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Division III  
State of Washington  
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NO. 35419-9-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

DYMON LEE WILLIAMS,

Appellant.

---

BRIEF OF RESPONDENT

---

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant raises seven assignments of error:

1. The trial court erred in finding the defendant guilty of Burglary in the First Degree.
2. The trial court erred when it denied defendant's motion to find Counts 1 and 2 were the same criminal conduct
3. Because of the court's error in not finding Counts 1 and 2 to be same criminal conduct defendant's offender score was miscalculated.
4. Defense counsel's conduct was ineffective when he failed to object to the improperly admitted criminal history found in exhibits 5 and 6.
5. The court did not make an individualized determination of defendant's future ability to pay the imposed legal financial obligations. (LFO)
6. The trial court erred when it imposed a discretionary LFO of \$250.00 for defendant's costs of healthcare and incarceration.
7. Costs of associated with this appeal should not be assessed.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

The State's response is as follows:

1. The State proved beyond a reasonable doubt that Williams committed first degree burglary.
2. The trial court properly determined that count 1 First Degree Burglary and count 2 Felony Violation of a No Contact order did not merge for sentencing
3. Because the trial court's determination regarding merger was correct the offender score calculated was also correct.
4. The trial court addressed "Blazina" with counsel, therefore this issue was properly addressed in the trial court.
5. Further, the defendant did not raise this issue in the trial court therefore pursuant to RAP 2.5 and State v. Blazina, 182 Wn.2d 827, 833, 344 P.3d 680 (2015), this court need not and should not consider the issue for the first time in this appeal. In the alternative the trial court properly imposed limited

mandatory legal financial obligations.

## II. STATEMENT OF THE CASE

It should be noted that Mr. Williams chose stand by his right not to take the stand and he did not testify in this trial.

On June 25, 2016 Ms. Yolanda Caldera arrived at her home after working at her aunt's restaurant and picking up her children. This was between 2:00 and 3:00 AM. Ms. Caldera had been in the home for a while before Williams climbed through the window. Ms. Caldera did not know that Williams was in the house until he walked in on her as she was literally sitting on the toilet in the bathroom. Williams appeared and confronted Ms. Caldera. RP 67 Williams confronted Caldera and ripped her underwear off her legs in manner that resulted in her having marks and scratches on the back of her legs. RP 66-67, 85.

Ms. Caldera testified that when she left the bathroom she went into the bedroom and Williams followed her, the argument they were having continued into that room. RP 67-8. She testified that they argued from the time he broke into her home until around 7:00 AM. RP 69. During this period Ms. Caldera wanted to call the police but the defendant had removed the "SIM" card from her phone. Ms. Caldera retrieved her son's iPad and was able to use an "app" on that device to call a friend who in turn called the police. RP 69-70. Ms. Caldera testified that reason that

she called her friend to contact the police was because “Dymon was there and he wouldn’t leave.” RP 70. The police did arrive at her home but it was several hours later, she estimated that it was 9:30 when they finally arrived. RP 71-2.

Ms. Caldera’s children were present in the home during this burglar. RP 68. Ms. Caldera testified that Williams did not have a key and that she asked him to leave. RP 84-85

The jury was shown pictures, which Ms. Caldera authenticated, of the injuries to the back of Ms. Caldera’s legs caused when Williams ripped her underwear off as well as a picture of her cellphone without the SIM card. RP 70-1.

Ms. Caldera was questioned on cross examination regarding whether the defendant had lived at the 3405 Clinton Way address. She indicated that he did “only for a bit...like March of 2015.” The date of this burglary was June 25, 2016. RP 80 CP 157

Ms. Caldera was extensively cross examined regarding the method of entry. She was very specific that she had changed the locks on her home after the defendant had moved out, that he did not have a key to that home and that all of the windows, except one, were shut in a manner that would not have allowed the defendant to enter. She testified “Because all the other windows were -- well, I had obviously changed the locks

already, and all the other windows had sticks and stuff. He couldn't enter.” RP 82-3, 88.

She testified on cross and on redirect that the reason the locks were changed was “in part because of Dymon.” She was also very specific that “[h] didn’t have a key…” She repeated this more than once. PR 84. When defense counsel pushed Ms. Caldera to “change (her) answer to line of inquiry regarding whether she was upset that Williams was “drunk or high” she stated “Change my answer what? I mean, was I upset? Yeah, probably. I think I was more upset that he was in the house.” PR 86

### **III. ARGUMENT**

#### **Response to allegation one - The State proved beyond a reasonable doubt that Williams committed the crime of First Degree Burglary.**

This crime was charged out under RCW 9A 52 020(1)(b), the first degree burglary statute. There were three primary instructions addressing this count given to the jury. Instruction 4 states:

A person commits the crime of burglary in the first degree when he or she enters or remains unlawfully in a building with intent to commit a crime against a person or property therein, and if, in entering or while in the building or in immediate flight therefrom, that person assaults any person.

The elements or to convict instruction, number 5, for that crime states the following:

To convict the defendant of the crime of First

Degree Burglary as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about June 25, 2016, the defendant entered or remained unlawfully in a building;
- (2) That the entering or remaining was with intent to commit a crime against a person or property therein;
- (3) That in so entering or while in the building or in immediate flight from the building the defendant assaulted a person; and
- (4) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

And finally instruction 6 reads as follows:

A person enters or remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.

Building, in addition to its ordinary meaning, includes any dwelling. Dwelling means any building or structure that is used or ordinarily used by a person for lodging.

Appellate courts review sufficiency of the evidence challenges to see if there was evidence from which the trier of fact could find each element of the offense proved beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307,319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

Issues of witness credibility are to be determined by the trier of fact and cannot be reconsidered by an appellate court. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A reviewing court will consider the evidence in a light most favorable to the prosecution. Id. It also must defer to the finder of fact in resolving conflicting evidence and credibility determinations. Camarillo, 115 Wn.2d at 71.

A challenge to the sufficiency of the evidence requires that the defendant address the evidence and all reasonable inferences drawn in favor of the State, with circumstantial evidence and direct evidence considered equally reliable. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The elements of a crime can be established by both direct and circumstantial evidence. State v. Brooks, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). One is no less valuable than the other. There is sufficient evidence to support the conviction if a rational trier of fact could find each element of the crime proven beyond a reasonable doubt.

A person commits the crime of burglary when he enters a building with the intent to commit a crime therein. RCW 9A.52.020(1)(b).

This trial was not very long, it did not have many witnesses and it was done in a short amount of time, but the level of proof set out by the State was more than sufficient to support the charge. The evidence that

the State presented was overwhelming.

This was not a case where the defendant came through the front door of some home, with permission, and while there he struck the owner. This is a case where the defendant, having no contact orders in place, while the doors locked and the windows, supposedly, secured still managed to get into the victim's home sometime in the very early morning hours. Then after he climbed through the window he confronted the victim while in almost the most personal and vulnerable place in a home, sitting on the toilet in her bathroom. He then literally ripped her underwear off of her and did it in a manner that was so violent that the fabric of her underwear left scratches and marks.

The State produced evidence which when considered by the jury was more than sufficient to prove beyond a reasonable doubt that William's actions were a burglary and the assault on the victim is the element necessary to raise this crime to first degree.

Williams attempted in the trial court and again in this appeal to have the court and the jury believe that because he was allowed into the victim's home the day before that he was therefore allowed to legally crawl through the window at 3 or 4 AM and physically assault Ms. Caldera in her own bathroom under the umbrella of an "implied consent." This is ludicrous.

State v. Ortiz, 77 Wn.App. 790, 895 P.2d 845 (Div. 3 1995) “Mr. Ortiz argues the evidence does not establish he entered or remained unlawfully in the home. If not licensed, invited or otherwise privileged to do so, a person who enters a residence or remains there does so unlawfully. RCW 9A.52.010(3); State v. Collins, 110 Wash.2d 253, 751 P.2d 837 (1988). Under RCW 9A.52.040, a jury may infer the necessary element of intent to commit a crime from the fact of unlawful entry. State v. Jackson, 112 Wash.2d 867, 774 P.2d 1211 (1989).”

A homeowner can expressly or impliedly revoke the right of a guest to enter or reside within his dwelling. State v. Howe, 57 Wn. App. 63, 71-72, 786 P.2d 824 (1990), rev'd on other grounds, 116 Wn.2d 466, 805 P.2d 806 (1991); see State v. Collins, 110 Wn.2d 253, 261-62, 751 P.2d 837 (1988). Permission may also expire once the purpose for which permission was granted is accomplished. Howe, 57 Wn.App. at 72.

William’s argument that the no contact order somehow was determinative of whether he could lawfully be in this residence is misplaced. He states “...the no contact order did not prohibit Mr. Williams from Caldera Lazo’s residence, and he had implied permission to be inside her home.” However, in his own statement of the case he has the following;

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 <sup>7</sup> children's school or daycare

<sup>7</sup> \_\_\_\_\_  
State's Ex. 3, p. 1; RP 32, vol. II. (Apps Brief at 5) (Emphasis added)

This order could possibly have listed a specific address but that in many ways defeats the use of this type of order because it gives the offender directions to the protected person. This type of order allows the protection to follow the victim if they must move or if they seek shelter elsewhere. To force the court in each instance to list a physical address would be the antithesis of what is needed from this type of order. The victim needs the security of anonymity. This order clearly informed the defendant to not go to this home. He knew it was a protected place because at the time of its issuance, or so Williams claims, he was an occupant of that home.

Here no matter what transpired the night or day or even the same day the fact remains that Ms. Caldera came home with her children in the early morning hours and locked herself into her home and sometime after that the defendant managed to force his way into that home and into her bedroom, her bathroom and literally ripped her underwear from her body. Clearly whatever took place before did not morph into an "implied

license” to do what Williams did.

Williams cites State v. Wilson, 136 Wn. App. 596, 606, 150 P.3d 144 (2007), Wilson is clearly factually and legally distinguishable the facts from Wilson state:

On April 16, 2005, the Clallam County District Court issued a no-contact order prohibiting Gregory Wilson from contacting Charlene Sanders, his girlfriend of six years, in person, by telephone, or through any intermediary except an attorney, a police officer, or an officer of the court. The no-contact order listed Sanders' address as 1123 East Park Avenue in Port Angeles, but it did not prohibit Wilson's presence at that address, where he and Sanders had been living together.”

Shortly thereafter, Sanders and Wilson co-signed a lease for the 1123 East Park residence and resumed living together. Their automobiles and all Wilson's clothing remained at this residence. Wilson had keys to the residence, to which Sanders referred as “[o]ur house. Id at 600-01.

There is absolutely no comparison between the facts in Wilson and the facts in this case. Ms. Caldera lived in the home at the time of the offense with her children, she testified that Williams did not live there, he did not have a key and she had changed the locks and secured the windows in part just to keep him from the home. Further, the order in this case specifically ordered Williams to stay away from Ms. Caldera; “Do not knowingly enter, remain, or come within . . . [1,000 feet] . . . of the protected person’s residence, school, workplace, other: ☒person”

Wilson actually lived in the home and had co-signed the lease, his no contact order did not exclude him from that or any residence. While the order here did not list the specific address of the victim there is no doubt that Williams knew that he was excluded from that residence.

Williams also claims that he had belongings in Ms. Caldera's home. The sections he refers to are testimony of Ms. Caldera, once again Williams did not take the stand, she states:

He was going through the house getting his stuff supposedly.... He didn't have a key, no.... it was not really -- just a backpack and maybe some old shoes, stuff like that that he had left behind from... He didn't have clothes there. He had taken it already..." and finally in response to a question cross examination that asked if the two had been intimate counsel ask "Q. Then he had at least some of his things there; you're telling us?" and Ms. Caldera responded "A. Yeah, I guess." None of this very brief testimony supports Williams theory that he had an implied right to be in Ms. Caldera's home. RP 70, 84,85.

The court in Wilson differentiated cases cited by the State and Wilson, the court addressed a case that the State cited which is factually similar to Williams' case. The court of appeals in Wilson found it was distinguishable. Footnote 5 in Wilson states:

[5] The State relies primarily on our decision in *State v. Jacobs*, 101 Wn.App. 80, 2 P.3d 974 (2000). We dismissed Jacobs' Fourth Amendment suppression claim when the police found him at a residence, the owner of which a court had prohibited him from contacting. 101 Wn.App. at 83-84, 2 P.3d

974. We reasoned that Jacobs' presence at the residence was unlawful and, therefore, he had no privacy interest in the residence even though the no-contact order did not explicitly bar him from the residence. 101 Wash App at 87-88, 2 P.3d 974.

*Jacobs*, however, is distinguishable from the case here because, unlike Wilson, Jacobs did not live at the residence where he contacted the subject of the no-contact order: Instead, he lived separately with friends or in a park. 101 Wash App. at 86-88, 2 P.3d 974. Therefore, we reasoned that, in addition to the no-contact order, Jacobs had no expectation of privacy at the residence because he did not live there.

That case, State v. Jacobs, 101 Wn.App. 80, 2 P.3d 974 (2000) addressed protection orders and the effect of those orders concluding that because Jacobs was excluded from the residence he had no legal standing to challenge a search warrant. Jacobs not Wilson sets out the law that is applicable to the facts in this present case.

Even if for the sake of argument, it was agreed that the defendant was given permission to climb through the window in the middle of the night, the testimony from Ms. Caldera that Williams entered her bathroom while she was sitting on the toilet and violently ripped her underwear off and that she told him to leave would have revoked any invitation.

“A person's entry into the dwelling house of another need not be unlawful, except insofar as the entry may become unlawful due to the intent to commit a crime.” State v. Gregor, 11 Wn. App. 95, 521 P.2d 960, review denied, 84 Wn.2d 1005 (1974), modified on other grounds, State v.

Collins, 110 Wn.2d 253, 751 P.2d 837 (1988).

State v. Thomson, 71 Wn. App. 634, 638, 861 P.2d 492 (1993)

“Although felonious entry was not in issue, felonious remaining was. According to numerous authorities, *Annot., Maintainability of Burglary Charge, Where Entry Into Building Is Made With Consent*, 58 A.L.R.4th 335 subsection 2, 4-5, 11-12 (1987), a defendant's invitation to enter a building can be expressly or impliedly limited as to place or time, and a defendant who exceeds either type of limit, with intent to commit a crime in the building, engages in conduct that is both burglarious and felonious.”

The State presented overwhelming evidence that Williams both entered and remained in unlawfully Ms. Caldera’s home. There is no legal or factual basis for this court to overturn this conviction.

Even is Ms. Caldera had given Appellant permission to enter a burglary was still committed. A person commits the crime of burglary when he enters or remains unlawfully in a dwelling with the intent to commit a crime therein. This court has ruled that entry is unlawful when made in violation of a court order, even when the violator acts with the permission of the protected person. State v. Sanchez, 166 Wn.App. 304, 307-312, 271 P.3d 264 (2012) See also, State v. Stinton, 121 Wn.App. 569, 573, 89 P.3d 717 (2004)

**2. Response to allegation two – Ineffective assistance. – Exhibits.**

Williams, for the first time on appeal, alleges that the State improperly admitted exhibits that he knew would be admitted because the State was required by law to present this evidence in order to prove beyond a reasonable doubt that Counts 2,3 and 4 had in fact been committed.

The only way for this information not to be presented in a trial involving Williams for violations of this law would be for Williams to not have committed this crime or for him to have stipulated to all that was needed for elements of the crimes and counts charged.

Williams asks this court to consider this issue for the first time on appeal, but as stated in State v. McFarland, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995) “As an exception to the general rule, therefore, RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court. Rather, the asserted error must be "manifest" - i.e., it must be "truly of constitutional magnitude". Scott, 110 Wn.2d at 688. The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error "manifest", allowing appellate review.” State v. Nguyen, 165 Wn.2d 428, 433, 197 P.3d 673 (2008) “In general, an error raised for the first time

on appeal will not be reviewed. An exception exists for a "manifest error affecting a constitutional right." RAP 2.5(a)(3). This is a "narrow" exception. A "manifest" error is an error that is "unmistakable, evident or indisputable." An error is manifest if it results in actual prejudice to the defendant or the defendant makes a "plausible showing" that the asserted error had practical and identifiable consequences in the trial of the case." (Citations omitted.)

Williams has failed to meet this burden

In order to establish that counsel was ineffective, Appellant must show that counsel's conduct was deficient and that the deficient performance resulted in prejudice. State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007) (adopting test in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). To show deficient representation, Appellant must show that counsel's performance fell below an objective standard of reasonableness based on all of the circumstances. Nichols, 161 Wn.2d at 8 (citing State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). Prejudice is established if there is a reasonable probability that, but for counsel's unprofessional errors, the trial outcome would have been different. Nichols, 161 Wn.2d at 8.

The claimed deficiency here is that counsel should have objected to information that was contained in an exhibit that, as the State sets forth

below, was an essential element the State had to prove to obtain conviction on counts 2, 3, and 4. A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude. Nichols, 161 Wn.2d at 9. This claimed error is not an "manifest error affecting a constitutional right." McFarland, 127 Wn.2d at 333 (quoting RAP 2.5(a)(3)). In order to be "manifest," an alleged error must have "practical and identifiable consequences in the trial." State v. Barr, 123 Wn. App. 373, 381, 98 P.3d 518 (2004) (quoting State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)). If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown, and the error is not manifest. McFarland, 127 Wn.2d at 333 (citing State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)).

This was a trial tactic. By forcing the State to prove all that must be proven for the admission of a series of documents such as was done here trial counsel was able to lay a heavy burden on the State. Failure to lay the proper foundation is very conceivable. There is no doubt that the actions of counsel were done as a trial tactic. Because the analysis of counsel's performance mandates an objective inquiry, that performance cannot be deemed insufficient if **any** conceivable tactical choice could explain counsel's challenged action or inaction. In re Pet. of Hatfield, 191

Wn.App. 378, 402, 362 P.3d 997 (2015).

Harrington v. Richter, 562 U.S. 86, 107,131 S.Ct. 770, 178

L.Ed.2d 624, 79 U.S.L.W. 4030 (2011):

Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies.

...

Although courts may not indulge "*post hoc* rationalization" for counsel's decision making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." (Citations omitted.)

"Judicial scrutiny of counsel's performance must be highly deferential" and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1955)). Tactical decisions cannot form the basis for a claim of ineffective assistance of counsel. McFarland, 127 Wn.2d at 336 (citing State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994)).

Once again, making the State bear that burden of proof in what

obviously would be the hope that it could not be proven of that the trial court would not allow admission of these documents which would negate proof beyond a reasonable doubt, clearly a very specific trial tactic.

The defendant acknowledges in a footnote in the facts section of his brief that the copies of the exhibits that went to the jury were the redacted copies that were reviewed and agreed to by his trial counsel his continuously refers in this section of his brief to those copies that were admitted to the court by never seen by the jury. The information that was in those documents had information that needed to be sanitized before the jury was allowed to review them, that was done and agreed to by the parties.

The redacted copies of the exhibits were also the copies which were shown to Ms. Amber Ross the fingerprint examiner for the State. RP 53-55. It was during this testimony that, without objection, Ms. Ross indicated what the fingerprint cards were related to what previous criminal acts committed by the defendant which was an essential element for the State to prove regarding Counts 2,3, and 4.

The elements that the State had to prove count 2 was:

- (1) That on or about June 25, 2016, there existed a no-contact order applicable to the defendant;
- (2) That the defendant knew of the existence of this order;
- (3) That on or about said date, the defendant knowingly

violated a provision of this order;  
(4) That  
(a) the defendant's conduct was an assault or  
**(b) the defendant has twice been previously convicted  
for violating the  
provisions of a court order; and**  
(5) That the defendant's act occurred in the State of  
Washington.  
(Emphasis added.) CP 515

The elements that the State had to prove count 3 and 4 were:

(1) That on or about August 8, 2016, there existed a  
no-contact order applicable to the defendant;  
(2) That the defendant knew of the existence of this  
order;  
(3) That on or about said date, the defendant  
knowingly violated a provision of this order;  
**(4) That the defendant has twice been previously  
convicted for violating the provisions of a court  
order; and**  
(5) That the defendant's act occurred in the State of  
Washington.  
(Emphasis added.) CP 517

Ms. Ross's testimony was as follows in order to prove the crimes  
charged:

MS. McDANIEL: The state would move to admit  
Identifications 4A and 5A.

THE COURT: Mr. Dalan.

MR. DALAN: No objection.

...

(By the States attorney) Q. Beginning with Exhibit 4A,  
could you tell us what documents are in that exhibit,  
please.

A. This is a complaint for the count of violation of a  
no-contact order, domestic violence, RCW 26.50.110(1).

Q. Are there any other documents besides the complaint?

A. There's a Statement of Defendant on Plea of Guilty.

Q. Are there any other documents besides the two that you just listed?

A. There's also a judgment and sentence.

Q. Is there a case number that's associated with Exhibit 4A?

A. It's Yakima Police Department Case No. 13Y-041381.

Q. If we could have you look at the first page of 4A. Where it says number, is there a number listed on the exhibit in front of you?

A. The number is 107842.

Q. What about Exhibit 5A?

A. It also is a complaint with the name Dymon Lee Williams. There's a Statement of Defendant on Plea of Guilty with a judgment and sentence.

Q. For Exhibit 5A, could you tell us if there's a crime alleged in the complaint.

A. It's a violation of an order of protection, domestic violence.

Q. Is there a date of incident associated with that?

A. Yes. The date is May 7, 2014.

Q. Is there a case number associated with that exhibit?

A. It's Yakima Police Department Case No. 14Y-017523.

Q. Are there any other numbers on that document?

A. The second number would be 4Z-0422948.

Q. If we could direct your attention back to Exhibit 4A. Could you tell us if there's a date of incident associated with one of the crimes alleged.

A. The date is September 28, 2013.

Q. If I could now direct your attention to Identification 6A. Do you notice any stamps or seals on that document?

A. I do. There is a stamp from a fingerprint tech from the Washington State Patrol.

Q. Could you tell us what that says.

A. It says, I certify that this is a true and accurate copy of the original document on file at the Washington State Patrol identification section. It's signed by Ashlyn Bogus, Fingerprint Tech 1, on the date of 9-30-2016.

MS. McDANIEL: The state would move to admit Identification 6A.

THE COURT: Any objection?  
MR. DALAN: No, your Honor.  
RP 55-57

This case was not just about the burglary there were three counts of  
“FELONY VIOLATION OF A PROTECTION ORDER - DOMESTIC  
Violence - RCW 26.50.110(4) and/or (5) and 10.99.020 and RCW  
9.94A.535(3)(t) and RCW;9.94A.535(2)(c)” CP 157-9 (All three count are  
similarly captioned and charged)

This first count alleges:

On or about June 25, 2016, in the State of Washington,  
with knowledge that -the Yakima County Superior  
Court had previously issued a protection order,  
restraining order, or no contact order pursuant to  
Chapter 7.90, 10.99, 26.09, 26.1.0, 26.26, 26.50, or  
74.34 RCW in State of Washington vs Dymon Lee  
Williams, Cause No. 15-1-00847-7, which protects  
Yolanda Caldera Lazo, you violated the order while the  
order was in effect by knowingly violating the restraint  
provisions therein, and/or by knowingly violating a  
provision excluding you from a residence, a workplace,  
a school or a daycare, and/or by knowingly coming  
within, or knowingly remaining within, a specified  
distance of a location, and you intentionally assaulted  
Yolanda Caldera Lazo in a manner that does not  
amount to assault in the first or second degree and/or  
you have at least two previous convictions, Yakima  
City Municipal Court Cause Numbers 4Z0422948 and  
YC13-I7842, for violating a provision of a court order  
issued under Chapter 7.90, 10.99, 26.09, 26.10, 26.26,  
26.50, or 74.34 RCW, or any valid foreign protection  
order as defined in RCW 26.52.020.

The other two counts are worded similarly and therefore the  
exhibits that are now being cast as error and a demonstration that trial

counsel was ineffective were, stated above essential to the proof of these crimes.

Counsel was effective, there was no error this allegation does not meet the standards for review for the first time on appeal and if it did this court would still find no error.

### **3. Response to allegation three – Sentencing same criminal conduct.**

Appellant admits that no matter what the outcome of this court's review of this issue he will still have an offender score that is in excess of 9 points. (Appellant's brief at 28) There is no reason for this court to accept review of this issue.

The Appellant does not cite to any case that involves no contact orders and burglary resulting in any court of review indicating that they need to be counted as same criminal conduct it was his burden to prove this allegation in the trial court and to uphold that proof on appeal.

Findings of fact and conclusions of law were entered regarding the imposition of the exceptional sentence and they also address the issue of same course of conduct. CP 607-09. Those findings and conclusions have not been challenged by Williams. State v. Hubbard, 200 Wn.App. 246, 402 P.3d 362 (2017) "We review the superior court's findings of fact to determine whether they are supported by substantial evidence. Evidence is "substantial" when it is enough to persuade a fair-minded

person of the truth of the stated premise. Unchallenged findings of fact are verities on appeal. We review the superior court's conclusions of law de novo to determine whether they are supported by the superior court's findings of fact.” (Citations omitted.) See also, State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

Finding 14 specifically addressed this issue “14. The Court finds that although counts one and two occurred on the same date, they were based on different conduct.”

Because the State believes that this court might determine that finding 14 was actually a conclusion of law and therefore subject to de novo review the State shall fully address this allegation rather than limit its response to the law cited above demonstrating that William’s failure to challenge the findings makes them verities for purposes of this appeal.

The State submitted a twenty-nine-page sentencing memorandum that in total was fifty-four pages including copies of prior conviction. This was served on the court and counsel before the sentencing hearing was conducted. The State address the basis for the exceptional sentence it was requesting and that was granted. CP 536-590 The State also specifically address this issue. CP 548-51. The State specifically inquired of the court whether it had had occasion to review this “brief”, the court indicated it had. Sentencing RP 46.

State v. Aldana Graciano, 176 Wn.2d 531, 539-40, 295 P.3d 219 (2013) "...a "same criminal conduct" finding favors the defendant by lowering the offender score below the presumed score. "In determining a defendant's offender score ... two or more current offenses ... are presumed to count separately unless the trial court finds that the current offenses encompass the same criminal conduct." "[A] 'same criminal conduct' finding is an exception to the default rule that all convictions must count separately. Such a finding can operate only to decrease the otherwise applicable sentencing range." **Because this finding favors the defendant, it is the defendant who must establish the crimes constitute the same criminal conduct.**" (Citations omitted. Emphasis added.)

Review of this type of allegation is for abuse of discretion or misapplication of the law. Graciano, 176 Wn.2d at 536

The trial court has the discretion to determine whether current convictions encompass the same criminal conduct for the purposes of calculating the defendant's offender score. RCW 9.94A.589(1)(a). this court will review the trial court's finding that offenses did not constitute the same criminal conduct for abuse of discretion or misapplication of the law. State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994).

Current offenses can be considered the same criminal conduct if they involved the same intent, were committed at the same time and place,

and involved the same victim. "[C]rimes. affecting more than one victim cannot encompass the same criminal conduct." State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992) (citing State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987)).

It is that State's position that the second Williams came within 1000 feet of this residence the violation of the orders occurred. There was no need for the defendant to enter the victim's home, again this was not Williams' home the victim had changed the locks and barred the windows. Therefore, the elements of the two crimes are not the same.

Further, it can be argued that because the no contact order involved only Ms. Caldera and the victims of the burglary were not limited to just Ms. Caldera but also the children who lived in this home and were present at the time Williams crawled in through a window. The trial court did not abuse its discretion by determining that the first degree burglary and the violation of a protection order are not the same criminal conduct.

And finally as stated by the trial deputy prosecuting attorney the State charged and proved two elements in these three counts.

State v. Hood, 196 Wn.App. 127, 382 P.3d 710 (2016) addresses this in the factual setting:

The defendant bears the burden at trial to show that current offenses encompass the same criminal conduct. State v. Aldana Graciano, 176 Wn.2d 531,

539-40, 295 P.3d 219 (2013). Our review is for abuse of discretion or misapplication of the law. Graciano, 176 Wn.2d at 536.

" Same criminal conduct" means " two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). Hood argues that both crimes required the same criminal intent--the intent to assault LD. The sentencing court could have reasonably taken a different view of the evidence. Hood violated the no-contact order when he approached the condo where LD lived. Having heard testimony about past vandalism of the condo, the trial court could have reasonably found that Hood did not necessarily intend an assault when he approached the condo. The court may have found that he developed the intent to commit an assault inside--the conduct that constituted the burglary--only after entering. We conclude the trial court did not abuse its discretion in finding that Hood did not meet his burden to show that his criminal intent was the same for each crime.

Williams' trial counsel proffered to the court that the counts should be treated as "same criminal conduct" and that law was "essentially punishing him twice for the exact same act and that act is being in the residence and having the physical altercation. Sentencing RP 50-51, 60-61.

Trial counsel made the argument the court just chose, made a discretionary ruling, that the argument was not valid.

The State made the following argument in rebuttal to Williams argument:

MCDANIEL: Certainly, Your Honor. Our position is

that had Count II only been based on the Assault Violation Protection Order, there certainly would have been a strong argument that the conduct was the same course. But here, the jury also found that he committed Count II by having two prior convictions for Violation of a Protection Order, so him being at the residence, having contact with Mr. Coldare-Alonzo (sp), constituted the nature of the violation. So, **the fact that the jury found both prongs of the statute, we believe has a strong argument that they are separate courses of conduct.** Sentencing RP 60. (Emphasis added.)

The detailed sentencing memorandum was served on the trial court and counsel prior to sentencing, the court reviewed that document prior to the argument by the parties and ultimately followed the position of the State when it came time to impose sentence.

This is true also of the imposition of the exceptional sentence. The judge was very specific that this case and this defendant merited and exceptional sentence:

JUDGE: I don't. Alright. Well, you know, based upon your offender score, Mr. Williams, it does appear to me that a sentence above the standard range is appropriate and essentially, you've -- you've gone through the ceiling here and have a -- offender score as to Count I of 13 and 11 as to the other three counts, and so, essentially, they cap out at 9. So, your four points over the line, as it were. So, I think that an exceptional sentence is appropriate. Sentencing RP 62.

State v. Creekmore, 55 Wn. App. 852, 866, 783 P.2d 1068 (1989)  
the court there ruled that the trial court had improperly considered certain

information when it made its determination regarding the length of Creekmore's sentence. The court stated that even if there was an error it "...does not necessitate a remand "when we are satisfied that the judge would have imposed the same sentence absent the improper factor." State v. Drummer, supra at 760 (210-month disparity; record did not support finding that victim was particularly vulnerable). We are satisfied the court would have imposed the same sentence even if it had not considered earned early release."

In the present case even if this court were to determine that Counts 1 and 2 should not both count as current points this defendant is still above the maximum point, 9+, and he still has the domestic violence against this same victim on more than one occasion. There is no doubt that the trial court would, even if there were error, impose the same sentence.

**4. Response to allegation four – Imposition of legal financial obligations.**

Appellant misreads the Judgement and Sentence that was issued in this case. Yakima County specifically added a "box" before several discretionary costs that had become constant basis for issues on appeal. In this case neither the box before medical costs or costs of incarceration are checked or filled in. CP 598-99. This court need only review the judgment and sentence to see that these two discretionary items have this

“box” which differentiates them from the other subsections in this section of this document. CP 595-99

Because the trial court addressed the costs of incarceration and imposed a capped amount the failure to check that box is a scrivener’s error. However, the opposite is true regarding the imposition of medical costs, that box is not checked therefore those costs were not imposed.

Regarding the future ability to pay Appellant appears to ignore the portion of the record where the trial court specifically asks William’s trial counsel to address “Blazina.” The court did more than enter boilerplate documentation:

JUDGE: Do you wish to address the Blazina factors, Mr. Dalan?

DALAN: We do, Your Honor. Mr. Williams is going to be incarcerated for extended period and he won’t be able to earn an income and he doesn’t have any current assets. Is that right, Mr. Williams?

DEFENDANT: None at all.

DALAN: Do you want -- does the Court have any further --

JUDGE: No.

DALAN: -- questions about that?

JUDGE: I don’t.

RP 61-2.

Williams himself addressed the fact that he has been employed in the past:

And the reason why I didn’t appear in those cases was that I had to work that day. I couldn’t afford to miss that day at work. I would have lost my job if I missed

that day at work. I've always turned myself in also to [inaudible] warrants.

It is the State's position that the information in the record is sufficient to allow the trial court to determine that Williams had the means to pay a limited amount towards this actions. To that end the court stated the only discretionary cost that he was liable for was a capped amount for the costs of Williams incarceration. Sentencing RP 63.

"Unpreserved LFO errors do not command review as a matter of right." State v. Blazina, 182 Wn.2d 827, 833, 344 P.3d 680 (2015). Under RAP 2.5(a), this court can and should exercise its discretion and deny this request.

The only other costs that were imposed were mandatory, Crime Penalty Assessment \$500.00 and DNA collection fee \$100.00. RCW 7.68.035(1)(a) (victim assessment); RCW 43.43.7541 (DNA testing fee); CP 598. In general, mandatory LFO's must be imposed regardless of the defendant's ability to pay. State v. Kuster, 175 Wn.App. 420, 424, 306 P.3d 1022 (2013); State v. Lundy, 176 Wn.App. 96, 102-03, 308 P.3d 755 (2013); State v. Shelton, 194 Wn.App. 660, 674-75, 378 P.3d 230 (2016), review denied, 187 Wn.2d 1002 (2017)

If this court determines that this one cost, incarceration, was imposed without sufficient inquiry by the court the State would ask that

this court order that the section be stripped from the judgment and sentence by separate ex parte order. The State has on numerous occasions prior appeals requested the alteration of the judgment and sentence in this manner as a proper limitation on the use of scarce resources and this court has granted those requests.

**Response to allegation four – Appellate costs.**

The State has indicated innumerable cases that State v. Sinclair, 192 Wn.App. 380, 385-86, 388-90, 367 P.3d 612 (quoting RAP 14.2), review denied 185 Wn.2d 1034 (2016) allows for the awarding of costs to the primary prevailing party on appeal. “The commissioner or clerk “will' award costs to the State if the State is the substantially prevailing party on review, 'unless the appellate court directs otherwise in its decision terminating review. "... When a party raises the issue in its brief, we will exercise our discretion to decide if costs are appropriate.... We base our decision on factors the parties set forth in their briefs rather than remanding to the trial court.”

The State, by and through the Yakima County Prosecutors Office continues to assert the right to request these costs.

However, as Yakima County has indicated in each and every appeal that this has been raise in, in the interests of justice and judicial economy the State shall not be requesting appellate costs in this case when

it prevails.

#### IV. CONCLUSION

For the facts presented at trial were supported the charge of first degree burglary beyond a reasonable doubt. The presentation of the documents and redacted exhibits were essential portions of this trial, necessary to proof of counts 2,3 and 4. The actions of trial counsel regarding those exhibits and the testimony regarding those document was not deficient.

The trial court properly sentenced Williams. Both the determination that counts 1 and 2 were separate crimes and that the was a basis for an exceptional sentence are supported by the record.

The costs issues were also properly addressed in the trial court.

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

Respectfully submitted this 30<sup>th</sup> day of April 2018,

By: s/ David B. Trefry

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DECLARATION OF SERVICE

I, David B. Trefry state that on April 30, 2018 emailed a copy, by agreement of the parties, of the Respondent's Brief, to:

Laura M. Chuang, and Kristina M. Nichols at admin@ewalaw.com

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

DATED this 30<sup>th</sup> day of April, 2018 at Spokane, Washington.

By: s/David B. Trefry  
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**YAKIMA COUNTY PROSECUTORS OFFICE**

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