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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

TROY M. FIX

Defendant/Appellant.

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APPELLANT'S OPENING BRIEF

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ROBERT M. SEINES  
Attorney at Law  
P.O. Box 313  
Liberty Lake, WA 99019  
p 509-844-3723  
f 509-255-6003  
rseines@msn.com  
Attorney for Defendant/Appellant

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## **I. ASSIGNMENTS OF ERROR**

1. Troy Fix's constitutional right to jury unanimity was violated because the jury was not instructed they must unanimously agree on the particular conduct that constituted stalking and violated a protective order.
2. The trial court erred by not merging Count 2, Violation of a Civil Antiharassment Protection Order, with Count 1, Felony Stalking - Violation of Protection Order.
3. The trial court erred by imposing mandatory legal financial obligations without making an adequate individualized inquiry as to Mr. Fix's present or future ability to pay.

### **Issues Pertaining to Assignments of Error**

1. Was Troy Fix entitled to a jury instruction informing that informed the jury they must be unanimous as to the specific and particular criminal acts that constituted felony stalking in violation of a protection order?
2. Should the charge of violation of a civil antiharassment protection order be merged into the charge of felony stalking and Troy Fix's conviction for the protection order violation be vacated?
3. Did the trial court error by assessing legal financial obligations without inquiring as to the defendant's resources and ability to pay?

## **II. STATEMENT OF THE CASE**

### **1. Background**

On June 7, 2017 Troy Fix was charged with; Count 1, Felony Stalking - Violation of Protection Order (Domestic Violence); and Count

2, Violation of a Civil Antiharassment Protection Order (Domestic Violence). CP 8-9.

In Count 1, the Information alleges that between the dates of March 16, 2017 and April 25, 2018 Mr. Fix intentionally and repeatedly harassed or followed Lisa Fix in violation of “any protective order protecting the person being stalked.” In Count 2 the Information alleges that between the dates of March 16, 2017 and April 25, 2017 Troy Fix knowingly and willfully disobeyed a civil antiharassment protection order in Clark County Cause No. 15H000202. Both Counts allege that the crimes charged were against a household or family member and therefore were domestic violence offenses.

Troy and Lisa Fix were married for eighteen years. RP 273. They separated in September 2013 and Lisa Fix filed for legal separation in December 2013. RP 274. Their divorce was finalized on April 1, 2015. RP 275. Prior to the separation Troy and Lisa Fix resided on a ten acre “hobby farm” in a rural area outside of Ridgefield, Washington. RP 268.

During their marriage, they acquired property including cars and trucks. Troy Fix received a 1993 Chevy Silverado that “was very much a farm truck” and a 2000-2001 white Lexus EF 300 in the dissolution property division. RP 276-77. The Lexus belonged to Lisa Fix before they were married, and she drove it regularly during the marriage. RP 278.

Troy Fix was convicted of Fourth Degree Assault Domestic Violence in Oregon in 2014 and a no-contact order was issued protecting Lisa Fix. RP 279; CP 170-71.

Troy Fix was charged with Stalking (Domestic Violence) for an incident that occurred in Clark County on November 4, 2014. The case was resolved by Mr. Fix pleading guilty to Disorderly Conduct and stipulating to the entry of a two-year antiharassment protection order with Lisa Fix as the protected party. The order was originally set to expire on July 11, 2017. CP 55; CP 113; RP 373. She filed a petition to renew the order, which was granted and extended the protection order to June 2019. RP 374.

## **2. CrR 3.5 Motion**

Mr. Fix's trial began on January 22, 2018. RP 29. A CrR 3.5 hearing was conducted regarding statements made by Troy Fix to Officer Jason Ferriss on April 24, 2017 and April 25, 2017. Officer Ferriss was dispatched to a possible protection order violation on April 24. Lisa Fix was the complaining party and she told dispatch that she saw Troy Fix drive by her early that morning when she was walking with a friend, thereby violating the antiharassment protection order. CP 55. Officer Ferriss confirmed that the order was active and after obtaining additional information from Lisa Fix he called Troy Fix. Officer Ferriss and Mr. Fix

spoke for a few minutes about the allegations and their conversation ended when Mr. Fix hung up. Then, on April 25, Troy Fix called Officer Ferriss. He began the conversation by asking if he would be arrested if he drove through Ridgefield. Officer Ferriss also testified that he did not inform Mr. Fix he was under arrest or give Mr. Fix *Miranda* warnings during either conversation. RP 36-43. Mr Fix did not testify at the CrR 3.5 hearing. RP 44.

After hearing argument, the court ruled that Mr. Fix was not under arrest and was merely being interviewed by Officer Ferriss during both calls so that *Miranda* warnings were not required -- and, accordingly, Troy Fix's statements to Officer Ferriss were admissible. RP 48. Findings of Fact and Conclusions of law were entered on February 9, 2018 after the completion of the trial. CP 210.

**3. ER 404(b) Motion.**

**(a) Prior Acts:**

The Court moved on to address the State's ER 404(b) motion to admit evidence of defendant's prior 'bad acts.' CP 55-64. In its motion, the State argued that evidence of defendant's prior acts was admissible to show his intent and his knowledge that his surveillance of Lisa Fix would frighten and intimidate her (CP 61). And, the 'bad acts' would show a

common scheme or plan on the part of Troy Fix to intentionally surveille, frighten, intimidate and harass Ms. Fix (CP 63).

The State conceded in its briefing that, “The trial court shall also give a limiting instruction to the jury if such [prior acts] evidence is admitted at trial (Cites Omitted); and that, “A jury is presumed to follow the court’s instructions.” (Cite Omitted). CP at 59. The State reiterated this in its argument on the ER 404(b) hearing. RP 128.<sup>1</sup>

The State then enumerated the prior acts it intended to present to the jury through the testimony of Lisa Fix and Deputy Charles Kerr. Lisa Fix testified as follows:

1. “The Barn Incident.” Lisa and Troy Fix were arguing on August 24, 2013. RP 73. The argument began in the house and Lisa Fix then went to the barn and began cleaning the tack room. Troy Fix followed her to the barn where the argument continued and blocked Lisa Fix when she went in and out of the barn. She went back in to the tack room and then Troy Fix shut the heavy door; effectively locking her in for “a matter of minutes.” RP 59-60. Troy Fix let her out and they both began walking

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<sup>1</sup> The trial court ordered the State to draft an appropriate limiting instruction. RP 480. However, despite its concession as to the necessity for a limiting instruction; and the trial court’s order -- the jury never received a limiting instruction as to the limited relevance of the prior acts.

back to the house, which was a “couple hundred feet” away. Troy Fix then got into his car “and backed it up - like directly aiming at ...” Lisa Fix. Ms. Fix jumped behind her car to get out of the way, and Troy Fix sped off down the driveway. RP 61-62.

2.       “The 2017 I-5 Incident”        Lisa Fix was on I-5 coming home from work when Troy Fix and she met at the intersection “where I-5 and 205 come together.” Lisa Fix was in the far left lane and Troy Fix was in the far right lane and they looked at each other. Lisa Fix got off on the Battle Ground exit, expecting Troy Fix to stay on I-5 to get to his home at Woodland. But - Troy Fix followed her off the exit. Lisa Fix stated she “was nervous and worried about my safety,” based on what had occurred during the “barn incident.” RP 63-64.

3.       “The 2014 cell phone assault.”        Lisa Fix suspected that Troy Fix might be having an affair, so she asked to see his phone. After deleting “a bunch of stuff” Troy Fix handed the phone to her; but then wanted it back after just a few seconds. He then ripped the phone from her hand “and it turns into this brawl” during which Troy Fix twisted her arm and put her in “this kind of headlock.” She then threw the phone across the yard and the fight ended when Mr. Fix went to get the phone. Lisa Fix did not call the police. RP 66-67.

4.       “The August 29, 2014 Oregon assault.”       Troy and Lisa Fix were traveling on I-5 south on their way to Oregon. They were arguing about the end of their marriage when Troy Fix tried to kiss her. They were in the “fast lane” but Troy was “grabbing and clawing” while Lisa Fix had her hands up, blocking him. Troy Fix then stopped on the freeway and went around the front of the car to the passenger door, yelling not to lock the doors. Lisa climbed over the console into the driver’s side and tried to get out of the seat. Troy Fix was then inside the car and he grabbed and twisted her breast and “got” her “in the private area below.” Lisa Fix then “layed on the horn” and got the attention of a woman in the other lane who Lisa thought called 911. Ms. Fix then got the car started and got off on an exit. Troy Fix had a cut lip and he was wiping his blood on Lisa Fix’s shirt, telling her he was going to report her for “spousal abuse,” and he called 911. Lisa parked the car and stayed inside while Troy Fix got out and spoke to the police officers who responded to the 911 call(s). Lisa Fix stated that Troy Fix was charged with Assault IV DV and DUI. Troy Fix was taken into custody and Lisa returned home, where she changed all the locks because she was fearful of another assault. RP 68-71.<sup>2</sup>

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<sup>2</sup>       The criminal history section in the State’s Sentencing Memorandum states that Troy Fix was sentenced for his conviction of Assault 4 Domestic Violence on October 7, 2014. CP 170-73.

5. Other prior incidents. Lisa Fix testified that after this incident the “Domestic violence people in Oregon” advised her to keep a log and document each domestic violence incident from then on. In her 404(b) testimony Lisa Fix used the document to refresh her recollection of the events she testified about. No objection was made for the use of the document for this purpose. RP 72-73.

After Ms. Fix reviewed the document she testified that in September 2014 she documented seeing Troy Fix driving around her property. RP 74-75.

Another time in September 2014, Lisa Fix was going to Whipple Creek to go for a horse ride. After she unloaded her horse, Troy Fix, who had been following her, slowly drove by her in the one-way-dead-end driveway and then stared at her and drove off. RP 75-76.

On November 1, 2014 Lisa Fix noted that Mr. Fix drove by her house six times. RP 76.

On November 4, 2014 Lisa Fix called 911 after her daughter and she discovered that the gate by the barn had been torn off its hinges and was laying on the ground. She informed the operator that she thought Troy Fix was the one who damaged the gate and gave the operator his current address. After she hung up Troy Fix drove past the barn driveway and damaged gate. Ms. Fix called 911 back to tell them not to bother going to

his address. On their way back to the house Troy Fix drove by again and then parked “across the field.” RP 78-79.

Troy Fix was arrested and charged with stalking. RP 80. The case was resolved when he pleaded guilty to disorderly conduct on July 14, 2015. CP 170-73.<sup>3</sup>

On March 19, 2015 Lisa Fix met Troy Fix while she was Westbound, and he was Eastbound on 259th in the vicinity of Lisa Fix’s residence. RP 80-81.

At the end of December 2015 or the beginning of January 2016 Lisa Fix saw Troy Fix drive by her in the white Lexus while she was walking her dog by a big Dollar Store distribution warehouse at around 6:00 am. She identified Troy Fix as the driver because she recognized the Lexus that she “drove for many, many years. RP 81-82.

On February 25, 2016 Lisa Fix stated that she saw Troy Fix driving around the roundabout by the Clark Public Utilities building where she worked. She called law enforcement on that occasion and an Officer Krebs responded. No charges were filed. RP 82-83.

Lisa Fix stated that on September 20, 2016 she saw Troy Fix drive by her house on a motorcycle. She identified Mr. Fix from a photo that a

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<sup>3</sup> This incident will be discussed later in connection with Deputy Charles Kerr’s testimony during the 404(b) hearing.

friend's son took of Troy Fix riding a maroon Honda Goldwing. Lisa Fix also did a "public disclosure" and was told he had a motorcycle. However, during this alleged sighting, she was unable to see the rider's face because it was obscured by a visor on the helmet. RP 84-85.

On September 25, 2016 she saw what she thought was the same motorcycle. It was around 8:00 am and they passed each other while she was on her way to work. RP 85-86.

And then, on September 29, 2016 she thought she saw the same motorcycle while she was walking her dog early in the morning by the Dollar Tree distribution warehouse. RP 86.

After working through all of the aforementioned incidents, State's Exhibit No. 3 was admitted, which was the Antiharassment Protection Order entered on July 14, 2015 in connection with the November 4, 2014 barn gate incident. RP 89.<sup>4</sup> The protection order prohibited Troy Fix from going within fifteen hundred feet of Lisa Fix's home. RP 87-89.

Lisa Fix was asked if she had seen Troy Fix when she was walking by the Dollar Tree distribution center between March 2017 and April 2017; which is the approximate time period charged in the Information.

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<sup>4</sup> The VRP transcript states the date as "11/14, 2015" (RP 89) but the State's sentencing memo gives the date, "7/14/2015." See CP at 171.

RP 90.<sup>5</sup> She answered “yes” and stated she had a particular routine where she walked around the Dollar Tree distribution center area between 5:30 and 6:00 am, with a lady from her church (Mary Bodine). RP 90.

During her cross examination and re-direct, Lisa Fix testified that she learned from a friend (Kevin Stadleman) that Troy Fix purchased a maroon colored Honda Gold Wing motorcycle after they were separated, and the friend’s son took a picture from behind of Mr. Fix riding the motorcycle. The photo showed the license plate and Lisa Fix obtained information from DOC<sup>6</sup> that verifying that Troy Fix was the owner of that motorcycle. RP 103 and RP 105-06.

Counsel for Mr. Fix re-noted his personal knowledge objection to the photograph of the motorcycle. And the Court recalled and reiterated that the objection was sustained the day before. RP 107.

The State Called Deputy Charles Kerr who testified that he responded to the November 4, 2014 Barn Gate incident involving Lisa Fix and Troy Fix. He arrived at Lisa Fix’s residence around 8:50 am. Deputy Kerr contacted Troy Fix, who was at 18th Avenue just south of 259th

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<sup>5</sup> The dates in the Information are “on, or, about or between March 16, 2017 and April 25, 2017.” CP 08.

<sup>6</sup> “DOC” is an error and Ms. Fix may have meant DOL, the Department of Licensing.

street, which was two blocks from Lisa Fix's residence. Mr. Fix was able to see Ms. Fix's residence from there. RP 112-113.

Deputy Kerr told Mr. Fix that there was a "Restraining Order" between him and Ms. Fix. Troy Fix confirmed he was aware of the order. The deputy then asked Mr. Fix why he was there. Mr. Fix replied that he was not doing business and was not visiting anyone in the Ridgefield area, and that if the deputy called Ms. Fix she would confirm that he was allowed to be there. And, he was watching her place. RP 114-15.

Another deputy interviewed Lisa Fix, who stated she was fearful of him being there and that a gate by the barn on her property had been lifted off the hinges. RP 115. That deputy stated he put the gate back on the hinges, and in the process was "slimed" with a green substance. Deputy Kerr noted that Troy Fix had the same type of mud on his pants and shoes. RP 115-116.

Deputy Kerr then arrested Troy Fix for stalking. In the process he noted that Mr. Fix was very cooperative and "he wasn't argumentative at all." RP 116.

**b. The Trial Court's Oral Ruling as to the ER 404(b) Motion.**

After hearing argument, the court went through the prior incidents and ruled as follows:

1. Red Motorcycle and White Lexus. There were variations in the court's rulings as to the admissibility of Lisa Fix's testimony pertaining to her identification of Troy Fix as the driver of the white Lexus and the maroon motorcycle. The issue was whether she would be permitted to testify she saw Troy Fix in proximity to her when she was unable to see his face when the Lexus drove by, and when Mr. Fix's face was covered by the visor on the helmet when he was on the motorcycle.

Initially, the court found that the State had failed to prove by a preponderance that Mr. Fix was the operator of the motorcycle or the operator of the Lexus. RP 145-46, 151. The court also found the same with respect to the charged 2017 industrial park incidents where Lisa Fix identified the Lexus and motorcycle, but not the driver/operator of the motorcycle or car. RP 153.

Then later, at the end of the first day of trial, Mr. Fix's attorney reopened his objections to Lisa Fix testifying about the motorcycle or Lexus based on her lack of personal knowledge that Mr. Fix owned a motorcycle and that that the friend's statements that Mr. Fix owned a motorcycle were hearsay. RP 187.

The State answered that Lisa Fix made a public records request and that Mr. Fix's DOC officer identified all of Mr. Fix's vehicles, including the motorcycle and its license plate, that matched the plate in the

photo taken by the friend's son. RP 188-190. As to this, the court ruled that the evidence was inadmissible because Lisa Fix's knowledge of the motorcycle was based on hearsay. RP 191. The Court also admonished the State not to bring up the motorcycle in opening statements. RP 192.

However, the motorcycle issue was brought up again at the beginning of the second day. The court reiterated that, "I've excluded the evidence from the alleged victim testifying that he [sic] learned of the motorcycle through a friend." RP 193.

The State persisted. Beginning at RP 228, the State re-addressed the motorcycle issue and whether there were sufficient non-hearsay grounds for her to be able to testify about the motorcycle. The state began with an offer of proof that Lisa Fix's testimony about seeing the motorcycle was not offered for the truth of it -- but was offered to show her state of mind when she repeatedly saw the motorcycle during her early morning walks.

The court responded, citing to ER 602; a witness may not testify to matters unless there is sufficient evidence to establish personal knowledge; and ER 701; a lay witness's opinions must be based on the witness's actual perception, helpful to a clear understanding the facts in issue, and not based on scientific, technical or other specialized knowledge. RP 233. The court determined that Ms. Fix's identification of

Mr. Fix and the motorcycle is an opinion, not based on personal knowledge, but based on hearsay. RP 235.

Then, Troy Fix's counsel reiterated his objections to Lisa Fix identifying the white Lexus. RP 238 as being driven by Troy Fix because she was familiar with the vehicle and that Troy Fix received the white Lexus in the 2015 dissolution. RP 239.

As to the Lexus, the court's changed its earlier ruling and ruled that Lisa Fix would be allowed to testify that Troy Fix was driving the Lexus because she was very familiar with the vehicle, and could therefore identify it, and that she could state that Troy Fix was the driver because he got the white Lexus in the divorce. RP 242.

The court also expanded its ruling on the motorcycle, permitting testimony from a witness, Kevin Stadleman, who saw him riding the motorcycle, and his son took a photo of it. RP 242-43.

The State then made an oral motion to amend its witness list to add Kevin Stadleman as a witness. RP 243. After inquiring when Mr. Fix's counsel first learned about the motorcycle and that there was a photo of him riding in the clothes that were later seen by Lisa Fix, the court stated that the person who saw Troy Fix on the motorcycle and/or took the photo would be permitted to testify. RP 248.

This was the end of the 404(b) discussions about the red motorcycle and white Lexus.

2. Deputy Kerr Incident. The court determined that the information Deputy Kerr obtained investigating on November 4, 2014 about the broken gate and Troy Fix's surveillance of Lisa Fix's home was "too highly prejudicial." However, the court ruled that Deputy Kerr would be permitted to testify about Mr. Fix's statements to the Deputy to show that "... he was there - knew he wasn't supposed to be there and had some convoluted excuse about being there." RP 153, 159, 161. This ruling was reiterated at RP 196-197.

3. Cell phone push and shove. After noting ER 402 and ER 403, the court determined that the cell phone push and shove and the throwing was inadmissible because it would confuse the jury and there was a substantial danger of unfair prejudice. RP 146, 152.

4. The Barn Incident. The court determined the 2013 incident was too remote in time to make it relevant to the case at hand under any exceptions. And RP 152.

5. August 29, 2014 Oregon Assault IV. The Court observed that the hitting, grabbing and scratching or fighting on I-5 was "completely different from anything that took place here." RP 147. The Court also found that the incident was "too highly prejudicial to come into

play” for the same reason. And further, the prejudicial effect of this evidence cannot be cured by a limiting instruction. RP 152.

The Court noted that with respect to the fear element of the stalking charge; that can easily be established by Lisa Fix obtaining a stipulated protection order dated July 14, 2015. RP 148-151.

After reciting the antiharassment and stalking definition statutes the Court then noted that the protection order proved that Ms. Fix was harassed, and that Troy Fix should have known she would be afraid, intimidated or harassed, even if he did not intend to place her in fear, or intend to intimidate or harass her. RP 148-150.

The court then instructed the State to prepare the Findings of Fact and Conclusions of Law as to the court’s ER 404(b) decisions regarding the admissibility of the aforementioned enumerated acts. RP 216.

After that, the parties re-argued the Rule 404(b) issues *again* and the court reiterated its rulings, clarifying that only Deputy Kerr -- and not Lisa Fix, could testify about the November 4, 2014 damaged gate/stalking/Deputy Kerr incident -- except that Lisa Fix could state there was an Oregon protection order in place in 2015 that prohibited Troy Fix from coming within a certain distance. RP 225.

The parties agreed to a written stipulation that in 2015, Troy Fix stipulated to an antiharassment protection order, admitting that his conduct

toward Lisa Fix seriously alarmed, annoyed, or was otherwise detrimental to Lisa Fix, and would cause a reasonable person to suffer substantial emotional distress. And, this stipulated admission could be used to prove that Lisa Fix had a reasonable fear of any contact with him in 2017. CP 113. RP 480. The Court read the stipulation to the jury at the end of the State's case. RP 494.

#### **4. Trial Testimony**

Lisa Fix was the State's first witness. Ms. Fix began by testifying about her rural residence with the barns and farm animals (RP 268-69; Troy Fix's and her history up through their separation in September 2013, and dissolution on April 1, 2015 (CP 275); the vehicles they acquired during the marriage and divided in the property settlement (RP 276-77); the Oregon No Contact Order in 2014 and the July 2015 Clark County antiharassment order (RP 279); the security system and lights she installed around the barns and residence (RP 279-82); and her frequent early morning walks (RP 287-88).

Lisa Fix testified about an incident on March 27, 2017 where she came into contact with Troy Fix. She was Northbound on I-5 and Troy Fix was on 205 at the intersection of those roads. Mr. Fix was driving the white Lexus and they "looked right at each other." RP 298-99. Troy Fix

followed her off the Battleground exit (RP 302) and she saw him again near her residence. RP 302-03.

Lisa Fix testified she saw Troy Fix again on April 11, 2017 during an early morning walk in the vicinity of the Dollar Tree distribution center. RP 306-07. She identified Troy Fix because it was the white Lexus, her old car. RP 308. However, she was not able to see the driver's entire face because the visor was pulled down and over to the side window, partially covering the driver's face. RP 310. she testified that she did not see the driver's entire face because the visor was down.

On April 13, 2017 Lisa Fix stated she was walking with her friend, Mary Bodine, near the Dollar Store warehouse. They were on their usual route around 6:00 am when Lisa Fix saw the white Lexus. RP 311-12. She stated she could not recall seeing Troy Fix on that occasion, but she recognized the car.

On April 17, 2017 she was on an early morning walk in the same area with Mary Bodine. When she saw the white Lexus. Again, she stated she recognized the car, but she did not note if she saw the driver's face. RP 316.

On April 18, 2017 Lisa Fix and Mary Bodine were on another early morning walk in the same area, when Ms. Fix saw the white Lexus.

Again, she recognized the car but could not state the driver was Troy Fix.  
RP 317-18.

On April 23 and 24, 2017 Lisa Fix and Mary Bodine and Ms. Fix's dog were walking at the same location around 6:00 am when they saw a green Explorer with Troy Fix inside. RP 318-19. Lisa Fix reported the April 24, 2017 sighting to law enforcement.

The State called its late added witness, Kevin Stadleman. Mr. Stadleman stated that he knew Troy Fix and Lisa Fix for many years and that they frequently played cards together. RP 391. He testified he was familiar with the Fixes' vehicles including the white Lexus and maroon motorcycle that Troy owned. RP 391-394. He testified that Troy regularly drove the motorcycle to work. RP 394.

Mr. Stadleman testified that on one occasion he saw Troy Fix riding the motorcycle on 205 in March 2017. RP 395. He recognized it was Troy Fix by the distinctive clothing and helmet he was wearing and by his upright stance on the motorcycle. RP 395. Mr. Stadleman's son was with him and commented on how Troy Fix sat on the motorcycle. The son also took a picture of Mr. Fix and the motorcycle from behind. RP 395-96. The photo was admitted without objection as Exhibit 18. RP 397-98.

The State then recalled Lisa Fix and she was asked about a March 15, 2017 incident. Ms. Fix testified that during her early morning walk

near the Dollar Tree warehouse that day she saw a maroon Honda Goldwing. The rider wore a silver helmet with a reflective stripe and a black jacket with a reflective stripe. RP 400. Ms. Fix then stated that she could not see the driver's face but that the driver looked at her. RP 402.

The State then had Ms. Fix to view Exhibit 18, the photograph taken by Mr. Stadleman's son. Ms. Fix stated that the photo was of the same motorcycle she saw that morning. RP 400-01.

The State then asked about another early morning walk incident during the routine Dollar Store route on March 31, 2017. RP 402. Ms. Fix testified that she saw a maroon Honda Goldwing and rider with the same jacket and helmet. Again, the driver's face was obscured by the helmet. RP 403.

Lisa Fix saw a maroon Goldwing and rider with the silver helmet with the visor and black jacket with the stripe, again, during her April 3, 2018 walk. RP 404. Ms. Fix repeated that she did not see the rider's face. RP 405.

Lisa Fix's walking partner was also recalled, and she testified that during some of the early morning walks with Lisa Fix Ms. Fix would point to cars and a motorcycle and exclaim "there he is," referring to Troy Fix. *eg*, RP 425. Ms. Bodine frequently referred to a document signed by her to refresh her memory. She stated thought the statement may have been

prepared by law enforcement. RP 416. On cross, Ms. Bodine testified she did not know who prepared the document, possibly including Lisa Fix. RP 430.

Officer Jason Ferriss was called, and he testified as to his April 24, 2017 conversation with Lisa Fix after her report of a protection order violation, and his April 24 and 25, 2017 phone conversations with Troy Fix. RP 444-458. This testimony was consistent with his testimony at the CrR 3.5 hearing. See RP 36-48.

The State called Deputy Kerr as its last witness. RP 488. Deputy Kerr gave an abbreviated account of his November 4, 2014 contact with Troy Fix on 18th Avenue, just south of 259th Street.<sup>7</sup> He testified that he contacted Mr. Fix who was in his vehicle at that location. He stated that Mr. Fix was able to see Lisa Fix's residence. Deputy Kerr confirmed there was an active No Contact Order out of Oregon at that time, protecting Lisa Fix, and prohibiting Mr. Fix from contacting her. RP 490-92. During their conversation, Troy Fix confirmed that he knew the No Contact Order was in place. RP 493. Mr. Fix stated he did not live in the vicinity, he was not visiting someone, and Mr. Fix did not have any business with anyone in

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<sup>7</sup> Deputy Kerr's testimony was within the Rule 404(b) boundaries set by the court. See RP 196-209.

response to the Deputies questions. Troy Fix also admitted 5that he was watching Lisa Fix. *Id.*

After Deputy Kerr was excused, the court read the stipulation to the jury:

In 2015, Troy Fix stipulated to entry of an Order for Protection-Harassment, which held Troy Fix's' [sic] course of conduct towards Lisa Fix prior to entry of that order willfully or knowingly

a. seriously alarmed, annoyed, harassed or was otherwise detrimental to Lisa Fix; and

b. Would cause a reasonable person to suffer substantial emotional distress.

You may, but are not required to, use this stipulated admission by Troy Fix in 2015 to find Lisa Fix had reasonable fear of any contact with Troy Fix in 2017.

RP 494. The stipulation is at CP 113. The State then rested its case.

*Id.*

The defense called three witnesses. Bret Van Horn testified that he sold some electronic music equipment to Troy Fix on March 7, 2017. Mr. Van Horn lives near Lisa Fix. Troy Fix went to Mr. Van Horn's residence on March 27, 2017 to pick up a piece of the music gear that was missing. This testimony was used to explain why Troy Fix was in that area when he was spotted by Lisa Fix that day, RP 505-12.

Vivian Hecker was an employee at the hotel where Troy Fix worked. She testified that she saw Troy Fix at the hotel around 6:00 am on April 24, 2017. RP 523. This was used to contradict Lisa Fix's testimony that she saw Troy Fix on that day during her early morning walk.

Troy Fix then testified that he saw Lisa Fix, but he had no contact with her when he went to Bret Van Horn's residence to get the music equipment part on March 27, 2017. RP 533. He testified that he did not follow or watch Lisa Fix in the Ridgeview area in March or April of 2017 and the only time he had done that was the incident back in 2014. RP 536. He stated he had no idea where Lisa Fix went for her early morning walks. (RP 537) and he described the conversations he had with Officer Ferriss and the route he normally took to work in some detail. RP 537-542.

On cross examination, the State had Mr. Fix go over the stipulated antiharassment protection order that was in effect during March and April 2017 and had him admit that he agreed that his course of conduct, "willfully and knowingly caused alarm, annoyed, and harassed, or otherwise detrimental to Lisa Fix." RP 545.

The State then had Mr. Fix admit that there was another protection order in effect in 2014, and that while it was, he parked and watched Lisa Fix's home. RP 546.

## **5. Closing Arguments**

In its closing argument, the State emphasized how Troy Fix adjusted his strategies to follow or surveil Lisa Fix. When he learned in 2014 that he would get in trouble if he parked where he could watch her house, he changed to driving by and changing his routes to match her's. RP 622. When he learned her early morning walk routine, he deliberately altered his route to see her there at the same place at the same time. RP 623.

And then, the State placed him on the motorcycle, "And the first time she sees him is March 15th. He's on a motorcycle - a maroon motorcycle. She can't see the face of the person on the maroon motorcycle which makes sense. One is about 6:00 a.m. in the morning and two that person is wearing a motorcycle helmet." RP 626.

The State conceded that while Lisa Fix did not see the face of the motorcycle rider, or the driver of the white Lexus or Green Explorer, every time ---- but, "this would basically have to be the greatest coincidence on her that three vehicles he owns - she happens to see them. And sometimes she sees his face. RP 628.

## **6. Verdicts**

The jury returned verdicts of guilty on both Count 1 Felony Stalking; and Count 2 Violation of Civil Antiharassment Protection Order.

The Jury also found that Troy and Lisa Fix were members of the same family or household in the Special Verdict Form. RP 678. CP 159-161.

**7. Sentencing**

Sentencing was set for February 9, 2018. The State submitted a Sentencing Memorandum in which it concedes that the Felony Stalking charge and the Antiharassment Protection Order charge should be merged because the stalking charge was elevated to a felony because the alleged stalking incidents occurred while the protection order was in place. CP 170-73. The Memorandum of Disposition indicates that, “Ct 2 is the same criminal conduct/merges for purpose of sentencing w/ Ct 1.” CP 187.

The State also requested the Court to impose “standard fines and fees.” *Id.* The issue of Troy Fix’s ability to pay legal financial obligations was summarized in the brief exchange between the court and Troy Fix:

Judge: Okay. Well - and sir you haven’t worked in a while is that correct?

TF: That is correct.

The court imposed the following Legal Financial Obligations in the Felony Judgment and Sentence:

Victim assessment	\$500
Domestic Violence assessment	100
Jury demand fee	250
DNA Collection Fee	<u>100</u>
	\$950

CP 188-196.

The court sentenced Troy Fix to 12+ months of confinement followed by 12 months of Community Custody. A 10 year No Contact Order prohibiting contact with Lisa Fix was also issued. *Id.*

### III. ARGUMENT

**1. Troy Fix’s constitutional right to jury unanimity was violated because the jury was not instructed it must agree on which particular conduct that constituted stalking and violated a protection order.**

a. A criminal defendant has a constitutional right to a unanimous jury verdict as to the particular criminal act that was committed.

Again, to prove the crime of felony stalking the State must prove beyond a reasonable doubt that Troy Fix “repeatedly harassed or repeatedly followed LISA MALEPORT FIX,” and while doing so, Troy Fix “violated a protective order protecting LISA MALEPORT FIX ... .” CP 92; RCW 9A.46.110(5)(b)(ii). To satisfy its burden of proof, the State was required to prove beyond a reasonable doubt that Mr. Fix did so on “two or more separate occasions.” CP 94.

When the prosecution presents evidence of multiple acts that could be the basis of the charge, either (1) the State must elect which act on

which it will rely on for conviction, or (2) the court must instruct the jury that all of them must agree that the same criminal act has been proven beyond a reasonable doubt. *State v. Petrich*, 101 Wash.2d 566 ,573, 683 P.2d 173 (1984); Comment WPIC 4.25.<sup>8</sup>

Failure to follow one of the two options is “violative of the defendant’s state constitutional right to a unanimous jury verdict and the United States constitutional right to a jury trial. *State v. Kitchen*, 110 Wash.2d 403, 409, 756 P.2d 105 (1988).

If the State fails to elect which incident it relies on for the conviction, or the trial court fails to instruct the jury that they must be unanimous as to which specific criminal act has been proved beyond a reasonable doubt, the error is presumed to be prejudicial. The “the error will be deemed harmless only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt.” *Id* at 405-406.

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<sup>8</sup> The appropriate instruction is:

WPIC 4.25 Jury Unanimity—Several Distinct Criminal Acts—*Petrich* Instruction

The [State] [County] [City] alleges that the defendant committed acts of (identify crime) on multiple occasions. To convict the defendant [on any count] of (identify crime), one particular act of (identify crime) must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of (identify crime).

Where the State has presented testimony and circumstantial proof of the multiple acts in evidence and there is conflicting evidence as to the acts, then the conviction must be reversed. *Id* at 412.

No *Petrich* instruction was given here. Nor did the State tell the jury which specific acts by Troy Fix constituted stalking and also violated a protective order protecting Lisa Fix.

b. The error in failing to provide a unanimity instruction was not harmless beyond a reasonable doubt.

There was conflicting evidence here as to whether Troy Fix was present on all of the occasions testified to by the State's witnesses, or whether his behavior during those occasions amounted to stalking or protection order violations.

Troy Fix presented conflicting evidence and explained why some of contacts with Lisa Fix were inadvertent and accidental and therefore did not constitute stalking or violate a protection order. See; *State v. Sisemore* 114 Wash.App 75, 55 P.3d 1178 (2002). Troy Fix denied that he ever followed or watched Lisa Fix. RP 536.

He stated he did see Lisa Fix on March 27, 2017 but that the contact was inadvertent and accidental. On that occasion he was on his way to Bret Horn's residence to pick up a pedal that belonged with some music equipment he bought from Van Horn earlier. Troy Fix stated he

encountered Lisa Fix when he was exiting I-5. He also stated he saw her in his rearview mirror on his way to Van Horn's residence. There was no further contact RP. 541-42.

However, the State unfairly conflated this accidental contact into a devious scheme during its closing argument, stating that Troy Fix was a "boundary tester" and he purposely bought this equipment from Bret Horn, rather than from someone else, because Bret Horn lived in the vicinity of Lisa Fix's residence, "[b]ecause it gives him the opportunity there - to run into her - to claim to have some sort of legal excuse to being there. RP 631. This is an unfair inference and it is hardly borne by the evidence because Bret Van Horn had testified that Troy Fix had bought the equipment off Craigslist on March 7, 2017, and during the transaction:

A. Yeah. So the equipment that he bought from me - there was a part I was unable to find when he bought it.

I mentioned that I would let him know if we could come across it - and we did. So I texted him - and told him we had it - that he would swing by and pick it up.

RP 505.

Mr. Fix also had an alibi witness, Vivian Hecker, who testified she saw him at work on April 24, 2017 at the same time he was alleged to have driven by Lisa Fix during her early morning walk. RP 523.

At a minimum, the evidence presented by Troy Fix and the defense witnesses conflicted with evidence and argument submitted by the state.<sup>9</sup> Therefore under the rules propounded by the Washington Supreme Court in *Petrich* and *Kitchen*, the conviction for Count 1, Stalking, should be reversed.

**2. The trial court erred by not merging Count 2, Violation of a Civil Antiharassment Protection Order, with Count 1, Felony Stalking - Violation of Protection Order. The remedy is to remand to the trial court to vacate the conviction for the violation of a protection order.**

The crime of stalking is generally a gross misdemeanor. However, stalking is elevated to a felony if the State charges and proves “the stalking violates any protective order protecting the person being stalked.” RCW 9A.46.110(5)(b)(ii). The State alleged that in the Information. CP 8. The State also charged Troy Fix with the violation of a civil

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<sup>9</sup> The trial court’s error in failing to give a unanimity instruction and the State’s error in failing to specifically elect which specific acts constituted stalking is compounded by the court’s failure to give a limiting instruction as to the limited admissibility of the prior bad acts under ER 404(b). The trial court recognized the need for a limiting instruction at RP 480. The State also failed to present Findings of Fact and Conclusions of Law pertaining to its the court’s 404(b) rulings after being ordered to do so at RP 216.

antiharassment protection order issued by the Clark County District Court in Cause No. 15H000202. CP 8-9.

Both the United States and Washington State Constitutions prohibit multiple punishments for the same offense. Double jeopardy claims are reviewed de novo. *State v. Smith*, 177 Wash.2d 533,545, 303 P.3d 1047,1053 (2013), and may be raised for the first time on appeal. *State v. Ralph*, 175 Wash. App. 814, 823, 308P.3d 729 (2013). Under both the federal and state constitutions it is the Legislature that decides what conduct is criminal and determines the appropriate punishment. *Smith, Id.*, citing *State v. Calle*, 125 Wash.2d 769, 776, 888 P.2d 155 (1995). The Legislature has the power to define offenses, and therefore, whether two offenses are separate offenses depends on whether the Legislature intended them to be separate. *State v. Freeman*, 153 Wash.2d 765, 770-71, 108 P.3d 753 (2005).

Under the merger doctrine, when the degree of one offense is raised by conduct that is defined as a crime elsewhere in the criminal statutes, the court presumes that the Legislature intended to punish both offenses through the greater crime. *State v. Freeman*, 153 Wash.2d at 772-73; *State v. Whittaker*, 192 Wash.App. 395, 410-11, 367 P.3d 1092 (2016).

When two offenses merge, entering a separate conviction for each violates the double jeopardy prohibition. *Freeman*, 153 Wash. 2d at 780. “Indeed, even a conviction alone, without an accompanying sentence, can constitute ‘punishment’ sufficient to trigger double jeopardy protections.” *State v. Turner*, 169 Wash.2d 448, 454-55, 238 P.3d 461 (2010); citing *State v. Womac*, 160 Wash. 2d 645, 657, 160 P.3d 40 (2007) and, *Ball v. United States*, 470 U.S. 856-865, 105 S.Ct. 1668 (1985).

Here, the State charged both felony stalking based on violation of a protective order, and the misdemeanor violation of the same protective order. CP 8-9. The jury was instructed that, to convict Troy Fix of the crime of misdemeanor violation of a protective order, it must find he violated the provisions of the antiharassment protection order that was in effect between March 16, 2017 and April 25, 2017. CP 102.

The jury was instructed, that, to convict Troy Fix of felony stalking, it must find that between March 16, 2017 and April 25, 2017 he intentionally and repeatedly harassed or repeatedly followed Lisa Fix and that he violated a protective order protecting Lisa Fix. CP 92.

The jury found that Troy Fix was guilty of stalking Lisa Fix while a protection order that protected Lisa Fix was in effect and, in

doing so, he was also guilty of violating that protective order. CP 159-161.

Therefore, the conviction for misdemeanor violation of the protection order merges into the conviction for felony stalking because the jury relied on the same protection order for both crimes. See *State v. Parmlee*, 108 Wash.App. 702, 710-11, 32 P.3d 1029 (2001). Accordingly, the conviction for misdemeanor violation of the antiharassment protection order must be vacated. See, *In re Personal Restraint of Strandy*, 171 Wash.2d 817,820, 356 P.3d 1159 (2011); *State v. Womac*, 160 Wash.2d 643, 658-59, 160 P.3d 40 (2007).

**3. The trial court erred by imposing mandatory legal financial obligations without making the adequate individualized inquiry as to Mr. Fix’s present or future ability to pay.**

The trial court imposed a \$500 Crime Victim Assessment, \$100 Domestic Violence assessment, \$250 Jury demand fee, and \$100 Felony DNA Collection Fee. The Court made a very limited inquiry into Troy Fix’s financial resources or present or future ability to pay. CP 188-196. RP 703-06.

RCW 10.01.160(3) was amended by the Legislature in 2018 and now provides:

(3) 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). In determining the amount and method of payment of costs for defendants who are not indigent as defined in RCW 10.101.010(3) (a) through (c), the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

The Washington Supreme Court recently ruled that the statute applies prospectively to cases on appeal. *State v. Ramirez*, 2018 WL 4499761, ¶ 2 (September 20, 2018).

If defendant's convictions are upheld, then this court should either remand the case to the trial court for resentencing or strike the legal financial obligations from Troy Fix's Judgment and Sentence.

#### IV. CONCLUSION

Troy Fix's conviction for felony stalking must be reversed because Mr. Fix's right to jury unanimity was violated. Mr. Fix was convicted twice for the same offense, requiring the conviction for violating a civil protection order be vacated. The Court should also vacate the legal financial obligations and remand the case to make the trial court make an individualized inquiry into defendant's current and future ability to pay.

DATED this 4th day of October, 2018.

Respectfully submitted,



Robert M. Seines, WSBA 16046, Attorney for Troy Fix

## CERTIFICATE OF SERVICE

I, Robert M. Seines, do hereby certify under penalty of perjury that on October 4, 2018, I provided e-mail service, a true and correct copy of the annexed Appellant's Opening Brief to:

Rachael Rogers, Prosecuting Attorney Clark County  
Rachael.rogers@clark.wa.gov

Deborah Wechselblatt  
deborah.wechselblatt@clark.wa.gov

And to:

Troy Fix  
95 Henderson Creek Road  
Hall, MT 59837



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s/Robert M. Seines

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Address:  
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