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NO. 54248-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

NEHEMIAH LOSACCO,

Appellant.

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

The Honorable Jerry Costello, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The prosecution presented insufficient evidence to sustain appellant's eight convictions for felony violation of a domestic violence no-contact order.

2. The trial court's jury instruction defining knowledge violated due process because it permitted the jury to find appellant guilty without finding he had actual knowledge. CP 27 (instruction 8).

3. The trial court erred in allowing a corrections officer to give his opinion on an ultimate issue of fact for the jury.

4. Counsel was ineffective for failing to object to the improper opinion testimony by a corrections officer.

5. The trial court erred in ordering, as a condition of community custody, that appellant pay supervision fees.

Issues Pertaining to Assignment of Error

1. To support each of appellant's eight charges of felony violation of a domestic violence no-contact order, the prosecution was required to prove that appellant "knew" of the existence of the order and "knowingly" violated a provision of the order. Where the State introduced the no-contact order

appellant allegedly violated, but failed to introduce any evidence related to the entry of that order or connect the “defendant” signature on that order to appellant, did the prosecution fail to prove appellant “knew” of the existence of the no-contact order or “knowingly” violated a provision of the order?

2. The jury instruction defining knowledge permits the jury to convict if the defendant had information that would lead a reasonable person to know. The instruction does not clarify that, in order to convict, the jury must conclude beyond a reasonable doubt that the defendant actually knew. Does the jury instruction violate due process by relieving the State of its burden to prove actual knowledge beyond a reasonable doubt?

3. Was appellant’s jury trial right violated when a corrections officer identified the complaining witness’ and appellant’s voices based solely on jail recordings, all of which were played for the jury, when the officer had no independent knowledge of either voice?

4. Was counsel ineffective for failing to object to improper opinion testimony by a corrections officer?

5. Is remand necessary for the trial court to strike the community custody condition ordering appellant to pay supervision fees, where appellant is indigent and the trial court expressly stated its intent to waive all discretionary legal financial obligations (LFOs) based on appellant's indigency?

B. STATEMENT OF THE CASE

1. Procedural History.

The Pierce County prosecutor charged appellant Nehemiah Losacco by amended information with eight counts of felony violation of a court order, and one count of fourth degree assault, for incidents alleged to have occurred against Brandi St. Clair between November 19, 2018 and June 18, 2019. CP 5-10; 1RP<sup>1</sup> 5. The State further alleged that each of the alleged offenses were committed against a family or household member. CP 5-10.

At trial, Losacco entered a written stipulation that he had two prior convictions for violating court orders. CP 15; 1RP 387-88. A jury found Losacco not guilty of fourth degree assault. CP 46; 1RP 489-90. The jury convicted Losacco of eight counts of

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<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – August 14, 15, 19, 20, 21, 2019; 2RP – November 1, 2019.

felony violation of a no contact order. CP 44, 48, 50, 52, 54, 56, 58, 60; 1RP 489-91. The jury also returned special verdicts, finding that each of the no contact order violations was committed against a family or household member. CP 45, 49, 51, 53, 55, 57, 59, 61; 1RP 492-97.

The court imposed a prison based drug offender sentencing alternative (DOSA) of 30 months imprisonment to be followed by 30 months on community custody. CP 76-90; 2RP 17. Finding Losacco indigent, the trial court waived all non-mandatory legal financial obligations (LFOs), imposing only the \$500 victim penalty assessment. CP 80-81; 2RP 12-13, 17, 19. The judgement and sentence, however, requires Losacco to pay community custody supervision fees. CP 85 (condition 5).

Losacco timely appeals. CP 93-112.

## 2. Trial Testimony.

The prosecution called only three witnesses at trial. Complaining witness, St. Clair, was not among them. Rather, Mitchell Nelson testified to the alleged events of November 19, 2018.

Nelson lived in a motor home that was parked about 50-feet away from the motor home St. Clair and Losacco shared. 1RP 329. Although not related by blood or marriage, Nelson considered St. Clair to be his stepdaughter. 1RP 332-33. St. Clair had previously refused Nelson's suggestion that she live alone in the motor home. 1RP 333-34.

On November 19, St. Clair arrived at Nelson's motor home looking like a "deer in the headlights." 1RP 336, 340, 370. Nelson had not heard any yelling coming from St. Clair's motor home nor observed any physical altercation. 1RP 335-36, 338, 369, 372.

St. Clair was not crying but appeared angry. 1RP 340, 370. A short time later, Nelson heard Losacco screaming at St. Clair and calling her names. 1RP 337-38. Losacco was not making any threats toward St. Clair. 1RP 338. Losacco drove off when Nelson went outside. 1RP 337-39.

St. Clair then disclosed to Nelson that Losacco had pushed her up against a wall and choked her. 1RP 342-43, 353-54. Nelson saw that St. Clair's collarbone and chin were red and

she had a blemish on her face. 1RP 355-57. Nelson called 911. 1RP 354, 358, 367.

Pierce County Sheriff deputy Brett Karhu responded to Nelson's 911 call. 1RP 375-78, 381. Karhu noticed light red marks on St. Clair's right cheek and collarbone. 1RP 379. St. Clair was uncooperative and refused to allow Karhu to take pictures or a statement from her. 1RP 378-79. As Karhu acknowledged, sometimes domestic incident calls involved people inflicting injuries on themselves. 1RP 382. Karhu did not see Losacco or his car at the scene. 1RP 378, 382. He also did not go inside the trailer or speak with anyone other than Nelson and St. Clair. 1RP 378, 382.

Between April 19 and June 18, 2019, eight telephone calls were placed from the Pierce County jail. 1RP 401, 412-15; Exs. 6A, 16A. Each call was placed to the same outgoing telephone number. 1RP 398. No one identified who that outgoing number belonged to. 1RP 372, 417. Six of the calls were placed using Losacco's assigned jail pin number. 1RP 398, 416; Exs. 6A, 16A. The April 19 call was placed from the jail intake unit. 1RP 399,

415. Up to 84 other people were in the same housing unit as Losacco. 1RP 419.

Pierce County Corrections officer, Torvald Pearson, acknowledged that use of Losacco's pin number did not mean he was actually the person who placed the calls. 1RP 416. Often inmates traded pin numbers for items such as food. 1RP 394-95. No video recordings showed who placed the calls to the outgoing number. 1RP 420. While the name "Brandi" was mentioned during one of the telephone calls, at no point did the caller ever ask to speak with "Brandi" or "St. Clair." 1RP 417-18. Nelson identified the male voice in the jail calls as Losacco's and the female voice as St. Clair's. 1RP 368-69.

Pearson had never met or spoke with either Lasacco or St. Clair. 1RP 415-16, 418. But Pearson identified the jail call participants as Losacco and St. Clair. 1RP 404-05, 415-16, 418. Pearson explained that he came to this opinion based on information he gathered while listening to the eight jail calls, as well as other separate calls placed by Losacco. 1RP 404-05, 418, 421. As Pearson explained:

After listening to multiple phone calls, during the course of the conversations I would hear the called party's name and match that up with other information that is available to me. Listening for the conversations, the type of topics they discuss, the relationship between the called party and her family, just multiple different little pieces of information gathered up over probably a couple dozen different phone calls gave me the identification that I was looking for, and that was that the called party's name was Brandi.

1RP 405.

Pearson did not specify which other calls he listened to. According to Pearson however, in the separate calls people identified Losacco as "Nehemiah". Pearson could not recall whether the female voice in the separate calls was identified by name. 1RP 421.

C. ARGUMENT

1. INSUFFICIENT EVIDENCE SUPPORTS EACH OF LOSACCO'S EIGHT CONVICTIONS FOR FELONY VIOLATION OF A DOMESTIC VIOLENCE NO CONTACT ORDER BECAUSE THE STATE DID NOT PROVE LOSACCO KNEW OF THE EXISTENCE OF THE ORDER OR THAT HE KNOWINGLY VIOLATED A PROVISION OF IT.

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v.

Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. In determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006).

Evidence is sufficient to support a conviction only if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). While the State is entitled to all favorable inferences, appellate courts are not required to ignore unfavorable facts. State v. Davis, 182 Wn.2d 222, 235, 340 P.3d 820 (2014) (Stephens, J., dissenting)<sup>2</sup>.

To prove each of the eight charged crimes of felony violation of a domestic violence no-contact order, the State was required to prove: (1) there existed a no contact order applicable to Losacco; (2) he “knew of the existence of this order; (3) he “knowingly violated a provision of this order”; and (4) he was

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<sup>2</sup> The dissenting opinion in Davis, which garnered five votes, is actually the majority decision on the sufficiency of evidence issue. Davis, 182 Wn.2d at 224.

twice previously convicted for violating the provisions of a court order. CP 28, 33-39; RCW 26.50.110(1), (5).

To prove Losacco “knew” of the existence of the no contact order, the prosecution was required to prove he was “aware of that fact.” CP 27; RCW 9A.08.010(b). This is a subjective rather than objective standard. The element of “knowledge” requires the jury to find actual, subjective knowledge. State v. Shipp, 93 Wn.2d 510, 515-16, 610 P.2d 1322 (1980).

The trial court provided the following instruction to the jury regarding knowledge:

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or result when he or she is aware of that fact. It is not necessary that the person know that the fact is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

CP 27 (instruction 8). The State proposed this instruction. Supp. CP \_\_\_ (State's Proposed Instructions to the Jury, filed 8/14/2019, at 13).

Thus, as instructed, the jury may infer that the defendant had actual knowledge if it finds "he or she ha[d] information that would lead a reasonable person in the same situation to believe that a fact exist[ed]." CP 27; RCW 9A.08.010(b). Although the State may rely upon circumstantial evidence to prove actual knowledge, "inferences based on circumstantial evidence must be reasonable and cannot be based on speculation." State v. Allen, 182 Wn.2d 364, 374, 341 P.3d 268 (2015); State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

Here, even taken in the light most favorable to the State, the prosecution failed to prove that Losacco either knew of the existence of the no-contact order or knowingly violated a provision of it.

The State introduced a redacted copy of the underlying no-contact order entered on June 13, 2019 that Losacco was alleged to have violated. See Ex. 1A. The order lists Losacco as the restrained party and St. Clair as the protected party. There

is a signature on top of the line labeled “Defendant.” Id. But the State introduced no evidence which proved that Losacco was the “Defendant”. The prosecution offered no evidence about the circumstances in which the order was entered, including whether Losacco was present when the order was entered, whether he received a copy of the order or otherwise knew of its existence, or whether he had actually signed the order. Similarly, there was no testimony from any of the prosecution’s three witnesses detailing that St. Clair had obtained a no-contact order against Losacco, or that if she had, whether Losacco himself was aware of that fact.

Although Losacco entered a stipulation at trial that he had two prior convictions for violating court orders, the stipulation did not tie those prior convictions to the order in question. See CP 15. On the contrary, the prosecution relied solely on the order contained in exhibit 1A, while acknowledging Losacco’s prior no-contact order convictions stemmed from a separate no-contact order entered in Pierce County. 1RP 32-33; CP 5-10.

The State likewise presented no evidence of the circumstances of Losacco's arrest that led to the jail calls in question, including whether his arrested stemmed from an alleged violation of the particular order in question. Moreover, the redacted jail calls introduced to the jury do not contain any discussion about the charges at issue or acknowledgement of the existence of any no-contact orders.<sup>3</sup> See Ex. 6A.

While the prosecution also entered a copy of Losacco's driver's license, the signature on that document looks distinctly different from the signature on top of the no-contact order line labeled "Defendant." Cf. Ex. 2. To be sure, the prosecutor acknowledged as much, declaring during closing argument:

I guess the one final thing as far as the signature line on the order that Mr. Losacco signed and matching that up with his identification, you can compare the handwriting there. *The State would probably agree that it doesn't quite exactly match up.*

1RP 482 (emphasis added). The prosecutor attempted to shore up this evidentiary shortcoming by telling the jury that did not

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<sup>3</sup> While the State sought to admit portions of two jail calls that it contended established Losacco's knowledge of the existence of the no-contact order, the trial court excluded these references based on defense counsel's objection. See 1RP 87-89, 103, 111-17, 122-29.

mean Losacco had not signed the order and that it was done in “open court” and “in the presence of at least three other parties.” 1RP 482. As explained above however, the prosecution presented no evidence about the circumstances in which the order was entered, including whether it was in fact done in “open court” or what the relationship of the “three other parties” was to Losacco. As with St. Clair, none of the “three other parties” testified at trial.

In short, the prosecution produced no evidence linking the order in exhibit 1A to Losacco beyond a signature above the line labeled “Defendant.” This evidence is insufficient to prove that Losacco signed the order or was otherwise aware of the specific order alleged to have been violated in the present case. Two cases are instructive by way of contrast.

In State v. France, this Court affirmed France’s conviction for violation of a no-contact order where the order in question had “France’s signature on it.”<sup>4</sup> 129 Wn. App. 907, 908, 911, 120 P.3d 654 (2005).

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<sup>4</sup> Although France’s confession to police that he knew about the no-contact order was found to be improperly admitted at trial, this Court ultimately

Division Three concluded the jury instructions used in Cindy Van Tuyl's trial for violation of a temporary restraining order were adequate as to the question of her intent to commit the offense where Van Tuyl admitted knowing about the restraining order and her attorney testified that he mailed her copies of the proposed order, notice of presentment hearing, and the signed order. State v. Van Tuyl, 132 Wn. App. 750, 758-60, 133 P.3d 955 (2006).

The facts of these cases clearly demonstrate that more evidence establishing a defendant's knowledge of a no-contact order is required than what the State proved here. Because nothing ties Losacco to the specific order at issue beyond a generic signature line which does not match Losacco's known signature, the State did not meet its burden to prove beyond a reasonable doubt that Losacco "knew" about the existence of the no-contact order or "knowingly" violated one of its provisions. See State v. Huber, 129 Wn. App. 499, 502, 119 P.3d 388 (2005) ("Identity of names alone" is insufficient to establish that the person named in a document is the same person on trial)

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concluded it was harmless error considering the order contained France's signature. France, 129 Wn. App. at 911.

(quoting United States v. Jackson, 368 F.3d 59, 63-64 (2<sup>nd</sup> Cir. 2004)).

Each of Losacco's eight convictions for felony violation of a domestic violence no-contact order must be reversed and the charges dismissed with prejudice. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003) (setting forth remedy where insufficient evidence supports conviction). The prohibition against double jeopardy forbids retrial after conviction is reversed for insufficient evidence. State v. Anderson, 96 Wn.2d 739, 742, 638 P.2d 1205, cert. denied, 459 U.S. 842 (1982).

2. THE JURY INSTRUCTION DEFINING KNOWLEDGE VIOLATED LOSACCO'S RIGHT TO DUE PROCESS BY PERMITTING THE JURY TO FIND HIM GUILTY BASED ON CONSTRUCTIVE RATHER THAN ACTUAL KNOWLEDGE THAT HE KNEW ABOUT THE EXISTENCE OF THE NO CONTACT ORDER.

- a. The knowledge instruction is manifest constitutional error because it relieves the state of its burden of proving actual knowledge.

As discussed in argument one, supra, the crime of violation of a court order requires proof that the person knew about the existence of the order and knowingly violated the provisions of the order. See RCW 26.50.110(1) ("Whenever an

order is granted...and the respondent or person to be restrained knows of the order, a violation of any of the following provisions of the order is a [crime].”); see also State v. Phillips, 94 Wn. App. 829, 833, 974 P.2d 1245 (1999) (“The defendant must among other things, know of the order of protection.”). In this case, the jury was instructed jurors may find the element of knowledge if the defendant has “information that would lead a reasonable person in the same situation” to have that knowledge. CP 27. This violates due process because it permitted the jury to find Losacco guilty without finding that he had actual, subjective knowledge of the existence of the no-contact order.

[I]t is no exaggeration to say that a criminal defendant can currently be found to have acted with knowledge, and therefore be found guilty of a crime, even though the defendant had no awareness of the fact he or she allegedly knew, and even though the “fact” he or she supposedly “knew” was not even true. This is untenable; the law must change.

Judge Alan R. Hancock, True Belief: an Analysis of the Definition of “Knowledge” in the Washington Criminal Code, 91 WASH. L. REV. ONLINE 177 (2016).<sup>5</sup>

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<sup>5</sup> Available at <https://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/1556/91WLRO177.pdf?sequence=1&isAllowed=y>

For a defendant to have knowledge under the criminal code, he must be proved to have actual, subjective knowledge of the fact in question. Allen, 182 Wn.2d at 374; Shipp, 93 Wn.2d at 516. Knowledge may not be redefined as its opposite – mere negligent ignorance. Shipp, 93 Wn.2d at 516. To do so would be unconstitutionally vague. Id. It would violate the constitutional requirement that criminal statutes provide fair warning of what is prohibited by stretching the meaning of knowledge far beyond what any reasonable person would understand it to mean. Id.

However, the State need not present direct evidence of knowledge. Knowledge may be proved by circumstantial evidence, including evidence that the defendant was in possession of knowledge which would lead a reasonable person to know the fact in question. Allen, 182 Wn.2d at 374.

This is a “subtle” distinction but a “critical” one. Id. The Allen court recognized it would be unconstitutional to permit a finding of knowledge merely because the person should have known. Id. If, for example, the defendant is less intelligent or less attentive than an ordinary reasonable person, then the

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(last visited April 30, 2019). This article is appended to this brief for ease of reference.

same information may not lead to the actual knowledge that the law requires. Shipp, 93 Wn.2d at 516.

By permitting conviction when a reasonable person would have known of the existence of a court order, rather than when the defendant actually did know, the pattern instruction, approved in State v. Leech,<sup>6</sup> essentially reduces the mens rea for the offense from knowledge to a state lower than even criminal negligence. A person is criminally negligent when (1) the person is “aware of a substantial risk that a wrongful act may occur” and (2) “his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation. RCW 9A.08.010(1)(d). The instruction defining knowledge, however, permits conviction when a reasonable person would have been aware, without requiring any proof that the defendant’s failure to be aware was a gross deviation from the standard of care. CP 27.

The instruction fails to preserve the critical distinction between actual knowledge (based on direct or circumstantial

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<sup>6</sup> 114 Wn.2d 700, 790 P.2d 160 (1990).

evidence) and mere negligent ignorance. Cf. Allen, 182 Wn.2d at 374. The instruction undermines and confuses the actual knowledge requirement and permits the jury to misapply the law by finding knowledge even where evidence of actual knowledge is absent. This violates due process.

The Shipp court deemed this problem solved because the jury was merely allowed, but not required, to find knowledge if the defendant had information that would lead a reasonable person to have knowledge. 93 Wn.2d at 516-17. So long as the inference was permissive, it allowed for the possibility that the jury could find the defendant was “less attentive or intelligent than an ordinary person.” Shipp, 93 Wn.2d at 516. But Shipp did not go far enough. It is not enough to *permit* the jury to acquit if it does not find actual knowledge. The instructions must make clear that, without actual knowledge, acquittal is required.

A conviction must rest not just on the jury’s finding that a reasonable person should have known, but also on the jury’s conclusion that the defendant is no less intelligent or attentive

than an ordinary person and therefore did know. This second requirement is missing from the instruction. CP 27.

Allen illustrates the problem. There, the prosecutor in closing urged the jury to convict Allen of being an accomplice because a reasonable person in the defendant's shoes should have known, rather than because Allen actually did. 182 Wn.2d at 374-75. When the prosecutor expressly urged such a conclusion, the court had no difficulty viewing this as serious misconduct that required reversal of Allen's conviction. Id. at 375, 380.

While Allen was correct in recognizing the prosecutor's argument was reversible misconduct, it still did not get at the heart of the problem – the jury instruction on knowledge. In other words, whether or not a prosecutor commits misconduct by expressly urging conviction based solely on constructive knowledge, the jury instructions allow it. Compare Allen, 182 Wn.2d at 374-75 (quoting prosecutor's closing argument that “under the law, even if he doesn't actually know, if a reasonable person would have known, he's guilty”) with CP 27 (“If a person has information that would lead a reasonable person in the

same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.”). Jurors would naturally interpret the instruction as permitting a finding of guilt based solely on constructive knowledge even without a prosecutorial misstatement of the law—as noted, the knowledge instruction explicitly permits the jury to find knowledge based solely on what a reasonable person would believe. As Division Three recently noted, “So confusingly a jury cannot convict the accused based on constructive knowledge, but may determine constructive knowledge to be evidence of subjective knowledge.” State v. Jones, \_\_\_ Wn. App. 2d \_\_\_, 463 P.3d 738, 747 (2020).

Jury instructions must not be misleading and must properly inform the trier of fact of the applicable law. Bodin v. City of Stanwood, 130 Wn.2d 726, 732, 927 P.2d 240 (1996). Jury instructions must convey “that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt.” State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). It is reversible error when the instructions relieve the State of this burden. State v. Allen, 101 Wn.2d 355,

358, 678 P.2d 798 (1984) (“Failure to inform the jury that there is an intent element is thus a ‘fatal defect’ requiring reversal.”); see also State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245, cert. denied, 518 U.S. 1026, 116 S. Ct. 2568, 135 L. Ed. 2d 1084 (1995).

By permitting a jury to find knowledge based on mere negligent ignorance, the jury instruction violates due process. It misleads the jury, fails to inform the jury of the requirement of actual knowledge, and relieves the State of its burden to prove actual knowledge. Although Washington case law makes clear that the jury “must still find subjective knowledge,” Shipp, 93 Wn.2d at 515, the pattern jury instruction does not.

When a jury instruction permits conviction on evidence less than proof beyond a reasonable doubt of every element of the crime, the instruction violates due process. Allen, 101 Wn.2d at 358. Omitting an element of the crime from the jury instructions, so as to fail to require proof of that element, is automatic constitutional error that may be raised for the first time on appeal. State v. O’Hara, 167 Wn.2d 91, 103, 217 P.3d 756 (2009). Instructions that direct a particular verdict or

relieve the prosecution of its burden constitute manifest constitutional errors under RAP 2.5(a)(3). State v. Scott, 110 Wn.2d 682, 688-89 & n.5, 757 P.2d 492 (1988). By permitting conviction based on constructive knowledge when the law requires actual knowledge, the jury instruction in Losacco's case violated due process.

When, as here, an erroneous jury instruction misstates an element the State must prove, it will be deemed harmless only if the reviewing court can conclude beyond a reasonable doubt that the element is supported by uncontroverted evidence. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 18, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1995)).

The State cannot make the necessary showing here. As discussed in argument one, supra, whether the evidence established that Losacco actually knew of the existence of the no-contact order was very much in dispute. 1RP 474-76, 482. Because evidence of Losacco's actual knowledge was controverted and in question, the erroneous instruction cannot be deemed harmless. Losacco's eight convictions for felony

violation of a domestic violence no-contact order must be reversed.

3. CORRECTION OFFICER PEARSON'S TESTIMONY IDENTIFYING LOSACCO'S AND ST. CLAIR'S VOICES IN AUDIO RECORDINGS IMPROPERLY INVADED THE PROVINCE OF THE JURY.

Correction Officer Pearson opined that the voices in the jail calls admitted at trial were Losacco's and St. Clair's. These opinions were improper because Pearson had no special knowledge of the party's voices that put him in a better position than the jury to make the assessment. These opinions invaded the province of the jury and violated ER 701. And defense counsel was ineffective in failing to object to these opinions.

- a. Pearson improperly linked Lossaco and St. Clair to the telephone calls which formed the basis of the charges despite having no independent knowledge.

The right to have factual questions decided by the jury is crucial to the jury trial right. State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008). As such, ER 701 permits lay opinion only when it is (1) rationally based on the perception of the witness, (2) helpful to the jury, and (3) not based on scientific or specialized knowledge. A witness may not offer an opinion,

directly or by inference, regarding the accused's guilt. State v. George, 150 Wn. App. 110, 117, 206 P.3d 697 (2009).

When photographs or videos are admitted, the identity of the persons portrayed is generally a factual question for the jury. George, 150 Wn. App. at 118. Lay opinion as to the identity of a person in question is therefore inadmissible, unless “there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury.” Id. (quoting State v. Hardy, 76 Wn. App. 188, 190-91, 884 P.2d 8 (1994)). For example, lay opinion testimony may be appropriate if the witness is personally acquainted with the individual. Id.

In Hardy, police officers testified to the defendants' identities in videos of drug transactions. 76 Wn. App. at 189. The officers had known the individuals for several years, so they were more likely than the jury to correctly identify them. Id. at 191-92. In George, by contrast, an officer identified the defendants in a surveillance video based on their build, movements, and clothing. 150 Wn. App. at 119. It was error to admit the officer's identification because he had only seen the defendants briefly the day of the crime. Id. These were not the type of extensive

contacts, as in Hardy, that would give the officer a better basis than the jury for comparing the defendants' appearance at trial to the individuals on the video. Id.

Pearson had even less contact with Losacco and St. Clair than the officer in George. During Pearson's testimony, the State played eight jail calls that occurred over a two month period, and which formed the basis of seven of the charges. 1RP 401, 412-15, 453; CP 5-10; Exs. 6A, 16A. Each call featured a single male and female voice. Neither person personally identified themselves in any of the calls. Pearson nonetheless testified that male voice belonged to Losacco and the female voice to St. Clair in each of the calls. As Pearson acknowledged however, he had never met nor spoken with either Losacco or St. Clair. 1RP 415-16, 418. Rather, the basis of his knowledge of the identities of the voices came solely from listening to jail calls. 1RP 404-05, 418, 421.

Pearson's identification of the party's voices was based solely on audio recordings, eight of which were played for the jury. 1RP 401, 404-05, 412-15, 418, 421, 453; Ex. 16A. Pearson had no other contact with either party, either in person or by telephone. 1RP 415-16, 418. He did not purport to be a voice identification

expert. He did not observe Losacco place any of the calls. 1RP 420. He did not identify who the telephone number receiving the calls belonged to. 1RP 417. He acknowledged at no point did the caller ever ask to speak with “Brandi” or “St. Clair.” 1RP 417-18.

This is more extreme than George, where the officer at least interacted with the defendants on the day of the crime. 150 Wn. App. at 119. Pearson was in no better a position than the jury to decide if either Losacco or St. Clair were the voices in the jail calls. Because identification of the voices was an ultimate issue of fact, Pearson’s opinion wrongly invaded the province of the jury.

b. Pearson’s ultimate opinion on guilt prejudiced the outcome of the trial.

Pearson’s testimony was particularly harmful with regards to counts three through nine, which were based entirely on the jail calls. CP 5-10; 1RP 10-11, 66, 68-69, 453. Whether Losacco and St. Clair were actual participants in the calls, and thus whether Losacco had called St. Clair in violation of a no-contact order, was the primary disputed issue at trial. 1RP 469-71.

Two of the jail calls were not made using Losacco's pin number. One of those came from the general jail booking area. 1RP 399, 415; Exs. 6A, 16A. While six of the calls were made using Losacco's assigned pin number, Pearson acknowledged that did not mean Losacco had actually placed those calls. Indeed, as Pearson testified, inmates often traded their pin numbers. 1RP 416-17.

The jail calls themselves were highly prejudicial and formed the entire basis for seven of the nine charges. Pearson's identification of Losacco and St. Clair as the speakers removed this issue of fact from the jury and made it a foregone conclusion.

Not only did Pearson's opinion go to the primary issue of fact on these charges, but he was akin to a law enforcement officer, meaning his testimony carried an "aura of reliability" with jurors. Montgomery, 163 Wn.2d at 595 (quoting Demery, 144 Wn.2d at 765); see also State v. Carlin, 40 Wn. App. 698, 703, 700 P.2d 323 (1985) ("Particularly where [an opinion on guilt] is expressed by a government official, such as a sheriff or a police officer, the opinion may influence the fact finder and thereby deny the defendant of a fair and impartial trial."),

overruled on other grounds by City of Seattle v. Heatley, 70 Wn. App. 573, 854 P.2d 658 (1993). An officer's opinion on guilt is therefore "particularly prejudicial and improper." State v. Sanders, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992).

This Court should reverse and remand for a new trial without Pearson's impermissible opinion testimony. George, 150 Wn. App. at 120.

c. The constitutional error requires reversal.

The State may argue this issue is waived because defense counsel did not object to Pearson's opinion testimony. Such an argument should be rejected.

First, Pearson's testimony was manifest constitutional error, reviewable under RAP 2.5(a)(3). Impermissible opinion testimony constitutes manifest constitutional error when there is an "an explicit or almost explicit witness statement on an ultimate issue of fact." State v. Kirkman, 159 Wn.2d 918, 936, 155 P.3d 125 (2007). This is precisely what happened here: Pearson gave an explicit statement identifying Losacco's and St. Clair's voices on the jail calls. The above discussion of prejudice demonstrates why this error was manifest.

Even if this Court determines there needed to be a contemporaneous objection, then failure to do so constituted ineffective assistance of counsel. Every accused person enjoys the right to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. 1, § 22. That right is violated when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Appellate courts review ineffective assistance claims de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).

Counsel's performance is deficient when it falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Where a failure to object is not justified by a legitimate trial strategy, it constitutes deficient performance. See, e.g., State v. Klinger, 96 Wn. App. 619, 622-23, 980 P.2d 282 (1999) (finding deficiency where there was no strategic reason for not moving to suppress marijuana found in a storage shed behind Klinger's cabin); State v. Hendrickson, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (holding failure to object to introduction of Hendrickson's

prior drug convictions not tactical decision). Prejudice occurs when there is a reasonable probability that but for counsel's deficiency, the result would have been different. Thomas, 109 Wn.2d at 226.

Given the case law prohibiting the type of improper opinion testimony that occurred in this case, there can be no strategic reason for defense counsel's failure to object during Pearson's testimony. As discussed above, counts three through nine were based entirely on the jail calls. But, whether Losacco and St. Clair were in fact the people involved those calls was the disputed issue. Under such circumstances, no reasonably prudent defense attorney would fail to object to the State's strongest evidence on identity when that evidence was inadmissible. This was no trial tactic. Thus, trial counsel's failure to object fell below the standard of a reasonably prudent attorney.

Counsel's failure to object also prejudiced Losacco. As discussed above, without Pearson's improper opinion testimony there is a significant likelihood that the jury would have found reasonable doubt and acquitted the defendant. The calls were the basis of seven of the charges, yet the speakers did not identify

themselves by name, no one observed Losacco place the calls, no one identified whom the number that was called from the jail belonged to, or confirmed that use of Losacco's jail pin number meant that he placed the calls.

While Nelson also identified the voices on the jail calls as belonging to Losacco and St. Clair, his testimony did not carry the aura of reliability that correction officer Pearson's did. Moreover, the jury had reason to doubt Nelson's veracity. First, by Nelson's own admission he did not want Losacco living with his St. Clair, whom he considered his stepdaughter. 1RP 333-34. Second, the jury acquitted Losacco of fourth degree assault, the alleged facts of which rested on Nelson's testimony, despite him not actually witnessing the alleged event itself. 1RP 335-36, 338, 369, 372.

Without the improper opinion evidence from Pearson, there is a significant likelihood that the jury would have found reasonable doubt and acquitted Losacco. Consequently, trial counsel's failure to object created a reasonable probability sufficient to undermine confidence in the outcome of the case and thereby denied Losacco effective assistance of counsel. Reversal is required.

4. REMAND IS NECESSARY TO STRIKE THE REQUIREMENT THAT LOSACCO PAY THE COSTS OF COMMUNITY CUSTODY.

The trial court ordered Losacco to serve 30 months on community custody as part of his prison based DOSA. CP 83-85; 2RP 17. The court imposed only the mandatory \$500 victim penalty assessment finding Losacco indigent. CP 80-81; 2RP 13, 19. But, as a condition of community custody, the court ordered Losacco “Pay supervision fees as determined by DOC.” CP 85 (condition 5).

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.) This Court recently held, “[s]ince the supervision fees are waivable by the trial court they are discretionary LFOs.” State v. Dillon, 12 Wn. App. 2d 133, 152, 456 P.3d 1199, rev. denied, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, WL 2950649 (2020).

The law now prohibits trial courts from ordering indigent defendants like Losacco to pay discretionary LFOs. RCW

10.01.160(3); State v. Ramirez, 191 Wn.2d 732, 749, 426 P.3d 714

(2018). Here, the trial appeared to recognize as much, explaining:

And I'm going to make that finding that you are indigent today, therefore I won't impose as to financial obligations only what the law requires I impose. In fact, the law forbids me to do anything more than the crime victim penalty assessment and the DNA database fee, so that's what I'm going to impose as far as financial legal obligations goes.

2RP 13.

From this, it is apparent that the inclusion of the pre-printed language requiring Losacco to pay supervision fee costs is a scrivener's error. The record shows the court's intent to waive all discretionary LFOs. A scrivener's error is a clerical mistake that, when amended, would correctly convey the trial court's intention as expressed in the record at trial. State v. Davis, 160 Wn. App. 471, 478, 248 P.3d 121 (2011).

A court may correct a scrivener's error at any time. In re Pers. Restraint Petition of Mayer, 128 Wn. App. 694, 702, 117 P.3d 353 (2005) (citing CrR 7.8(a)). The remedy for a scrivener's error in a judgment and sentence is to remand to the trial court for correction. Id. This Court should remand for the trial court to strike the discretionary, and mistakenly included, community

custody supervision fee from the judgment and sentence. Dillon, 12 Wn. App. 2d at 152 (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 and dismiss Losacco's convictions for insufficient evidence. Alternatively, Losacco's convictions must be reversed and remanded for a new trial. At the very least, remand to strike the supervision fees is required given Losacco's indigency.

DATED this 30<sup>th</sup> day of June, 2020.

Respectfully submitted,

NIELSEN KOCH, PLLC

A handwritten signature in black ink, appearing to read 'Jared B. Steed', written in a cursive style.

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