this topic, stating, "[l]et's ask another question." Id.

At the next recess, the court asked the prosecutor to caution Ms. King about bringing up any history between the defendant and Ms. Jones. 6RP 383. The defendant then made a motion for a mistrial. 6RP 383. The court noted that the prosecutor had not elicited this information, rather, Ms. King was "blurting out" that she was sick of things. 6RP 384. The court also noted that Ms. King never said anything about the defendant ever having struck or assaulted Ms. Jones in the past, just that she was tired of the relationship and their fighting. 6RP 384-85. The court found no basis to declare a mistrial. Id.

Four recorded phone calls placed by the defendant to Ms. Jones were played for the jury. 7RP 507-19. In one of the calls, Ms. Jones tells the defendant that her face is all "puffed up" and that the kids were having nightmares. 7RP 512-13. The defendant confesses, "I messed up...I'm sorry...[and] it will never happen again." 7RP 514. The defendant's "hearsay" objection was overruled. 7RP 470.

b. The Trial Court's Rulings Were Correct

The decision to admit evidence is left to the sound discretion of the trial court. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). A trial court's decision to admit evidence will be overturned only upon a finding that the trial court abused its discretion. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). While reasonable minds might disagree with a trial court's evidentiary ruling, that is not the standard upon review. Id.; State v. Willis, 151 Wn.2d 255, 264, 87 P.3d 1164 (2004). An abuse of discretion is shown only when the reviewing court is satisfied that "no reasonable judge would have reached the same conclusion." State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

At the most basic level, evidence is admissible if it meets the requirements of ER 401, ER 402 and ER 403.

ER 402 provides that "[a]ll relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible."

ER 401 provides that evidence is relevant if it has "any 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 403 provides that relevant evidence may be excluded only "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

In considering a defendant's evidentiary claims on appeal, a reviewing court must also examine what actions the defendant took in the trial court. Where a defendant fails to raise an evidentiary objection below, review is barred. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1185 (1985). Where a defendant makes a specific evidentiary objection in the trial court, review is limited only to the specific ground raised at trial. Id.

Here, much of what the defendant now argues is barred. For example, he did not object to the testimony that Ms. Jones' kids were present at the time of the assault. He only objected to how the kids reacted to the assault. Similarly, in objecting to the recorded phone calls made by the defendant, the defendant's argument on appeal would be limited to the "hearsay" claim he

asserted at trial. See 7RP 470. The defendant appears to have abandoned hearsay as a basis to argue his claim.[6]

In any event, the defendant contends that the fact that Ms. Jones' children were present at the time of the assault was not relevant and that the admission of the evidence was highly prejudicial. This claim has no merit.

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[6] The defendant attempts to circumvent waiver by raising a claim of ineffective assistance of counsel. This will not help the defendant. A person claiming ineffective assistance of counsel must show both that (1) counsel's deficient performance deprived the defendant of his constitutional right to counsel and (2) counsel's deficient performance prejudiced the defendant's case. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Prejudice occurs when, but for counsel's deficient performance, there is a reasonable probability the outcome would have differed. Id.

Courts are reluctant to find ineffective assistance of counsel except in the most extreme cases. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). This is particularly true where the alleged deficient performance consists of an attorney's failure to object. "Counsel is not, at the risk of being charged with incompetence, obliged to raise every conceivable point, however frivolous, damaging or inconsequential it may appear at the time, or to argue every point to the court and jury which in retrospect may seem important to the defendant." In re Stenson, 142 Wn.2d 710, 735, 16 P.3d 1 (2001). "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, rev. denied, 113 Wn.2d 1002 (1989). And if a claim of ineffective assistance rests on counsel's failure to object, "a defendant must show that an objection would likely have been sustained" and that the evidence probably affected the verdict. State v. Fortun-Cebada, 158 Wn. App. 158, 172, 241 P.3d 800 (2010).

Here, clearly the above evidence was not central to the State's case. It was relatively inconsequential. Thus, the defendant cannot show that it would have been manifestly unreasonable for an attorney not to raise an objection. In addition, just as with an evidentiary objection, the defendant must show that the objection would have been granted and he must show prejudice. He can do neither.

Ms. Jones testified that what led to the defendant punching her was the defendant's anger at her after she tried to get him to stop harassing her children. Whether termed res gestae[7] or what motivated the assault, the defendant's pestering of the kids and Ms. Jones' attempt to get him to stop was the very action that led to the assault. The evidence also put into context the defendant's phone call to Ms. Jones wherein he admitted that he "messed up" and apologizes after Ms. Jones told him that the kids were having nightmares.[8]

In addition, it is certainly relevant whether witnesses are present during the commission of a crime, who the witnesses are, did they see the crime committed and how they reacted. For example, the missing witness doctrine would allow a defendant to have the jury instructed that a witness not called by the State can be presumed to have unfavorable evidence against the State's case unless the absence of the witness is satisfactorily explained. See State v. Montgomery, 163 Wn.2d 577, 598-99, 183 P.3d 267 (2008). Similarly, if there were multiple persons around but none of

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[7] *Res gestae* is evidence that completes the story of the crime by proving its immediate context of happenings near in time and place, or motive. State v. Mutchler, 53 Wn. App. 898, 901, 771 P.2d 1168, rev. denied, 113 Wn.2d 1002 (1989).

[8] The evidence also was relevant in proving that it was the defendant and Ms. Jones whose voices were heard on the recording, and that they were discussing this actual incident.

them saw the crime being committed, this would certainly be relevant. Because the potential witnesses might be children does not make their presence irrelevant or somehow overly prejudicial. The parties do not get to choose who witnesses a crime whether it be a priest, a rabbi, a drug dealer or a child, their presence is relevant.

As to the fact that Ms. King's testimony suggested that the defendant and Ms. Jones had been involved in prior conflicts, this was hardly news to the jury. After all, the defendant stipulated that there were multiple no-contact orders in existence that prevented him from having any contact with Ms. Jones. Still, while evidence of any prior conflict between Ms. Jones and the defendant was likely admissible under ER 404(b),[9] the State informed the court pretrial that it would not be eliciting such evidence. 2RP 48-49. At trial, it was Ms. King who "volunteered" that she was tired of the defendant and Ms. Jones fighting.

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[9] See State v. Magers, 164 Wn.2d 174, 185-86, 189 P.3d 126 (2008) (prior assaultive conduct is relevant and admissible to assess a domestic violence victim's credibility as a witness and accordingly to prove that the charged assaultive acts actually occurred – the jury is entitled to evaluate the victim's credibility with full knowledge of the dynamics of a relationship marked by domestic violence), accord, State v. Wilson, 60 Wn. App. 887, 808 P.2d 754, rev. denied, 117 Wn.2d 1010 (1991), and State v. Grant, 83 Wn. App. 98, 105-07, 920 P.2d 609 (1996).

An evidentiary error is grounds for reversal only if it results in prejudice. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An evidentiary error is prejudicial if a reasonable probability exists that it materially affected the outcome of the trial. State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). No prejudice exists if the inadmissible evidence is "of minor significance in reference to the overall, overwhelming evidence as a whole." Bourgeois, 133 Wn.2d at 403. In assessing whether the error was harmless, a reviewing court measures the admissible evidence of the defendant's guilt against the prejudice caused by the improperly admitted evidence. Id.

Here, in assessing harmless error, the court must look at the evidence and the nature of the charges. The defendant stipulated to the existence of multiple no-contact orders. Evidence of violations of the no-contact order charges consisted of phone calls wherein the defendant and Ms. Jones' voices were identified and the content of the calls showed that it was the defendant and Ms. Jones engaged in the conversations. It is difficult to see how the alleged inadmissible evidence could have prejudiced the jury's determination on these counts.

In regards to the assault on the officer, a video of the assault was shown to the jury. The defendant also stipulated that he told the officer afterward, "I kicked you, yeah I admit to that." 5RP 237; Trial Exhibit 14. There can be no prejudice here.

Finally, as to the assault and violation of the no-contact order involving Ms. Jones, the evidence of guilt was overwhelming. Ms. Jones clearly suffered a significant injury that caused permanent scarring. Ms. King, in calling 911, identified the defendant as the perpetrator of the assault. Ms. Jones, when admitted to the hospital, identified the defendant as the perpetrator. The defendant, in recorded phone calls, apologized for his assault. In addition, the defendant was located a short distance away from Ms. Jones' house – intoxicated and angry as the victims described. The defendant lied about his identity and upon being arrested, he threatened, "[t]he bitch is going to die." 5RP 237; Trial Exhibit 14. Whatever prejudice existed by the admission of the challenged evidence was minor. With the substantial evidence proving guilt that was admitted, the defendant cannot prove that there was a reasonable likelihood that the inadmissible evidence affected the verdict.

4. THE DEFENDANT'S CUMULATIVE ERROR CLAIM IS WITHOUT MERIT

The defendant contends that the cumulative effect of multiple trial errors warrants a new trial, even if they do not justify a reversal individually. This claim should be rejected.

An accumulation of errors that do not individually require reversal may still deny a defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). It is axiomatic, however, that to seek reversal pursuant to the "accumulated error" doctrine, a defendant must establish the presence of multiple trial errors ***and*** that the accumulated prejudice affected the verdict. Reversals due to cumulative error are justified only in rather extraordinary circumstances. See State v. Perrett, 86 Wn. App. 312, 323, 936 P.2d 426, rev. denied, 133 Wn.2d 1019 (1997); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963).

Here, the double jeopardy claim has nothing to do with any prejudice at trial; the charges were properly brought. The issue is merely a sentencing issue. Additionally, the defendant was not entitled to a self-defense instruction, and the evidentiary claims, even if valid, are easily resolved under the standard harmless error analysis.

5. **THE DEFENDANT'S ARGUMENTS OPPOSING THE DNA FEE AND VPA ARE WITHOUT MERIT**

For the first time on appeal, the defendant challenges the imposition of the $100 DNA Collection Fee and the $500 Victim Penalty Assessment. The sentencing court imposed these mandatory fees[10] without objection, while waiving all other costs and fees. See CP 129; 10RP 691. There is no indication in the record that the State has sought to enforce collection of these fees. In challenging these fees, the defendant raises a number of claims, all of which have been collectively or individually rejected in State v. Duncan, 90188-1, 2016 WL 1696698 (Apr. 28, 2016); State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997); State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992); and State v. Mathers, 47523-5-II, 2016 WL 2865576 (May 10, 2016).

In Duncan, the Supreme Court recently set forth the requirements of a constitutionally permissible system that requires defendants to pay court ordered discretionary legal financial obligations (LFO's). Duncan, 2016 WL 1696698, at *2. At the

[10] RCW 7.68.035 states that a $500 victim penalty assessment "shall be imposed by the court upon such convicted person." RCW 43.43.7541 states that for "[e]very sentence imposed" on a felony offense and certain misdemeanor offenses, a $100 DNA Collection Fee must be imposed. See also RCW 43.43.754 (listing crimes for which DNA collection is required).

same time, the Court noted that the legislature has made the imposition of certain fees mandatory, including the DNA collection fee and the victim penalty assessment. The Court added that "[w]hile we have not had occasion to consider the constitutionality of all of these statutes, we have found that the victim penalty assessment statute was not unconstitutional on its face or as applied to the defendants in the case because there were sufficient safeguards to prevent the defendants from being sanctioned for nonwillful failure to pay." Duncan, 2016 WL 1696698, at *5 n.3 (citing Curry, 118 Wn.2d at 917). That is exactly the situation here for both the VPA and DNA fee.

In addition to Duncan, in Mathers, supra, Division II just recently rejected all of these same claims as raised by the defendant here.

A LACK OF STANDING: A person cannot challenge the constitutionality of a statute unless he or she has been adversely affected by the provisions claimed to be unconstitutional. State v. Lundquist, 60 Wn.2d 397, 401, 374 P.2d 246 (1962). To establish standing, a defendant must show (1) that he is within the zone of interests to be protected by the constitutional guarantee in question, and (2) that he has suffered an injury in fact, economic or

otherwise. Branson v. Port of Seattle, 152 Wn.2d 862, 875-76, 101 P.3d 67 (2004). The injury must be "fairly traceable to the challenged conduct and likely to be redressed by the requested relief." State v. Johnson, 179 Wn.2d 534, 552, 315 P.3d 1090 (2014). The injury also must be "(a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" Witt v. Dep't of Air Force, 527 F.3d 806, 811 (9th Cir. 2008) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). Where a party lacks standing, courts must refrain from reaching the merits of the claim raised. Johnson, 179 Wn.2d at 552.

"[T]he due process and equal protection clauses prevent a state from invidiously discriminating against, or arbitrarily punishing, indigent defendants for their failure to pay fines they cannot pay." Johnson, 179 Wn.2d at 552 (citing Bearden v. Georgia, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983)). In Blank, supra, the Supreme Court clarified that the imposition of fees against an indigent party as a part of sentencing is not constitutionally forbidden; rather, constitutional principles are implicated only if the State seeks to enforce collection of the fee "at a time when the defendant is unable, through no fault of his own, to comply."

131 Wn.2d at 241 (quoting Curry, at 917). Thus, it is at the point of enforced collection that a defendant has standing to assert a constitutional objection on the ground of indigence. Id.

NOT RIPE FOR REVIEW: In general, "challenges to orders establishing legal financial sentencing conditions that do not limit a defendant's liberty are not ripe for review until the State attempts to curtail a defendant's liberty by enforcing them." State v. Lundy, 176 Wn. App. 96, 108, 308 P.3d 755 (2013). It is only when the State attempts to collect or impose punishment against an indigent person for failure to pay that constitutional principles are implicated. Curry, at 917.

Our supreme court adhered to this position in Blank, when it held that an inquiry into defendant's ability to pay is not constitutionally required before imposing a repayment obligation in a judgment and sentence, as long as the court must determine whether the defendant is able to pay before sanctions are sought for nonpayment. Blank, 131 Wn.2d at 239-42. The point of enforced collection or sanctions for nonpayment is the appropriate time to discern the individual's ability to pay because before that point, "it is nearly impossible to predict ability to pay." Id. at 242. "If at that time defendant is unable to pay through no fault of his own,

Bearden and like cases indicate constitutional principles are implicated." Id. at 242.

Similar to standing, because there has been no attempt to collect the fees imposed, any challenge to the order requiring payment on hardship grounds is not yet ripe for review. Lundy, 176 Wn. App. at 109.

RAP 2.5 PRECLUDES REVIEW: A claim of error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Not every constitutional error falls within this exception; the defendant must show that the error occurred and that it caused actual prejudice to the defendant's rights. McFarland, 127 Wn.2d at 333. If the facts necessary to adjudicate the issue are not in the record, the error is not manifest. State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009).

Here, the defendant's constitutional claims depend on his present ***and future*** ability or inability to pay the mandatory DNA fee and VPA. But as discussed above, there is no evidence in the record to show that the defendant will be constitutionally indigent at the time of collection, so the error is not manifest within the

meaning of RAP 2.5(a). In State v. Blazina, the Supreme Court recognized that "[a] defendant who makes no objection to the imposition of discretionary [LFO's] at sentencing is not automatically entitled to review." 182 Wn.2d 827, 832, 344 P.3d 680 (2015). Thus, where defendants fail to object to the LFO's at sentencing, it is appropriate for appellate courts to decline review. Id. at 834. Because the defendant failed to raise an objection below and there is insufficient information in the record as to the defendant's future ability to pay, this Court should decline review.

NO DUE PROCESS ISSUE: A statute is presumed constitutional, and the party challenging the legislation bears the burden of proving the legislation is unconstitutional beyond a reasonable doubt. State ex rel. Peninsula Neighborhood Ass'n v. Dep't of Transp., 142 Wn.2d 328, 335, 12 P.3d 134 (2000). Constitutional challenges are questions of law subject to de novo review. Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 215, 143 P.3d 571 (2006).

The federal and Washington State Constitutions guarantee that an individual is not deprived of "life, liberty, or property, without due process of the law." U.S. CONST. amends. V, XIV; WASH. CONST. art. I, § 3. Washington's due process clause is coextensive

with that of the Fourteenth Amendment, providing no greater protection. State v. McCormick, 166 Wn.2d 689, 699, 213 P.3d 32 (2009). It confers both procedural and substantive protections. Amunrud, 158 Wn.2d at 216. "Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." Nielsen v. Washington State Dep't of Licensing, 177 Wn. App. 45, 53, 309 P.3d 1221 (2013) (quoting Amunrud, 158 Wn.2d at 218-19).

The level of scrutiny applied to a due process challenge depends upon the nature of the interest involved. Nielsen, at 53 (citing Amunrud, at 219). Where no fundamental right is at issue, as in this case, the rational basis standard applies. Amunrud, at 222. Rational basis review merely requires that a challenged law be "rationally related to a legitimate state interest." Id. This deferential standard requires the reviewing court to "assume the existence of any necessary state of facts which [it] can reasonably conceive in determining whether a rational relationship exists between the challenged law and a legitimate state interest." Id.

In 2002, the legislature created a DNA database to store DNA samples of those convicted of felonies and certain

misdemeanor offenses. RCW 43.43.753. The legislature identified such databases as "important tools in criminal investigations, in the exclusion of individuals who are the subject of investigations or prosecutions, and in detecting recidivist acts." Id. To fund the DNA database, the legislature enacted RCW 43.43.7541, which originally required courts to impose a $100 DNA collection fee with every sentence imposed for specified crimes "unless the court finds that imposing the fee would result in undue hardship on the offender." Former RCW 43.43.7541 (2002). In 2008, the legislature amended the statute to make the fee mandatory regardless of hardship: "Every sentence ... must include a fee of one hundred dollars." RCW 43.43.7541. Eighty percent of the fee goes into the "state DNA database account." Id. Expenditures from that account "may be used only for creation, operation, and maintenance of the DNA database [.]" RCW 43.43.7532.

In Curry, the Supreme Court upheld the constitutionality of the mandatory (VPA) as applied to indigent defendants. 118 Wn.2d 911. Just like the DNA fee, the VPA is mandatory and must be imposed regardless of the defendant's ability to pay. Lundy, 176 Wn. App. at 102. The appellants in Curry argued that the statute could operate to imprison them unconstitutionally if they were

unable to pay the penalty. 118 Wn.2d at 917. It is fundamentally unfair to imprison indigent defendants solely because of their inability to pay court-ordered fines. Bearden, 461 U.S. at 667-68. The Curry court agreed that the sentencing scheme includes sufficient safeguards to prevent unconstitutional imprisonment of indigent defendants:

> Under RCW 9.94A.200[11], a sentencing court shall require a defendant the opportunity to show cause why he or she should not be incarcerated for a violation of his or her sentence, and the court is empowered to treat a nonwillful violation more leniently. Moreover, contempt proceedings for violations of a sentence are defined as those which are *intentional*. RCW 7.21.010(1)(b). Thus, no defendant will be incarcerated for his or her inability to pay the penalty assessment unless the violation is willful.

118 Wn.2d at 918 (citing Curry, 62 Wn. App. at 682) (emphasis in original).

While Curry addressed the mandatory VPA, the same principle has been extended to all mandatory legal financial obligations, including the DNA fee required by RCW 43.43.7541. See Lundy, 176 Wn. App. at 102-03; State v. Kuster, 175 Wn. App. 420, 424-26, 306 P.3d 1022 (2013). Although RCW 9.94A.200 has

[11] Recodified in 2001 as RCW 9.94A.634 and in 2008 as RCW 9.94B.040.

been recodified, the same safeguards against imprisonment of indigent defendants discussed in Curry apply. See RCW 9.94B.040; RCW 7.21.010(1)(b). Additionally, any defendant who is not in "contumacious default" may seek relief "at any time ... for remission of the payment of costs or any unpaid portion thereof" on the basis of hardship. RCW 10.01.160(4). A defendant may also seek reduction or waiver of interest on LFO's upon a showing that the interest "creates a hardship for the offender or his or her immediate family." RCW 10.82.090(2)(a), (c).

As in Curry, these safeguards are sufficient to prevent sanctions and imprisonment for mere inability to pay. Duncan, 2016 WL 1696698 at 5, n.3. Accordingly, like the VPA, the mandatory DNA fee in RCW 43.43.7541 does not violate substantive due process as applied to indigent defendants.

Blazina does not aid the defendant's argument. Blazina held that a different statute, RCW 10.01.160(3), requires the trial court to conduct an individualized inquiry into the defendant's ability to pay before imposing discretionary LFO's. 182 Wn.2d at 837-38. But Blazina involved a claimed violation of a statute, not due process, and its holding is based on statutory construction. In addition, Blazina concerned *discretionary* LFO's, not mandatory fees like the

one involved here. 182 Wn.2d at 837-38. Nothing in Blazina changes the principle articulated in Curry that mandatory LFO's may be constitutionally imposed at sentencing without a determination of the defendant's ability to pay so long as there are sufficient safeguards to prevent imprisonment of indigent defendants for a noncontumacious failure to pay.

NO EQUAL PROTECTION ISSUE: The defendant next argues that allowing mandatory costs and fees to be waived for indigent civil litigants, but not for criminal defendants, violates equal protection. This claim was rejected in Mathers, supra.

Under the equal protection clause of the Washington State Constitution, article I, section 12, and the Fourteenth Amendment to the United States Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive similar treatment. Harmon v. McNutt, 91 Wn.2d 126, 130, 587 P.2d 537 (1978). Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made. In re Thorell, 149 Wn.2d 724, 745, 72 P.3d 708 (2003).

Like here, where the challenge does not involve a suspect class and the right at issue is not a fundamental right, courts utilize

the rational basis test. State v. Scherner, 153 Wn. App. 621, 648, 225 P.3d 248 (2009), aff'd, 173 Wn.2d 405 (2012). Under that test, "a law is subjected to minimal scrutiny and will be upheld unless it rests on grounds wholly irrelevant to the achievement of a legitimate state objective." State v. Schaaf, 109 Wn.2d 1, 17, 743 P.2d 240 (1987). In other words, does there exist a legitimate governmental objective and a rational means of achieving it. Mathers, at 6 (citing In re Turay, 139 Wn.2d 379, 410, 986 P.2d 790 (1999). To overcome the strong presumption of constitutionality, the party challenging the classification must show that it is purely arbitrary. In re Ross, 114 Wn. App. 113, 118, 56 P.3d 602 (2002), rev. denied, 149 Wn.2d 1015 (2003).

The first question in evaluating an equal protection claim is whether the person claiming the violation is similarly situated with other persons. State v. Osman, 157 Wn.2d 474, 484, 139 P.3d 334 (2006). "A defendant must establish that he received disparate treatment because of membership in a class of similarly situated individuals and that the disparate treatment was the result of intentional or purposeful discrimination." Id. Here, the defendant seeks to lump indigent civil litigants and waivable costs associated with their access to the court system with indigent criminal

defendants who have already been convicted and are ordered to pay costs associated with the cost of collecting DNA and with funding crime victim programs. Besides indigence, these groups are not even closely similar. The groups involve two totally different areas of law, the civil arena where indigent defendants are provided with the ability to access the judicial system and address grievances, and the criminal arena where defendants are drawn into the system through their own criminal conduct, provided attorneys at State expense, and attempts to recoup money associated with criminal prosecution and victim's harms are at stake. See State v. Brewster, 152 Wn. App. 856, 860, 218 P.3d 249 (2009); RCW 7.68.035. The defendant fails to establish that indigent civil litigants and indigent criminal defendants are similarly situated individuals receiving disparate treatment. See Mathers, supra. The different purposes of the two classes, access to the judicial system versus recoupment of costs of criminal acts and prosecution, is a rational basis to distinguish whether costs should be mandatory or discretionary.[12]

[12] The defendant also relies on Fuller v. Oregon, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974), a case in which the United States Supreme Court upheld a criminal cost statute that required consideration of ability to pay before costs could be imposed. Fuller has no application here because the case did not involve mandatory cost and fee statutes.

6. THERE SHOULD BE NO DETERMINATION ON APPELLATE COST

The defendant asks this court to waive appellate cost due to indigence. This Court should not, as a part of this appeal, determine whether appellate cost ought to be waived due to indigence.

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review. RAP 14.2. With the State conceding a key issue on appeal (double jeopardy), it is doubtful that the State would be considered the substantially prevailing party on appeal. In any event, the State respectfully disagrees with this Court's approach to costs on appeal set forth in State v. Sinclair.[13] A decision on the State's petition for review of Sinclair is expected at the end of June, 2016.

As in most cases, the defendant's ability to pay was not litigated in the trial court because it was not relevant to the issues at trial. As such, the record does not contain sufficient information about the defendant's financial status and the State did not have the right to obtain information about the defendant's financial situation.

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[13] 192 Wn. App. 380, 367 P.3d 612 (2016).

The declaration that the defendant filed when he requested the appointment of appellate counsel addressed only his present financial circumstances and his ability to pay appellate costs up front. It does not address his future ability to pay. It is a defendant's future ability to pay, instead of his current ability, that is most relevant in determining whether the imposition of financial obligations is appropriate. See Blank, 131 Wn.2d at 241 (indigence is a constitutional bar to the collection of monetary assessments only if the defendant is unable to pay at the time the government seeks to enforce collection of the assessments).

7. THE AGGRAVATING FACTOR MUST BE VACATED

After the defendant's trial on the underlying charges, in a separate penalty phase, the jury was tasked with determining whether the offenses as found in counts 1 and 2 were "part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents ***over a prolonged period of time***." CP 65 (emphasis added); CP 200-01. This is a domestic violence aggravating sentencing factor pursuant to RCW 9.94A.535(3)(h)(i).

In defining the aggravator factor for the jury, the trial court provided the jury with WPIC 300.17, an instruction that told the jury that "[t]he term 'prolonged period of time' means more than a few weeks." CP 65. On May 27, 2015, the jury answered "yes," to the aggravating factor. CP 60-61. Two months later, but prior to the defendant's sentencing, the Supreme Court held that the language in WPIC 300.17 that states that "[t]he term 'prolonged period of time' means more than a few weeks," constitutes an impermissible judicial comment on the evidence. Brush, 183 Wn.2d 550. Based on the Supreme Court's ruling, the State did not seek an exceptional sentence despite the jury's findings. 9RP at 681. However, in a likely oversight, the judgment and sentence includes the jury finding on the aggravating factor. CP 128. In resentencing the defendant, the aggravating factor must be vacated.

D. CONCLUSION

For the reasons cited above, this Court should remand this case for resentencing, a hearing that would include the following: (1) reduction of Felony Violation of a No Contact Order in count 1 to a misdemeanor, (2) a recalculation of the offender score on count 2 from a 14 to a 12 (although the standard range would remain at 63 to 84 months), (3) a recalculation of the offender score on count 3

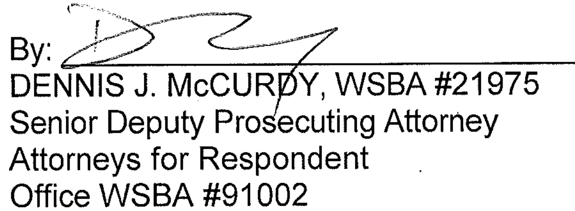
from a 7 to a 6 (with a new standard range of 22 to 29, and

(4) vacation of the sentence aggravator on counts 1 and 2.

DATED this 16 day of June, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney



By: ______________________
DENNIS J. McCURDY, WSBA #21975
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
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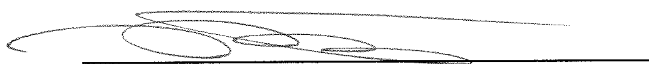
<u>Certificate of Service by Electronic Mail</u>

Today I directed electronic mail addressed to the attorneys for the appellant, Marla Zink, OF Washington Appellate Project, containing a copy of the Brief of Respondent, in <u>STATE V. HUTTON,</u> Cause No. 73945-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

06-16-16
Date