

FILED  
NOVEMBER 3, 2014  
Court of Appeals  
Division III  
State of Washington

No. 32356-1-III  
IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

ADRIAN MUNOZ-RIVERA,

Defendant/Appellant.

APPEAL FROM THE FRANKLIN COUNTY SUPERIOR COURT  
Honorable Vic L. VanderSchoor, Judge,

---

BRIEF OF APPELLANT

---

SUSAN MARIE GASCH  
WSBA No. 16485  
P.O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149  
Attorney for Appellant

**TABLE OF CONTENTS**

A. ASSIGNMENTS OF ERROR.....1

B. STATEMENT OF THE CASE.....4

C. ARGUMENT.....10

    1. Munoz-Rivera’s right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the elements of the crimes of second degree assault and harassment as instructed in the “to convict” jury instructions.....10

    2. The sentencing court lacked statutory authority to designate K.T. as a protected party of a Domestic Violence No-Contact Order where the relationship between Defendant and K.T. does not qualify as a “family or household member.”.....14

    3. Munoz-Rivera’s second degree assault and felony harassment against K.T. are the same criminal conduct. Munoz-Rivera received ineffective assistance of counsel when his attorney failed to challenge Munoz-Rivera’s offender score.....16

    4. The sentencing court violated due process and exceeded its statutory authority by imposing certain conditions of community custody that are not crime-related.....19

5. The unsupported finding of ability to pay Legal Financial Obligations and the discretionary costs imposed without compliance with RCW 10.01.160 should be stricken from the Judgment and Sentence.....	24
6. The Judgment and Sentence contains a scrivener’s error that should be corrected.....	30
D. CONCLUSION.....	31

**TABLE OF AUTHORITIES**

<u>Cases</u>	<u>Page</u>
<i>Fuller v. Oregon</i> , 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974).....	26
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	10
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	16, 19
<i>Hook v. Lincoln County Noxious Weed Control Bd.</i> , 166 Wn. App. 145, 160, 269 P.3d 1056 (2012).....	30
<i>Nordstrom Credit, Inc. v. Dep't of Revenue</i> , 120 Wn.2d 935, 845 P.2d 1331 (1993).....	27

<i>State v. Adams</i> , 91 Wn.2d 86, 586 P.2d 1168 (1978).....	17
<i>State v. Armendariz</i> , 160 Wn.2d 106, 156 P.3d 201 (2007).....	20
<i>State v. Ancira</i> , 107 Wn. App. 650, 27 P.3d 1246 (2001).....	20
<i>State v. Baeza</i> , 100 Wn.2d 487, 670 P.2d 646 (1983).....	10
<i>State v. Bahl</i> , 164 Wn.2d 739, 193 P.3d 678 (2008).....	20
<i>State v. Baldwin</i> , 63 Wn. App. 303, 818 P.2d 1116, 837 P.2d 646 (1991).....	27, 28, 29, 30
<i>State v. Bertrand</i> , 165 Wn. App. 393, 267 P.3d 511 (2011).....	24, 27, 28
<i>State v. Blazina</i> , 174 Wn. App. 906, 301 P.3d 492, <i>review granted</i> , 178 Wn.2d 1010, 311 P.3d 27 (2013).....	24, 25
<i>State v. Bower</i> , 64 Wn. App. 808, 827 P.2d 308 (1992).....	24
<i>State v. Brockob</i> , 159 Wn.2d 311, 150 P.3d 59 (2006).....	16, 27
<i>State v. Calvin</i> , 316 P.3d 496 (Wash. Ct. App. 2013).....	25, 28
<i>State v. Curry</i> , 118 Wn.2d 911, 829 P.2d 166 (1992).....	26, 27
<i>State v. Dunaway</i> , 109 Wn.2d 207, 743 P.2d 1237 (1987).....	17
<i>State v. Duncan</i> , 180 Wn. App. 245, 327 P.3d 699, <i>petition for review</i> <i>filed</i> , No. 90188-1 (April 30, 2014).....	25
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	24
<i>State v. French</i> , 157 Wn.2d 593, 141 P.3d 54 (2006).....	17
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	11
<i>State v. Healy</i> , 157 Wn. App. 502, 237 P.3d 360 (2010).....	31

<i>State v. Hickman</i> , 135 Wn.2d 97, 954 P.2d 900 (1988).....	10, 11, 12, 13
<i>State v. Jones</i> , 118 Wn. App. 199, 76 P.3d 258 (2003).....	20, 23
<i>State v. Kuster</i> , 175 Wn. App. 420, 306 P.3d 1022 (2013).....	25
<i>State v. Lee</i> , 128 Wn.2d 151, 904 P.2d 1143 (1995).....	10
<i>State v. Lewis</i> , 115 Wn.2d 294, 797 P.2d 1141 (1990).....	17
<i>State v. Llamas–Villa</i> , 67 Wn. App. 448, 836 P.2d 239 (1992).....	22
<i>State v. McFarland</i> , 127 Wn.2d 322, 988 P.2d 1251 (1995).....	16
<i>State v. Motter</i> , 139 Wn. App. 797, 162 P.3d 1190 (2007), <i>disapproved on other grounds</i> , <i>State v. Valencia</i> , 169 Wn.2d 782, 239 P.3d 1059 (2010).....	23
<i>State v. Nallieux</i> , 158 Wn. App. 630, 241 P.2d 1280 (2010).....	30
<i>State v. O’Cain</i> , 144 Wn. App. 772, 184 P.3d 1262 (2008).....	21
<i>State v. Paige-Colter</i> , noted at 175 Wn. App. 1010, 2013 WL 2444604, <i>review granted</i> , 178 Wn.2d 1018, 312 P.3d 650 (2013).....	25
<i>State v. Pettitt</i> , 93 Wn.2d 288, 609 P.2d 1364 (1980).....	29–30
<i>State v. Quintanilla</i> , 313 P.3d 493 (Wash. Ct. App. 2013).....	25
<i>State v. Riles</i> , 135 Wn.2d 326, 957 P.2d 655 (1998), <i>abrogated on other grounds by State v. Valencia</i> , 169 Wn.2d 782, 239 P.3d 1059(2010).	16, 22
<i>State v. Smith</i> , 131 Wn.2d 258, 930 P.2d 917 (1997).....	10
<i>State v. Thach</i> , 126 Wn. App. 297, 106 P.3d 782 (2005).....	16
<i>State v. Wilson</i> , 136 Wn. App. 596, 150 P.3d 144 (2007).....	18

**Constitutional Provisions and Statutes**

U.S. Const. amend. 14.....	10
Const. art. 1, § 3.....	10
Laws of 1979 ex.s. c 105 § 1.....	14
RCW 9.94A.030(10).....	19
RCW 9.94A.505(8).....	19, 20
RCW 9.94A.525(5)(a)(1).....	19
RCW 9.94A.589(1).....	17
RCW 9.94A.589(1)(a).....	17
RCW 9.94A.703(2)(c).....	20
RCW 9.94A.703(3).....	20
RCW 9.94A.703(3)(b).....	21
RCW 9.94A.703(3)(c).....	22, 24
RCW 9.94A.703(3)(d).....	22, 24
RCW 9.94A.703(3)(f).....	19
RCW 9.94A.760(1).....	26
RCW 9.94A.760(2).....	26
RCW 9A.20.021.....	9
RCW 9A.36.021(1).....	11
RCW 9A.46.020.....	11

RCW 10.01.160.....	24, 27, 28, 29
RCW 10.01.160(1).....	26
RCW 10.01.160(2).....	26
RCW 10.01.160(3).....	26, 29, 30
Chapter 10.99 RCW.....	14
RCW 10.99 <i>et seq.</i> .....	15
RCW 10.99.010.....	14
RCW 10.99.020(3).....	15
RCW 10.99.020(5).....	14, 15
RCW 10.99.020(8).....	14
RCW 10.99.040(2)(a).....	14
RCW 10.99.045.....	14
RCW 10.99.050.....	14

**Court Rules**

RAP 2.5(a).....	25
-----------------	----

**Other Resources**

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 35.19 (3d Ed).....	6, 11
11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 36.07.02 (3d Ed).....	11

**A. ASSIGNMENTS OF ERROR**

1. There was insufficient evidence to support the convictions of second degree assault and harassment.

2. The court erred in finding for purposes of the Domestic Violence No-Contact Order the Defendant's relationship to K.T. is "[X] current or former cohabitant as intimate partner [X] other family or household member as defined in RCW 10.99." CP 4.

3. The court erred in designating "K.T. (DOB: 11/27/03)" as a protected party of the Domestic Violence No-Contact Order issued pursuant to RCW 10.99 *et seq.* CP 4.

4. Defendant's offender score was miscalculated. The second degree assault and felony harassment crimes against K.T. were same criminal conduct.

5. Defense counsel failed as effective counsel when he did not argue the second degree assault and felony harassment convictions involving K.T. were same criminal conduct.

6. The trial court erred in imposing certain conditions of community custody as part of the sentence.

7. The record does not support the finding Defendant has the ability or likely future ability to pay Legal Financial Obligations.

8. The trial court erred by imposing discretionary costs

9. The Judgment and Sentence contains a scrivener's error that should be corrected.

*Issues Pertaining to Assignments of Error*

1. Was Defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove the elements of the crimes of second degree assault and harassment as instructed?

2. Does a sentencing court lack statutory authority to designate a person as a protected party of a Domestic Violence No-Contact Order where the relationship between the person and Defendant does not qualify as a "family or household member?"

3. Defendant's objective intent did not shift when he simultaneously threatened K.T. with a knife—a second degree assault—while insinuating she was about to die—a felony harassment. Even though these two crimes involved the same victim at the same time and place and defendant had the same objective intent, defense counsel failed to argue at sentencing the two crimes were the same criminal conduct. Did defense counsel fail as effective counsel?

4. Does a sentencing court violate due process and exceed its statutory authority by imposing certain conditions of community custody that are not crime-related?

5. Should the finding of ability to pay Legal Financial Obligations be stricken from the Judgment and Sentence as clearly erroneous where the finding is not supported in the record?

6. Does a trial court abuse its discretion in imposing discretionary costs where it does not take Defendant's financial resources into account nor consider the burden it would impose on him as required by RCW 10.01.160?

7. Does the Judgment and Sentence contain a scrivener's error that should be corrected where the court did not impose an exceptional sentence but paragraph 2.4 is marked "[X] EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence: ... [X] above the standard range for Count I"? CP 11.

## **B. STATEMENT OF THE CASE**

In early November 2013 Adrian Munoz-Rivera had been living with Maria Tomayo and her 9-year-old daughter K.T. for approximately 19 months. RP<sup>1</sup> 12–14; CP 118–19<sup>2</sup>. Late one night the three returned home from a friend’s birthday party. Munoz-Rivera and Ms. Tomayo had been drinking. RP 14–15, 39, 204–05, 209–10. While preparing to go to bed, Munoz-Rivera and Ms. Tomayo argued over various things. RP 15–17, 115–16, 219–34.

Ms. Tomayo testified Munoz-Rivera blocked the door preventing her from leaving the bedroom, pushed her onto the bed several times, hit her and tried to choke her, and tried to take her phone away because she wanted to call 911. RP 17–18, 30–31. Munoz-Rivera told police and also testified he was trying to calm her down from screaming, yelling and making a disturbance. He stopped Ms. Tomayo from calling police because he didn’t want to get in trouble. RP 117–18. Ms. Tomayo began banging on the walls and screaming for her daughter to get help. RP 18–19. At some point Ms. Tomayo with her daughter close behind was able to run out of the apartment and down the stairs to a neighbor’s door. RP 19–20,

---

<sup>1</sup> The trial transcript is contained in two volumes and will be cited to as “RP \_\_\_\_”. Other hearings including sentencing will be cited to by date and page, e.g. “3/25/14 RP \_\_\_\_”.

<sup>2</sup> Counts I and III of the Third Amended Information show K.T.’s date of birth as November 27, 2003.

32–34, 43. Munoz-Rivera followed and pulled K.T. back up the stairs by her hair. RP 20, 44, 49–50.

Ms. Tomayo ran back to the apartment. Munoz-Rivera held or pointed a kitchen knife with an eight inch blade at K.T. and asked Ms. Tomayo if she wanted to see her daughter die. RP 20–21, 34–35, 45, 141. K.T. thought Munoz-Rivera was going to kill her. RP 45. Munoz-Rivera denied threatening K.T. RP 235–36, 241. Ms. Tomayo said she asked him to think about what he was doing and Munoz-Rivera stepped away from K.T. Ms. Tamayo made no attempt to step in between Munoz-Rivera and her daughter. He asked again if she wanted to see her daughter die and then put the knife away. RP 22, 34–35. K.T. went to her room. RP 22.

During the commotion a downstairs neighbor girl called police. RP 122–23, 125–28. Police arrived almost right away. RP 22, 78. They found K.T. hiding in her closet. RP 47, 65, 71. Munoz-Rivera was arrested. RP 238–39. While in jail he sent letters seeking Ms. Tomayo’s help in obtaining an attorney and defusing the allegations against him. RP 24–25, 104–06, 154–55, 160–66.

At jury trial, the second degree assault “to convict” instruction provided:

INSTRUCTION NO. 11. To convict the defendant of the crime of Assault in the Second Degree, as charged in Count I, each of the

following two<sup>3</sup> elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about November 3, 2013, the defendant assaulted K.T. (**DOB: 11/27/03**) with a deadly weapon;

(2) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proven beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to either element (1) or (2)<sup>4</sup>, then it will be your duty to return a verdict of not guilty.

CP 42 (emphasis added). The State proposed this instruction. CP 93.

The felony harassment “to convict” instruction provided:

INSTRUCTION NO. 17. To convict the defendant of the crime of Harassment, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about November 3, 2013, the defendant knowingly threatened to kill K.T. (**DOB: 11/27/03**) immediately or in the future;

(2) That the words or conduct of the defendant placed K.T. (**DOB: 11/27/03**) in reasonable fear that the threat to kill would be carried out;

(3) That the defendant acted without lawful authority; and

---

<sup>3</sup> The pattern instruction for second degree assault based on use of a deadly weapon does not include the word “two”. 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 35.19 (3d Ed).

<sup>4</sup> The pattern instruction for second degree assault based on use of a deadly weapon uses the phrase “any of these elements” and does not include the phrase “as to either element (1) or (2)”. *Id.*

(4) That the threat was made or received in the State of Washington.

If you find from the evidence that each of these elements has been proven beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 48 (emphasis added). The State proposed this instruction. CP 99.

The jury convicted Munoz-Rivera of second degree assault of K.T. while using a deadly weapon, felony harassment involving a threat to kill K.T., and tampering with a witness (Ms. Tomayo). CP 22, 23, 25–26, 118–19; RP 12–13. For purposes of the domestic violence allegation on the latter crime, the jury found by special verdict Munoz-Rivera and Ms. Tamayo were members of the same family or household. CP 21. The jury acquitted Munoz-Rivera of second degree assault against Ms. Tomayo. CP 24, 118–19.

The sentencing court disregarded the prosecutor's request for an exceptional sentence and imposed standard range concurrent sentences based on an offender score of two. The actual number of months of total confinement of 25 months includes 12 months for the deadly weapon enhancement on the second degree assault. CP 10, 15; 3/25/14 RP 7–10.

As part of the sentence the court ordered Munez-Rivera to have no contact with K.T. and Ms. Tamayo for 10 years. CP 13 at paragraph 4.3. The court imposed a similar no contact order as a sentencing condition. CP 16. Separately the court issued a Domestic Violence No-Contact Order naming “K.T. (DOB: 11/27/03)” and Ms. Tamayo as the protected victims. CP 4–5. The court made a finding that Munoz-Rivera’s “relationship to a person protected by this order is ... [X] current or former cohabitant as intimate partner [X] other family or household member as defined in RCW 10.99.” CP 4.

The court imposed discretionary costs of \$1,581.25<sup>5</sup> and mandatory costs of \$1,502.42<sup>6</sup> for a total Legal Financial Obligation (“LFO”) of \$3,083.67. CP 12. The court made a boilerplate finding Munoz-Rivera had the ability to pay the LFOs:

**2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.** The court has considered the total amount owing, the defendant’s past, present and future ability to pay legal financial obligations, including the defendant’s financial resources and the likelihood that the defendant’s status will change.

The court finds:

---

<sup>5</sup> Consisting of \$381.25 sheriff service fee, \$700 court-appointed attorney fee and \$500 fine pursuant to RCW 9A.20.021. CP 12.

<sup>6</sup> Consisting of \$452.42 restitution, \$250 jury demand fee, \$500 victim assessment, \$200 criminal filing fee and \$100 felony DNA collection fee. CP 12.

[X] That the defendant is an adult and is not disabled and therefore has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 29. The trial court did not inquire into Munoz-Rivera's financial resources or whether he is disabled or the nature of the burden payment of LFOs would impose. 3/25/14 RP 7–10.

The court imposed 18 months of community custody<sup>7</sup> and included the following conditions:

- [T]he defendant shall: ... (4) not consume controlled substances except pursuant to lawfully issued prescriptions;<sup>8</sup>
- (5) not unlawfully possess controlled substances while in community custody; ...<sup>9</sup>
- [X] Defendant shall undergo an evaluation for treatment for [X] domestic violence [X] substance abuse ... [X] anger management and fully comply with all recommended treatment ...<sup>10</sup>
- [S]hall not unlawfully possess or deliver or use or introduce into his/her body without a valid prescription for its use, any controlled substances or legend drug, and shall not possess or use drug paraphernalia or commit the offense of loitering for the purpose of engaging in drug related activity ...<sup>11</sup>
- [S]hall not associate with any known user or dealer of unlawful controlled substances nor frequent any places where the same are commonly known to be used, possessed or delivered ...<sup>12</sup>

---

<sup>7</sup> Paragraph 4.6(a) at CP 15.

<sup>8</sup> Paragraph 4.6 at CP 16.

<sup>9</sup> Paragraph 4.6 at CP 16.

<sup>10</sup> Paragraph 4.6 at CP 17.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

This appeal followed. CP 3.

**C. ARGUMENT**

**1. Munoz-Rivera’s right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the elements of the crimes of second degree assault and harassment as instructed in the “to convict” jury instructions.**

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970); *State v. Hickman*, 135 Wn.2d 97, 101–04, 954 P.2d 900 (1988); *State v. Lee*, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995).

To-convict jury instructions must contain all the elements of the crime or else the State is relieved of its burden to prove every essential element beyond a reasonable doubt. *State v. Smith*, 131 Wn.2d 258, 265, 930 P.2d 917 (1997). If the parties do not object to jury instructions, they become the law of the case. *State v. Hickman*, 135 Wn.2d at 102. If, in a

criminal case, the State adds an unnecessary element in the to-convict instruction without objection, the added element also becomes the law of the case and the State assumes the burden of proving it. *Id.* A criminal defendant may challenge the sufficiency of the evidence to support such added elements. *Id.* In a criminal case, evidence is sufficient to support a guilty verdict if, viewed in the light most favorable to the State, any rational trier of fact could find each element of the crime proved beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Proof of age is not a required element of proof for the crimes of second degree assault and felony harassment. RCW 9A.36.021(1); RCW 9A.46.020; WPIC 35.19; WPIC 36.07.02. However as instructed in this case the State was required to prove, among other things, that a person named K.T. *and* whose date of birth was November 27, 2003, was assaulted. CP 42. Similarly the State was required to prove a person named K.T. *and* whose date of birth was November 27, 2003, was both threatened to be killed and placed in reasonable fear the threat to kill would be carried out. CP 48. The State was not surprised or ambushed by the added element of proof of date of birth in these instructions since it

included the information in the charging document (CP 118–19) and proposed the language of the instructions. CP 93, 99.

The decision in *State v. Hickman* is instructive. In *Hickman*, the “to convict” jury instruction added venue as an additional element for the jury to consider by indicating that the crime occurred in Snohomish County. Venue was not an element of the crime for which Hickman was charged. Hickman argued that, by adding venue to the instruction, the State assumed the burden of proving that element beyond a reasonable doubt. The Washington Supreme Court agreed with this argument and held that added elements become the law of a case when they are included in jury instructions and that a defendant may challenge the sufficiency of the evidence of an added element.

There, the remaining inquiry was whether the State offered sufficient evidence that Hickman presented or caused to be presented a false insurance claim in Snohomish County. When Hickman allegedly called his insurance company to submit the fraudulent claim, he was in Hawaii while his insurance company was in King County. The relevant reference to Snohomish County was the Snohomish County Sheriff’s testimony that he had been called, following the theft of the vehicle, to an address “off Logan Road.” “Even assuming Logan Road is somewhere in Snohomish County

and only in Snohomish County, such evidence simply does not demonstrate Hickman knowingly presented or caused to be presented a fraudulent insurance claim in Snohomish County.” *Hickman*, 135 Wn.2d at 106. The court reversed and dismissed Hickman's conviction for insufficient evidence because the State failed to meet its burden of proving venue as an additional element of the crime for which Hickman was charged. *Id.*

The facts in the present case are much fewer than those found insufficient in *Hickman*. K.T. testified she was 10 years old at time of trial and had recently had a birthday. RP 37–38. While K.T.’s first and last name were used at trial, there was no reference to her by her initials. No witness testified and no argument was made that K.T. was the “K.T.” referred to in the jury instructions. Based on the factual circumstances and argument of counsel, arguably she was the person identified as “K.T.”. However the State presented no evidence as to her date of birth.

Because the State failed to prove the elements as stated in its proposed instructions—that K.T.’s date of birth was November 27, 2003—insufficient evidence supports the assault and harassment convictions. The convictions must be reversed and remanded with instructions to dismiss them and the attendant deadly weapon sentence enhancement with prejudice. *Hickman*, 135 Wn.2d at 103 (“Retrial following reversal for

insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.”).

**2. The sentencing court lacked statutory authority to designate K.T. as a protected party of a Domestic Violence No-Contact Order where the relationship between Defendant and K.T. does not qualify as a “family or household member.”**

Chapter 10.99 RCW applies to no-contact orders that protect victims of domestic violence. Enactment of this statute followed recognition that increasing situations of repeated domestic violence required legislative intervention. *See* RCW 10.99.010, Purpose—Intent (1979 ex.s. c 105 § 1). The statute authorizes issuance of a no-contact order where a person is charged, arrested or convicted of a crime involving domestic violence. RCW 10.99.040(2)(a); RCW 10.99.045; RCW 10.99.050.

RCW 10.99.020(8) defines a “[v]ictim” as “a family or household member who has been subjected to domestic violence.” “Domestic violence” is defined as certain crimes that are committed by “one family or household member” against another. RCW 10.99.020(5). “Family or household members” are defined as follows:

... [S]pouses, former spouses, persons who have a child in common regardless of whether they have been married or have lived together at any time, adult persons related by blood or marriage, adult persons who are presently residing together or who have resided together in the past, persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship, and persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.

RCW 10.99.020(3).

Munez-Rivera and K.T. do not fall within the class of individuals defined as “family or household members.” They are not spouses or former spouses and have had no dating relationship. K.T. is under sixteen years of age and they have no biological or legal<sup>13</sup> parent-child relationship. Thus the crimes against K.T. were not committed by one family or household member against another. RCW 10.99.020(5). Accordingly, the criteria for imposing a domestic violence no-contact order under RCW 10.99 *et seq.* have not been met. The trial court lacked authority to order Munez-Rivera to have no contact with K.T. premised on domestic violence. Munoz-Rivera’s case must be remanded for the superior court to delete the

---

<sup>13</sup> In letters, statements to police and testimony Munoz-Rivera referred to Ms. Tamayo as his “wife” a number of times. 3/6/14 115, 163–64, 187; 3/7/14 RP 219, 221, 223, 231, 240–42. If this were true arguably he would be a step-parent to K.T. The context of the testimony suggests Munoz-Rivera was not claiming existence of a legal marital relationship (see, e.g. RP at 240) and the State presented no evidence to support a finding and/or conclusion he and Ms. Tamayo were legally married.

designation of K.T. as a protected party under the domestic violence no contact order. *See State v. Riles*, 135 Wn.2d 326, 350, 957 P.2d 655 (1998), *abrogated on other grounds by State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059(2010).

**3. Munoz-Rivera’s second degree assault and felony harassment against K.T. are the same criminal conduct. Munoz-Rivera received ineffective assistance of counsel when his attorney failed to challenge Munoz-Rivera’s offender score.**

A claim that counsel ineffectively represented the defendant is reviewed de novo. *State v. Thach*, 126 Wn. App. 297, 319, 106 P.3d 782 (2005). To establish that counsel was ineffective, the defendant must show that (1) counsel’s performance fell below an objective standard of reasonableness and (2) the deficient representation prejudiced his defense, i.e., there was a reasonable probability that but for the deficient performance the trial result would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Brockob*, 159 Wn.2d 311, 344–45, 150 P.3d 59 (2006). A defendant must also overcome a strong presumption that counsel’s conduct was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 988 P.2d 1251 (1995). Legitimate trial strategy or tactics cannot serve as the basis for a

claim that the defendant received ineffective assistance of counsel. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978).

The trial court calculates an offender score for the purpose of sentencing by adding current offenses and prior convictions. RCW 9.94A.589(1). Prior and current convictions involving the “same criminal conduct” are calculated as one crime for sentencing purposes. RCW 9.94A.589(1)(a). Convictions will count as the “same criminal conduct” only when (1) they share the same criminal intent; (2) they are committed at the same time and place; and (3) they involve the same victim. *State v. French*, 157 Wn.2d 593, 613, 141 P.3d 54 (2006) (quoting RCW 9.94A.589(1)(a)). In determining whether two crimes share a criminal intent, a court should focus on the extent to which the defendant’s intent, viewed objectively, changed from one crime to the next. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). When numerous offenses are committed as part of a scheme or plan, a single intent exists if there is no substantial change in the nature of the criminal objective. *State v. Lewis*, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990).

Here, defense counsel’s failure to argue same criminal conduct could not have been tactical because the argument would not have exposed Munoz-Rivera to any adverse consequences. Even if the trial court rejected

the argument, Munoz-Rivera would have the same offender score he has now. Moreover, Munoz-Rivera would likely have prevailed on the argument. The first two elements are clearly met: the assault and harassment had the same victim, K.T., and happened at the same time and in the same place. The only disputable element is whether the two crimes shared the same criminal objective.

To prove the assault, the State had to show Munoz-Rivera acted with the intent to make K.T. apprehensive and fearful of bodily injury. For felony harassment, the State had to prove Munoz-Rivera knowingly threatened to kill K.T. Unlike in cases where the objective criminal intent necessarily changed between two criminal acts, these two intent elements are not mutually exclusive. *Cf. State v. Wilson*, 136 Wn. App. 596, 615, 150 P.3d 144 (2007) (finding distinct criminal conduct where the two crimes' respective statutes define different criminal intents). There was also no opportunity for Munoz-Rivera to form a new intent from one crime to the next because the acts occurred simultaneously. *Cf. Wilson*, 136 Wn. App. at 615 (the two acts were separated in time, providing an opportunity for the completion of the assault and the formation of a new intent to reenter the house and harass the victim). Defendant's objective intent did not shift when he simultaneously threatened K.T. with a knife—a second

degree assault—while insinuating she was about to die—a felony harassment. Thus, if counsel had argued the issue, the trial court should have counted the assault and harassment of K.T. as the “same criminal conduct.” Under RCW 9.94A.525(5)(a)(1), the felony harassment and assault would have been calculated as a single offense, reducing his total offender score and standard sentencing ranges.

Munoz-Rivera has demonstrated prejudice and therefore satisfied both prongs of the *Strickland* test. This court should vacate the sentence and remand for resentencing of these crimes as one in calculating the offender score.

**4. The sentencing court violated due process and exceeded its statutory authority by imposing certain conditions of community custody that are not crime-related.**

RCW 9.94A.505(8) permits a court to impose “crime-related” prohibitions as part of a sentence and RCW 9.94A.703(3)(f) permits a court to order compliance with those prohibitions as a condition of community custody. A “crime-related” prohibition is “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). Thus, discretionary, or non-mandatory, conditions imposed by the trial court

must be either crime-related prohibitions under RCW 9.94A.505(8) or authorized under RCW 9.94A.703(3).

A defendant may challenge an illegal or erroneous sentence for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003).

Whether the trial court had statutory authority to impose community custody conditions is reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). If the condition was statutorily authorized, crime-related prohibitions are reviewed for abuse of discretion.

*Armendariz*, 160 Wn.2d at 110 (citing *State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001)). But conditions that do not reasonably relate to the circumstances of the crime, the risk of reoffense, or public safety are unlawful, unless explicitly permitted by statute. *See Jones*, 118 Wn. App. at 207–08.

*Prohibition beyond possession and consumption of controlled substances.* RCW 9.94A.703(2)(c) provides that, unless waived by the court, the court shall order an offender to “[r]efrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions.” Munoz-Rivera agrees the court had statutory authority to impose the following two conditions even though not crime-related:

- [T]he defendant shall: ... (4) not consume controlled substances except pursuant to lawfully issued prescriptions;<sup>14</sup>
- (5) not unlawfully possess controlled substances while in community custody; ...<sup>15</sup>

However, he challenges the **bolded** portions of the following related condition:

- [S]hall not unlawfully possess or deliver or use or introduce into his/her body without a valid prescription for its use, any controlled substances or legend drug, **and shall not possess or use drug paraphernalia or commit the offense of loitering for the purpose of engaging in drug related activity ...**<sup>16</sup>

The prohibition regarding drug paraphernalia and drug-related loitering is not authorized by statute and it is not related to the circumstances of Munoz-Rivera’s crimes. There is no justification for the imposition of this non-crime-related prohibition as a condition of sentence and the offending condition must be stricken. *State v. O’Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

*Prohibition against contact with drug users or drug dens.* RCW 9.94A.703(3)(b) provides a court may in its discretion order an offender to “refrain from direct or indirect contact with the victim of the crime or a

---

<sup>14</sup> Paragraph 4.6 at CP 16.

<sup>15</sup> Paragraph 4.6 at CP 16.

<sup>16</sup> *Id.*

specified class of individuals.” Munoz-Rivera challenges the following condition:

- [S]hall not associate with any known user or dealer of unlawful controlled substances nor frequent any places where the same are commonly known to be used, possessed or delivered ...<sup>17</sup>

When ordering an offender to have no contact with a “specified class of individuals”, the specified class must bear some relationship to the crime. *State v. Riles*, 135 Wn.2d at 350; *cf. State v. Llamas–Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992)(“[s]ince associating with individuals who use, possess, or deal with controlled substances is conduct intrinsic to the crime for which Llamas was convicted, it is directly related to the circumstances of the crime.”). In this case there was no evidence drugs were involved in any manner. The trial court abused its discretion in imposing this prohibition as a condition of sentence and the condition should be stricken.

*Requirement of drug evaluation and recommended treatment.*

RCW 9.94A.703(3)(c) and (d) provide a court may in its discretion order an offender to “(c) Participate in crime-related treatment or counseling services; (d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense,

the offender's risk of reoffending, or the safety of the community.” Munoz-Rivera challenges the following condition to the extent it requires evaluation and recommended treatment for drug abuse:

- [X] Defendant shall undergo an evaluation for treatment for [X] domestic violence [X] substance abuse ... [X] anger management and fully comply with all recommended treatment ...<sup>18</sup>

In this case there was no evidence drugs were involved in any manner. Under the Sentencing Reform Act, a substance abuse condition can be imposed only when controlled substances, as opposed to alcohol alone, contribute to the defendant’s crime. *Jones* recognized a difference between controlled substances and alcohol in holding that alcohol counseling was not statutorily authorized when methamphetamines but not alcohol contributed to the offense. *Jones*, 118 Wn. App. at 202; *see also State v. Motter*, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007) (distinguishing between “substance abuse” and “alcohol” treatment as a condition of community custody), *disapproved on other grounds, State v. Valencia*, 169 Wn.2d 782, 790–91, 239 P.3d 1059 (2010). Conditions that do not reasonably relate to the circumstances of the crime, the risk of re-offense, or public safety are unlawful, unless explicitly permitted by statute. *See Jones*, 118 Wn. App. at 207–08. This condition is not authorized by

---

<sup>17</sup> *Id.*

RCW 9.94A.703(c) and (d) because it is not crime-related or reasonably related to Munoz-Rivera's risk of re-offense or public safety. The offending condition must be stricken.

**5. The unsupported finding of ability to pay Legal Financial Obligations and the discretionary costs imposed without compliance with RCW 10.01.160 should be stricken from the Judgment and Sentence.**

Although Munoz-Rivera did not make these arguments below, illegal or erroneous sentences may be challenged for the first time on appeal. *See State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999); *see also State v. Bertrand*, 165 Wn. App. 393, 398, 403-05, 267 P.3d 511 (2011) (considering the defendant's challenge to the trial court's imposition of LFOs for the first time on appeal); *State v. Bower*, 64 Wn. App. 808, 810, 827 P.2d 308 (1992) (also considering the challenge for the first time on appeal); *cf. State v. Blazina*, 174 Wn. App. 906, 911-12, 301 P.3d 492, *review granted*, 178 Wn.2d 1010, 311 P.3d 27 (2013) (declining to

---

<sup>18</sup> Paragraph 4.6 at CP 17.

consider the challenge for the first time on appeal)<sup>19</sup>; *State v. Calvin*, 316 P.3d 496, 508 (Wash. Ct. App. 2013) (declining to consider the challenge for the first time on appeal); *State v. Quintanilla*, 313 P.3d 493, 497 (Wash. Ct. App. 2013) (acknowledging *State v. Blazina*, but also discussing the merits of the LFO issue raised by the defendant); *State v. Duncan*, 180 Wn. App. 245, 327 P.3d 699, *petition for review filed*, No. 90188-1 (April 30, 2014)<sup>20</sup> (although previously reviewing the issue when raised for the first time on appeal in a number of cases<sup>21</sup>, declining to do so now).

a. The finding of ability to pay must be stricken. There is insufficient evidence to support the trial court's finding that Munoz-Rivera has the present and future ability to pay legal financial obligations, and the finding must be stricken from the Judgment and Sentence.

---

<sup>19</sup> Oral argument was held February 11, 2014, in *Blazina* and its companion case, *State v. Paige-Colter*, noted at 175 Wn. App. 1010, 2013 WL 2444604, *review granted*, 178 Wn.2d 1018, 312 P.3d 650 (2013).

<sup>20</sup> By order dated July 7, 2014, consideration of Mr. Duncan's Petition for Review has been deferred pending a final decision in Supreme Court No. 89028-5 - *State of Washington v. Nicholas Peter Blazina*.

<sup>21</sup> "In other cases, we have often taken our cue from the State's response to this issue-and the State's response has varied among the county prosecutors in our division. Taking our cue from the State, we have sometimes ordered that a finding of ability to pay be stricken if not supported by the record. Other times, we have remanded for a hearing on ability to pay. We have sometimes accepted the argument that an order to pay LFOs (unlike a finding of ability to pay) is not ripe for review before an attempt is made to enforce it. Sometimes, as in [*State v. Kuster*], 175 Wn. App. 420, 306 P.3d 1022 (2013)], we have refused to consider the challenge, citing RAP 2.5(a)." *Duncan*, 180 Wn. App.at 252-53.

Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. *Fuller v. Oregon*, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 9.94A.760(2); RCW 10.01.160(3). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his or her poverty.

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court “may order the payment of a legal financial obligation.” RCW 10.01.160(1) authorizes a superior court to “require a defendant to pay costs.” These costs “shall be limited to expenses specially incurred by the state in prosecuting the defendant . . . .” RCW 10.01.160(2). In addition, “[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). “In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” RCW 10.01.160(3).

In *Curry*, our Supreme Court concluded that while the ability to pay was a necessary threshold to the imposition of costs, a court need not make a specific finding of ability to pay: “[n]either the statute nor the

constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs." *Curry*, 118 Wn.2d at 916. However, the *Curry* court recognized that both RCW 10.01.160 and the federal constitution require consideration of the ability to pay. *Id.* at 915-16.

Here, there is insufficient evidence to support the trial court's finding that Munoz-Rivera has the present and future ability to pay legal financial obligations. A trial court's findings of fact must be supported by substantial evidence. *State v. Brockob*, 159 Wn.2d at 343 (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination " 'as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard.' " *Bertrand*, 165 Wn. App. at 404 n.13 (quoting *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)).

"Although *Baldwin* does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether 'the trial court judge took into account the financial resources of the defendant and the nature of the burden' imposed by LFOs under the clearly erroneous standard."

*Bertrand*, 165 Wn. App. at 404 (quoting *Baldwin*, 63 Wn. App. at 312) (internal citation omitted). A finding that is unsupported in the record must be stricken. *Bertrand*, 165 Wn. App. at 405; *see also Calvin*, 302 P.3d at 522.

The record does not show the trial court took into account Munoz-Rivera's financial resources and the nature of the burden of imposing LFOs on him. The record contains no evidence to support the trial court's finding Munoz-Rivera has the present or future ability to pay LFOs. To the contrary, the trial court found him indigent for purposes of pursuing this appeal (on file; SCOMIS sub #84, filed 3/25/14). The finding is clearly erroneous and must be stricken from the Judgment and Sentence. *See Bertrand*, 165 Wn. App. at 404-05 (ordering the trial court to strike an unsupported finding of ability to pay).

b. The imposition of discretionary costs of \$1,581.25 must also be stricken. Because the record does not reveal the trial court took Munoz-Rivera's financial resources into account and considered the burden it would impose on him as required by RCW 10.01.160, the imposition of discretionary costs must be stricken from the Judgment and Sentence.

A court's determination as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly

erroneous standard. *Baldwin*, 63 Wn. App. at 312. The decision to impose discretionary costs requires the trial court to balance the defendant's ability to pay against the burden of his obligation. *Id.* This is a judgment which requires discretion and should be reviewed for an abuse of discretion. *Id.*

The trial court may order a defendant to pay discretionary costs pursuant to RCW 10.01.160. However:

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3).

Here, the court ordered Munoz-Rivera to pay discretionary costs of \$1,581.25. The record reveals no balancing by the court through inquiry into his financial resources including present or future employment or employability and the nature of the burden payment of LFOs would impose on him. And contrary to what was stated in the boilerplate finding of ability to pay, the trial court did not inquire into whether Munoz-Rivera was disabled. The record does not support the court's boilerplate finding it considered these statutory requirements before imposing the discretionary costs. Making a boilerplate finding without inquiry is a failure to exercise discretion, which is also an abuse of discretion. *See State v. Pettitt*, 93

Wn.2d 288, 296, 609 P.2d 1364 (1980); *Hook v. Lincoln County Noxious Weed Control Bd.*, 166 Wn. App. 145, 160, 269 P.3d 1056 (2012).

The trial court's imposition of discretionary costs without compliance with the balancing requirements of RCW 10.01.160(3) is an abuse of discretion. *See Baldwin*, 63 Wn. App. at 312 (stating this standard of review). The imposition of discretionary costs of \$1,581.25 should be stricken from the Judgment and Sentence.

**6. The Judgment and Sentence contains a scrivener's error that should be corrected.**

Paragraph 2.4 of the Judgment and Sentence is marked "[X] EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence: ... [X] above the standard range for Count I. CP 11. The State recommended the imposition of an exceptional sentence. CP 11; 3/25/14 RP 7–8. However the court did not follow the recommendation and did not make any finding that substantial and compelling reasons existed which justified an exceptional sentence above the standard range. Instead the court imposed a standard range sentence. CP 10, 15; 3/25/14 RP 9–10. This court should remand the case to correct the Judgment and Sentence by removing checkmarks from the boxes in paragraph 2.4. *See, e.g., State v. Nallieux*, 158 Wn. App. 630, 647, 241

P.2d 1280 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, erroneously stating the defendant stipulated to an exceptional sentence); *State v. Healy*, 157 Wn. App. 502, 516, 237 P.3d 360 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, incorrectly stating the terms of confinement imposed).

**D. CONCLUSION**

For the reasons stated, the matter should be remanded to reverse and dismiss the convictions of second degree assault and felony harassment. Alternatively the matter should be remanded to remove the designation of "K.T. (DOB: 11/27/03)" as a protected party on the Domestic Violence No-Contact Order and for resentencing to use a correct offender score, remove offending conditions of sentence, strike the unsupported finding of ability to pay and imposition of discretionary costs, and remove the incorrect finding regarding an exceptional sentence.

Respectfully submitted on November 3, 2014.

---

s/Susan Marie Gasch, WSBA #16485  
Gasch Law Office  
P.O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149  
FAX: None  
[gaschlaw@msn.com](mailto:gaschlaw@msn.com)

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on November 3, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

Adrian Munoz-Rivera (#373246)  
Monroe Corrections Center  
P. O. Box 777  
Monroe WA 98272-0777

**E-mail:** [appeals@co.franklin.wa.us](mailto:appeals@co.franklin.wa.us)  
Shawn P. Sant  
Franklin County Prosecutor's Office  
1016 N 4th Ave  
Pasco WA 99301-3706

---

s/Susan Marie Gasch, WSBA #16485