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NO. 51483-4-II

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

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STATE OF WASHINGTON, Respondent

v.

TROY MICHAEL FIX, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-01276-9

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BRIEF OF RESPONDENT

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## TABLE OF CONTENTS

INTRODUCTION .....	1
RESPONSE TO ASSIGNMENTS OF ERROR.....	3
I.    Because the crimes charged are “course of conduct” crimes the trial court did not need to include a unanimity instruction in the jury instructions. ....	3
II.   The conviction for violating a protection order did merge with the stalking conviction as evidenced by the fact that a judgment was not entered for the protection order conviction. ....	3
III.  The State agrees that the discretionary legal financial obligations imposed must be stricken. ....	3
STATEMENT OF THE CASE.....	3
ARGUMENT .....	3
I.    Because the crimes charged are “course of conduct” crimes the trial court did not need to include a unanimity instruction in the jury instructions. ....	3
II.   The conviction for violating a protection order did merge with the stalking conviction as evidenced by the fact that a judgment was not entered for the protection order conviction. ....	7
III.  The State agrees that the discretionary legal financial obligations imposed must be stricken. ....	8
CONCLUSION.....	10

## TABLE OF AUTHORITIES

### Cases

<i>State v. Askham</i> , 120 Wn.App. 872, 86 P.3d 1224 (2004).....	5
<i>State v. Bradford</i> , 175 Wn.App. 912, 308 P.3d 736 (2013).....	5
<i>State v. Brown</i> , 159 Wn.App. 1, 248 P.3d 518 (2010).....	4, 5
<i>State v. Garman</i> , 100 Wn.App. 307, 984 P.2d 453 (1999).....	4, 5
<i>State v. Haines</i> , 151 Wn.App. 428, 213 P.3d 602 (2009).....	5
<i>State v. Handran</i> , 113 Wn.2d 11, 775 P.2d 453 (1989).....	4
<i>State v. Kitchen</i> , 110 Wn.2d 403, 756 P.2d 105 (1988).....	4
<i>State v. Love</i> , 80 Wn.App. 357, 908 P.2d 395 (1996) .....	4
<i>State v. Petrich</i> , 101 Wn.2d 566, 683 P.2d 173 (1984) .....	4
<i>State v. Ramirez</i> , 191 Wn.2d 732, 426 P.3d 714 (2018).....	8
<i>State v. Shelton</i> , 194 Wn.App. 660, 378 P.3d 230 (2016) .....	9
<i>State v. Whittaker</i> , 192 Wn.App. 395, 367 P.3d 1092 (2016) .....	5

### Statutes

RCW 10.14.020 .....	6
RCW 10.14.020(1),(2) .....	6
RCW 43.43.754 .....	9
RCW 43.43.7541 .....	8, 9
RCW 7.68.035 .....	9
RCW 9.94A.760(1).....	9
RCW 9A.46.110(1)(a) .....	6
RCW 9A.46.110(6)(c),(e).....	6

### Other Authorities

WPIC 4.25.....	4
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### Rules

GR 14.1 .....	5
RAP 10.3(b).....	3

### Unpublished Opinions

<i>State v. Lister</i> , 189 Wn.App. 1040, 2015 WL 5010687, 4-5 (2015).....	5
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## INTRODUCTION

Troy and Lisa Fix were married for 18 years. But in September of 2013, the couple separated and by December of that same year Lisa filed for divorce.<sup>1</sup> The divorce was finalized on April 1, 2015. Lisa remained in the house in Ridgefield, Washington, located on ten acres and described as a “hobby farm.” Fix relocated to Woodland, Washington in Cowlitz County.

Nonetheless, the two were together on August 29, 2014 and were in a car driving down to Oregon when they got into an argument regarding the end of their marriage. The argument ended with Fix assaulting Lisa. Fix was convicted in Oregon of Assault in the Fourth Degree – Domestic Violence for his actions during the incident and a no-contact order (“NCO”) was put in place protecting Lisa.

The NCO did not stop Fix from attempting to have contact with Lisa, however, and on November 4, 2014 the State of Washington charged Fix with stalking Lisa. That case was resolved on July 14, 2015 when Fix pleaded to Disorderly Conduct and stipulated to another NCO in which he

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<sup>1</sup> For the purpose of clarity the State will refer to Troy Fix as “Fix” and Lisa Fix as “Lisa.” No disrespect is intended.

also admitted to engaging in the behavior that gave rise to the stalking charge.

Next, during the time period of March 16, 2017 and April 25, 2017, Fix followed and/or harassed Lisa on approximately ten occasions by driving to the location in Ridgefield where Lisa took her early morning walks or near her residence. During five of the incidents, Fix was driving an older white Lexus with which Lisa was familiar because she drove it for many years during their marriage. During the other incidents, Fix drove either a maroon Honda motorcycle that was associated with him or a green Ford Explorer that he owned. Sometimes Lisa saw Fix's face during these incidents but more oftentimes she did not due to Fix putting the car's visor down or wearing a motorcycle helmet. Additionally, during some of these contacts Lisa was walking with a friend of hers.

As a result of these contacts in 2017, the State charged Fix with one count of Felony Stalking – Violation of Protection Order (Domestic Violence) and one count of Violation of Civil Anti-Harassment Protection Order (Domestic Violence). The jury convicted Fix as charged and the trial court sentenced him to 12+ months of confinement. This appeal follows.

## RESPONSE TO ASSIGNMENTS OF ERROR

- I. **Because the crimes charged are “course of conduct” crimes the trial court did not need to include a unanimity instruction in the jury instructions.**
- II. **The conviction for violating a protection order did merge with the stalking conviction as evidenced by the fact that a judgment was not entered for the protection order conviction.**
- III. **The State agrees that the discretionary legal financial obligations imposed must be stricken.**

## STATEMENT OF THE CASE

Pursuant to RAP 10.3(b), and for the purposes of this responsive brief only, the State is satisfied with Fix’s statement of the case. While the State would emphasize certain facts more and other less, Fix’s statement of the case accurately summarizes the facts relating to the underlying offenses for which Fix was found guilty as well as the procedural history of the case. The State will discuss any additional facts relevant to deciding the legal issues raised by Fix in the argument section.

## ARGUMENT

- I. **Because the crimes charged are “course of conduct” crimes the trial court did not need to include a unanimity instruction in the jury instructions.**

In cases where the State “presents evidence of several distinct acts, any one of which could be the basis of a criminal charge, the trial court

must ensure that the jury reaches a unanimous verdict on one particular incident.” *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989); *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). In these situations, unanimity can be assured if either the State explicitly elects the act that constitutes the crime or if the trial court instructs the jury that it must unanimously agree as to the act that constitutes a crime—this instruction is usually referred to as a “unanimity” or “*Petrich*” instruction. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); WPIC 4.25; *State v. Garman*, 100 Wn.App. 307, 313, 984 P.2d 453 (1999).

The State, however, need not elect a particular act and the trial court need not give a unanimity instruction where the evidence of the crime shows a “continuing course of conduct.” *Handran*, 133 Wn.2d at 17. “To determine whether there is a continuing course of conduct, we evaluate the facts in a commonsense manner considering (1) the time separating the criminal acts and (2) whether the criminal acts involved the same parties, location, and ultimate purpose. *State v. Brown*, 159 Wn.App. 1, 14, 248 P.3d 518 (2010) (citing *State v. Love*, 80 Wn.App. 357, 361, 908 P.2d 395 (1996)).

Stalking is a continuing course of conduct crime and the crime of violating a no-contact order often is as well.<sup>2</sup> *State v. Bradford*, 175 Wn.App. 912, 924-25, 308 P.3d 736 (2013) (applying the definition of “course of conduct” to the stalking statute); *State v. Haines*, 151 Wn.App. 428, 434-36, 213 P.3d 602 (2009) (holding that stalking is committed by the “combination of separate acts . . . to the victim” and that this combination “must comprise a harassing ‘course of conduct’”) (emphasis in original); *State v. Askham*, 120 Wn.App. 872, 882-83, 86 P.3d 1224 (2004); *Brown*, 159 Wn.App. at 13-15 (holding that multiple violations of a no-contact order constituted a “continuing course of conduct”); *State v. Lister*, 189 Wn.App. 1040, 2015 WL 5010687, 4-5 (2015);<sup>3</sup> see *State v. Whittaker*, 192 Wn.App. 395, 367 P.3d 1092 (2016) (discussing the interplay of stalking and multiple violations of a no-contact order); *Garman*, 100 Wn.App. at 313-15 (finding multiple, different types of theft over time from one victim to constitute a “continuing course of conduct”).

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<sup>2</sup> “[T]he unit of prosecution analysis is a pure question of legislative intent, while the continuing course of conduct analysis . . . is a factual inquiry undertaken by the trial court.” *Brown*, 159 Wn.App. at 13. Thus, the State could charge multiple violations of a no-contact order for violations “within a short span” without the requirement of election or a unanimity instruction. *Id.*

<sup>3</sup> *Lister* is an unpublished opinion holding that a unanimity instruction was not required “to ensure that the jury agreed on the particular protective order . . . violated and [the] particular conduct that violated the order” because the violations were a “continuous course of conduct.” Pursuant to GR 14.1, the opinion “may be accorded such persuasive value as the court deems appropriate.”

In fact, stalking cannot be defined as a criminal offense if a defendant does not engage in a “course of conduct.” A person:

commits the crime of stalking if . . . : (a) [h]e or she intentionally and repeatedly harasses or repeatedly follows another person

RCW 9A.46.110(1)(a). “Repeatedly” is defined as “on two or more occasions,” while “[h]arasses” means “unlawful harassment as defined in RCW 10.14.020.” RCW 9A.46.110(6)(c),(e). RCW 10.14.020, in turn, defines “[u]nlawful harassment” and “[c]ourse of conduct,” in relevant part, as follows:

(1) “Unlawful harassment” means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose. The course of conduct shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner. . . .

(2) “Course of conduct” means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. . . .

RCW 10.14.020(1),(2).

Here, Fix engaged in a “continuous course of conduct” when he, in a little over a month, violated the provisions of a no-contact order ten times by following and/or harassing Lisa in Ridgefield, Washington and a significant majority of the time early in the morning at the location where

Lisa would take her morning walk. Accordingly, the State was not required to make an election nor was the trial court required to give a unanimity instruction for either the charge of stalking or the charge of violation of a no-contact order. Consequently Fix's claim—and he does not address the “continuing course of conduct” exception—that his right to a unanimous jury was violated fails. Brief of Appellant at 27-28.

**II. The conviction for violating a protection order did merge with the stalking conviction as evidenced by the fact that a judgment was not entered for th3 protection order conviction.**

Fix is correct that his conviction for violating the protection order merges with his conviction for stalking. Br. of App. at 31-34. In fact, this was the State's position at Fix's sentencing. CP 171-72 (State's Sentencing Memorandum). As a result, the trial court only entered judgment and sentenced Fix for his stalking conviction. CP 188-198. Additionally, in a separate “memorandum of disposition” entered after sentencing, the trial court found that “Ct. 2 is the same criminal conduct/merges for the purpose of sentencing w/ Ct 1.” CP 187. It appears then the parties agreed that the protection order conviction merged.

To the extent that the purported error is that the trial court failed to enter a specific order vacating the protection order conviction or otherwise failed to note the vacation in the judgment and sentence, the State

concedes neither of these was done. The State does not object to a remand for purpose of entering an order vacating the protection order conviction.

**III. The State agrees that the discretionary legal financial obligations imposed must be stricken.**

Former RCW 43.43.7541 required the imposition of a \$100 DNA fee when a defendant was convicted of a felony regardless of whether the State had previously collected the defendant's DNA as a result of a prior conviction. Last year, however, the legislature amended the statute to provide that "[e]very sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars *unless the state has previously collected the offender's DNA as a result of a prior conviction.* RCW 43.43.7541 (emphasis added); Laws of 2018, ch. 269 § 18. Fix's conviction occurred while the former version was in place, but his appeal was pending at the time the statute was amended.

In *State v. Ramirez*, our Supreme Court held that the statutory amendments applied prospectively. 191 Wn.2d 732, 426 P.3d 714, (2018). This means that the amended statute, and the relief it offers, applies to all pending cases, including those "pending on direct review and thus not final when the amendments were enacted." *Id.* at 747. But there is no evidence that the State has ever collected Fix's DNA as a result of a prior conviction since his criminal history does not contain any convictions in

Washington that would have required that he submit a DNA sample. CP 199; RCW 43.43.754; RCW 43.43.7541.<sup>4</sup> Consequently, the trial court properly assessed the \$100 DNA fee—a fee that does not require an inquiry into his ability to pay. *See State v. Shelton*, 194 Wn.App. 660, 378 P.3d 230 (2016).

The statutory amendments, however, did not affect the mandatory nature of the victim penalty assessment. The victim penalty assessment remains a mandatory legal financial obligation regardless of an offender’s ability to pay. RCW 7.68.035; RCW 9.94A.760(1) (stating that “[a]n offender being indigent . . . is not grounds for failing to impose . . . the crime victim penalty assessment. . . .”). As a result, the trial court properly imposed the \$500 victim penalty assessment on Fix. CP 193.

On the other hand, despite making a finding that “the defendant is indigent and is not anticipated to be able to pay financial obligations in the future” the court imposed two discretionary legal financial obligations—the domestic violence assessment and the jury demand fee, which are \$100 and \$250, respectively. CP 190, 193. Based on the court’s own findings these legal financial obligations should be stricken upon remand.

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<sup>4</sup> Even in Washington Assault in the Fourth Degree – Domestic Violence was not added to the statute requiring the taking of a DNA sample until 2017. RCW 43.43.754. Fix’s conviction for Assault in the Fourth Degree – Domestic Violence occurred in Oregon in 2014. CP 199.

**CONCLUSION**

For the reasons argued above, this Court should affirm Fix's conviction and sentence, but remand for the striking of the \$100 domestic violence assessment and the \$250 jury demand fee.

DATED this 7 day of January, 2019.

Respectfully submitted:

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