Supreme Court No. 96611-7
Division III, No. 35419-9-III

IN THE
SUPREME COURT
OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DYMON LEE WILLIAMS,

Petitioner

PETITION FOR REVIEW FOLLOWING
APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY

The Honorable Michael McCarthy

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Dymon Lee Williams asks this Court to accept review of the Court of Appeals' decision that affirmed his conviction for first degree burglary (Count 1).

B. DECISION FOR WHICH REVIEW IS SOUGHT

The Court of Appeals, Division III, unpublished opinion, filed on November 6, 2018. A copy of this opinion is attached as "Appendix A."

C. ISSUES PRESENTED FOR REVIEW

Issue 1: Whether this Court should accept review under RAP 13.4(b)(3) and (4), because Mr. Williams' right to due process was violated when there was insufficient evidence of first degree burglary, as the no contact order did not prohibit Mr. Williams from the residence and he had implied permission to be in the residence.

D. STATEMENT OF THE CASE

On June 23, 2016, Yolanda Caldera Lazo[1] hosted a birthday party for one of her children. RP 81, vol. II.[2] Dymon Lee Williams was present. RP 81, vol. II. Later that evening, Caldera Lazo and Williams conceived a child together. RP 82, 87, vol. II.

Almost two days later, in the early morning hours of June 25, 2016, Caldera Lazo returned home from work at a restaurant. RP 66, vol.

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[1] On the record, Ms. Caldera Lazo indicated her preference to be called "Ms. Caldera." RP 65, vol. II. Because a majority of the court documents on this direct appeal refer to her as "Yolanda Caldera Lazo" this brief will refer to her as "Caldera Lazo."

[2] Three different volumes were transcribed in this case. This brief will refer to the volume transcribed by Amy M. Brittingham and the court dates therein (November 18, 2016 through July 7, 2017) as "vol. I." This brief will refer to the volume transcribed by Joan E. Anderson and the court dates therein (May 22–25, 2017) as "vol. II." The third volume will not be referenced in this brief.

II. Caldera Lazo resided in a home on Clinton Way, in Yakima, Washington. RP 64, vol. II. Not long after she returned from work, Mr. Williams entered the house through an open bedroom window while Caldera Lazo was in the bathroom. RP 67, vol. II. Caldera Lazo was sitting on the toilet when Mr. Williams appeared. RP 67, vol. II. While she was sitting, Mr. Williams grasped Caldera Lazo's underwear and pulled them off. RP 68, vol. II. Mr. Williams appeared to be intoxicated or on drugs, and he accused Caldera Lazo of sleeping with other people and using drugs. RP 67–68, vol. II. The couple began arguing, and continued until approximately 7:00 in the morning, when Mr. Williams finally left. RP 67–69, vol. II.

The State charged Mr. Williams with first degree burglary (Count 1), and felony violation of a protection order (Counts 2, 3, and 4). CP 157–58. All charges involved domestic violence. CP 157–58.

The no contact order relevant to the felony violations of a protection order in Counts 2, 3, and 4, prohibited Mr. Williams from making contact with Caldera Lazo. State's Ex. 3, p. 1; RP 32, vol. II. The order also contains the following language:

> Do not knowingly enter, remain, or come within _____ (1,000 feet if no distance entered) of the protected person's residence, school, workplace, other: ☒ person ☐ children's school or daycare ☐ _____

State's Ex. 3, p. 1; RP 32, vol. II.

Caldera Lazo's testimony at a jury trial was consistent with the facts above. RP 63–88, vol. II. She also testified she and Mr. Williams had been

in a prior relationship, which lasted about four years, and that he is the father of two of her children (one of which was conceived close to the date of the incident). RP 65–66, 80, vol. II. Mr. Williams had resided previously with Caldera Lazo in the home on Clinton Way. RP 80, vol. II. Caldera Lazo testified that during the incident in question on June 25, 2016, Mr. Williams was going through the house and gathering his belongings. RP 69–70, 82, vol. II. She also testified she told Mr. Williams to leave, but then appeared to equivocate by stating she could not quite recall the conversation and at what point she told Mr. Williams to leave. RP 85, vol. II.

At trial, Mr. Williams stipulated that on August 2, 2016, and August 8, 2016, he contacted Caldera Lazo by phone from the Yakima County Jail. RP 89, vol. II; State's Ex. 16. These phone calls were the basis for the charges in Counts 3 and 4 (felony violations of a protection order). CP 158–59.

A jury found Mr. Williams guilty on all counts. CP 525–33; RP 151–52, vol. II. The jury also found Mr. Williams and Caldera Lazo were members of the same family or household, classifying the offenses as domestic violence. CP 157–59, 525–33; RP 151–52, vol. II.

The Court of Appeals affirmed Mr. Williams' convictions, but remanded the case for reconsideration of discretionary legal financial obligations. *See* Appendix A. Mr. Williams now seeks review by this Court.

E. ARGUMENT

A petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

Issue 1: Whether this Court should accept review under RAP 13.4(b)(3) and (4), because Mr. Williams' right to due process was violated when there was insufficient evidence of first degree burglary, as the no contact order did not prohibit Mr. Williams from the residence and he had implied permission to be in the residence.

Review by this Court is merited because the issue of whether there was insufficient evidence to convict raises a significant question of law under the Washington and United States Constitutions: a defendant's right to due process of law. *See* U.S. Const., amends. V and XIV; Const. Art. I, § 3; *State v. Smith*, 155 Wn.2d 496, 502, 120 P.3d 559, 562 (2005). Review is also merited because ensuring the right to due process for a defendant is an issue of substantial public interest. RAP 13.4(b)(4).

There was insufficient evidence to support Mr. Williams' conviction for first degree burglary. In order to find Mr. Williams guilty of first degree burglary, the jury had to find Mr. Williams "entered or remained unlawfully"

in a building. RCW 9A.52.020. The evidence presented at trial did not clearly establish whether Mr. Williams was without permission to enter or remain in Ms. Caldera Lazo's home. A rational jury could not have found Mr. Williams guilty of first degree burglary beyond a reasonable doubt. Therefore, the evidence is insufficient to support Mr. Williams' conviction of first degree burglary.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220–22, 616 P.2d 628 (1980)). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)).

"Circumstantial evidence and direct evidence are equally reliable." *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Circumstantial evidence "is sufficient if it permits the fact finder to infer the finding beyond a reasonable doubt." *State v. Askham*, 120 Wn. App. 872, 880, 86 P.3d 1224

(2004) (citing *State v. King,* 113 Wn. App. 243, 270, 54 P.3d 1218 (2002)). The appellate court "defer[s] to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *Thomas*, 150 Wn.2d at 874875.

Sufficient means more than a mere scintilla of evidence; there must be that quantum of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved. *State v. Fateley*, 18 Wn. App. 99, 102, 566 P.2d 959 (1977). The remedy for insufficient evidence to prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

"[A] criminal defendant may always challenge the sufficiency of the evidence supporting a conviction for the first time on appeal." *State v. Sweany*, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011), *aff'd*, 174 Wn.2d 909, 281 P.3d 305 (2012) (citing *State v. Hickman,* 135 Wn.2d 97, 103 n. 3, 954 P.2d 900 (1998)); *see also* RAP 2.5(a)(2) (stating "a party may raise the following claimed errors for the first time in the appellate court . . . failure to establish facts upon which relief can be granted. . . ."). "A defendant challenging the sufficiency of the evidence is not obliged to demonstrate that the due process violation is 'manifest.'" *Id.*

To find Mr. Williams guilty of first degree burglary, the jury had to find he entered or remained unlawfully in a building with the intent to commit a crime against a person or property inside the building, and also that he assaulted a person while in the building or in immediate flight from the

building. RP 113–114, vol. II; CP 510; *see also* RCW 9A.52.020(1)(b)(first degree burglary).

Here, the evidence was insufficient that Mr. Williams entered or remained unlawfully because the no contact order did not prohibit Mr. Williams from Caldera Lazo's residence, and he had implied permission to be inside her home.

For the purposes of first degree burglary, a person "enters or remains unlawfully in or upon premises when he . . . is not then licensed, invited, or otherwise privileged to so enter or remain." CP 511; RP 114, vol. II; RCW 9A.52.010(2).

"[I]n determining whether an offender's presence is unlawful, courts must turn to whether the perpetrator maintained a licensed or privileged occupancy of the premises." *State v. Wilson*, 136 Wn. App. 596, 606, 150 P.3d 144 (2007). Cases involving domestic violence can pose a lack of certainty when determining whether an offender's presence is lawful. *Id.* at 606–07. For example, in *Wilson*, the defendant was found not to have committed burglary because despite an existing no contact order, which prohibited him from contacting his girlfriend but did not prohibit him from the residence itself, several factors showed he had permission from his girlfriend to be in the residence. *Id.* at 604–08. Defendant Wilson had co-signed for the lease on the residence, had keys to the home, he stored his clothes and automobiles at the residence, no evidence was presented that he lived elsewhere, and Wilson's girlfriend referred to the residence as "our house." *Id.* at 607. The court found these factors were evidence Wilson had

his girlfriend's permission to live in the residence at the time of the charged burglary. *Id.* Division II further expounded upon the burglary statute's purpose versus that of the no contact order:

> Although the purpose of a no-contact order is to prevent a victim from having to face her batterer, the burglary statute's intent is to allow an occupant to prevent all those who are unwelcome from entering the premises. *It is the consent, or lack of consent*, of the residence possessor, not the State's or court's consent or lack of consent, *that drives the burglary statute's definition of a person who "is not then licensed, invited, or otherwise privileged to so enter or remain" in a building.*

Id. at 608–09 (emphasis added).

In *State v. Collins*, the defendant was initially invited into the residence to use the telephone. *State v. Collins*, 110 Wn.2d 253, 254–55, 751 P.2d 837 (1988). However, because he remained in the residence after the phone call was complete and proceeded to commit crimes in the residence, he was found to have "unlawfully remained." *Id.* at 255–61. The Washington Supreme Court held in some cases, depending on the specific facts, a "limitation or revocation of the privilege to be on the premises may be inferred from the circumstances of the case." *Id.* at 261– 62. And yet, in so holding, the Court emphasized this did not necessarily "convert all indoor crimes to burglaries." *Id.* at 262.

A no contact order "is not applicable to the charged crime if it is not issued by a competent court, is not statutorily sufficient, is vague or inadequate on its face, or otherwise will not support a conviction of violating the order." *State v. Miller*, 156 Wn.2d 23, 31, 123 P.3d 827 (2005). The

validity of a no contact order is solely within the province of the trial court, not the jury. *Id.* at 30–31. Yet the *Miller* court recognized that in some instances, issues regarding the sufficiency of the evidence relating to a no contact order may exist due to the specific facts of a particular case. *Id.* at 31–32.

The evidence was insufficient to convict. In ruling to the contrary, the Court of Appeals found Mr. Williams was excluded from the residence by the protection order and therefore his entry into Caldera Lazo's home was unlawful. *See* Appendix A., pg. 3-4. The Court determined the protection order expressly prohibited Mr. Williams from coming within 1,000 feet of Caldera Lazo's residence:

> Do not knowingly enter, remain, or come within _____ (1,000 feet if no distance entered) of the protected person's residence, school, workplace, other: ☒ person ☐ children's school or daycare ☐ _____

See Appendix pg. 4.

However, contrary to the Court of Appeals' conclusion, the order did not clearly exclude Mr. Williams from the residence. State's Ex. 3, p. 1. In this case, the no contact order is unclear as to which locations Mr. Williams was supposed to avoid. State's Ex. 3, p.1; RP 32, vol. II. The no contact order prohibits Mr. Williams from remaining or coming within 1,000 feet of Caldera Lazo, and the box labeled "other" in subsection "C" is checked, indicating as such. State's Ex. 3, p. 1. Yet subsection "C" of the order does not list a specific residential address, is unclear as to whether everything listed in that section is excluded or included because the sentence does not use the word "and", and the box check marked "other" can be

reasonably read to mean exclusion of the remaining options in the sentence (residence, school, workplace) because the inclusion of one generally means the exclusion of others. *Id.*

By way of analogy, a maxim of statutory construction called "expressio unius est exclusio alterius" holds that when "a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature." *State v. Swanson*, 116 Wn. App. 67, 75, 65 P.3d 343 (2003) (citation and quotations omitted). The same principle applies here: because of the inclusion of "other: ☒ person" in subsection "C" without the inclusion of the other locations (for instance, there is no "and" to make it clear whether the locations are all included), the other locations are impliedly excluded. State's Ex. 3, p. 1. The only portion of the no contact order which is straightforward is the language ordering Mr. Williams not to come within 1,000 feet of Ms. Caldera Lazo. State's Ex. 3, p.1.

The no contact order's language was a significant factor for the burglary conviction in *Wilson*, because the defendant there was prohibited from contacting his girlfriend but was not prohibited from her residence. *Wilson*, 136 Wn. App. at 604–08. The Court of Appeals does not address *Wilson* at all in its opinion. *See* Appendix pg. 3-4. Yet in *Wilson*, the court found helpful the following: the no contact order did not prohibit the defendant from entering a specific residence, boxes on the no contact order form were left unchecked (residence, workplace, school, and daycare), and there were checked boxes on other portions of the form prohibiting other types of contact

with the victim. *Id.* at 604–05. Because the no contact order in this case is similar to that in *Wilson*, the no contact order here was not a sufficient basis upon which the State could prove Mr. Williams unlawfully entered or remained in Caldera Lazo's residence. State's Ex. 3, p.1; *Wilson*, 136 Wn. App. at 604–08. The no contact order here was unclear, and thus it provided insufficient evidence Mr. Williams unlawfully entered or remained in the residence, which is an essential element of first degree burglary. *Id.*

Since the no contact order did not prohibit Mr. Williams from Caldera Lazo's residence, the inquiry must now turn to whether the State sufficiently proved Mr. Williams did not have other permission to be in the residence.

Several factors indicate Mr. Williams had implied permission to be in Caldera Lazo's residence. On June 23, 2016, and less than 48 hours prior to the incident which led to the charge of burglary, Mr. Williams was in Caldera Lazo's home for a birthday party. RP 80–81, vol. II. It was later that same evening when Caldera Lazo conceived a child by Mr. Williams. RP 82, 87, vol. II. The intimate act shows Mr. Williams had implied permission to be in the residence. *Id.*

Mr. Williams also stored some of his belongings in the home. RP 69–70, 84–85, vol. II. Although the facts showed Mr. Williams climbed into an open window of the home in the early morning hours of June 25th, no sign of damage or forced entry to the home was found. RP 84, 94 vol. II. Finally, Ms. Caldera Lazo's testimony regarding whether she told Mr. Williams to leave is at issue, as she could not quite recall when she told him to leave and

it seems almost uncertain whether she did tell him to leave because she could not recall the conversation. RP 85, vol. II. These facts all point to Mr. Williams having implied permission to be at the residence.

No rational trier of fact could have found beyond a reasonable doubt that Mr. Williams entered or remained unlawfully in Caldera Lazo's residence. *See State v. Salinas*, 119 Wn.2d 192, 201. Mr. Williams was intimate with Caldera Lazo barely more than a day before the incident, he stored belongings in the home, no damage or sign of forced entry into the home was presented as evidence, and Caldera Lazo's testimony as to whether she asked Mr. Williams to leave is questionable due to her inability to recall the details. Finally, the no contact order did not prohibit Mr. Williams from being in the residence, or at least was unclear or ambiguous as to whether it did. The facts are similar to those in *State v. Wilson*, and there was insufficient evidence here to prove first degree burglary. *Wilson*, 136 Wn. App. 596.

The conviction in Count 1 for first degree burglary should be vacated for insufficient evidence.

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E. CONCLUSION

For the reasons stated herein, Mr. Williams respectfully requests that this Court grant review pursuant to 13.4(b).

Respectfully submitted this 6th day of December, 2018.

Laura M. Chuang, WSBA #36707

/s/ Kristina M. Nichols
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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Plaintiff/Respondent vs. DYMON LEE WILLIAMS Defendant/Appellant	)	COA No. 35419-9-III PROOF OF SERVICE

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on December 6, 2018, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the attached Petition for Review to:

Dymon L. Williams, DOC #361527
Victor B-203
Washington State Penitentiary
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Having obtained prior permission from the Yakima County Prosecutor's Office, I also served the Respondent State of Washington at appeals@co.yakima.wa.us using the Washington State Appellate Courts' Portal.

Dated this 6th day of December, 2018.

/s/ Kristina M. Nichols
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APPENDIX A

FILED
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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. DYMON LEE WILLIAMS, Appellant.	)	No. 35419-9-III UNPUBLISHED OPINION

KORSMO, J. — Dymon Williams appeals from convictions for first degree burglary and three counts of felony violation of a protection order (VPO). We affirm the convictions and remand for the trial court to reconsider Mr. Williams' ability to repay his financial obligations.

FACTS

Mr. Williams was charged in the Yakima County Superior Court with the noted offenses. The VPO charges all arose from an order of protection that prevented Mr. Williams from coming within 1,000 feet of Yolanda Caldera or her home. Williams is the father of two of Ms. Caldera's three children and had briefly lived at her residence in the past.

Despite the protection order, Mr. Williams was present at a birthday party held at Ms. Caldera's home on June 23, 2016. He spent the ensuing night with her. Two nights

later, around 2:00 a.m., he broke into the house through a bedroom window while Ms. Caldera was in the bathroom. When she returned to her bedroom, he confronted her about seeing other men. He took the SIM card out of her telephone so that she could not place a call. When he left around 7:00 a.m., she was able to call a friend to contact the police.

The jury returned guilty verdicts on all four charges and also entered special findings in each case that Williams and Caldera were members of the same household. The court calculated the offender score at 13 for the burglary and 11 for the VPO counts. The court imposed an exceptional sentence of 140 months on the burglary count due to the high offender score resulting in the additional crimes going unpunished.

Mr. Williams appealed to this court. A panel considered the case without hearing oral argument.

ANALYSIS

This appeal challenges the sufficiency of the evidence on the burglary count, the adequacy of counsel's representation at trial, the calculation of the offender score, and the imposition of discretionary legal financial obligations (LFOs). We address the issues in that order.

Sufficiency of the Evidence

Review of this issue is in accord with long settled standards. This court reviews the appellate record to determine if there was evidence from which the trier of fact could find each element of the offense proved beyond a reasonable doubt. *Jackson v. Virginia*,

443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). The reviewing court will consider the evidence in a light most favorable to the prosecution. *Id.* The appellate court's focus is on the evidence actually presented to the jury. *State v. Jackson*, 82 Wn. App. 594, 608, 918 P.2d 945 (1996). Reviewing courts also must defer to the trier of fact "on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-875, 83 P.3d 970 (2004). "Credibility determinations are for the trier of fact and are not subject to review." *Id.* at 874.

As charged in this case, a person commits the crime of first degree burglary if he enters or remains unlawfully in a building and assaults a person therein. RCW 9A.52.020(1)(b); Clerk's Papers at 157. Mr. Williams argues that the protection order did not expressly exclude him from Ms. Caldera's residence, thereby preventing his entry from being unlawful. He also claims that he had Ms. Caldera's implicit permission to be in the building because of his visit two days earlier.[1] However, because the court order excluded him from the building, she was unable to grant him consent to enter. *See State v. Sanchez*, 166 Wn. App. 304, 308, 271 P.3d 264 (2012).

[1] At trial, defense counsel argued the burglary case on the theory that the State had not proved its case because Ms. Caldera was not a reliable witness and was biased against him.

Thus, the only remaining question is whether the protection order excluded Mr. Williams from the building. It did. The provision in question reads:

> Do not knowingly enter, remain, or come within _____ (1,000 feet if no distance entered) of the protected person's residence, school, workplace, other: ☒ person ☐ children's school or daycare ☐ _____

Ex. 3.

The terms of the order expressly prohibit Mr. Williams from coming within 1,000 feet "of the protected person's residence." Inside the residence is certainly within 1,000 feet of it. The building also was protected while Ms. Caldera was inside since he also could not get within 1,000 feet of her. For both reasons, his entry into her home was unlawful.

The evidence supported the jury's verdict.

Ineffective Assistance of Counsel

Mr. Williams next contends that his counsel provided ineffective assistance by failing to object to portions of documents that established his prior convictions for VPO. He has not established that he was prejudiced by the alleged error.

The standards governing this claim are equally well settled. Counsel's failure to live up to the standards of the profession will require a new trial when the client has been prejudiced by counsel's failure. *State v. McFarland*, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions. A strategic or tactical decision is not a basis for finding error.

Strickland v. Washington, 466 U.S. 668, 689-691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under *Strickland*, courts apply a two-prong test: whether or not (1) counsel's performance failed to meet a standard of reasonableness and (2) actual prejudice resulted from counsel's failures. *Id.* at 690-692. When a claim can be resolved on one ground, a reviewing court need not consider both *Strickland* prongs. *Id.* at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

In instances, as here, where counsel failed to object to the admission of evidence, the *Strickland* standard requires the defendant show that the failure to object fell below professional norms, that the objection would have been sustained, that counsel was not acting for tactical reasons, and that the outcome of the trial would have been different. *State v. Sexsmith*, 138 Wn. App. 497, 509, 157 P.3d 901 (2007). The first three portions of that test address the question of whether counsel erred, while the fourth addresses the question of actual prejudice.

At issue are portions of Exhibits 4, 5 and 6, complaints filed in the Yakima Municipal Court and accompanying fingerprint records from jail booking in those cases. One of the complaints alleged a count of malicious mischief that was dismissed and a violation of a protection order that was proved. Ex. 5. The fingerprint records reflect the arrest on the two charges and on a different VPO charge. Ex. 6.

The exhibits were admissible to prove prior convictions for violation of the protection order, one of the elements of the felony VPO charges. The fingerprint records

were admitted, in conjunction with the testimony of a fingerprint expert, to prove the identity of Mr. Williams as the person who committed the prior offense. This evidence was necessary and clearly was admissible to prove elements of the charges against Mr. Williams. The parties agreed to the admission of redacted copies of the documents that removed references to most other arrests and charges.

Nonetheless, appellant now argues that the references to the malicious mischief charge and other offenses were extremely prejudicial and would have been removed if his attorney had objected at trial. That last point is difficult to determine, just as it is impossible on this record to determine what defense counsel's thinking may have been. The reference to the malicious mischief charge was clearly harmless since the jury was told by the judgment and sentence that the charge was dismissed. The only other offense listed anywhere was a criminal trespass charge mentioned on the fingerprint sheet. Since that charge was in the first position and its removal would have been obvious, it is quite possible that it was left on so that the jury did not speculate that some more significant charge might have been the basis for the arrest.

For those reasons, we do not believe that Mr. Williams has established that his counsel was not acting strategically, let alone shown that counsel erred. He also does not persuasively argue that the reference to two misdemeanor charges, one of which was shown to have been dismissed, was so significantly prejudicial that his right to a fair trial was abridged.

Mr. Williams has not established that his counsel performed ineffectively.

Same Criminal Conduct

Mr. Williams argues that the trial court erred by treating the burglary and VPO charges as separate offenses for scoring. The trial court did not abuse its discretion.

The governing principle is found in RCW 9.94A.589(1)(a). When imposing sentence under that subsection, courts are required to include each other current offense in the offender score unless one or more of those offenses constitute the same criminal conduct, in which case they shall be "counted as one crime." The statute then defines that particular exception to the scoring rule: "'Same criminal conduct,' as used in this subsection, 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.*

It is the defendant's burden to establish that offenses constitute the same criminal conduct. *State v. Graciano*, 176 Wn.2d 531, 540-541, 295 P.3d 219 (2013). We review the trial court's ruling on this issue for abuse of discretion. *Id.* at 541. An additional factor at play in this computation is the burglary anti-merger statute. RCW 9A.52.050. This statute gives trial courts the authority to treat burglary offenses separately even when the underlying crime would otherwise constitute the same criminal conduct. *State v. Lessley*, 118 Wn.2d 773, 781-782, 827 P.2d 996 (1992).

Although defense counsel argued that the two offenses should be treated as one, primarily arguing that the assaultive behavior was common to both the burglary and VPO

charges, the trial court declined to do so. The court did not explain its reasoning, but several reasons suggest themselves.

First, as the prosecutor argued, the VPO charge was based on the two prior convictions rather than the assaultive behavior. Second, the anti-merger statute gave the court discretion to score the offenses separately even if they otherwise constituted the same criminal conduct. Third, the VPO was established before the burglary was even committed. Mr. Williams only needed to be within 1,000 feet of Ms. Caldera to establish the VPO charge.

For all of those reasons, Mr. Williams cannot establish that the trial court acted on untenable grounds or for untenable reasons. Accordingly, he has not established that the trial court erred in computing his offender score.

Legal Financial Obligations

Lastly, Mr. Williams contends that the trial court erred in considering his ability to pay discretionary court costs. We agree and remand for a new sentencing hearing in accordance with *State v. Ramirez*, ___ Wn.2d ___, 426 P.3d 714 (2018).

The trial court imposed a $250 cap on jail incarceration costs, although it did not check the box on the judgment and sentence form that expressly imposed the costs. The court also imposed the mandatory $500 crime victim penalty assessment and the $100 DNA collection fee.

After the appeal was filed, the Washington Supreme Court released *Ramirez*. Among its holdings, the court concluded that the 2018 amendments governing LFO obligations were retroactive to any case still pending on direct appeal. *Id.* at 722. The court also expanded upon the necessary questions the trial court needed to ask in order to afford a proper understanding of the defendant's ability to pay discretionary LFOs. *Id.* at 722-723.

Here, Mr. Williams challenged the sufficiency of the court's inquiry in his initial brief. After *Ramirez*, we agree that the trial court's inquiry was insufficient. Accordingly, we remand for additional consideration of Mr. Williams' ability to pay incarceration costs and, potentially, the DNA fee. If the court determines it should strike the fees in accordance with its previous ruling, there need not be a new sentencing hearing.

The convictions are affirmed. The case is remanded for consideration of the discretionary LFOs.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Fearing, J.

Pennell, A.C.J.

OF COUNSEL NICHOLS LAW FIRM PLLC

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