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Court of Appeals  
Division III  
State of Washington

**NO. 32356-1-III**

**STATE OF WASHINGTON  
COURT OF APPEALS - DIVISION III**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**ADRIAN MUNOZ RIVERA**

**Appellant.**

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**APPEAL FROM THE SUPERIOR COURT FOR  
FRANKLIN COUNTY**

**BRIEF OF RESPONDENT**

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**A. COUNTERSTATEMENT OF THE ISSUES**

- 1. VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION, COULD A RATIONALE TRIAL TRIER OF FACT HAVE FOUND BEYOND A REASONABLE DOUBT THAT K.T. (D.O.B. 11/27/03) WAS THE VICTIM WHO TESTIFIED AT TRIAL AND WAS ASSAULTED AND THREATENED BY THE APPELLANT ON NOVEMBER 3, 2013?**
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6. **DID A SCRIVENER'S ERROR OCCUR WHEN THE BOX REMAINED CHECKED FOR IMPOSITION OF AN EXCEPTIONAL SENTENCE ON THE APPELLANT'S JUDGMENT AND SENTENCE?**

#### B. COUNTERSTATEMENT OF THE CASE

In November of 2014, Maria Tamayo, her daughter, K.T. (full name used in actual record), and the Appellant lived in Pasco. K.T. went to Emerson elementary school. At the time of the trial, March 2014, K.T. testified she was 10 years old and had recently had a birthday. RP 12-13, 38.

Ms. Tamayo and the Appellant had been together for approximately one year and seven months. Ms. Tamayo said she and the Appellant had a difficult relationship which escalated to physical violence when the Appellant drank. RP 14. The night of November 2, 2013, Ms. Tamayo went to bed angry with the Appellant because of an incident at a party earlier in the night. RP

15-16. When the Appellant made advances on her, she attempted to leave their bedroom. RP 16-17. The Appellant stopped her and said “you’re not going to go nowhere, bitch.” RP 17. He threw her on the bed and choked her. Ms. Tamayo began to bang on the walls and yell to her daughter for help. RP 18.

According to the Appellant, Ms. Tamayo was angry at him that night because she was jealous. He describes his interactions with her as an attempt to calm her down and get her to return to bed. RP 227-228. He stated Ms. Tamayo responded by punching him. RP 229. He then struck her several times in self defense and she struck him again also. RP 230. Eventually, Ms. Tamayo yelled for K.T., and both Ms. Tamayo and K.T. left the apartment. RP 232. The Appellant testified he went outside to bring K.T. back in because Ms. Tamayo was out control. RP 233-34.

K.T. supports her mother’s version of the story. K.T. was awoken by her mother’s screams. RP 39. When K.T. approached the bedroom Ms. Tamayo told her to get help. RP 19. The Appellant attempted to stop K.T., but both Ms. Tamayo and K.T. managed to open the door and go outside down the stairs. RP 19-20.

Ms. Tamayo begin to knock on the neighbor's door to get help, but the Appellant grabbed K.T. by the hair and begin to force her up the stairs. RP 20. The Appellant, armed with the knife, forced K.T. inside the apartment. RP 44. K.T. was forced to stand "tippy-toed" as he grabbed her and pulled her back. She could feel the knife touching her. RP 44-45. Once inside, Ms. Tamayo begged the Appellant to think about what he was doing. RP 21. The Appellant then asked Ms. Tamayo if she wanted to see her daughter die. RP 45.

After a time, the Appellant settled down and put the knife away. RP 45. K.T. than went to her room and took the screen off her window. RP 46. She waved her hand to try and get the attention of some people outside the building. RP 46. After police arrived, K.T. hid in her closet and armed herself with the shaft of a vacuum cleaner. She planned to poke the Appellant and run if he discovered her. RP 47-48.

When Officer Corey Smith responded to the scene he could see K.T. in the window of the apartment waving at him. When he approached, K.T. told him, "shush, my stepdad is trying to kill me. RP 80. Off. Smith went to the door of the apartment and saw Ms. Tamayo standing there with blood on her face. RP 83. He saw

signs of struggle in the apartment. The Appellant was in the bedroom, sitting on his bed and buttoning his shirt. RP 85. Off. Smith observed a bite mark on Ms. Tamayo's inner thigh. RP 88. Ms. Tamayo also had injuries to her face and neck. RP 102-03.

After the Appellant's arrest, he attempted to contact Ms. Tamayo by phone and letter. RP 24-25. In the letters the Appellant told her to say she was drunk and angry and that is why she did it. RP 161. He asks her forgiveness and said everything had happened because of drunkenness. RP 163. He also repeatedly asks her to contact his attorney and explain that she was drunk and that his fingerprints were only on the knife because he had used it to chop up guts earlier. He asks forgiveness and admits to threatening K.T. and beating her. RP 164-165.

### C. RESPONSE TO ARGUMENT

- 1. VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION, A RATIONALE TRIAL TRIER OF FACT COULD HAVE FOUND BEYOND A REASONABLE DOUBT, THE APPELLANT HAD COMMITTED THE CRIMES CHARGED IN COUNTS ONE AND THREE BY FINDING K.T. (D.O.B. 11/27/2003) WAS THE VICTIM WHO TESTIFIED AT TRIAL AND THE PERSON THE APPELLANT ASSAULTED WITH A KNIFE AND THREATENED.**

Although a child victim's name inevitably comes out at trial, the State makes efforts to minimize the written record of that name throughout the court process. The State's efforts to protect the victim's privacy interests in the written record should not be viewed as adding additional elements to the charge. By using the letters K.T., along with a date of birth, the State simply elected a manner of identifying the victim without using her full name. The actual element of identity is not changed or altered by this specific election.

Jury instructions should be read as a whole and in a straightforward and commonsense manner. *State v. Pittman*, 134 Wn.App. 376, 382-83, 166 P.3d 720 (2006), abrogated on other grounds by *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011); *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). A court will not assume a strained reading of an instruction. *State v. Moultrie*, 143 Wn. App. 387, 394, 177 P.3d 776 (2008). Instructions are adequate if they are readily understood and not misleading to the ordinary mind. *State v. Meneses*, 169 Wn.2d 586, 592, 238 P.3d 495 (2010). The jury in the present case utilized its common sense and adopted the mode of identification used by the State,

when it found, beyond a reasonable doubt, the Appellant had assaulted and harassed K.T. Looking at the facts in the record in the light most favorable to the State provides sufficient evidence to allow a jury to find the Appellant guilty beyond a reasonable doubt of those offenses.

When considering claims of insufficiency of the evidence, the Court acknowledges that a reviewing court is not ideally placed to second guess the trier of fact:

The standard for determining whether a conviction rests on insufficient evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn there from. This standard is a deferential one, and questions of credibility, persuasiveness, and conflicting testimony must be left to the jury.

*In re Martinez*, 171 Wash.2d 354, 364, 256 P.3d 277 (2011) (citations omitted). At the time of deliberation, the jury was aware of the victim's first and last name, her age, and the fact that she had a recent birthday. With these facts in mind, it is logical to infer that K.T. (D.O.B. 11/27/2003) is the victim whom they had heard from during testimony. Such a logical inference is within the purview of the jury. The jury demonstrated no difficulty assimilating

this information as evidenced by the lack of questions about use of “K.T.” in the jury instructions and their ability to find the Appellant “guilty” of the crimes against the minor victim and “not guilty” of the assault charge against her mother, Ms. Tamayo. CP 21-26.

The Appellant argues against such logical inferences, stating that no one identified “K.T.” as the victim during the course of testimony. This is not accurate, the victim was identified by her first and last name and her age, and therefore, the jury had the initials K.T. and approximate date of birth. With these pieces of information the jury logically inferred the victim was K.T. (D.O.B. 11/27/03) as formulated in the jury instructions. This is an example of a clear inference the jury chose to make.

The grammatical form of the “to convict” instructions also lend themselves to this logical interpretation. The instructions state that element one of each of the two offenses as conduct committed against “...K.T. (DOB: 11/27/03).” The date of birth appears in parenthesis behind the initials of the minor victim. The date of birth is not presented as a separate piece of information, like the other elements of the offense, but instead, it is attached to the initials as subtext. Webster’s defines parenthesis as “an amplifying or explanatory word, phrase, or sentence inserted in a passage from

which it usually set off by punctuation.” Webster’s Online Dictionary, <http://www.merriam-webster.com/dictionary/parenthetical> (last visited March 23, 2015). The victim’s date of birth, used in this fashion, is simply explanatory of the age the of the person being identified as K.T. By giving her age, the jury can distinguish K.T. from the other victim, her mother, Ms. Tamayo, or any other person who testified.

The manner of presentation in the jury instructions distinguishes the facts in this case from the facts in *State v. Hickman*. 135 Wash.2d 97, 954 P.2d 900 (1998). In that case the jury instruction added the term “Snohomish County” to the element of jurisdiction. *Id.* at 101. In doing that, the instruction modified all the elements in the case by requiring each of them to occur in Snohomish County. This was significant because the defendant in that case had called from Hawaii to a location in the King County to submit his fraudulent insurance claim. *Id.* at 105-06. In the current case, the parenthetical addition of the date of birth does not modify the identity of the victim, nor does it change any of the other elements. Also, in *Hickman*, where there was no evidence that the crimes occurred in Snohomish County. *Id.* at 105-06. In this case, all the witnesses agreed K.T. was the only child present at the time

of the incident and even the Appellant admitted in his letters that she was the one threatened.

In the State's charging document, to protect the minor victim's identity as much as possible, it identifies the victim by her initials and her date of birth. CP 134-35. Division III has adopted a similar policy to protect child victims and witnesses and ordered that "initials or pseudonyms in place of the names of all child witnesses or any victims[.]" Div. III Gen. Ord. June 18, 2012. In that General Order, this Court specifically notes the ease of accessing court documents online. *Id.* The purpose of this order is the same purpose the State chose to utilize the victim's name and date of birth in the jury instructions, to identify the minor party without providing a written record of her name.

Theoretically, the State could utilize a pseudonym in the jury instructions and during the trial. But as a practical matter, making such an attempt would have been problematic. Using a pseudonym would have required all the witnesses to remember to not refer to K.T. by her real name. The civilian witnesses here included a K.T.'s mother, a fifteen-year old neighbor, K.T., and Appellant. It is difficult to imagine all those civilian witnesses, in the uncomfortable position of having to testify about traumatic events,

keeping at the front of their minds to not refer to K.T. by the name they were accustomed to using. Given the Court's compelling interest in protecting the privacy of child victims and witnesses, using the victim's initials (and date of birth to show their age) is an effective method of identifying the victim for the jury in their instructions.

Here, the jury considered the testimony of the victim, who identified herself by first and last name, by age, and by approximate date of birth. Both her mother and Appellant identified her as the child who was present during the incidences that gave rise to these charges. RP 21, 233. K.T. described Appellant assaulting her and her fear that he was going to kill her. RP 44-45. There can be no doubt that the girl who testified is the same K.T. identified in the State's information and the jury instructions.

2. **K.T. AND THE APPELLANT WERE MEMBERS OF THE SAME FAMILY OR HOUSEHOLD BECAUSE HE ACTED AS HER STEPFATHER, AND IN ANY EVENT, EVEN IF THE VICTIM IS NOT A FAMILY OR HOUSEHOLD MEMBER OF THE APPELLANT SHE IS STILL A VICTIM OF DOMESTIC VIOLENCE AS THE ASSAULT AND HARASSMENT WERE THE RESULT OF A DOMESTIC VIOLENCE INCIDENT BETWEEN THE APPELLANT AND THE MOTHER OF K.T.**

K.T. should be considered a “family or household member” because the Appellant acted as her stepfather. The record indicates that the Appellant, Ms. Tamayo, and K.T. resided together during the time of the incident and were in a romantic relationship. The Appellant provided rent for them. He also referred to Ms. Tamayo as his wife on multiple occasions. RP 115, 163-64, 219, 221, 223, 231, 240-42. K.T. also referred to the Appellant as her stepfather when she told police that her stepfather was trying to kill her on the night of the incident.

The Appellant argues that the Appellant and Ms. Tamayo were not married in the legal sense; therefore, he cannot be considered K.T.’s stepfather. A reading of the definition of family or household members within RCW 10.99.020(3) would suggest this distinction was not intended by the legislature:

“Family or household members” means spouses, 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

The categories within the definition describe a number of different groups which do not have any actual legal relationship: people who have lived together, people who used to be married, people in dating relationships, etc. This indicates the legislature intended a broad definition of family or household member which was not limited to strict legal relationships. The Appellant said he and Ms. Tamayo lived as man and wife. RP 240. This makes him the stepfather of K.T. under RCW 10.99.

In any event, regardless of K.T.'s classification under RCW 10.99, there is still adequate legal foundation for her to be included on the same no contact order as her mother. There is no dispute that K.T.'s mother, Ms. Tamayo, and the Appellant were "family or household members" at the time of the incident. During the incident, whether one believes the Appellant's version, whereby Ms. Tamayo was the aggressor, or whether one believes Ms. Tamayo and K.T.'s version of the incident; the dispute revolved around domestic violence. When K.T. came to help her mother she became embroiled in the domestic violence and was assaulted and threatened by the Appellant. RCW 9A.05(8) authorizes trial

courts to impose crime related prohibitions, including no contact orders. *State v. Armendariz*, 160 Wash.2d 106, 112-13, 156 P.3d 201 (2007). The domestic violence no contact order entered in this case directly relates to the incident which occurred.

Even if K.T. herself had not been a directly victim of the crime, the State would still have been within its authority to provide for her under the protection of the same no contact order her mother received because children may be victimized simply by having to witness a violent crime. The Court has previously pointed out that those children who witness a crime can be considered “indirect” victims of that crime and be entitled to protections. *State v. Aguilar*, 176 Wash.App. 264, 278, 308 P.3d 778 (2013). In *Aguilar*, the Court granted no contact orders which protected two children from their own father because they had been victimized in the process of a murder he committed against their mother. *Id.* One child had been a direct victim, having been hit while trying to intervene, and both were indirect victims, because they had to witness the incident. *Id.* The *Aguilar* court upheld the no contact orders against the defendant even though it recognized defendants have a “fundamental liberty interest in the care, custody, and control of their children.” *Id.* at 277.

In this case, the order makes even more sense, as a stepparent who has not legally adopted K.T.; the Appellant has no fundamental parenting right in K.T. K.T. was a direct and indirect victim domestic violence because she was assaulted when she tried to help her mother and was further victimized by having to witness the domestic violence between her mother and the Appellant. The court properly included K.T. in the domestic violence no contact order.

- 3. THE APPELLANT ASSAULTED K.T. WITH A KNIFE TO GAIN CONTROL OF HER AND FORCE HER MOTHER TO STOP SEEKING AID, HE COMMITTED A SECOND CRIME BY THREATENING TO KILL K.T. IN ORDER TO SHOCK AND TERRIFY HER MOTHER, IN ANY EVENT, THE APPELLANT'S TRIAL COUNSEL WAS NOT INEFFECTIVE BECAUSE HE MADE A TACTICAL DECISION TO FOCUS HIS ARGUMENTS AT SENTENCING ON PREVENTING A CONSECUTIVE SENTENCE ON THE TAMPERING WITH A WITNESS CHARGE WHICH WOULD HAVE RESULTED IN A MUCH LONGER TERM THAN IF THE JUDGE LOWERED HIS OFFENDER SCORE BY ONE POINT.**

The Appellant committed to separate crimes against the victim, K.T., and her mother on the night of incident. The first crime his committed was to take control of K.T. and utilize a knife to neutralize her and force her back inside the apartment. Once the

Appellant had her in his control, he turned his attention to shocking and terrifying her mother, Ms. Tamayo, by asking her at least two times if she wanted to see her daughter die. In a sense, the threat to kill was directed at Ms. Tamayo, while the assault was directed at K.T. These represent separate criminal conduct and the Appellant was properly punished for both separate offenses.

Two crimes are the same criminal conduct if they “require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1). This statute is narrowly construed. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974, 976 (1997). “If any one element is missing, multiple offenses cannot be said to encompass the same criminal conduct, and they must be counted separately in calculating the offender score.” *State v. Lessley*, 118 Wn. 2d 773, 778, 827 P.2d 996, 998 (1992). Although both crimes were committed around the same time, their purpose and intent differed because one was directed at K.T. and the other one was directed at K.T.’s mother, Ms. Tamayo, even though K.T. was also a victim because she heard the threat against her.

The standard for determining whether the crimes require the same intent is “the extent to which the criminal intent, objectively

viewed, changed from one crime to the next.” *State v. Vike*, 125 Wn.2d 407, 411, 885 P.2d 824, 825 (1994). Appellant’s “[o]bjective intent may be determined by examining whether one crime furthered the other or whether both crimes were a part of a recognizable scheme or plan. But where the second crime is accompanied by a new objective intent, one crime can be said to have been completed before commencement of the second; therefore, the two crimes involved different criminal intents and they do not constitute the same criminal conduct.” *State v. Wilson*, 136 Wn. App. 596, 613-14, 150 P.3d 144, 152-53 (2007)(interior quotations removed).

Here, we have two distinct crimes. Firstly, the Appellant pulled K.T. by the hair and held a knife to her throat. RP 20, 44. K.T. could feel the knife against her skin. RP 45. It is clear Appellant intended to assault K.T. with the knife. RP 164. His objective intent was completed when he laid the knife against K.T.’s throat and forced her back into the apartment. This crime does not require a threat to kill. One may speculate he intended to kill K.T. at that time, but all that is required for the assault is for fear and apprehension of “bodily injury.” CP 44. The purpose of the knife

was to take control of K.T., neutralize her, and get her and Ms. Tamayo back inside where they could not call for help.

The second crime occurred when K.T.'s mother began to plead with Appellant to release K.T. RP 21. Appellant moved the knife away from K.T.'s neck and stepped slightly away from her. *Id.* It was after this Appellant asked K.T.'s mother – *not* K.T. – if she wanted to watch her daughter die. *Id.* K.T. testified that she heard her mother say “don’t kill my daughter, kill me instead[,]” and this left her “in shock.” RP 46.

Although, K.T. was the person threatened, the threat was made to instill fear and shock into Ms. Tamayo. At this point the Appellant already had K.T. under his control and he also had the full attention of Ms. Tamayo. The Appellant had already pulled K.T. up the stairs and forced Ms. Tamayo to follow him. He had both of them neutralized and away from the neighbors’ doorway and back into the apartment. He testified he wanted them to come back inside, and using K.T. as a hostage, he was successful in accomplishing his goal. Instead of banging on the neighbor’s door and yelling for help, Ms. Tamayo was pleading for her daughter’s life. It is at this point when the Appellant chose to raise the terror level of Ms. Tamayo, when he verbalizes what is surely going

through her head, “do you want to watch your daughter die?” The only purpose the threat served was to terrify and shock Ms. Tamayo. This does not serve a practical purpose, as one could argue the assault did. It is essentially emotional torment. The intent and goal is separate from that of the assault.

It is with these facts in mind, that one must consider the choices and decisions of the Appellant’s trial counsel at sentencing. “To prevail on an ineffective assistance of counsel claim, the defendant must show that defense counsel’s objectively deficient performance prejudiced him.” *State v. Statler*, 160 Wn. App. 622, 635, 248 P.3d 165, 172 (2011). To demonstrate prejudice, Appellant must show “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. McFarland*, 127 Wn. 2d 322, 335, 899 P.2d 1251, 1256 (1995), *as amended (Sept. 13, 1995)*. This Court will “engage in a strong presumption counsel’s representation was effective.” *McFarland*, 127 Wn.2d at 335, 899 P.2d at 1257. Counsel is not required to raise every colorable claim. *Stenson, In re Pers. Restraint of*, 142 Wn. 2d 710, 734, 16 P.3d 1, 14 (2001).

In order for the appellant to show he received ineffective assistance of counsel he must satisfy a two-pronged test. *State v. McFarland*, 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995). The second prong the appellant must satisfy is to make a showing that “defense counsel’s deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* As explained above, the Appellant fails to show prejudice because the trial court would have properly found that two separate crimes occurred.

In any event, the Appellant also fails to satisfy the first requirement to show ineffective assistance of counsel. To do this, the appellant to must show that deficient representation because there is “no legitimate strategic or tactical reasons” for the trial defense counsel to have made his decision. *State v. Rainy*, 107 Wash.App 129, 135-36, 28 P.3d 10 (2001). The Appellant argues that there is not a legitimate trial strategy for allowing the State to treat the assault and harassment as separate crimes. This argument ignores the context of the Appellant’s sentencing hearing.

The State argued at sentencing that the sentence for Tampering with a Witness should run consecutively with the other

charges, as is permitted by the juror's special finding of domestic violence. Docket, Verdict, Sentencing RP 7-8. The State pointed out that Appellant had committed a particularly heinous crime by holding a knife to the throat of a young girl. *Id.* The Appellant's trial counsel argued against this by focusing on his client's remorse. His goal was to avoid an exceptional sentence. To do this, he wanted to avoid being drawn into a detailed discussion about exactly how his client had threatened and terrorized a mother and daughter. Docket, Verdict, Sentencing RP 8-9. Trial counsel could not avoid being drawn into such an argument if he had argued those details in the context of the same criminal conduct. Had the judge lowered the Appellant's offender score by one point, on the Assault in the Second Degree, the Appellant would have faced a range of 6 to 12 months, instead of 12+ to 14 months (not counting the 12 month enhancement which would not have changed). RCW 9.94A.510 & 9.94A.515. There is only a difference of two months between the top of the range on an offender score 1 and the top of the range for an offender score of 2. If the Tampering charge had been run consecutively, however, it would have resulted in an additional 12 months.

Trial counsel, appearing regularly in front of Judge Vic Vanderschoor, was in a better position to decide what to focus his arguments on at sentencing. Avoiding a full year, was more important than arguing about what may have only amounted to 2 months. Had trial counsel had made the additional argument; the trial judge may have decided to concede one argument each to side and the Appellant would have ultimately ended up with a longer sentence. Such practical tactical considerations are best left in the hands of trial counsel, which is why the Court engages “in a strong presumption counsel’s representation was effective.” *State v. McFarland*, 127 Wn.2d at 335, 899 P.2d at 1257.

**4. THE APPELLANT COMMITTED THE CRIMES IN QUESTION WHILE UNDER THE INFLUENCE OF A SUBSTANCE (ALCOHOL), THEREFORE, THE TRIAL COURT IS WITHIN ITS AUTHORITY TO IMPOSE CONDITIONS WHICH AID IN SUBSTANCE ABUSE RECOVERY AND PROTECT THE PUBLIC FROM DANGER CAUSED BY RELAPSE IN THAT RECOVERY**

RCW 9.94A.030(10) defines a crime-related prohibition as “an order of a court prohibiting conduct that directly *relates to the circumstances* of the crime for which the offender has been convicted” (emphasis added). The circumstances of the present

case involve the Appellant committing violent acts while under the influence of a drug or substance. Alcohol may be legal, but it is still a drug. The trial court required substance abuse treatment. As a companion to this condition, the Appellant was not to possess drug paraphernalia, engage in drug loitering, or associate with drug users and/or dealers.

*State v. Jones* holds that conditions which relate to the risk of re-offense or public safety are permissible. 118 Wn. App. 199, 207-208, 76 P.3d 258 (2003). Substance abuse treatment requires one to refrain from spending time around drugs or other individuals using drugs. A condition which prohibits an individual in treatment from drug loitering or possession of drug paraphernalia relates directly to an individual's success in treatment and his chances of relapsing. There is no distinction between refraining from alcohol and drugs when in recovery:

Thinking of alcohol as different from other drugs has caused a great many addicts to relapse. Before we came to NA, many of us viewed alcohol separately, but we cannot afford to be confused about this. Alcohol is a drug. We are people with the disease of addiction who must abstain from all drugs in order to recover.

NARCOTICS ANONYMOUS WORLD SERVICES, INC., NA White Booklet (1986). When dealing with addictive behaviors, whether narcotics

or alcohol, there is a correlation between relapse and exposure to drug related leisure activities. Maureen A. Walton, Fredric C. Blow, C. Raymond Bingham, & Stephen T. Chermack, *Individual and social/environmental predictors of alcohol and use 2 years following substance abuse treatment*, 28 Addictive Behaviors 628, 638 (2003). Studies consistently "...support the notion that aftercare approaches for both alcohol and other drugs should assist people in establishing leisure activities that are alcohol and drug free. *Id.*

In this case, it is in the best interests of the public that individuals in substance abuse programs (including those dealing with alcohol) follow the conditions ordered in the Judgment and Sentence in this case, and limit contact with all drug abuse environment and activities.

**5. THE APPELLANT MAY NOT RAISE A CHALLENGE TO LEGAL FINANCIAL OBLIGATIONS FOR THE FIRST TIME ON APPEAL AND IN ANY EVENT THE RECORD CONTAINS SUFFICIENT INFORMATION TO ESTABLISH THE APPELLANT HAS THE ABILITY TO PAY HIS LEGAL FINANCIAL OBLIGATIONS.**

The Appellant may not raise the his challenge to legal obligations for the first time on appeal. The Court of Appeals recently addressed this challenge in *State v. Duncan*, 18

Wn. App. 246, 327 P.3d 699 (2014), noting that the challenge is "recurrent" in appeals. *State v. Duncan*, 18 Wn. App. at 249. The court held that it would decline to address for the first time on appeal a claim that the record did not support the trial court's findings regarding ability to pay discretionary LFO's. The opinion explains that an offender may decline to challenge the finding at the trial level, because the State's burden of proof is low. *State v. Duncan*, 18 Wn. App. at 250. But also an offender has good strategic reasons to waive the issue at the time of sentencing when there are "more important issues at stake." *State v. Duncan*, 18 Wn. App. at 251.

At the moment, the judge is considering the incarceration penalty for the offense, the offender should be trying to portray himself in the best light. Therefore, it is "unhelpful" to portray oneself as perpetually unemployed and irretrievably indigent. *State v. Duncan*, 18 Wn. App. at 250. And, in any case, the matter can be readdressed later by a petition for remission at the more pertinent time, i.e. the time of collection. *Id.* This authority should decide the matter without further discussion. The Court of Appeals will not

hear a challenge to LFO's that is not preserved below. The Defendant did not challenge the imposition of discretionary LFO's. The challenge is not preserved.

Furthermore, it is premature for this court to address the assigned error for two reasons. Challenges to LFOs are not properly before a court until the State seeks to enforce them. *State v. Hathaway*, 161 Wn. App. 634, 651, 251 P.3d 253 (2011); *State v. Smits*, 152 Wn. App. 514, 524, 216 P.3d 1097 (2009). A person is not an "aggrieved party" under RAP 3.1 "until the State seeks to enforce the award of costs and it is determined that [the defendant] has the ability to pay." *State v. Mahone*, 98 Wn. App. 342, 349, 989 P.2d 583 (1999); see also *State v. Blank*, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997). "Mandatory Department of Corrections deductions from inmate wages for repayment of legal financial obligations are not collection actions by the State requiring inquiry into a defendant's financial status." *State v. Crook*, 146 Wn. App. 24, 27-28, 189 P.3d 811 (2008). Therefore, "[i]nquiry into the defendant's ability to pay is appropriate only when the State enforces collection under the judgment or imposes sanctions for nonpayment." *State v. Crook*, 146 Wn. App. at 27. If the State seeks to collect, the Defendant

may petition the court at that time for remission under RCW 10.01.160(4).

In any event, the record establishes sufficient facts that the Appellant has the ability to pay his legal financial obligations. The Appellant testified at trial that he worked picking apples on a farm. RP 214. Following that season, he would prune trees. He had indicated that leading up to the time of the incident he had been working four years at that farm. RP 214-15. He eventually moved in with Ms. Tamayo and K.T. because he was going to be paying the rent for himself and them. RP 216. The Appellant was able to work every day, even Sundays. RP 216. These facts were known to the court at the time of sentencing and properly establish a basis for the court's belief the Appellant could work to pay back his court costs.

**6. THE STATE CONCEDES THE JUDGE DID NOT FIND SUBSTANTIAL AND COMPELLING REASONS TO IMPOSE AN EXCEPTIONAL SENTENCE AND THE JUDGMENT AND SENTENCE SHOULD BE CORRECTED.**

Although the jury did return a special verdict finding an aggravating factor, the court chose not to find grounds for an

exceptional sentence. The Court should authorize the trial court to enter an order modifying the Judgment and Sentence or an Amended Judgment and Sentence to correct the scrivener's error.

#### D. CONCLUSION

The arguments raised by the Appellant are based largely on issues taken out of context with the rest of the case. By looking at the record of the proceedings as a whole, understanding the contested issues in the case, and the tactical response to those issues, one can see that trial court did not err and the jury returned a correct verdict.

On the basis of the arguments set forth therein, it is respectfully requested that the Franklin County Superior Court convictions for Adrian Munoz-Rivera be affirmed.

DATED this 2nd day of April, 2015.

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