FILED
Court of Appeals
Division II
State of Washington
10/9/2018 2:11 PM

No. 51445-1-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DELBERT NICHOLS,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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Respondent's Brief/Response to Appellate Counsel's Motion to Withdraw

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I. ISSUES

A. Did appellate counsel correctly determine there are no non-frivolous issues on appeal and therefore should be permitted to withdraw as court appointed counsel by this Court?

B. Did the State present sufficient evidence of Violation of a Civil Anti-Harassment Order to sustain the jury's conviction for Count II?

C. Do Nichols' convictions for Harassment – Threat to Kill and Violation of a Civil Anti-Harassment Order violate Nichols' constitutional right to be free from double jeopardy?

D. Did Nichols' trial counsel's failure to raise a timely objection to the excusal of potential jurors by the trial court for hardship waive any error? Did the trial court abuse its discretion by dismissing the potential jurors?

E. Did Nichols receive effective assistance from his trial counsel?

F. Did the trial court err when it calculated Nichols' offender score and included a prior sex offense?

II. STATEMENT OF THE CASE

Bruce Norris and Nichols are neighbors who share an easement. RP 94-95. The easement has been a point of constant contention between the neighbors, including harassment and threats to Mr. Norris who must use the easement to access his property. RP 95-98. The issues came to a head in June 2017 and Mr. Norris sought an anti-harassment order from Lewis County District Court. RP 101-02.

Mr. Norris attempted to get an anti-harassment order on a Friday, was too late in the day and told to come back the following Monday. RP 102-03. Over the weekend Mr. Norris was the victim of arson, two fires were set on his property by Nichols' son, Joshua. RP 103-05. Mr. Norris obtained a temporary anti-harassment order at 9:00 a.m. on Monday, June 26, 2017, restraining Nichols. Ex. 2.

Nichols was served with the anti-harassment order by Lewis County Sheriff's Deputy Eastman at 2:50 p.m. RP 144-45. Deputy Eastman explained the highlights of the anti-harassment order to Nichols. RP 147. Around 3:00 p.m. Nichols headed to the Lewis County courthouse for Joshua's court hearing, accompanied by his tenant Benjamin Curtis. RP 153-54, 156-57, 180-81. Nichols showed Mr. Curtis the anti-harassment order. RP 157. Mr. Curtis also explained the order to Nichols. RP 198.

Nichols arrived at the courthouse and waited outside the courtroom. RP 192. Mr. Norris and his family arrived at the courthouse for Joshua's court appearance, walked up quietly and took a seat on a bench outside the courtroom. RP 106-07, 130-31-160. Nichols glared at Mr. Norris and threatened him, stating "I swear I'm going to kill him." RP 107-160.

The State charged Nichols, for his conduct from the incident outside the courtroom, with Count I: Harassment – Threat to Kill and Count II: Violation of a Civil Anti-Harassment Order. CP 1-2. Nichols elected to have his case tried to a jury. *See* RP. During jury selection several members of the venire expressed sitting on the jury would cause a hardship. RP 37-41. Prior to individual questioning by the attorneys the trial court dismissed those potential jurors, without objection, for hardship. RP 41. Nichols' attorney later, after the jury panel was selected and sworn in raised an objection to the dismissal of the jurors for hardship. RP 82-83.

Nichols was convicted as charged. CP 74-75. The trial court included a 1985 charge of Indecent Liberties in Nichols' offender score and sentenced Nichols to three months for Count I. RP 283; CP 85-87. Nichols timely appeals his conviction and sentence. CP 110-18.

The State will supplement the facts as necessary in its argument section below.

III. ARGUMENT

A. APPELLATE COUNSEL HAS CORRECTLY DETEREMINED THERE ARE NO NON-FRIVIOUS ISSUES ON APPEAL.

Counsel has identified (5) potential appellate issues: (1) whether the State presented sufficient evidence to sustain the conviction for Count II, (2) whether Nichols' convictions for felony harassment and misdemeanor harassment violated state and federal double jeopardy clauses of the Constitution, (3) did the trial court err when it excused jurors for hardship, (4) did Nichols receive effective assistance from his trial counsel during the course of trial, and (5) did the trial court properly calculate Nichols' offender score? Motion at 2. Counsel correctly notes each of these issues lack merit. Counsel also has requested permission from the Court to withdraw as Nichols' court appointed counsel.

A motion to withdraw as court appointed counsel on review on the ground there is no basis for a good faith argument must "be accompanied by a brief referring to anything in the record that might arguably support the appeal." *State v. Theobald,* 78 Wn.2d 184, 470 P.2d 188 (1970), *citing Anders v. California,* 386 U.S. 738, 744, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967); *see also* RAP 15.2(i); RAP 18.3(a). The indigent defendant should be given a copy of this brief

and allowed time to raise any issues of his or her choosing. *Id.* The court then decides whether the case is wholly frivolous after a full examination of the proceedings. *Id.*

Nichols' counsel has complied with this procedure. The State concurs with counsel's assessment that there are not any meritorious issues. The State, while understanding Nichols' counsel's addressment of the issues, would respectfully point out, if this were a full briefing, the State would be countering the issues as follows below. Even with the State's reassessment of how the issues must be presented to this Court, there are still no meritorious issues to present. Nichols has not filed a *pro se* brief. Therefore, this Court should grant counsel's motion to withdraw and affirm Nichols' conviction and sentence.

B. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN THE JURY'S FINDING NICHOLS COMMITTED THE CRIME, VIOLAITON OF A CIVIL ANTI-HARASSMENT ORDER, AS CHARGED IN COUNT II.

The State presented sufficient evidence to sustain the jury's verdict of guilty for Count II: Violation of a Civil Anti-Harassment Order. The Court should affirm Nichols conviction and sentence.

1. Standard Of Review.

Sufficiency of evidence is reviewed in the light most favorable to the State to determine if any rational jury could have found all the

essential elements of the crime charged beyond a reasonable doubt. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

2. The State Proved Each Element Beyond A Reasonable Doubt, Therefore, Presenting Sufficient Evidence To Sustain The Jury's Verdict For Violation Of A Civil Anti-Harassment Order.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re* Winship, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); State *v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). An appellant challenging the sufficiency of evidence presented at a trial "admits the truth of the State's evidence" and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman,* 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury's by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State*

v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "The fact finder…is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence." *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

The crime of Violation of a Civil Anti-Harassment Order, requires the State to prove Nichols, with knowledge of the existence of a court order for protection, willfully disobeyed the order. RCW 10.14.120. In Count II the State charged Nichols with Violation of Civil Anti-Harassment Order, alleging on or about June 26, 2017 Nichols,

> with knowledge that the Lewis County District Court had previously issued a civil anti-harassment protection order to RCW 10.14 in Cause No. 17-H00066, prohibiting the defendant from unlawful harassment, did willfully disobey the order while the order is in effect…

CP 2, citing RCW 10.14.120, RCW 10.14.170. The to-convict jury instruction mirrored the charging information language, requiring the jury to find Nichols willfully violated the court order for protection on June 26, 2017. CP 69.

On June 26, 2017, Bruce Norris was granted a temporary civil anti-harassment order against Nichols. RP 100-01; Ex. 2. The order

was issued by the Lewis County District Court at 9:00 a.m. Ex. 2. The order restrained Nichols from contacting Mr. Norris in person, by telephone, mail, electronic media, social media, or third parties. Ex. 2.

Nichols did not sign the order, therefore he would need to be served with it in order for Nichols to have knowledge of the order. Ex. 2. Deputy Eastman served Nichols with a copy of the anti-harassment order on June 26, 2017. RP 144-45. Deputy Eastman served Nichols at Nichols' residence at 2:50 p.m. RP 145. Deputy Eastman explained to Nichols he was being served with an anti-harassment order and the petitioner was Mr. Norris. RP 147. Deputy Eastman also explained some of the highlights of the order, including no contact and no surveillance, but also warned Nichols he was responsible for everything that was contained within the order. RP 147. Deputy Eastman suggested if Nichols had any questions about what was contained in the order to contact an attorney. RP 147.

Mr. Norris was the victim of an arson by Joshua Nichols over the weekend prior to receiving the anti-harassment order. RP 103-05. Mr. Norris went to the Lewis County courthouse to attend Joshua's first court hearing on June 26, 2017 around 4:00 p.m. RP 180-81. Nichols was also at the courthouse for his son's hearing. RP

157-59. Mr. Curtis accompanied Nichols to the courthouse that day. RP 153-54, 157.

Nichols arrived at the courthouse first and was waiting outside the courtroom with Mr. Curtis. RP 159, 161. Mr. Norris and his family arrived and quietly sat down on the benches outside the courtroom without speaking to Nichols. RP 106-07, 130-31, 160. Nichols glared at the entire Norris family, looked at Mr. Norris and stated, “I swear I’m going to kill him.” RP 107, 160. Nichols did not leave the area, but stayed outside the courtroom in the vicinity of Mr. Norris and his family. RP 106-08, 159-61.

Nichols insisted he was talking about his son, Joshua, when Nichols threated to kill “him.” RP 196. Nichols explained he was mad at Joshua for the fires and breaking his lawn mower. RP 196. Nichols knew there was a “restraining order” but said he did not talk to Mr. Norris and he stayed away from Mr. Norris by not walking up to Mr. Norris. RP 197.

The evidence presented, in the light most favorable to the State, with all reasonable inferences drawn in favor of the State, proved all the essential elements of Violation of Civil Anti-Harassment Order. Nichols had knowledge of the court ordered Civil Anti-Harassment Order. Nichols willfully violated the restraint

provisions of the court order on June 26, 2017 when he threatened to kill Mr. Norris after Mr. Norris arrived outside the courtroom and sat down with his family. Mr. Norris and Mr. Curtis were clear it was Mr. Norris who Nichols was threatening, not Joshua. RP 107-08, 161-63. This Court should affirm the jury's verdict on Count II, Violation of Civil Anti-Harassment Order.

C. THE HARASSMENT – THREAT TO KILL CONVICTION AND THE CONVICTION FOR VIOLATION OF CIVIL ANTI-HARASSMENT ORDER DO NOT VIOLATE NICHOLS' CONSTITUTIONAL RIGHT TO BE FREE OF DOUBLE JEOPARDY.

Nichols' convictions for Harassment – Threat to Kill and Violation of Civil Anti-Harassment Order do not violate the double jeopardy clauses of the State and Federal Constitutions.

1. Standard Of Review.

Double jeopardy claims are reviewed de novo. *State v. Lindsay*, 171 Wn. App. 808, 840, 288 P.3d 641 (2012), *review accepted* 177 Wn.2d 1023 (2013).

2. The Convictions For Harassment – Threat To Kill And Violation Of Civil Anti-Harassment Order Do Not Put Nichols Twice In Jeopardy For The Same Offense And Are Therefore Constitutional.

The Fifth Amendment of the United States Constitution and Article One, Section Nine of the Washington State Constitution provide that no person shall be put in jeopardy twice for the same

offense. "In Washington, a defendant is subject to double jeopardy if convicted of two or more offenses that are identical in law and in fact." *State v. Taylor*, 90 Wn. App. 312, 318, 950 P.2d 526 (1998), *citing State v. Calle*, 125 Wn.2d 769, 777, 888 P.3d 155 (1995). This analysis is commonly known as the *Blockburger* test. *State v. Marchi*, 158 Wn. App. 823, 829, 243 P.3d 556 (2010), *citing Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180 (1932). The remedy for a double jeopardy violation is vacation of the lesser of the offenses. *Marchi*, 158 Wn. App. at 829.

There are two parts to the double jeopardy analysis. *Marchi*, 158 Wn. App. at 829. "[W]hether the two charged crimes arose from the same act and, if so, whether evidence supporting conviction of one crime was sufficient to support conviction of the other crime." *Id.*, *citing In re Organge*, 152 Wn.2d 795, 820, 100 P.3d 291 (2004). When a single transaction violates two statutes, the question then becomes, does each require proof of an additional fact? *Blockburger*, 284 U.S. at 304.

The State acknowledges the two crimes it charged Nichols with arose out of the same act. Nichols saw Mr. Norris outside the courtroom at the Lewis County Courthouse, after being served with an anti-harassment order earlier in the day. Nichols looked at Mr.

Norris and said, “I’m going to kill him.” This conduct is what led Nichols to being charged by the State with Count I: Harassment – Threat to Kill, and Count II: Violation of Civil Anti-Harassment Order. CP 1-2.

The two charged crimes are not however identical in law. To convict Nichols of Harassment – Threat to Kill, the State must prove (1) Nichols knowingly and without lawful authority, (2) threatened to kill, immediately or in the future, the person threatened, or any other person, (3) the threat was made in a context, or under such circumstances, that a reasonable person would foresee the statement would be interpreted as a serious expression of the intention to kill, and (4) Nichols, by words or conduct, placed the person threatened in reasonable fear the threat would be carried out. RCW 9A.46.020(1)(a)(i) and (2)(b); CP 1. Whereas, to convict Nichols of Violation of Civil Anti-Harassment Order, the State must prove (a) Nichols with knowledge that the Lewis County District Court had previously issued a civil anti-harassment order prohibiting Nichols from unlawful harassment in Cause No. 17-H00066, (2) did willfully disobey the order while the order was in effect. RCW 10.14.120; RCW 10.14.170; CP 2.

To prove Count I, Harassment – Threat to Kill, the State must prove Nichols not only contacted Mr. Norris, but Nichols also threatened to kill Mr. Norris, and by doing such, put Mr. Norris in reasonable fear Nichols would carry out the threat. Therefore, Harassment – Threat to Kill is not identical in law as it requires proof of additional facts not required to prove a Violation of Civil Anti-Harassment Order. Further, to prove a Violation of Civil Anti-Harassment Order, simply threatening to kill someone would not be sufficient. The State must prove there was a valid anti-harassment order the defendant had knowledge of and willfully violated by contacting the victim. Therefore, the convictions for Harassment – Threat to Kill and Violation of Civil Anti-Harassment Order do not violate the State or Federal Constitutions prohibition against double jeopardy. The Court should affirm both convictions.

D. NICHOLS FAILED TO TIMELY OBJECT TO THE EXCUSAL OF JURORS BY THE TRIAL COURT FOR ECONOMIC HARDSHIP. THE EXCUSAL WAS A PERMISSIBLE USE OF THE TRIAL COURT'S AUTHORITY.

Nichols failed to make a timely objection when the trial court excused several jurors for economic hardship, waiting until after the entire jury selection process was complete and the jury was sworn in to raise his objection. Further, the record does not support Nichols'

possible contention that all economically disadvantaged individuals were dismissed from the panel for economic hardship.

1. Standard Of Review.

Excusal of jurors is reviewed under an abuse of discretion standard. *State v. Tingdale,* 117 Wn.2d 595, 600, 817 P.2d 850 (1991). "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v. Stenson,* 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). This Court will find a trial court abused its discretion "only when no reasonable judge would have reached the same conclusion." *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002) (internal quotations and citation omitted).

2. Nichols' Trial Counsel Failed To Timely Object To The Excusal Of The Jurors.

A party must afford the trial court the opportunity to correct an error by lodging a timely objection. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). Nichols' counsel waited until after the jury was sworn in to raise an objection to potential jurors who had been dismissed prior to the attorneys even conducting individualized questioning of the venire. RP 41, 82-83. Nichols' own counsel acknowledged his objection did not have an adequate remedy,

except according to Nichols' counsel, a mistrial. RP 82-83. Yet, the Supreme Court has held, "[a] motion for new trial is not a substitute for raising a timely objection that could have completely cured the error." *State v. Jones*, 185 Wn.2d 412, 426, 372 P.3d 755 (2016).

The individual jurors stated they had hardships, mostly of the economic nature, but some of just the nature of their work, that prevented them from serving on the jury. RP 37-41. There were a number of people who could not afford to miss work due to the type of work they did and the people who relied upon them. *Id.* There were jurors who were solely responsible for running the business, others who had to put on training, a city council member, a person who had state assessment training, and a case manager for DSHS. *Id.* The trial court dismissed all the jurors who expressed hardship without a contemporaneous objection from either the State or Nichols' trial counsel. RP 41. A contemporaneous objection by Nichols could have cured any error, and any error should be deemed waived.

3. The Trial Court Did Not Abuse Its Discretion When It Dismissed The Jurors For Hardship.

There is not sufficient support in the record to find that all economic disadvantaged individuals were removed from the jury. *See* RP 20-83. The parties did not ask the venire about their economic status. *Id.* Therefore, drawing such a conclusion could not

be possible, as the trial judge aptly noted. RP 83. There was no abuse of discretion for dismissing potential jurors.

Criminal defendants are guaranteed the right to a fair and impartial jury by the Sixth Amendment of the United States Constitution and Article I, section 22, of the Washington State Constitution. A criminal defendant does not, however, have the right to be tried by a particular jury*. State v. Van Elsloo*, Washington Supreme Court Slip Op. No. 94325-7, pg. 22, (9/13/2018). Nichols received constitutionally guaranteed right to a fair and impartial jury.

The jurors in this matter were dismissed prior to jury being impaneled. Even if the trial court rejected a juror on insufficient grounds and excused the juror, a defendant is not prejudiced when such a rejection occurs prior to the juror being impaneled and the defendant fails to show he or she was forced to accept other not qualified jurors. *Van Elsloo*, at 22-23, *citing State v. Phillips*, 65 Wash. 324, 326, 118 P. 43 (1911). In this matter, Nichols cannot make such a showing on the record before the Court.

The jurors were excused for hardship, Nichols' counsel and the State questioned the remaining panel, exercised preemptory challenges, and the panel was seated and sworn in. RP 41-82. The trial court did not abuse its discretion when it dismissed the potential

jurors from the venire for hardship. Nichols is not entitled to a new trial and the Court should affirm his convictions.

E. NICHOLS RECEIVED EFFECTIVE ASSISTANCE FROM HIS ATTORNEY THROUGHOUT THE TRIAL PROCEEDINGS.

Nichols' attorney provided competent and effective legal counsel throughout the course of his representation. An attorney is not required to object to a witness' testimony simply for the sake of objecting. Admissible testimony does not require an objection by Nichols' trial counsel. This Court should affirm Nichols' convictions.

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *State v. McFarland,* 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted).

2. Nichols' Attorney Was Not Ineffective During His Representation Of Nichols Throughout The Jury Trial.

To prevail on an ineffective assistance of counsel claim Nichols must show (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674

(1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, *citing Strickland v. Washington*, 466 U.S. at 694.

An attorney's decision regarding whether and when to object generally falls within the category of tactical decisions. *State v. Rafay*, 168 Wn. App. 734, 841, 285 P.3d 83 (2012). Failing to object

to permissible, admissible testimony is not ineffective. Without a more definite statement from Nichols or Nichols' appellate counsel about what testimony was objectionable, the State is left with a conclusory assertion regarding alleged ineffective assistance of counsel for failing to object during testimony. The testimony elicited by the State of its witnesses was admissible and therefore, no objection was warranted. *See* RP. Any ineffective assistance of counsel claim fails. This Court should affirm Nichols' conviction.

F. THE TRIAL COURT CORRECTLY CALCULATED NICHOLS' OFFENDER SCORE AND SENTENCED NICHOLS WITHIN THE STANDARD RANGE.

The trial court correctly calculated Nichols' offender score for Count I: Felony Harassment and sentenced Nichols within the standard range. The Court should affirm the trial court's calculation and sentence.

1. Standard Of Review.

This Court reviews a trial courts calculation of an offender score de novo. *State v. Rodriguez,* 183 Wn. App. 947, 953, 335 P.3d 448 (2014). This court also conducts statutory interpretation de novo. *Rodriguez,* 183 Wn. App. at 953.

2. The Trial Court Correctly Calculated Nichols' Offender Score.

Nichols was convicted of a sex offense in 1986 and the conviction was properly included in his offender score for his conviction for Felony Harassment, Count I. See CP 74; 85-86; 97-104. Nichols was charged in 1985 with Indecent Liberties, pursuant to RCW 9A.44.110(1)(b) as it was enacted at the time. CP 97. The State presented certified documents regarding the charging and judgment and sentence. CP 97-107. The State sufficiently met its burden and the trial court correctly included the prior conviction in Nichols' offender score.

In a sentencing hearing, "[a] criminal history summary relating to the defendant from the prosecuting authority . . . shall be prima facie evidence of the existence and validity of the convictions listed therein." RCW 9.94A.500. The State must prove a defendant's prior criminal convictions by a preponderance of the evidence. RCW 9.94A.500(1); *State v. Knippling*, 166 Wn.2d 93, 101, 206 P.3d 332 (2009). A summary of a defendant's prior criminal history that is unsupported is not sufficient to satisfy the State's burden of proof. *State v. Hunley*, 175 Wn.2d 901, 910, 287 P.3d 584 (2012). The State may be relieved of its burden of proof if the defendant

affirmatively acknowledges her or his prior criminal history. *Hunley*, 175 Wn.2d at 910. A defendant's failure to object is not sufficient. *Id.*

Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004) (citations omitted). The remedy for an erroneous sentence is remand for resentencing. *Id.*

Nichols' trial counsel did not object to the admission of the certified documents. RP 279. The argument was purely regarding whether Nichols' prior conviction met the statutory definition of a sex offense. RP 279-83. The prong of the statute Nichols' was charged under in 1985 no longer exists. RCW 9A.44.100; Laws of 1975 1st ex.s. c 260, § 9A.88.100; CP 97.[1] Yet, Nichols was previously convicted of Indecent Liberties, RCW 9A.44.100(b). CP 97-104.

Pursuant to the Sentencing Reform Act, a felony sex offense conviction shall always be included in the offender score. RCW 9.94A.525(2)(a). The definition of sex offense is, "[a] felony that is a violation of chapter 9A.44 RCW other than RCW 9A.44.132;… [a]ny conviction for a felony offense in effect at any time prior to July 1 1976, that is comparable to a felony classified as a sex offense in (a) of this subsection." RCW 9.94A.030(47)(a)(i),(b). The crime of

[1] 9A.88.100 was recodified as RCW 9A.44.100 pursuant to the 1979 ex.s. c 244, §17.

Indecent Liberties under prong (b) requiring sexual contact with a person under the age of 14 who was not married to the offender, as charged in 1985, was in effect in 1975, therefore it was a conviction for a felony offense in effect prior to July 1, 1976. The crime, as charged here, was comparable to Child Molestation in the Third Degree, or in this case, under the facts, comparable to Child Molestation in the First Degree. CP 97-98. Therefore, it would be a sex offense under RCW 9.94A.030(47)(b). *In re Pers. Restraint of Arnold*, 190 Wn.2d 136, 141-46, 410 P.3d 1133 (2018). Further, it meets the definition of sex offense under RCW 9.94A.030(41)(a)(i) because it was a conviction under 9A.44.

A criminal defendant is sentenced under the law in effect at the time the crime is committed, including applying the current definition of criminal history enacted by the legislature. *In re Pers. Restraint of La Chapelle*, 153 Wn.2d 1, 12, 100 P.3d 805 (2004). A criminal defendant does not have "a vested right in the definition of criminal history in effect when a previous crime was committed." *In re La Chapelle*, 153 Wn.2d at 12.

The trial court correctly included Nichols' 1985 Indecent Liberties charge (1986 conviction) in his offender score. RP 283. Nichols had an offender score of one for his Felony Harassment –

Threat to Kill, Count I, conviction. CP 85-86. Therefore, Nichols sentence of three months was a permissible sentence. CP 87.[2] This Court should affirm the trial court's calculation of the offender score and Nichols' sentence.

IV. CONCLUSION

Appellate counsel has correctly determined there are no non-frivolous issues that could be raised on appeal in this case. The five potential areas counsel identifies have no merit. There was sufficient evidence to sustain Nichols' conviction for Violation of Civil Anti-Harassment Order. Nichols' convictions for Harassment – Threat to Kill and Violation of Civil Anti-Harassment Order do not violate the State or Federal Constitutions double jeopardy prohibition. The trial court did not error when it excused the jurors without a timely objection for hardship prior to the panel being selected and sworn in. Nichols received effective assistance from his trial counsel. Finally,

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[2] The standard range for an offender score of one for Harassment – Threat to Kill is 3-8 months, while the standard range for an offender score of zero is 0-3 months. RCW 9.94A.510; RCW 9.94A.515; RCW 9A.46.020.

the trial court properly calculated Nichols' offender score. This Court should grant appellate counsel's motion and dismiss this appeal.

RESPECTFULLY submitted this 9th day of October, 2018.

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by:_____
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October 09, 2018 - 2:11 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	51445-1
Appellate Court Case Title:	State of Washington, Respondent v. Delbert Nichols, Appellant
Superior Court Case Number:	17-1-00421-3

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