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NO. 54248-0

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

STATE OF WASHINGTON,

Respondent,

v.

NEHEMIAH LOSACCO,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Jerry Costello

No. 19-1-00391-1

BRIEF OF RESPONDENT

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I. INTRODUCTION

Defendant Nehemiah Losacco was ordered to have no contact with Brandi St. Clair. After he was arrested for violating the order and assaulting Ms. St. Clair, he continued to call her from jail. The court order, which he signed and which was entered into evidence, is sufficient evidence of his knowledge of the order. WPIC 10.02 provides a single definition for “knowing” while explaining that the jury can infer what someone actually knows from the circumstantial evidence. The WPIC has been upheld by the Washington supreme court and court of appeals.

For the first time on appeal, the Defendant challenges foundational testimony identifying the voices on the jail phone calls. The testimony offered no opinion on his guilt or innocence, is admissible under the rules of evidence (ER 701 and ER 704), and only duplicates testimony from Ms. St. Clair’s stepfather which the Defendant does not challenge. The claim does not implicate the constitution and does demonstrate error, much less manifest error. It is not reviewable under RAP 2.5(a)(3) and *Kirkman*.

Nor is the challenge to supervision fees reviewable under RAP 2.5 and RAP 3.1 where none have been imposed at this time and where the fees are not “costs” within the meaning of RCW 10.01.160.

II. RESTATEMENT OF THE ISSUES

- A. Is there sufficient evidence of the Defendant's knowledge of the no-contact order which he signed in open court with his attorney present?
- B. Did the court err in using a WPIC which the Washington supreme court has held to be constitutional?
- C. Does foundational evidence identifying the voices in a recorded call, admissible under ER 701 and ER 704 and repetitive of the unchallenged identification made by another witness, demonstrate error of any kind?
- D. Should this Court deny review under RAP 2.5 and RAP 3.1 of a challenge to supervision fees which are not "costs" under RCW 10.01.160(2) and which have not been imposed at this time?

III. STATEMENT OF THE CASE

The Defendant Nehemiah Losacco has been convicted by a jury of eight counts of violating a protection order. CP 78-79. The protected party was Brandi St. Clair. CP 5-12, 45, 47, 49, 51, 53, 55, 57, 59, 61, 82, 85, 90; Exh. 1A.

In 2018, with the assistance of her stepfather Mitchell Nelson, Ms. St. Clair took up residence in a motor home in Buckley. 1RP¹ 328-29, 333-34. When she moved in, the Defendant moved in with her. 1RP 329-34.

On June 13, 2018, Pacific municipal court entered a "Domestic Violence No-Contact Order (Misdemeanor)" "in open court in the presence

¹ Consistent with the Brief of Appellant, "1RP" refers to the verbatim report of proceedings for August 14, 15, 19, 20, 21, 2019, and "2RP" refers to the sentencing transcript of November 1, 2019.

of the defendant” Nehemiah Losacco requiring him to have no contact with Brandi St. Clair, whether in person or by phone, and to stay at least 1000 feet away from her residence. Exh. 1A. The Defendant and his attorney both signed the order. Exh. 1A. It has an expiration date of June 13, 2023.

Five months later, on November 19, 2018, the Defendant held Ms. St. Clair against the wall of her motorhome and choked and hit her, reddening her cheek and neck. 1RP 329, 343-44, 353-57, 379. She fled to Mr. Nelson’s neighboring motorhome. 1RP 335-36. The Defendant followed her and, from outside Mr. Nelson’s home, he yelled abuse at her, “calling her a bitch, a whore,” and “the C word.” 1RP 336-37. When Mr. Nelson exited his motorhome, the Defendant took off running, jumped in a car, hit a tree, straightened out, and drove away. 1RP 337-38. Ms. St. Clair looked shocked and tearful. 1RP 345, 354. Although she had been raised rough and knew how to defend herself, this was different. 1RP 345-46. She had run from the Defendant and stood on her stepfather’s steps “like a deer,” “frightened.” 1RP 346. Mr. Nelson called the police. 1RP 358. Pierce County sheriff’s deputy Brett Karhu responded and observed Ms. St. Clair’s reddened cheek and neck. 1RP 376, 379.

The State charged the Defendant with violating the no-contact order and assault. CP 3-6.

From jail, the Defendant continued to contact Ms. St. Clair over two dozen times. 1RP 405. The State charged seven of these contacts as protection order violations alleged to have occurred on separate days over a two-month period. CP 6-12; Exh. 16.

Corrections deputy Torvald Pearson gathered and reviewed the recorded calls. 1RP 398. Both Mr. Nelson and Dep. Pearson identified the voices in the recordings. 1RP 368-69, 401-06, 410. Although the deputy was less familiar with the parties, he was aided by context such as the Defendant's PIN number, the names the speakers used in identifying themselves and addressing each other, references to family members, the topics of conversation, and "just multiple different little pieces of information gathered up over probably a couple dozen different phone calls." 1RP 405.

The state submitted recordings of eight calls made on seven days. Exh. 6A; Exh. 16. All eight calls were made to the same cell phone number. Exh. 16; 1RP 398. Six of them were made from the Defendant's PIN. Exh. 16; 1RP 398. The caller's voice, however, is consistently the same. Exh. 6A; 1RP 404.

In the first call, on April 19, Ms. St. Clair was tearful about money concerns and being alone on "my 40th fucking birthday." Exh. 6A (no money for gas or even coffee). She said, "my dad told me to come home.

He said, ‘Come home till your money² gets here, then we’ll deal with it. Don’t be out there [] sleeping in the truck, Brandi. ... Come home before your birthday.’” Exh. 6A; 1RP 456-57. Ms. St. Clair turned 40 on April 20, 2019. Exh. 1A; 1RP 450-51. That day, the Defendant called using a different PIN. Exh. 16. He said he traded “three trays” of food for someone else’s phone minutes. Exh. 6A; 1RP 459. He said he had been calling every hour trying to reach her to wish her a happy birthday. Exh. 6A; 1RP 457. Ms. St. Clair explained that her cell phone battery has been low. *Id.* The third call is under yet another inmate’s PIN, but the voices are the same. Exh. 6A; Exh. 16. The Defendant explained the phone call was free because the PIN holder was being released. Exh. 6A. In the fourth call, Ms. St. Clair was again tearful, this time because she had come into some money. *Id.* (“I gotta walk around fucking watching every step, because you never know, you know, who might need that money that day.”) In the fifth call, Ms. St. Clair advised that she has put money on the Defendant’s account and got herself a new phone. Exh. 6A; 1RP 457. The Defendant reminded her of their time together in her motorhome and told her that she is the woman that he wants. Exh. 6A; 1RP 394-96. On June 18, the Defendant called Ms. St. Clair twice as she arrived in Las Vegas. Exh. 6A; 1RP 458.

² The court redacted a running theme throughout the phone calls where Ms. St. Clair expressed concern that the Defendant was only interested in her, as his brother informed her, because she was expecting to receive a large settlement. 1RP 85-87.

In the first of these calls, he said, “I want to hear, ‘I love you, Nehemiah.’”
Exh. 6A; 1RP 472.

All told, the Defendant was charged with one count of simple assault and eight counts of felony violation of a domestic violence court order. CP 5-10. A violation becomes a felony if there are two previous convictions. RCW 26.50.110(5). The Defendant stipulated to the previous convictions. 1RP 386-88.

Ms. St. Clair would not cooperate with the investigation, refusing to provide a written statement or be photographed. 1RP 378-79. She did not testify at trial. 1RP 317, 323. The jury convicted the Defendant on the eight felony order violations, but acquitted on the simple assault. CP 44-61.

At his sentencing hearing, the prosecutor asked for a standard sentence of 60 months, LFOs of \$800 (\$500 victim assessment, \$200 filing fee, and \$100 DNA fee), and a no-contact order. 2RP 6-7. The prosecutor noted that, where the criminal behavior continued during the Defendant’s incarceration, the relationship dynamics were the issue and not alcohol abuse. 2RP 4-6.

Defense counsel argued that the Defendant was indigent based solely on his arrest and pretrial incarceration. 2RP 7. The Defendant is employed refinishing and repairing hardwood floors, has \$7500 in a checking account, and is capable of “financ[ing] any treatment that the

Court orders.” 2RP 9, 11-12. He enjoys the support of his family and his employer. 2RP 7, 9, 12-13.

The court found the Defendant indigent and crossed off the \$200 criminal filing fee and \$100 DNA fee, writing an LFO total of \$500. 2RP 13; CP 81.

Defense counsel requested a first-time offender waiver (FTOW) which would provide a sentencing range of 0-90 days. 2RP 7-8, 10-11. Counsel also noted that the Defendant was eligible for a drug offender sentencing alternative (DOSA). 2RP 10.

The prosecutor opposed the request for a FTOW, noting that the Defendant was not an offender who had “never been previously convicted of a felony in this state” as required by RCW 9.94A.650(1). 2RP 15. The Honorable Judge Costello decided to assume that the Defendant was eligible, but refused the request for FTOW in his discretion, noting the large number of repeated felony violations of a court’s order. 2RP 16.

The court imposed a DOSA of 30 months incarceration and 30 months community custody in order to allow for domestic violence and substance abuse evaluations and treatment and close supervision. 2RP 16-18; CP 83. That supervision includes standard terms plus the supervision fee “as determined by DOC.” CP 85, 90. By law, once community custody commences, the Department of Corrections has discretion to defer or waive

any or all of these fees based on a consideration of statutory factors which include employment, education, and hardship. RCW 9.94A.870.

IV. ARGUMENT

A. There is sufficient evidence that the Defendant was aware of the no-contact order which he signed in open court.

The Defendant challenges the sufficiency of the evidence for his actual knowledge of the existence of the domestic violence court order. Brief of Appellant (BOA) at 8-10.

In reviewing a challenge to the sufficiency of the evidence, we ask whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). We draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant. *State v. Salinas*, 119 Wash.2d at 201, 829 P.2d 1068. An accused's claim of insufficiency of evidence admits the truth of the State's evidence and all inferences reasonably drawn therefrom. *State v. Salinas*, 119 Wash.2d at 201, 829 P.2d 1068. Circumstantial evidence and direct evidence carry equal weight when reviewing a challenge to the sufficiency of the evidence. *State v. Goodman*, 150 Wash.2d 774, 781, 83 P.3d 410 (2004). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wash.2d 821, 874-75, 83 P.3d 970 (2004).

State v. Jones, 13 Wn. App. 2d 386, 398–99, 463 P.3d 738, 744–45 (2020).

The State entered Exhibit 1A into evidence, which showed that the Pacific municipal court order had been entered in open court and in the Defendant's presence. After the municipal court determined the terms of

the order, it was presented to the parties for signature. Both the Defendant and his attorney signed the order. By affixing a signature, the party subject to the order demonstrates his or her knowledge of the terms. This exhibit provides sufficient evidence that the Defendant knew of the existence of the order and its terms.

The prosecutor also argued that the Defendant plainly had knowledge of the order before he committed the last seven counts, because he was in jail after being arrested for the order violation charged in the first count. 1RP 442.

The Defendant argues that the exhibit does not demonstrate that he was the “defendant” in the Pacific municipal court case BOA at 12. In fact, his name Nehemiah T. Losacco is in the caption along with his date of birth. Exh. 1A; Exh. 2. The protected party is also named in the order. The exhibit demonstrates he is the defendant therein.

The Defendant argues that the exhibit does not demonstrate the circumstances under which the order was entered. BOA at 12. While the State is under no obligation to demonstrate this, in fact, the order indicates it was entered “in open court in the presence of the defendant” and signed by him. Exh. 1A.

The Defendant argues that the State could have offered more or different evidence than it did. BOA at 12-13. For example, the prosecutor

could have shown that the last seven violations occurred after he had been charged with the first. BOA at 13. But the State is not required to make its case with any particular facts.

Sometimes defendants will confess to one or more elements. *State v. Van Tuyl*, 132 Wn. App. 750, 759, 133 P.3d 955, 959 (2006) (defendant admitted knowing about the restraining order). Just because this happened in one case does not mean the State is obliged to obtain a confession in every case.

The Defendant concedes that this same evidence, on reconsideration, was held sufficient to demonstrate harmless error in *State v. France*, 129 Wn. App. 907, 911, 120 P.3d 654 (2005). BOA at 14. *See also State v. Floyd*, 178 Wn. App. 402, 412, 316 P.3d 1091, 1097 (2013) (holding a rational juror could infer defendant's knowledge of the order by his signature upon it). He distinguishes this case, because his signature on the 2018 order looks somewhat different from his 2014 signature on his driver's license. This challenge does not respect the standard of review.

The Defendant alleges that nothing linked him to the order "beyond his signature." BOA at 14. This is false. Beyond his signature, there was his highly unusual name, his date of birth, and his contentious relationship with Brandi St. Clair who is named in the order.

It is not reasonable to infer that two attorneys and a municipal court judge allowed someone other than the named defendant to sign the order. CJC Canon 1, Rule 1.2 (judges have a duty to promote confidence in the judiciary by acting with integrity); RPC 3.3 (attorneys owe a duty of candor to the court); RPC 8.4 (attorneys can lose their licenses for dishonesty or violations of the ethical rules). And it is not reasonable to believe, based on slight differences in the signature alone, that there is more than one Nehemiah T. Losacco born on September 19, 1989 and living in the state of Washington and in a volatile relationship with Ms. St. Clair.

What is reasonable to understand is that people can sign their names differently depending on the situation and that their signatures can change over time. It is particularly easy to understand that a person will sign their name carefully on their driver's license, an identification card that is earned and purchased. *Svendgard v. State*, 122 Wn. App. 670, 681, 95 P.3d 364, 370 (2004) (licensees have a substantial property right in their driving privilege). And a person will sign carelessly when they are unwilling but compelled to do so. *Cf. State v. Davis*, 125 Wn. App. 59, 62, 104 P.3d 11, 12 (2004) (defendant refusing to sign judgment and firearm notification).

The slight differences in signature must be interpreted most strongly against the Defendant with all inferences drawn in favor of the State. *Jones*,

13 Wn. App. 2d at 399. There is sufficient evidence that the Defendant knew of the existence of the restraining order.

B. The court made no error in using the standard WPIC which recites the statutory definition which explains that a jury may infer knowledge from circumstantial evidence.

The Defendant challenges the second paragraph in Jury Instruction No. 8 (CP 27, 135 (taken from WPIC 10.02)). BOA at 17-18. The constitutionality of this revised instruction has been upheld repeatedly. *State v. Leech*, 114 Wn.2d 700, 710, 790 P.2d 160 (1990) (providing a list of appellate cases at footnote 20), *abrogated on other grounds by In re Pers. Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002). The Washington supreme court's decisions are binding on this Court. *State v. Parnel*, 195 Wn. App. 325, 328, 381 P.3d 128, 130 (2016); *State v. Ballew*, 167 Wn. App. 359, 369, 272 P.3d 925 (2012).

The instruction is a variation on RCW 9A.08.010(b):

(b) KNOWLEDGE. A person knows or acts knowingly or with knowledge when:

(i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

(ii) he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.

RCW 9A.08.010.

In 1980, the Washington supreme court found this definition was susceptible to interpretations (mandating a presumption or applying an objective standard) which would be unconstitutional. *State v. Shipp*, 93 Wn.2d 510, 514-16, 610 P.2d 1322, 1325-26 (1980). However, the statute is constitutional when interpreted as a permissive inference only. *Shipp*, 93 Wn.2d at 516. Where the defendant was charged under a former statute with knowingly promoting the prostitution of a person less than eighteen years old, “[t]he jury must be instructed that, although it may infer knowledge from circumstantial evidence which suggests that an ordinary person would have known she was under age, it must find that the defendant knew she was under 18 years old.” *Shipp*, 93 Wn.2d at 519.

The WPIC and jury instruction conform with this 1980 holding:

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.

WPIC 10.02; CP 27 (emphasis added). The Washington supreme court has approved the instruction. *Leech, supra*.

Notwithstanding the authorities, the Defendant insists that the instruction is inadequate. BOA at 19-20. He points to *State v. Allen*, 182 Wn.2d 364, 341 P.3d 268 (2015) as analogous. It is not. That case regards the prosecutor's closing argument which repeatedly misstated the law which was correctly set forth in the instruction. Typically, the court would have presumed that the jury followed the court's instructions. *Allen*, 182 Wn.2d at 380. And in fact the court of appeals had affirmed for this reason. *Id.* at 379. However, the supreme court found that the cumulative effect of the repeated misstatements of the law in the face of objections and admonishments was too egregious to overcome. *Id.* at 375-80.

The Defendant takes his inspiration from an online article which advocates for the amendment of the statute: Alan R. Hancock, *True Belief: an Analysis of the Definition of "Knowledge" in the Washington Criminal Code*, 91 WASH. L. REV. ONLINE 177 (2016).³ The article addresses the issue that *Shipp* remedied more than thirty years ago. Judge Hancock interprets that there are prongs to the definition of "knowledge" and argues that the WPIC "allows the jury *not* to consider the subjective knowledge of the defendant." Hancock, 91 WASH. L. REV. ONLINE at 179, 185 (emphasis in the original). This is a significant misreading of the WPIC. The second

³ <https://www.law.uw.edu/wlr/online-edition/hancock>

paragraph is not an alternative definition or “prong.” It merely advises that knowledge can be inferred from circumstantial evidence.

The author argues that both the statute and WPIC “literally permit the jury to find the defendant guilty based on constructive knowledge.” Hancock, 91 WASH. L. REV. ONLINE at 178. This is not so. The instruction allows the jury to infer what a defendant knows from the circumstantial evidence. This is no different from any other element. CP 22; *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004) (circumstantial evidence and direct evidence carry equal weight); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (review of a jury’s verdict considers all reasonable inferences from the evidence).

For example, knowledge in the context of a guilty plea may be established directly – by the defendant’s reciting back the terms in answer to the judge’s colloquy. *State v. Zhao*, 157 Wn.2d 188, 200-01, 137 P.3d 835, 841 (2006). But a colloquy is not required. And the defendant’s knowledge can be demonstrated in more passive ways, for example, the attorney’s signature on the plea form which indicates that the attorney reviewed the form with the client. *Zhao*, 157 Wn.2d at 201.

The author would amend the WPIC to indicate that the jury “must in any event act with actual, subjective knowledge.” *Id.* at 190. Because the WPIC provides a single definition, this is what it already says. The

second paragraph correctly advises that inferences that the defendant was actually aware may be ascertained from circumstantial evidence.

While the State must prove actual knowledge, it may do so through circumstantial evidence. Thus, Washington's culpability statute provides that a person has actual knowledge when "he or she has information which would lead a reasonable person in the same situation to believe" that he was promoting or facilitating the crime eventually charged. RCW 9A.08.010(1)(b)(ii).

Allen, 182 Wn.2d at 374.

There are other permissive inferences in Washington law with which superior court judges have been known to struggle. In *State v. Cantu*, 156 Wn.2d 819, 132 P.3d 725 (2006), the Washington supreme court reviewed the juvenile court judge's application of RCW 9A.52.040. This law allows the finder of fact to find through inferences the element which elevates a criminal trespass to a burglary, i.e. intent to commit a crime therein. Cantu was alleged to have entered his mother's locked bedroom in order to steal cash, alcohol, and pills. *Cantu*, 156 Wn.2d at 823. Judge Jorgenson acquitted the respondent of theft, minor in possession, and possession of a legend drug, but convicted Cantu of residential burglary. The juvenile court judge's verdicts were irreconcilable. There was no evidence of any intent to commit a crime therein outside of the cash, beer, and pills. The supreme court concluded that the superior court judge had

misinterpreted the permissive inference in the statute as a mandatory presumption. *Id.* at 827.

In some ways, the Defendant's argument is epistemological. The Defendant argues that the definition permits conviction when a reasonable person "would have known" a court order existed but the actual defendant unreasonably insists that despite all evidence to the contrary, he was unaware of or failed to grasp what was in front of his own nose. BOA at 19. It is a metaphysical question. We can never fully share another person's experience and perceive the world as they do. Even a confession may be perceived differently. The jury instruction returns us to reality and pragmatism. Is it reasonable to believe the defendant's denials in the face of the evidence? The instruction allows the jury to infer what a defendant knows, without being the defendant, from the circumstantial evidence.

The instruction, which has been approved by the Washington supreme court, was not error.

C. A witness does not invade the province of the jury by identifying a voice or an image of a person.

For the first time on appeal, the Defendant challenges Deputy Pearson's testimony identifying the voices in the jail phone calls as belonging to Mr. Losacco and Ms. St. Clair. BOA at 25.

1. This Court must decline review under RAP 2.5(a)(3) consistent with *Kirkman* where the alleged error is neither constitutional nor manifest.

Generally, appellate courts will not consider issues raised for the first time on appeal. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007) (citing RAP 2.5(a)). The issue preservation rule encourages the efficient use of judicial resources by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals. *Kirkman*, 159 Wn.2d at 935; *State v. Hamilton*, 179 Wn. App. 870, 878, 320 P.3d 142 (2014).

Unpreserved claims of improper opinion testimony do not constitute manifest constitutional error reviewable for the first time on appeal. *Kirkman*, 159 Wn.2d at 926-27, 936.

- a. Because a jury is not bound by the opinion of a witness, no testimony can be said to usurp the constitutional authority of the jury.

There is a line of cases which would prohibit opinion testimony as to the guilt or veracity of the defendant as an “invasion of the province of the jury.” *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (citing *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993)). Such “empty rhetoric” will not elevate the challenge to a constitutional plane. *Heatley*, 70 Wn. App. at 583, n.5. It is impossible to usurp the jury’s function, because even if there is uncontradicted expert

testimony on the victim's credibility, the jury is not bound by it. *Id.*; *State v. Middleton*, 657 P.2d 1215, 1219 (Or. 1982). "Jurors always remain free to draw their own conclusions." *Heatley*, 70 Wn. App. at 583 n.5.

The Washington supreme court has echoed *Heatley*, finding that the claim that a witness' opinion could invade the constitutional role of the jury is "simple rhetoric." *Kirkman*, 159 Wn.2d at 928. The jury is not bound by any one witness' opinion, even where there is "uncontradicted testimony on a victim's credibility." *Kirkman*, 159 Wn.2d at 928. In fact, jurors are instructed that they are the sole judges of the credibility of each witness, an instruction they are presumed to follow. CP 19-20; *Kirkman*, 159 Wn.2d at 928; WPIC 1.02. When experts testify, jurors are routinely instructed that are not bound even by the opinion of a witness with special training, education, or experience, but rather "determine [for themselves] the credibility and weight to be given" to the witness' opinion. WPIC 6.51.

Because the expression of someone else's opinion does not usurp a juror's ability to think independently and reach a contrary conclusion, a claim of improper opinion testimony does not amount to a constitutional claim under RAP 2.5(a)(3).

In the instant case, the testimony the Defendant challenges is not an opinion as to his guilt or veracity. Dep. Pearson did not testify that the Defendant was guilty or a liar. The Defendant challenges the foundational

identification of a voice in a phone call which preceded the request to admit the exhibit. Defense counsel repeatedly reminded the jurors in his closing argument that they were the sole judges of credibility. 1RP 465, 468. And he argued the jury should not rely upon the deputy's identification of the voices in the recordings. 1RP 470. Because the finders of fact were "free to disbelieve" the deputy, the ultimate issue of identification was left to the jury. *State v. Hardy*, 76 Wn. App. 188, 191, 884 P.2d 8, 9 (1994). There is no constitutional matter for this Court to review.

- b. There is no error, manifest or otherwise, in foundational evidence which determines that an exhibit is relevant and is what it purports to be or in a witness' identification of a voice with which he has become familiar after investigation and study.

The Washington Supreme Court has never seen a claim of impermissible opinion testimony which rose to the level of manifest error.

No case of this court has held that a manifest error infringing a constitutional right *necessarily* exists where a witness expresses an opinion on an ultimate issue of fact that is not objected to at trial. Prior decisions in the Court of Appeals have found alleged improper witness opinion testimony *not* to constitute "manifest" error.

State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125, 134–35 (2007).

The Defendant believes that his claim will be the first. BOA at 30. But there is nothing exceptional about his claim. On the contrary, his case is mundane and insignificant compared to the cases reviewed in *Kirkman*. There the consolidated cases reviewed were child rape cases. Doctors and

police officers had opined on the credibility of the child victims. The opinions were all the more significant, because there was no circumstantial evidence and the entire prosecution rested on the credibility of the victims.

Cases involving alleged child sex abuse make the child's credibility "an inevitable, central issue." *Petrich*, 101 Wash.2d at 575, 683 P.2d 173. Where the child's credibility is thus put in issue, a court has broad discretion to admit evidence corroborating the child's testimony. *Id.* at 575, 683 P.2d 173.

Kirkman, 159 Wn.2d at 933.

Unlike a child rape case, ours is not a he-said-she-said case. In fact, neither the victim nor the Defendant testified. And the deputy did not opine on either's credibility. Unlike a typical child rape case, there was direct evidence both of the no-contact order (Exh. 1A) and of contact (through Mr. Nelson's observation of the Defendant outside his home and Exh. 6A). Mr. Nelson also identified the voices in the phone call as being his stepdaughter's and her boyfriend's. Accordingly, there can be no suggestion that the deputy's agreement with Mr. Nelson's identification is prejudicial. It was duplicative and merely foundational to the admission of the exhibit.

The *Kirkman* opinion explained that "[m]anifest error' requires a nearly explicit statement by the witness that the witness believed the accusing victim" and "requires a showing of actual prejudice." *Kirkman*,

159 Wn.2d at 935-36. Here we have neither. There is no prejudice where the deputy's testimony was duplicative of Mr. Nelson's testimony. And the deputy did not testify that he believed an accusing victim, disbelieved the Defendant, or thought the Defendant was guilty.

The Defendant only argues that the deputy made an explicit statement on an ultimate fact. BOA at 30. This does not allege error, let alone manifest error. Such testimony is specifically admissible under the evidence.

Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

ER 704. *See also State v. Rafay*, 168 Wn. App. 734, 806, 285 P.3d 83 (2012) (“testimony that is based on inferences from the evidence, does not comment directly on the defendant’s guilt or veracity of a witness, and is otherwise helpful to the jury, does not generally constitute an opinion on guilt”); *State v. George*, 150 Wn. App. 110, 117, 206 P.3d 697 (2009) (testimony is not objectionable simply because it embraces an ultimate issue that the trier of fact must decide).

A witness may testify as to “opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized

knowledge.” ER 701. For example, “A lay witness may give an opinion concerning the identity of a person depicted in a surveillance photograph if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury.” *State v. Hardy*, 76 Wn. App. 188, 190, 884 P.2d 8, 9 (1994).

The Defendant argues that the officers in the *Hardy* case were only permitted to identify the individuals in a photo because “they had known the individuals for several years.” BOA at 26. That would certainly be one way to gain familiarity. It is by no means the exclusive way. Most Americans do not know and have never met the president and yet can readily identify him by image and voice. We see him on TV and the internet. In a similar way, we become familiar with the voices of radio and podcast personalities – by hearing them on several occasions and based on information (such as introductions) which attaches a name to the voice.

This is exactly what the deputy did to become familiar with the voices on the recordings.

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 that 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. There were themes that tied the calls together even as the Defendant switched PINs. 1RP 85-87; 456-61. After doing his research, the deputy was able to testify to his recognition of voices in eight recordings.

As the prosecutor argued to the jury: "You don't need a voice identification expert to make that determination. Of course, Mr. Nelson, as well as Deputy Pearson, testified as much, but you can make your own determination." 1RP 456.

This testimony is plainly admissible. There is no basis to permit review under RAP 2.5(a).

2. Defense counsel provided effective assistance at trial.

In order to "avoid this preservation requirement," sometimes an appellant will reframe the challenge as a constitutional error. *Kirkman*, 159 Wn.2d at 926. And this is what the Defendant does here, reframing the admission of testimony as ineffective assistance of counsel. BOA at 25.

a. Standards of Review

Even with a timely objection, the admission of evidence would be reviewed only for an abuse of discretion. *State v. Gunderson*, 181 Wn.2d 916, 922, 337 P.3d 1090, 1093 (2014).

To prevail on a claim of ineffective assistance, the defendant has the burden of showing, first, that his counsel's performance was deficient by falling below an objective standard of reasonableness and, second, that this error was so serious as to prejudice his defense and deprive him of a fair trial. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011).

“Competency of counsel is determined based upon the entire record below.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251, 1257 (1995). The courts strongly presume that counsel's performance was reasonable. *State v. Grier*, 171 Wn.2d at 33. To rebut this presumption, a defendant must demonstrate that “there is no conceivable legitimate tactic explaining counsel's performance.” *Id.*, (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). To satisfy the prejudice prong, the defendant must establish that but for counsel's deficient performance, the outcome of proceedings would have been different.” *State v. Grier*, 171 Wn.2d at 34.

“Counsel's errors must be ‘so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.’” *Id.* (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052). In other words, “[t]he likelihood of a different result must be substantial, not just conceivable.” *Id.* at 112, 131 S.Ct. 770.

Matter of Lui, 188 Wn.2d 525, 538–39, 397 P.3d 90, 101 (2017).

b. Counsel had no cause to object to foundational evidence admissible under ER 701.

Before offering Exhibit 6A, the jail phone calls, the prosecutor had to lay a foundation demonstrating that they were what they purported to be and that they were relevant. He did this first by having Mr. Nelson listen to the calls and identify the voices. 1RP 368-69. Then he had the investigator describe the process of collecting and reviewing the data which resulted in the copied audio file. 1RP 390-403. Finally, the deputy explained that the particular files were relevant, because they were phone calls between the parties who were prohibited from having contact. 1RP 397-98, 403-06. Only then did the prosecutor offer the exhibit into evidence. 1RP 406.

The defense could not have objected to this testimony for two reasons. First, the Defendant cannot challenge testimony offered for foundational purposes. Because the determination of admissibility is a preliminary question, the rules of evidence do not limit the evidence that can be offered for authentication. ER 104(a); *Passovoy v. Nordstrom, Inc.*, 52 Wn. App. 166, 170, 758 P.2d 524 (1988).

Second, witness testimony identifying the perpetrator is not inadmissible opinion testimony. Any witness may testify as to their perceptions based on their firsthand observations and as to their opinions or inferences rationally based on those perceptions. ER 701. The trial court

will admit such testimony at its discretion if it is helpful to the fact finder's clear understanding of the testimony. 5B WASH. PRAC. §§ 701.4 - 701.5.

Although it is questionable whether a law enforcement officer's identification testimony is imbued with an aura of reliability⁴, it "has long been recognized that a qualified expert is competent to express an opinion on a proper subject even though he thereby expresses an opinion on the ultimate fact to be found by the trier of fact." *Gerberg v. Crosby*, 52 Wn.2d 792, 795-96, 329 P.2d 184 (1958); ER 704. "[T]he mere fact that the opinion of an expert covers the very issue which the jury has to pass upon does not call for its exclusion." *State v. Ring*, 54 Wn.2d 250, 255, 339 P.2d 461 (1959).

A correctional deputy, just like any other witness, may offer an inference based on his or her observations. *State v. Stark*, 183 Wn. App. 893, 904-05, 334 P.3d 1196 (2014). The fact that the opinion supports a conclusion of guilt makes the opinion relevant and material, and not an improper opinion on guilt. *State v. Stark*, 183 Wn. App. at 905.

It is not unreasonable to fail to object to testimony that is admissible.

Defense counsel's performance was not deficient.

⁴ *State v. Montgomery*, 163 Wn.2d 577, 595, 183 P.3d 267, 276 (2008) ("police officers' opinions on guilt have low probative value because their area of expertise is in determining when an arrest is justified, not in determining when there is guilt beyond a reasonable doubt").

- c. Where the deputy's identification followed Mr. Nelson's unchallenged identification, there can be no suggestion of prejudice.

Before the deputy took the stand, Mr. Nelson testified that the voices on the tape belonged to Mr. Losacco and Ms. St. Clair. Mr. Nelson had significant familiarity with the Defendant and Ms. St. Clair. He had raised Ms. St. Clair, and the couple had been living close to him and interacting with him for approximately a year. 1RP 328-35, 340. The Defendant did not and does not object to Mr. Nelson's identification of the voices in the exhibit. Because the challenged testimony only repeated what Mr. Nelson had already testified to, the Defendant cannot show that the challenged testimony produced a substantial likelihood of a different result.

D. The court did not abuse its discretion in authorizing the Department of Corrections to impose supervision fees at a later date.

For the first time on appeal, the Defendant challenges language in the judgment which authorizes the Department of Corrections to impose supervision fees at a later date. Brief of Appellant (BOA) at 34; CP 85 ("Pay supervision fees as determined by the DOC"). Because no fees have been imposed at this time, the Defendant is not aggrieved and has no right to review this provision. Because error was not preserved below and the possible later imposition of statutorily mandated supervision fees is not manifest constitutional error, this Court must deny review as a matter of

judicial economy and out of respect for the general rule. Because supervision fees are not the costs of prosecution and the record demonstrates no abuse of discretion, there is no error.

1. The Court must deny review under RAP 3.1 where the Defendant is not an aggrieved party.

“Only an aggrieved party may seek review by the appellate court.” RAP 3.1. “ ‘An aggrieved party is one who has a present, substantial interest, as distinguished from a mere expectancy, or ... contingent interest in the subject matter.’ ” *State v. Mahone*, 98 Wash.App. 342, 347, 989 P.2d 583 (1999) (quoting *Tinker v. Kent Gypsum Supply, Inc.*, 95 Wash.App. 761, 764, 977 P.2d 627, *review denied*, 139 Wash.2d 1008, 989 P.2d 1143 (1999)).

State v. Shirts, 195 Wn. App. 849, 854, 381 P.3d 1223, 1226 (2016).

The Defendant’s total balance is \$500, i.e. the crime victim assessment. CP 81. He is not challenging the \$500 imposed. He challenges a hypothetical fee that may be imposed at a later date. No supervision fees have been imposed at this time. Therefore, the Defendant is not aggrieved and has no right to review of his claim.

When a convicted person begins community custody, the Department of Corrections “shall” set the amount for supervision fees. RCW 9.94A.760(1); RCW 9.94A.780(1); RCW 72.04A.120. However, the Department has discretion to defer/exempt the fee for any number of reasons. RCW 9.94A.780(1); RCW 72.04A.120(1).

The Defendant has not begun his community custody, and the Department has not yet determined whether it will defer or exempt supervision fees. Nothing has been imposed at this time aside from the \$500 crime victim assessment. The Defendant is not aggrieved.

Where the Defendant's concerns are entirely hypothetical, the equities do not lie with him. RAP 3.1 must be enforced.

2. This Court should decline to review unpreserved challenges under RAP 2.5.

A claim of error must be preserved below to be raised above. RAP 2.5(a). This rule is one of judicial economy and efficiency. *State v. Sublett*, 176 Wn.2d 58, 154, 292 P.3d 715, 762 (2012). When parties are required to raise and preserve error below, trial courts have an opportunity to correct errors thereby making effective use of judicial resources.

There is an exception for claims which raise a manifest constitutional error. RAP 2.5(a)(3). Challenges to legal financial obligations will never satisfy this provision. *State v. Blazina*, 182 Wn.2d 827, 833-34, 344 P.3d 680 (2015) (the court of appeals properly exercises its right to decline review of unpreserved LFO matters, which do not command review as a matter of right). The Defendant's challenge under RCW 10.01.160 is statutory in nature, not constitutional. And no manifest error is apparent where the judgment only authorizes parties to do, at a later

time, what the legislature permits under RCW 36.18.190 and requires under RCW 9.94A.780.

If supervision fees were true concerns of the Defendant, it stands to reason that he would have challenged these standard provisions in a timely fashion. *State v. Duncan*, 180 Wn. App. 245, 250-52, 327 P.3d 699 (2014), *aff'd and remanded*, 185 Wn.2d 430, 374 P.3d 83 (2016) (explaining the many reasons defendants may choose to waive objection below). If supervision fees are imposed at a later date, the Defendant will have a remedy. For as long as the state is collecting on the Defendant's judgment, he may petition the court for remission under RCW 10.01.160(4). *Duncan*, 180 Wn. App. at 250. However, to hear this challenge before LFOs have even been imposed undermines the judicial economy goal of the court rule.

The dismissal of this challenge does not prejudice the Defendant. RAP 2.5 should be enforced.

3. Supervision fees are not “costs” within the meaning of RCW 10.01.160 and, therefore, are not limited by a defendant’s indigency.

The Defendant claims that the trial court lacks authority to impose “discretionary LFOs” on an indigent defendant. BOA at 34-35 (citing RCW 10.01.160(3) and *State v. Ramirez*, 191 Wn.2d 732, 749, 426 P.3d 714 (2018)). This is not what the cited authority says. The *Ramirez* opinion

discusses HB 1783 which amended RCW 10.01.160(3) which in turn mandates that “costs” as defined under RCW 10.01.160(2) “shall not” be imposed on indigent defendants.

The issue is not whether particular LFOs are mandatory or discretionary – terms which are not referenced in RCW 10.01.160. The question is whether they are “costs” as defined under RCW 10.01.160(2). The “costs” which are subject to an ability-to-pay rule are the “expenses especially incurred by the state in prosecuting the defendant,” not fines or fees related to punishing, rehabilitating, or supervising the defendant. RCW 10.01.160(2).

The indigency or ability-to-pay provision in RCW 10.01.160(3) has its roots in the right to counsel. Criminal defendants “cannot be influenced to surrender [the constitutional right to assistance of counsel without cost] by the imposition of a penalty on the exercise thereof.” *State v. Barklind*, 87 Wn.2d 814, 815, 557 P.2d 314 (1976). A recoupment procedure must pass constitutional muster to insure that reimbursement does not chill that exercise. *Fuller v. Oregon*, 417 U.S. 40, 51, 94 S. Ct. 2115, 2123, 40 L. Ed. 2d 642 (1974) (upholding the imposition of attorney and investigator fees where the recoupment statute contained safeguards against oppressive application). Washington’s statute mirrors the Oregon statute which the

Fuller court upheld. *State v. Blank*, 131 Wn.2d 230, 237-38, 930 P.2d 1213 (1997); *Barklind*, 87 Wn.2d at 818; *Fuller*, 417 U.S. at 44-47; RCW 10.01.160(4). Recent amendments to our statute go even further, altogether prohibiting the imposition of the costs of prosecution (i.e. fees for appointed counsel and associated defense costs prior to conviction) upon indigent defendants. RCW 10.01.160(3); Laws of 2018, c. 269, sec. 6.

The only relevant question under the statute and constitution is: Is the legal financial obligation (LFO) a “cost” within the context of RCW 10.01.160? The costs of prosecution include attorney fees, investigator fees, and fees to obtain witnesses and jurors.

Costs do not include post-conviction punishment or penalties, e.g. the discretionary fine under RCW 9A.20.021 and the mandatory crime victim penalty assessment. *See e.g. State v. Clark*, 191 Wn. App. 360, 376, 362 P.3d 309, 312 (2015) (fines are not costs). They do not include reparative or restorative consequences like restitution.

Supervision serves both a punitive and rehabilitative purpose. It is not associated with any cost incurred in prosecuting the defendant.

A community custody supervision assessment clearly does not meet the definition of a cost under RCW 10.01.160(2) because it is not an expense specially incurred by the State to prosecute the defendant, to administer a deferred prosecution program, or to administer pretrial supervision. Because the community custody supervision assessment is not a cost, the trial court was not required to conduct an

inquiry into Abarca's ability to pay under RCW 10.01.160(2). See *State v. Clark*, 191 Wn. App. 369, 374-75, 362 P.3d 309 (2015) (distinguishing fines from costs).

State v. Abarca, No. 51673-0-II, 11 Wn. App. 2d 1012, 2019 WL 5709517 at *10-11 (2019), *review denied*, 195 Wn.2d 1006, 458 P.3d 776 (2020) (unpublished)⁵; see *State v. Estavillo*, No. 51629-2-II, 10 Wn. App. 2d 1044, 2019 WL 5188618 at *5-6 (2019) (unpublished) (declining to accept state's concession because "the supervision assessment is not a discretionary 'cost' merely because it is a discretionary LFO").

The trial court was not prohibited from imposing or authorizing the supervision fees which are not costs and not barred by the Defendant's indigent status.

4. The court does not abuse its discretion or act inadvertently merely because the oral record does not address every written provision in the judgment.

The Defendant argues that the court clearly intended to waive supervision fees. BOA at 35. This is inaccurate; the court intended to assess indigency and to follow the law. 2RP 13. The court's judgment does not impose supervision fees. It left this decision to the appropriate agency, the Department of Corrections, imposing only a condition that the Defendant abide by the DOC's decision.

⁵ 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. GR 14.1(a).

If the court had imposed supervision fees, its decision would be reviewable for an abuse of discretion. *State v. Clark*, 191 Wn. App. 369, 372, 362 P.3d 309 (2015). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State v. Walters*, 162 Wn. App. 74, 82, 255 P.3d 835, 839 (2011) (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

The judgment's recitation of the relevant law does not constitute an abuse of discretion.

Recent decisions from the court of appeals have remanded on the theory that the absence of an oral record addressing small provisions in the judgment indicates the entry of those provisions was inadvertent or unintended. *State v. Dillon*, 12 Wn. App. 2d 133, 152, 456 P.3d 1199 (2020) (where the trial court waived DNA and filing fees “it appears that the trial court intended to waive all discretionary LFOs, but inadvertently imposed supervision fees because of its location in the judgment and sentence”); *State v. Tucker*, No. 53014-7-II, 2020 WL 2857612 (Wash. Ct. App. June 2, 2020) (unpublished) (cited under GR 14.1(a) as nonbinding authority) (where the trial court had waived the DNA fee, its failure to strike “boilerplate language in the judgment and sentence imposing discretionary collection costs” was “perhaps inadvertent”). The drawing of such a

conclusion is contrary to the law and demonstrates a misunderstanding of the different rationales behind the different LFOs.

There are 12 pages of provisions in the felony judgment. It should come as no surprise that the Honorable Judge Costello did not make an oral record as to every provision in those pages. For example, he did not discuss the clerk's role in setting a payment schedule or the clerk's income withholding authority. CP 81-82, 86. He did not discuss the possibility of LFOs being sent to collections. CP 82. He did not review aloud the six standard community custody provisions (of which supervision fees is one) or the detail of every provision in Appendix F. CP 84, 90. And he did not inform the Defendant of loss of his firearm rights. CP 85. The lack of an oral record does not affect the validity or intentionality of each provision.

“The written decision of a trial court is considered the court's ‘ultimate understanding’ of the issue presented.” *State v. Dailey*, 93 Wn.2d 454, 459, 610 P.2d 357 (1980). It is not presumed to be inadvertent merely because every provision therein was not repeated aloud. In fact, where there are differences between the oral and written ruling, the writing will control. *State v. Sims*, 193 Wn.2d 86, 99-100, 441 P.3d 262, 269 (2019); *Dailey*, 93 Wn.2d at 458-59. An appellate court may only consider a trial court's oral decision insofar as it is consistent with the trial court's written order. *State v. Kull*, 155 Wn.2d 80, 88, 118 P.3d 307, 311 (2005) (citing *State v. Bryant*,

78 Wn. App. 805, 812-12, 901 P.2d 1046 (1995)). “[A] trial court’s oral statements are ‘no more than a verbal expression of (its) informal opinion at that time ... necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned.’” *Dailey*, 92 Wn.2d at 458 (quoting *Ferree v. Doric Co.*, 62 Wn.2d 561, 567, 383 P.2d 900, 904 (1963)). See also *In re Det. of Smith*, 117 Wn. App. 611, 615, 72 P.3d 189 (2003) (“[t]his court need not consider the trial court’s oral ruling because it is not necessary to understanding its written one.”).

In a recent unpublished case, the court held that it was not a reasonable exercise of discretion to impose supervision fees when the court was not mandated to do so. *State v. Richard*, No. 81046-4-I, 2020 WL 2026106 (Wash. Ct. App. April 27, 2020) (Unpublished) (cited under GR 14.1 as a nonbinding authority). The decision is not persuasive. The court of appeals lacked the background to reach such a conclusion. In declining to decide whether supervision fees were “costs” within the meaning of the statute, it side-stepped consideration of the rationale behind the indigency rule. The indigency rule protects the right to counsel. The supervision fee does not touch on the right to counsel. The supervision fee encourages buy-in into an offender’s rehabilitation program. Therefore, the fact of a defendant’s indigency cannot mandate a waiver of these fees.

The Legislature intends that the supervision fee be mandatory unless the Department assesses, at a more meaningful time, that exemption or deferral is the better course toward the offender's rehabilitation. *See e.g.* RCW 9.94A.780(1)(b) (permitting an exemption where repayment interferes with the offender's education). The Forms Committee has acknowledged this intent, incorporating the supervision fee into the standard court judgment form:

While on community custody, the defendant shall: ...
(7) pay supervision fees as determined by DOC...

WPF CR 84.0400 P at page 5, ¶4.2(B). The form does not provide a checkbox, thereby indicating that these provisions are mandatory.

The unpublished *Richard* case is wrongly decided. It is tenable for a trial court to leave intact language drafted by the Forms Committee to reflect the legislative intent. It is tenable for a trial court to recognize that these assessments are treated differently than those which reflect the exercise of the right to counsel. And the *Richard* opinion is inconsistent with the standard of review, because it substitutes the higher court's judgment for that of the lower court on a discretionary matter.

The oral record in our own case is not inconsistent with the judgment. It simply provides no insight. The court struck the Criminal Filing Fee and DNA Database Fee by drawing a line through each and writing in the total. CP 81. The filing fee is a cost of prosecution which may not be imposed on indigent defendants. RCW 36.18.020(h). The DNA fee is used in maintaining the state database. The court may waive the fee, if the defendant has already paid it on a previous occasion. RCW 43.43.7541. The court's decisions on these two LFOs, memorialized by the judge's writing, do not speak to the court's intent on supervision fees which have a different purpose and are imposed by a different agency at a later date.

The lower court's decisions are tenable and may not be disturbed. This Court may not assume that the superior court judge did not intend what he signed.

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V. CONCLUSION

For the above-stated reasons, the State asks the Court to affirm the Defendant's convictions and sentence.

RESPECTFULLY SUBMITTED this 31st day of August, 2020.

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The undersigned certifies that on this day she delivered by E-file 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.

8-31-20 *s/Therese Kahn*
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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