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Court of Appeals
Division III
State of Washington

NO. 34176-3-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

RICHARD GARCIA,

Appellant.

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

The Honorable David Elofson, Judge

CORRECTED
BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

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9. Should Richard Garcia have to pay appellate costs if he does not substantially prevail on appeal and the state requests costs?

C. STATEMENT OF THE CASE

1. Procedural History

The Kittitas County prosecutor charged Richard Garcia with assault in the first degree¹ (count I), felony harassment–threat to kill (count II)², and unlawful possession of a firearm in the first degree (count III).³ CP 1-2.

The felony harassment information read

That on or about September 22, 2015, in Kittitas County, WA, the defendant, Richard Garcia, without lawful authority, knowingly threatened to cause bodily injury immediately or in the future to the person threatened, to wit: threatened to kill April Garcia, thereby committing the felony crime of HARASSMENT[.]

¹ RCW 9A.36.011(1)(a)

² RCW 9A.46.020(1)(a) and (2)(b)(ii)

³ RCW 9.41.040(1)(a)

The unlawful possession of a firearm read

That on or about September 22, 2015 in Kittitas County, Washington, the defendant Richard Garcia, owned, had in his possession or had in his control any firearm after having previously been convicted in this state or elsewhere of any serious offense, as defined in this chapter thereby committing the felony crime of UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE[.]

CP 2.

Counts I and II were pled as domestic violence offenses. CP 1-2.

Count I alleged aggravating sentencing factors: ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a long period; or the offense occurred within sight or sound of the victim's or offender's minor children under the age of 18; or the offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.⁴ CP 1-2. Count I also alleged that a firearm was used in commission of that offense.⁵

The case was charged on September 25, 2015. CP 1. Garcia was arraigned on October 5, 2015, and the court set trial for November 17. Supplemental Designation of Clerk's Papers, Order of Arraignment and October 5 Scheduling Order. Defense counsel was appointed on October 6. Supp. DCP, Order Appointing Counsel. On November 13, the court

⁴ RCW 9.94A.535(3)(h)(i), (ii), or (iii)

⁵ RCW 9.94A.533

reset the trial to start December 1. Supp. DCP, November 13 Scheduling Order. On November 18, the state filed an Amended State's Witness List.⁶ Supp. DCP. Garcia's only family member listed as a witness is his wife, April Garcia.⁷

Trial commenced on December 1. Yakima County Superior Court Judge David Elofson sat as a visiting judge. RP⁸ I 33. The trial commenced with the state telling the court they would not be calling April as a witness. RP I 34. The state characterized her as "unavailable" and that its (unspecified) efforts to secure her attendance were "futile." RP I 34. The state assured the court it was not seeking a material witness warrant so to avoid disrupting "her life or the lives of her children." RP I 34.

In lieu of live testimony from April, the state motioned the court to admit certain statements allegedly made by April contemporaneous with the charged incident. RP I 36-61. The court initially granted the state's motions, in part, and over Garcia's objection. RP I 44-61.

The jury was selected and sworn. RP I 92.

⁶ This is the first and only witness list in the court file.

⁷ For purposes of the appeal and for the sake of clarification, April Garcia is referred to as "April" to distinguish her from Richard Garcia who is referred to as "Garcia." No disrespect of April is intended.

⁸ There are 4 volumes of verbatim report of proceedings for this appeal references herein as RP I (pgs. 1-200); RP II (pgs. 201-400); RP III (pgs. 401-600); and RP IV (pgs. 601-711).

The state orally amended the unlawful possession of a firearm from a first degree offense to a second degree offense. RP I 62, 78.

The court day ended with no witnesses having been called. RP I 1-105.

The next morning, before taking any testimony, the court reversed its ruling and declined to admit any statements by the still-absent April. RP I 128-132.

The court asked the state to give additional information about its effort to secure April's presence for testimony. RP I 108.

In response, the state said it would have attempted to secure April's presence had she been at a known address in Washington. RP 1 108. However, April left her home in Cle Elum shortly after the incident and moved to Oregon. RP I 109. The prosecutor's victim witness coordinator contacted April. RP I 109. However, the contact became more sporadic and she could only leave voice mails for April. RP I 110. They state obtained April's email address. RP 1 110. The state exchanged email with April. There was a discussion about having two of her children testify. RP I 111. The prosecutor spoke with April on the phone. They discussed having the children testify. RP I 111. Although April did not refuse to testify, it was the state's sense she was reluctant to testify. RP I

111-12. All of this contact took place before the reset of the original November 17 trial date. RP I 112.

The prosecutor sent April an email telling her the trial was reset to December 1. RP I 113. Thereafter, additional calls to April either went to her voice mail or her voice mail box was full and would not accept a message. RP I 113. The prosecutor stepped up its effort to contact April by putting the lead investigator, Cle Elum Officer Jennifer Rogers, on the task. RP I 113-14. Officer Rogers left voice mails for April until her voice mail box was full. RP I 114. Officer Rogers tried to locate April in Oregon. An Oregon police officer successfully contacted one of April's sons. RP I 114.

On the Friday before the Tuesday, December 1 start of trial, the prosecutor alerted Officer Rogers they would have to reconcile how to proceed. RP I 115. On Sunday evening, the prosecutor resolved to try the case without April's testimony. RP I 115.

The prosecutor talked to April's mother, Jackie Serratt, about the importance of April testifying. Per Serratt, April did not want to testify. RP I 116. April was not responding to her phone calls and text messages. RP I 117. The state arranged for Serratt to fly to Washington from her home in Arizona and be available to give testimony on December 1. RP I 118.

The prosecutor knew that to compel April's subpoenaed testimony in Washington, he had have help from an Oregon court. RP I 118. Ultimately, rather than doing so, the prosecutor made a tactical decision to try its case without April's testimony. RP I 119. In making that decision, the prosecutor weighed the disruption to April and her children and the trauma he felt they already experienced. "We're going to go for it. We're going to go forward without the victim, and it is what it is. And that's it."⁹ RP I 119.

The court refused to change its mind about the admission of April's alleged statements in lieu of April's in-person testimony. RP I 149.

The state told the court it could not prove the assault and the harassment charges without April's testimony. RP I 136, 154. It could only prove the unlawful possession of a firearm in the second degree but that Garcia's standard range was only one to three months and he would "walk right out of jail." RP I 135.

For the first time, the state asked the court to issue a material witness warrant not only for April but also for two of her daughters, ages 7 and 16. RP I 150, 154, 157; RP II 304. Nothing in the record indicates that either daughter had been endorsed as a state's witness. The court agreed to

⁹ The state also informed the court that there was no evidence of Garcia's interfered with April decision to testify and thus no forfeiture by wrongdoing. RP I 119.

sign the requested material witness warrants and later did so. RP I 159; RP II 287.

The prosecutor also asked for a modified “good cause” continuance. RP I 151. He asked to start the trial right away and allow it to present witnesses. RP I 151-53. But because Officer Rogers had a pre-scheduled vacation from December 6-12, so he asked that the trial be adjourned and recommence ideally with April and the children present. RP I 151, 159.

Defense counsel agreed to the state’s request to put on the witnesses and then adjourn the trial to a later date. RP I 159; RP II 303. Defense counsel believed the case was “highly defensible” from a defense perspective. RP I 139. He hoped to interview April and the children before they testified. RP II 312.

The parties settled on December 15 as the continued trial date. RP II 3-4. 309.

April and the children were located in Oregon. RP II 320; RP III 522. The prosecutor participated in the process to have the Oregon court order them to appear in Kittitas County Superior Court. RP II 320. April and the children were transported to Washington. In court on December 15, the prosecutor announced that they were not in custody because they were cooperative witnesses. RP II 321.

April and the children, A.G. and V.G., testified. RP II 320, 359-400; RP III 401-44, 532-35.

During trial, the state amended the information without objection. The language of the first degree assault “added some additional language.” RP II 299. There was no change to the felony harassment charge. And the unlawful possession of a firearm was amended from first degree to second degree given the nature of proof of the underlying offense. RP II 300.

The amended information is not in the court file and, to date, has not been located and provided to appellate counsel.

The state later filed a second amended information. RP III 537. It described the changes as syntax only. RP III 537. It deleted the reference to unlawful possession of a firearm in the first degree because only second degree was charged. RP III 537. Apparently, it added the word “felony” before harassment to distinguish it from the misdemeanor harassment. RP III 537-38. And it deleted reference to Kittitas County as the venue. RP III 538.

The second amended information has not been filed in the court file and, to date, has not been provided to appellate counsel.

After the presentation of the state’s case, Garcia unsuccessfully moved to dismiss all the charges for insufficient evidence. RP III 578-79. Garcia did not testify and presented no defense witnesses.

The state proposed a lesser included offense jury instruction of assault in the second degree. RP III 525, 563-64. Garcia did not object. RP III 563-64. The court gave Garcia's lesser included proposed instruction of unlawful display of a weapon. RP III 563-67.

The jury could not reach a verdict on the first degree assault and instead returned a verdict of guilty to the lesser assault in the second degree, felony harassment, and unlawful possession of a firearm in the second degree. CP 7, 8, 9, 10, 11. The jury found that Garcia and April were family or household members thus qualifying as domestic violence. CP 12, 15. The jury was also unanimous on a specific interrogatory that the assault was aggravated domestic violence offense. CP 13. The jury found that Garcia was armed for purposes of the firearm enhancement on the assault. CP 14; RP IV 664-67.

At the state's request, the court ordered a risk assessment report. RP IV 672. The court reviewed the report prior to sentencing. RP IV 684; Supp. DCP Risk Assessment. The assessment noted that Garcia relapsed on methamphetamine some months prior to the charges incident. However, he had not used methamphetamine for a month prior to the incident. Supp. DCP Risk Assessment.

The court sentenced Garcia to 60 months broken down as 14 months on the leading offense of assault in the second degree, 36

consecutive months for the firearm enhancement, and 12 extra months for the aggravating sentencing factor. RP IV 706; CP 19. The court did not reduce to writing its findings and conclusions to support the exceptional sentence. CP 16-29.

On the judgment and sentence, the felony harassment sentence is listed as 12 *days* instead of 12 *months* as per the standard range and the sentence articulated by the court. RP IV 708; CP 19.

The sentence included a term of 18 months of community custody. CP 20. The court imposed conditions of community custody including a substance abuse evaluation and treatment, not to enter or remain in establishments where alcohol was the main source of revenue, and not be anywhere where controlled substances, narcotics, or dangerous drugs are sold, purchased, possessed, or consumed. CP 27-28. The court did not find that Garcia had a chemical dependency that contributed to the offenses. CP 17; RP IV 675-710.

Garcia appeals all portions of his judgment and sentence. CP 30. The court found him indigent for appeal. Supp. DCP, Motion for Indigency; Order of Indigency.

2. Trial Evidence

December 2 testimony

April and Richard Garcia are married and have three children together. The children's ages are 7, 6, and 2. April has three older children from other relationships. RP I 176.

The couple lived in Cle Elum and had done so for about five years. RP I 175-76. But they wanted to move closer to Seattle where they had family. RP I 175-76. April's mother, Jackie Seratt, was in Cle Elum to help April and Garcia clean up their rental house so they could get their \$1,500 rental deposit returned. RP I 177-79. While the work on the house was ongoing, Seratt took a local job. RP I 178.

On the afternoon of September 22, April called her. The tone of April's voice told Seratt that April had "high anxiety" and that a gun was involved. RP I 180, 182. The phone call prompted Seratt to call the police and to go to April's home. RP I 182-83. While at the home, she saw a handgun that had been removed from a red bag stored in April's closet. RP I 184-85.

Seratt 911 call prompted Cle Elum Police Officer Jennifer Rogers to respond to a domestic violence call at the shared residence of April and Richard Garcia. RP I 163-64. Officer Rogers took a .45 semi-automatic pistol into evidence. The pistol had been in a red and black backpack in

April bedroom. RP I 163. Officer Rogers sent the gun to the Washington State Patrol Crime Lab for DNA testing. Id. at 163-65.

The night before, Seratt and April had gone out to a pub together to have dinner and some mother-daughter time. RP II 210. Garcia came to the pub. Seratt thought there was a lot of tension between the couple. RP II 209. He left after asking April for money to buy ice cream for the children. April declined to give him any money. RP II 210.

About three weeks after the incident, Seratt helped April and the children move to Oregon. She stayed with April in Oregon for about two months before returning to her home in Arizona. RP I 193-95.

A WSP forensic scientist examined the pistol. Garcia's DNA was found on it. RP II 257, 270.

December 15 testimony

When Garcia returned home from work on the afternoon of September 22, he was unhappy that April had gone to dinner the night before with her mother. RP II 363-64. Garcia put the couple's children in their bedroom and closed the door. Id. at 363. The couple argued in their bedroom. Garcia put a gun to April's head and threatened to blow her brains out. RP II 365. Garcia was shouting and being aggressive. Id. at 367. April believed that Garcia would kill her because their relationship had been getting progressively worse and worse. Id. at 395.

Their 7 year-old daughter, A.G., came into the bedroom and saw Garcia point the gun at April. RP II 366; RP III 429-30. April left the room with A.G. April went into the bathroom and turned on the shower to mask the noise of her calling her mother. RP II 371-72.

When Officer Rogers responded to the home, April was hysterical and crying. RP III 446. April directed her to a pistol. Id. at 445.

April's 16 year-old daughter, V.L., knew that a pistol was kept in her mother's bedroom closet. She had seen Garcia fire the pistol at a New Year celebration in 2013. RP III 405-06.

Separate from the trial testimony, Garcia stipulated he had a prior felony conviction. RP III 541-42.

After the incident, the police interviewed Garcia. The interview was audio and video recorded. RP III 457. The jury watched the recorded interview. RP III 460-509. In the video, Garcia agreed he and April argued but he denied pulling a gun on her. RP III 496. He also disavowed ownership of the pistol. Rather, it belonged to Jackie Seratt. RP III 470.

D. ARGUMENT

1. Defense counsel denied Garcia effective assistance of counsel by agreeing to a mid-trial continuance when he knew the state could not prove the charges against Garcia without the continuance and the opportunity to subpoena witnesses.

a. Garcia has the right to effective assistance of counsel.

The Sixth Amendment guarantees the right to the effective assistance of counsel in criminal proceedings. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed 158 (1932). “The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to afford defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The proper standard for attorney performance is that of reasonably effective assistance. *Strickland*, 466 U.S. at 687. To prevail on a claim that a defendant was denied this right, the court must find that counsel’s performance was deficient and that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. Counsel’s deficient performance is prejudicial if there is a reasonable probability that the result of the proceeding would have been different but for counsel’s

errors. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Ineffective assistance of counsel claims are reviewed de novo. *State v. Brown*, 159 Wn. App. 366, 370, 245 P.3d 776 (2011).

b. Defense counsel's failure to object to the trial continuance was deficient.

(i) Trial continuances require good cause.

CrR 3.3(f) permits the court to grant continuances “(1) upon written agreement of the parties or (2) when a delay is required in the administration of justice and the defendant will not be prejudiced, so long as the parties agree in writing or on motion from a party or the court.” A trial court commits reversible error if it grants a continuance without “good cause.” *State v. Mack*, 89 Wn.2d 788, 794, 576 P.2d 44 (1978).

Good cause did not exist in this case. The state headed into trial assuming the court would admit certain hearsay evidence and with no intent to call April or her two children as witnesses. RP I 34. In fact, neither of the children were even listed as state’s witnesses. Supp. DCP, Amended State’s Witness List.¹⁰ When the court declined to admit the hearsay, the state’s lack of due diligence in obtaining the presence of the three material witnesses came to light.

¹⁰ No original state’s witness list is in the court file.

- (ii) Failure to take adequate measures to assure witness attendance at trial vitiates any finding of “good cause.”

The requirements for a continuance are not satisfied where the state moves to continue in order to secure a material witness but fails to prove it acted with due diligence in seeking to secure the witness's presence at trial. *State v. Nguyen*, 68 Wn. App. 906, 915-16, 847 P.2d 936 (1993). “[A] party's failure to make ‘timely use of the legal mechanisms available to compel the witness' presence in court’ preclude[s] granting a continuance for the purpose of securing the witness' presence at a subsequent date.” *State v. Adamski*, 111 Wn.2d 574, 579, 761 P.2d 621 (1988), quoting *State v. Toliver*, 6 Wn. App. 531, 533, 494 P.2d 514 (1972). “[T]he issuance of a subpoena is a critical factor in granting a continuance.” *State v. Wake*, 56 Wn.App. 472, 476, 783 P.2d 1131 (1989). Due diligence must be exercised to secure the attendance of a witness, and that due diligence includes the issuance of a subpoena and the taking of necessary steps to enforce attendance. *Toliver*, 6 Wn. App. at 533; *State v. Fortson*, 75 Wn.2d 57, 448 P.2d 505 (1968). If it appears that a witness is material and will not respond to a lawfully issued subpoena, a material witness warrant is an available option. CrR 4.10. A procedure is also available that allows for out-of-state state witnesses to be summoned to testify in a Washington court. RCW 10.55.060.

A court may continue a case if a material state's witness is unavailable to testify only if there is a valid reason for the unavailability, if the witness will become available within a reasonable time, and if the continuance will not substantially prejudice the defendant. *State v. Day*, 51 Wn. App. 544, 549, 754 P.2d 1021 (1988). None of these factors were present in Garcia's case.

Other than the prosecutor talking to April over the phone and telling her she would need to come and testify, nothing was done to secure her attendance at trial prior to a jury having been selected and sworn to hear the case. RP I 108-19. The record is devoid of any indication that a subpoena was issued, or that a good faith effort was made to overcome the hurdle posed by the witness' anticipated absence. *Wake*, 56 Wn. App. at 475.

When the prosecutor lost phone contact with April two weeks before trial, rather than utilizing the out-of-state witness procedure to secure a material witness warrant for April, he decided to go to trial without her and the (unendorsed) children.

The state's reticence to disturb April and her children, followed by the sudden awareness that it needed her testimony to prove its case, is not good cause for a continuance. The trial court erred in finding otherwise. The state readily found April and the children after the court granted its

untimely mid-trial request for a material witness warrant. The ease in finding April is a testament to how available April was for trial despite her implied reluctance to appear.

(c) *Defense counsel's agreement to continue the trial, knowing that the state could not prove two of the three charges without its absent witnesses, is unfathomable.*

In asking for the trial continuance, the state told the court it could not prove both the assault and the felony harassment without April's testimony. First degree assault is a class A felony with a maximum sentence of life in prison. RCW 9A.36.011(1)(a); RCW 9A.20.010; RCW 9A.20.021(1)(a). The aggravating factor added to the information alleging the assault occurred within the sight or sound of the children, allowed the court to impose a sentence up to life in prison. The state explained to the court that it would seek a sentence of 30 years to life against Garcia. RP I 134. Even with this hanging over Garcia's head, defense counsel agreed to a mid-trial extension to allow the state to obtain the testimony of April and the children to enable the conviction of Garcia. Had the court refused to grant the continuance, as it should have because the state had not complied with its obligation to use due diligence in subpoenaing its witnesses for trial, there would have been no

case to defend. The court would have been compelled to direct a verdict dismissing the case for lack of sufficient evidence.

Moreover, defense counsel's assertion that April's presence would make his case more defensible confounds reason. He had not interviewed April or the children. RP II 312. And, as it turned out at trial, April and the children did not help the defense case at all. RP II 359; RP III 434. Instead, Garcia has three new felony convictions and is serving 60 months in prison. CP 16, 19.

Defense counsel's failure to move to dismiss the charges is unfathomable. The trial court's decision was based on defense counsel's agreement to the continuance. The court noted, "Defense has not objected to this, and in fact has embraced the idea that April Garcia should be here." RP II 313. The court recognized its authority to be, by its own term, a "hard-liner" by denying the continuance have the state fail in its proof and dismiss the case with prejudice. Instead, because "everyone" agreed to the continuance, the judge allowed it to happen. RP II 318.

(d) Defense counsel's ignorance of the law is no excuse.

An appellant making an ineffective assistance of counsel claim faces a strong presumption that counsel's representation was effective. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Legitimate trial

strategy or tactics cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Kylo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). However, “[w]here an attorney unreasonably fails to research or apply relevant statutes without any tactical purpose, that attorney’s performance is constitutionally deficient.” *In re Pers. Restraint of Yung–Cheng Tsai*, 183 Wn.2d. 91, 102, 351 P.3d 138 (2015). “ ‘An attorney’s ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.’ ” *Yung–Cheng Tsai*, 183 Wn.2d at 102 (quoting *Hinton v. Alabama*, __ U.S. __, 134 S.Ct. 1081, 1089, 188 L.Ed.2d 1 (2014)). Failing to conduct research falls below an objective standard of reasonableness where the matter is at the heart of the case. *Kylo*, 166 Wn.2d at 868 (2009) (failure to object to inaccurate self-defense instructions).

Here, defense counsel acknowledged he had “limited ability” to do research. RP IV 678. Perhaps it was this limited ability that led to counsel’s failure to recognize that the state, without witnesses, without the requisite proof, with no attempt to take measures to assure witnesses’ attendance, had no legal basis for a continuance and no case against Garcia. Where an attorney is ignorant of a point of law that is fundamental to the case and fails to perform basic research on the point,

his conduct is unreasonable. *Yung–Cheng Tsai*, 183 Wn.2d at 10. A flat dismissal of unproven charges at trial with jeopardy attached¹¹ is better than any defense that defense counsel could have presented on Garcia’s behalf.

Defense counsel’s constitutional ineffectiveness entitles Garcia to reversal of his convictions and dismissal of the charges with with prejudice.

2. Neither the felony harassment nor the unlawful possession of firearm information adequately apprised Garcia of the charges against him.

a. An information provides adequate notice to an accused only if it includes all essential elements of the charged offense.

A challenge to the sufficiency of the charging document to support a criminal conviction implicates the due process requirement of notice under Washington Constitution, article I, section 22 (amendment 10) and the Sixth Amendment to the Constitution of the United States. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). This court reviews challenges to charging documents de novo. *State v. Marcum*, 116 Wn. App. 526, 533, 66 P.3d 690, 694 (2003).

¹¹ A criminal defendant cannot be put in jeopardy twice for the same offense. U.S. Const. amend. V; Wash. Const. art. I, § 9. And jeopardy attaches when a jury is selected and sworn. *State v. Juarez*, 115 Wn. App. 881, 882-83, 64 P.3d 83 (2003).

An information is constitutionally sufficient “only if all essential elements of a crime, statutory and nonstatutory, are included in the document.” *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995); *Kjorsvik*, 117 Wn.2d at 97. “ ‘An essential element is one whose specification is necessary to establish the very illegality of the behavior charged.’ ” *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013). This essential elements rule exists “to apprise the accused of the charges against him or her and to allow the defendant to prepare a defense.” *Vangerpen*, 125 Wn.2d at 787. If the state fails to allege every essential element, then the information is insufficient and the charge must be dismissed without prejudice. *State v. Nonog*, 169 Wn.2d 220, 226 n.3, 237 P.3d 250 (2010).

When a charging document is challenged for the first time on appeal, it is liberally construed in favor of validity. *Kjorsvik*, 117 Wn.2d at 105. Under the liberal construction rule, where a missing element may be fairly implied from the language within the information, it will be upheld as proper. *Id.* at 104. Two questions persist on review:

- (1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so,
- (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?

Id. at 105–06.

The information must contain in some form language that can be construed as giving notice of the essential elements. And if it does not, “ ‘the most liberal reading cannot cure it.’ ” *State v. Moavenzadeh*, 135 Wn.2d 359, 362–63, 956 P.2d 1097 (1998) (quoting *State v. Campbell*, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995)). A person of common understanding must be able to understand what is intended by the language in the information. RCW 10.37.050(6). The act or omission charged as the crime must be stated with “such a degree of certainty as to enable the court to pronounce judgment upon a conviction according to the right of the case.” RCW 10.37.050(7); *Marcum*, 116 Wn. App. at 534.

b. The information charging felony harassment is defective.

To convict Garcia of felony harassment based on a threat to kill, RCW 9A.46.020 requires that the state prove the person threatened was placed in reasonable fear that the threat to kill would be carried out.¹² *State v. C.G.*, 150 Wn.2d. 604, 612, 80 P.3d 594 (2003); *State v. Mills*, 154 Wn.2d. 1, 10-11, 109 P.3d 415 (2005). In Garcia’s case the information does not mention the requirement that April must reasonably believe the

¹² The court’s instructions to the jury correctly instructed the jury that Garcia’s words or conduct placed April in “reasonable fear that the threat to kill would be carried out.” Supp. DCP, Court’s Instructions to the Jury, Instruction 13.

threat would be carried out. The information, liberally read, does not imply that either.

Because the information lacked an essential element, Garcia need not be prejudiced by the insufficient charging document. The remedy is reversal and dismissal without prejudice. *State v. Gill*, 103 Wn. App. 435, 442, 13 P.3d 646 (2000).

c. The information charging unlawful possession of a firearm is defective.

Knowledge is an essential element of unlawful possession of a firearm, despite its absence from the statute. *State v. Anderson*, 141 Wn.2d 357, 5 P.3d 1247 (2000); RCW 9.41.040. The state need not prove that the defendant knew that possession of a firearm was unlawful. But it must prove that the defendant knew he possessed the firearm. *Anderson*, 141 Wn.2d at 361. Because knowledge is an essential element, it must appear in the body of the information. *Kjorsvik*, 117 Wn.2d at 100; *Marcum*, 116 Wn. App. at 534–35. Alternatively, the information must include language from which the knowledge element can be inferred. Simply to state that the offense charged is unlawful possession is not enough.

Here, the information charged Garcia with the crime of unlawful possession of a firearm in that “he owned, had in his possession, or had in

his control any firearm after having previously been convicted in this state or elsewhere of any serious offense[.]” CP 2. The description of the act or omission allegedly constituting the crime does not contain the word “unlawfully.”¹³

This language distinguishes Garcia’s information from others which courts have found to be sufficient in a first-time, post-conviction challenge. In *State v. Cuble*, the information charged unlawful possession of a firearm in the first degree, committed as follows: “ [that Mr. Cuble] did unlawfully and feloniously own, have in his possession, or under his control a firearm....’ ” *State v. Cuble*, 109 Wn. App. 362, 367, 35 P.3d 404 (2001). Likewise, in *State v. Krajieski*, the charge was unlawful possession of a firearm. The conduct constituting the crime was that the defendant “ ‘did unlawfully and feloniously own, have in his possession, or under his control a firearm....’ ” *State v. Krajieski*, 104 Wn. App. 377, 381–82, 16 P.3d 69 (2001).

Because the information lacked an essential element, Garcia need not be prejudiced by the insufficient charging document. The remedy is reversal and dismissal without prejudice. *Marcum*, 116 Wn. App. at 536.

¹³ The court’s instructions to the jury correctly instructed the jury that Garcia “knowingly had a firearm in his possession or control.” Supp. DCP, Court’s Instructions to the Jury, Instruction 14.

3. The trial court had no basis to require Garcia obtain a substance abuse evaluation and avail himself of any recommended treatment.

a. A substance abuse evaluation and treatment condition can only be imposed if it is crime-related.

As a condition of community custody, the court ordered Garcia to undergo an evaluation for, and fully comply with, treatment for substance abuse. CP 27. Because the condition is not crime-related, and was imposed without a statutory required finding, it should be stricken from Garcia's judgment and sentence.

Although Garcia did not object to the substance abuse sentencing condition, sentencing errors may be raised 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 a specific community custody condition is a question of law reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

RCW 9.94A.703 sets out mandatory, waivable, and discretionary community custody conditions that the court may impose. Any conditions not authorized by statute must be crime-related. RCW 9.94A.703(3)(f). 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.” Before a court may impose a substance abuse evaluation, it must first find chemical dependency contributed to the offense.

When the court finds that the offender has chemical dependency, that has contributed to his or her offense, the court may, as a condition of the sentence and subject to available resources, order the offender to participate in rehabilitation programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which the offender has been convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender.

RCW 9.94A.607(1) (emphasis added).

The goal of statutory construction is to carry out legislative intent. *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). When the meaning of a statute is clear on its face, the appellate court assumes the Legislature means exactly what it says, giving criminal statutes literal interpretation. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001).

b. The record does not support, and the trial court did not find, chemical dependency contributed to the charged event.

The court did not find chemical dependency contributed to Garcia’s offenses. At judgment and sentence section 2.1, the court did not check this box:

[] The defendant has a chemical dependency that has contributed to the offense(s). RCW 9.94A.607.

CP 17. Under the plain terms of RCW 9.94A.607(1), the court had to make such a finding before it could order Garcia to obtain a substance abuse evaluation and follow all treatment recommendations.

There is no evidence that chemical dependency played a role in Garcia's offenses. The court made no finding it did. In the pre-sentence investigation prepared for sentencing, Garcia volunteered a relapse in methamphetamine use but had been clean of any drugs for a month prior to the incident. Supp. DCP, Risk Assessment Report. The Risk Assessment recommended Garcia engage in both a substance abuse evaluation and a domestic violence batterer's assessment. Risk Assessment, page 4. But the risk assessment did not make the mandatory link between the offenses and a chemical dependency. Risk Assessment Report.

Significantly, in making its sentencing recommendation to the court, the prosecutor did not ask the court to order a chemical dependency evaluation. RP IV 693-99.

Finally, the court did not articulate required community custody conditions except to tell Garcia he needed to read the conditions in the judgment and sentence. RP IV 708, 710. The lack of specific articulation deprived Garcia of a contemporaneous opportunity to object.

c. *The evaluation and treatment requirement must be stricken.*

Because chemical dependency was unrelated to the incident between Garcia and his wife, the evaluation and treatment obligation must be stricken from the judgment and sentence.

4. The trial court had no basis to impose alcohol-related community custody conditions.

The trial court also imposed conditions of community custody prohibiting Garcia from going to establishments where alcohol is the primary commodity for sale. CP 20, 28. Although Garcia did not object to the imposition of this condition, sentencing errors may be raised for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999); *Bahl*, 164 Wn.2d at 744. “As part of any term of community custody, the court may order an offender to . . . [c]omply with any crime-related prohibitions.” RCW 9.94A.703(3)(f). Whether a community custody condition is crime-related is reviewed for an abuse of discretion. *State v. Zimmer*, 146 Wn. App. 405, 413, 190 P.3d 121 (2008). The definition of a “[c]rime-related prohibition” is noted in Issue 4. See also *State v. O’Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

There was no evidence in the record that alcohol was a factor in the offenses. Therefore, the condition of community custody prohibiting

Garcia from going to establishments where alcohol is the main source of revenue is not a “[c]rime-related prohibition.” RCW 9.94A.030(10); *O’Cain*, 144 Wn. App. at 775. Accordingly, this court should remand this case with an order that the trial court strike the community custody condition. *O’Cain*, 144 Wn. App. at 775 (stating the remedy for an erroneous community custody condition was to strike it on remand).

5. The community custody condition prohibiting entry or remaining in places where controlled substances are sold, possessed, or consumed is unconstitutionally vague.

a. A sentencing condition is unconstitutionally vague if it does not provide adequate notice of what conduct is proscribed or allows for arbitrary enforcement.

Due process requires that individuals (1) receive adequate notice of what conduct is proscribed and (2) are protected from arbitrary enforcement. U.S. Const. amend. XIV; *State v. Moultrie*, 143 Wn. App. 387, 396, 177 P.3d 776 (2008). Ordinary people must be able to “understand what is and is not allowed.” *State v. Valencia*, 169 Wn.2d 782, 791, 239 P.3d 1059 (2010). A sentencing condition that does not comport with these requirements is unconstitutionally vague. *Moultrie*, 143 Wn. App. at 396.

On review, this Court does not presume a sentencing condition is constitutional. *Valencia*, 169 Wn.2d at 793. A condition must be stricken

if it is unconstitutionally vague, because a trial court has necessarily abused its discretion in imposing it. *Id.* at 793, 795.

b. The condition prohibiting “entry or remaining in areas where dangerous drugs, narcotics, or controlled substances are sold, possessed or consumed” does not provide adequate notice of what conduct is proscribed and allows for arbitrary enforcement.

The trial court imposed the following condition of community custody on Garcia: “shall not enter or remain in areas where dangerous drugs, narcotics, or controlled substances are being sold/purchased, possessed, and/or consumed.” CP 27. This condition should be stricken as unconstitutionally vague.

In *Moultrie*, the court held that a condition prohibiting the defendant from contacting “vulnerable, ill, or disabled adults” was unconstitutionally vague. *Id.* at 397-98. The court explained that the terms “are ambiguous and thereby fail to provide clear notice” of what would constitute a violation. *Id.* at 397.

In *Sansone*, the court held that a condition prohibiting a defendant from possessing “pornography” was unconstitutionally vague. *State v. Sansone*, 127 Wn. App. 630, 634, 111 P.3d 1251 (2005). The court reasoned, “The term has not been defined with sufficient definiteness such that ordinary people can understand what it encompasses.” *Id.* at 639.

Furthermore, “[t]he condition does not provide ascertainable standards of guilt to protect against arbitrary enforcement.” *Id.*

More recently in *Valencia*, our Supreme Court struck the following community custody condition as unconstitutionally vague:

Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, police scanners, and hand held electronic scheduling and data storage devices.

Valencia, 169 Wn.2d at 785. The court noted that the dictionary definition of “paraphernalia” broadly includes “personal belongings, articles of equipment, or appurtenances.” *Id.* at 794 (citing Webster’s Third New International Dictionary 1638 (2002)). The “vague scope of proscribed conduct fails to provide the petitioners with fair notice of what they can and cannot do.” *Id.*

Moreover, the breadth of potential violations under this condition offended the second prong of the vagueness test, rendering the condition unconstitutionally vague. Because the condition might encompass a wide range of everyday items, it did not provide ascertainable standards of guilt to protect against arbitrary enforcement. *Id.*

The “no enter or remain in [certain] areas condition” is similarly vague and subjects Garcia to arbitrary enforcement. Prohibiting Garcia from entering or remaining in areas where dangerous drugs, narcotics, or

controlled substances are sold, purchased, possessed, or consumed fails to give him fair notice of what he cannot do and does not provide ascertainable standards of guilt.

Under the Controlled Substance Act, a "controlled substance" means a drug, substance, or immediate precursor included in Schedules I through V as set forth in federal or state laws, or federal or commission rules. RCW 69.50.1011(e). A controlled substance can be something as innocuous as a low dose of codeine (schedule V) in a prescribed cough suppressant.

"Narcotic drugs" are controlled substances produced via extraction from substances of vegetable origins, from chemical synthesis, or a combination thereof. RCW 69.50.101(ee). Tylenol 3, a combination of acetaminophen and codeine, is a narcotic. Vicodin, a narcotic, is a combination of hydrocodone and acetaminophen and is the most prescribed drug in the United States. <http://www.goodrx.com/>.

"Dangerous drug" is not defined in the Revised Code of Washington. RCW 69.40 references dangerous drugs in its title, "Poison and Dangerous Drugs." None of the sections under the title use the term "dangerous drugs." Rather, RCW 69.40 mostly refers to penalties for poisoning food.

Controlled substances, narcotics, and, likely, “dangerous drugs” are legal and found in everyday circumstances. Garcia could easily find himself in violation for engaging in innocuous and legal behavior.

For example, one community corrections officer might believe Garcia cannot visit a sick friend in a hospital because narcotics and controlled substances are possessed and consumed by hospital patients. Another community corrections officer might believe Garcia cannot shop at Costco or Safeway because both stores commonly contain pharmacies which sell controlled substances. Yet another community corrections officer might believe Garcia cannot enter a stand-alone pharmacy to pick up his own lawful prescription for a controlled substance because controlled substances are sold at pharmacies and people who lawfully purchase controlled substances sometimes remain at pharmacies while their prescriptions are filled.

c. The “shall not enter or remain” condition must be stricken.

A condition that is so broad and leaves so much to the discretion of individual community corrections officers is unconstitutionally vague. *Valencia*, 169 Wn.2d at 795. This “shall not enter or remain” condition fails to provide notice of precisely what conduct Garcia must avoid, and allows for arbitrary enforcement. Accordingly the condition prohibiting

“entering or remaining in areas where dangerous drugs, narcotics, and controlled substances are sold, purchased, or consumed” should be stricken from Garcia’s judgment and sentence.

6. The trial court erred in failing to enter written findings of fact and conclusions of law in support of the exceptional sentence.

a. Written findings of fact and conclusions of law to support an exceptional sentence are mandatory.

The SRA¹⁴ imposes a mandatory duty on the trial court to enter written findings of fact and conclusions of law whenever it imposes an exceptional sentence in a criminal case. RCW 9.94A.535 expressly provides: “Whenever a sentence outside the standard sentence range is imposed, the court *shall* set forth the reasons for its decision in written findings of fact and conclusions of law.” (emphasis added).

The trial court’s duty to enter written findings and conclusions when imposing an exceptional sentence is a mandatory duty that may not be circumvented. *State v. Friedlund*, 182 Wn.2d 388, 395, 341 P.3d 280 (2015). The SRA’s requirement that the court set forth its reasons for imposing an exceptional sentence in written findings of fact and conclusions of law has been part of the SRA from its inception. *Id.* at 394

¹⁴ Sentencing Reform Act. RCW 9.94A.020

(citing Laws of 1981, ch. 137, § 12(3)). The written findings provision requires exactly what it says—the entry of “written findings.” *Friedlund*, at 394.

A court’s oral ruling cannot satisfy the mandate of the statute. To permit a court’s verbal reasoning to substitute for written findings ignores the statute. *Id.* “[A] trial court’s oral or memorandum opinion is no more than an expression of its informal opinion at the time it is rendered. It has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment.” *Id.* A written judgment and sentence, by contrast, is a final order subject to appeal. *Id.* Allowing a trial court to rely solely on its oral ruling would “deprive defendants of the finality accorded by the inclusion of written findings in the court’s formal judgment and sentence.” *Id.*

In addition, allowing trial courts to ignore the SRA’s written findings requirement “would also run contrary to the SRA’s explicit statutory purpose of ‘mak[ing] the criminal justice system accountable to the public.’” *Id.* at 395. (quoting RCW 9.94A.010). The criminal court rules require a court’s written findings entered to support an exceptional sentence be sent to the Washington State Sentencing Guidelines Commission with the judgment and sentence. *Id.* (citing CrR 7.2(d) (“If the sentence imposed departs from the applicable standard sentence

range, the court’s written findings of fact and conclusions of law shall also be supplied to the Commission.”). Without written findings, the Sentencing Guidelines Commission and the public at large cannot readily determine the reasons behind an exceptional sentence, greatly hampering the public accountability that the SRA requires. *Id.*

b. Garcia’s case must be remanded.

The remedy for a trial court’s failure to enter written findings of fact and conclusions of law to support an exceptional sentence is to remand the case for entry of those findings and conclusions. *Id.*

Here, the trial court imposed an exceptional sentence but never entered written findings of fact and conclusions of law as required by the SRA and the policies it embodies. *Id.* at 394-95. RCW 9.94A.535. The remedy is to remand the case to the trial court for entry of those written findings and conclusions. *Id.* at 395.

7. The court should remand for correction of a scrivener’s error in the judgment and sentence.

a. Scrivener’s errors may be challenged for the first time on appeal.

A defendant may challenge an erroneous sentence for the first time on appeal. *Bahl*, 164 Wn.2d at 744. Scrivener’s errors are clerical errors that result from mistake or inadvertence, especially in writing or copying something on the record. *In re Personal Restraint of Mayer*, 128 Wn. App.

694, 701, 117 P.3d 353 (2005). CrR 7.8(a) provides that clerical errors in judgments, orders, or other parts of the record may be corrected by the court at any time on its initiative or on the motion of any party. The remedy for a scrivener's error in a judgment and sentence is remand to the trial court for correction. CrR 7.8(a); *State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.3d 1280 (2010).

b. The felony harassment sentencing error should be corrected.

The trial court ordered Garcia to serve 12 months on his felony harassment conviction. RP IV 708. The judgment and sentence lists the sentence as 12 days. CP 19. The reference to days rather than months is error and should be corrected on remand.

8. If the State substantially prevails on appeal, any request for appellate costs should be denied.

If Garcia does not substantially prevail on appeal, he requests that no costs of appeal be authorized under Title 14 of the Rules of Appellate Procedure. The Court of Appeals has discretion to deny a cost bill even where the state is the substantially prevailing party on appeal. *State v. Sinclair*, 192 Wn. App. 380, 391, 367 P.3d 612, *review denied*, 185 Wn.2d 1034 (2016); RCW 10.73.160(1) (the “court of appeals . . . may require an adult . . . to pay appellate costs.”). Imposing costs against indigent defendants raises problems well documented in *Blazina*:

“increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.” *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). *Sinclair* recognized the concerns expressed in *Blazina* applied to appellate costs and it is appropriate for appellate courts to be mindful of them in exercising discretion. *Sinclair*, 192 Wn. App. at 391.

The trial court found Garcia qualified for indigent defense at trial and on appeal. Supp. DCP, Order Appointing Counsel (trial), Motion for Order of Indigency (appeal), Order of Indigency (appeal). Importantly, there is a presumption of continued indigency throughout the review process. *Sinclair*, 192 Wn. App. at 393; RAP 15.2(f). As in *Sinclair*, there is no trial court order finding Garcia’s financial condition has improved or is likely to improve. *Sinclair*, 192 Wn. App. at 393. Garcia is in DOC serving a 60 month sentence. CP 19. Given the serious concerns recognized in *Blazina* and *Sinclair*, this court should soundly exercise its discretion by denying the state’s request for appellate costs in this appeal involving an indigent appellant.

E. CONCLUSION

All three of Garcia’s convictions should be reversed and dismissed with prejudice based on counsel’s ineffectiveness in failing to move for

dismissal of the case when the state could not proceed without the testimony of April and the children.

Various relief is available to the court in the alternative.

The court should reverse and remand the felony harassment and the unlawful possession of a firearm in the second degree for failure to give adequate notice of all elements of each charge in the information.

This court should order the trial court to strike the community custody condition requiring Garcia partake of an evaluation for substance abuse treatment.

This court should order the trial court to strike the community custody condition prohibiting Garcia from going to establishments where alcohol is the main source of revenue.

This court should order the trial court to strike the community custody condition that Garcia not enter or remain in areas where dangerous drugs, narcotics, or controlled substances are sold, purchased, possessed, or consumed.

This court should remand for the trial court to enter findings of fact and conclusions of law on the court's finding of an exceptional sentence.

On remand, the scrivener's error in the judgment and sentence should be corrected to accurately reflect a sentence of months on the felony harassment.

Finally, this court should not impose any appellate costs on Garcia if the state substantially prevails on appeal.

Respectfully submitted November 2, 2016.

A handwritten signature in black ink, appearing to read 'LISA E. TABBUT', written over a horizontal line.

LISA E. TABBUT/WSBA 21344
Attorney for Richard Garcia

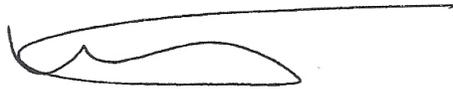
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) Kittitas County Prosecutor's Office, at prosecutor@co.kittitas.wa.us and Doug.Mitchell@co.kittitas.wa.us; (2) the Court of Appeals, Division III; and (3) I mailed it to Richard Garcia/DOC#387796, Airway Heights Corrections Center, PO Box 1899, Airway Heights, WA 99001-1899.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed November 2, 2016, in Winthrop, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Richard Garcia, Appellant