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**COURT OF APPEALS, DIVISION II**  
**STATE OF WASHINGTON**

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STATE OF WASHINGTON,

Respondent,

v.

LUCAS EWING,

Appellant.

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Appeal from the Superior Court of Pierce County  
The Honorable Stanley J. Rumbaugh

No. 17-1-04795-5

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

On November 12, 2017, Defendant grabbed his wife's neck and tried to hit her with a metal bar. His thirteen-year-old daughter called police, enraging him. He beat his wife using his fists and a table leg. He threatened to kill her and their nine year-old son. His wife, visibly injured, told police they would have died if they hadn't escaped. Defendant fled.

Defendant was arraigned for five domestic violence offenses on March 8, 2018. He had twenty-five prior convictions, including violent felonies and domestic violence offenses. About ten cases included warrant history. The court imposed \$125,000 bail. That decision was informed by the parties' recommendations and Defendant's financial resources. Bail and other conditions were carefully imposed to assure appearance, prevent violence, and discourage witness tampering pursuant to Criminal Rule 3.2.

Bail was not excessive in light of the particularly disconcerting facts and Defendant's history. Equal protection and due process were not implicated by Defendant's pre-trial incarceration given the public's interests in preventing violence and ensuring just adjudication of the case. Trial began 97 days after arraignment. Defendant was convicted of two aggravated felony domestic violence offenses and received an exceptional sentence of 132 months imprisonment. Any error in setting or maintaining bail is moot.

## II. RESTATEMENT OF THE ISSUES

- A. Was high bail properly imposed when it was the least restrictive condition available to protect the public as well as assure Defendant's appearance given his high probability of committing future violence combined with a history of intimidating witnesses and failing to appear at court?
- B. Did the court abuse its discretion at the reconsideration hearing by maintaining bail when the same concerns that justified the originally imposed amount had not changed?
- C. Is any error by the court in perfecting the record moot when Defendant has been convicted and is no longer held on bail?
- D. Did the court comply with constitutional requirements when it reasonably addressed the State's substantial interests in preventing violence, protecting witnesses from intimidation, and assuring Defendant's appearance in the case?

## III. STATEMENT OF THE CASE

### A. Domestic Violence Incident and Police Investigation

At 11p.m. on November 12, 2017, 13 year-old R.R.E. called 911. Ex. 12; 8RP 12-20, 46.<sup>1</sup> She reported that her father, Defendant Lucas Ewing, had attacked her mother, Shalandra Ewing.<sup>2</sup> Ex.12; 8RP 109-10. R.R.E. said that Defendant, who was drunk and high, jumped on the bed, grabbed her mother's neck, and tried to hit her with a metal bar. Ex.12. Despite Defendant telling her not to, R.R.E. called police less than a minute after the assault. Ex.12.

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<sup>1</sup> For the Court's convenience, the State uses the same citation system as Defendant, with the exception of 12RP for the June 29, 2018, sentencing hearing. Br. of Appellant at 2.

<sup>2</sup> Shalandra Ewing is hereinafter referred to as "Shalandra" to avoid confusion. No disrespect is intended.

Pierce County Sheriff's Deputy Dustin Markholt responded to the call. 8RP 12-20, 46. Neither Defendant nor Shalandra were found at the scene. 8RP 30, 48-49, 94. Shalandra's house was in disarray. 9RP 32-33. A table was broken and items appeared to have been thrown and scattered throughout the house. 9RP 32-33.

Shalandra was located at her father's house where she had fled with her nine-year-old son A.L.E. 8RP 19-20, 28-29, 33, 48, 50; 9RP 35-36. Shalandra spoke with Deputy Markholt about the incident for ten to fifteen minutes. 8RP 23, 25-26. She cried as she told him that when Defendant discovered police had been called, he said, "It's time for you guys to die." 9RP 19-20. She told Deputy Markholt she believed they would have died if she had not been able to escape. 9RP 19-20.

Shalandra completed a written statement under penalty of perjury. 8RP 25-26; 9RP 14-15, 18. In it she wrote:

My husband and I had been arguing about his drug use for the last several days. Then he woke me up in my daughter's room going berserk. He broke everything in the house and then came back into my daughter's room attacking me by punching me in my face and telling my daughter he had to do this to make me stay away from him forever. And my daughter called the police and escaped to the neighbor's.<sup>3</sup> Then my son woke up and he threw him down, after which he figured out my daughter had gotten away and called the police, he came back in a violent rage hitting me again and again and trying to force my son and I into the car because it

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<sup>3</sup> Deputy Markholt found R.R.E. at the neighbor's house and spoke with her about the incident for ten to fifteen minutes. 8RP 48.

was time for us to die. Then when he got out and said to go get my daughter, I put the car into gear and locked the doors and sped away to my father's with my son.

9RP 35-36. Deputy Markholt observed and photographed bruising and swelling on Shalandra's face, bruising on her back and shoulder blade, bruising and swelling on her arms, and a swollen welt above her left eyebrow. 8RP 23, 32, 38; 9RP 39-40.

Deputy Markholt remained in his patrol car in front of the home for several hours to provide the family a sense of security. 8RP 53; 9RP 39. Later that morning police obtained a warrant for Defendant's arrest and attempted to find him. 9RP 40-41. Unsuccessful, they left a copy of the warrant on a table in Shalandra's residence. 9RP 41.

**B. Charges**

Defendant was charged with six crimes for his actions the night of November 12th:

Count I: assault in the second degree, victim Shalandra Ewing  
Count II: assault in the fourth degree, victim Shalandra Ewing  
Count III: assault in the fourth degree, victim A.L.E.  
Count IV: malicious mischief in the third degree  
Count V: felony harassment, victim Shalandra Ewing  
Count VI: felony harassment, victim A.L.E.

CP 3-6. Each was a domestic violence offense. CP 3-6. Count I included a deadly weapon enhancement. CP 3-6. Counts I, II, V, and VI were aggravated by Defendant's commission of the crime in sight or sound of children. CP 3-6, 68-69.

### C. Arraignment

Defendant was summoned to an arraignment scheduled for January 4, 2018.<sup>4</sup> CP 127-28, 159-60. He failed to appear and a warrant was issued. CP 129, 161-62; 1RP 4. Defendant was arraigned in custody on March 8th. 1RP 8-12. He completed the pre-trial financial eligibility form before the hearing. CP 157 (sealed attachment). The court found Defendant eligible for a court-appointed attorney immediately prior to the parties' bail arguments. 1RP 9. The court found probable cause and set conditions of release based upon the following facts:

On November 12th, around 11:10 PM, deputies responded to a domestic violence incident in Roy, Washington. Upon arrival, they contacted R.R.E. (DOB 7/7/2004) who told them the following: her dad is Lucas Ewing ("the defendant"). The defendant was arguing with her mom when he all of a sudden went crazy and swung a pipe at her mom. She was not sure if it actually hit her. When the defendant found out she called the cops, the defendant started chasing her. She ran out the front door to their neighbors house where she was able to barely escape.

Deputies went to the scene of the incident, but there was no answer. They looked through the windows and saw that the house was in disarray: the dining room table was broken, there was a hole in one of the doors, and there were things thrown all over the house.

Deputies contacted R.R.E.'s mother - Shalandra Ewing at her grandfather's house. Shalandra told the following: she and her husband, the defendant, were arguing. The defendant went crazy and started punching her. The defendant punched her in her left cheek, arms, and back. Deputies noticed

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<sup>4</sup> Arraignment and all further court dates through sentencing took place in 2018.

bruising on her face, arms and back that were consistent with her account. Shalandra stated that the defendant than grabbed her by her arms and threw her around the house. Shalandra had bruising on the inside of her arm where the defendant had grabbed her.

Shalandra said that the defendant also hit her with a table leg above her left eyebrow. There was a visible welt that was consistent with a blow to her left eyebrow. At one point, the defendant also threw her their son, A.L.E. (DOB 6/18/2008) to the ground. During the assaults, the defendant told R.R.E.: "I have to do this to make her stay away from me forever."

When the defendant learned that R.R.E. had called the cops, he told Shalandra: "It's time for you guys to die." Shalandra said that if she was not able to get into the car and drive away that they would have died. Shalandra was visibly upset and crying and she told what happened to her. Shalandra was scared that the defendant would know where they are at and that he was going to come and kill them.

CP 1-2. The court also considered Defendant's prior felony convictions which at the time of arraignment included:

Taking a Motor Vehicle Without Permission, Second Degree, 2016  
Possession of Stolen Property in the Second Degree, 2016  
Unlawful Possession of a Controlled Substance, 2016  
Unlawful Possession of a Controlled Substance, 2014  
Attempt to Elude a Pursuing Police Vehicle, 2012  
Robbery in the Second Degree, 2009  
Assault in the Second Degree, 2009  
Burglary in the Second Degree, 2001  
Residential Burglary, 2002  
Theft in the Second Degree, 2001  
Theft in the Second Degree, 2000

CP 102-03, 107-108. Defendant's misdemeanor convictions included:

Malicious Mischief in the Third Degree, 2015  
Reckless Driving, 2014

Vehicle Prowling in the Second Degree, 2014  
Driving with License Suspended in the Third Degree, 2014  
Reckless Driving, 2014  
Driving with License Suspended in the Third Degree, 2005  
Hit and Run Unattended, 2003  
No Valid Operator's License, 2000  
No Valid Operator's License, 1999  
No Valid Operator's License, 1999  
Theft in the First Degree, 1997  
Possession of Stolen Property in the Second Degree, 1997  
Assault in the Fourth Degree, 1996  
Assault in the Fourth Degree, 1995

CP 102-03, 107-08. In total, at the time of arraignment Defendant had twenty-five prior convictions for crimes committed in a twenty-one-year time span.<sup>5</sup> CP 102-03, 107-08.

Given the danger Defendant posed to the victims, his family, and the community, the State asked the court to set bail at \$200,000. 1RP 9. The request rested on his prior violent and domestic violence convictions, his extensive warrant history, and his assaults of and threats to kill two family members. 1RP 9-10.

Defense counsel asked the court to set bail no higher than \$60,000. 1RP 10. She told the court Defendant had lived in Washington his entire life, had family in the area, a residence, and a stable job for the past year.

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<sup>5</sup> This criminal history is based upon the Statement of Prior Record and Offender Score and Section 2.2 in the Judgment and Sentence. CP 102-03, 107-08. It is not a reproduction of what the trial court used to view criminal history at arraignment. This Court can infer the trial court had access to an accurate record of Defendant's history.

1RP 10. No one appeared to vouch for Defendant's character or commit to supervising him if released. 1RP 10.

The court set bail at \$125,000. 1RP 11. It noted Defendant had approximately ten cases with warrant activity, assaults dating back to 1994, a previous conviction for assault in the second degree, and past domestic violence assaults.<sup>6</sup> 1RP 11. It found the present allegations "particularly disconcerting" given the involvement of two children, one of whom had to call 911. 1RP 11. Numerous other conditions were ordered, including no contact with the victims, surrender of weapons, travel restrictions, law abiding behavior, and no use of alcohol or drugs. 1RP 11, CP 7-8.

**D. Pre-Trial Continuances and Bail Reconsideration**

Trial was initially set for April 24th. CP 163. It was continued three times to May 14th, June 11th, and June 13th. CP 14, 17, 20, 163, 7RP 5. The State made diligent efforts to prepare prior to the first trial date. CP 138-43, 144-49, 150, 165-70, 164, 171-74. The State filed a witness list and issued subpoenas in late March. CP 138-43, 144-49, 150, 165-70. The State attempted to contact Shalandra on March 9th, March 26th, April 10th, April 17th, and April 20th. CP 171-74. When the State attempted to serve her with a subpoena on April 17th, she refused to take paperwork from the process server. CP 164.

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<sup>6</sup> The State asserted Defendant had nine cases with warrant activity. 1RP 10.

The State asked for a continuance of the first trial date given the difficulties in reaching and serving Shalandra, who was now uncooperative. 3RP 4, 9. Defendant objected. 3RP 7; CP 14. The court continued the trial to May 14th, following defense counsel's vacation and other scheduling issues. 3RP 8-9; CP 14.

On May 14th, defense counsel asked for a continuance because he was currently in trial on another case. 1RP 16-17; CP 17. The State joined the motion. 1RP 16-17. The State had continued its attempts to reach Shalandra. CP 171-74. The court continued the trial to June 11th. 1RP 19.

At the same hearing, defense counsel asked the court to lower bail to \$25,000. 1RP 25. Counsel noted Defendant had a job, an address where he could stay if released, and children he supports. 1RP 21-22. Defendant's mother was present in the courtroom. 1RP 21. Defendant contended he did not appear to arraignment on January 4th because he was not living at any of the three addresses where the summons was sent. 1RP 21-22.

The State objected to a change in conditions. 1RP 2-26. Its initial argument for bail was supplemented by the argument that Defendant's elude conviction also showed he was a flight risk. 1RP 23. The State noted Defendant had previously been convicted of domestic violence malicious mischief in 2015 and domestic violence assault in the fourth degree in 1994 and 1995. 1RP 23. The State reminded the court Defendant was facing a

significant sentence, creating reason to flee and tamper with an already uncooperative victim. 1RP 23. The court declined to reduce bail. 1RP 26.

Shalandra's cooperation was ultimately secured following her arrest on a material witness warrant. CP 171-75, 176-79. The State and defense counsel agreed to a two-day continuance of trial on June 11th.<sup>7</sup> 6RP 21-23; CP 20. Trial began on June 13th, 97 days after arraignment. 7RP 5.

#### **E. Trial and Sentencing**

Shalandra testified at trial. 8RP 108-146. Like most domestic violence victims, she recanted.<sup>8</sup> She asserted she was "[t]he only person that was aggressive or did anything." 8RP 118. She denied Defendant assaulted her, assaulted A.L.E., threatened her, or threatened A.L.E. 8RP 108-146.

Shalandra alleged the incident began because she was heavily intoxicated and "overemotional."<sup>9</sup> 8RP 118-22. She started an argument with Defendant and "lunged" at him, falling and breaking the table. 8RP 123-24. She said R.R.E. and A.L.E. woke up and misinterpreted what was going on. 8RP 123-24, 126-28. Instead of Defendant throwing A.L.E. to the

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<sup>7</sup> Defendant objected. 6RP 21-23.

<sup>8</sup> Tom Lininger, *Prosecuting Batterers After Crawford*, 91 Va.L.Rev. 747, 768 (2005); Douglas Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 Colum.J.Gender & L. 1, 3 (2002); Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence & Justice for Victims of Domestic Violence*, 8 Yale J.L. & Feminism 359, 367-68 (1996).

<sup>9</sup> Deputy Markholt testified he never saw any signs Shalandra was under the influence of alcohol. 8RP 24, 88.

ground, she claimed A.L.E. “possibly” fell, because he was startled and clumsy. 8RP 127; 9RP 35-36. A.L.E. was also purportedly responsible for breaking two doors in the house on prior occasions. 8RP 125. Shalandra denied Defendant threatened to kill her as she and A.L.E. fled, saying he only tried to stop her because it was in her best interest. 8RP 136, 141.

Shalandra claimed she only spoke with police and completed a written statement because the police would not return R.R.E. to her until she did so.<sup>10</sup> 8RP 119. Neither A.L.E. nor R.R.E. testified at trial. Shalandra did not allow police to speak with A.L.E and told the prosecutor she would not allow R.R.E., who by the time of trial lived with Defendant’s mother, to testify. 3RP 80-81; 8RP 111, 113.

The jury found Defendant guilty of both counts naming Shalandra as the victim: Count I, assault in the second degree, and Count V, felony harassment. CP 85-86. The jury found Defendant was armed with a deadly weapon as to Count I and had committed both counts within the sight or sound of children. CP 83, 87. Defendant was acquitted of Counts III and VI pertaining to A.L.E. Counts II and IV were dismissed prior to closing argument. 10RP 89, 93; CP 152-55.

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<sup>10</sup> Shalandra called 911 herself from her father’s house. 8RP 129-30. Deputy Markholt testified Shalandra willingly spoke with him and completed the handwritten statement. 8RP 23, 25-26, 9RP 24-25, 18-20. She also met with a deputy about the incident on November 16th. 9RP 68, 70-73, 78.

Defendant was sentenced on June 29th. CP 104-118; 12RP. His offender score was 14 and 12 for Counts I and V, respectively. CP 121. The court found Defendant's high offender score and multiple current offenses resulted in unpunished crimes, and that his crimes occurred in the presence of minor children, warranting an exceptional sentence of 132 months imprisonment. CP 108, 111, 121-23. Defendant timely appealed. CP 119.

#### IV. ARGUMENT

**A. The court correctly imposed bail pursuant to Criminal Rule 3.2 to address Defendant's risk of flight, violence, and interference with justice.**

Bail and other conditions of release are imposed under Criminal Rule (CrR) 3.2. Personal recognizance release is required unless:

- (1) the court determines that such recognizance will not reasonably assure the accused's appearance, when required, or
- (2) there is shown a likely danger that the accused:
  - (a) will commit a violent crime, or
  - (b) will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice.<sup>11</sup>

CrR 3.2(a). In determining whether an accused is a risk of flight, violence, or interference with justice, the court is required to consider any relevant facts, including but not limited to those listed in CrR 3.2(c) and (e). If such a finding is made, conditions may be imposed under CrR 3.2(b) and (d).

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<sup>11</sup> Bail may be denied when the accused is charged with a capital offense or faces the possibility of life imprisonment. CrR 3.2(a); WA Constitution Article I § 20.

Bail may be imposed if no less restrictive condition or conditions would reasonably address the risk of flight, violence, or interference with justice. CrR 3.2(b) and (d). If bail is imposed, the court is required to “consider, on the available information, the accused’s financial resources for the purpose of setting a bond that will reasonably assure” the accused’s appearance or safety. CrR 3.2(b)(7), (d)(6).

Decisions regarding pretrial release will be affirmed absent abuse of discretion. *State v. Huckins*, 5 Wn. App.2d. 457, 466, 426 P.3d 797 (2018); *State v. Reese*, 15 Wn. App. 619, 620, 550 P.2d 1179 (1976). “A trial court abuses its discretion if its decision falls outside the range of acceptable choices, its decision is unsupported by the record, or the court applies an incorrect legal standard.” *State v. Ingram*, 447 P.3d 192, 198 (August 6, 2019) (citing *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013)).

CrR 3.2 does not require the entry of oral or written findings. *Ingram*, 447 P.3d at 198. A reviewing court examines the record to determine if there is substantial evidence for the court’s findings the accused is a risk of flight, violence, or interference with justice. That determination involves “the exercise of sound discretion of the trial judge.” *Huckins*, 5 Wn. App.2d. at 465 (quoting *State v. Smith*, 84 Wn.2d 498, 505, 527 P.2d 674 (1974)). A reviewing court will not substitute its judgment when the findings are supported. *Id.*

Similarly, when bail has been imposed, a reviewing court examines the record to determine whether the trial court considered the accused's financial resources and less restrictive conditions of release. *Ingram*, 447 P.3d at 198, 200. The application of the court rule to the facts is reviewed de novo. *State v. Rose*, 146 Wn. App. 439, 445, 191 P.3d 83 (2008).

**1. Substantial evidence supports the court's determination Defendant was a risk of flight.**

Defendant's history shows personal recognizance release would not reasonably assure his appearance. The nonexclusive list of factors the court considers in this inquiry includes:

(1) history of appearing when ordered; (2) participation in employment, school, treatment, or community activities; (3) family ties and relationships; (4) reputation, character, and mental condition; (5) length of community residence; (6) criminal record; (7) vouching by community members; (8) the nature of the charge; and (9) other factors showing ties to the community.

CrR 3.2(c).

Defendant's criminal history alone provides substantial evidence that he was a flight risk. *See* CrR 3.2(c)(1) and (6); CP 102-03, 107-08. His approximately ten cases with warrant history, his 2012 elude conviction, and his twenty-five total prior criminal convictions indicates a total disregard for the rule of law. CP 102-03, 107-08.

The facts in the probable cause declaration also support the conclusion Defendant was a flight risk. CP 1-2; *See* CrR 3.2(c)(8). From the

beginning, Defendant sought to evade authorities, first by ordering his daughter not to call 911, then by fleeing the scene after police were contacted. CP 1-2. Once charged, Defendant failed to appear to his originally scheduled arraignment.<sup>12</sup> CrR 3.2(c)(1); CP 129, 161-62; 1RP 4.

No community members appeared to vouch for Defendant or his character. CrR 3.2(c)(4) and (7). It was within the “sound discretion of the trial judge” to conclude the risks of releasing him were not outweighed by his counsel’s assertion of a job, residence, and long history in the State. *See Huckins*, 5 Wn. App.2d at 465; CrR 3.2(c)(2) and (3). Substantial evidence supports a finding that personal recognizance release would not secure Defendant’s appearance.

**2. Substantial evidence supports the court’s determination Defendant would commit a violent act or interfere with the administration of justice.**

The danger Defendant posed to his family, the community, and the judicial process through intimidation of witnesses was clear. The nonexclusive list of factors the court considers in this determination include:

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<sup>12</sup> Although he argued on May 14<sup>th</sup> he was unaware of the January 4<sup>th</sup> date because he provided a different address than the three the summons was sent, there is an inference Defendant was aware he was sought by authorities based on: the police responding on November 12<sup>th</sup> and looking for him, a summons sent to three addresses associated with him including a P.O. Box, and a warrant issuing following the January 4<sup>th</sup> date. 1RP 4, 22; CP 1-2, 129, 161-62. It is reasonable to infer Defendant was also informed by family and friends of police efforts to locate him and that a person with his experience of the criminal justice system who knew police responded to his assault of family members would check to see if he was charged and/or warrants were issued.

(1) criminal record; (2) vouching by community members; (3) the nature of the charge; (4) reputation, character, and mental condition; (5) past threats or intimidation; (6) present threats or intimidation; (7) past record of committing offenses pretrial or while supervised; (8) past use or threats involving weapons.

CrR 3.2(e).

Defendant's history alone shows he is a risk to his family and the community. *See* CrR 3.2(e)(1). Defendant's eleven prior felonies included two Class B violent offenses against persons, assault in the second degree and robbery in the second degree, as well as two convictions for burglary. CP 102-03, 107-108. His three prior convictions for domestic violence indicated the present charge was not the first time he had inflicted violence upon family members. CP 102-03, 107-108; 1RP 23.

The facts in the probable cause declaration raised even greater concern for his family's welfare and possible witness intimidation. CP 1-2; *See* CrR 3.2(e)(3). Defendant's daughter's call to 911 *increased* Defendant's threats of violence. CP 1-2; CrR 3.2(e)(5) and (6). He responded by chasing his daughter to the neighbor's house and threatening to kill Shalandra and nine year-old A.L.E. CP 1-2. A conclusion Defendant presented a danger of violence and intimidation to his family, especially if they cooperated with prosecution, is well-founded. *See Huckins*, 5 Wn. App.2d at 466.

**3. The court properly determined no less restrictive conditions would address the dangers posed by Defendant.**

The court rightly concluded less restrictive conditions would not address the risks associated with Defendant. To address flight risk, the court may impose the least restrictive conditions listed in CrR 3.2(b) to assure the accused's appearance, including bail. To address violence and intimidation, bail may be set if no less restrictive conditions could achieve the same purpose. CrR 3.2(d)(6).

That the court imposed bail in addition to almost every other condition at its disposal shows that bail was necessary address the risks Defendant posed. The court required Defendant to: (1) reside only at his listed address (CrR 3.2(b)(2) and (d)(8)); (2) abide by travel restrictions (CrR 3.2(b)(2) and (d)(8)); (3) not drive without valid license and insurance (CrR 3.2(d)(5)); (4) maintain law abiding behavior (CrR 3.2(d)(5)); (5) have no contact with victims or witnesses (CrR 3.2(d)(1) and (2)); (6) not possess weapons (CrR 3.2(d)(3)); (7) not use drugs or alcohol (CrR 3.2(d)(3)); and (8) remain in contact with his attorney. CP 7-8. There is no evidence of any option to place Defendant in the custody of a person, organization, or day release. CrR 3.2(d)(1), (7), (9).

The court characterized the case as "particularly disconcerting," above and beyond an average felony-level domestic violence assault. IRP

11. That bail was substantial shows the court had profound concerns about Defendant. Although requesting less bail than was imposed, counsel's initial request for \$60,000 is additional evidence of the appropriateness of high bail in this case. 1RP 10.

This case is distinguishable from both *Ingram* and *Huckins*, where this Court found the trial court erred by failing to consider less restrictive conditions. In *Huckins*, unlike here, the small amount of bail set demonstrated the possibility less restrictive conditions may have addressed the court's concerns. *Huckins*, 5 Wn. App.2d at 468. In *Ingram*, unlike here, the trial court set bail at the State's request and nothing in the record indicated an effort to impose the least restrictive conditions necessary. *Ingram*, 447 P.3d at 200.

The record in this case shows the court's careful analysis of Defendant's history and the facts of the case. 1RP 11. The court rejected the State's proposal of \$200,000 and used its own calculus to set bail at \$125,000. 1RP 11. Certainly the absence of an explicit comment from the court regarding "least restrictive conditions" is not error where oral and written findings are not required and the record supports the court's decision. *Ingram*, 447 P.3d at 198, 200. The trial court's assessment of the least restrictive conditions required given the risks and dangers posed by Defendant should be affirmed.

**4. The court considered Defendant's financial resources.**

The record shows that the court considered Defendant's financial resources at the time bail was set. When the court sets bail, CrR 3.2(b)(7) and CrR 3.2(d)(6) require the court to consider, on the available information, the accused's financial resources in setting bail to address the risks associated with the accused.

Defendant completed the financial pre-trial eligibility form prior to arraignment. CP 157 (sealed attachment). The information gathered was sufficient to determine Defendant qualified for a court-appointed attorney.<sup>13</sup> 1RP 9. The court made this determination immediately prior to argument about conditions of release. 1RP 9. No other subjects were discussed prior to the court making its decision as to bail. 1RP 9-11. Mere moments separated the court's examination of Defendant's financial resources and its decision as conditions. 1RP 9-11.

The record supports the inference the court considered Defendant's financial resources in setting an amount of bail necessary to assure appearance, prevent violence, and prevent interference with justice. *Ingram*, 447 P.3d at 198, 200. Unlike in *Ingram*, facts in the record support this inference. *Ingram*, 447 P.3d at 200. Courts are presumed to follow the law

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<sup>13</sup> "A lawyer shall be provided to any person who is financially unable to obtain one without causing substantial hardship to the person or to the persons family." CrR 3.1(d).

and there is no reason to believe the court deviated from CrR 3.2's requirements. *See State v. Read*, 147 Wn.2d 238, 244, 53 P.3d 26 (2002) (presumption court followed the law during bench trial). This Court should find the court considered Defendant's financial resources in setting bail.

**B. The court did not abuse its discretion in declining to reduce bail at the reconsideration hearing.**

The court did not abuse its discretion in declining to reduce bail at the May 14th bail reconsideration hearing. Pursuant to CrR 3.2(j)(1), an accused may move for reconsideration of bail. If bail is maintained, the court "shall set out its reasons on the record or in writing." CrR 3.2(j)(2).

On May 14th, the court heard extensive argument from the parties about Defendant's request to reduce bail to \$25,000. 1RP 20-26. In addition to the facts considered at arraignment, Shalandra had become uncooperative with prosecution, raising concern for past or future witness tampering. 1RP 22-23; *See Davis v. Washington*, 547 U.S. 813, 832-33, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (recognizing that domestic violence crimes are "notoriously susceptible to intimidation or coercion of the victim."). The court declined to reduce bail immediately following the parties' argument. 1RP 26.

Although it did not set out its reasons on the record or in writing, by declining Defendant's request the court adopted the reasoning put forth by the State. *E.g. State v. Pirtle*, 127 Wn.2d 628, 650-51, 904 P.2d 245 (1995)

(court's incomplete weighing of ER 403 evidence sufficient where the record indicated the court adopted the prosecutor's argument). The court's decision was supported by the same facts and circumstances as at arraignment and the additional concern about Shalandra's cooperation. This Court should find the court did not abuse its discretion in maintaining bail.

**C. Even if the court erred in perfecting the record at arraignment or the bail hearing, the issue is moot.**

Even if the court erred in making a record at arraignment or the bail hearing, the issue is moot. An issue is moot if a court can no longer provide effective relief. *Ingram*, 447 P.3d at 197 (citing *State v. Gentry*, 125 Wn.2d 570, 616, 888 P.2d 1105 (1995)). Moot issues are only considered if they involve matters of "continuing and substantial public interest." *Id.*, 447 P.3d at 197 (citing *State v. Cruz*, 189 Wn.2d 588, 598, 404 P.3d 70 (2017)).

In order to qualify as a matter of continuing and substantial interest, the court considers, "[1] the public or private nature of the question presented, [(2)] the desirability of an authoritative determination for the future guidance of public officers, and [(3)] the likelihood of future recurrence of the question." *Huckins*, 5 Wn. App.2d at 463 (citing *State v. Hunley*, 175 Wn.2d 901, 907, 287 P.3d 584 (2012)). Prior courts have found that bail is a matter of continuing and substantial public interest due to the

past lack of case law on the issue. *Id.*, at 463-64; *Ingram*, 447 P.3d at 197; *State v. Barton*, 181 Wn.2d 148, 152, 331 P.3d 50 (2014).

Because Defendant has been convicted and is no longer being detained, there is no relief this Court can offer and the issue is moot. *See Ingram*, 447 P.3d at 192. Furthermore, Defendant's bail was set prior to the decisions in *Huckins* and *Ingram* and consequently is not evidence of the court ignoring this Court's recent guidance as Defendant claims. Br. of Appellant at 32; *Huckins*, 5 Wn. App.2d at 457; *Ingram*, 447 P.3d at 197.

This case raises no unique questions requiring additional guidance from this Court. *See Huckins*, 5 Wn. App.2d at 463. Defendant is a person who has engaged in unremitting criminal activity for over twenty years, who was charged for attacking and threatening two family members, and who has a history of disregarding court orders. CP 1-2, 102-03, 107-08. Common sense and the parameters of CrR 3.2 establishes that substantial bail was the likely outcome of these circumstances. This case does not warrant consideration as a matter of substantial public interest. *See State v. Cummings*, 8 Wn. App.2d 1006, 5 (2019)(**unpublished**); *see also State v. Barnes*, 4 Wn. App.2d 1079, 4 (2018)(**unpublished**).<sup>14</sup>

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<sup>14</sup> Unpublished cases have no precedential value and are not binding on any court. An unpublished case filed after March 1, 2013, may be cited as non-binding authority and may be accorded such persuasive value as this Court deems appropriate. CR 14.1(a).

Nothing about the case warrants the extreme and unprecedented remedy of dismissal as Defendant's requests. *See* Br. of Appellant at 33; *see also State v. Perez*, 16 Wn. App. 154, 157, 553 P.2d 1107 (1976) (violation of CrR 3.2 did not warrant dismissal in absence of prejudice). Defendant does not allege incarceration harmed his ability to prepare for trial. He also fails to show he would have been successful in bailing out at the \$60,000 and \$25,000 amounts he requested.

Defendant's argument that he deserves relief because of pre-trial delay is meritless. Br. of Appellant at 32. Defendant's case proceeded to trial 97 days after arraignment. Convictions following much longer delays have been upheld. *See State v. Shemesh*, 187 Wn. App. 136, 148, 347 P.3d 1096 (2015) (forty-month delay not violation of constitutional right to speedy trial); *State v. Iniquez*, 167 Wn.2d 273, 295-96, 217 P.3d 768 (2008) (eight-month delay did not violate speedy trial rights).

There were three continuances prior to trial approved by the court under CrR 3.3. CP 14, 17, 20, 163. The first was requested by the State after diligent efforts to reach and serve Shalandra. CP 164, 171-74. The second was requested by defense counsel and agreed to by the State. 1RP 16-17, CP 17. The third was agreed and delayed trial by two days. CP 20. Defendant's characterization that there were "repeated delays because of the State's failure to exert due diligence" is without factual basis. *See* Br. of

Appellant at 32. Subtracting the delays due to continuances requested or agreed to by his counsel, Defendant's case proceeded to trial 68 days after arraignment, 8 days longer than CrR 3.3 proscribes for in-custody defendants and within the cure period had that been requested.

Defendant has not shown or alleged a violation of his right to a speedy trial under CrR 3.3, his constitutional right to a speedy trial, or alleged any specific prejudice due to the delay. *See State v. Ollivier*, 178 Wn.2d 813, 822-27, 840-41, 312 P.3d 1 (2019). This issue is moot, does not warrant treatment as a matter of substantial public interest, and there is no relief available to Defendant.

**D. Bail was set in compliance with the State and Federal Constitutions.**

**1. Defendant's bail was reasonable under Article I, § 14**

Article I, § 14 of the Washington State Constitution provides that "excessive bail shall not be required." Article I, § 20 mandates that "[a]ll persons charged with crime shall be bailable by sufficient sureties."<sup>15</sup> Defendants do not have an absolute right to be released on personal recognizance pending trial. *State v. Goodwin*, 4 Wn. App. 949, 951, 484 P.2d 1155, 1156 (1971). Whether bail is excessive depends on the alleged

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<sup>15</sup> Except for capital offenses and offenses punishable by the possibility of life imprisonment. Article I, § 20.

facts as well as the potential penalties of the crime. *Ex parte Rainey*, 59 Wn. 529, 529-530, 110 P.7 (1910).

Defendant's bail was reasonable based on the facts, his history, and the potential penalties for aggravated Class B and C domestic violence felonies with an offender score above 9. Another reasonable judge may have set bail at an even higher amount. This Court should reject Defendant's claim his bail was excessive.

2. **Bail was set in compliance with the guarantee of equal protection under the State and Federal Constitutions.**

Defendant's equal protection claim fails because he cannot show he suffered undue discrimination based on wealth. Equal protection requires that similarly situated individuals are similarly treated under the law. *Harris v. Charles*, 171 Wn.2d 455, 462, 256 P.3d 328 (2011) (citing U.S. Const. amend. XIV, § 1; Wash.Const. art. I § 12). However, "[e]qual protection provides equal application of law but does not provide complete equality among individuals or classes of individuals." *Id.* (citing *State v. Simmons*, 152 Wn.2d 450, 458, 98 P.3d 789 (2004)).

Equal protection analysis differs depending on the right and the class at issue. Strict scrutiny applies to a law affecting a fundamental right or suspect class. *State v. Harner*, 153 Wn.2d 228, 235, 103 P.3d 738 (2004). Intermediate scrutiny applies to a law affecting a liberty right and a semi-suspect class. *Id.* Rational basis applies when the law does not implicate a

suspect or semi-suspect class or fundamental right. *State v. Manussier*, 129 Wn.2d 652, 673, 921 P.2d 473 (1996).

In limited circumstances, Washington courts have applied intermediate scrutiny where a denial of liberty is based on wealth. *In re Mota*, 114 Wn.2d 465, 543, 788 P.2d 538 (1990) *superseded by statute as recognized in In Re Matter of Williams*, 121 Wn.2d 655, 853 P.2d 444 (1993) (holding that denial of credit for time served for pre-trial detention discriminates against indigent defendants). An individual's inability to make bail, however, does not necessarily constitute evidence of wealth-based discrimination implicating equal protection. As the Washington State Supreme Court explained in *Fogle*:

Without disturbing *Mota*, we note failure to pay set bail does not necessarily represent a wealth-based classification to merit semi-suspect status. The determination of bail may depend on many factors beyond wealth, such as perceived dangerousness and likelihood of flight. *See* CrR 3.2(b). Moreover, a prisoner may elect not to pay bail for reasons other than financial condition.

*In re Fogle*, 128 Wn.2d 56, 63, 904 P.2d 722 (2015). Defendant cannot show his bail constituted a wealth-based classification given that it was set in response to his perceived dangerousness and risk of flight. *See Fogle*, 128 Wn.2d at 63.

Applying the rational basis test, the imposition of bail in this case is certainly rationally related to the legitimate state purposes of preventing

violence and assuring future appearance. *See Fogle*, 128 Wn.2d at 62. Even if the Court applies intermediate scrutiny, the inquiry asks whether any unequal treatment “may fairly be viewed as furthering a substantial interest of the State.” *Plyer v. Doe*, 457 U.S. 202, 217-18, 109 S. Ct. 2382, 2395, 72 L. Ed. 2d 786, *reh’g denied*, 458 U.S. 1131, 103 S. Ct. 14, 73 L. Ed. 2d 1401 (1992). The State has substantial interests in ensuring that an accused does not inflict violence upon others, does not interfere with the just disposition of a case, and reappears at future court dates. Bail furthers these interests in a manner other conditions cannot, especially when the risks posed by an individual are high, like in this case.

Furthermore, Defendant’s argument assumes the court would set the same bail amount for a wealthier but similarly violent individual charged with similar crimes. A court may in fact set higher bail for an individual with greater resources given the person’s greater ability to flee and avoid detection. There is no indication the trial court in this case would not have done so. This Court should reject the Defendant’s claim that his equal protection rights were violated.

**3. Bail was set in compliance with the due process guarantees of the State and Federal constitutions.**

Defendant’s due process rights were not violated by the imposition of bail. Due process is guaranteed by the Fourteenth Amendment of the United States Constitution and article I, § 3 of the Washington State

Constitution. “Due process requires fair notice of proscribed criminal conduct and standards to prevent arbitrary enforcement.” *Harner*, 153 Wn.2d at 237.

Defendant alleges his due process rights were violated on the basis of wealth. Br. of Appellant at 26. “[W]here due process concerns are implicated in an equal protection challenge, the court will generally rest its decision on an equal protection analysis. *Fogle*, 128 Wn.2d at 55 (citing *Mota*, 114 Wn.2d at 474). This Court should analyze this claim under the equal protection rubric and deny it on the same basis.

#### **V. CONCLUSION**

Substantial bail was set based on Defendant’s disturbing acts of family violence, his long criminal history including violent felonies and domestic violence offenses, his repeated refusals to comply with State commands, and his willingness to threaten violence if his family sought help from authorities. Defendant was detained because of his own actions, not because of error or violation of his rights. This Court should find the court

complied with CrR 3.2, any error is now moot, and affirm Defendant's convictions.

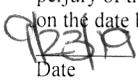
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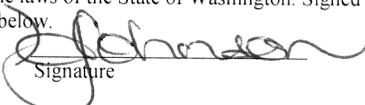
MARY E. ROBNETT  
Pierce County Prosecuting Attorney

  
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ERICA EGGERTSEN  
WSB# 40447  
Deputy Prosecuting Attorney

Certificate of Service:

The undersigned certifies that on this day she delivered by E-file or U.S. mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

  
Date

  
Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

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