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No. 35419-9-III

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

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STATE OF WASHINGTON,

Respondent,

v.

DYMON LEE WILLIAMS,

Appellant.

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

The Honorable Michael McCarthy

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APPELLANT'S OPENING BRIEF

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## **A. SUMMARY OF ARGUMENT**

Dymon Lee Williams was found guilty of first degree burglary (Count 1). He was also found guilty of three felony violations of a protection order (Counts 2, 3 and 4). His conviction for first degree burglary should be dismissed.

The State presented insufficient evidence Mr. Williams committed first degree burglary (Count 1) by entering or unlawfully remaining in Yolanda Caldera Lazo's residence. While Mr. Williams was prohibited by court order from contacting Caldera Lazo, he was not specifically prohibited from her residence, and he had her implied permission to be there. Mr. Williams' conviction for first degree burglary should be vacated for insufficient evidence.

During trial the State introduced Exhibits 5 and 6<sup>1</sup> (complaint and fingerprint cards), which included improper criminal history evidence. Defense counsel did not object, and the admission of this evidence affected the outcome of the trial, as the criminal history was more prejudicial than probative. A new trial is warranted.

At sentencing, the trial court denied defense counsel's motion to count the first two convictions as same criminal conduct (first degree

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<sup>1</sup> The State redacted versions of some of the exhibits that were admitted, including Exhibits 5 and 6. RP 98, vol. II. State's Exhibits 5 and 6 are the redacted versions of State's Exhibits 5A and 6A; however, the State failed to redact all of the necessary portions of Exhibits 5 and 6. RP 98, vol. II.

burglary and felony violation of a protection order, Counts 1 and 2), despite the fact these incidents occurred at the same time, same place, involved the same victim, and were committed with the same criminal intent. The trial court abused its discretion by failing to find same criminal conduct. The case should be remanded for resentencing.

The trial court imposed discretionary financial obligations of \$250 for costs of incarceration and costs of medical care, despite finding Mr. Williams indigent. Mr. Williams' financial status has not improved. The case should be remanded to strike these financial obligations from the judgement and sentence. Mr. Williams also preemptively objects to being assessed any costs associated with this appeal.

Count 1 (first degree burglary) should be vacated, and the case remanded for retrial or resentencing, as stated herein.

### **B. ASSIGNMENTS OF ERROR**

1. The trial court erred in finding Mr. Williams guilty of first degree burglary, where the evidence was insufficient that Mr. Williams entered or remained unlawfully in the building.

2. The trial court erred in finding Counts 1 and 2 were not based on the same criminal conduct. *See* Findings of Fact and Concl. of Law on Exceptional Sentence at p. 2–3, Findings of Fact, No. 14, and Concl. of Law, No. 1. CP 608–09.

3. Because the trial court erred in concluding Counts 1 and 2 were not the same criminal conduct, the trial court miscalculated the defendant's offender score. *See* Findings of Fact and Concl. of Law on Exceptional Sentence at p. 3, Concl. of Law, Nos. 1–7. CP 609.

4. Defense counsel was ineffective for failure to object to the admission of improper criminal history in State's Exhibits 5 and 6,<sup>2</sup> which was more prejudicial than probative.

5. The trial court erred by entering a boilerplate finding Mr. Williams had the ability or likely future ability to pay legal financial obligations despite his indigency.

6. The trial court erred by assigning discretionary legal financial obligations, \$250 costs of incarceration and costs of medical care, to Mr. Williams despite his indigency.

7. Mr. Williams preemptively objects to any costs associated with this appeal.

### **C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Issue 1: Whether there is sufficient evidence of first degree burglary when the no contact order did not prohibit Mr. Williams from the residence and he had implied permission to be in the residence.

Issue 2: Whether Mr. Williams was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to the admission of prejudicial criminal history contained in State's Exhibits Nos. 5 and 6<sup>3</sup> (complaint and fingerprint cards).

Issue 3: Whether the trial court abused its discretion by failing to find the convictions for first degree burglary (Count 1) and felony violation of a protection order (Count 2) were same criminal conduct, as the incident occurred at the same time, same place, and with the same intent.

Issue 4: Whether the trial court erred by imposing discretionary legal financial obligations against the defendant when the trial court found Mr. Williams indigent.

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

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<sup>2</sup> See fn. 1.

<sup>3</sup> See fn. 1.

#### **D. STATEMENT OF THE CASE**

On June 23, 2016, Yolanda Caldera Lazo<sup>4</sup> hosted a birthday party for one of her children. RP 81, vol. II.<sup>5</sup> Dymon Lee Williams was present. RP 81, vol. II. Later that evening, Caldera Lazo and Williams conceived a child together. RP 82, 87, vol. II.

Almost two days later, in the early morning hours of June 25, 2016, Caldera Lazo returned home from work at a restaurant. RP 66, vol. II. Caldera Lazo resided in a home on Clinton Way, in Yakima, Washington. RP 64, vol. II. Not long after she returned from work, Mr. Williams entered the house through an open bedroom window while Caldera Lazo was in the bathroom. RP 67, vol. II. Caldera Lazo was sitting on the toilet when Mr. Williams appeared. RP 67, vol. II. While she was sitting, Mr. Williams grasped Caldera Lazo's underwear and pulled them off. RP 68, vol. II. Mr. Williams appeared to be intoxicated or on drugs, and he accused Caldera Lazo of sleeping with other people

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<sup>4</sup> On the record, Ms. Caldera Lazo indicated her preference to be called "Ms. Caldera." RP 65, vol. II. Because a majority of the court documents on this direct appeal refer to her as "Yolanda Caldera Lazo" this brief will refer to her as "Caldera Lazo."

<sup>5</sup> Three different volumes were transcribed in this case. This brief will refer to the volume transcribed by Amy M. Brittingham and the court dates therein (November 18, 2016 through July 7, 2017) as "vol. I." This brief will refer to the volume transcribed by Joan E. Anderson and the court dates therein (May 22–25, 2017) as "vol. II." The third volume will not be referenced in this brief.

and using drugs. RP 67–68, vol. II. The couple began arguing, and continued until approximately 7:00 in the morning, when Mr. Williams finally left. RP 67–69, vol. II.

The State charged Mr. Williams with first degree burglary (Count 1), and felony violation of a protection order (Counts 2, 3, and 4). CP 157–58. All charges involved domestic violence. CP 157–58.

The no contact order relevant to the felony violations of a protection order in Counts 2, 3, and 4, prohibited Mr. Williams from making contact with Caldera Lazo. State’s Ex. 3, p. 1; RP 32, vol. II. The order also contains the following language:

C. Do not knowingly enter, remain, or come within . . . [1,000 feet] . . . of the protected person’s residence, school, workplace, other:  person  children’s school or daycare  \_\_\_\_\_.

State’s Ex. 3, p. 1; RP 32, vol. II.

Caldera Lazo’s testimony at a jury trial was consistent with the facts above. RP 63–88, vol. II. She also testified she and Mr. Williams had been in a prior relationship, which lasted about four years, and that he is the father of two of her children (one of which was conceived close to the date of the incident). RP 65–66, 80, vol. II. Mr. Williams had resided previously with Caldera Lazo in the home on Clinton Way. RP 80, vol. II. Caldera Lazo testified that during the incident in question on June 25, 2016, Mr. Williams was going through the house and gathering his

belongings. RP 69–70, 82, vol. II. She also testified she told Mr. Williams to leave, but then appeared to equivocate by stating she could not quite recall the conversation and at what point she told Mr. Williams to leave. RP 85, vol. II.

During trial the State presented a complaint and fingerprint cards, which were admitted into evidence. State’s Ex. 5; State’s Ex. 6; RP 54–57, 98, vol. II.<sup>6</sup> Defense counsel did not object to the exhibits’ admission or the criminal history listed on the complaint and fingerprint cards. RP 54, 56–58, vol. II.

At trial, Mr. Williams stipulated that on August 2, 2016, and August 8, 2016, he contacted Caldera Lazo by phone from the Yakima County Jail. RP 89, vol. II; State’s Ex. 16. These phone calls were the basis for the charges in Counts 3 and 4 (felony violations of a protection order). CP 158–59.

A jury found Mr. Williams guilty on all counts. CP 525–33; RP 151–52, vol. II. The jury also found Mr. Williams and Caldera Lazo were members of the same family or household, classifying the offenses as domestic violence. CP 157–59, 525–33; RP 151–52, vol. II.

At sentencing, defense counsel moved the trial court to score the first two counts as same criminal conduct. RP 51, vol. I. Defense counsel

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<sup>6</sup> See fn. 1.

argued the first two counts (first degree burglary and felony violation of a protection order, both of which occurred on June 25, 2016) were the same conduct. RP 51, vol. I; CP 157–58, 510, 515. The trial court denied the motion, with little explanation. RP 59–60, 62–63, vol. I; CP 595, 608–09 (Findings of Fact and Concl. of Law on Exceptional Sentence, Findings of Fact No. 14, Concl. of Law No. 1).

Based on the understanding Mr. Williams’ offender score was 13 for the first degree burglary (Count 1), and a score of 11 on the felony violations of a protection order (Counts 2, 3 and 4), the trial court sentenced Mr. Williams above the standard range on Count 1. RP 62, vol. I; CP 596–97, 609. The trial court found an exceptional sentence was warranted under the “free crimes” aggravator statute. RP 62–63, vol. I; CP 609; *see* RCW 9.94A.535(2)(c).

At sentencing, legal financial obligations (LFOs) were also briefly addressed. RP 61, 63, vol. I; CP 598. Mr. Williams explained he did not have any assets and would be unable to earn income as he would be incarcerated for a lengthy period of time. RP 61, vol. I. The trial court imposed the mandatory fees of \$600 (\$500 crime penalty assessment and \$100 DNA collection fee), but also imposed \$250 for costs of incarceration and costs of medical care. RP 63, vol. I; CP 598–99.

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 596, 599.

The trial court found Mr. Williams indigent, and entered an Order of Indigency, granting Mr. Williams a right to review at public expense. RP 68, vol. I; CP 616–17. Mr. Williams' Report as to Continued Indigency, dated 8/1/17 and filed contemporaneously with this brief, indicates he owes approximately \$40,000 in child support, that he owns no assets, and is not receiving any income. Report as to Continued Indigency.

Mr. Williams timely appeals. CP 611.

## **E. ARGUMENT**

**Issue 1: Whether there is sufficient evidence of first degree burglary when the no contact order did not prohibit Mr. Williams from the residence and he had implied permission to be in the residence.**

There was insufficient evidence to support Mr. Williams' conviction for first degree burglary. In order to find Mr. Williams guilty of first degree burglary, the jury had to find Mr. Williams "entered or remained unlawfully" in a building. RCW 9A.52.020. The evidence presented at trial did not clearly establish whether Mr. Williams was without permission to enter or remain in Ms. Caldera Lazo's home. A rational jury could not have found Mr. Williams guilty of first degree burglary beyond a reasonable doubt. Therefore, the evidence is insufficient to support Mr. Williams' conviction of first degree burglary.

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. Williams guilty of first degree burglary, the jury had to find he entered or remained unlawfully in a building with the intent to commit a crime against a person or property inside the building, and also that he assaulted a person while in the building or in immediate flight from the building. RP 113–114, vol. II; CP 510; *see also* RCW 9A.52.020(1)(b)(first degree burglary).

Here, the evidence was insufficient that Mr. Williams entered or remained unlawfully because the no contact order did not prohibit Mr. Williams from Caldera Lazo’s residence, and he had implied permission to be inside her home.

For the purposes of first degree burglary, a person “enters or remains unlawfully in or upon premises when he . . . is not then licensed, invited, or otherwise privileged to so enter or remain.” CP 511; RP 114, vol. II; RCW 9A.52.010(2).

“[I]n determining whether an offender's presence is unlawful, courts must turn to whether the perpetrator maintained a licensed or privileged occupancy of the premises.” *State v. Wilson*, 136 Wn. App. 596, 606, 150 P.3d 144 (2007). Cases involving domestic violence can

pose a lack of certainty when determining whether an offender's presence is lawful. *Id.* at 606–07. For example, in *Wilson*, the defendant was found not to have committed burglary because despite an existing no contact order, which prohibited him from contacting his girlfriend but did not prohibit him from the residence itself, several factors showed he had permission from his girlfriend to be in the residence. *Id.* at 604–08. Defendant Wilson had co-signed for the lease on the residence, had keys to the home, he stored his clothes and automobiles at the residence, no evidence was presented that he lived elsewhere, and Wilson's girlfriend referred to the residence as "our house." *Id.* at 607. The court found these factors were evidence Wilson had his girlfriend's permission to live in the residence at the time of the charged burglary. *Id.* Division II further expounded upon the burglary statute's purpose versus that of the no contact order:

Although the purpose of a no-contact order is to prevent a victim from having to face her batterer, the burglary statute's intent is to allow an occupant to prevent all those who are unwelcome from entering the premises. *It is the consent, or lack of consent, of the residence possessor, not the State's or court's consent or lack of consent, that drives the burglary statute's definition of a person who "is not then licensed, invited, or otherwise privileged to so enter or remain" in a building.*

*Id.* at 608–09 (emphasis added).

In *State v. Collins*, the defendant was initially invited into the residence to use the telephone. *State v. Collins*, 110 Wn.2d 253, 254–55, 751 P.2d 837 (1988). However, because he remained in the residence after the phone call was complete and proceeded to commit crimes in the residence, he was found to have “unlawfully remained.” *Id.* at 255–61. The Washington Supreme Court held in some cases, depending on the specific facts, a “limitation or revocation of the privilege to be on the premises may be inferred from the circumstances of the case.” *Id.* at 261–62. And yet, in so holding, the Court emphasized this did not necessarily “convert all indoor crimes to burglaries.” *Id.* at 262.

A no contact order “is not applicable to the charged crime if it is not issued by a competent court, is not statutorily sufficient, is vague or inadequate on its face, or otherwise will not support a conviction of violating the order.” *State v. Miller*, 156 Wn.2d 23, 31, 123 P.3d 827 (2005). The validity of a no contact order is solely within the province of the trial court, not the jury. *Id.* at 30–31. Yet the *Miller* court recognized that in some instances, issues regarding the sufficiency of the evidence relating to a no contact order may exist due to the specific facts of a particular case. *Id.* at 31–32.

In this case, the no contact order is unclear as to which locations Mr. Williams was supposed to avoid. State’s Ex. 3, p.1; RP 32, vol. II.

The no contact order prohibits Mr. Williams from remaining or coming within 1,000 feet of Caldera Lazo, and the box labeled “other” in subsection “C” is checked, indicating as such. State’s Ex. 3, p. 1. Yet subsection “C” of the order does not list a specific residential address, is unclear as to whether everything listed in that section is excluded or included because the sentence does not use the word “and”, and the box check marked “other” can be reasonably read to mean exclusion of the remaining options in the sentence (residence, school, workplace) because the inclusion of one generally means the exclusion of others. *Id.*

By way of analogy, a maxim of statutory construction called “expressio unius est exclusio alterius” holds that when “a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature.” *State v. Swanson*, 116 Wn. App. 67, 75, 65 P.3d 343 (2003) (citation and quotations omitted). The same principle applies here: because of the inclusion of “other:  person” in subsection “C” without the inclusion of the other locations (for instance, there is no “and” to make it clear whether the locations are all included), the other locations are impliedly excluded.

The order states, in part:

C. Do not knowingly enter, remain, or come within . . .  
[1,000 feet] . . . of the protected person’s residence,

school, workplace, other:  person  children's school  
or daycare  \_\_\_\_\_.

State's Ex. 3, p. 1. The only portion of the no contact order which is straightforward is the language ordering Mr. Williams not to come within 1,000 feet of Ms. Caldera Lazo. State's Ex. 3, p.1.

The no contact order's language was a significant factor for the burglary conviction in *Wilson*, because the defendant there was prohibited from contacting his girlfriend but was not prohibited from her residence. *Wilson*, 136 Wn. App. at 604–08. In *Wilson*, the court found helpful the following: the no contact order did not prohibit the defendant from entering a specific residence, boxes on the no contact order form were left unchecked (residence, workplace, school, and daycare), and there were checked boxes on other portions of the form prohibiting other types of contact with the victim. *Id.* at 604–05. Because the no contact order in this case is similar to that in *Wilson*, the no contact order here was not a sufficient basis upon which the State could prove Mr. Williams unlawfully entered or remained in Caldera Lazo's residence. State's Ex. 3, p.1; *Wilson*, 136 Wn. App. at 604–08. The no contact order here was unclear, and thus it provided insufficient evidence Mr. Williams unlawfully entered or remained in the residence, which is an essential element of first degree burglary. *Id.*

Since the no contact order did not prohibit Mr. Williams from Caldera Lazo's residence, the inquiry must now turn to whether the State sufficiently proved Mr. Williams did not have other permission to be in the residence.

Several factors indicate Mr. Williams had implied permission to be in Caldera Lazo's residence. On June 23, 2016, and less than 48 hours prior to the incident which led to the charge of burglary, Mr. Williams was in Caldera Lazo's home for a birthday party. RP 80–81, vol. II. It was later that same evening when Caldera Lazo conceived a child by Mr. Williams. RP 82, 87, vol. II. The intimate act shows Mr. Williams had implied permission to be in the residence. *Id.*

Mr. Williams also stored some of his belongings in the home. RP 69–70, 84–85, vol. II. Although the facts showed Mr. Williams climbed into an open window of the home in the early morning hours of June 25<sup>th</sup>, no sign of damage or forced entry to the home was found. RP 84, 94 vol. II. Finally, Ms. Caldera Lazo's testimony regarding whether she told Mr. Williams to leave is at issue, as she could not quite recall when she told him to leave and it seems almost uncertain whether she did tell him to leave because she could not recall the conversation. RP 85, vol. II. These facts all point to Mr. Williams having implied permission to be at the residence.

No rational trier of fact could have found beyond a reasonable doubt that Mr. Williams entered or remained unlawfully in Caldera Lazo's residence. *See State v. Salinas*, 119 Wn.2d 192, 201. Mr. Williams was intimate with Caldera Lazo barely more than a day before the incident, he stored belongings in the home, no damage or sign of forced entry into the home was presented as evidence, and Caldera Lazo's testimony as to whether she asked Mr. Williams to leave is questionable due to her inability to recall the details. Finally, the no contact order did not prohibit Mr. Williams from being in the residence, or at least was unclear or ambiguous as to whether it did. The facts are similar to those in *State v. Wilson*, and there was insufficient evidence here to prove first degree burglary. *Wilson*, 136 Wn. App. 596.

The conviction in Count 1 for first degree burglary should be vacated for insufficient evidence.

**Issue 2: Whether Mr. Williams was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to the admission of prejudicial criminal history contained in State's Exhibits Nos. 5 and 6 (complaint and fingerprint cards).**

At trial, a complaint and several fingerprint cards were admitted into evidence as State's Exhibits 5 and 6<sup>7</sup>, without any objection by defense counsel. RP 56–58, vol. II. The complaint and fingerprint cards contained irrelevant and

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<sup>7</sup> See fn. 1.

prejudicial criminal history. State's Ex. 5, p. 1; State's Ex. 6, pp. 2, 4. Defense counsel's failure to object to the admission of State's Exhibits Nos. 5 and 6 constituted ineffective assistance of counsel, because the evidentiary objection would have been sustained, the result of the trial would have been different if the prejudicial evidence had not been admitted, and the decision not to object was not tactical. Therefore, Mr. Williams' convictions in Counts 1 and 2 should be reversed and remanded for a new trial.

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, a defendant 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)).

Prejudice can also be established by showing that “‘counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.’” *State v. Hicks*, 163 Wn.2d 477, 488, 181 P.3d 831 (2008) (quoting *Strickland*, 466 U.S at 687).

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).

To prove that the failure to object to the admission of evidence constituted ineffective assistance of counsel, a defendant must show “that the failure to object fell below prevailing professional norms, that the objection would have been sustained, . . . that the result of the trial would have been different if the evidence had not been admitted[,]” and that the decision was not tactical. *State v. Sexsmith*, 138 Wn. App. 497, 509, 157 P.3d 901 (2007). “[S]trategy must be based on reasoned decision-making[.]” *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 928, 158 P.3d 1282 (2007).

Evidence of prior misconduct is not admissible to show a defendant has a propensity to engage in such conduct. ER 404(b). “This prohibition encompasses not only prior bad acts and unpopular behavior but any evidence offered to ‘show the character of a person to prove the person acted in conformity’ with that character at the time of a crime.” *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (citation omitted). In order to admit evidence under ER 404(b),

the trial court must follow four steps: “(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.” *Foxhoven*, 161 Wn.2d at 174 (*State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). “This analysis must be conducted on the record.” *Id.* (citing *State v. Smith*, 106 Wn.2d 72, 776, 725 P.2d 951 (1986)). “In doubtful cases, the evidence should be excluded.” *Thang*, 145 Wn.2d at 642 (citing *Smith*, 106 Wn.2d at 776). When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists. *State v. Rice*, 48 Wn. App. 7, 13, 737 P.2d 726 (1987).

In domestic violence cases, “courts must be careful and methodical in weighing the probative value against the prejudicial effect of prior acts . . . because the risk of unfair prejudice is very high. *State v. Gunderson*, 181 Wn.2d 916, 925, 337 P.3d 1090 (2014). Because of this heightened prejudicial effect, prior acts of domestic violence are not admissible unless “the State has established their overriding probative value, such as to explain a witness’s otherwise inexplicable recantation or conflicting account of events.” *Id.*

The nonconstitutional harmless error standard is applied in determining whether improper admission of evidence in violation of ER 404(b) is harmless. *Gunderson*, 181 Wn.2d at 926. Errors are not harmless when “within reasonable probabilities . . . the outcome of the trial [was] materially affected.” *Id.*

The State presented prejudicial evidence of Mr. Williams’ prior bad acts when it sought to admit Exhibits 5 and 6 (complaint and fingerprint cards). State’s Ex. 5, p. 1; State’s Ex. 6<sup>8</sup>, pp. 2, 4. The first page of Exhibit 5 lists a third degree malicious mischief charge, which was dismissed, but the complaint also includes the alleged facts supporting the charge. State’s Ex. 5, p. 1. Additionally, on pages 2 and 4 of Exhibit 6, the prior charges of malicious mischief in the third degree (domestic violence), and criminal trespass in the second degree, are listed as offenses attributable to Mr. Williams. State’s Ex. 6, pp. 2, 4. Defense counsel never objected to the admission of such evidence, and the court never conducted an ER 404(b) admissibility analysis. RP 56–58, vol. II. Also, Mr. Williams did not testify. RP 27–99, vol. II. Defense counsel should have objected to the admission of such evidence, because the factual allegations on the complaint and the two allegations on the fingerprint cards were more prejudicial than probative, were not relevant, and would

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<sup>8</sup> See fn. 1.

not have been admitted by the trial court. Although the State was using the complaint and fingerprint cards to prove Mr. Williams' identity and link him to two prior convictions for violation of a court order, the other crimes were not relevant to this proceeding. State's Ex. 5, p. 1; State's Ex. 6, pp. 2, 4. For these reasons, the court would have denied admission of the unredacted portions of the complaint and fingerprint cards, and defense counsel was ineffective for failure to object. *Foxhoven*, 161 Wn.2d at 174; *McFarland*, 127 Wn.2d at 334-35.

Defense counsel's failure to object was not tactical and fell below professional norms, as allowing prior charges to be presented made it appear Mr. Williams' had a propensity to engage in criminal activity. *See Grier*, 171 Wn.2d at 33. The admission of the past citations are particularly troubling due to this being a domestic violence case, and one of the charges (third degree malicious mischief) also included a domestic violence notation. State's Ex. 5, p. 1; State's Ex. 6, p. 2. Because of the heightened prejudice present in domestic violence cases, this information was especially damaging. *Gunderson*, 181 Wn.2d at 925. This is particularly true where Mr. Williams' had implied permission to be in Caldera Lazo's home and the jury could have been swayed to find guilt based upon his past history. *See Issue 1.*

The trial outcome would have been different had the prior citations not been admitted through the complaint and fingerprint cards. Defense counsel was ineffective for failure to object. The case should be remanded for retrial.

**Issue 3: Whether the trial court abused its discretion by failing to find the convictions for first degree burglary (Count 1) and felony violation of a protection order (Count 2) were same criminal conduct, as the incident occurred at the same time, same place, and with the same intent.**

At sentencing, the trial court refused to find same criminal conduct for first degree burglary (Count 1) and felony violation of a protection order (Count 2). RP 51, 59–60, 62–63, vol. I; CP 595, 608–09. However, assuming without conceding that the burglary conviction withstands this appeal, the act of burglary furthered the crime of felony violation of a protection order. Moreover, the assault on June 25, 2016, was the same act of assault required to prove first degree burglary, RCW 9A52.020(1)(b), and the felony violation of a protection order in Count 2, pursuant to RCW 26.50.110(4). RP 51, 61, vol. I. Same criminal conduct applies, and the trial court erred when it found Counts 1 and 2 were based on different conduct. CP 595, 608.

The offender score establishes the standard range term of confinement for a felony offense. RCW 9.94A.530(1); RCW 9.94A.525. The sentencing court calculates an offender score by adding current

offenses and prior convictions. RCW 9.94A.589(1)(a). “A defendant’s current offenses must be counted separately in determining the offender score unless the trial court finds that some or all of the current offenses ‘encompass the same criminal conduct.’” *State v. Anderson*, 92 Wn. App. 54, 61, 960 P.2d 975 (1998); *see also* RCW 9.94A.589(1)(a). “[I]f two current offenses encompass the ‘same criminal conduct,’ as defined in RCW 9.94A.400(1)(a) [recodified as RCW 9.94A.589], then those current offenses together merit only one point.” *State v. Haddock*, 141 Wn.2d 103, 108, 3 P.3d 733 (2000).

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

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

RCW 9.94A.589(1)(a) (emphasis added). The absence of any of these elements precludes a finding of "same criminal conduct." *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997) (citing *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994)).

Appellate courts review determinations of same criminal conduct for abuse of discretion or misapplication of the law. *State v. Graciano*, 176 Wn.2d 531, 537, 295 P.3d 219 (2013). “Under this standard, when the record supports only one conclusion on whether crimes constitute the ‘same criminal conduct,’ a sentencing court abuses its discretion in arriving at a contrary result.” *Id.* at 537–38. The defendant bears the burden of proving the crimes constitute the same criminal conduct. *Id.* at 539.

The offenses of first degree burglary (Count 1) and felony violation of a protection order (Count 2) involved the same place, as they occurred in Caldera Lazo’s residence. RP 63–88, vol. II. The offenses also occurred at the same time, because the first degree burglary and felony violation of the protection order occurred on June 25, 2016, when Mr. Williams entered or remained unlawfully<sup>9</sup> in the residence and assaulted Caldera Lazo by pulling off her underwear. RP 67, vol. II; CP 510, 515. Elements of both offenses were met simultaneously due to these actions. RP 67, vol. II; CP 157–58, 510, 515.

The offenses involved the same victim, Ms. Caldera Lazo. RP 63–88, vol. II; CP 157–58.

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<sup>9</sup> Although making this argument, Mr. Williams does not concede sufficient evidence existed to prove he entered or remained unlawfully. *See* Issue 1.

Counts 1 and 2 also involved the same criminal intent, but this prong requires a more in-depth analysis.

“Intent, in this context, is not the particular *mens rea* element of the particular crime, but rather is the offender’s objective criminal purpose in committing the crime.” *State v. Phuong*, 174 Wn. App. 494, 546, 299 P.3d 37 (2013) (citation omitted). “In determining whether multiple crimes constitute the same criminal conduct, courts consider ‘how intimately related the crimes are,’ ‘whether, between the crimes charged, there was any substantial change in the nature of the criminal objective,’ and ‘whether one crime furthered the other.’” *Id.* at 546–47 (citation omitted). The standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next. *Vike*, 125 Wn.2d at 411 (citing *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987)). When one crime furthers another, same criminal conduct applies. *State v. Garza-Villarreal*, 123 Wn.2d 42, 47, 864 P.2d 1378 (1993); *see also Dunaway*, 109 Wn.2d at 217. “[I]f one crime furthered another, and if the time and place of the crimes remained the same, then the defendant’s criminal purpose or intent did not change and the offenses encompass the same criminal conduct.” *State v. Lessley*, 118 Wn.2d 773, 777, 827 P.2d 996 (1992).

In *Dunaway*, the Court found the offenses of robbery and kidnapping encompassed the same criminal conduct. *Dunaway*, 109 Wn.2d at 217. The defendant pleaded guilty to the charge of abducting his victim with the intent to commit robbery. *Id.* The Court noted it was the defendant's "very intent to commit robbery that enabled the prosecutor to raise the charge from second degree to first degree kidnapping" because the kidnapping charge necessarily included robbery as an element of the offense and the kidnapping furthered the robbery. *Id.* Thus, the objective intent behind both crimes was the robbery. *Id.*

The criminal intent behind both Counts 1 and 2 is indistinguishable. Mr. Williams entered the residence, and immediately thereafter assaulted Caldera Lazo. There was no change in the intent behind these actions, even though the actions constituted the commission of two crimes: first degree burglary and felony violation of a protection order. According to the jury's verdicts, Mr. Williams entered or remained unlawfully in Caldera Lazo's residence and then intentionally assaulted her while in the residence, thereby establishing the elements of first degree burglary. RP 67, vol. II; CP 157, 510; RCW 9A.52.020. In doing so, the jury found he also committed the crime of felony violation of a protection order: that is, (1) he knew of the no contact order, (2) made contact with Caldera Lazo in violation of the order, (3) he assaulted Caldera Lazo, and

(4) the defendant had twice previously been convicted of violating the provisions of a court order. RP 67, vol. II; CP 158, 515. The criminal intent between the burglary and felony no contact order violation was not different. Nothing happened to indicate a break in the sequence of events, and the burglary furthered the commission of the felony violation of the protection order because it allowed Mr. Williams to gain access to Caldera Lazo to assault her, thereby violating the terms of the court order. The criminal intent remained the same for both crimes.

The trial court erred by failing to find Mr. Williams' convictions for first degree burglary (Count 1) and felony violation of a protection order (Count 2) constituted the same criminal conduct. As a result, Mr. Williams' offender scores were miscalculated.

"A correct offender score must be calculated before a presumptive or exceptional sentence is imposed." *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). "Remand is necessary when the offender score has been miscalculated unless the record makes clear that the trial court would impose the same sentence." *Id.* (citing *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997)).

Mr. Williams acknowledges that the correct calculation of his offender scores does not change his standard range for sentencing purposes, because his offender score remains a "nine-plus." However,

where the offender score has been miscalculated, remand is still the proper remedy unless the record makes it clear the trial court would have imposed the same sentence had it known the correct offender score. The record in this case does not make it clear that the same sentence would have been imposed if the trial court knew Mr. Williams' correct offender scores. Instead, the comments by the trial court suggest it felt compelled to impose the exceptional sentence because of Mr. Williams' higher offender scores that would have effectively allowed certain offenses to go unpunished. RP 62, vol. I; CP 594–97, 608–09. Since the trial court's reasoning was based on miscalculated offender scores, it is impossible to say on this record that the court would have imposed the same sentence had it known Mr. Williams' correct offender scores.

The trial court erred in not finding same criminal conduct, and new offender scores could affect the outcome of Mr. Williams' exceptional sentence. Mr. Williams respectfully requests this case be remanded for resentencing to allow the trial court to exercise its discretion based on a correct offender score calculation. *See Tili*, 148 Wn.2d at 358 (setting forth this remedy).

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**Issue 4: Whether the trial court erred by imposing discretionary legal financial obligations against the defendant when the trial court found Mr. Williams indigent.**

Mr. Williams requests this Court remand 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 598–99. The trial court’s boilerplate finding that Mr. Williams had the present or likely future ability to pay was not supported by the record, and was clearly erroneous in light of the record developed at sentencing. RP 61, vol. I; CP 598–99. The imposition of discretionary costs is inconsistent with the principles enumerated in *Blazina, infra*, and *Blank, 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. Williams 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 1 and 3 above). In addition, there is a high likelihood that a new sentencing hearing would change the LFO amount, given Mr. Williams’ 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, a 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. Williams 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 598–99; RP 63, vol. I; *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)).

The court considered Mr. Williams' financial position and entered the boilerplate finding that it had considered his total amount owing and his ability to pay LFOs. CP 596; RP 61, 63, vol. I. The court also entered the boilerplate finding that the defendant had the ability or likely future ability to pay the legal financial obligations imposed herein. CP 596. However, the court's finding that the defendant had the ability to pay both those present and later-imposed LFOs is not supported by the record and is clearly erroneous. CP 596; RP 61, vol. I; Report as to Continued Indigency. The trial court recognized Mr.

Williams was indigent and knew he would be incarcerated for 140 months, but still imposed costs of incarceration (\$250) and costs of medical care. RP 61, 63, 68, vol. I; CP 598–99, 616–17. The court’s finding is not supported by substantial evidence in the record and must be set aside. *Brockob*, 159 Wn.2d at 343; *Lundy*, 176 Wn. App. at 103; RCW 10.01.160(3); *Blazina*, 344 P.3d at 683.

The trial court also neglected to consider the nature of the burden that LFOs would impose on Mr. Williams when he attempts to successfully reenter society. *Blazina*, 182 Wn.2d at 838-39; RCW 10.01.160(3). Given the defendant’s indigent status, the trial court should have “seriously question[ed]” Mr. Williams’ ability to pay LFOs. *Id.*; RP 68, vol. I; Report as to Continued Indigency.

The finding on Mr. Williams’ ability to pay LFOs should be set aside, and the discretionary legal financial obligations, the \$250 costs of incarceration and the costs of medical care, should be stricken from Mr. Williams’ judgment and sentence.

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

Mr. Williams preemptively objects to any appellate costs should the State be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 385-94, 367 P.3d 612, 618

(2016), this Court’s General Court Order issued on June 10, 2016, and RAP 14.2 (amended effective January 31, 2017).

An order finding Mr. Williams indigent was entered by the trial court, and there has been no known improvement to this indigent status. RP 68, vol. I; CP 616–17. To the contrary, Mr. Williams’ report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. Williams remains indigent. The report shows Mr. Williams’ 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*, as discussed in the issue above. *See State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015).

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. Williams has demonstrated his indigency and current and future inability to pay costs.

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. Williams met this standard for indigency. RP 68, vol. I; CP 616–17; Report as to Continued Indigency.

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

It does not appear to be the burden of Mr. Williams to demonstrate his continued indigency given the newly amended RAP 15.2, since his indigency is presumed to continue during this appeal. Nonetheless, Mr. Williams’ report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. Williams 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). *State v. 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 that Mr. Williams's current indigency or likely future ability to pay has significantly improved since the trial court entered its order of indigency in this case. To the contrary, there is a completed report as to continued indigency showing that Mr. Williams remains indigent.

Appellate costs should not be imposed in this case.

#### **F. CONCLUSION**

Mr. Williams requests his conviction for first degree burglary (Count 1) be vacated for insufficient evidence.

In the alternative as to Count 1, while simultaneously including Count 2 (felony violation of a protection order), Mr. Williams requests a new trial because he was denied his Sixth Amendment right to effective

assistance of counsel, and counsel's deficiencies affected the outcome of the trial.

Alternatively, Mr. Williams respectfully requests this Court remand his case for resentencing as the trial court abused its discretion by failing to find same criminal conduct for Counts 1 and 2, which would affect his offender score, and likely also affect the length of his exceptional sentence.

The trial court erred by imposing discretionary legal financial obligations, and finding an ability to pay where there is none; Mr. Williams requests the case be remanded for resentencing. Mr. Williams further respectfully requests this Court deny any of the State's requests for appellate costs.

Respectfully submitted this 2<sup>nd</sup> day of January, 2018.

/s/ Laura M. Chuang  
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/s/ Kristina M. Nichols  
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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON )  
Plaintiff/Respondent ) COA No. 35419-9-III  
vs. )  
DYMON LEE WILLIAMS ) PROOF OF SERVICE  
Defendant/Appellant )  
\_\_\_\_\_)

I, Kristina M. Nichols, of Nichols and Reuter, PLLC, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on January 2, 2018, I deposited for first-class mailing with the U.S. Postal Service, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Dymon L. Williams, DOC #361527  
Victor B-203  
Washington State Penitentiary  
1313 North 13th Ave  
Walla Walla, WA 99362

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](mailto:appeals@co.yakima.wa.us) using Division III's e-service feature.

Dated this 2<sup>nd</sup> day of January, 2018.

/s/ Kristina M. Nichols  
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