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Court of Appeals
Division III
State of Washington

No. 34638-2-III

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

STATE OF WASHINGTON,

Respondent,

v.

JULIAN MIGUEL JUAREZ,

Appellant.

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

The Honorable Judge Michael G. McCarthy

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

A domestic violence no contact order prohibited Julian Miguel Juarez from contacting Eugenia Claudia Gutierrez. On a single date and time in 2016, Mr. Juarez had contact with Ms. Gutierrez. The contact lasted minutes. From this contact, the State charged Mr. Juarez with two counts of violation of a protection order, and one count of second degree assault. A jury found Mr. Juarez guilty as charged. The jury also found that the crimes were domestic violence, and the existence of an aggravating factor. Mr. Juarez now appeals, arguing: (1) one of his convictions for violation of a protection order (count 1) should be vacated, because the jury instructions and the State's closing arguments permitted the jury to use the second degree assault as the predicate assault for this conviction; (2) he was denied his constitutional right to effective assistance of counsel when his attorney failed to request a lesser included jury instruction on fourth degree assault; and (3) entry of convictions on both counts of violation of a protection order violate his double jeopardy rights, or in the alternative, constitute same criminal conduct. Mr. Juarez also challenges the length of his sentence, legal financial obligations, and preemptively objects to the imposition of any appellate costs.

B. ASSIGNMENTS OF ERROR

1. The trial court erred by convicting Mr. Juarez of assault in violation of a protection order (count 1), because the jury instructions and the State's closing arguments permitted the jury to use the second degree assault (count 3) as the predicate for the assault in violation of a protection order conviction (count 1).

2. Mr. Juarez was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to request a jury instruction for fourth degree assault, a lesser-included offense of second degree assault (count 3).

3. The trial court erred by convicting Mr. Juarez of both assault in violation of a protection order (count 1) and felony violation of a protection order (count 2), where entry of both convictions violated Mr. Juarez's double jeopardy rights.

4. The trial court erred in finding Mr. Juarez's convictions for assault in violation of a protection order (count 1) and felony violation of a protection order (count 2) do not constitute same criminal conduct.

5. The trial court erred in sentencing Mr. Juarez beyond the statutory maximum sentence for both assault in violation of a protection order (count 1) and felony violation of a protection order (count 2).

6. The trial court erred in imposing a total term of confinement and community custody that exceeds the statutory maximum for both assault in violation of a protection order (count 1) and felony violation of a protection order (count 2).

7. The trial court erred by requiring Mr. Juarez to pay medical care costs while incarcerated, despite having found him indigent, imposing only mandatory costs, and capping the costs of incarceration at \$200.

8. An award of costs on appeal against Mr. Juarez would be improper.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the trial court erred by convicting Mr. Juarez of assault in violation of a protection order (count 1), because the jury instructions and the State's closing arguments permitted the jury to use the second degree assault (count 3) as the predicate for the assault in violation of a protection order conviction (count 1).

Issue 2: Whether Mr. Juarez was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to request a jury instruction for fourth degree assault, a lesser-included offense of second degree assault (count 3).

Issue 3: Whether the trial court erred by convicting Mr. Juarez of both assault in violation of a protection order (count 1) and felony violation of a protection order (count 2), where entry of both convictions violated Mr. Juarez's double jeopardy rights.

Issue 4: Whether the trial court erred in finding Mr. Juarez's convictions for assault in violation of a protection order (count 1) and felony violation of a protection order (count 2) do not constitute same criminal conduct.

Issue 5: Whether the trial court erred in sentencing Mr. Juarez beyond the statutory maximum sentence for both assault in violation of a protection order (count 1) and felony violation of a protection order (count 2).

Issue 6: Whether the trial court erred in imposing a total term of confinement and community custody that exceeds the statutory maximum for both assault in violation of a protection order (count 1) and felony violation of a protection order (count 2).

Issue 7: Whether the trial court erred by requiring Mr. Juarez to pay medical care costs while incarcerated.

Issue 8: Whether this Court should refuse to impose costs on appeal.

D. STATEMENT OF THE CASE

Julian Miguel Juarez and Eugenia Claudia Gutierrez are the parents of two daughters, both under the age of eighteen. (RP¹ 47). Effective July 15, 2014 through July 15, 2019, a domestic violence no contact order prohibited Mr. Juarez from contacting Ms. Gutierrez. (RP 48, 80, 125; Pl. Ex. 8). After this order was imposed, Mr. Juarez remained involved with co-parenting his daughters. (RP 48-49, 55).

On January 21, 2016, Ms. Gutierrez made arrangements with Mr. Juarez's mother to meet up with her that day in order for Mr. Juarez to see his daughters. (RP 16, 49-51, 54, 65, 69). Ms. Gutierrez brought their daughters in her car to meet Mr. Juarez's mother at the designated location. (RP 16, 18-21, 51-53, 69, 104; Pl.'s Ex. 2). Mr. Juarez's mother arrived in her car, and pulled in next to Ms. Gutierrez's car. (RP 53-54). When Ms. Gutierrez got out of her car, Mr. Juarez got out from the back seat of his mother's car. (RP 16-17, 54-55, 69).

According to Ms. Gutierrez, Mr. Juarez told her she had some explaining to do, and then pushed her against her car. (RP 55-56, 65, 69-70). Also according to Ms. Gutierrez, she told Mr. Juarez she was not

¹ The Report of Proceedings consists of three volumes containing the jury trial, reported by Joan E. Anderson, and one volume containing a motion hearing and the sentencing hearing, transcribed by Amy M. Brittingham. The three volumes containing the jury trial are referred to herein as "RP." The one volume containing a motion hearing and the sentencing hearing is referred to herein as "2 RP."

going with him, and he pulled her hair. (RP 56-57, 70). Mr. Juarez punched Ms. Gutierrez in the face, slapped her, and told her to get into her car. (RP 16-18, 57-58, 60-61, 64-65, 69-72). Mr. Juarez let her go, and she went towards the front of her car. (RP 17-18, 58, 64). Mr. Juarez grabbed her by the hair. (RP 17-18, 58-59, 75-76). Mr. Juarez's mother then got out of her car, told Mr. Juarez to stop, and the two left in her car. (RP 16, 59-60, 71).

One eyewitness, Melanie Merrill, saw a male punch a female in the face more than once and grab her hair. (RP 32-34, 36-37, 39, 87-89, 99-101, 104; Def. Ex. 19). A second eyewitness, Christina Acevado, saw a male pull a female's hair. (RP 32-33, 116-117, 121-124).

The State charged Mr. Juarez with three counts: assault in violation of a protection order under RCW 26.50.110(4) (count 1); felony violation of a protection order under RCW 26.50.110(5) (count 2); and second degree assault under RCW 9A.36.021(1)(e) (count 3). (CP 24-25).

For Count 1, the State alleged Mr. Juarez violated a protection order protecting Ms. Gutierrez, and "intentionally assaulted [Ms.] Gutierrez in a manner that does not amount to assault in the first or second degree." (CP 24). For Count 2, the State alleged Mr. Juarez violated a protection order protecting Ms. Gutierrez, and that he has "at least two previous convictions . . . for violating provisions of a court order" issued

under the applicable statutes. (CP 25). For Count 3, the State alleged Mr. Juarez, “with intent to commit the felony of Unlawful Imprisonment . . . intentionally assaulted [Ms.] Gutierrez.” (CP 25).

The State also alleged Mr. Juarez committed each offense “against a family or household member” (domestic violence) and an aggravating factor, that each offense “occurred within the presence, sight, or sound of the victim’s or the offender’s minor children under the age of eighteen years. . . .” (CP 24-25).

Around the time he was initially charged, the trial court entered an order finding Mr. Juarez indigent but able to contribute and appointed an attorney at public expense. (CP 8-9, 142). The order stated:

Indigent but able to contribute. Defendant is able to contribute but is not able to retain counsel without substantial hardship. [CrR 3.1(d)]. An attorney will be appointed at public expense. If Defendant is convicted, the court may order an attorney fee recoupment commensurate with the Defendant’s ability to pay.

(CP 142).

The case proceeded to a jury trial. (RP 11-180). Witnesses testified consisted with the facts stated above. (RP 11-125).

In addition, Ms. Gutierrez testified the incident with Mr. Juarez lasted “like five, maybe ten, not even ten minutes.” (RP 80). She testified Mr. Juarez punched her, and “[h]e would stop, tell me to get into the car, and then he would hit me again.” (RP 57). Ms. Gutierrez testified that

when she went towards the front of her car and Mr. Juarez was pulling her hair, she fell to the ground and “[h]e was kind of dragging me by the hair, but at the same time I was kind of crawling.” (RP 58-59). She testified it was her impression that Mr. Juarez expected her to get into her car with him. (RP 61).

Ms. Gutierrez acknowledged she has a prior conviction for shoplifting, which was a theft conviction as a juvenile. (RP 78-79).

Ms. Merrill testified she saw a male hitting a female, pushing her, and punching her in the face. (RP 87-88, 96-99; Def. Ex. 19). She testified she heard shouting, but she could not hear what was being said, except that she heard the female say “stop.” (RP 87).

Ms. Merrill testified she witnessed the entire incident. (RP 95). She testified she did not see the male try to drag the female anywhere, but rather, the male was holding the female and hitting her. (RP 101, 104; Def. Ex. 19). When asked if she saw the male pull the female’s hair, Ms. Merrill responded “I wouldn’t say pull as much as he grabbed it so he could get ahold of her.” (RP 104).

Ms. Acevado testified she heard a female yelling “call 911, help.” (RP 116). She testified she saw a male pull a female’s hair from behind, and that she saw the male get into the car shortly after. (RP 116-117, 121, 124). Ms. Acevado testified the male and the female were standing up at

the time, and that she did not see anyone on the ground or anyone being dragged. (RP 117, 121-122).

Mr. Juarez stipulated that “prior to January 21, 2016, [he] had been convicted of the misdemeanor violation of a no contact order on two separate occasions[,]” and this stipulation was read to the jury during the State’s case-in-chief. (CP 36; RP 7-8, 124).

Mr. Juarez did not call any witnesses. (RP 125, 132, 134-135, 141-142).

The trial court instructed the jury that “[a] person commits the crime of Assault in Violation of a No Contact Order when he knows of the existence of a no-contact order and knowingly violates a provision of the order, and the person’s conduct was an assault.” (CP 84; RP 151).

The trial court instructed the jury that in order to convict Mr. Juarez of the crime of “Assault in Violation of a No Contact Order in Count 1,” it had to find the following elements beyond a reasonable doubt:

- (1) That on or about January 21, 2016, there existed a no-contact order applicable to the defendant;
- (2) That the defendant knew of the existence of this order;
- (3) That on or about said date, the defendant knowingly violated a provision of this order;
- (4) That the defendant’s conduct was an assault
- (5) That the defendant’s act occurred in the State of Washington.

(CP 85; RP 151-152).

The trial court instructed the jury that “[a] person commits the crime of Second Degree Assault when he intentionally assaults another with intent to commit a felony.” (CP 90; RP 154).

The trial court instructed the jury that in order to convict Mr. Juarez of the crime of “Second Degree Assault in Count 3,” it had to find the following elements beyond a reasonable doubt:

- (1) That on or about January 21, 2016, the defendant assaulted [Ms.] Gutierrez;
- (2) That the assault was committed with intent to commit Unlawful Imprisonment and
- (3) That this act occurred in the State of Washington.

(CP 91; RP 154-155).

The trial court instructed the jury that “Unlawful Imprisonment is a felony[.]” and gave the following instruction defining unlawful imprisonment:

A person commits the crime of unlawful imprisonment when he knowingly restrains the movements of another person in a manner that substantially interferes with the other person’s liberty if the restraint was without legal authority and was without the other person’s consent or accomplished by physical force or intimidation. The offense is committed only if the person acts knowingly in all these regards.

(CP 92-93; RP 155).

Defense counsel did not request, and the trial court did not give, a jury instruction for fourth degree assault as a lesser-included offense of second degree assault. (CP 78-99; RP 136-141, 147-160).

In its closing argument, the State argued “Count 1 is assault in violation of no contact order [sic]. So there needs to be an assault absolutely.” (RP 163). In its argument addressing Count 1, the State characterized the incident between Mr. Juarez and Ms. Gutierrez as one continuous assault. (RP 163-169).

The State argued:

Ms. Gutierrez was not free to leave. She was being restrained by Mr. Juarez. Substantially interfered - - her liberty was substantially interfered. She was trying to free herself. If you look at the context of that concept of her liberty being restrained, there’s this initial kind of get in the car, get in the car thing. It’s clear what the intent of Mr. Juarez is. It’s to get her in the car. Then it moves through the assault to the grassy area where it becomes obvious that it’s physically related to moving her, restraining her, substantially interfering with her liberty.

(RP 167-168).

In its closing argument, the defense argued that Mr. Juarez did not act with the intent to commit unlawful imprisonment. (RP 172-178).

The jury found Mr. Juarez guilty as charged. (CP 100-102, 112; RP 183-184). The jury also returned special verdicts for each count, finding that Mr. Juarez and Ms. Gutierrez were “family or household members” at the time of the offenses and that each offense “was

committed within the sight or sound of the victim's children who were under the age of 18 years[.]" (CP 98, 103-108, 113; RP 184).

At sentencing, defense counsel argued that all three counts should be found to encompass the same criminal conduct. (2 RP 20-21). The trial court disagreed, and found that only count 1 and count 3 encompassed the same criminal conduct. (CP 113; 2 RP 12-13, 21).

The State requested the trial court impose "the statutory maximum on count 1 of sixty months," and no community custody on count 1 and count 2 "because there'd be no time remaining." (2 RP 23-24). Defense counsel also argued the maximum sentence for count 1 and count 2 is 60 months. (2 RP 25).

For count 1 and count 2, the trial court sentenced Mr. Juarez to 60 months, plus 12 months for aggravating circumstances, for a total of 72 months confinement on each count. (CP 114; 2 RP 27). The State asked for clarification and informed the trial court "it's a statutory maximum of sixty. . . ." (2 RP 29). The trial court stated "I think the twelve aggravating can be used as more than sixty." (2 RP 29).

The trial court imposed community custody conditions, "as to Count 3 only." (CP 115; 2 RP 27). The Judgment and Sentence imposes community custody as follows: "[t]he defendant shall serve community

custody for a period of 12 months on Counts 1 and 2 and 18 months on Count 3[.]” (CP 114).

Defense counsel asked the trial court “to reduce whatever you can in the financial obligations to impose no cost of incarceration or medical assistance[.]” (2 RP 26). Defense counsel argued Mr. Juarez owes financial obligations for prior convictions, will owe child support when he gets out of prison, and “[h]is ability to get work with these convictions is going to be seriously impaired.” (2 RP 25-26).

The trial court imposed only mandatory costs, and capped the costs of incarceration at \$200. (CP 116; 2 RP 28). The Judgment and Sentence contains the following boilerplate language:

2.7 Financial Ability: 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 that the defendant is an adult and is not disabled and therefore has the ability or likely future ability to pay legal financial obligations imposed herein. RCW 10.01.160.

....

4.D.5 Costs of Medical Care: In addition to the above costs, the court finds that the defendant has the means to pay for any costs of medical care incurred by Yakima County on behalf of the defendant, and orders the defendant to pay such medical costs as assessed by the Clerk. Such costs are payable only after restitution costs, assessments and fines listed above are paid. RCW 70.48.130.

(CP 113, 116).

The Judgment and Sentence also contains the following boilerplate language: “[a]n award of costs on appeal against the defendant may be added to the total financial obligations.” (CP 116).

Mr. Juarez timely appealed. (CP 124-132). The trial court made a finding that Mr. Juarez is indigent and entered an Order of Indigency, granting Mr. Juarez a right to review at public expense. (CP 136-137; 2 RP 28-29).

E. ARGUMENT

Issue 1: Whether the trial court erred by convicting Mr. Juarez of assault in violation of a protection order (count 1), because the jury instructions and the State’s closing arguments permitted the jury to use the second degree assault (count 3) as the predicate for the assault in violation of a protection order conviction (count 1).

In count 1, the State charged Mr. Juarez with assault in violation of a protection order under RCW 26.50.110(4). (CP 24). In count 3, the State charged Mr. Juarez with second degree assault under RCW 9A.36.021(1)(e). (CP 25).

“Whenever an order is granted under this chapter . . . and the respondent or person to be restrained knows of the order, a violation of any of the following provisions of the order is a gross misdemeanor, except as provided in subsections (4) and (5) of this section[.]” RCW 26.50.110(1)(a).

Under RCW 26.50.110(4), “[a]ny assault that is a violation of an order issued under this chapter . . . *and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021* is a class C felony[.]” RCW 26.50.110(4) (emphasis added). “The statute clearly excludes the use of first and second degree assaults to elevate violation of a no-contact order from a gross misdemeanor to a felony.” *State v. Azpitarte*, 140 Wn.2d 138, 141, 995 P.2d 31 (2000). “Thus, if a defendant is charged and convicted under RCW 9A.36.011 or 9A.36.021, the statute proscribes the use of that assault to enhance a no-contact violation to a felony.” *State v. Ward*, 148 Wn.2d 803, 812, 64 P.3d 640 (2003); *see also State v. Olsen*, 187 Wn. App. 149, 156, 348 P.3d 816 (2015) (acknowledging that “[t]he Washington Supreme Court has twice held that if a defendant is charged and convicted of first or second degree assault, that conviction cannot serve as the predicate to make the violation a felony.”) (internal quotation marks omitted) (*quoting Ward*, 148 Wn.2d at 812 (*quoting Azpitarte*, 140 Wn.2d at 141)).

In *Azpitarte*, there were two separate assaults alleged: first, that the defendant pulled the victim’s hair, and second, that the defendant pulled the victim’s arm. *Azpitarte*, 140 Wn.2d at 139-40. The State charged the defendant, in relevant part, with one count of second degree assault based on the hair pulling, and one count of felony violation of a court order. *Id.*

at 140. The felony violation of a court order charge was based upon the defendant's two assaults of the victim. *Id.* The State did not charge a separate assault based upon the arm pulling. *Id.*

In its closing argument, the State told the jury it could rely on either assault for the felony violation of a court order charge. *Id.* The jury instructions did not specify "which assault or what degree of assault" was necessary in order to find the defendant guilty of this charge. *Id.* "The instructions only stated that felony violation required an intentional assault and jury unanimity in regards to a particular assault." *Id.* The defendant was convicted of both second degree assault and felony violation of a court order. *Id.*

On appeal, the defendant challenged his conviction for felony violation of a court order, arguing that second degree assault cannot be the predicate assault for this conviction. *Id.* Our Supreme Court agreed, finding that "[t]he felony verdict here must be set aside because the jury could have relied on [the defendant's] second degree assault in finding him guilty of felony violation of a court order." *Id.* at 142. The Court held "[t]he statute clearly states that second degree assault cannot serve as the predicate to make the violation a felony." *Id.* at 141. Accordingly, the Court vacated the defendant's conviction for felony violation of a court order. *Id.* at 142.

Here, as in *Azpitarte*, the jury instructions and the State’s closing arguments permitted the jury to use the second degree assault (count 3) as predicate for the assault in violation of a protection order conviction (count 1). *See Azpitarte*, 140 Wn.2d at 140-142.

The jury instructions did not specify the degree of assault necessary to find Mr. Juarez guilty of assault in violation of a protection order (count 1). (CP 84-85; RP 151-152). The jury was only instructed that it had to find “[t]hat the defendant’s conduct was an assault[.]” (CP 85; RP 151-152).

In its closing argument, addressing assault in violation of a protection order (count 1), the State characterized the incident between Mr. Juarez and Ms. Gutierrez as one continuous assault. (RP 163-169). The State did not argue there were two or more distinctive assaults. (RP 161-172, 178-180). Thus, the State argued the jury could rely upon to entire incident between Mr. Juarez and Ms. Gutierrez to find an assault occurred for the purpose of count 1.

Furthermore, the State did not limit its argument for count 1 to assaultive conduct that did not encompass assault committed with intent to commit unlawful imprisonment. (CP 90-93; RP 154-155, 163-169). The State did not tell the jury it could not use the second degree assault of Mr. Gutierrez to find Mr. Juarez guilty of count 1. (RP 161-172, 178-180).

Because the jury instructions and the State’s closing arguments permitted the jury to use the second degree assault (count 3) as the predicate for the assault in violation of a protection order conviction (count 1), Mr. Juarez’s conviction for assault in violation of a protection order (count 1) should be vacated. *See Azpitarte*, 140 Wn.2d at 140-142; *see also Ward*, 148 Wn.2d at 811-12; *see also Olsen*, 187 Wn. App. at 156.

Issue 2: Whether Mr. Juarez was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to request a jury instruction for fourth degree assault, a lesser-included offense of second degree assault (count 3).

When a defendant is charged with an offense consisting of varying degrees, the jury may find that person not guilty of the higher degree that has been charged and guilty of an inferior degree thereto. RCW 10.61.003. To benefit from this statute, the defendant needs to request an instruction on the inferior offense. *See e.g., State v. Crittenden*, 146 Wn. App. 361, 366, 189 P.3d 849 (2008) (“To find an accused guilty of a lesser included offense, the jury must be instructed on its elements.”)

A defendant is entitled to a lesser-included offense jury instruction if two conditions are met. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382, 385 (1978). First, “[t]o satisfy the legal requirement, the proponent must show that the proposed instruction describes an offense that is an inferior degree of the charged offense, or, alternatively, that the

proposed instruction describes an offense each element of which is included within the charged offense.” *State v. McDonald*, 123 Wn. App. 85, 88-89, 96 P.3d 468 (2004) (internal citations omitted). Second, “[t]o satisfy the factual requirement, the proponent must show that when the evidence is viewed in the light most favorable to him, the jury could find that even though the defendant is not guilty of the charged offense, he is guilty of the inferior or lesser offense embodied in the proposed instruction.” *Id.* at 89 (citing *State v. Tamalini*, 134 Wn.2d 725, 732, 953 P.2d 450 (1998) (evidence must support inference that defendant committed the lesser offense “instead of” the charged offense)).

Here, Mr. Juarez was charged with second degree assault as follows: “with intent to commit the felony of Unlawful Imprisonment, you intentionally assaulted [Ms.] Gutierrez.” (CP 25); *see also* RCW 9A.36.021(1)(e). “A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.” RCW 9A.36.041(1).

Fourth degree assault is a lesser degree of second degree assault, and second degree assault includes the elements the State must prove for fourth degree assault. The legal requirement of the *Workman* test is therefore satisfied. *See McDonald*, 123 Wn. App. at 88-89 (setting forth

the *Workman* test); *see also Workman*, 90 Wn.2d at 447-48 (stating “each of the elements of the lesser offense must be a necessary element of the offense charged.”).

The factual requirement of the *Workman* test is also satisfied: when the evidence is viewed in the light most favorable to Mr. Juarez, the evidence supports an inference that fourth degree assault was committed. *See McDonald*, 123 Wn. App. at 89 (setting forth this factual requirement); *see also Workman*, 90 Wn.2d at 448 (stating “the evidence in the case must support an inference that the lesser crime was committed.”)

To find Mr. Juarez guilty of second degree assault, the jury had to find that he assaulted Ms. Gutierrez, “with intent to commit Unlawful Imprisonment.” (CP 91; RP 154-155); *see also* RCW 9A.36.021(1)(e). “A person commits the crime of unlawful imprisonment when he knowingly restrains the movements of another person in a manner that substantially interferes with the other person’s liberty if the restraint was without legal authority and was without the other person’s consent or accomplished by physical force or intimidation.” (CP 92-93; RP 155); *see also* RCW 9A.40.040 (unlawful imprisonment); RCW 9A.40.010(6) (defining restraint). A substantial interference in this context means “a ‘real’ or ‘material’ interference with the liberty of another as contrasted

with a petty annoyance, a slight inconvenience, or an imaginary conflict.”
State v. Robinson, 20 Wn. App. 882, 884, 582 P.2d 580 (1978), *aff’d*, 92
Wn.2d 357, 597 P.2d 892 (1979).

When the testimony of the two eyewitnesses, Ms. Merrill and Ms. Acevado, is viewed in the light most favorable to Mr. Juarez, the evidence supports an inference that fourth degree assault was committed. *See* RCW 9A.36.041(1) (fourth degree assault). Neither eyewitness testified Mr. Juarez knowingly restrained Ms. Gutierrez in a manner that substantially interfered with her liberty. *See* RP 84-106, 114-124; *see also* CP 92-93; RP 155 (defining unlawful imprisonment); RCW 9A.40.040 (unlawful imprisonment); RCW 9A.40.010(6) (defining restraint).

Eyewitness Ms. Merrill testified she heard shouting, but she could not hear what was being said, except that she heard the female say “stop.” (RP 87). She testified she did not see the male try to drag the female anywhere, but rather, the male was holding the female and hitting her. (RP 101, 104; Def. Ex. 19). Eyewitness Ms. Acevado only witnessed the male pull a female’s hair from behind, and testified that she did not see anyone on the ground or anyone being dragged. (RP 116-117, 121, 124). She also testified she heard a female yelling for help. (RP 116).

At most, the testimony of Ms. Merrill and Ms. Acevado shows that Mr. Juarez assaulted Ms. Gutierrez. Holding Ms. Gutierrez to hit her, and

pulling her hair, was not restraint that substantially interfered with her liberty. *See* RP 155 (defining unlawful imprisonment); RCW 9A.40.040 (unlawful imprisonment); RCW 9A.40.010(6) (defining restraint); *see also Robinson*, 20 Wn. App. at 884 (defining what constitutes a “substantial interference”).

The only evidence that Mr. Juarez assaulted Ms. Gutierrez with intent to commit Unlawful Imprisonment, knowingly restraining her in a manner that substantially interfered with her liberty, came from the testimony of Ms. Gutierrez. (RP 55-59, 61, 65, 69-70). However, Mr. Gutierrez acknowledged she has a prior conviction for shoplifting, which was a theft conviction as a juvenile. (RP 78-79). “[C]rimes of theft involve dishonesty and are *per se* admissible for impeachment purposes under ER 609(a)(2).” *State v. Ray*, 116 Wn.2d 531, 545, 806 P.2d 1220 (1991).

Given Ms. Gutierrez’s crime of dishonesty, and the fact that her testimony regarding restraint was not corroborated by Ms. Merrill or Ms. Acevado, viewing the evidence in the light most favorable to Mr. Juarez, the evidence supports an inference that fourth degree assault was committed.

Mr. Juarez is raising this error for the first time on appeal because he was denied his constitutional right to effective assistance of counsel

when his defense attorney failed to request the lesser included instruction on fourth degree assault at trial. To establish ineffective assistance of counsel, Mr. Juarez must prove the following two-prong test:

(1) [D]efense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) 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.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

When the failure to instruct the jury on a lesser-included offense is raised as an ineffective assistance of counsel claim, “[t]he salient question . . . is not whether [the defendant] is entitled to such instructions but, rather, whether defense counsel was ineffective in forgoing such instructions.” *State v. Grier*, 171 Wn. 2d 17, 42, 246 P.3d 1260 (2011). The decision to forgo an otherwise permissible instruction on a lesser included offense is not ineffective assistance if it can be characterized as part of a legitimate trial strategy to obtain an acquittal. *Id.* at 43; *see also State v. Hassan*, 151 Wn. App. 209, 218, 211 P.3d 441 (2009).

In *Grier*, our Supreme Court found the withdrawal of lesser-included jury instructions was not ineffective assistance of counsel. 171 Wn.2d at 42-45. The Court reasoned “[the defendant] and her defense

counsel reasonably could have believed that an all or nothing strategy was the best approach to achieve an outright acquittal.” *Id.* at 43. But, “where there is overwhelming evidence that the defendant is guilty of some offense, such strategy may be unreasonably risky.” *State v. Breitung*, 155 Wn. App. 606, 620, 230 P.3d 614 (2010), *aff’d*, 173 Wn.2d 393, 267 P.3d 1012 (2011), (citing *Grier*, 150 Wn. App. at 643). ““Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction.”” *Grier*, 150 Wn. App. at 643.

Here, Ms. Gutierrez, Ms. Merrill, and Ms. Acevado each testified that Mr. Juarez assaulted Ms. Gutierrez. (RP 45-81, 84-106, 114-124). Defense counsel could not have reasonably believed that an “all or nothing” strategy was the best approach for the second degree assault count. *See Grier*, 171 Wn.2d at 43. Because there was overwhelming evidence that Mr. Juarez was guilty of some offense (fourth degree assault), this strategy was unreasonably risky. *See Breitung*, 155 Wn. App. at 620. The jury was likely to resolve its doubts in favor of a conviction. *See Grier*, 150 Wn. App. at 643. Without the jury instruction for fourth degree assault as a lesser-included offense, the jury was more likely to convict Mr. Juarez of second degree assault.

Furthermore, Mr. Juarez did not call any witnesses. (RP 125, 132, 134-135, 141-142). The defense theory was that Mr. Juarez did not act with the intent to commit unlawful imprisonment. (RP 172-178). An all or nothing strategy was not reasonable, given the testimony presented at trial that an assault did occur. *Cf. Breitung*, 173 Wn.2d at 398-400 (finding pursuing an all or nothing strategy for second degree assault was reasonable, where the defense theory was that no assault occurred, and two defense witnesses testified consistent with this theory). Because the jury was likely to convict Mr. Juarez of some degree of assault, there was no legitimate tactical advantage to not request a lesser included jury instruction for fourth degree assault.

Counsel was ineffective for failing to ask for a lesser included instruction that would have given the jury the opportunity to convict Mr. Juarez of fourth degree assault rather than second degree assault. Mr. Juarez requests that this Court reverse his conviction and remand for a new trial. *State v. Henderson*, 180 Wn. App. 138, 143, 321 P.3d 298 (2014), *aff'd*, 182 Wn.2d 734, 344 P.3d 1207 (2015) (citing *State v. Ginn*, 128 Wn. App. 872, 878, 117 P.3d 1155 (2005)) (“The remedy for failure to give a lesser included instruction when one is warranted is reversal.”).

Issue 3: Whether the trial court erred by convicting Mr. Juarez of both assault in violation of a protection order (count 1) and felony violation of a protection order (count 2), where entry of both convictions violated Mr. Juarez’s double jeopardy rights.

The Fifth Amendment to the United States Constitution provides that no “person be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. amend. V. Article I, section 9 of the Washington Constitution provides, “[n]o person shall ... be twice put in jeopardy for the same offense.” Wash. Const. art. I, § 9. “A defendant may face multiple charges arising from the same conduct, but double jeopardy forbids entering multiple convictions for the same offense.” *State v. Hall*, 168 Wn.2d 726, 729–30, 230 P.3d 1048 (2010).

Although Mr. Juarez did not raise this argument in the trial court, a double jeopardy argument may be considered for the first time on appeal, “because it implicates a manifest error affecting a constitutional right.” *State v. Allen*, 150 Wn. App. 300, 312, 207 P.3d 483 (2009) (citing *State v. Turner*, 102 Wn. App. 202, 206, 6 P.3d 1226 (2000)).

There are two different tests for determining whether multiple convictions violate a defendant’s double jeopardy rights. *See State v. Adel*, 136 Wn.2d 629, 632-35, 965 P.2d 1072 (1998).

First, where a defendant has multiple convictions for violating several statutory provisions, the “same evidence” test is applied. *Adel*, 136 Wn.2d at 632-33. “Under the same evidence test, double jeopardy is

violated if a defendant is convicted of offenses which are the same in law and in fact.” *Id.* at 632 (citing *State v. Calle*, 125 Wn.2d 769, 772, 888 P.2d 155 (1995)).

Second, where a defendant has multiple convictions for violating the same statute, the “unit of prosecution” test is applied. *Id.* at 634. Under this test, “[t]he proper inquiry . . . is what ‘unit of prosecution’ has the Legislature intended as the punishable act under the specific criminal statute.” *Id.* “When the Legislature defines the scope of a criminal act (the unit of prosecution), double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime.” *Id.*

Here, Mr. Juarez was convicted of two counts of violation of a protection order under RCW 26.50.110: count 1, assault in violation of a protection order under RCW 26.50.110(4); and count 2, felony violation of a protection order under RCW 26.50.110(5). (CP 24-25, 100-101, 112; RP 183-184). Because Mr. Juarez has multiple convictions for violating the same statute (RCW 26.50.110), the proper test to apply is the “unit of prosecution” test. *See Adel*, 136 Wn.2d at 634.

“The first step in the unit of prosecution inquiry is to analyze the criminal statute.” *Allen*, 150 Wn. App. at 313. RCW 26.50.110 provides: “[w]henever an order is granted under this chapter . . . and the respondent

or person to be restrained knows of the order, a violation of any of the following provisions of the order is a gross misdemeanor, except as provided in subsections (4) and (5) of this section[.]” RCW

26.50.110(1)(a). An individual violation of a protection order under RCW 26.50.110 constitutes a single unit of prosecution. *Allen*, 150 Wn. App. at 313-14; *State v. Brown*, 159 Wn. App. 1, 10–13, 248 P.3d 518 (2010).

Once the unit of prosecution is determined, the next step is to conduct a factual analysis to determine if more than one unit of prosecution is present. *Hall*, 168 Wn.2d at 735. Here, the essential question is whether Mr. Juarez’s contact with Ms. Gutierrez on January 21, 2016 constituted one continuous offense, or multiple violations of the statute. The crime of violating a no-contact order continues as long as the person “remains within the prohibited zone.” *State v. Spencer*, 128 Wn. App. 132, 136, 114 P.3d 1222 (2005).

Mr. Juarez contacted Ms. Gutierrez on one date, and according to Ms. Gutierrez, this continuous contact lasted for approximately “five, maybe ten” minutes. (RP 16-17, 54-55, 69, 80). This single contact on one date constitutes one unit of prosecution. *Cf. Allen*, 150 Wn. App. at 305, 313-14 (two convictions for violating a no-contact order, for two emails sent on separate days, did not violate double jeopardy); *Brown*, 159 Wn. App. at 10–13 (five convictions for violating a no-contact order, each

for a separate contact on a separate day, did not violate double jeopardy). Therefore, Mr. Juarez's two convictions of violation of a protection order violate his double jeopardy rights.

Should this Court disagree that the proper test to apply is the "unit of prosecution" test, then Mr. Juarez argues, in the alternative, that his double jeopardy rights were violated under the "same evidence" test. *See Adel*, 136 Wn.2d at 632-33. As acknowledged above, under this test, "double jeopardy is violated if a defendant is convicted of offenses which are the same in law and in fact." *Id.* at 632 (citing *Calle*, 125 Wn.2d at 772).

Mr. Juarez's two convictions for violation of a protection order are the same in law. "[I]f each offense, as charged, includes elements not included in the other, the offenses are different and multiple convictions can stand." *Calle*, 125 Wn.2d at 777. Although count 1 required that Mr. Juarez's conduct was an assault, and count 2 required that Mr. Juarez have two prior convictions for violating a protection order, these requirements are not essential elements of the crime of violation of a protection order. *See RCW 26.50.110(4), (5); see also, e.g., State v. Washington*, 135 Wn. App. 42, 49, 143 P.3d 606 (2006) (identifying the elements of the crime of violation of a protection order). Instead, these requirements elevate the crime itself from a gross misdemeanor to a felony. *See RCW*

26.50.110(1)(a), (4), (5); *see also State v. Davis*, 116 Wn. App. 81, 93–94, 64 P.3d 661 (2003), *aff'd*, 154 Wn.2d 291, 111 P.3d 844 (2005), *aff'd*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (“Unlike most crimes, felony violation of a no-contact order is not a separate, distinct crime. Rather, the statute defines a misdemeanor crime and then enumerates the grounds on which the crime is elevated to a felony.”). The crime itself consists of violating the protection order, not the circumstances which increase the degree of crime. *See RCW 26.50.110(1)(a)*.

Mr. Juarez’s two convictions for violation of a protection order are also the same in fact. Mr. Juarez contacted Ms. Gutierrez on one date, and the contact lasted only minutes. (RP 16-17, 54-55, 69, 80). Mr. Juarez’s two convictions of violation of a protection order for this single contact of Ms. Gutierrez violate his double jeopardy rights.

The trial court erred by convicting Mr. Juarez of both assault in violation of a protection order (count 1) and felony violation of a protection order (count 2), because entry of both convictions violated Mr. Juarez’s double jeopardy rights. Therefore, the case should be reversed and remanded to vacate one of these convictions and for resentencing on one count of violation of a protection order. *See State v. Jensen*, 164 Wn.2d 943, 949, 195 P.3d 512 (2008) (“The remedy for a double jeopardy

violation is to vacate any multiplicitous convictions.”) (citing *State v. Westling*, 145 Wn.2d 607, 612, 40 P.3d 669 (2002)).

Issue 4: Whether the trial court erred in finding Mr. Juarez’s convictions for assault in violation of a protection order (count 1) and felony violation of a protection order (count 2) do not constitute same criminal conduct.

If this Court does not agree that the entry of convictions for both count 1 and count 2 violated Mr. Juarez’s double jeopardy rights (as argued in Issue 3 above), then, in the alternative, Mr. Juarez’s convictions for count 1 and count 2 constitute the same criminal conduct.

RCW 9.94A.589(1)(a) sets forth when two or more current offenses should be counted as one crime for sentencing purposes:

...whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime . . . “Same criminal conduct,” as used in this subsection, means two or more crimes that require the [1] same criminal intent, [2] are committed at the same time and place, and [3] involve the same victim . . .

RCW 9.94A.589(1)(a).

In order for the trial court to find same criminal conduct, all three requirements set forth in RCW 9.94A.589(1)(a) must be met. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997) (citing *State v. Vike*,

125 Wn.2d 407, 410, 885 P.2d 824 (1994)). “An appellate court will reverse a sentencing court's decision only if it finds a clear abuse of discretion or misapplication of the law.” *Porter*, 133 Wn. 2d at 181.

Here, Mr. Juarez was convicted of two counts of violation of a protection order: count 1, assault in violation of a protection order under RCW 26.50.110(4); and count 2, felony violation of a protection order under RCW 26.50.110(5). (CP 24-25, 100-101, 112; RP 183-184).

The trial court rejected Mr. Juarez’s argument that these two counts should be found to encompass the same criminal conduct. (CP 113; 2 RP 12-13, 20-21). The trial court abused its discretion in failing to count these two counts as same criminal conduct in calculating Mr. Juarez’s offender score, because the three requirements set forth in RCW 9.94A.589(1)(a) are met.

First, both counts involve the same victim, Ms. Gutierrez.

Second, the counts were committed at the same place and the same time. Both occurred at the location where Ms. Gutierrez and Mr. Juarez’s mother agreed to meet, and both occurred at the same time. (RP 16-17, 54-55, 69, 80); *but see State v. Channon*, 105 Wn. App. 869, 877 n.6, 20 P.3d 476, 480 (2001) (“A finding of ‘same criminal conduct’ does not require simultaneity of crimes.”) (citing *Porter*, 133 Wn.2d at 182-83).

Mr. Juarez violated the protection order, while having two prior

convictions for violating a protection order, at the same time he violated the protection order with assaultive conduct. Therefore, count 1 and count 2 satisfy the “same time” requirement.

Third, the criminal intent for both counts was the same: contact Ms. Gutierrez, in violation of the protection order. For purposes of same criminal conduct, “[i]ntent . . . is not the particular *mens rea* element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime.” *State v. Phuong*, 174 Wn. App. 494, 546, 299 P.3d 37 (2013) (quoting *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990)). Mr. Juarez’s objective criminal purpose for both count 1 and count 2 was to contact Ms. Gutierrez in violation of the protection order. Therefore, the “same criminal intent” requirement is met.

Count 1 and count 2 meet the three requirements for same criminal conduct. *See* RCW 9.94A.589(1)(a). The case should be remanded for resentencing so count 1 and count 2 can be counted as one crime.

Issue 5: Whether the trial court erred in sentencing Mr. Juarez beyond the statutory maximum sentence for both assault in violation of a protection order (count 1) and felony violation of a protection order (count 2).

“The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535. That an offense “occurred within sight or

sound of the victim's or the offender's minor children under the age of eighteen years” can support a sentence above the standard sentencing range. *See* RCW 9.94A.535(3)(h)(ii) (setting forth this aggravating factor).

Here, the jury returned special verdicts for each count, finding each offense “was committed within the sight or sound of the victim’s children who were under the age of 18 years[.]” (CP 98, 106-108, 113; RP 184).

At sentencing, the State requested the trial court impose “the statutory maximum on count 1 of sixty months[.]” (2 RP 23-24). Defense counsel also argued the maximum sentence for count 1 and count 2 is 60 months. (2 RP 25). For count 1 and count 2, the trial court sentenced Mr. Juarez to 60 months, plus 12 months for aggravating circumstances, for a total of 72 months confinement on each count. (CP 114; 2 RP 27). When the State asked for clarification and informed the trial court “it’s a statutory maximum of sixty[.]” the trial court stated “I think the twelve aggravating can be used as more than sixty.” (2 RP 29).

The statutory maximum sentence for both assault in violation of a protection order (count 1) and felony violation of a protection order (count 2) is five years, or 60 months. *See* RCW 26.50.110(4) (assault in violation of a protection order is a class C felony); RCW 26.50.110(5) (felony violation of a protection order is a class C felony); RCW 9A.20.021(1)(c)

(the statutory maximum sentence for a class C felony is five years, or 60 months). Our Supreme Court recently held that even if a jury finds the existence of an aggravating factor, a defendant's aggravated sentence cannot exceed the statutory maximum for the crime, as set forth in RCW 9A.20.021. *See State v. Barbee*, No. 92771-5, 2017 WL 58960, at *2, 8-9 (Wash. Jan. 5, 2017).

Here, the trial court sentenced Mr. Juarez beyond the 60-month statutory maximum sentence, as set forth in RCW 9A.20.021, for count 1 and count 2. (CP 114; 2 RP 27); *see also* RCW 9A.20.021(1)(c). Therefore, this Court should remand the case to resentence Mr. Juarez to no more than 60 months confinement for count 1 and for count 2. *See Barbee*, 2017 WL 58960, at *9 (setting forth this remedy).

Issue 6: Whether the trial court erred in imposing a total term of confinement and community custody that exceeds the statutory maximum for both assault in violation of a protection order (count 1) and felony violation of a protection order (count 2).

The State requested the trial court impose no community custody on count 1 and count 2 “because there’d be no time remaining.” (2 RP 23). Defense counsel argued the maximum sentence for count 1 and count 2 is 60 months. (2 RP 25). Although the trial court imposed community custody conditions “as to Count 3 only[,]” the Judgment and Sentence imposes 12 months of community custody on count 1 and count 2. (CP 114-115; 2 RP 27).

By arguing the maximum sentence for count 1 and count 2 is 60 months, Mr. Juarez sufficiently preserved the issue that imposing 12 months of community custody on count 1 and count 2 exceeds the statutory maximum sentence. (2 RP 25). Nonetheless, sentencing errors may be raised for the first time on appeal. *See State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (stating that “[i]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.”).

“The interpretation of provisions of the SRA [Sentencing Reform Act] involves questions of law that we review de novo.” *State v. Winborne*, 167 Wn. App. 320, 326, 273 P.3d 454 (2012) (citing *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005)).

In *In re Personal Restraint of Brooks*, our Supreme Court held that “when the trial court imposes an aggregate term of confinement and community custody that potentially exceeds the statutory maximum, it must include a notation clarifying that the total term of confinement and community custody actually served may not exceed the statutory maximum.” *State v. Boyd*, 174 Wn.2d 470, 472, 275 P.3d 321 (2012) (citing *In re Personal Restraint of Brooks*, 166 Wn.2d 664, 674, 211 P.3d 1023 (2009)). Subsequent to *Brooks*, the following amendment to the SRA became effective:

The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

RCW 9.94A.701(9).

In *Winborne*, the defendant was sentenced to 60 months of confinement and 12 months of community custody following his conviction of felony violation of a domestic violence no-contact order under RCW 26.50.110(5). *Winborne*, 167 Wn. App. at 322. The judgment and sentence included a *Brooks* notation: “the total terms of confinement and community custody must not exceed the statutory maximum sentence of 60 months.” *Id.* at 322-23; *see also Brooks*, 166 Wn.2d at 674.

On appeal, the defendant argued that because he was sentenced to the statutory maximum term of confinement of five years, RCW 9.94A.701(9) required the trial court to reduce his term of community custody to zero. *Id.* at 326. This Court agreed, holding that RCW 9.94A.701(9) no longer permits a sentencing court to make a *Brooks* notation to ensure the validity of a sentence. *Id.* at 322, 327-31. This Court found that RCW 9.94A.701(9) plainly presents a three-step process for the sentencing court to follow: “impose the term of confinement, impose the term of community custody, then reduce the term of

community custody if necessary[.]” *Id.* at 329. This Court then remanded the case for resentencing. *Id.* at 331.

Subsequently, in *Boyd*, our Supreme Court reached the same result when interpreting RCW 9.94A.701(9). *See Boyd*, 174 Wn.2d at 471-73. There, the defendant was sentenced to a term of confinement and a term of community custody that together exceeded the statutory maximum sentence for the crime. *Id.* at 471-72. The judgment and sentence included a *Brooks* notation. *Id.* at 471; *see also Brooks*, 166 Wn.2d at 674.

In reversing and remanding the case for resentencing, the Court held “[t]he trial court here erred in imposing a total term of confinement and community custody in excess of the statutory maximum, notwithstanding the *Brooks* notation.” *Id.* at 473. The Court reasoned that RCW 9.94A.701(9) required “the trial court . . . to reduce [the defendant’s] term of community custody to avoid a sentence in excess of the statutory maximum.” *Id.*

Here, Mr. Juarez was convicted of three felonies, each involving domestic violence: assault in violation of a protection order under RCW 26.50.110(4) (count 1); felony violation of a protection order under RCW 26.50.110(5) (count 2); and second degree assault under RCW 9A.36.021(1)(e) (count 3). (CP 24-25, 98, 100-105, 112-113; RP 183-

184); *see also* RCW 10.99.020(3), (5) (defining domestic violence).

Count 1 and count 2 are class C felonies. *See* RCW 26.50.110(4) (assault in violation of a protection order); RCW 26.50.110(5) (felony violation of a protection order). The statutory maximum for a class C felony is five years, or 60 months. RCW 9A.20.021(1)(c). A community custody term of 12 months is authorized for both crimes. *See* RCW 9.94A.701(3)(a) (authorizing one year of community custody for an offender sentenced to a crime against persons); RCW 9.94A.411(2) (listing a domestic violence court order violation under RCW 26.50.110 as a crime against persons).

On count 1 and count 2, the trial court sentenced Mr. Juarez to 60 months, plus 12 months for aggravating circumstances, for a total of 72 months confinement on each count, plus 12 months of community custody, which totals 84 months on each count. (CP 114; 2 RP 27). Thus, the term of confinement and the term of community custody together exceed the 60 month statutory maximum for both count 1 and count 2. *See* RCW 26.50.110(4) (assault in violation of a protection order is a class C felony); RCW 26.50.110(5) (felony violation of a protection order is a class C felony); RCW 9A.20.021(1)(c) (statutory maximum for a class C felony). Pursuant to RCW 9.94A.701(9), this Court should remand the case to resentence Mr. Juarez so that the combined terms of incarceration and community custody for count 1 and count 2 do not exceed 60 months.

See RCW 9.94A.701(9); *Winborne*, 167 Wn. App. at 322, 327-31; *Boyd*, 174 Wn.2d at 471-73.

Issue 7: Whether the trial court erred by requiring Mr. Juarez to pay medical care costs while incarcerated.

At sentencing, defense counsel asked the trial court “to impose no cost of incarceration or medical assistance[.]” (2 RP 26). The trial court imposed only mandatory costs, capped the costs of incarceration at \$200, and found Mr. Juarez indigent. (CP 116, 136-137; 2 RP 28-29). But the trial court then included the following boilerplate language in the judgment and sentence, regarding Mr. Juarez’s ability to pay and costs of medical care:

2.7 Financial Ability: 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 that the defendant is an adult and is not disabled and therefore has the ability or likely future ability to pay legal financial obligations imposed herein. RCW 10.01.160.

.....

4.D.5 Costs of Medical Care: In addition to the above costs, the court finds that the defendant has the means to pay for any costs of medical care incurred by Yakima County on behalf of the defendant, and orders the defendant to pay such medical costs as assessed by the Clerk. Such costs are payable only after restitution costs, assessments and fines listed above are paid. RCW 70.48.130.

(CP 113, 116).

The discretionary medical care costs that were imposed herein are inconsistent with the trial court's findings and the record on Mr. Juarez's ability to pay legal financial obligations (LFOs).

Medical care costs are discretionary costs. *State v. Leonard*, 184 Wn.2d 505, 506-08, 358 P.3d 1167 (2015). Therefore, "the assessment of . . . costs of medical care must be based on an individualized inquiry into the defendant's current and future ability to pay that is reflected in the record, consistent with the requirements of *State v. Blazina*. See *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015).

Before imposing discretionary LFOs, the sentencing court must consider the defendant's current or future ability to pay based on the particular facts of the defendant's case. *Blazina*, 182 Wn.2d at 834. The record must reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay, and the burden that payment of costs imposes, before it assesses discretionary LFOs. *Id.* at 837-39. This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including any restitution. *Id.* at 838-39.

"[T]he court *shall* take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." *Blazina*, 182 Wn.2d at 838 (quoting RCW 10.01.160(3)).

“[T]he court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them.” *Id.* (quoting RCW 10.01.160(3)). If a defendant is found indigent, such as if his income falls below 125 percent of the federal poverty guideline and thereby meets “the GR 34 standard of indigency, courts should seriously question that person’s ability to pay LFOs.” *Id.* at 838-39.

Where a trial court does make a finding that the defendant has the ability to pay, “perhaps through inclusion of boilerplate language in the judgment and sentence,” its finding is reviewed under the clearly erroneous standard. *State v. Lundy*, 176 Wn. App. 96, 105, 308 P.3d 755 (2013) (citing *State v. Bertrand*, 165 Wn. App. 393, 404 n.13, 267 P.3d 511 (2011)). “A finding of fact is clearly erroneous when, although there is some evidence to support it, review of all of the evidence leads to a ‘definite and firm conviction that a mistake has been committed.’” *Id.* (internal quotations omitted). Ultimately, a finding of fact must be supported by substantial evidence in the record. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep’t of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)).

Here, the trial court entered a boilerplate finding that it had considered Mr. Juarez’s ability to pay legal financial obligations and found that he had the present or future ability to pay. (CP 113). The trial

court also entered a boilerplate finding that Mr. Juarez “has the means to pay for any costs of medical care incurred by Yakima County. . . .” (CP 116). These boilerplate findings were clearly erroneous, considering the record that was made on Mr. Juarez’s ability to pay. (2 RP 25-26, 28-29).

Defense counsel asked the trial court “to reduce whatever you can in the financial obligations to impose no cost of incarceration or medical assistance[.]” (2 RP 26). Defense counsel argued Mr. Juarez owes financial obligations for prior convictions, will owe child support when he gets out of prison, and “[h]is ability to get work with these convictions is going to be seriously impaired.” (2 RP 25-26). In response, the trial court imposed only mandatory costs, and capped the costs of incarceration at \$200. (CP 116; 2 RP 28). The trial court also subsequently found Mr. Juarez indigent. (CP 136-137; 2 RP 28-29).

The court’s written boilerplate findings on Mr. Juarez’s ability to pay and costs of medical care are inconsistent with the record at sentencing, and the trial court’s imposition of only mandatory costs and capping the costs of incarceration. (CP 113, 116; 2 RP 25-26, 28-29). The boilerplate findings are inconsistent with the record at sentencing were clearly erroneous, mistaken, and not supported by substantial evidence in the record. (CP 113, 116). The record at sentencing demonstrates Mr. Juarez’s inability to pay medical care costs. (2 RP 25-

26, 28-29). Accordingly, Mr. Juarez respectfully requests that this court remand to strike these findings and discretionary medical care costs from his judgment and sentence.

Issue 8: Whether this Court should refuse to impose costs on appeal.

Mr. Juarez preemptively objects to any appellate costs should the State be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 385-94, 367 P.3d 612, 618 (2016), and pursuant to this Court's General Court Order issued on June 10, 2016.

Although the trial court initially entered an order finding Mr. Juarez indigent but able to contribute, at the time of sentencing, the trial court entered an Order of Indigency, granting Mr. Juarez a right to review at public expense. (CP 8-9, 136-137, 142; 2 RP 28-29). Accordingly, the trial court did not impose a court-appointed attorney recoupment, and instead imposed only mandatory costs, and capped the costs of incarceration at \$200. (CP 116, 142; 2 RP 28).

At sentencing, defense counsel argued Mr. Juarez owes financial obligations for prior convictions, will owe child support when he gets out of prison, and "[h]is ability to get work with these convictions is going to be seriously impaired." (2 RP 25-26). Mr. Juarez's Report as to

Continued Indigency² reflects his status has not changed from the time of sentencing: he owns no real property, has no income from any source, and has outstanding LFOs and child support. Accordingly, Mr. Juarez remains indigent and unable to pay costs that may be imposed on appeal. The imposition of costs would be inconsistent with those principles enumerated in *Blazina*. See *Blazina*, 182 Wn.2d at 835-37.

In *Blazina*, our Supreme Court recognized the “problematic consequences” LFOs inflict on indigent criminal defendants. *Blazina*, 182 Wn.2d at 835-37. To confront these serious problems, this Court emphasized the importance of judicial discretion: “The trial court must decide to impose LFOs and must consider the defendant’s current or future ability to pay those LFOs based on the particular facts of the defendant’s case.” *Blazina*, 182 Wn.2d at 834. Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” *Id.*

The *Blazina* Court addressed LFOs imposed by trial courts, but the “problematic consequences” are every bit as problematic with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then “become[s] part of the trial court judgment and sentence.” RCW

² Mr. Juarez’s Report as to Continued Indigency was filed in this Court on the same day as this Opening Brief.

10.73.160(3); *see also* CP 116. Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants' ability to move on with their lives in precisely the same ways the *Blazina* court identified.

Although *Blazina* applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene its reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion that *Blazina* held was essential before including monetary obligations in the judgment and sentence. This is particularly true where, as here, Mr. Juarez's Report as to Continued Indigency demonstrates a continued inability to pay costs. Mr. Juarez qualified for indigent appellate counsel upon filing the underlying notice of appeal and remains indigent at this time. (CP 136-137).

The *Blazina* court suggested, "if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person's ability to pay LFOs." *Blazina*, 182 Wn.2d at 839. This Court receives orders of indigency "as a part of the record on review." RAP

15.2(e). “The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party’s financial condition has improved to the extent that the party is no longer indigent.” RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) standard, requires this Court to “seriously question” an indigent appellant’s ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839.

This Court has discretion to deny appellate costs. RCW 10.73.160(1) states the “supreme court . . . *may* require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” *Staats v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000).

The record demonstrates Mr. Juarez does not have the ability to pay costs on appeal. He was found indigent by the trial court and remains indigent. Mr. Juarez respectfully requests this Court exercise its discretion by denying an award of appellate costs in this case, in the event that the State substantially prevails on appeal.

F. CONCLUSION

Mr. Juarez's conviction for assault in violation of a protection order (count 1) should be vacated, because the jury instructions and the State's closing arguments permitted the jury to use the second degree assault (count 3) as the predicate assault for this conviction.

Mr. Juarez's conviction for second degree assault (count 3) should be reversed and remanded for a new trial, because he was denied his constitutional right to effective assistance of counsel when his attorney failed to request the lesser included jury instruction on fourth degree assault.

In addition, because entry of convictions for both count 1 and count 2 violated Mr. Juarez's double jeopardy rights, the case should be reversed and remanded to vacate one of these convictions and resentence Mr. Juarez on one count of violation of a protection order. In the alternative, because count 1 and count 2 constitute same criminal conduct, the case should be remanded for resentencing so count 1 and count 2 can be counted as one crime.

The case should also be remanded for resentencing: (1) to no more than 60 months confinement for count 1 and for count 2; (2) so that the combined terms of incarceration and community custody for count 1 and count 2 do not exceed 60 months; and (3) for the trial court to strike the

unsupported and contrary findings regarding his ability to pay legal financial obligations, including discretionary medical care costs.

Finally, Mr. Juarez objects to any appellate costs should the State prevail on appeal. The record does not reflect that he has the ability to pay.

Respectfully submitted this 20th day of January, 2017.


Jill S. Reuter, WSBA #38374

/s/ Kristina M. Nichols
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Attorney for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 34638-2-III
vs.)
)
JULIAN MIGUEL JUAREZ)
) PROOF OF SERVICE
Defendant/Appellant)
_____)

I, Jill S. Reuter, of counsel for Nichols Law Firm, PLLC and Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on January 20, 2017, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Julian Miguel Juarez, DOC #375801
Washington Corrections Center
2321 W Dayton Airport Rd
PO Box 900
Shelton, WA 98584

Having obtained prior permission from the Yakima County Prosecutor's Office, I also served the Respondent State of Washington at appeals@co.yakima.wa.us using Division III's e-service feature.

Dated this 20th day of January, 2017.



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