

NO. 34638-2-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

JULIAN MIGUEL JUAREZ,

Appellant.

---

BRIEF OF RESPONDENT

---

David B. Trefry WSBA #16050  
Senior Deputy Prosecuting Attorney  
Attorney for Respondent

JOSEPH A. BRUSIC  
Yakima County Prosecuting Attorney  
128 N. 2d St. Rm. 329  
Yakima, WA 98901-2621

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ..... ii-iv

I. ASSIGNMENTS OF ERROR ..... 1

    A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR..... 1

    B. ANSWERS TO ASSIGNMENTS OF ERROR..... 2

II. STATEMENT OF THE CASE..... 2

III. ARGUMENT ..... 10

Response to issue 1 – Juarez’s conviction for count 1 assault in violation of a protection order was not based on the second degree assault as alleged in count 3..... 10

Response to issue 2 – Trial counsel was not ineffective for not requesting a lesser included jury instruction for count 3 ..... 15

Response to issue 3 – Conviction for both count 1 and count 2 did not violate double jeopardy..... 21

Response to issue 4 – The trial court did not err when it determined that counts 1 and 2 were not the same criminal conduct ..... 26

Response to issue 5 - Imposition of aggravator counts 1 and 2..... 28

Response to issue 6 - Community Custody, counts 1 and 2 ..... 30

Response to issue 7 - Costs of medical care while incarcerated..... 31

Response to issue 8 - Appellate costs ..... 31

IV. CONCLUSION ..... 32

APPENDIX A ..... 33

TABLE OF AUTHORITIES

PAGE

**Cases**

Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)..... 22

Brundridge v. Fluor Fed. Servs., Inc., 164 Wn.2d 432, 191 P.3d 879 (2008)..... 11, 15

City of Seattle v. Lewis, 70 Wn.App. 715, 855 P.2d 327 (1993) (noting that a defense must be raised at trial in order to be reviewable), review denied, 123 Wn.2d 1011 (1994) ..... 11, 15

Garza-Villarreal, 123 Wash.2d at 46, 864 P.2d 1378 ..... 28

In re Fletcher, 113 Wn.2d 42, 776 P.2d 114 (1989) ..... 25

In the Pers. Restraint of Orange, 152 Wash.2d 795, 100 P.3d 291 (2004)22

Maxfield, 125 Wash.2d at 402, 886 P.2d 123..... 28

Porter, 133 Wash.2d at 181, 942 P.2d 974..... 28

Smith v. Shannon, 100 Wn.2d 26, 666 P.2d 351 (1983) ..... 11, 15

State v. Aldana Graciano, 176 Wn.2d 531, 295 P.3d 219 (2013)..... 26, 27

State v. Barbee, 187 Wn.2d 375, 386 P.3d 729 (2017)..... 28

State v. Berlin. 133 Wn.2d 541, 947 P.2d 700 (1997)..... 19

State v. Brooks, 45 Wn. App. 824, 727 P.2d 988 (1986) ..... 20

State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850 (1990)..... 21

State v. Davis, 53 Wn. App. 306, 766 P.2d 1120 (1989)..... 30

State v. Delmarter, 94 Wn.2d 634, 618 P.2d 99 (1980)..... 20

State v. Drummer, 54 Wn. App. 751, 775 P.2d 981 (1989) ..... 30

State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150(2000)..... 20

State v. Fisher, 108 Wn.2d 419, 430 n.7, 739 P.2d 683 (1987)..... 30

State v. Gatlin, 158 Wn.App. 126, 241 P.3d 443, (2010)..... 22

<u>State v. Grier</u> , 150 Wn.App. 619, 208 P.3d 1221 (2009), review granted, 167 Wn.2d 1017, 224 P.3d 773 (2010).....	18
<u>State v. Grisby</u> , 97 Wn.2d 493, 647 P.2d 6 (1982).....	15
<u>State v. Hassan</u> , 151 Wn.App. 209, 211 P.3d 441 (2009) .....	16, 17, 19
<u>State v. Hood</u> , 196 Wn.App. 127, 382 P.3d 710 (2016).....	26
<u>State v. Kirkpatrick</u> , 160 Wn.2d 873, n.10, 161 P.3d 990 (2007) .....	12
<u>State v. Kroll</u> , 87 Wn.2d 829, 558 P.2d 173 (1976) .....	15
<u>State v. Linton</u> , 156 Wash.2d 777, 132 P.3d 127 (2006).....	22
<u>State v. Mullins</u> , 158 Wn.App. 360, 241 P.3d 456 (2010) .....	18
<u>State v. Pepoon</u> , 62 Wash. 635, 114 P. 449 (1911).....	14
<u>State v. Perez</u> , 69 Wn. App. 133, 847 P.2d 532 (1993) .....	29
<u>State v. Pittman</u> , 134 Wn.App. 376, 166 P.3d 720 (2006) .....	16, 18
<u>State v. Reiff</u> , 14 Wash. 664, 45 P. 318 (1896) (quoting <u>Morey v.</u> <u>Commonwealth</u> , 108 Mass. 433, (1871)).....	22
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992) .....	20
<u>State v. Sinclair</u> , 192 Wn.App. 380, 367 P.3d 612 (quoting RAP 14.2), review denied 185 Wn.2d 1034 (2016).....	31
<u>State v. Tunell</u> , 51 Wn. App. 274, 753 P.2d 543 (1988).....	30
<u>State v. Turner</u> , 169 Wn.2d 448, 238 P.3d 461 (2010).....	21
<u>State v. Vladovic</u> , 99 Wn.2d 413, 662 P.2d 853 (1983) .....	25
<u>State v. Ward</u> , 125 Wn.App. 243, 104 P.3d 670 (2004).....	18
<u>State v. Workman</u> . 90 Wn.2d 443, 584 P.2d 382 (1978).....	19

**Other Authorities**

284 U.S. at 304, 52 S.Ct. 180.....	22
U.S. CONST. amend. V; CONST. art. I, § 9.....	22

**Rules**

RAP 2.5.....	15
RAP 2.5(a) .....	11, 12, 15
RCW 26.50.110(4) and (1) and 10.99.020.....	23

RCW 26.52.020 .....	24
RCW 9.94A.535(3)(h)(ii) .....	23
RCW 9.94A.589(1)(a) .....	26

## I. ASSIGNMENTS OF ERROR

### A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant sets forth three assignments of error. These can be summarized as follows;

**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.

## B. ANSWERS TO ASSIGNMENTS OF ERROR.

Juarez assigns error to eight issues, the State's answer to those allegations are as follows:

Issue 1: The facts and argument presented by the State in support of Count 1 Assault in violation of a protection order did not "invite" the jury to use the assault charged in Count 3 as the predicate offense.

Issue 2: Trail counsel was not ineffective when he did not request a lesser included offense of offense for Count 3 – second degree assault the facts did not support such a charge.

Issue 3: Conviction for assault in violation of a protection order and felony violation of a court order does not violate double jeopardy.

Issue 4: The trial court did not err when it determined that the two counts of violation of a protection order, counts 1 and 2, were the same criminal conduct.

Issue 5: The court properly imposed the additional 12-month sentence arising from the aggravator found by the jury.

Issue 6: The judgment and sentence improperly reflects that community custody is to be imposed on counts 1 and 2. The court only imposed community custody on count 3. The state concedes this issue and requests this court grant leave for the State to file an ex parte order that removes this error.

Issue 7: The State will agree to amend the original judgment and sentence, ex parte, to remove the costs of medical care from the defendant's financial obligations rather than incur the cost of returning the defendant and conducting a resentencing hearing.

Issue 8: The State shall not request appellate costs in this case.

## II. STATEMENT OF THE CASE

**Eugenia Gutierrez.** The victim, Eugenia Gutierrez testified that the incident took place in pieces. Her testimony was that she had contacted the defendant's mother and agreed to allow him visitation with

the children they have in common, but the transfer had to be done without the defendant being present. She testified that before she met with the defendant's mother in a prearranged location she "had a weird feeling" and changed the location where she was to meet and transfer the two children who were with Eugenia in her car. RP<sup>1</sup> 52-3

She testified that she arrived before the defendant's mother who arrived soon thereafter. She stated that she got out of her car to start to move her children to the other car when the defendant suddenly and unexpectedly got out of his mother's car. She testified that the windows on the other car were tinted and she could not see inside. RP 54-5.

Juarez told her "you have some explaining to do" and shoved her toward her own car. Eugenia told Juarez that she was not going anywhere with him at which time he grabbed her by the hair and pushed her up against the car. He also struck her in the face with his fist a couple times. Eugenia was resisting and testified "[t]here's no way I was going to get into that car." RP 56-7. She testified [h]e punched me. He would stop, tell me to get into the car, and then he would hit me again." RP 57.

Eugenia got away from the defendant and moved away from her car, she stated she felt that the defendant believed she was just going to get

---

<sup>1</sup> The State shall follow the Appellants designation for the verbatim report of proceedings.

into her car with him and she wanted to get away from the car. She also testified that she wanted to get away from the car so that her children would not have to see more of the assault than they already had seen. RP 58-9.

Juarez followed Ms. Gutierrez to the grassy area where she had fled and once again grabbed her by the hair. She stated this time it was different than before, that he had a “full handful of hair.” She testified that she fell down after this occurred and that the defendant started to drag her by her hair. She was attempting to crawl as she was dragged by her hair. She testified that she was also hit some during this portion of the assault. RP 58-9.

Eventually the defendant’s mother got out of her car and told him to stop, grabbed him and put him into her car and left the scene of the assault. RP 59-60.

Ms. Gutierrez’s testimony highlighted the two different areas of this criminal act. She testified responded affirmatively to questioning from the State that her impression was that the defendant expected her to get into her own car with him. RP 61.

The next area of testimony covers the actual assault and Ms. Gutierrez’s testimony regarding the injuries which she sustained from the assault. She testified that she had “bumps on my head...a black eye and a

bruised cheek, and...a bump on (the) left side of (her) face.” RP 61.

Ms. Gutierrez testified on cross examination when asked “He was trying to get you in the car so he could talk to you; is that what your understanding was?” I don’t know what he was trying do...[h]e was trying to get me into my car, yeah.” RP 65.

**Melanie Merrill.** Melanie Merrill was sitting in her truck in the same parking lot where the attack on Ms. Gutierrez occurred. She was able to hear the conversation but not the substance other than she was able to hear the victim yelling “stop.” While the victim was yelling stop, Ms. Merrill observed that the defendant was “pushing her and being rough.” PR 87, 96. She testified that the pushing by the defendant was towards the victim’s car and that the pushing took place near “by the cars.” RP 97, 99-100. Ms. Merrill observed the defendant exiting his mother’s car from the passenger side. She also observed this same man punching the victim in the face, “a lot.” RP 88, 95.

On cross examination she concurred with defense counsel that the “hitting” took place twice, one time the defendant struck the victim about ten times and the other three to five times. The three to five times took place between the cars the ten times was over on the grass. RP 99-100. The first portion of the actual physical hitting by the defendant took place between the cars and the second was over on the grass RP 99-100.

During the assault Ms. Merrill saw “the mother” get out of her car and tell the defendant to stop. RP 89. Ms. Merrill also testified that between the two occurrences of the victim being hit in the face, the defendant was chasing Ms. Gutierrez. RP 100-101. Defense counsel asked “[h]e stopper her from getting away; I take it? Ms. Merrill replied “[y]es.” RP 100-01. She testified that the defendant “...was hitting her on the ground...he had a grip on her hair.” RP 101.

Ms. Merrill observed the defendant get into the passenger side of the mother’s car and they drove from the scene. RP 93.

**Christina Acevedo.** Christina Acevedo was delivering mail on her route when she heard a girl yelling call 911, call 911, help. She walked over to where the yelling was coming from and saw a guy pulling on a girl’s hair from behind, she then called 911. RP 115-16. She testified that she could see the victim and Juarez and that “[t]here was a girl facing away from the guy, and he had her by the hair. He was pulling her. So I would imagine it would be hard for her to get away.” RP 117. She testified that the assault that she observed was “on the grass.” Ms. Acevedo also observed that the guy got into the passenger side of a car that was driven by a person she assumed was his mother. RP 119-20

On cross examination Ms. Acevedo testified again that the male in the fight had “her by the hair. You wouldn’t be able to get away from

that.”

**Officer Escamilla.** Officer Cesar Escamilla testified as to the excited utterance that occurred when he arrived at the scene of the crime. The testimony supports the count of Assault in the Second degree based on Unlawful Restraint:

A. According to my report, Ms. Gutierrez explained that as she walked up to grandma's vehicle, the back door, which had the back windows tinted, she thought it was only grandma in the car because that's the only person she could see in the car sitting in the front driver's seat. She walked up to the car. One of the back doors opens, and there is her ex-boyfriend. According to my report, he told her she had some explaining to do, grabbed onto her arm and told her to get in the car with him. She stated that she tried to pull away, but then he started to punch her in the face. She at one point broke loose, and she began to run away from the suspect, from the boyfriend, her ex-boyfriend. He gave chase onto the park area, the grass area of the park. At some point he managed to catch up to her, grabbed onto her by the hair, pulled her onto the ground and just -- she told me she lost track of how many times he punched her. She estimated about ten times or more.

RP 17-18

Cross-examination of Officer Escamilla regarding the unlawful restraint;

Q. Okay. You said that she was talking about statements that she said Mr. Juarez made. Did she

tell you what Mr. Juarez was saying? Did she give you a quote?

A. I'd have to look at my report.

Q. Please do.

A. I wrote that he --Q. What is your recollection now that you've refreshed it?

A. Oh, sure. My recollection is that pretty much you got some explaining to do.

Q. Okay. You testified that he said something about getting in a car, that she told you that he'd said something about getting in a car.

A. Oh, yes. Something about you got some explaining to do, at that moment he grabbed onto her, get in the car.

Q. Now, that would have been the blue car in the pictures; is that correct?

A. No.

Q. She told you otherwise or do you not know which car?

A. She had approached the grandma's car.

Q. Right.

A. He gets -- he opens the back door, grabs onto her. You've got some explaining to you. She explained that he said, get in the car.

RP 27-8

**Officer Agledal.** Officer Einar Agledal testified as to what Mr.

Merrill stated to him at the scene of the assault.

Q. Thank you. And did she tell you what she was doing when she started to see what was happening?

A. What she was doing? I think she just kind of -- she didn't really say what she was doing. I guess she was leaving class. She was getting in her truck to leave but then saw this and decided to not drive away.

Q. Tell us what she told you about the nature of the assault.

A. She said that she saw this victim get punched several times. She referred to the -- if I refer to my report, her statement was the male -- let's see. He was waling on the female. I asked her to describe that. She said that he punched her several times in the face with a closed fist. That's a common thing I'll ask. Was it an open hand or a closed fist? She said, yeah, it was. And he was pulling her by the hair. It kind of started between the two cars. The victim was able to escape apparently running south towards the park. Then she was then pulled down to the ground again by her hair and was punched again a few more times in the face.

Juarez moved for dismissal of the second degree assault count at the end of the State's case. RP 128. His argument was that the State had not proven that there was unlawful restraint and that Juarez had only told the victim that they should talk and that he directing the victim into her car "using some force to get them into their car does not amount to unlawful imprisonment." RP 128.

Juarez acknowledged that the State's theory throughout regarding this assault charge was based on the attempt to commit another felony. "The state's theory has been, as long as I've known it, it was an attempt to commit another felony. There wasn't substantial injury and a deadly weapon was not used, etcetera." RP 129.

The State argued against this motion supporting its theory that this count of Assault was based on "an" assault that was in conjunction with the unlawful restraint. The deputy prosecutor stated "...that I need to

show, substantially interfering with her liberty. She wasn't free to leave and get up when she's being held and dragged on the ground with this idea in her mind that she needs to get in the car with him. It wasn't with legal authority. It wasn't with her consent. It was certainly accomplished by physical force.”

The trial court addressed the issue of double jeopardy regarding counts 1 and 2;

Well, on this narrow question I do believe that the intent is the intent that's inherent in the crime of assault, consequently Counts 1 and 3 are the same course of criminal conduct under the --- under the rule --- the sentencing rule. I don't believe that they merge. I don't believe that it's an issue of double jeopardy to him --- for Mr. Juarez to be convicted of all three offenses. I don't --- I don't believe that Count 2 is the same course of criminal conduct as to Count 1 and 3. I think that that's a separate crime and you can commit one and not commit the other and so consequently, I think he has essentially --- essentially has two current offenses, one encompassing Counts 1 and 3 and one encompassing Count 2.

2 RP 22

This portion of the trial, both the argument and the ruling by the court is set forth in its totality in Appendix A.

### **III. ARGUMENT**

#### **Response to Allegation I – Juarez's conviction for count 1 assault in violation of a protection order was not based on the second degree assault as alleged in count 3.**

Juarez's claim that the State “invited” the jury to use the totality of

this criminal act as a basis to convict him of count 1 is without merit.

Throughout the trial the State continually made it clear that the basis for the second degree assault was that the “assault was committed with the intent to commit unlawful imprisonment.” RP 128-131, 140, 141, 152, 155, 169, 171, 172 CP 91.

There was never any challenge by Juarez in the trial court of this allegation because it was clear during the trial that the State’s theory was that the intent to get the victim back into her car, against her will, was the basis for count 3.

Generally, appellate courts will not entertain issues raised for the first time on appeal. RAP 2.5(a); Brundridge v. Fluor Fed. Servs., Inc., 164 Wn.2d 432, 441, 191 P.3d 879 (2008). The reason for this rule is to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials. Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). A defendant waives his right to assert an affirmative defense if he fails to raise the defense at trial. City of Seattle v. Lewis, 70 Wn.App. 715, 718-19, 855 P.2d 327 (1993) (noting that a defense must be raised at trial in order to be reviewable), review denied, 123 Wn.2d 1011 (1994); c.f. State v. Kroll, 87 Wn.2d 829, 843, 558 P.2d 173 (1976) (finding that “[n]o error can be predicated on the failure of the trial court to give an instruction when no request for such an instruction was ever

made"). This court even has the authority to decline to address an issue under RAP 2.5(a) sua sponte. State v. Kirkpatrick, 160 Wn.2d 873, 880 n.10, 161 P.3d 990 (2007). This court should decline to address this alleged error for the first time on appeal.

The State has set forth sections of the State's closing argument in Appendix A. This closing makes it very clear that the State made it clear to the jury what the bases of the various count was. That the first count was an assault in violation of a no contact order and that this assault had to be some sort of act that involved assaultive behavior. The very first statement by the State makes this clear:

Count 1 is assault in violation of no contact order.  
So there needs to be an assault absolutely. The definition of assault is in there. There doesn't have to be blood. There doesn't have to be cuts or "X" amount of punches. So it's not an issue for a decision today.

Certainly, you can take into account that different people said that there was a different amount of punches or hits or the manner was differently described. What is consistent is that there was hitting. There was grabbing of the hair. Certainly all the witnesses talked about hitting and grabbing of hair. RP 163

The State then goes on later in its closing to directly address the jury instructions and the facts that the State believes support the counts as set forth in the instructions;

So the jury instructions, the state has charged three charges, assault in violation of a no contact order. The

state is asking you to find that there was an assault. The evidence shows no dispute about an assault. The no contact order is in evidence. You'll have that. It occurred here in Washington.

Count 2, violation of a no contact order. There's contact between the restrained party and the protected party, Ms. Gutierrez and Mr. Juarez. There are two prior convictions for no contact order violations. It's straightforward.

Count 3, assault with intent to commit a felony. Again, it says Assault 2. The level of injury is not relevant to your consideration. Read the jury instruction. It's with the intent to commit a felony. Unlawful imprisonment is a felony. Unlawful imprisonment is that substantial interference with liberty based on Mr. Juarez restraining Ms. Gutierrez.

Those are the three counts. RP 168-9

The assaultive nature of the actions of the defendant throughout are mentioned by the State. However, it is not necessary to assault the object of the unlawful imprisonment. Here the assault that was alleged to be the basis of count 1 was the continuous hitting and striking and hair pulling done by the defendant. The act of restraining her as the court stated "The state just has to show that he acted with intent to commit unlawful imprisonment, not that he actually committed the crime of unlawful imprisonment." (RP 132) When ruling against the defendant's "half-time" motion to dismiss the second degree assault charge.

The State was not precluded from discussing the assaultive acts of

the defendant as he was trying to restrain the victim. The jury is instructed at the very beginning of the trial and it is repeated in the very first instruction read at the close of the case;

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions. RP 8, 149. CP 80

The jury instruction for count 1 specifically states that the conduct that is an element is “an assault” not unlawful imprisonment. CP 85. Jurors are presumed to follow the law, the instructions of the court. The jury is reminded throughout the trial that they are to follow the instructions as given. “It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.” CP 79 As stated in State v. Pepoon, 62 Wash. 635, 644, 114 P. 449 (1911) “In addition, we must indulge some presumptions in favor of the integrity of the jury. It is a branch of the judiciary, and if we assume that jurors are so quickly forgetful of the duties of citizenship as to stand continually ready to violate their oath on the slightest provocation,

we must inevitably conclude that a trial by jury is a farce and our government a failure.” Jurors are presumed to follow the court's instructions, State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982) (citing State v. Kroll, 87 Wn.2d 829, 558 P.2d 173 (1976))

**Response to Allegation 2 – Trial counsel was not ineffective for not requesting a lesser included jury instruction for count 3.**

Juarez states that he is raising this issue for the first time in this appeal. (Appellant’s brief 21-2). However, he does not address how that issue may be raised pursuant to RAP 2.5 nor does he cite to any cases related to that rule.

Once again, generally appellate courts will not entertain issues raised for the first time on appeal. RAP 2.5(a); Brundridge v. Fluor Fed. Servs., Inc., 164 Wn.2d 432, 441, 191 P.3d 879 (2008). The reason for this rule is to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials. Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). A defendant waives his right to assert an affirmative defense if he fails to raise the defense at trial. City of Seattle v. Lewis, 70 Wn.App. 715, 718-19, 855 P.2d 327 (1993)

The third count, Assault in the Second degree was based on the State proving that the defendant had committed this assault by unlawful imprisoning the victim. The proof of this unlawful imprisonment was an

element that the state had to prove for the second degree assault. Further, there is clearly a motivation, a trial strategy that was in play here, if the state could not prove the unlawful, which is arguably the weakest portion of this criminal act, then the defendant walked free; if they proposed a lesser it would give the jury a clear and easy fallback position which would result in the defendant being incarcerated instead of acquitted.

In order to prevail on an ineffective assistance claim, the defendant must demonstrate " (1) deficient performance, that his attorney's representation fell below the standard of reasonableness, and (2) resulting prejudice that, but for the deficient performance, the result would have been different." State v. Hassan, 151 Wn.App. 209, 216-17, 211 P.3d 441 (2009). Juarez would be entitled to a lesser included offense instruction "if each of the elements of the lesser offense is a necessary element of the greater offense (the legal prong), and the evidence supports an inference that only the lesser offense was committed (the factual prong)." State v. Pittman, 134 Wn.App. 376, 384, 166 P.3d 720 (2006).

When a court of review is looking at the alleged failure by trial counsel to propose a lesser include offense this court must take into account that "[w]here a lesser included offense instruction would weaken the defendant's claim of innocence, the failure to request a lesser included offense instruction is a reasonable strategy." State v. Hassan, 151 Wn.App.

209, 220, 211 P.3d 441 (2009).

In this case the defense attorney strongly argued in closing that there was no assault, that the witnesses and the officer and the victim were speculating and that there was no physical evidence of any assault. He further argued that there was no restraint and therefore no unlawful imprisonment.

To ask for a lesser included of Assault in the fourth degree would have completely negated the defendant's trial strategy that this was just a couple that had past history that was going at it again. That the victim had been the aggressor when she pushed the defendant and that there could be no unlawful imprisonment because physically it did not occur and further, the movement and the statements by the defendant at the scene and what he brought out in his examination of the witnesses was that the movement was towards the victim's own car, not the car of the defendant's mother. RP 172-78.

That's blood. That's blood. It's foundation. It's makeup. It's lipstick. Did they prove that she was hit 10 to 12 times? No. Did they prove she was hit? Well, if you can see a strike somewhere on that photograph, she was hit. Ms. Acevedo says that didn't happen. I didn't see that.

Officer Escamilla says, according to witnesses hit ten times. He's telling you he doesn't believe it because he... Why does he do that? Because he knows he has to convince you that facts exist which prove that this crime was committed beyond a reasonable doubt. He didn't have to

do that, but he thought it was important.

...

What did Julian say? From Ms. Gutierrez, the only person we know, she said he got out of the car and said you have some explaining to do and tried to get her in her car.

...

That's her car. Would somebody telling you to get in your own car restrain your liberty? You've got the keys in your pocket.

I pushed him. Okay. She assaulted him according to the definition of assault you have, right? She told him to leave me alone. He punched me in the face because I refused. He slapped me and pulled my hair. I tried to run away. He pulled me by my hair and brought me to the floor. That's it. It lasted a couple seconds. That's all it is. She gets up. His mom gets out of the car. He jumps in her car and leaves. RP 174-6

As was the case in State v. Mullins, 158 Wn.App. 360, 372, 241

P.3d 456 (2010) "(Juarez) contends we should follow a line of cases holding that ineffective assistance will be found where a fact intensive inquiry discloses that an "acquittal only" strategy was objectively unreasonable. See State v. Grier, 150 Wn.App. 619, 208 P.3d 1221 (2009), review granted, 167 Wn.2d 1017, 224 P.3d 773 (2010); State v. Pittman, 134 Wn.App. 376, 166 P.3d 720; State v. Ward, 125 Wn.App. 243, 104 P.3d 670 (2004). But in these cases, the record does not disclose a conscious choice by the defense to pursue acquittal only. And as we noted in Hassan, these cases "do not properly take into consideration the strong presumption of effective assistance in determining whether the decision to seek acquittal was a legitimate trial strategy." Hassan, 151 Wn.App. at 221

n. 6, 211 P.3d 441.

In this trial the strategy was clearly that the offenses alleged were not committed. On appeal Juarez argues that "...there was overwhelming evidence that Mr. Juarez was guilty of some offense (fourth degree assault). He now claims that his strategy in the trial court was unduly risky given his new position that there was clearly an assault. He argues that this was actually an assault in that parking lot just not one that was based on an attempt by Juarez to unlawfully imprison the victim.

That was not argued in trial. Juarez also attempts to discount the sworn testimony of the victim of this assault by arguing in this appeal that she should not be believed because when she was a juvenile she was caught shoplifting some items. (Appellant's brief at 21)

To determine if Juarez was even entitled to a lesser included instruction the trial court and on review this court must analyze the requested instruction under the two-pronged test outlined in State v. Workman. 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

First, each of the elements of the lesser offense must be a necessary element of the charged offense (the "legal prong"). State v. Berlin. 133 Wn.2d 541,545-46, 947 P.2d 700 (1997) (citing Workman. 90 Wn.2d at 447-48. Second, the evidence must raise an inference that only the lesser offense was committed to the exclusion of the charged offense

(the "factual prong"). State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150(2000). When analyzing the factual prong, this court will view the evidence in the light most favorable to the party who requested the instruction at trial. Fernandez-Medina, 141 Wn.2d at 455-56. However, "the evidence must affirmatively establish the defendant's theory of the case—it is not enough that the jury might disbelieve the evidence pointing to guilt." Fernandez-Medina, 141 Wn.2d at 456.

Here Juarez fails the second prong, in the light most favorable to the State the evidence does not support just fourth degree assault. Based on the unrefuted testimony of the victim there were facts that supported the State's theory, that Juarez was trying to unlawfully imprison the victim, despite claims now on appeal that he did assault her but he did not try force her into his car.

Juarez must admit the truth of the State's evidence and all reasonable inferences drawn in favor of the State, with circumstantial evidence and direct evidence considered equally reliable. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The elements of a crime can be established by both direct and circumstantial evidence. State v. Brooks, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). One is no less valuable than the other. There is sufficient evidence to support the conviction if a rational trier of

fact could find each element of the crime proven beyond a reasonable doubt.

While the defendant has the absolute right not to take the stand that presents the jury with only the State's witnesses and their testimony on both direct and cross-examination. The rule of law says that credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The evidence clearly does not support the proposed lesser included offense of assault in the fourth degree to the exclusion of seconded degree assault based on the attempted unlawful imprisonment of the victim. Because the lesser does not factually exclude the greater there would have been no legal basis for the court to grant a request for a lesser included even if Juarez had actually asked for one during his trial,

**Response to issue 3 – Conviction for both count 1 and count 2 did not violate double jeopardy.**

This court as indicated on innumerable occasions the standard of review when a defendant raises a double jeopardy claim. The court has ruled that “[d]ouble jeopardy claims raise questions of law, which (the court) will review de novo.” State v. Turner, 169 Wn.2d 448, 454, 238 P.3d 461 (2010). Turner goes on to set forth the basis for this review:

"Both our federal and state constitutions protect persons from being twice put in jeopardy for the same

offense." Turner, 169 Wn.2d at 454, 238 P.3d 461; U.S. CONST. amend. V; CONST. art. I, § 9. This includes, "being (1) prosecuted a second time for the same offense after acquittal, (2) prosecuted a second time for the same offense after conviction, and (3) punished multiple times for the same offense." State v. Linton, 156 Wash.2d 777, 783, 132 P.3d 127 (2006).

The standard of review was set forth by this Division of the court in State v. Gatlin, 158 Wn.App. 126, 134, 241 P.3d 443, (2010):

At issue in any double jeopardy analysis is whether the legislature intended to impose multiple punishments for the same event. In the Pers. Restraint of Orange, 152 Wash.2d 795, 815, 100 P.3d 291 (2004). Courts may discern the legislature's purpose by applying the tests set forth in Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932) ("same elements test"). Under Blockburger, "[t]he applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. at 304, 52 S.Ct. 180. Under the Washington rule, double jeopardy attaches only if the offenses are identical in both law and fact, which is demonstrated when "the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other." State v. Reiff, 14 Wash. 664, 667, 45 P. 318 (1896) (quoting Morey v. Commonwealth, 108 Mass. 433, 434 (1871)). The "same elements" test and the "same evidence" test are largely indistinguishable. Orange, 152 Wash.2d at 816, 100 P.3d 291.

The State filed an amended information that was the final charging document in this case. That amended information is set forth in its totality

in Appendix A to this brief. Below are the pertinent sections of the two counts that Juarez now challenges as violating double jeopardy. As can be seen these two counts do not violate the standard as set forth in the cases cited herein, a mere reading of these two charges demonstrates why there is no violation.

**Count 1- ASSAULT IN VIOLATION OF PROTECTION ORDER-DOMESTIC VIOLENCE RCW 26.50.110(4) and (1) and 10.99.020 and RCW 9.94A.535(3)(h)(ii)**

On or about January 21, 2016, in the State of Washington, with knowledge that the **Yakima County Superior Court had previously issued a protection order, restraining order, or no contact order pursuant to Chapter 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 RCW in State of Washington vs Julian Miguel Juarez, Cause No. 14-1-00863-1, which protects Eugenia Claudia Gutierrez**, you violated the order while the order was in effect by knowingly violating the restraint provisions therein, and/or by knowingly violating a provision excluding you from a residence, a workplace, a school or a daycare, and/or by knowingly coming within, or knowingly remaining within, a specified distance of a location, and/or by knowingly violating a provision of the foreign protection order for which a violation is specifically indicated to be a crime, **and you intentionally assaulted Eugenia Claudia Gutierrez in a manner that does not amount to assault in the first or second degree.**  
(Emphasis added.)

**Count 2-FELONY VIOLATION OF A PROTECTION ORDER-DOMESTIC VIOLENCE RCW 26.50.110(5) and 10.99.020 and RCW 9.94A.535(3)(h)(ii)**

On or about January 21, 2016, in the State of Washington, with knowledge that the **Yakima County Superior Court had previously issued a protection order. restraining order. or no contact order pursuant to Chapter 7.90, 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 RCW in State of Washington vs Julian**

**Miguel Juarez, Cause No. 14-1-00863-1, which protects Eugenia Claudia Gutierrez, you violated the order while the order was in effect by knowingly violating the restraint provisions therein, and/or by knowingly violating a provision excluding you from a residence, a workplace, a school or a daycare, and/or by knowingly coming within, or knowingly remaining within, a specified distance of a location, and you have at least two previous convictions, City of Yakima Municipal Court Cause Numbers 5Z0124055 and 5Z0156123, for violating a provision of a court order issued under Chapter 7.90, 10.99, 26.09, 26.10, 26.26, 26.50, or 7 4.34 RCW, or any valid foreign protection order as defined in RCW 26.52.020.**  
**(Emphasis added)**

The jury instructions clearly required that the jury could only find this defendant guilty if they found that the State had proven beyond a reasonable doubt that count 1;

To convict the defendant of the crime of Assault in Violation of a No Contact Order in Count 1, each of the following five elements of the crime must be proved 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.

And Count 2:

To convict the defendant of the crime of Violation of a No Contact Order in Count 2, each of the following five elements of the crime must be proved 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 has twice been previously convicted for violating the provisions of a court order;** and

(5) That the defendant's act occurred in the State of Washington.

The State was required to prove several identical elements in each criminal act and one very distinct and separate act for the jury to determine that the case had been proven beyond a reasonable doubt. The case law cited throughout this section makes it clear that if there are distinct elements between the two criminal acts in question a finding of guilt on both does not implicate double jeopardy.

Once again the rule of law as set out in In re Fletcher, 113 Wn.2d 42, 47, 776 P.2d 114 (1989):

The double jeopardy clause does not prohibit the imposition of separate punishments for *different* offenses. State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983) held that:

In order to be the "same offense" for purposes of double jeopardy the offenses must be the same in law and in fact. If there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses.

The test set forth in Vladovic involves two components. First, the offenses must be factually the same. If "proof of one offense would not necessarily also prove the other", double jeopardy would not protect against multiple punishments. Vladovic, at 423.

Finally, the trial court addressed this issue at sentencing. The court was addressing the issue of whether counts one and three were the same

course and conduct for sentencing, it found that to be true. In the discussion regarding that issue the court stated;

I don't believe that it's an issue of double jeopardy to him --- for Mr. Juarez to be convicted of all three offenses. I don't --- I don't believe that Count 2 is the same course of criminal conduct as to Count 1 and 3. I think that that's a separate crime and you can commit one and not commit the other and so consequently, I think he has essentially --- essentially has two current offenses, one encompassing Counts 1 and 3 and one encompassing Count 2.  
(Sentencing RP 21)

**Response to Issue 4: The trial court did not err when it determined that counts 1 and 2 were not the same criminal conduct.**

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

"The defendant bears the burden at trial to show that current offenses encompass the same criminal conduct. State v. Aldana Graciano, 176 Wn.2d 531, 539-40, 295 P.3d 219 (2013). Our review is for abuse of discretion or misapplication of the law. Graciano, 176 Wn.2d at 536." State v. Hood, 196 Wn.App. 127, 137, 382 P.3d 710 (2016).

The record contains insufficient proof by the defendant that these two crimes were the same conduct. The following statement would appear to be the sum total of proof by Juarez at sentencing "I honestly

believe that all three should count together but I appreciate the Court's reasoning and I'm not ---I doubt that I would change your mind, Your Honor. My client went to one place, saw one person, and did one serious (inaudible)." (Sentencing RP 20)

Graciano reaffirmed that that standard of review was abuse of discretion stating "[c]rimes constitute the "same criminal conduct" when they "require the same criminal intent, are committed at the same time and place, and involve the same victim." Id. Deciding whether crimes involve the same time, place, and victim often involves determinations of fact. In keeping with this fact-based inquiry, we have repeatedly observed that a court's determination of same criminal conduct will not be disturbed unless the sentencing court abuses its discretion or misapplies the law." Id. at 536.

The two counts in question are decidedly different. The intent in count 1 is not only to violate an existing order but also to assault the named person while violating the order of the court.

In count 2 the intent is merely to violate the order of the court having previously been convicted of two or more of the named offenses.

Therefore, as the court stated "that's a separate crime and you can commit one and not commit the other." (Sentencing RP 21).

"If the defendant fails to prove any element under the statute, the

crimes are not the "same criminal conduct." Maxfield, 125 Wash.2d at 402, 886 P.2d 123. "[T]he statute is generally construed narrowly to disallow most claims that multiple offenses constitute the same criminal act." Porter, 133 Wash.2d at 181, 942 P.2d 974." Id at 540.

“In deciding if crimes encompassed the same criminal conduct, trial courts should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next.... [P]art of this analysis will often include the related issues of whether one crime furthered the other and if the time and place of the two crimes remained the same. Garza-Villarreal, 123 Wash.2d at 46, 864 P.2d 1378.” State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994)

Juarez states that his objective intent was singular, his desire to contact the victim. If that was true, there would be no “need” to assault the victim. He could have merely stood there and made his case to his ex without ever lay a hand on the victim. The facts do not support this theory.

**Response to Issue 5: Imposition of aggravator counts 1 and 2.**

It would appear that the Appellant is correct and that State v. Barbee, 187 Wn.2d 375, 386 P.3d 729 (2017) is controlling. That case indicates that the trial court cannot impose an aggravator such as the one in this case if such imposition will result in the sentence exceeding the

statutory maximum.

Count 3 is a class B felony and the court imposed a base sentence of 57 months and an additional 12 months for the aggravator plead and proven by the State. Therefore, the State would request, as with the other concessions below, that this court simply order that the judgment and sentence be amended to strike the additional 12 month imposed for the aggravator on counts 1 and 2.

There will be no overall change in the length of the sentence for this defendant because the trial court had already imposed the statutory maximum base sentence on counts 1 and 2. The trial court indicated the need for this lengthy sentence and clearly the trial court will once again impose the same base sentence.

The Court had this to say at sentencing:

JUDGE: Okay, well, Mr. Juarez at some time in the future you're going to raise your hand to the wrong one and she's gonna kill you and that will be the end of that and nobody will mourn your passing. You like to beat up women. Some woman is gonna say that's enough. I can't take this anymore. (Sentencing VRP 26-7)

State v. Perez, 69 Wn. App. 133, 140, 847 P.2d 532 (1993);

We are satisfied that the trial court would have followed the State's recommendation and imposed the same sentence absent the improper factor. Therefore, we need not remand for further consideration. State v. Fisher, 108 Wn.2d 419, 429-

30, 430 n.7, 739 P.2d 683 (1987). State v. Drummer, 54 Wn. App. 751, 760, 775 P.2d 981 (1989).

State v. Davis, 53 Wn. App. 306, 316, 766 P.2d 1120 (1989);

Where a finding, as is this finding, is so clearly supported by the record, the fact that the court may have considered other possibly improper matters in reaching the finding is no basis for reversal if the trial court would have reached the same result had it not considered the other matters. State v. Tunell, 51 Wn. App. 274, 284, 753 P.2d 543 (1988)

**Response to Issue 6: Community Custody, counts 1 and 2.**

The State must concede that the Judgment and Sentence incorrectly indicates that the court imposed community custody on counts 1 and 2. This is a scrivener's error. The State indicated at sentencing and the court agreed that there should not be any community custody on the first two counts due to the length of the base sentence;

JACKSON: (DPA for the State) Now, I do believe that in this case then if we're dealing with perhaps a top end range on Count 1 of sixty months then that should be a sixty month sentence. That would be an additional seventeen months on top of the top of the range for a five --- an offender score of five and that would still allow for community custody to be served on Count 3. There's no community custody as to the other counts, the Class C felonies, because there'd be no time remaining. There still would be time remaining as to Class B and (inaudible) and so would place Mr. Juarez in custody and I do think it's important to place Mr. Juarez in community custody.

THE COURT: The conditions of community custody are imposed as to Count 3 only.

As with issue 7 the State would urge that this court order that the trial court enter an ex parte order that simply corrects the judgment and sentence to reflect the position of the State and the oral order of the court. There is no need for a remand and “resentencing.” Clearly the order of the court is not reflected in the written judgment and sentence and this can be corrected without the expense of returning the defendant to the trial court.

**Response to Issue 7: Costs of medical care while incarcerated.**

In order to preserve the scarce resources of this court, the State and the trial court, the State would request leave of this court to file an order, ex parte, amending the Judgment and Sentence which simply strikes section 4.D.4 from the original judgment and sentence. This solution is proposed so that rather than incurring the cost of returning the defendant to the custody of Yakima County, appointing counsel, setting a hearing date and time and conducting that hearing the one section shall simply be struck and the defendant shall not be liable for any costs of incarceration.

**Response to Issue 8 – Appellate costs.**

State v. Sinclair, 192 Wn.App. 380, 385-86, 388-90, 367 P.3d 612 (quoting RAP 14.2), review denied 185 Wn.2d 1034 (2016) “The commissioner or clerk “will' award costs to the State if the State is the substantially prevailing party on review, 'unless the appellate court directs

otherwise in its decision terminating review. "... When a party raises the issue in its brief, we will exercise our discretion to decide if costs are appropriate.... We base our decision on factors the parties set forth in their briefs rather than remanding to the trial court."

While the State has the legal right to request costs in this case and the State fully expects to "substantially prevail" the State has not asked for nor will it ask for appellate costs in this case when it prevails.

#### **IV. CONCLUSION**

For the reasons set forth above this court should deny this appeal.

Respectfully submitted this day of May 2017,

By: s/ David B. Trefry

DAVID B. TREFRY WSBA# 16050

Senior Deputy Prosecuting Attorney

P.O. Box 4846 Spokane, WA 99220

Telephone: 1-509-534-3505

E-mail: [David.Trefry@co.yakima.wa.us](mailto:David.Trefry@co.yakima.wa.us)

# APPENDIX A

THE COURT: I guess at this point the state has rested. You had a motion you wanted to make in regard to one of the counts.

MR. DOLD: Your Honor, with respect to the second degree assault, taking the evidence in a light most favorable to the state, I don't think that there is any possibility of demonstrating an effort to get somebody into their own car was, in fact, an unlawful imprisonment. I understand, if Mr. Jackson thought he was trying to get her into his car, there would be some reason to think that. Telling somebody that we have to talk, directing them to get in their car and using some force to get them in their car does not amount to unlawful imprisonment. Also, the evidence is according to -- the statement written by Melanie indicated that the original push took place from Ms. Gutierrez, that she was the one that pushed first before anything else happened. Given that evidence, I don't think that there is any evidence that there was an attempt or a substantial step toward committing the crime of unlawful imprisonment. As a result, I don't think the second degree assault can stand.

Certainly the injury was not sufficient to amount to a second degree assault. The state's theory has been, as long as I've known it, it was an attempt to commit another felony. There wasn't substantial injury and a deadly weapon was not used, etcetera.

THE COURT: Well, they never alleged grievous bodily harm.

MR. DOLD: Right.

THE COURT: Let me hear from Mr. Jackson. Do you have anything further on your motion?

MR. DOLD: No.

THE COURT: Okay.

MR. JACKSON: Well, your Honor, the assault part of that is clear. The court is right. There doesn't have to be any certain level or degree of assault, just that an assault did occur without intent to commit the unlawful imprisonment.

So it starts with this issue -- the testimony reflects that it starts with this issue the getting into the car.

There's certainly pushing towards the car and this desire of

Mr. Juarez to get Ms. Gutierrez into the car. She expresses that she's scared. She doesn't want to get into the car. She goes towards the front of the car. He pursues her at that point. There's an assault that occurs on the grass, including some punching and then down to the ground, then dragging where she -- my understanding of the testimony, she's kind of crawling in the direction she was being dragged by the hair. She didn't say it, but you can certainly imply that it was because it hurt less if you're crawling towards somebody who's pulling your hair.

At that point she did say that she was fighting to get out of his grasp, was trying to get away. Other witnesses, Ms. Acevedo said it seems like she was trying to escape. I mean, it's clear that there was restraint, and that's really all that I need to show, substantially interfering with her liberty. She wasn't free to leave and get up when she's being held and dragged on the ground with this idea in her mind that she needs to get in the car with him.

It wasn't with legal authority. It wasn't with her consent. It was certainly accomplished by physical force. So I believe, your Honor, that under all the evidence there is sufficient evidence to get this to the jury on an assault, with the intent to commit the felony of unlawful imprisonment.

THE COURT: Anything else, Mr. Dold?

MR. DOLD: The best testimony we have on the time is ten seconds that she was not able to go in the direction that she wanted to go. There's no evidence that he took any step to drag her to the car. It was to prevent her from leaving, yes.

The fact is she would not be leaving her children in the car. She wanted to be away from him, and that's true. She did not want to go anywhere. The scope that she would have gone without her kids is very limited at that time, I suspect, and he didn't interfere with that.

She was leaving the application of physical force. He was trying to prevent her from doing that. I don't believe that amounts to unlawful imprisonment.

THE COURT: Well, It doesn't have to. The state just has to show that he acted with intent to commit unlawful imprisonment, not that he actually committed the

crime of unlawful imprisonment.

Looking at the evidence in a light most favorable to the nonmoving party in this instance and most favorable to the state, there is sufficient evidence for the matter to go forward. I'm going to deny the motion to dismiss.

Do you need a few minutes to talk to your client?

RP 128-132

DECLARATION OF SERVICE

I, David B. Trefry state that on May 11, 2017 emailed a copy, by agreement of the parties, of the Respondent's Brief, to Kristina Nichols, at Admin@ewalaw.com and Jill Reuter at jill@ewalaw.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 11<sup>th</sup> day of May, 2017 at Spokane, Washington.

By: s/David B. Trefry  
DAVID B. TREFRY WSBA# 16050  
Senior Deputy Prosecuting Attorney  
Yakima County  
P.O. Box 4846 Spokane, WA 99220  
Telephone: 1-509-534-3505  
E-mail: David.Trefry@co.yakima.wa.us

# YAKIMA COUNTY PROSECUTORS OFFICE

May 11, 2017 - 5:14 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 34638-2  
**Appellate Court Case Title:** State of Washington v. Julian Miguel Juarez  
**Superior Court Case Number:** 16-1-00179-9

### The following documents have been uploaded:

- 346382\_Briefs\_20170511171303D3106710\_1343.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was Jurarez 346382 Brief.pdf*

### A copy of the uploaded files will be sent to:

- David.Trefry@co.yakima.wa.us
- admin@ewalaw.com
- joseph.brusic@co.yakima.wa.us
- jill@ewalaw.com

### Comments:

---

Sender Name: David Trefry - Email: David.Trefry@co.yakima.wa.us  
Address:  
PO BOX 4846  
SPOKANE, WA, 99220-0846  
Phone: 509-534-3505

**Note: The Filing Id is 20170511171303D3106710**