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NO. 54076-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

AARON WARKENTIN,

Appellant.

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

The Honorable David Gregerson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant Aaron Warkentin's constitutional right to counsel by failing to inquire into his motion for new counsel.

2a. A clerical error in the judgment and sentence, in which several discretionary legal financial obligations (LFOs) were ordered, should be corrected.

2b. The trial court erred in ordering, as a condition of community custody, that Warkentin pay supervision fees.

Issues Pertaining to Assignments of Error

1. Must Warkentin's conviction for third degree assault be reversed, where the trial court violated his constitutional right to counsel under the Sixth Amendment and article I, section 22 of the Washington Constitution by refusing to inquire into Warkentin's motion for new counsel?

2. Is remand necessary for the trial court to strike erroneously ordered discretionary LFOs from the judgment and sentence, where the court found Warkentin indigent at the time of sentencing and waived all discretionary LFOs?

B. STATEMENT OF THE CASE

On December 28, 2018, Officers Andrea Bauman and Nicole Vigil were dispatched to Share House, a homeless shelter and resource center in Vancouver, Washington. RP 102-03, 120. The call was for a disorderly intoxicated male, Aaron Warkentin, who refused to leave the property. RP 103-04.

Warkentin was homeless at the time. RP 134. He had been processed through the Share House, but was not getting the services he needed, like counseling. RP 134. To qualify for rapid rehousing, Warkentin needed additional housing points. RP 134, 138. He testified at trial that housing points can be gained in a variety of ways, including drug and alcohol abuse, doctor visits, and ambulance rides. RP 134.

Warkentin decided he could get the housing points he needed for rehousing by getting trespassed from the Share House. RP 138-39. That, combined with the beers he had that day, led to his belligerent behavior. RP 138, 140 (describing himself as in a "slightly drunk haze"), 145 (explaining he had three beers, which is a lot for Warkentin because he typically does not drink).

Officer Bauman requested Warkentin leave the Share House property multiple times, but he refused. RP 107. Bauman testified Warkentin would move towards the street, then turn around quickly and not leave, saying things like, "I don't want to make it that easy for you." RP 107. Bauman claimed Warkentin also made multiple statements suggesting he wanted to fight. RP 109.

After about 20 minutes, Bauman testified, Warkentin started walking straight at her. RP 110. When he got close, Bauman put her hand on his chest and "push[ed] him back sturdy." RP 110. Bauman claimed Warkentin then slapped her hand down and pushed her in the chest, causing her to step backwards to regain her balance. RP 110-11. Warkentin agreed he brushed Bauman's hand away, but denied pushing her. RP 140-41, 145.

The officers placed Warkentin under arrest for the alleged push, and Warkentin was ultimately charged with third degree assault. RP 111; CP 5.

The day Warkentin's trial was scheduled to begin, his appointed attorney notified the court, "And my client

apparentluy [sic] wants to say something to the Court. I'm not quite sure what it is." RP 9. Counsel then read a written statement by Warkentin:

> Replace [defense counsel's] bias on his ideas to me. I believe I voiced a concern out loud in court, but not in a particular order, not spending enough time discussing what constitute an assault 3, being flip-flopped on outcome of trial, not spending enough time talking to me about the process of proceedings.
>
> . . . .
>
> Mostly, no advocating, just installing -- instilling a fear of prosecution. He doesn't care when we go to trial, game playing and plan, selling me on the idea of making me lose (inaudible) and thinking being the trial in this course over my (inaudible) and direction. Once I have presented opinions or ideas like apology . . . . Something to fit the crime.

RP 10. Warkentin interjected and continued, "I got the message, but I think it's outlandish to do a trial, spend 30 or 60,000 for -- if I would have assaulted a cop, I think I would have been thrown to the ground immediately." RP 10-11.

The trial court responded, "you're best off not speaking and letting your attorney doing your talking for you," and asked,

"What are you specifically asking this Court to do at this time?" RP 11. Warkentin replied:

> Well, I don't -- we're on the same page to go to trial, if that's the course of action that we're going to take. I don't feel comfortable with him at all. I have voiced it twice. Once with an evaluation that I had, just a distrust. We've had a lot of communication gaps. He says that all the time, in fact, that we have -- you're not understanding me. "Do you understand this," over and over again, even in the hall and separate rooms, and apparently, I don't.
>
> But I thought this assault 3 was a realistic prosecution for a touch, then I would have pleaded -- taken a plea deal a long time ago. I just -- I don't understand it, apparently.

RP 11.

The trial court explained it "stands as a neutral referee" and "expects the attorneys to have engaged in motion practice beforehand." RP 12. The court then informed Warkentin, "So now we're set to go to trial, and that's what we're going to do today." RP 12. The court did not engage in any further inquiry into Warkentin's request for new counsel. RP 12.

The parties proceeded immediately to jury selection, during which Warkentin expressed confusion about the process. RP 17. For instance, during for-cause challenges, Warkentin

asked, "What's a challenge?" RP 61. He was ignored. RP 61. Later, during peremptory challenges, Warkentin inquired, "Why are we striking stuff? Why are striking (inaudible) strike anybody." RP 63. He was again ignored. RP 63. At the subsequent CrR 3.5 hearing, the court inquired whether Warkentin needed time to talk to his attorney about testifying. RP 82. Warkentin responded, "It's useless. No." RP 82.

The jury found Warkentin guilty as charged. CP 44.

At sentencing, there was discussion of Warkentin stipulating to his criminal history, including one 1999 felony conviction. RP 203-04.

Warkentin, however, reiterated his request to discharge his attorney. RP 205. He informed the court, "I was planning on firing [defense counsel]. This time -- I tried handing you something last time we were in court and he read it last time. This time, I'd still prefer to hand this to you. Or we can just go with the -- since I've tried to replace him three times just for bad representation and a few other things which I've written down." RP 205. The court responded, "Well, really what's on the table today is the question of sentencing." RP 205.

Defense counsel added, "my client has indicated he does want a new counsel. He's indicated that several times to me and to Your Honor. Probably we should deal with that now." RP 208-09. The trial court finally inquired, "All right. So, you know, [defense counsel] ably represented you at trial, sir. Why do you want him discharged him [sic] as your attorney at this time?" RP 209.

Warkentin responded:

> I don't even know what the stipulation is, for, about, what's its -- all I know is 1999 the attorney say, "Whatever you do, don't do this." So I remember that was a very painful lesson and this is going through another very painful less which I haven't been advised the ins and outs of what it is and it's just a real quick three-minute conversation, "Do you want to do it or not" -- basically --

RP 209. Warkentin explained, "it was a very bad relationship from the get-go. I just felt like I was sold a ticket on the Titanic." RP 210. Defense counsel agreed "there's got to be some communications problems there or something," explaining he met with Warkentin in jail and they discussed the stipulation. RP 210-11. Warkentin informed the court, "He can stay as long as I'm sure I understand." RP 210.

The trial court continued sentencing for Warkentin's criminal history to be proven, and ruled Warkentin's motion to substitute counsel was withdrawn. RP 211-14.

At subsequent hearing to continue sentencing again, Warkentin told the court, "The last time we spoke, I wanted to replace [my attorney]. Still want to do that." RP 216. The court responded, "Well, we're at sentencing now. We're not going to -- we've come this far." RP 216.

When Warkentin was finally sentenced, the trial court imposed an exceptional sentence downward of 62 days in confinement, with credit for time served, along with 12 months of community custody. RP 238; CP 51-53. The court found Warkentin indigent and waived all discretionary LFOs. RP 240-41; CP 52. Warkentin timely appealed. CP 62.

C. ARGUMENT

1. Warkentin's conviction must be reversed where the trial court refused to make any inquiry into Warkentin's request for new counsel.

Warkentin moved to discharge his appointed attorney before trial, expressing distrust and communication problems. The trial court refused to make any inquiry into Warkentin's

motion, ruling only, "now we're set to go to trial, and that's what we're going to do today." RP 12. The court's refusal to inquire constituted an abuse of discretion and violated Warkentin's constitutional right to counsel. Reversal is required.

a. *The trial court failed to make any inquiry into Warkentin's request, let alone a full and meaningful inquiry as required by law.*

Criminal defendants have the constitutional right to assistance of counsel. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."); CONST. art. I, § 22 ("In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel."). Although indigent defendants do not have an absolute right to counsel of choice, substitution of counsel is required where there is (1) a conflict of interest, (2) an irreconcilable conflict, or (3) a complete breakdown in communication between the attorney and the defendant. State v. Stenson, 132 Wn.2d 668, 733-34, 940 P.2d 1239 (1997).

If the relationship between lawyer and client completely collapses, the refusal to appoint new counsel violates the defendant's right to counsel, "even if no actual prejudice is shown."

State v. Cross, 156 Wn.2d 580, 606, 132 P.3d 80 (2006). This is so because, "[e]ven if a defendant's counsel is competent, a serious breakdown in communication can result in an inadequate defense." United States v. Musa, 220 F.3d 1096, 1102 (9th Cir. 2000).

A trial court's refusal to appoint new counsel is generally reviewed for abuse of discretion. Cross, 156 Wn.2d at 607. However, a court necessarily abuses its discretion by violating a criminal defendant's constitutional rights. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). A court likewise abuses its discretion by failing to make an adequate inquiry into the attorney-client conflict. United States v. Lott, 310 F.3d 1231, 1249-50 (10th Cir. 2002); see also State v. Lopez, 79 Wn. App. 755, 767, 904 P.2d 1179 (1995), overruled on other grounds by State v. Adel, 136 Wn.2d 629, 965 P.2d 1072 (1998).

When reviewing a trial court's refusal to appoint new counsel, courts consider: (1) the extent of the conflict, (2) the adequacy of the trial court's inquiry, and (3) the timeliness of the motion. Cross, 156 Wn.2d at 607.

When an indigent defendant moves for new counsel, the trial court must make a "penetrating and comprehensive examination" into the reasons for the defendant's dissatisfaction. State v. Dougherty, 33 Wn. App. 466, 471, 655 P.2d 1187 (1982). "An adequate inquiry must include a full airing of the concerns (which may be done in camera) and a meaningful inquiry by the trial court." Cross, 156 Wn.2d at 610. The court should examine "both the extent and nature of the breakdown in communication between attorney and client and the breakdown's effect on the representation the client actually receives." In re Pers. Restraint of Stenson, 142 Wn.2d 710, 724, 16 P.3d 1 (2001).

A private, in-depth hearing is typically "crucial" for the trial court to be able to "determine whether an attorney-client conflict rises to the level of a 'total breakdown in communication' or instead whether the conflict is insubstantial or a mere 'disagreement about trial strategy [that] does not require substitution of counsel.'" Lott, 310 F.3d at 1249 (quoting United States v. Taylor, 128 F.3d 1105, 1110 (7th Cir. 1997)); United States v. Nguyen, 262 F.3d 998, 1004-05 (9th Cir. 2001).

The inquiry must provide a "'sufficient basis for reaching an informed decision.'" United States v. Adelzo-Gonzalez, 268 F.3d 772, 777 (9th Cir. 2001) (quoting United States v. McClendon, 782 F.2d 785, 789 (9th Cir. 1986)). In most cases, "a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions." Id. at 777-78. "[P]erfunctory inquiries" are insufficient. Id. at 778.

Here, the trial court made no inquiry whatsoever into Warkentin's motion to discharge his appointed attorney. Warkentin requested new counsel before trial began. RP 10. He expressed concern about his attorney's bias, their mutual distrust, and lack of communication. RP 10-11. Warkentin likewise indicated concern about negotiating a plea versus going to trial, suggesting further problems with communication. RP 10-11.

Yet, the only question the trial court asked was, "What are you specifically asking this Court to do at this time?" RP 11. Warkentin reiterated that he and his attorney were not communicating. RP 11. Then, instead of asking probing questions of Warkentin and defense counsel—or asking any questions at all—the court ruled simply, "So now we're set to go to

trial, and that's what we're going to do today." RP 12. The court made no further inquiry. RP 12.

The court erred in summarily dismissing Warkentin's motion for new counsel. It did not ask Warkentin or his attorney a single question to determine the extent of the conflict or breakdown in their communications. The court could have done so in camera, safeguarding any privileged information. Warkentin expressed concerns that could rise to the level of denial of counsel, but the trial court failed to make any inquiry that would allow for such a determination. In short, the court did not develop a sufficient basis for reaching an informed decision. It simply rejected Warkentin's concerns out of hand.

The conclusion that the trial court erred is in accord with precedent. In Cross, the court found sufficient inquiry where the trial court made "careful review" of the extent of the conflict, which allowed the court to become "fully apprised" of the problem at hand. 156 Wn.2d at 610. The trial court there denied the defendant's motion to discharge counsel only after making repeated inquiries, conducting an "extensive" in camera hearing, and reviewing briefs on the subject. Id. at 605-06, 608, 610.

Similarly, the court in Stenson found sufficient inquiry where the trial court considered exhaustively detailed descriptions of the extent of the reputed conflict given at an in camera hearing. 142 Wn.2d at 726-29, 731. By way of contrast, the court's inquiry of Warkentin was nonexistent, and so did not allow for the court to make a fully informed decision on his request to discharge assigned counsel.

Finally, Warkentin requested new counsel the day trial began, though before jury selection or any substantive hearings. RP 10. However, "[t]he fact that the motion was made on the eve of trial alone is not dispositive." Adelzo-Gonzalez, 268 F.3d at 780. In the context of the similar right to self-representation, a pro se request made when trial begins vests the trial court with a "measure of discretion." State v. Breedlove, 79 Wn. App. 101, 106-07, 906 P.2d 586 (1995) (quoting State v. Fritz, 21 Wn. App. 354, 358, 585 P.2d 173 (1978)). But there is still a "substantial limitation on the court's exercise of discretion" at this stage. State v. Honton, 85 Wn. App. 415, 420-21, 932 P.2d 1276 (1997). Thus, when a motion is made on the day of trial, the court must carefully weigh the potential inconvenience and delay against the

defendant's constitutional right to assistance of counsel. Adelzo-Gonzalez, 268 F.3d at 780.

Again, the trial court here engaged in no such balancing, stating only, "So now we're set to go to trial, and that's what we're going to do today." RP 12. It is very possible substitute counsel could have gotten up to speed quickly, given that there was essentially no police investigation; the prosecution presented only two witnesses; and the trial took a single day. RP 102, 119, 191. Warkentin's counsel seemed to know little about the case himself. For instance, he needed to interview the prosecution's witnesses at lunch the day of trial. RP 66-67. And, in his opening statement, counsel admitted he did not understand Warkentin's anticipated testimony, "I'm not quite sure I understand how this works with getting housing . . . I don't understand." RP 132.

The trial court abused its discretion by summarily denying Warkentin's request for new counsel. By refusing to inquire, the court failed to inform itself of the necessary facts on which to exercise its discretion. The court's error violated Warkentin's constitutional right to counsel. Nguyen, 262 F.3d at 1005.

b. *No showing of prejudice is required where the trial court fails to conduct an adequate inquiry.*

The erroneous denial of a motion to substitute counsel requires reversal and remand for a new trial. Nguyen, 262 F.3d at 1005; United States v. Moore, 159 F.3d 1154, 1161 (9th Cir. 1998). In the event this Court declines to reverse Warkentin's conviction, the alternative remedy is remand for an evidentiary hearing to determine (1) the nature and extent of the conflict and breakdown between Warkentin and his attorney, and (2) whether that conflict deprived Warkentin of his constitutional right to assistance of counsel. Schell v. Witek, 218 F.3d 1017, 1027 (9th Cir. 2000); RAP 12.2 ("The appellate court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require.").

The prosecution may argue Warkentin must show ineffective assistance of counsel in order to obtain reversal for the trial court's failure to inquire. In Lopez, Division Three of this Court held "[t]he 'peremptory denial' of a defendant's request for new counsel is harmful only if counsel's performance actually violated the defendant's Sixth Amendment right to effective

assistance of counsel." 79 Wn. App. at 768 (quoting United States v. Morrison, 946 F.2d 484, 499 (7th Cir.1991)). The Lopez court therefore required a showing a deficient performance and prejudice under the Strickland[1] standard. Id.

This Court is not bound to follow Lopez, nor should it. In re Pers. Restraint of Arnold, 190 Wn.2d 136, 147, 410 P.3d 1133 (2018) ("One division of the Court of Appeals should give respectful consideration to decisions of another division, but should not apply stare decisis to that prior decision."). In fact, this Court has already declined to do so in an unpublished case. State Gambill, No. 44816-5-II, 2015 WL 263707, at *3 n.5 (Jan. 21, 2015) ("[T]o the extent that [Lopez] may require a constitutional harmless error analysis, we disagree with that conclusion when the trial court fails to make an adequate inquiry.").[2]

Gambill makes good sense. The harmless error standard in Lopez essentially renders a nullity the trial court's duty to inquire. It reduces failure to inquire to an ineffective assistance claim,

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[1] Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

[2] As an unpublished case, Gambill has no precedential value and is cited here only for such persuasive value as this Court deems appropriate. GR 14.1.

which can be exceedingly difficult to establish on direct appeal, because of the "strong presumption counsel's representation was effective." State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). If the matter simply comes down to showing ineffective assistance of counsel, then the factors a reviewing court must assess—extent of conflict, adequacy of inquiry, and timeliness of request—are superfluous.

The Tenth Circuit explained, "A defendant who cannot communicate with his attorney cannot assist his attorney with preparation of his case, including suggesting potential witnesses to call and trial strategies to pursue, discussing whether the defendant himself should testify, and helping formulate other bread-and-butter decisions that can constitute the core of a successful defense." Lott, 310 F.3d at 1250. Many if not all of these essential components of an adequate defense would be impossible to establish on direct appeal—*because of the trial court's error in failing to inquire.*

The Washington Supreme Court has already spoken on this matter in the analogous context of a defendant's request to proceed pro se. The trial court must determine whether the

defendant's waiver of counsel and request to proceed pro se is unequivocal, timely, as well as knowing, intelligent, and voluntary, "usually by colloquy." State v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714 (2010). A colloquy is unnecessary only "if there are independent, identifiable facts that show whether the request is voluntary, knowing, and intelligent." Id. at 504 n.2.

Most significantly, the court in Madsen emphasized the trial court "cannot stack the deck against a defendant by not conducting a proper colloquy to determine whether the requirements for waiver are sufficiently met." Id. at 506. Where a trial court fails to adequately inquire and there is no evidence to the contrary, "the only permissible conclusion" is the request was valid. Id. No harmless error analysis ensues. Id. at 510.

Notably, the right to self-representation and the right to counsel stem from the same constitutional provisions—the Sixth Amendment and article I, section 22. Madsen, 168 Wn.2d at 503. There is no reason they should be treated differently in this context. The deck should not be stacked against a defendant who requests new counsel by requiring the defendant to demonstrate

ineffective assistance of counsel after the trial court refuses to conduct an adequate inquiry.

Finally, excusing a trial court's failure to inquire unless ineffective assistance of counsel can be shown implicates the accused's constitutional right to appeal "in all cases," also contained in article I, section 22. "A criminal defendant is constitutionally entitled to a record of sufficient completeness to permit effective appellate review of his or her claims." State v. Tilton, 149 Wn.2d 775, 781, 72 P.3d 735 (2003) (internal quotation marks omitted) (quoting State v. Thomas, 70 Wn. App. 296, 298, 852 P.2d 1130 (1993)); see also In re Welfare of R.S.G., 174 Wn. App. 410, 431, 299 P.3d 26 (2013) ("A trial lawyer has the right to make the record for appeal.").

The lack of record on a motion for new counsel itself establishes prejudice, because it infringes the defendant's right to effective appellate review. For instance, had the trial court actually inquired and discovered a complete breakdown in communication between Warkentin and his attorney, a refusal to appoint new counsel would necessitate reversal without any showing of prejudice. Cross, 156 Wn.2d at 606. As it is, however,

the trial court denied Warkentin the necessary record for effective review of whether the relationship breakdown "result[ed] in the complete denial of counsel." Stenson, 142 Wn.2d at 722; see also State v. Brittain, 38 Wn. App. 740, 742, 689 P.2d 1095 (1984) ("Without such an examination and determination we have no way of reviewing the court's discretionary decision to deny the request for different counsel.").

For these reasons, this Court should reverse without requiring Warkentin demonstrate prejudice, where the trial court failed to adequately inquire into his request for new counsel.

c. *Reversal is also required under the Lopez standard because Warkentin can show ineffective assistance of counsel.*

Even if this Court follows Lopez and requires Warkentin demonstrate ineffective assistance of counsel, Warkentin can do so. Even where one error by defense counsel may not establish constitutional ineffectiveness, a combination of unreasonable errors may deny the accused a fair trial. In re Pers. Restraint of Brett, 142 Wn.2d 868, 882-83, 16 P.3d 601 (2001); see also United States v. Tucker, 716 F.2d 576, 595 (9th Cir. 1983) ("[A] court may

find unfairness—and thus prejudice—from the totality of counsel's errors and omissions.").

Defense counsel did not file a trial memorandum or any written motions in limine. At the CrR 3.5 hearing, counsel noted some "402 and 404(b)" issues with Warkentin's statements to police. RP 80. The trial court informed counsel it would address only CrR 3.5 issues at the moment, but could later address any evidentiary objections. RP 80. But counsel inexplicably did not bring the issues up again until testimony began. This led to several speaking objections, which effectively allowed the prosecution additional argument time.

For instance, defense counsel objected to admission of Warkentin's statement "I don't want to make it that easy for you" on relevance and ER 404(b) grounds. RP 107-08. In front of the jury, the prosecution responded:

> Your honor, the statements are admissible under a number of theories. One, is that we need to show the intent of the defendant. They go to his intent. The next is that it's the res gestae of the crime. Part of this is showing one of the ways that someone can assault one is to cause apprehension of harm. And, so, certainly, part of that would be his statements that he's making to her while he's conducting certain actions.

> Also, it appears that there may be some sort of voluntary intoxication instruction given later. And if that's the case, then these statements would certainly be relevant to dispute that.

RP 108. The court accordingly overruled defense counsel's objection. RP 108.

The speaking objections did not end there. Defense counsel objected to evidence that Warkentin physically resisted arrest, arguing, it was irrelevant because, "He's not charged with resisting arrest." RP 111. The prosecution responded, "Again, Your Honor, as part of the res gestae of the crime, it goes to his intent." RP 111. Still in front of the jury, defense counsel stated, "But the crime has already been committed at that point. It's already over. How can that be res gestae? It's already over." RP 111. The court again overruled, "I think it goes, again, to the question of intent, or it may go on that," putting its imprimatur on the prosecution's theory for the evidence. See also RP 123-24 (another speaking objection, another overruling). Defense counsel could have resolved these issues before trial, outside the presence of the jury, but failed to do so.

Defense counsel then undermined his own client's testimony in opening, "He's going to testify that because he was homeless, there's -- and I -- I'm not quite sure I understand how this works with getting housing." RP 132. He reiterated, "I don't understand." RP 132. Again in closing, counsel stated, "I don't technically really understand how that works . . . ." RP 184. By repeating he did not understand Warkentin's testimony regarding housing points, defense counsel suggested his personal opinion that Warkentin was not credible.

Finally, defense counsel proposed a voluntary intoxication instruction with knowledge as the requisite mental state.[3] CP 28. The prosecution did not oppose the instruction, generally, but correctly pointed out intent is the requisite mental rea for assault. RP 159-60; CP 39; State v. Kruger, 116 Wn. App. 685, 692, 67 P.3d 1147 (2003). Defense counsel objected, "Mine is proper, I believe." RP 160. Counsel contended, "'[k]knowledge' and 'intent' are basically the same thing, Your Honor," plainly contrary to the hierarchy of mental states in RCW 9A.08.010(1). RP 161.

[3] "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determine whether the defendant acted with knowledge." CP 28.

Fortunately, however, the court agreed with the prosecution and changed the mental state to intent in the final instruction. CP 41; RP 160-61. Counsel's proposed instruction was inconsistent with the law, as well as his duty to know the law. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) ("Reasonable conduct for an attorney includes carrying out the duty to research the relevant law.").

All of the above mistakes demonstrate defense counsel's lack of preparedness for trial. His errors ultimately worked to undermine Warkentin's credibility and, ultimately, his defense. Counsel himself suggested he found Warkentin's testimony implausible by repeating he did not understand it. This was particularly harmful because the trial boiled down to a credibility contest between Officer Bauman, who said Warkentin pushed her, and Warkentin, who said he did not. RP 110-11, 140-41, 145. Under the circumstances, Warkentin was deprived of his right to effective assistance of counsel. The trial court's failure to inquire into Warkentin's request for new counsel accordingly necessitates reversal, even under the standard articulated in Lopez.

2. Remand is necessary to strike several inadvertently ordered legal financial obligations.

The trial court found Warkentin indigent "based on the record it recalls from trial." RP 241. In the judgment and sentence, the court expressly found Warkentin indigent under RCW 10.101.010(3)(c): "The defendant receives an annual income, after taxes, of one hundred twenty-fiver percent or less of the current federally established poverty level." CP 52. Consistent with this, the trial court waived the $100 DNA fee. RP 240.

The record therefore reflects the court's intent to waive discretionary LFOs. This is consistent with the current state of the law, which prohibits ordering indigent defendants like Warkentin to pay discretionary LFOs. RCW 10.01.160(3); State v. Ramirez, 191 Wn.2d 732, 749, 426 P.3d 714 (2018).

Yet the judgment and sentence erroneously ordered several discretionary LFOs, including the $200 criminal filing fee, $250 jury demand fee, and $1,400 in court appointed attorney fees. CP 54. No total amount assessed was entered. CP 54. The inclusion of these LFOs in the judgment and sentence appears to be a

clerical error because it is inconsistent with the court's express finding of indigency and waiver of other discretionary LFOs.

Remand for correction of the clerical error, i.e., striking the discretionary fees, is the proper remedy. In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701-02, 117 P.3d 353 (2005). Even if not a clerical error, this Court should remand for the discretionary LFOs to be stricken because the trial court found Warkentin to be indigent. Ramirez, 191 Wn.2d at 750.

The trial court also ordered Warkentin, as a condition of community custody, to "(7) pay supervision fees as determined by DOC [(Department of Corrections)]." CP 53. RCW 9.94A.703(2) provides, "unless waived by the court, as part of any term of community custody, the court shall order an offender to: (d) Pay supervision fees as determined by the department." (Emphasis added.) Division One of this Court recently held, "[s]ince the supervision fees are waivable by the trial court they are discretionary LFOs." State v. Dillon, __Wn.2d__, 456 P.3d 1199, 1209 (2020).

This Court should therefore also remand for the trial court to strike the community custody supervision fees from the

judgment and sentence. Id. (striking supervision fees where trial court appeared to have inadvertently imposed it, finding Dillon indigent and waiving all other discretionary LFOs).

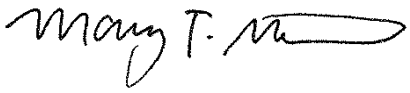
D. CONCLUSION

For the reasons discussed above, this Court should reverse Warkentin's conviction and remand for a new trial or, alternatively, remand for a hearing on his motion for new counsel. This Court should also remand for the erroneously ordered LFOs to be stricken from Warkentin's judgment and sentence.

DATED this 6th day of May, 2020.

Respectfully submitted,

NIELSEN KOCH, PLLC



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