Supreme Court No. 99147-2
(COA No. 78856-6-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FRANCISCO MORENO,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Francisco Moreno, petitioner here and appellant below, asks this Court to accept review of the published Court of Appeals decision, filed August 17, 2020, terminating review. The Court of Appeals denied a motion to reconsider on September 24, 2020. RAP 13.3(a)(1), 13.4(b).

B. ISSUES PRESENTED FOR REVIEW

1. Burglary requires a person unlawfully enter or remain in a building, and a person must know of the unlawfulness of this entry or remainder. Knowledge is part of the common law defining burglary and is an essential element of the lesser included offense of trespass. The Court of Appeals held trespass is not a lesser included offense of burglary and therefore knowledge of the unlawfulness is not an element of the offense of burglary. The Court of Appeals opinion holding trespass is not a lesser included offense of burglary is contrary to decisions from this Court and other Court of Appeals decisions.

2. Essential to the crime of burglary is not only that a person is somewhere he has no right to be, but that he *knows* he has no right to be there. The State must allege all essential elements in the information, and courts must instruct jurors on all essential elements in the "to-convict" instruction. The Court of Appeals erred in affirming Mr. Moreno's conviction for burglary where this contested essential element was not

charged in the information and not presented to the jury in the "to convict" instruction.

3. The right to a fair trial and the discovery rules require the State to disclose certain evidence before trial, as well as any other information the court orders disclosed in its discretion. The court ordered the State to disclose its intent to use any of the calls Mr. Moreno made from jail, and, although the State made no such disclosures, the court permitted it to introduce statements from the calls. Contrary to several Court of Appeals decisions, both the trial and appellate court excused the State's failure to identify the calls and found it did not violate discovery obligations because the statements were rebuttal and impeachment evidence.

4. The domestic violence penalty assessment is a discretionary legal financial obligation (LFO). This Court has repeatedly interpreted LFO statutes to prohibit the imposition of discretionary LFOs on indigent individuals. The trial court imposed this assessment even though it found Mr. Moreno was indigent, and the Court of Appeals affirmed the imposition because it held the assessment was not a cost of prosecution. The statute and this Court's precedent prohibit the imposition of this discretionary LFO on indigent defendants.

C. STATEMENT OF THE CASE

The State charged Francisco Moreno with first-degree burglary, fourth-degree assault, and interfering with the reporting of domestic violence for entering Ashley Vollmar's house and allegedly assaulting her. CP 162-63. At trial, the parties contested whether Mr. Moreno still lived in the house and whether he thought he had permission to be there.

Mr. Moreno moved into Ms. Vollmar's home shortly after they began dating in August 2017. 2RP[1] 186, 289-90. Ms. Vollmar testified she "kicked out" Mr. Moreno in October 2017, changed the locks, and that they were no longer living together by the time of the incident in April 2018, although she admitted they continued their relationship until January. 2RP 186-89. Mr. Moreno, conversely, testified he was still living at the residence with Ms. Vollmar at the time of the incident and they were still in a relationship. 2RP 289-90, 294, 300, 303, 316. Ms. Vollmar agreed that Mr. Moreno still came to the house regularly and had spent the night at the house with her permission as recently as the week of the incident. 2RP 208-09, 215-16.

Ms. Vollmar claimed that, on the day of the incident, she retrieved her car, which Mr. Moreno had taken without her permission earlier in the

[1] The VRPs for the trial and post-trial dates are paginated consecutively and referred to by volume and page. The VRPs for the pretrial dates are referred to by date and page.

week. 2RP 208-11, 214-16. When Mr. Moreno called her to confront her, she lied to him about taking the car. 2RP 215, 217. According to Ms. Vollmar, Mr. Moreno called again, threatened to assault her, and then broke into her house and did assault her. 2RP 193-94, 217-18. Ms. Vollmar called 911 shortly before Mr. Moreno entered the house. 2RP 191. Police arrested him in the driveway. 2RP 231, 245, 272.

Mr. Moreno explained they shared the car and that he had left his cellphone, house keys, and wallet in the car while it was parked at a bar. 2RP 293-96, 303-06. Ms. Vollmar was upset with him because he had been spending time with the mother of his son instead of with her. 2RP 295-96. When he discovered the car missing, he sought a ride home. 2RP 296-97. Upon arriving, he did not have his keys, which had been left in the car. 2RP 297. After knocking without response, he accidentally burst through the back door trying to get in. 2RP 297-98, 307, 310.

As soon as Mr. Moreno entered their bedroom and turned on the light, Ms. Vollmar threw Mr. Moreno's telephone at him, which she had retrieved from the car she took. 2RP 298, 307-08; 3RP 386. In addition to much yelling and screaming, the two of them wrestled as Mr. Moreno tried to retrieve his wallet, which Ms. Vollmar had also taken from the car. 2RP 298-99, 308. Ms. Vollmar yelled at Mr. Moreno to leave, which he did. 2RP 298-99, 308.

Before trial, Mr. Moreno moved the court to order the State to identify "what specific phone calls they plan on using" at trial from a compact disc of all of the telephone calls Mr. Moreno made from jail. 6/29/18RP 44. The court granted the motion and ordered the State to disclose the identity of any calls it intended to use by July 2, 2017. 6/29/18RP 46; CP 187.

The State never disclosed any telephone calls they intended to use at trial. 3RP 328-31. Despite this, the court allowed the State to introduce statements from jail calls over Mr. Moreno's objections. 3RP 327-49. The State introduced statements by Mr. Moreno that he was not staying at their residence and that the car was taken from him not when he was at a bar but at another residence. 3RP 345, 366-68, 372-76.

D. ARGUMENT

1. The Court of Appeals ignored this Court's precedent, its own opinions, and the common law presumption in favor of a mens rea element to conclude that knowledge of the unlawfulness is not an essential element of burglary.

Where a fact is "necessary to establish the very illegality" of an offense, it is essential element. *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013) (quoting *State v. Ward*, 148 Wn.2d 803, 811, 64 P.3d 640 (2003)). For burglary, knowledge of the unlawfulness of the entry or remaining is such a fact. Courts must interpret burglary to require proof

not only that the entry or remaining is unlawful in fact but also that the defendant *knew* the entry or remaining was unlawful.

The State did not allege knowledge of the unlawfulness in the information and the court did not instruct the jury the prosecution must prove knowledge of the unlawfulness. Because this contested essential element was lacking in the information and the "to convict" jury instruction, Mr. Moreno's conviction for burglary must be reversed, and the Court of Appeals erred in affirming his conviction. This Court should accept review. RAP 13.4(b).

a. <u>The law of lesser included offenses demonstrates knowledge of the unlawfulness of the entry or remaining is an essential element of burglary.</u>

This Court and all three divisions of the Court of Appeals have long recognized that criminal trespass in the first degree is a legal lesser included offense of all three burglary offenses.[2] "[B]urglary is a criminal trespass with the added element of intent to commit a crime against a person or property therein." *State v. J.P.*, 130 Wn. App. 887, 895, 125 P.3d 215 (2005).

[2] Criminal trespass in the first degree is lesser included offense of burglary in the first degree, *State v. Southerland*, 109 Wn.2d 389, 390, 745 P.2d 33 (1987); *State v. Mounsey*, 31 Wn. App. 511, 517-18, 643 P.2d 892 (1982), of burglary in the second degree, *State v. Olsen*, 182 Wn. App. 362, 375, 329 P.3d 121 (2014); *State v. Allen*, 127 Wn. App. 945, 950, 113 P.3d 523 (2005); *State v. Soto*, 45 Wn. App. 839, 841, 727 P.2d 999 (1986), and of residential burglary, *State v. Pittman*, 134 Wn. App. 376, 384, 166 P.3d 720 (2006); *State v. J.P.*, 130 Wn. App. 887, 895, 125 P.3d 215 (2005).

Trespass requires knowledge of the unlawfulness of the entry in addition to proof of the unlawfulness in fact. RCW 9A.52.070(1); *State v. R.H.*, 86 Wn. App. 807, 812-13, 939 P.2d 217 (1997); *State v. Soto*, 45 Wn. App. 839, 841, 727 P.2d 999 (1986); *State v. Mounsey*, 31 Wn. App. 511, 517, 643 P.2d 892 (1982). RCW 9A.52.070(1) provides, "A person is guilty of criminal trespass in the first degree if he or she knowingly enters or remains unlawfully in a building." Courts have recognized this requires a subjective knowledge of the unlawfulness of the entry or remaining that is separate from the unlawfulness in fact. *R.H.*, 86 Wn. App. at 812-13; *Soto*, 45 Wn. App. at 841; *Mounsey*, 31 Wn. App. at 517. The pattern jury instruction also demonstrates the element of knowledge of the unlawfulness. 11A Wash. Prac., Pattern Jury Instr., Crim. WPIC 60.16 (4th ed. 2016) (including as element in "to convict" instruction, "That the defendant knew that the entry or remaining was unlawful").

Following the logic of the law of lesser included offenses, if knowledge of the unlawful entry or remaining is an essential element of trespass, it must also be an essential element of the greater offense of burglary. By definition, a lesser included offense has every element of the greater offense. *State v. Workman*, 90 Wn.2d 443, 447-49, 584 P.2d 382 (1978). Because knowledge of the unlawfulness is an element of trespass,

and trespass is a lesser included offense of burglary, knowledge of the unlawfulness is an element of burglary.

b. The common law further demonstrates knowledge of the unlawfulness of the entry or remaining is an essential element of burglary.

The historical importance of the actor's mens rea as an essential element also shows one's underlying mental state is part of burglary. There is "a longstanding presumption, traceable to the common law," that criminal statutes require proof of "a culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent conduct.'" *Rehaif v. United States*, __ U.S. __, 139 S. Ct. 2191, 2195, 204 L. Ed. 2d. 594 (2019) (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994)); *State v. Anderson*, 141 Wn.2d 357, 363-64, 5 P.3d 1247 (2000). "[W]rongdoing must be conscious to be criminal." *Morissette v. United States*, 342 U.S. 246, 252, 72 S. Ct. 240, 96 L. Ed. 288 (1952).

At common law, the requirement of "a guilty mind" was necessary to establish the very illegality of the offense of burglary. *State v. Montague*, 10 Wn. App. 911, 918, 521 P.2d 64 (1974) (interpreting common law burglary to require "a guilty mind" to satisfy the "unlawful entry" element). If a defendant lacks the knowledge that his or her

entering or remaining is unlawful, he lacks "a guilty mind" as to one of the essential elements of burglary.

c. The Court of Appeals ignored this Court's precedent and decades of cases recognizing trespass is a lesser included offense to wrongly conclude knowledge of the unlawfulness is not an essential element of burglary.

The Court of Appeals ruled knowledge of the unlawful nature of the person's entry or remainder in a building is not an essential element of burglary. Slip Op. at 6-11. In doing so, the court ignored precedent from this Court and disregarded its own opinions and instead erroneously relied on dicta from a 33-year-old Court of Appeals' opinion to reject Mr. Moreno's argument. Slip Op. at 8-10.

In *State v. Kilponen,* the court stated in dicta that burglary does not require proof the defendant knew he was acting unlawfully. 47 Wn. App. 912, 919-20, 737 P.2d 1024 (1987). However, as the Court of Appeals acknowledged in its opinion, *Kilponen*'s conclusion that burglary does not require knowledge of the unlawfulness was not essential to the resolution of the case. Slip. Op. at 9. In *Kilponen,* the defense proposed the instruction, which lacked knowledge of the unlawfulness, that the defendant then challenged on appeal. Therefore, the court did not need to consider his argument to resolve the appeal because the error was invited. *Kilponen*, 47 Wn. App. at 919. The court here nonetheless followed that case's dicta and dismissed Mr. Moreno's challenge. Slip Op. at 9.

The court abandoned well-established law and held, contrary to cases dating back to the adoption of the Revised Code of Washington in 1975, that trespass is not a lesser included offense of burglary. Slip Op. at 8-11. In doing so, the Court ignored binding precedent from this Court holding to the contrary.

In *State v. Southerland*, this Court ruled trespass is a lesser included offense of burglary. The court affirmed the reversal of a burglary conviction where the trial court failed to instruct the jury on trespass. 109 Wn.2d 389, 390, 745 P.2d 33 (1987). This Court held:

> The Court of Appeals was correct in its legal analysis regarding the failure of the trial court to instruct the jury on criminal trespass and in its conclusion that such failure was reversible error under the facts of this case with regard to the burglary conviction.

Id. The Court affirmed the Court of Appeals' legal analysis that the trial court erred in denying a trespass instruction as a lesser included offense of burglary where the facts warranted it. *Id.*; *State v. Southerland*, 45 Wn. App. 885, 888-90, 728 P.2d 1079 (1986).

A defendant is entitled to a lesser included offense instruction only where every element of the lesser offense is a necessary element of the greater and where the evidence supports an inference the defendant committed the lesser offense. *Workman*, 90 Wn.2d at 447-49. The *Southerland* court necessarily agreed trespass is a lesser included offense

of burglary when it affirmed reversal of a conviction based on the failure to provide this lesser included offense as an option for the jury.

The Court of Appeals ignored *Southerland* and instead deferred to the State's interpretation of a 1986 Court of Appeals case to dismantle decades of cases recognizing trespass as a lesser included offense. Slip Op. at 10 (discussing *Soto*, 45 Wn. App. at 840-41). The court also ignored cases holding "the unlawful entry element of criminal trespass is identical to the unlawful entry element of burglary." *State v. Cordero*, 170 Wn. App. 351, 370, 284 P.3d 773 (2012); *J.P.*, 130 Wn. App. at 895.

The Court of Appeals also rejected the common law presumption requiring a mens rea element because burglary requires the State to prove the defendant possessed the intent to commit a crime. Slip op. at 10-11. But the intent to commit a crime is a separate element. Possessing the intent to commit a crime does not establish the actor knew he was some place he was not legally permitted to be.

d. <u>The Court of Appeals affirmed Mr. Moreno's conviction for burglary despite the government's failure to allege all of the essential elements in the information and the court's failure to instruct the jury on all of the essential elements.</u>

The jury convicted Mr. Moreno of burglary, but the State never pled the essential element of knowledge of the unlawfulness in the information, and the court did not instruct the jury on this element in the "to convict" instruction. These errors prejudiced Mr. Moreno because the

issues of whether his presence in the house was unlawful, as well as whether he *knew* it was unlawful, were both contested at trial.

"[T]he accused . . . has a constitutional right to be apprised of the nature and cause of the accusation against him." *State v. Pry*, 194 Wn.2d 745, 751, 452 P.3d 536 (2019) (internal quotations omitted); U.S. Const. amends. VI, XIV; Const. art. I, § 22. Constitutional notice of the "nature and cause" of the charges against the accused requires the charging document to contain "all essential elements of the crime, statutory or otherwise, and the particular facts supporting them." *State v. Hugdahl*, 195 Wn.2d 319, 324, 458 P.3d 760 (2020); *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). Information that do not contain both the essential elements and a description of the specific conduct of the defendant which allegedly constituted the offense are constitutionally deficient. *Hugdahl*, 195 Wn.2d at 324.

The information here only alleged that Mr. Moreno entered and remained in Ms. Vollmar's residence, that the entry and remaining was unlawful, that he had the intent to commit a crime, and that he assaulted her. CP 162. The necessary element of knowledge of the unlawfulness is neither explicitly stated nor fairly implied under a liberal construction of the information. CP 162. Because the essential element of knowledge of the unlawfulness does not appear in the information, reversal is required

without proof of actual prejudice. *State v. Zillyette*, 173 Wn.2d 784, 786, 270 P.3d 589 (2012).

In addition, due process and the right to a jury trial require that the State prove every element of an offense to the jury. *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); Const. art. I, §§ 3, 22; U.S. Const. amends. VI, XIV. Jury instructions that relieve the State of its burden to prove each element beyond a reasonable doubt violate due process.

The court here did not instruct the jury that the State bore the burden of proving that Mr. Moreno *knew* his entry or remaining was unlawful. CP 127-28. Rather, the court instructed the jury it simply needed to find Mr. Moreno, in fact, entered or remained unlawfully, along with the other elements of burglary, to convict Mr. Moreno. CP 127-28. This was error.

The State cannot prove the omission of this element from the "to convict" instruction was harmless constitutional error. *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). The jury needed to decide whether the State proved Mr. Moreno knew his presence in the home was unlawful. Mr. Moreno testified he still lived there. 2RP 303, 316. He introduced records from the Department of Licensing establishing

the house as his residential address. Ex. 34. He said his clothes, personal items, and "pretty much everything" were at their house. 2RP 211, 292-95, 301. Mr. Moreno and Ms. Vollmar agreed he still received his checks there. 2RP 211, 215, 301. Given that this was a contested issue, the State cannot meet its burden to prove the instructional error was harmless. This Court should grant review.

2. The right to a fair trial and the criminal rules do not exempt rebuttal and impeachment evidence from discovery obligations, contrary to the Court of Appeals decision.

The court ordered the State to disclose its intent to use any of Mr. Moreno's calls from jail by a date certain before trial. The State said it was not using the calls but then introduced statements by Mr. Moreno contained in two of those calls. The introduction of the statements following the State's failure to identify them in accordance with the court's order violated Mr. Moreno's rights to due process and a fair trial.

Due process and the right to a fair trial require the State to notify the defendant of the evidence against him. *State v. Boyd*, 160 Wn.2d 424, 434, 158 P.3d 54 (2007); *State v. Greiff*, 141 Wn.2d 910, 920-21, 10 P.3d 390 (2000). CrR 4.7 clarifies these constitutional rights and mandates disclosure of certain evidence, as well as any other information a court orders disclosed in its discretion. *State v. Blackwell*, 120 Wn.2d 822, 826, 845 P.2d 1017 (1993). The State's failure to disclose evidence or comply

with a court's discovery order violates a defendant's constitutional right to a fair trial and the meaningful opportunity to present a complete defense. *Greiff*, 141 Wn.2d at 920; *Blackwell*, 120 Wn.2d at 826.

The State's discovery obligations are not limited to evidence it intends to present in its case in chief. *State v. Brush*, 32 Wn. App. 445, 455, 648 P.2d 897 (1982). "A prosecutor must also disclose relevant evidence if it is reasonably possible that the evidence will be used during any phase of the trial." *State v. Cole*, 117 Wn. App. 870, 879, 73 P.3d 411 (2003). Courts have repeatedly rejected narrower interpretations. *State v. Linden*, 89 Wn. App. 184, 193-94, 947 P.2d 1284 (1997); *State v. Dunivin*, 65 Wn. App. 728, 731-33, 829 P.2d 799 (1992). Instead, the State's obligation extends to information it could use in its "case-in-chief, for rebuttal, for impeachment purposes, or in some other way." *Dunivin*, 65 Wn. App. at 734 (internal quotations omitted).

The Court of Appeals incorrectly ruled the State could withhold its intent to use evidence against Mr. Moreno because it disclosed the calls. Slip. Op. at 11-16. But here the court ordered the State to disclose not only the evidence itself but also to identify the evidence it intended to use. The court ordered the State to identify the specific calls it planned to use at trial. 6/29/18RP 44, 46; CP 187. The court made no limitations on its

order. The State then affirmatively misled Mr. Moreno when it indicated it did not intend to use any of the calls as evidence at trial. 3RP 327-31.

Despite that, the State introduced statements about whether Mr. Moreno was staying at the residence with Ms. Vollmar and from where she took the car. 3RP 327-33, 367-68, 372-76. The court permitted the calls, finding them "proper rebuttal and impeachment," despite Mr. Moreno's objection based on the discovery order. 3RP 334. The Court of Appeals ruled the State complied with the order because it did not intend to introduce the calls until after Mr. Moreno testified. Slip. Op. at 15.

This was error. The State violated the court's discovery order that required it not only to disclose the calls but also to identify the calls it would use. There was more than a "reasonably possibility" these statements might be relevant. *Cole*, 117 Wn. App. at 879. The State knew a crucial part of Mr. Moreno's defense was that he still lived in the house with Ms. Vollmar and was not knowingly unlawfully present. CP 156-57, 168; 1RP 14-16; 2RP 155, 183-85, 300; 6/29/18RP 15. Rather than disclose its intent to use the calls in compliance with the discovery order, the State mislead Mr. Moreno. It was able to lie in wait and then benefit from its failure to comply with the court's order. The State did the very thing the court's order intended to eliminate.

The State's failure to disclose its intent to use the calls prejudiced Mr. Moreno and denied him a fair trial. The case consisted of a credibility contest between Mr. Moreno and Ms. Vollmar over, among other things, whether Mr. Moreno was still living at the residence. The State used the calls to discredit Mr. Moreno and to address a crucial disputed issue and an essential element of burglary: whether or not Mr. Moreno's presence was unlawful. Introducing the calls after the State represented it did not intend to use them violated Mr. Moreno's right to a fair trial. This Court should accept review.

3. The Court of Appeals disregarded the plain language of the statute and this Court's precedent that courts should not interpret statutes to permit the imposition of discretionary LFOs on indigent defendants.

The trial court imposed a $100 domestic violence penalty assessment even though it found Mr. Moreno was indigent and declined to impose all other discretionary LFOs. 4RP 476; CP 61-62. The Court of Appeals recognized Mr. Moreno was indigent yet held the trial court did not abuse its discretion in imposing this discretionary LFO because it ruled the assessment is not a cost under RCW 10.01.160 and because it concluded the relevant statute "encourages, but does not require" consideration of indigency. Slip Op. at 21. This unduly narrow interpretation ignores the plain language of the statutes and conflicts with this Court's opinions on discretionary LFOs.

RCW 10.99.080 does not require courts to impose a domestic violence penalty assessment.

> All superior courts . . . *may* impose a penalty assessment not to exceed one hundred dollars on any adult offender convicted of a crime involving domestic violence.

RCW 10.99.080(1)[3] (emphasis added). The statute also encourages courts to consider a defendant's ability to pay "[w]hen determining *whether* to impose a penalty assessment under this section." RCW 10.99.080(5) (emphasis added). The plain language of "may" and "whether" demonstrates the assessment fee is discretionary. *See State v. Smith*, 9 Wn. App. 2d 122, 127-28, 442 P.3d 265 (2019).

The court found this LFO was a fee, not a cost under RCW 10.01.160(3)[4] and, therefore, held courts could impose this discretionary LFO despite a finding of indigency. Slip Op. at 21-22. The court's distinction between "costs" barred under RCW 10.01.160 and other fees and assessments is too narrow. A legal financial obligation is "a sum of money that is ordered by a superior court" and includes various types of financial assessments. RCW 9.94A.030(31). Statutes imposing LFOs are

[3] RCW 10.99.080(1) as amended by Laws of 2015, ch. 265, permits a $100 penalty but as amended by Laws of 2015, ch. 275, permits a $115 penalty. Both amended versions of the statute include the language of "may impose" and encourage the court to assess the defendant's ability to pay the assessment. RCW 10.99.080(1), (5).

[4] "The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c)." RCW 10.01.160(3).

simply part of a "cost and fee recovery regime" covering "any other financial obligation" imposed due to a criminal case. *State v. Diaz-Farias*, 191 Wn. App. 512, 518-519, 362 P.3d 322 (2015). The label of an LFO as a cost or fee should not control whether a court may force an indigent person to pay it.

Starting with *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), this Court has consistently demonstrated the greatest concern for combating the harms caused by the imposition of LFOs on indigent defendants. *See, e.g., State v. Schwartz*, 194 Wn.2d 432, 443, 450 P.3d 141 (2019) (holding failure to pay LFOs does not prevent washout because such interpretation would be absurd); *State v. Catling*, 193 Wn.2d 252, 259 n.5, 266, 438 P.3d 1174 (2019) (ordering revision of judgment and sentence to indicate LFOs cannot be satisfied from protected funds and to eliminate prohibited nonrestitution interest); *State v. Ramirez*, 191 Wn.2d 732, 746-50, 426 P.3d 714 (2018) (finding court failed to conduct adequate indigency inquiry, holding amendments apply prospectively, and striking discretionary LFOs).

The Court's vigilant defense against the imposition of discretionary LFOs on indigent defendants stems from its recognition of the barriers these penalties create for individuals reentering society. The Court's expansive review of improper LFOs is consistent with the

legislative goal of facilitating re-entry. "[I]t is the policy of the state of Washington to encourage and contribute to the rehabilitation of felons and to assist them in the assumption of the responsibilities of citizenship" as "an essential ingredient to rehabilitation and the assumption of the responsibilities of citizenship." RCW 9.96A.010. Burdening indigent defendants with debt does not further that goal. *See Blazina*, 182 Wn.2d at 835 ("problems associated with LFOs imposed against indigent defendants … include increased difficulty in reentering society"). LFOs also disproportionately impact people of color. *See, e.g.*, An Analysis of Court Imposed Monetary Sanctions in Seattle Municipal Courts, 2000-2017, at 10-12 (2020)[5] (report prepared for City of Seattle, Office for Civil Rights, discussing imposition of LFOs by case type across different racial groups).

This Court should grant review to clarify a court abuses its discretion when it imposes discretionary LFOs on an indigent defendant.

E. CONCLUSION

This Court should grant review. RAP 13.4(b).

DATED this 23rd day of October 2020.

Respectfully submitted,
/s Kate R. Huber
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[5] Available at https://www.seattle.gov/Documents/Departments/CivilRights/SMC%20Monetary%20Sanctions%20Report%207.28.2020%20FINAL.pdf

APPENDIX A

August 17, 2020, Opinion

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. FRANCISCO RUBEN MORENO, Appellant.	No. 78856-6-I DIVISION ONE PUBLISHED OPINION

APPELWICK, J. — Moreno appeals his convictions for first degree burglary, fourth degree assault, and interfering with domestic violence reporting. He argues that knowledge of the unlawfulness of one's entry or remaining is an essential element of first degree burglary. He asserts that the State violated its discovery obligations and the court's discovery order by failing to identify the jail calls it intended to use at trial. Further, he argues that the court violated his right to present a defense when it refused to instruct the jury on self-defense. He also argues that the court miscalculated his offender score when it concluded that his burglary and assault convictions did not encompass the same criminal conduct. Last, he asserts that certain LFOs must be stricken from his judgment and sentence, and that a statutory citation must be corrected. We affirm Moreno's convictions, but remand for resentencing to correct his offender score and the statutory citation in his judgment and sentence.

FACTS

Francisco Moreno and Ashley Vollmar began dating in August 2017. Moreno moved into Vollmar's townhome in Everett that same month. Two months later, they found out they were expecting a child together.

According to Vollmar, she kicked Moreno out of her house and changed the locks at the end of October 2017. Despite kicking him out, she testified that she continued her relationship with him until January 2018. According to Moreno, he and Vollmar continued their relationship until early April 2018. He testified that she never changed the locks on him, and that he was welcome to live in her home throughout their relationship.

Vollmar testified that the morning of Sunday, April 8, 2018, she picked up a car that Moreno had taken from her garage earlier that week. She stated that he had come over Tuesday night to pick up his tribal check, and that her car was gone when she woke up the next morning. She explained that she retrieved her car on April 8 from a residence in Marysville. That same afternoon, she stated that Moreno called her looking for the car. She denied having it. She did not specify where she was when Moreno called her. When she was at home later that night, Vollmar missed a call from an unknown number. She called the number back, and it was Moreno. Despite telling him that he was not allowed at her home, she stated that he told her he was going to come over. She explained that he also started yelling at and threatening her. She testified, "He was saying he's going to beat my ass and I told him I was going to call the police."

Further, Vollmar testified that while she was on the phone with 911, she heard her door get kicked in. She explained that Moreno came up to her bedroom door, grabbed her, threw her on the bed, held her down by her neck so that she could not move, and took her phone out of her hand. She stated that she was eventually able to break free and run downstairs. As she was running down the stairs, she testified that Moreno grabbed her again and she fell to the ground on her knees and stomach. She explained that Moreno then ran out the front door, and she waited for the police to arrive.

In contrast, Moreno testified that he and Vollmar shared the car that he took from the garage. He also testified that he took the car on April 8, not earlier in the week. He explained that on April 8, he was doing laundry and barbecuing at Vollmar's house all day before driving the car to his ex-girlfriend's house at 3:00 p.m. to visit his son.[1] He stated that he had not seen Vollmar all day because she was at work. After visiting his son, he explained that he went to a bar around 8:00 p.m. He parked the car outside the bar with his phone, keys, and wallet inside. When he went outside to check his phone, he realized that the car was gone. He was then able to find someone to give him a ride to Vollmar's house.

When he arrived at the house, Moreno stated that he remembered he did not have his keys so he knocked on the door. After no one answered, he walked around to the back of the house and quickly ran up to the back door because he thought it was open. The door was locked, and he stated that he ended up going

[1] Moreno characterizes Vollmar's house as his house throughout his testimony. For clarity, we refer to it as Vollmar's house.

"right through the window." He testified that once he was inside, he went upstairs and turned on the light. At that point, he explained that Vollmar threw his phone at him, told him to leave, and told him she had called the police. He testified that he then started looking for his keys and wallet. He explained that Vollmar grabbed his wallet first, he tried to grab it back from her, and they ended up "kind of wrestling around over it." He stated that he ended up taking his wallet and walking outside. Once he was outside, the police blocked him from leaving.

The State charged Moreno with first degree burglary domestic violence, aggravated by domestic violence against a pregnant victim, fourth degree assault domestic violence, and interfering with domestic violence reporting.[2] At a June 29, 2018 pretrial hearing, Moreno asked the trial court to direct the State to provide him with a list of his jail telephone calls that it planned to use at trial. He reasoned that because a detective in the case had already listened to "60 days' worth of jail calls," it would be fair for the State to provide him with this information. The court asked the State to clarify whether it was intending "in [its] case in chief to use any of the jail calls." The State responded that it did not recall the calls being relevant, but that it needed to review a detective's report to make sure. The court ordered the State to "provide to the defense if it intends to use any jail phone calls by Mr. Moreno what date and phone calls it intends to use" by July 2, 2018. The State later gave notice that it did not intend to use the calls.

[2] The State also charged Moreno with two counts of second degree unlawful possession of a firearm. Moreno pleaded guilty to the first unlawful possession count, and the State dismissed the second unlawful possession count.

However, at trial, Moreno testified that he had been at Vollmar's house all day on April 8 before leaving to visit his son. The next day, the State sought to introduce excerpts from Moreno's jail calls in its rebuttal. The trial court found that Moreno's statements in two of those excerpts contradicted his testimony regarding his whereabouts on April 8. Moreno asked the trial court to disallow the evidence. He argued that the State's attempt to introduce the excerpts from his jail calls violated the court's discovery order and relevant case law. He also asked for a continuance so that he could listen to the calls.

The trial court ruled that excerpts "two and three" from Moreno's jail calls were proper rebuttal and impeachment testimony. It also ruled that the State did not violate the discovery order. Further, it denied Moreno's request for a continuance. Instead, it granted a recess to allow Moreno and his counsel to listen to the calls in the jury room.

At the close of evidence, Moreno asked the trial court to instruct the jury on self-defense. The court denied his request. A jury then found him guilty as charged. At sentencing, Moreno asked the court not to count his fourth degree assault conviction towards his offender score because his burglary and assault convictions constituted the same criminal conduct. The court disagreed and counted his assault conviction. On the first degree burglary conviction, it sentenced him to 48 months of confinement and 18 months of community custody. On the fourth degree assault and interfering with domestic violence reporting convictions, it sentenced him to 364 days of confinement for each conviction. It

ordered that the sentences for all three convictions run concurrently with one another. Last, the court imposed two legal financial obligations (LFOs).

Moreno appeals.

DISCUSSION

Moreno makes six arguments. First, he argues that knowledge of the unlawfulness of one's entry or remaining is an essential element of first degree burglary. Second, he argues that the State violated its discovery obligations and the court's discovery order by failing to identify the jail telephone calls it intended to use at trial. Third, he argues that the court violated his right to present a defense when it refused to instruct the jury on self-defense. Fourth, he argues that the court miscalculated his offender score when it concluded that his burglary and assault convictions did not encompass the same criminal conduct. Fifth, he argues that certain LFOs must be stricken from his judgment and sentence. And sixth, he argues that a statutory citation in his judgment and sentence must be corrected.

I. Essential Element of First Degree Burglary

Moreno argues first that knowledge of the unlawfulness of one's entry or remaining is an essential element of first degree burglary. He contends that his conviction must be reversed, because the State failed to plead this element in the information and the trial court failed to instruct the jury on it.[3]

[3] Moreno failed to raise these arguments below. But, the sufficiency of a charging document may be challenged for the first time on appeal because it involves a question of constitutional due process. State v. Ward, 148 Wn.2d 803, 813, 64 P.3d 640 (2003). And, omitting an element of the crime charged in jury instructions is a manifest constitutional error under RAP 2.5(a)(3). State v. Scott, 110 Wn.2d 682, 688 n.5, 757 P.2d 492 (1988). As a result, we consider both arguments.

Criminal defendants have a constitutional right to be informed of the nature and cause of the charges against them. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. To be constitutionally adequate, a charging document must include all essential elements of the crime, both statutory and nonstatutory. State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991). An essential element is one whose specification is necessary to establish the very illegality of the behavior. State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992). The primary purpose of the rule is to give defendants sufficient notice of the charges so that they can prepare an adequate defense. Kjorsvik, 117 Wn.2d at 101. We review challenges to the sufficiency of a charging document de novo. State v. Williams, 162 Wn.2d 177, 182, 170 P.3d 30 (2007).

Further, the State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld. State v. Byrd, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995). "It is reversible error to instruct the jury in a manner that would relieve the State of this burden." Id. at 714. We review the legal sufficiency of jury instructions de novo. State v. Walker, 182 Wn.2d 463, 481, 341 P.3d 976 (2015).

Since it is the legislature that defines crimes, we first look to the relevant statute to determine the elements of the crime. State v. Gonzalez-Lopez, 132 Wn. App. 622, 626, 132 P.3d 1128 (2006). Our objective is to determine and give effect to the legislature's intent by ascertaining the plain meaning of the statute. State v. Budik, 173 Wn.2d 727, 733, 272 P.3d 816 (2012). In doing so, we look to the text of the provision, the context of the statute in which that provision is found, related

provisions, and the statutory scheme as a whole. Id. If the statute remains susceptible to more than one reasonable interpretation, it is ambiguous, and we look to the legislative history of the statute and the circumstances surrounding its enactment to determine legislative intent. Id. We review this criminal statute de novo. See id.

The first degree burglary statute provides in part,

> A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

RCW 9A.52.020(1) (emphasis added).

Moreno argues that burglary "requires a knowing unlawful entering or remaining." (Emphasis added.) He acknowledges that this court suggested otherwise in State v. Kilponen, 47 Wn. App. 912, 737 P.2d 1024 (1987). But, he states that we should decline to follow Kilponen because its conclusion was "unsupported by the facts." He also argues that first degree criminal trespass is a lesser included offense of first degree burglary. Because first degree criminal trespass requires knowledge of the unlawfulness of one's entry or remaining, he contends that "knowledge of the unlawfulness is an element of burglary" too.

In Kilponen, a jury found Kilponen guilty of first degree burglary. 47 Wn. App. at 913. On appeal, he argued that the first degree burglary instruction was erroneous "because it did not include all the elements of the crime charged, specifically, the requirement he knowingly made an unlawful entry into his own

home." Id. at 919. Because Kilponen's attorney proposed the instruction, this court noted that it need not consider his argument. Id. Still, it found that "RCW 9A.52.020 does not require the State to prove the defendant knew he was acting unlawfully." Id. It clarified that "[t]he intent required in the burglary statute is simply the intent to commit a crime against a person or property inside the burglarized premises." Id.

Kilponen's conclusion is not "unsupported by the facts," as Moreno suggests. The portion of RCW 9A.52.020 describing the required intent states that a person is guilty of first degree burglary if "with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building." RCW 9A.52.020(1). The plain language of the statute makes clear that a person must purposefully enter a building and intend to commit a crime therein, and their entry or remaining must be unlawful. It does not require that a person know their entry or remaining is unlawful.

Moreno's citation to the first degree criminal trespass statute bolsters this interpretation. The statute provides, "A person is guilty of criminal trespass in the first degree if he or she knowingly enters or remains unlawfully in a building." RCW 9A.52.070(1) (emphasis added). Unlike the first degree burglary statute, the legislature included the word "knowingly" before the phrase "enters or remains unlawfully in a building." If the legislature intended for first degree burglary to include a knowledge requirement, it would have placed the word "knowingly" in front of the same phrase. Instead, it made a deliberate choice not to include this

language in the burglary statute. Thus, the legislature did not intend for the statute to require proof that a defendant knew he or she was acting unlawfully.

Moreno's argument that first degree criminal trespass is a lesser included offense of first degree burglary relies in part on State v. J.P., 130 Wn. App. 887, 125 P.3d 215 (2005). There, this court cited State v. Soto, 45 Wn. App. 839, 727 P.2d 999 (1986), for the proposition that "[c]riminal trespass is a lesser included offense of burglary." J.P., 130 Wn. App. at 895. In Soto, this court held that first degree criminal trespass is a lesser included offense of second degree burglary. 45 Wn. App. at 841. It explained that "[a] lesser included offense exists when all of the elements of the lesser crime are necessary elements of the greater crime." Id. at 840. It noted that under the second degree burglary statute, "[t]he actor must, with intent to commit a crime against a person or property therein, enter or remain unlawfully in a building." Id. at 841. It further noted that first degree criminal trespass "requires the actor knowingly to enter or remain unlawfully in a building." Id. Therefore, it concluded that second degree burglary requires intent, while first degree criminal trespass requires knowledge. Id. Because "[p]roof of a higher mental state is necessarily proof of a lower mental state," it reasoned that second degree burglary is necessarily proof of first degree criminal trespass. Id.

However, the analysis in Soto was flawed. First degree criminal trespass requires a person to know that their entry or remaining in a building is unlawful. But, the first degree burglary statute requires no such knowledge. A person's entry or remaining must be factually unlawful. The required mental state for first degree burglary is the intent to commit a crime against a person or property therein.

Compare RCW 9A.52.070(1), with RCW 9A.52.020(1). As a result, not all of the elements of first degree criminal trespass are necessary elements of first degree burglary. A person could commit all of the elements of first degree burglary, but not be guilty of first degree criminal trespass because they did not know that their entry or remaining was unlawful. Thus, to the extent our previous cases support that first degree criminal trespass is a lesser included offense of first degree burglary, we disagree with them and decline to follow them.

Knowledge of the unlawfulness of one's entry or remaining is not an element of first degree burglary. Accordingly, the information and jury instructions here were sufficient.

II. State's Discovery Obligations

Moreno argues second that the State violated its CrR 4.7 discovery obligations and the trial court's discovery order by failing to identify the jail calls it intended to use at trial. Thus, he contends that the court erred in admitting the recordings and denying his motion for a continuance. He asserts that these errors deprived him of his rights to due process and a fair trial.

CrR 4.7 defines the discovery obligations of both the prosecution and defense. CrR 4.7(a)(1)(ii) specifically requires the State to disclose to the defendant "any written or recorded statements and the substance of any oral statements made by the defendant" no later than the omnibus hearing. While CrR 4.7 does not define the term "disclose," its general usage, the policies underlying the discovery rules, and CrR 4.7's provisions "indicate that 'disclose' includes

making copies of certain kinds of evidence." State v. Boyd, 160 Wn.2d 424, 433, 158 P.3d 54 (2007).

Courts have long recognized that access to evidence is a crucial element of due process and the right to a fair trial. Id. at 434. Thus, the State must disclose to the defense evidence that it intends to use not only for its case-in-chief but also for impeachment or rebuttal purposes. State v. Dunivin, 65 Wn. App. 728, 734, 829 P.2d 799 (1992). The trial court has wide discretion in ruling on discovery violations. State v. Linden, 89 Wn. App. 184, 189-90, 947 P.2d 1284 (1997). Therefore, we will not disturb a trial court's discovery ruling absent an abuse of discretion. Id. at 190. Even if the court commits a discovery error, the error is not reversible unless it materially affects the outcome of the trial. Id.

Moreno asserts that the State knew a crucial part of his defense to burglary was that "he still lived in Vollmar's house and was not unlawfully present." As a result, he argues that the State should have known there was a reasonable possibility that his statements in his jail calls indicating he was not at Vollmar's house on April 8 before the incident might be relevant. He relies on Dunivin and Linden.

In Dunivin, the State charged Dunivin with manufacturing marijuana. 65 Wn. App. at 729. Police initially became aware of marijuana growing near his property based on anonymous telephone tips. Id. at 729-30. They later discovered that the caller was Dunivin's son-in-law, Buis. Id. Buis told police that Dunivin was running a grow operation. Id. Before trial, Dunivin provided the State with a list of defense witnesses, including Buis. Id. After reviewing the list, the prosecutor

discovered that Buis had provided police with information about the grow operation, but did not disclose this information. Id. When Buis testified that he had never seen marijuana growing on or near Dunivin's property, the State cross-examined him about the information he gave police. Id. This was the first time Dunivin heard about Buis's participation in the investigation. Id. After a jury found Dunivin guilty, the court ruled that the State violated its discovery obligations and granted Dunivin's motion for a new trial. Id. at 731.

On appeal, the State argued that CrR 4.7(a)(1)(v), which requires a prosecutor to reveal to the defense any books, papers, or documents the prosecuting attorney intends to use at trial, did not apply because it "'had no intention of questioning Mr. Buis on these previous statements.'" Id. at 732. This court noted that even if the State expected Buis to avoid the topic of Dunivin's participation in the crime, "there was certainly a reasonable possibility that Buis would testify as he did." Id. at 733. And, it pointed out that the prosecution was ready to use the evidence to impeach Buis should his testimony contradict his prior statements. Id. This court held that the State's CrR 4.7 discovery obligations extend to evidence it intends to use for rebuttal or impeachment purposes, and that disclosure was therefore required. Id. at 733-34.

In Linden, the State charged Linden with violating the Uniform Controlled Substances Act, chapter 69.50 RCW, for cocaine possession. 89 Wn. App. at 188. At trial, it cross-examined him regarding his statements that he did not use cocaine. Id. The State then revealed at a sidebar that the day before Linden testified, it received a report indicating police recently found a vial of cocaine on Linden's

person. Id. Linden objected to the State using this report to impeach him, arguing that it violated the discovery rules by failing to disclose the report earlier. Id. He requested that the report be suppressed or that the trial court declare a mistrial. Id. at 188-89. The court ruled that the State had a duty to disclose the report as soon as it confirmed its existence, but that a mistrial was unnecessary. Id. at 189. A jury then heard the evidence and returned a guilty verdict. Id.

On appeal, this court reaffirmed its holding in Dunivin that CrR 4.7's disclosure requirements apply to impeachment and rebuttal evidence. Id. at 194. It also rejected the State's argument that "there was no 'reasonable possibility' it would use the police report at trial because it couldn't predict that Linden would make such 'sweeping' statements when testifying." Id. It explained that the situation was akin to Dunivin to the extent that Linden's testimony took a different course than anticipated.[4] Id.

The State counters that the reasoning in State v. Cole, 117 Wn. App. 870, 73 P.3d 411 (2003), applies here. There, the State charged Cole with second degree assault and attempted first degree robbery. Cole, 117 Wn. App. at 873. During the victim's testimony, he revealed for the first time that he had given Cole at least $7.00 from his wallet to get Cole out of his car. Id. at 879. Defense counsel then established that police found only $1.11 on Cole in a search incident to arrest, using a form that the State provided in discovery. Id. Later at trial, the State requested admission of a different document showing the amount of money found

[4] However, because it held that the trial court did not abuse its discretion in ruling that a mistrial was unnecessary, this court affirmed Linden's conviction. Linden, at 89 Wn. App. at 196-97.

on Cole was $13.11. Id. This document had not been provided in discovery. Id. at 879-80. Cole then moved for a mistrial. Id. at 880. The trial court denied his motion and admitted the evidence. Id.

On appeal, Cole argued that the State's withholding of the form recording $13.11 was a material breach of the discovery rule. Id. This court disagreed. Id. It noted that before his testimony, the victim had never mentioned to anyone that he gave Cole money during the incident. Id. It further explained,

> The State did not undertake to prove that Cole took any money from the victim, so the exact amount of money found on Cole after the attack was not material to the issue of his guilt. There is no indication in the record that the State planned to use either document at trial. Nor could the State have reasonably expected that these documents would be used at trial, when the victim had not told anyone that he gave Cole money.

Id. Thus, this court held that the trial court did not abuse its discretion in denying Cole's motion for a mistrial. Id.

Here, the issue is not whether the State violated the trial court's discovery order. That order compelled the State to disclose by July 2 which of Moreno's jail calls it intended to use at trial. The State complied with the order by giving notice that it did not intend to use any of the jail calls. It was not until Moreno testified at trial that those calls became relevant. At that point, the State knew the calls contradicted Moreno's testimony. As a result, the issue is whether the trial court abused its discretion by then admitting the excerpts from the jail calls into evidence.

At trial, Moreno testified that he had been at Vollmar's house all day on April 8 until he took the car from her garage to visit his son in the afternoon and go to a

bar that evening. He testified that he parked the car outside the bar, and that he realized it was gone when he went to get his phone from the car. In discussing the excerpts from Moreno's jail calls that were played for the jury at trial, the State explained that Moreno stated he had woken up somewhere, someone told him that his car had "just pulled out" and asked where his keys were, and he figured out he was laying on them. The State also explained that Moreno stated he was not even "staying at the house."

Moreno is correct that the State knew "a crucial part of [his] defense was that he still lived in the house with Ms. Vollmar." But, as the trial court explained,

> [Moreno's] testimony . . . was not just that this is his residence, but that he was there on the 8th, that he had woken up there that morning. I find that excerpts 2 and 3 [of the jail calls] contradict those particular statements. I understand your point that the overall argument was that he lived there. I think these rebuttal statements are significantly more particular as to his exact testimony about what happened throughout the day on April 8th.

Moreno has not met his burden of showing that the trial court abused its discretion in admitting the excerpts from his jail calls into evidence. In light of Moreno's new testimony, the trial court was free to evaluate whether the excerpts became relevant and allow the State to use them to impeach Moreno. Further, the court granted a recess to allow Moreno to listen to the calls before they were admitted. Moreno does not show prejudice from the denial of his motion for a continuance to listen to the calls.

Because the trial court did not err in admitting the excerpts and denying Moreno's motion, it did not deprive Moreno of his rights to due process and a fair trial.

III. Self-Defense Instruction

Moreno argues third that that the trial court violated his right to present a defense when it refused to instruct the jury on self-defense.

Moreno is entitled to an instruction on his theory of the case if there is evidence to support that theory. State v. Fisher, 185 Wn.2d 836, 849, 374 P.3d 1185 (2016). Generally, a defendant is entitled to a self-defense instruction if there is some evidence demonstrating self-defense. State v. Werner, 170 Wn.2d 333, 336-37, 241 P.3d 410 (2010). To prove self-defense, there must be evidence that (1) the defendant subjectively feared that he was in imminent danger of death or great bodily harm, (2) this belief was objectively reasonable, and (3) the defendant exercised no greater force than reasonably necessary. Id. at 337. We evaluate the sufficiency of the evidence "by determining what a reasonable person would do standing in the shoes of the defendant." Id. Because the defendant is entitled to the benefit of all the evidence, a self-defense instruction may be based on facts inconsistent with the defendant's testimony. Fisher, 185 Wn.2d at 849.

"The question of whether the defendant has produced sufficient evidence to raise a claim of self-defense is a matter of law for the trial court." State v. Janes, 121 Wn.2d 220, 238 n.7, 850 P.2d 495 (1993). Here, the trial court's refusal to give a self-defense instruction was based on a lack of evidence supporting the defense. Thus, we review whether Moreno was entitled to a self-defense instruction de novo. See Fisher, 185 Wn.2d at 849. If the trial court erred in refusing to give the instruction, the error is reversible only if it prejudiced Moreno. See Werner, 170 Wn.2d at 337.

Moreno points to his testimony that when he turned on the light in Vollmar's house, she threw his phone at him. He also cites his testimony that he and Vollmar ended up "kind of wrestling" over his wallet. Based on this evidence, he contends that the jury could have found any touching was in response to Vollmar throwing the phone at him, or him trying to retrieve his wallet from her hands.

Even if we were to assume that any nonconsensual touching took place in response to Vollmar throwing his phone or taking his wallet, Moreno's testimony does not demonstrate that he subjectively feared he was in imminent danger of death or great bodily harm. Nor does he point to other evidence suggesting that he feared Vollmar. There must be some evidence that a defendant subjectively feared he was in imminent danger of death or great bodily harm to receive a self-defense instruction. See Werner, 170 Wn.2d at 337. Moreno was not entitled to a self-defense instruction, and the trial court did not err in refusing to give one.

IV. Offender Score Calculation

Moreno argues fourth that the trial court erred in concluding that his burglary and assault convictions did not encompass the same criminal conduct. He therefore contends that the court miscalculated his offender score by counting each conviction separately.

In calculating an offender score, the trial court counts a defendant's current and prior convictions. RCW 9.94A.589(1)(a). The offender score for a defendant's current offense includes all other current offenses unless "the court enters a finding that some or all of the current offenses encompass the same criminal conduct." Id. "Same criminal conduct" means "two or more crimes that require the same

criminal intent, are committed at the same time and place, and involve the same victim." Id. "The relevant inquiry for the intent prong is to what extent did the criminal intent, when viewed objectively, change from one crime to the next." State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). A sentencing court's determination of same criminal conduct will not be disturbed unless it abuses its discretion or misapplies the law. State v. Aldana Graciano, 176 Wn.2d 531, 536, 295 P.3d 219 (2013).

The burglary and assault here included the same victim, Vollmar, and occurred at the same place, her home, at the same time. Moreno and the State dispute only whether the two convictions required the same criminal intent. The trial court instructed the jury that to convict Moreno of first degree burglary, it had to find in part that he entered or remained in the house "with intent to commit a crime against a person or property therein." It further instructed the jury that an assault "is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person."

In determining that Moreno's burglary and assault convictions did not constitute the same criminal conduct, the trial court likened this case to State v. Lessley, 118 Wn.2d 773, 827 P.2d 996 (1992). There, the Washington Supreme Court held that burglary and kidnapping were not the same criminal conduct because the intent was not the same for both crimes. Id. at 778. It stated that "the objective intent of Lessley's burglary was completed when he broke into the Thomas residence armed with a deadly weapon." Id. It explained, "'Crimes which he objectively intended to commit [in the Thomas residence] included the property

damage caused when he broke in, the assault against Mr. Thomas, and the assaults against Mrs. Thomas and his former girlfriend, Dorothy Olson.'" Id. (alterations in original) (quoting State v. Lessley, 59 Wn. App. 461, 468-69, 798 P.2d 302(1990)). The court stated that it would only be speculating to assume that Lessley's subjective intent was to kidnap and assault his former girlfriend. Id. Thus, it found that "Lessley's criminal intent changed when he moved from the burglary to the kidnapping; the former did not further the latter." Id.

The trial court reasoned that Lessley "is akin to the testimony here . . . as to the basis for essentially the property damage to the door, the intent to retrieve items that had been in the vehicle, and then subsequently what resulted in the assault that was ultimately charged." But, Moreno points out that the State argued Moreno's intent during the burglary was to assault Vollmar.

Indeed, during closing argument, the State addressed the intent element of first degree burglary and asserted that Moreno's intent in going to Vollmar's house was to assault her. It stated,

> [T]he State has to prove that [Moreno] went there and entered that home unlawfully with the intent to commit a crime. We know that that was his intent because he told [Vollmar] what his intent was. Not only do you have that evidence of her testimony, but you have the 911 call to back it up because she was frightened. You can hear it in her voice. When she called 911, she did not want him coming to her house. Why was she so frightened? Because he had called and threatened to beat her before he got there.

Viewed objectively, the State's evidence shows that Moreno's intent did not change from the burglary to the assault. The record demonstrates that Moreno told Vollmar he was going to go to her house and beat her, and that he grabbed

her, threw her on a bed, and held her down once he arrived. Unlike Lessley, the former offense furthered the latter. Accordingly, the trial court abused its discretion in determining that Moreno's burglary and assault convictions did not constitute the same criminal conduct. We therefore remand for resentencing.[5]

V. Legal Financial Obligations

A. Domestic Violence Penalty Assessment

Moreno contends that the $100 domestic violence penalty assessment must be stricken from his judgment and sentence because the trial court found that he was indigent.

RCW 10.01.160(3) states that "[t]he court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent." But, the domestic violence penalty assessment is not a cost of prosecution under RCW 10.01.160. State v. Smith, 9 Wn. App. 2d 122, 127, 442 P.3d 265 (2019). Thus, Moreno's indigence does not dictate whether the fee is applicable. Id. A trial court's ultimate decision of whether to impose LFOs is reviewed for abuse of discretion. Id. at 126. RCW 10.99.080(5) encourages, but does not require, judges to solicit input from the victim or representatives for the victim in assessing the ability of the convicted offender to pay the penalty. The court did not solicit such input at sentencing. But,

[5] The State points out that the burglary antimerger statute permits courts to punish and prosecute separately crimes committed during the commission of a burglary. RCW 9A.52.050. In Lessley, the Washington Supreme Court held that the statute gives a sentencing judge discretion to punish for burglary, even where burglary and an additional crime encompass the same criminal conduct. 118 Wn.2d at 781. Here, however, the trial court did not address its authority to punish Moreno separately for burglary. As a result, it is unclear whether the court would have exercised its discretion to do so, and we will not assume that it would have.

because this inquiry is not required, the court did not abuse its discretion in imposing the assessment.

B. Interest Accrual Provision

Moreno also contends that the provision in his judgment and sentence imposing interest on nonrestitution LFOs must be stricken. Citing RCW 10.82.090, his judgment and sentence provides that "[t]he financial obligations imposed . . . shall bear interest from the date of the judgment until payment in full at the rate applicable to civil judgments." Under RCW 10.82.090(1), no interest shall accrue on nonrestitution LFOs as of June 7, 2018. Moreno's judgment and sentence was entered over two months later on August 13, 2018. Thus, the change in the law had taken effect. The citation to RCW 10.82.090 makes clear that no interest can accrue on Moreno's nonrestitution LFOs. Accordingly, we need not remand to strike the provision.

VI. Statutory Citation in Judgment and Sentence

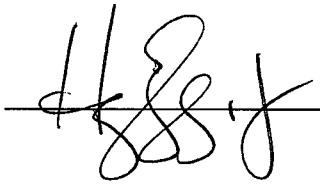
Moreno argues last that his judgment and sentence reflects the wrong statutory subsection for count one and must be corrected. A first degree burglary conviction may be based on the defendant being "armed with a deadly weapon" under RCW 9A.52.020(a), or "assault[ing] any person" under RCW 9A.52.020(b). Here, the State charged Moreno with first degree burglary based on his assault of Vollmar. However, Moreno's judgment and sentence states that the jury found him guilty of first degree burglary under the subsection that refers to being armed with a deadly weapon. The remedy for a scrivener's error in a judgment and sentence is remand to the trial court for correction. State v. Sullivan, 3 Wn. App. 2d 376,

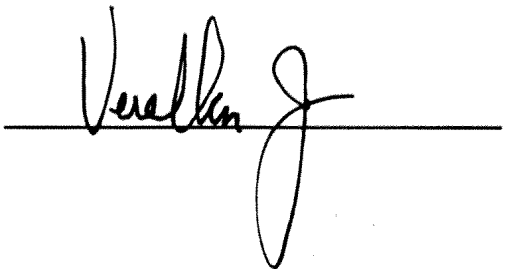
381, 415 P.3d 1261 (2018). Therefore, we instruct the trial court on remand to correct the citation in Moreno's judgment and sentence to reflect that he was found guilty of first degree burglary under RCW 9A.52.020(b).

We affirm Moreno's convictions, but remand for resentencing to correct his offender score and the statutory citation in his judgment and sentence.

Appelwick, J.

WE CONCUR:





APPENDIX B

September 24, 2020, Order

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

STATE OF WASHINGTON, Respondent, v. FRANCISCO RUBEN MORENO, Appellant.	No. 78856-6-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Francisco Moreno, filed a motion for reconsideration. A majority of the panel has considered the motion pursuant to RAP 12.4 and has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Appelwick, J.
Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 78856-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Seth Fine
[sfine@snoco.org]
Snohomish County Prosecuting Attorney
[Diane.Kremenich@co.snohomish.wa.us]

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: October 23, 2020
Washington Appellate Project

WASHINGTON APPELLATE PROJECT

October 23, 2020 - 4:25 PM

Transmittal Information

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Appellate Court Case Number:	78856-6
Appellate Court Case Title:	Francisco Moreno, Appellant/Cr-Respondent v. State of Washington, Respondent/Cr-Appellant
Superior Court Case Number:	18-1-01239-7

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