

No. 35097-5-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 Douglas L. Federspiel

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Julian Miguel Juarez hit a Yakima County Jail corrections officer during a struggle. The State charged Mr. Juarez with a single count of third degree assault of the corrections officer, under the subsection of the statute prohibiting assault against a law enforcement officer or other employee of a law enforcement agency.

At the jury trial held on the charge, the corrections officer testified that although he completed training at the Washington State Criminal Justice Center, he was not made a sworn officer. A jury found Mr. Juarez guilty as charged. The trial court imposed an exceptional sentence, under a provision of the Sentencing Reform Act authorizing an exceptional sentence where a defendant has committed multiple current offenses. The trial court also sentenced Mr. Juarez using an offender score that included two prior convictions that the prior sentencing court determined were same criminal conduct.

Mr. Juarez now appeals, arguing the trial court erred in finding him guilty of third degree assault, where the evidence was insufficient that the corrections officer was a law enforcement officer or other employee of a law enforcement agency. Mr. Juarez also challenges the imposition of an exceptional sentence under the applied statutory provision, because he was convicted of only one offense, not multiple current offenses. In addition,

Mr. Juarez challenges the inclusion of two prior convictions, previously found to be same criminal conduct, in his offender score.

Mr. Juarez also challenges the imposition of discretionary legal financial obligations and preemptively objects to the imposition of any appellate costs.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Juarez guilty of third degree assault of a Yakima County Jail corrections officer, where the evidence was insufficient that the corrections officer was a law enforcement officer or other employee of a law enforcement agency.
2. The trial court erred in imposing an exceptional sentence.
3. The trial court erred in entering finding of fact 2.2 in the Judgment and Sentence:

2.2 Special Findings: The Court makes the following special findings:

The Court finds an aggravating circumstance for the offense in Count 1 that the defendant has committed multiple current offenses and the defendant's high offender score in Yakima County Cause 16-1-0179-39 results in the current offense in the above-entitled cause going unpunished. (RCW 9.94A.535(2)(c)).

(CP 60).

4. The trial court erred in entering finding of fact 2.6 in the Judgment and Sentence:

2.6 Exceptional Sentence: Substantial and compelling reasons exist which justify an exceptional sentence. Pursuant to aggravating circumstance in RCW 9.94A.535(2)(c), the court

finds that an exceptional sentence to run the above-entitled cause consecutive with 16-1-00179-39 is consistent with the interests of justice and the purposes of the sentencing reform act.

(CP 61).

5. The trial court erred in entering the following finding of fact regarding the exceptional sentence:

Julian Juarez's sentence on 16-1-00179-39, is for the statutory maximum, if the sentence on 16-1-00561-39 was run concurrent, it would result in the current offense going unpunished.

(CP 99-100).

6. The trial court erred in entering the following finding of fact regarding the exceptional sentence:

The assault against Garrett Goettsch on 3/5/16, was not a small scuffle, it was significant and Garrett Goettsch was punched in the face.

(CP 100).

7. The trial court erred in entering the following finding of fact regarding the exceptional sentence:

Running the sentences in 16-1-00561-39 and 16-1-00179-39 consecutive to one another serves a deterrent effect, and should dissuade assaultive behavior while in custody.

(CP 100).

8. The trial court erred in entering the following conclusion of law regarding the exceptional sentence:

There is a factual basis under RCW 9.94A.535(2)(c) to depart from the sentencing guidelines and impose

a sentence of 16 months in custody consecutive to the sentence in 16-1-00179-39.

(CP 100).

9. The trial court erred by not counting two prior convictions, assault in violation of a protection order – domestic violence and second degree assault – domestic violence, previously found to be same criminal conduct, as one offense for purposes of Mr. Juarez’s offender score.
10. Mr. Juarez was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to argue two prior convictions, assault in violation of a protection order – domestic violence and second degree assault – domestic violence, constituted the same criminal conduct.
11. The trial court erred by failing to conduct a sufficient inquiry into Mr. Juarez’s likely present or future ability to pay and imposing discretionary legal financial obligations.
12. An award of costs on appeal against Mr. Juarez would be improper in the event that the State is the substantially prevailing party.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the trial court erred in finding Mr. Juarez guilty of third degree assault of a Yakima County Jail corrections officer, where the evidence was insufficient that the corrections officer was a law enforcement officer or other employee of a law enforcement agency.

Issue 2: Whether the trial court erred in imposing an exceptional sentence.

Issue 3: Whether the trial court erred by not counting two prior convictions, previously found to be same criminal conduct, as one offense, or in the alternative, whether Mr. Juarez was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to argue the two prior convictions constituted the same criminal conduct.

Issue 4: Whether the trial court erred by imposing discretionary legal financial obligations against this indigent defendant without conducting a sufficient inquiry into Mr. Juarez's present or likely future ability to pay.

Issue 5: Whether this Court should deny costs against Mr. Juarez on appeal in the event the State is the substantially prevailing party.

D. STATEMENT OF THE CASE

On March 5, 2016, Julian Miguel Juarez was an inmate in the Yakima County Jail. (RP 135, 140, 159-161). Mr. Juarez was removed from his cell and placed in a visiting room while his cell was inspected for contraband. (RP 138-140, 160-162). When the inspection was complete, corrections Officer Garrett Goettsch was assigned to transport Mr. Juarez back to his cell. (RP 140, 160-162).

While transporting Mr. Juarez back to his cell, Officer Goettsch had removed Mr. Juarez's handcuffs. (RP 141, 143-145, 162-163). Officer Goettsch decided not to allow Mr. Juarez back into his cell, so he attempted to place handcuffs back on Mr. Juarez in order to transport him back to the visiting room. (RP 163-164, 186-187, 196). Mr. Juarez resisted being placed in handcuffs, and a struggle ensued between Mr. Juarez and Officer Goettsch. (RP 147-149, 164-166, 222-223). During this struggle, Mr. Juarez swung at and hit Officer Goettsch. (RP 149, 155, 164-166, 223, 228-229; Pl.'s Ex. 1).

The altercation between Mr. Juarez and Officer Goettsch was recorded on the jail video system, on two separate video cameras. (RP 111-115; Pl.'s Ex. 1).

The State charged Mr. Juarez with one count of third degree assault against Officer Goettsch, in violation of RCW 9A.36.031(1)(g). (CP 4).

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 98). 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 98).

The case proceeded to a jury trial. (RP 109-303). The jury viewed the two videos of the altercation between Mr. Juarez and Officer Goettsch. (RP 114-115, 144-145, 167-170, 203-205, 226, 228, 231, 122; Pl.'s Ex. 1). The jury also viewed still photographs from one of the videos. (RP 187-197, 202; Def.'s Exs. 2-31).

Witnesses testified consisted with the facts stated above. (RP 109-235). In addition, Sergeant Nicolas Perez, who testified regarding the jail video system, testified he worked for the Department of Corrections as a

special investigator in internal affairs. (RP 110-111). On cross-examination, Sergeant Perez testified as follows:

[Defense counsel:] What does internal affairs in the jail do?

[Sergeant Perez:] Investigates various incidents in - - - just investigates various things.

[Defense counsel:] Okay, do you investigate crimes against jail staff?

[Sergeant Perez:] That's typically turned over to law enforcement for investigation.

[Defense counsel:] Okay, so you're familiar with the investigation in this case, correct?

[Sergeant Perez:] At the beginning I assisted law enforcement with video.

....

[Defense counsel:] [W]ere you aware of anybody else that did an investigation? Did the sheriff's office come in and investigate anything?

[Sergeant Perez:] They did the - - - they did the law enforcement investigation, I believe, yes.

....

[Defense counsel:] [W]hat they did is they transmitted the statements and the video to the prosecutor's office and that's all they did, correct, the sheriff's office?

[Sergeant Perez:] I believe so, yes.

(RP 116-117).

Sergeant Perez also testified that to be a regular custody officer, you have to go through basic custody officer academy. (RP 118).

Yakima County Jail Corporal Alfredo Larios testified that Officer Goettsch was a law enforcement officer. (RP 135, 141).

Officer Goettsch testified he is a corrections officer for the Yakima County Department of Corrections, working at the Yakima County Jail.

(RP 158-159). He testified prior to getting this job, he went through training at the Washington State Criminal Justice Center. (RP 158-159).

Officer Goettsch then testified:

[Deputy prosecutor:] Okay and after you went through that training did they make you a sworn officer?

[Officer Goettsch:] No.

(RP 159).

On cross-examination, Officer Goettsch testified as follows:

[Defense counsel:] [Y]ou were the lead officer involved in this, right?

[Officer Goettsch:] Yes.

[Defense counsel:] Okay, in law enforcement for street officers, officers who work on the street, the lead officer is an officer who is the primary investigator. Did you have any investigative duties with respect to this matter?

[Officer Goettsch:] No.

(RP 175-176).

Mr. Juarez testified in his own defense. (RP 213-235). He testified he felt like he had to defend himself against Officer Goettsch, (RP 214, 223, 225, 231). He acknowledged he resisted when Officer Goettsch attempted to handcuff him, and testified that as Officer Goettsch tried to take him to the ground, it felt like Officer Goettsch hit him. (RP 222-223, 226, 229). Mr. Juarez testified it was after that contact that he swung and made contact with Officer Goettsch. (RP 223, 228-229). He testified he was afraid he was going to get beat up. (RP 223, 225, 227, 229-230).

The trial court instructed the jury that in order to find Mr. Juarez guilty of third degree assault, the State had to prove each of the following elements beyond a reasonable doubt:

- (1) That on or about March 5, 2016, the defendant assaulted Garrett Goettsch;
- (2) That at the time of the assault, Garrett Goettsch was a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties; and
- (3) That any of these acts occurred in the State of Washington.

(CP 54; RP 283).

Mr. Juarez requested, and the trial court gave, a self-defense jury instruction. (CP 33-35, 38-41, 55; RP 243-262, 275, 283-284).

The jury found Mr. Juarez guilty as charged. (CP 58, 60-67; RP 306-309).

At sentencing, the State asked the trial court to impose an exceptional sentence under RCW 9.94A.535(2)(c). (RP 316-320). The State requested a term of confinement within the standard range, based on an offender score of four, but requested the confinement run consecutive to a previous sentence imposed on Mr. Juarez, rather than concurrent to this previous sentence. (RP 316-320).

Mr. Juarez requested a standard range sentence, based on an offender score of four, to run concurrent to his previous sentence. (RP 324). Mr. Juarez's offender score of four included three points from the

three felony convictions in his previous case: (1) assault in violation of a protection order – domestic violence; (2) felony violation of a protection order – domestic violence; and (3) second degree assault – domestic violence. (CP 61). Mr. Juarez did not object to the inclusion of these three convictions in his offender score. (RP 319-324). The prior sentencing court found that Mr. Juarez’s felony convictions of assault in violation of a protection order – domestic violence and second degree assault – domestic violence encompassed the same criminal conduct. *See* Felony Judgment and Sentence, Yakima County Superior Court No. 16-1-00179-39.¹ In addition, Mr. Juarez did not object to the legal basis proffered by the State for an exceptional sentence. (RP 320-321, 324).

The trial court imposed an exceptional sentence as requested by the State, of a term of confinement within the standard range based on an offender score of four, to run consecutive to Mr. Juarez’s previous sentence. (CP 60-62, 99-100; RP 334). The trial court also entered written findings of fact and conclusions of law regarding the exceptional sentence. (CP 99-100). The trial court found that Mr. Juarez committed the current third degree assault prior to being sentenced on his previous case. (CP 99). The trial court entered the following conclusion of law:

¹ On the same day as this opening brief was filed, Mr. Juarez filed a Motion to Accept Additional Evidence under RAP 9.11, asking this Court to accept and consider a copy of his Felony Judgment and Sentence, entered Yakima County Superior Court No. 16-1-00179-39, as additional evidence.

“[t]here is a factual basis under RCW 9.94A.535(2)(c) to depart from the sentencing guidelines and impose a sentence of 16 months in custody consecutive to [Mr. Juarez’s previous sentence].” (CP 100).

The trial court stated it would take the previous sentencing judge’s “indications of your indigency as valid.” (RP 324, 335). The trial court then imposed the following legal financial obligations: \$500 Crime Penalty Assessment; \$100 DNA collection fee; and \$250 costs of incarceration. (CP 63; RP 335).

The Judgment and Sentence contains the following findings:

2.2 Special Findings: The Court makes the following special findings:

The Court finds an aggravating circumstance for the offense in Count 1 that the defendant has committed multiple current offenses and the defendant’s high offender score in [Mr. Juarez’s previous case] results in the current offense in the above-entitled cause going unpunished. (RCW 9.94A.535(2)(c)).

....

2.6 Exceptional Sentence: Substantial and compelling reasons exist which justify an exceptional sentence. Pursuant to aggravating circumstance in RCW 9.94A.535(2)(c), the court finds that an exceptional sentence to run the above-entitled cause consecutive with [Mr. Juarez’s previous case] is consistent with the interests of justice and the purposes of the sentencing reform act.

(CP 60-61).

The Judgment and Sentence also 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 61, 64).

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 64).

Mr. Juarez appealed.² (CP 83-91). The trial court found that Mr. Juarez is indigent and entered an Order of Indigency, granting Mr. Juarez a right to review at public expense. (CP 75-80; RP 334).

² Initially, this Court filed a motion to dismiss the notice of appeal as untimely filed. In a Commissioner's Ruling issued June 5, 2017, the Court denied its motion to dismiss and allowed this appeal to proceed.

E. ARGUMENT

Issue 1: Whether the trial court erred in finding Mr. Juarez guilty of third degree assault of a Yakima County Jail corrections officer, where the evidence was insufficient that the corrections officer was a law enforcement officer or other employee of a law enforcement agency.

The State's evidence demonstrated, at most, that Mr. Juarez assaulted a corrections officer employed by the Yakima County Jail. However, a corrections officer is not "a law enforcement officer or other employee of a law enforcement agency," under the third degree assault statute. Furthermore, Officer Goettsch testified he was not a sworn officer, and other testimony at trial demonstrated that the jail corrections staff functioned separately from law enforcement. (RP 116-117, 159, 175-176). A rational jury could not have found Mr. Juarez guilty of third degree assault beyond a reasonable doubt. Therefore, the evidence is insufficient to support Mr. Juarez's conviction of third degree assault.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201,

829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, “[a] claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.* (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)).

“Circumstantial evidence and direct evidence are equally reliable.” *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Circumstantial evidence “is sufficient if it permits the fact finder to infer the finding beyond a reasonable doubt.” *State v. Askham*, 120 Wn. App. 872, 880, 86 P.3d 1224 (2004) (citing *State v. King*, 113 Wn. App. 243, 270, 54 P.3d 1218 (2002)). The appellate court “defer[s] to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *Thomas*, 150 Wn.2d at 874-875.

Sufficient means more than a mere scintilla of evidence; there must be that quantum of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved. *State v. Fateley*, 18 Wn. App. 99, 102, 566 P.2d 959 (1977). The remedy for

insufficient evidence to prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

“[A] criminal defendant may always challenge the sufficiency of the evidence supporting a conviction for the first time on appeal.” *State v. Sweany*, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011), *aff’d*, 174 Wn.2d 909, 281 P.3d 305 (2012) (citing *State v. Hickman*, 135 Wn.2d 97, 103 n. 3, 954 P.2d 900 (1998)); *see also* RAP 2.5(a)(2) (stating “a party may raise the following claimed errors for the first time in the appellate court . . . failure to establish facts upon which relief can be granted. . . .”). “A defendant challenging the sufficiency of the evidence is not obliged to demonstrate that the due process violation is ‘manifest.’” *Id.*

To find Mr. Juarez guilty of third degree assault, the jury had to find that Officer Goettsch “was a law enforcement officer or other employee of a law enforcement agency” (CP 54; RP 283); *see also* RCW 9A.36.031(1)(g). For purposes of the third degree assault statute, the Legislature has not defined the terms “law enforcement officer” or “law enforcement agency.” *See* RCW 9A.04.110 (definitions for the criminal code).

The legislature has created a criminal statute specifically to punish assault against a corrections officer: custodial assault. *See* RCW 9A.36.100(1)(b). This statute prohibits assault upon any staff member at

any adult corrections institution or local adult detention facility who was performing official duties at the time of the assault. *See* RCW 9A.36.100(1)(b). Staff members at corrections institutions include corrections officers. *See, e.g., State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000) (affirming custodial assault conviction against a corrections officer); *State v. Ratliff*, 77 Wn. App. 522, 892 P.2d 118 (1995) (same).

Under the “general-specific rule” of statutory construction, where two statutes punish the same conduct, the more specific statute prevails over the general one. *State v. Conte*, 159 Wn.2d 797, 803-04, 154 P.3d (2007). The state must charge someone accused of the more specific conduct only under the specific statute. *Id.* Under this rule, even if the term “law enforcement officer or other employee of a law enforcement agency” could be read to include a corrections officer, the state must, nonetheless, charge assault against a corrections officer under the more specific statute for custodial assault. *Id.*

In another context, this Court has held that the Department of Corrections qualifies as a “law enforcement agency” for purposes of the Employment Disqualification Statute. *See McLean v. State, Dep't of Corr.*, 37 Wn. App. 255, 257-59, 680 P.2d 65 (1984). However, *McLean* was decided before the custodial assault statute was enacted in 1987. *See* 1987 Wash. Sess. Laws. 657, ch. 188. Accordingly, the *McLean* court did

not have the benefit of the application of the rules of statutory construction as discussed herein.

Statutes should also be interpreted so as not to render any provision superfluous. *State v. K.L.B.*, 180 Wn.2d 735, 740, 328 P.3d 886 (2014). Applying this rule, the Department of Corrections and county jails cannot be “law enforcement agencies” for purposes of third degree assault. *Id.* If they were, the portion of the custodial assault statute protecting “full or part-time staff member[s]... of adult corrections institution or local adult detention facilities” would be superfluous because those parties would already be protected by the third degree assault statute.

The rule of lenity compels the same result. *See, e.g., State v. Weatherwax*, 188 Wn.2d 139, 155, 392 P.3d 1054 (2017) (applying the rule of lenity to interpret the applicable statute in favor of the defendant). If the third degree assault statute is ambiguous as to whether it punishes assault against a corrections officer, that ambiguity must be construed in favor of Mr. Juarez. *See id.* Under the rules of statutory construction, a corrections officer does not qualify as “a law enforcement officer or other employee of a law enforcement agency” for purposes of third degree assault. *See id.*; *K.L.B.*, 180 Wn.2d at 740; RCW 9A.36.031(1)(g).

In addition, here, Officer Goettsch testified he was not a sworn officer. (RP 159). Although Corporal Larios testified that Officer

Goettsch was a law enforcement officer, Officer Goettsch's own testimony as to his status should control. (RP 135, 141, 159). In addition, other testimony at trial demonstrated that the jail corrections staff functioned separate and distinct from law enforcement. (RP 116-117, 159, 175-176). Based on this testimony, there was insufficient evidence presented at trial that Officer Goettsch was a law enforcement officer or other employee of a law enforcement agency.

Based on the foregoing, a rational jury could not have found Mr. Juarez guilty of third degree assault beyond a reasonable doubt. *See Salinas*, 119 Wn.2d at 201 (citing *Green*, 94 Wn.2d at 220-22); *see also* CP 54; RP 283; RCW 9A.36.031(1)(g). His conviction for third degree assault should be reversed and dismissed with prejudice. *See Smith*, 155 Wn.2d at 505 (stating this remedy).

Issue 2: Whether the trial court erred in imposing an exceptional sentence.

The trial court imposed an exceptional sentence under a statutory provision, RCW 9.94A.535(2)(c), authorizing an exceptional sentence under specified circumstances where a defendant is convicted of multiple current offenses. However, because Mr. Juarez was convicted of only one offense, not multiple current offenses, this statutory provision did not apply. Therefore, the case should be reversed and remanded for resentencing.

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)). An appellate court reviews de novo “whether a trial court’s reasons for imposing an exceptional sentence meet the requirements of the SRA.” *State v. Friedlund*, 182 Wn.2d 388, 394, 341 P.3d 280 (2015).

Further, an appellate must find the following in order to reverse an exceptional sentence:

(1) [U]nder a clearly erroneous standard, there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence; (2) under a de novo standard, the reasons supplied by the sentencing court do not justify a departure from the standard range; or (3) under an abuse of discretion standard, the sentence is clearly excessive or clearly too lenient.

State v. France, 176 Wn. App. 463, 469, 308 P.3d 812 (2013) (citing RCW 9.94A.585(4); *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005)).

Here, because Mr. Juarez challenges the trial court’s authority to impose the exceptional sentence as it did, the second standard of review, *de novo*, applies.

Mr. Juarez was sentenced RCW 9.94A.589(1)(a), which provides: “Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.” RCW 9.94A.589(1)(a); *see also State v. Smith*, 74 Wn. App. 844, 853–54, 875 P.2d 1249 (1994) (holding that “defendants who are sentenced for multiple convictions at the same proceeding must be given concurrent sentences unless the sentencing court determines that there are grounds for an exceptional sentence.”).

However, RCW 9.94A.589(1)(a) does not apply to Mr. Juarez’s sentence here, because he was convicted of only one offense. *See State v. Champion*, 134 Wn. App. 483, 487 n.1, 140 P.3d 633, 634 (2006) (finding that because “RCW 9.94A.589(1) deals with sentencing for two or more current offenses” it did not apply to the defendant’s sentence for one count of assault).

Likewise, the statutory provision under which the trial court imposed an exceptional sentence on Mr. Juarez, RCW 9.94A.535(2)(c), does not apply to Mr. Juarez’s sentence here, because he was convicted of only one offense. Under RCW 9.94A.535(2)(c), “[t]he trial court may

impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances . . . [t]he defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.” RCW 9.94A.535(2)(c) (emphasis added). “While the SRA does not formally define ‘current offense,’ the term is defined functionally as convictions entered or sentenced on the same day.” *In re Pers. Restraint of Finstad*, 177 Wn. 2d 501, 507, 301 P.3d 450 (2013). Because Mr. Juarez was convicted of a single offense of third degree assault, he did not commit “multiple current offenses,” and therefore, RCW 9.94A.535(2)(c) did not apply.

Mr. Juarez committed the current third degree assault prior to being sentenced on his previous case. (CP 99). Mr. Juarez acknowledges that the trial court could have imposed a consecutive sentence under RCW 9.94A.589(3). *See, e.g., Champion*, 134 Wn. App. at 486-88 (upholding a consecutive sentence imposed under RCW 9.94A.589(3)). This statutory provision provides:

[W]henever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced *unless the court pronouncing the current sentence expressly orders that they be served consecutively.*

RCW 9.94A.589(3) (emphasis added).

However, a consecutive sentence under that statutory provision is discretionary, and it must be expressly ordered by the trial court. *See Champion*, 134 Wn. App. at 487 (quoting *State v. Grayson*, 130 Wn. App. 782, 786, 125 P.3d 169 (2005)). Because the trial court did not exercise its discretion under this applicable statute, RCW 9.94A.589(3), but instead incorrectly applied the exceptional sentence provisions of RCW 9.94A.589(1)(a) and RCW 9.94A.535(2)(c), remand for resentencing under the correct law is appropriate.

Remand for resentencing is appropriate, because the principal justification relied upon by the court for Mr. Juarez's exceptional sentence, the basis set forth in RCW 9.94A.535(2)(c), was improper. *See In re the Matter of George*, 52 Wn. App. 135, 148–49, 758 P.2d 13 (1988) (“When not all of a trial court's justifications for imposing an exceptional sentence are proper, a reviewing court can nonetheless affirm the sentence if the principal justifications relied on by the trial court are proper and the reviewing court is confident that the trial court, on remand, would impose the same sentence even without considering the improper justifications.”); *see also State v. Bourgeois*, 72 Wn. App. 650, 664, 866 P.2d 43 (1994) (“A remand for resentencing is necessary because, as is clear from a review of its oral findings and opinion, the trial court placed

‘significant weight’ on the inappropriate factors in departing from a standard range disposition.”).

Accordingly, Mr. Juarez’s sentence should be reversed and remanded for resentencing under the correct law, RCW 9.94A.589(3).

Issue 3: Whether the trial court erred by not counting two prior convictions, previously found to be same criminal conduct, as one offense, or in the alternative, whether Mr. Juarez was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to argue the two prior convictions constituted the same criminal conduct.

The trial court sentenced Mr. Juarez based upon an offender score of four, which included two prior convictions, assault in violation of a protection order – domestic violence and second degree assault – domestic violence, that the prior sentencing had found encompassed the same criminal conduct. The trial court erred by not counting these two prior convictions as one offense. In the alternative, Mr. Juarez was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to argue these two prior convictions constituted the same criminal conduct. Therefore, the case should be reversed and remanded for resentencing.

A defendant may challenge a sentencing court’s calculation of his offender score for the first time on appeal. *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994). A challenge to the offender score is reviewed de novo. *Id.*

The State has the burden to establish on the record the existence and the classification of the convictions relied on in calculating the score.

State v. Ford, 137 Wn.2d 472, 480-82, 973 P.2d 452 (1999). RCW

9.94A.525 provides, in relevant part:

In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except . . . Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score.

RCW 9.94A.525(5)(a)(i).

The current sentencing court must determine the offender score based upon “other current and prior convictions.” *State v. Williams*, 176

Wn. App. 138, 141, 307 P.3d 819 (2013) (citing RCW 9.94A.589(1)(a)).

“If a prior sentencing court found multiple offenses ‘encompass the same criminal conduct,’ the current sentencing court must count those prior convictions as one offense.” *Id.* at 141 (citing RCW 9.94A.525(a)(i)).

Here, the trial court sentenced Mr. Juarez based upon an offender score of four. (CP 61-62; RP 334). His offender score of four included three points from the three felony convictions in his previous case: (1) assault in violation of a protection order – domestic violence; (2) felony violation of a protection order – domestic violence; and (3) second degree assault – domestic violence. (CP 61). Mr. Juarez did not object to the inclusion of these three convictions in his offender score. (RP 319-324).

However, the prior sentencing court found that Mr. Juarez’s felony convictions of assault in violation of a protection order – domestic violence and second degree assault – domestic violence encompassed the same criminal conduct. *See* Felony Judgment and Sentence, Yakima County Superior Court No. 16-1-00179-39.

Because the prior sentencing court found that Mr. Juarez’s felony convictions of assault in violation of a protection order – domestic violence and second degree assault – domestic violence encompassed the same criminal conduct, the trial court here erred by not counting these two prior convictions as one offense, for sentencing purposes. *See* RCW 9.94A.525(5)(a)(i); *see also Williams*, 176 Wn. App. at 141.

In the alternative, Mr. Juarez was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to argue the two prior convictions, for assault in violation of a protection order – domestic violence and second degree assault – domestic violence, constituted the same criminal conduct.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). “A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal.” *State v. Kylo*, 166 Wn.2d 856,

862, 215 P.3d 177 (2009). The claim is reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

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)).

Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

“Trial counsel owe several responsibilities to their clients, including the duty to research relevant law.” *State v. Brown*, 159 Wn. App. 366, 371, 245 P.3d 776 (2011) (citing *Kyllo*, 166 Wn.2d at 862). Here, the applicable provision of the SRA, RCW 9.94A.525(5)(a)(i), requiring prior offenses found to be same criminal conduct to be counted as one offense, was in effect at the time of sentencing. *See* RCW 9.94A.525(5)(a)(i) (2016). Therefore, this statute was relevant law at the time of sentencing. *Cf. Brown*, 159 Wn. App. at 373-74 (defense counsel

had no responsibility to seek out a pending United States Supreme Court decision). Thus, defense counsel's failure to argue that Mr. Juarez's two prior convictions, for assault in violation of a protection order – domestic violence and second degree assault – domestic violence, constituted the same criminal conduct, was deficient performance. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26) (setting forth the two-part test for ineffective assistance of counsel). Defense counsel's performance was also deficient because he was the defense attorney for both the current and the previous sentencings, so he was aware that the two prior convictions encompassed the same criminal conduct. *See Felony Judgment and Sentence, Yakima County Superior Court No. 16-1-00179-39.*

Furthermore, defense counsel's failure to argue that Mr. Juarez's two prior convictions, for assault in violation of a protection order – domestic violence and second degree assault – domestic violence, constituted the same criminal conduct, prejudiced Mr. Juarez. Had defense counsel made this argument, the two convictions would have counted as one offense in Mr. Juarez's offender score, which would have lowered his offender score to three and therefore, subjected him to a lower standard range sentence. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26); *see also* RCW 9.94A.525(5)(a)(i); RCW

9.94A.510 (sentencing grid); RCW 9.94A.515 (seriousness levels). At an offender score of three, the standard range for third degree assault was 9-12 months confinement, as opposed to a standard range of 12+ - 16 months confinement for an offender score of four. *See* RCW 9.94A.510 (sentencing grid, setting forth the standard range sentences based upon seriousness level and offender score); RCW 9.94A.515 (listing the crimes within each seriousness level).

Based on the foregoing, the case should be remanded for resentencing under the correct offender score.

Issue 4: Whether the trial court erred by imposing discretionary legal financial obligations against this indigent defendant without conducting a sufficient inquiry into Mr. Juarez’s present or likely future ability to pay.

Mr. Juarez requests this Court remand this case for resentencing and direct the trial court to strike the discretionary legal financial obligations (LFOs) from his judgment and sentence, the \$250 costs of incarceration and the costs of medical care. (CP 63-64). The trial court’s boilerplate finding that Mr. Juarez had the present or likely future ability to pay was not supported by the record. (CP 61). The imposition of discretionary costs is inconsistent with the principles enumerated in *Blazina, infra*, *Blank, infra*, and *Mahone, infra*.

As a threshold matter, “[a] defendant who makes no objection to the imposition of discretionary LFOs [legal financial obligations] at

sentencing is not automatically entitled to review.” *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015). Instead, “RAP 2.5(a) grants appellate courts discretion to accept review of claimed errors not appealed as a matter of right . . . [and] [e]ach appellate court must make its own decision to accept discretionary review.” *Id.* at 834-35.

Mr. Juarez asks this Court to exercise its discretion under RAP 2.5(a) to decide the LFO issue for the first time on appeal. *See id.* The factors identified by this Court when deciding whether to exercise its discretion to decide the LFO issue weigh in favor of deciding the issue. *See State v. Gonzalez-Gonzalez*, 193 Wn. App. 683, 693, 370 P.3d 989 (2016) (stating “[a]n approach favored by this author is to consider the administrative burden and expense of bringing a defendant to court for a new hearing, versus the likelihood that the discretionary LFO result will change.”). The trial court would not have to hold a resentencing hearing only to address this issue, because remand for resentencing is already required (Issues 2 and 3 above). In addition, there is a high likelihood that a new sentencing hearing would change the LFO amount, given Mr. Juarez’s indigent status, including as stated on the report as to continued indigency, filed in this Court on the same day as this opening brief.

Turning to the substantive issue, the court may order a defendant to pay LFOs, including costs incurred by the State in prosecuting the

defendant. RCW 9.94A.760(1); RCW 10.01.160(1), (2). Mr. Juarez was ordered to pay mandatory court costs (\$500 Crime Penalty Assessment and \$100 DNA collection fee) and discretionary court costs (\$250 costs of incarceration and costs of medical care). (CP 63-64; RP 335); *see also In re Pers. Restraint of Dove*, 196 Wn. App. 148, 152, 381 P.3d 1280 (2016) (acknowledging that a \$500 crime victim assessment and a \$100 DNA collection fee are mandatory LFOs); *State v. Leonard*, 184 Wn.2d 505, 506-508, 358 P.3d 1167 (2015) (costs of incarceration and costs of medical care are discretionary).

“Unlike mandatory obligations, if a court intends on imposing *discretionary* legal financial obligations as a sentencing condition, such as court costs and fees, it must consider the defendant’s present or likely future ability to pay.” *State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013) (emphasis in original). The applicable statute states:

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

RCW 10.01.160(3).

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 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 839.

The *Blazina* court specifically acknowledged the many problems associated with imposing LFOs against indigent defendants, including increased difficulty reentering society, increased recidivism, the doubtful recoupment of money by the government, inequities in administration, the accumulation of collection fees when LFOs are not paid on time, defendants’ inability to afford higher sums especially when considering

the accumulation at the current rate of twelve percent interest, and long-term court involvement in defendants' lives that may have negative consequences on employment, housing and finances. *Blazina*, 182 Wn.2d at 834–837. “Moreover, the state cannot collect money from defendants who cannot pay, which obviates one of the reasons for courts to impose LFOs.” *Id.* at 837.

A trial court must consider the defendant's ability to pay before imposing discretionary LFOs, but it is not required to enter specific findings regarding a defendant's ability to pay discretionary court costs. *Lundy*, 176 Wn. App. at 105 (citing *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)). Where a finding of fact is entered, it “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 court entered the following boilerplate finding: “the defendant is an adult and is not disabled and therefore has the ability or likely future ability to pay the legal financial obligations imposed herein.”

(CP 61). But this finding was clearly erroneous. The trial court did not consider Mr. Juarez's present or likely future ability to pay at sentencing, but rather, indicated it agreed that Mr. Juarez was indigent, then proceeded to impose LFOs. (RP 335).

Our Supreme Court in *Blazina* detailed the inquiry the trial court should undertake before finding that a defendant has the ability to pay, but the trial court here did not conduct the required inquiry. (RP 335); *see also Blazina*, 182 Wn.2d at 837-39.

The court's finding that Mr. Juarez had the present or likely future ability to pay LFOs was not made after a sufficient individualized inquiry. The court's finding is not supported by substantial evidence in the record and must be set aside. *Brockob*, 159 Wn.2d at 343.

Mr. Juarez was found indigent by the trial court and remains indigent at this time. (CP 98, 75-80; RP 324, 335). His report as to continued indigency, filed in this Court on the same day as this opening brief, demonstrates his continued indigency, including a lack of assets and income, and outstanding debts owing. His continued indigent status, coupled with the length of his prison term in both his previous case and this case, weights against a finding that Mr. Juarez has the current or future ability to pay LFOs.

The finding on Mr. Juarez's ability to pay LFOs should be set aside, and discretionary court costs, the \$250 costs of incarceration and the costs of medical care, should be stricken from Mr. Juarez's judgment and sentence.

Issue 5: Whether this Court should deny costs against Mr. Juarez on appeal in the event the State is the substantially prevailing party.

Mr. Juarez preemptively objects to any appellate costs being imposed against him, 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), this Court's General Court Order issued on June 10, 2016, and RAP 14.2 (amended effective January 31, 2017).

An order finding Mr. Juarez indigent was entered by the trial court, and there has been no known improvement to this indigent status. (CP 75-80). To the contrary, Mr. Juarez's report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. Juarez remains indigent. The report shows that Mr. Juarez's financial circumstances have not improved since the date he was sentenced in this case.

The imposition of costs under the circumstances of this case would be inconsistent with those principles enumerated in *Blazina*. See *Blazina*,

182 Wn.2d at 835. 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, the 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 serious 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 10.73.160(3). 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 successfully rehabilitate in precisely the same ways the *Blazina* court identified for trial costs.

Although *Blazina* applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene our High Court’s 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 *Blazina* held was essential before imposing monetary obligations. This is particularly true where, as here, Mr. Juarez has demonstrated his indigency and current and future inability to pay costs. In addition, as set forth above, it is not proper to defer the required ability to pay inquiry to the time the State attempts to collect costs, as suggested by the trial court in this case. *See Blazina*, 182 Wn.2d at 832, n.1. Mr. Juarez would be burdened by the accumulation of significant interest and would be left to challenge the costs without the aid of counsel. RCW 10.82.090(1) (interest-bearing LFOs); RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same); *State v. Mahone*, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999) (because motion for remission of LFOs is not appealable as matter of right, “Mahone cannot receive counsel at public expense”). The trial court is required to conduct an individualized inquiry prior to imposing the costs, not prior to the State’s collection efforts. *See Lundy*, 176 Wn. App. 96; 103 RCW 10.01.160(3); *Blazina*, 182 Wn.2d 827.

Furthermore, the *Blazina* court instructed *all* courts to “look to the comment in GR 34 for guidance.” *Blazina*, 182 Wn.2d at 838. That

comment provides, “The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis.” GR 34 cmt. (emphasis added). The *Blazina* court said, “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. Mr. Juarez met this standard for indigency. (CP 75-80).

This Court receives orders of indigency “as a part of the record on review.” RAP 15.2(e); CP 152-159. “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) indigency standard, requires this Court to “seriously question” this indigent appellant’s ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839.

It does not appear to be the burden of Mr. Juarez to demonstrate his continued indigency given the newly amended RAP 15.2, since his indigency is presumed to continue during this appeal. Nonetheless, Mr. Juarez’s report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. Juarez remains indigent.

This Court is asked to deny appellate costs at this time. 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). *Blank*, too, recognized appellate courts have discretion to deny the State’s requests for costs. *State v. Blank*, 131 Wn.2d 230, 252-53, 930 P.2d 1213 (1997). Pursuant to RAP 14.2, effective January 31, 2017, this Court, a commissioner of this court, or the court clerk are now specifically guided to deny appellate costs if it is determined that the offender does not have the current or likely future ability to pay such costs. RAP 14.2. Importantly, when a trial court has entered an order that the offender is indigent for purposes of the appeal, that finding of indigency remains in effect pursuant to RAP 15.2(f), unless the commissioner or court clerk determines by a preponderance of the evidence that the offender’s financial circumstances have significantly improved since the last determination of indigency. *Id.*

There is no evidence Mr. Juarez’s current indigency or likely future ability to pay has significantly improved since the trial court entered its order of indigency in this case. And, to the contrary, there is a completed report as to continued indigency showing that Mr. Juarez remains indigent.

Appellate costs should not be imposed in this case.

F. CONCLUSION

The evidence presented at trial was insufficient to find Mr. Juarez guilty of third degree assault. His conviction should be reversed and the charge dismissed with prejudice.

At a minimum, the case should be reversed and remanded for resentencing, for the trial court to sentence Mr. Juarez under the correct law, RCW 9.94A.589(3), and for the trial court to count two of Mr. Juarez's prior convictions, assault in violation of a protection order – domestic violence and second degree assault – domestic violence, as one offense, for purposes of his offender score.

Mr. Juarez also requests this Court remand the case for the trial court to strike discretionary LFOs from Mr. Juarez's judgment and sentence: the \$250 costs of incarceration and the costs of medical care.

Finally, Mr. Juarez asks this Court to deny the imposition of any costs against him on appeal.

Respectfully submitted this 28th day of July, 2017.


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Attorney for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

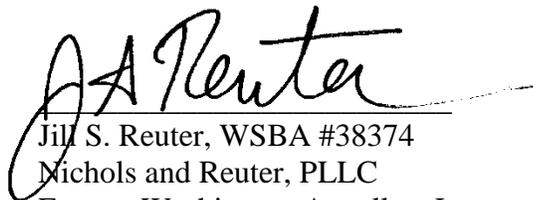
STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 35097-5-III
vs.)
)
JULIAN MIGUEL JUAREZ)
) PROOF OF SERVICE
Defendant/Appellant)
_____)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on July 28, 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:

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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 the Washington State Appellate Courts' Portal.

Dated this 28th day of July, 2017.



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July 28, 2017 - 1:16 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35097-5
Appellate Court Case Title: State of Washington v. Julian Miguel Juarez
Superior Court Case Number: 16-1-00561-1

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