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Division III
State of Washington
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NO. 35484-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSE PEDRO LINARES,

Appellant.

BRIEF OF RESPONDENT

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 2. The trial court had the authority to run the sentences in this case consecutive to the sentence in another of Linares’ cases.

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes numerous assignments of error. These can be summarized as follows;

1. The trial court abused its discretion when it denied repeated motions for new counsel.
2. The trial court exceeded its statutory authority when it ordered current offenses to run consecutively.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The record before this court indicates that at most there was one actual motion for a new attorney. There were innumerable statements by Linares that he wanted a new attorney. The trial court properly denied Linares' unsupported demands to have a new attorney appointed.
2. The trial court had the authority to run the sentences in this case consecutive to the sentence in another of Linares' cases.

II. STATEMENT OF THE CASE

The first time Linares addressed the court regarding his motion for a new attorney his only basis was that he did not want any continuances and he wanted "...to go to trial on my speedy trial rights...[t]hat's the only reason I've got for right now." The defendant went so far as to even challenge the trial court when it added to an order language which indicated that Linares was physically in the court, telling the court that he, Linares, had not told the judge to put that information into the order.

Hearings RP 27-8.¹

The next hearing in this case occurred on July 22, 2016. On that date an order was entered indicating that Linares had been found competent by “Eastern State.” Hearing RP 32-4

Linares again was asking for a new attorney. He had no basis other than he did not want any continuances and “I wanted to do my speedy trial...” The court ruled that this was not a basis for a new attorney. Hearing RP 36-8

At the next hearing on August 10, 2016 Linares again told the court that he wanted a new attorney, he still had no independent reason, he repeated back what the court suggested as a basis. Trial counsel stated communication had become difficult but there was not a basis for him to withdraw. When asked specifically as to whether he was asking to be relieved from the cases he was representing Linares on, Mr. Therrien-Powers specifically stated no. RP 40-43. Once again, the court ruled that there was no basis to appoint a new attorney and told Linares that he could hire his own attorney. Hearings RP 43-4.

August 23, 2016, Linares indicates that he has not found new counsel, asks again for a new attorney, again objected to the requested

¹ The State attempts as a general rule not to set out block quotes of large sections of the verbatim report of proceedings however, in this case there is no method for this court to understand what occurred without these direct quotes being set forth.

continuance and still has no other reason for requesting a new attorney other than difficulties in communicating and “the presentation.” RP 49-50. His trial counsel again assures the court there is still an attorney/client relationship which would allow him to provide Linares with a defense.

RP 49-50

At the October 13, 2106 status hearing, again, Linares asks for a new attorney, the court on this occasion specifically asks Linares if there is new information the court should consider because this motion has been denied before. The only answer that Linares gives is that he has not been wanting any continuances. Hearing RP 59-60

During this hearing the trial court made a very specific ruling regarding Linares’ request:

The motion to change attorney — Mr. Linares has again, asked that I hear his motion to change attorney. We did that in part today. The Court denied that request. Mr. Linares has been invited by this Court to file a written motion outlining his specific reasons. The Court today made the finding that his lack of cooperation with Mr. Therrien-Power is an attempt by him to try to manipulate this Court into appointing another attorney.

The Court further finds that Mr. Therrien-Power has been working diligently to represent him on this case. And the Court, despite Mr. Linares’s best efforts, has not convinced this Court that Mr. Therrien-Power cannot provide him with a more than adequate representation in this case and the Court has declined his motion to change attorneys.

The Court has invited him to set out a written motion. He has declined to do so. He wants to simply appear in Court and basically give us his reasons orally rather than

any notice to counsel on the case. But, you know, I understand that Mr. Linares believes, is very adamant that he needs to change his attorney in this case, so I am going to set that for a hearing. We'll set it on the same day as his omnibus hearing, Friday, October 28, 2016. And it will be Mr. Linares and Mr. Linares alone who will be addressing this Court as to the reasons why this Court should change counsel at this point in time. Hearings RP 63-4

October 28, 2016 hearing, when asked if there was any added information for the court Linares stated "MR. LINARES: There ain't...There ain't -- I don't got nothing to say. There's not." Hearing RP 70. The court ruled "...I have not --it has not been demonstrated to the Court that Mr. Therrien-Power is not providing adequate representation to you. Your basis yesterday for changing counsel was that you objected to a request for some continuances in this case to allow Mr. Therrien-Power to properly prepare for trial. The Court has found yesterday that that was not an appropriate basis to change counsel. I find the same today..." Hearing RP 70-1.

November 20, 2016 Linares again states he wants a new attorney and that he had his speedy trial rights. PR 76-77. The trial court noted that trial counsel had been effective resulting in the dismissal of one other charge that had been filed against Linares. RP 77-8.

February 9, 2017, same as all of the other preceding hearings, Linares requests the appointment of a new attorney, the basis being the

same, that he hasn't wanted any continuances and there have been several granted to allow his attorney to properly prepare. Hearing RP 86-7.

April 7, 2017, using the exact same language Linares states that he wants a new attorney and that the only reason he has for that is that he has not wanted any continuances. While at the same time stating that he understands that if he were to get a new attorney that there would be a big continuance so that the new attorney would be able to prepare for the trial Hearing RP 104-5

May 3, 2017 again Linares tells the court he wants a new attorney. And the court again denies the motion. Counsel for Linares states on the record that he has reviewed discovery and the offers that had been made. Hearing RP 111-12.

May 26, 2017 once again asks for new counsel:

MR. LINARES: I haven't been wanting to do no continuance. I haven't been wanting to do no continuances at all.

...

MR. LINARES: I'm not really communicating with the lawyer. I'm not really communicating — that's pretty much it.

...

MR. LINARES: I haven't been wanting to do no continuances.

...

MR. LINARES: Why — I don't want to go to trial. I no longer want him as an attorney.

MR. LINARES: Well, I don't want to go to

trial with -- I want another lawyer.

...

MR. LINARES: I would like another lawyer-- I don't want to go to trial with this lawyer.

...

MR. LINARES: Well, the continuances, the Courts that I haven't been there for. Hearings RP 119-121

In response his attorney states "I am ready to go to trial. I have interviewed all the witnesses. My client does not prefer to have me in trial, does not wish to communicate with me, which we'll address next on the notice of appeal. I have nothing to add. My position is the same as it was when my prior motion was denied."

After this entire conversation the court ruled:

THE COURT: Okay. You're entitled to an attorney at public expense if you can't afford one. You have an attorney now. You can't really be the one selecting which attorney you get, so it sounds to me like you've been able to communicate well enough to get to this point. I understand that you don't want continuances, but we're pushing your case forward to trial now. You've had one trial, now you're going to have two more trials. So, you're not getting any further continuances, so. And I don't think that you're being prejudiced in any way with the communication issues. I think it's something that you are doing yourself -- that you're choosing not to communicate with your attorney and making it difficult for him to represent you. I don't think that another attorney would be in any different position to help you because I don't think that you're really working with them either. You've said the same thing to me over and over and over and to other judges, so your motion is denied. Hearing RP 122-3

...

THE COURT: All right. Mr. Linares, I'm going to deny your request. You're poised and ready to go to trial on this. Mr. Therrien-Power is ready to go to trial for you. You've had a long period of time in which to obtain your own attorney, you haven't done so. So, basically, it would be impeding -- it would be impeding the administration of justice, but also the process would cause you to have further delays and you're asking not to have further continuances, so it's counterintuitive, as far as the Court's concerned. So, I'm denying your motion. Hearing RP 124

TRIAL

The very first day of trial, which is the very first page of the VRP supplied to this court, the court and the parties address the fact that the defendant was refusing to leave his cell and to be transported to the courtroom as well as wear the "civilian clothes" that were provided to him for the trial. RP 3. Trial started on May 30, 2017. The defendant refused to come to court and/or dress in the civilian clothing provided. The court determined that this issue had to be addressed with the defendant present and that this would occur in one of the jail courtrooms which would take less transport, that would be more secure. The court stated what Linares rights were regarding trial and that he did have the legal right to trial. Defense counsel stated that he had spoken to the defendant, but he would not attest to the court what Linares understood or was waiving. He stated on the record that Linares was not willing to wear the clothing given, nor was he willing to be transported to court. RP 3

Upon reconvening in the second courtroom the court was informed the appellant continued to refuse to come into court. At that time the jail staff provided the parties with copies of the report that the court indicated chronicled the defendant's refusal to cooperate with staff and had refused to appear at other matters. RP 6. Counsel for the defendant had met with the defendant and Linares had once again stated that he would not dress in the clothes provided or come to the court. RP 6-7

Jail staff stated that the defendant had refused to come to court and that "I imagine we're going to have to fight with him to bring him down." Officer Turner testified that he has spoken to Linares and told him that the court wanted him present in the courtroom and Linares had refused. RP 7-8. It was decided that the best method to ascertain if Linares was actually waiving his right to be present at this trial was to issue an order which allowed the jail staff to "...use any reasonable and necessary force to transport the defendant to court for hearing today." RP 8-9

Eventually the defendant was brought to the courtroom. The court's first inquiry of the defendant was if he understood why the court was being held in the jail courtroom. Linares first statement in response to this statement by the court was "Well, I don't -- I want another attorney. I would like another attorney." The court then addressed the fact that on the previous Friday Linares had asked for a new attorney and that was

denied by a different judge. RP 11. What follows this initial exchange is a series of questions and responses that cover over nine pages in which the court attempts to get this defendant to state to the court the reason, any reason, he needs a new attorney. The closest that this defendant comes to stating a reason is just that he does not communicate with his attorney. He does not state why, this is a typical exchange:

THE COURT: When you say you do not communicate with him, is that your choice not to communicate?

MR. LINARES: It's not really my choice. I just don't.

THE COURT: Well, do you speak with him?

MR. LINARES: I don't want to. I don't. I don't.

THE COURT: Okay. Do you understand that if you don't communicate with him and you don't speak with him that it makes it more difficult for him to prepare your case and your defense for trial?

MR. LINARES: I do. I just don't. I would like another attorney. RP 13.

This continues for several pages of the proceedings wherein Linares states over and over “I would like another attorney or that he wants a continuance to allow him to obtain his own attorney. When inquiry is made by the court as to his ability to pay for an attorney Linares for the most part just continues this mantra. The court eventually rules:

THE COURT: The court is satisfied that your request for a continuance in this case is simply an attempt by you to delay these proceedings further. The court has also previously denied your request not only in this case, but in other cases, of your request for a new attorney. The court has found in the past, and I have found in the past, and do find today, that your request for an attorney, a new

attorney, is simply a delay tactic in this particular circumstance.

This case has been pending for a considerable period of time. The court also finds that you have repeatedly throughout this case and in other cases have insisted that you go to trial and that the court grant no continuances under any circumstances. Now we find ourselves in a situation where you're asking that we delay this.

The court finds that you have not satisfied me that you have the ability to hire another attorney. The court also has denied your request for a new court-appointed attorney. So, the court at this time, based on those findings, will deny your request for a continuance.
RP 16-17

The trial court continues from many more pages of this transcript to get this defendant to actually state why he wants a new attorney the court finally states:

THE COURT: Okay. If we are to start the trial today with opening statements and the presentation of witnesses, do you wish to be present for the trial during that time period?

MR. LINARES: What?

THE COURT: If we start with opening statements and presentation of evidence, do you wish to be present at trial for that?

MR. LINARES: What's that?

THE COURT: One more time. I want you to listen carefully, Mr. Linares.

Do you wish to be present for opening statements and presentation of evidence at trial today, yes or no?

MR. LINARES: What?

THE COURT: Mr. Linares, I'm getting the impression that you're kind of playing games with the court right now.

MR. LINARES: I ain't playing games with you.

THE COURT: Do you want to be present for the trial today?

MR. LINARES: No, I don't until I get another attorney? RP 19

Even after this exchange the court still attempts to ascertain why the defendant wants a new attorney. The court grants defense counsel time after this hearing to go to the jail and speak directly to his client. Mr. Therrien-Power returns to court and confirms again that Linares just continued to demand a new attorney or to be granted a continuance so that he could obtain an attorney. RP 22. Mr. Power informed the court that he would throughout the trial continually visit his client in jail and inquire if he still did not want to participate in his own trial. RP 22

Before jury selection Linares' attorney went to the jail and had a conversation with Linares about whether he was going to come to court. Linares was also informed at that time that if he changed his mind he could tell jail staff and they would contact the court. RP 47.

The court did a similar procedure at the beginning of the second day of trial, bringing the defendant to court in one of the jail courtrooms and making inquiry regarding his participation in his case. This court needs to read this section of the VRP 135-142. The same rote statements came from the defendant as an example:

THE COURT:...The reason I had you brought down, I wanted to make a determination as to whether or not you had changed your mind regarding appearing at your trial. Have you changed your mind? Do you wish now to attend

your trial?

MR. LINARES: No, I don't until I get another attorney. RP 135

...

MR. LINARES: I don't want to go to my trial. I only want to go to my trial until I get another attorney.

THE COURT: Do you understand that if you don't attend trial that you will be giving up your right to testify?

MR. LINARES: Yes.

THE COURT: Okay.

MR. LINARES: Yes.

THE COURT: Do you understand by not showing up for trial that you would give up your right to face your accuser at time of trial, those persons who would be called to testify against you? Do you understand that?

MR. LINARES: Yes.

THE COURT: Are you voluntarily giving up your right to be present at trial?

MR. LINARES: No.

THE COURT: You're not voluntarily giving up your right?

MR. LINARES: No.

THE COURT: Why is that?

MR. LINARES: I don't want to go to trial until I get another attorney. I would like another attorney
RP 136.

The court then inquires of this defendant what actions he has taken to hire his own attorney. This conversation is of the same nature and content as most conversations the court has with this defendant. He tells the court he has called "the attorneys" but refused the courts direct statement that it wanted the names of those attorneys. PR 137. The court concludes this fruitless conversation as follows:

THE COURT: Mr. Linares, this case has been delayed a few times over your objection. The court is satisfied that you've made no efforts to hire your own attorney in spite of the fact the court has on numerous occasions, both in this case and in your other case I've recently resolved, where you demanded a new attorney and the court denied your request for appointment of a new court appointed attorney.

The court also finds that you have not made any financial arrangements. This is the first time -- actually yesterday was the first time that I personally heard you say that you intend to hire your own attorney on the day of trial. You have had sufficient time to do that. You have been notified by the court on several occasions that the court is not going to appoint a new court-appointed attorney to represent you, finding that Mr. Therrien-Power is more than adequate to represent you in these proceedings. The court also found that your demand for a new attorney and your claim that you can't work with this attorney is brought on by your own behavior and your refusal to work with the attorney. Under those circumstances, the court denied your request for a court-appointed attorney. The court also finds that you've made little or no effort to hire an attorney. You do not have one that is ready to stand in the shoes of Mr. Therrien-Power at this point in time. The court is well within its discretion to deny your request for a continuance on that basis. I did so yesterday, and I will deny your request again today. Now, the question is do you want to participate at trial today?

MR. LINARES: No. I would like another attorney, until I get another attorney.

THE COURT: The court is satisfied Mr. Linares has voluntarily waived his right to have an attorney, waived his right to appear in court today as he did yesterday.

Mr. Linares, if the trial continues until tomorrow, I will come back tomorrow morning and ask you again whether or not you have changed your mind. I also want to inform you that if you change your mind and you want to appear at time of trial, all you need to do is notify jail staff. We will make immediate arrangements to get you

transported over so you can participate in the trial. It's entirely your decision. Do you understand that?
MR. LINARES: I'm not -- I don't want to go to trial until I got another lawyer. RP 140-41

After the State rested the court had defense counsel inquire of this defendant if he intended to testify at his trial. Mr. Power indicated that the only thing stated to him by his client was "He requested a new attorney."
RP 212-213, 216

On June 9, 2017 the parties appeared in court for sentencing. The occurrence of the actual assault on trial counsel has not been supplied to this court, it would appear that the parties were not on the record when that occurred. The State has set forth the conversation between trial counsel where he explains the assault, the query of the court and counsel's reply in Appendix B.

That assault was a kick to the leg of trial counsel by Linares who was then forcibly removed from the courtroom. At the time of the kick Linares was, according to the court, "...in his security clothing and was wearing ankle chains and a belly chain where his hands were handcuffed and fell close to his stomach."

The court inquired of trial counsel if he believed that he would still be able to represent Linares. After the kick Mr. Therrien-Power indicated to the court that he did not believe it affected his continued representation

because all that was left was a 20-minute sentencing. Hearing RP 133-4. There was discussion about new counsel being appointed but the determination was that the parties would just continue as before. Hearings RP 134-5.

On June 14, 2017 counsel for Linares moved the court to allow him to withdraw from representation of Linares. Counsel stated that he had conferred with the Washington State Bar Association and was told that he should move for withdrawal based on the conflict which had arisen due to the kick. The court allowed counsel to withdraw and assigned DAC (Department of Assigned Counsel) to appoint new counsel setting this last matter, sentencing, to a later date. Hearing RP 139-43.

The next hearing which physically took place was on July 10, 2017 by that time the second attorney who had been appointed had moved to withdraw also based on an alleged assault by Linares. The court queried Linares about his actions and told him that soon no more attorneys would be appointed. Linares stated he wanted representation. When asked by the court if he, Linares, could assure the court that he would not assault the third attorney he stated that he could not assure the court that he would not assault the latest appointed counsel. Hearing RP 146-9

At this hearing Linares repeated over and over that he would not assure the court that he would not assault new counsel, that he wanted to

waive his right to counsel, that he wanted a new attorney. Hearing RP 148-50.

At a subsequent sentencing hearing Mr. Kelley, the head of the Department of Assigned Counsel stated that Linares wanted him to make a motion under CrR 7.8 for a new trial there was not written motion filed by counsel as he was representing to the court what Linares stated to him. Mr. Kelley stated “..... I’m an officer of the Court and I did not see a reason to file that motion and he may not like what I have to say about it, but that’s my opinion.” When asked by the trial court for a basis for this motion Mr. Kelly went on to state “...His -- the only -- well, let me (indiscernible). I don’t believe this is incompetence, Judge. He -- it’s -- he did not like the lawyer who represented him.” Hearing RP 179-80

The trial court stated that it had dealt with a similar issue throughout trial and further, the court did not believe that the reason provided was a basis to grant a motion for a new trial. Hearing RP 180

There were several hearings that were scheduled and conducted regarding the defendant’s criminal history and the basis for that history. Hearing RP 157-175, 176-203. The State argued that the court should impose an exceptional sentence, consecutive terms in light of the fact that the defendant had history that pushed his point total past 9 which would then allow him to reap a benefit of being a recidivist. The discussion

addressed Linares' juvenile convictions, same course of conduct and many other issues. The State conceded on one conviction because it was unclear that the defendant had representation at the juvenile plea. There were numerous documents supplied to the trial court. At the hearing on July 27, 2017 the court took final testimony, reserved on the final ruling so that it could review all of the information supplied and any pertinent case law. Hearing RP 176-203.

At the final sentencing hearing the trial court determined that Linares' position regarding his past history was correct. The court determined that it would not count the one conviction from Adams County and that it would consider convictions from Walla Walla County to be the same course of conduct which then made the defendant's offender score 9.5, which with the rule of rounding down would set his offender score at 9 and therefore, the State's basis for an exceptional sentence did not exist. Hearing RP 206-214.

However, the court did find that it was going to determine that the previous conviction for Assault in the Second degree for which the defendant had previously been convicted and sentenced was such that the court would run the two concurrent Third Degree Assaults consecutively to the sentence in that first assault. Hearing RP 214-16. Linares objected to that sentence arguing that the Assault Second degree should be

run concurrently to the charges from these convictions. Hearing RP 215.

The State pointed out that the court had at its discretion the ability to determine that these charges should run consecutively. Hearing RP 206-225

III. ARGUMENT.

1. RESPONSE TO ASSIGNMENT OF ERROR ONE – THE COURT DID NOT ERR WHEN IT DENIED LINARES REQUESTS FOR NEW COUNSEL.

This issue was addressed in State v. Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997), “[a] criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant.” In determining whether the court should substitute counsel, the factors the court should consider are “(1) the reasons given for the dissatisfaction, (2) the court’s own evaluation of counsel, and (3) the effect of any substitution upon the scheduled proceedings.” Stenson, at 734. State v. DeWeese, 117 Wn.2d 369, 376, 816 P.2d 1 (1991) The right to counsel does not encompass the right to choose any advocate if the defendant wishes representation.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant effective assistance of counsel, free from any conflict of interest in the case. Wood v. Georgia, 450 U.S. 261, 271, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981); see also State v. Dhaliwal, 150 Wn.2d 559, 566, 79 P.3d 432 (2003). State v. White, 80 Wn.App. 406, 412-13, 907 P.2d 310 (1995), review denied, 129 Wn.2d 1012 (1996). In order to establish a Sixth Amendment violation, Linares must show that an actual conflict of interest adversely affected his attorney's performance. See Dhaliwal, 150 Wn.2d at 571, "An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance." citing Mickens v. Taylor, 535 U.S. 162, 172 n.5, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002).

Although Linares need not demonstrate that the outcome of the trial would have been different but for the alleged conflict, the "mere theoretical division of loyalties" is insufficient to establish a Sixth Amendment violation. Mickens, 535 U.S. at 171; see also State v. Fualaau, 155, *infra*. A conflict adversely affects counsel's performance if "some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." State v. Regan, 143 Wn.App. 419, 428, 177 P.3d 783(2008)

(internal quotation marks omitted) (quoting United States v. Stantini, 85 F.3d 9, 16 (2d Cir. 1996)), review denied, 165 Wn.2d 1012 (2008).

During the substantive portion of this case, which lasted through the entire trial, there was no actual conflict that existed between counsel and Linares. It was only after the jury rendered its verdict that Linares kicked his attorney.

The actions of the trial court in denying the motion to withdraw was discretionary and therefore appellant must demonstrate to this court that the trial court abused that discretion. There are no indications in the record supplied to this court that Linares' attorney ever moved the court for leave to withdraw before the kick. And after the kick the motion which was filed was granted. CP 57, 59. Hearing RP 134-149

As can be seen from the extensive pretrial and trial history set forth above, the only thing that the defendant could come up with was he "wanted" a new attorney. He parroted back one or two comments made by one of the several judges who had to address this ad nauseum request on the part of Linares. But he literally never once placed on the record any valid, substantive reason as to why he needed a new attorney. His counsel states that he has addressed this a couple times and that was denied by the court, but those instances are not reflected in the record.

Perhaps they occurred in one of Linares' other cases because there is nothing that the State can find in the VRP or in the clerk's papers from this case which would confirm that any motions were filed by counsel.

The only document filed in this case that addressed the issue of Linares right to an attorney was filed by counsel, Paul Kelley, who was the counsel from the Department of Assigned Counsel who has been substituted in for original counsel whom Linares kicked. CP 60-68.

In this case the trial court took the proper action when it reviewed the claims of appellant and determined that his attorney could continue to effectively represent him. The case law indicates where the error occurs is when the court does not make this inquiry. Holloway v. Arkansas, 435 U.S. 475, 484, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). The court's failure to take these steps deprives defendant of the guarantee of assistance of counsel. Holloway, 435 U.S. at 484, 98 S.Ct. 1173. Our Supreme Court has stated the rule as follows: "[A] trial court commits reversible error if it knows or reasonably should know of a particular conflict [of interest] into which it fails to inquire." In re Personal Restraint of Richardson, 100 Wn.2d 669, 677, 675 P.2d 209 (1983).

On occasion after occasion several different judges who heard this case came to the same conclusion, Linares was just attempting to

manipulate the system. This court should not countenance this type of activity.

The Court in State v. Fualaau, 155 Wn.App. 347, 228 P.3d 771 (2010) review denied, 169 Wn.2d 1023, 238 P.3d 503 (2010) set forth the applicable law regarding this allegation a matter with striking similarities to this case, eerily citing a New York case bearing the Linares name. In Fualaau the court stated the following:

A criminal defendant cannot force the withdrawal of his court appointed attorney and the appointment of a new attorney simply by assaulting his present counsel during the trial. " Substitution of counsel is an instrument designed to remedy meaningful impairments to effective representation, not to reward truculence with delay." People v. Linares, 2 N.Y.3d 507, 512, 780 N.Y.S.2d 529, 813 N.E.2d 609 (2004).

...

A defendant's misconduct toward his attorney does not necessarily create a conflict of interest. Where the defendant's actions do not create an actual conflict of interest adversely affecting the attorney's performance, the defendant is not entitled to a new attorney. State v. Dhaliwal, 150 Wn.2d 559, 571, 79 P.3d 432 (2003). However, even in circumstances wherein the defendant's wrongful actions create an actual conflict of interest, the defendant may properly be denied substitution of counsel.

Defendants can forfeit their Sixth Amendment rights by misconduct... Thus, a defendant who threatened his attorney with physical bodily harm and attempted to persuade his attorney to engage in unethical conduct in connection with the case was held to have forfeited his right to the assistance of counsel. United States v. McLeod, 53 F.3d 322, 326 (11th Cir.1995). Forfeiture by misconduct "is grounded in equity-the notion that people cannot complain of the natural and generally intended

consequences of their actions." Mason, 160 Wn.2d at 926, 162 P.3d 396. Hence, where a defendant intentionally creates a conflict of interest with his or her attorney, that defendant may be deemed to have forfeited either the right to the assistance of counsel or the right to the assistance of counsel free of the conflict created.

When a defendant misbehaves in a courtroom, the trial judge "must be given sufficient discretion" to determine the appropriate course of action. Illinois v. Allen, 397 U.S. 337, 343, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). "No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations." Allen, 397 U.S. at 343, 90 S.Ct. 1057. Hence, even where the defendant's misconduct causes a conflict of interest with defense counsel, the trial court is not necessarily required to grant the attorney's motion to withdraw, thus necessitating the substitution of new counsel. Rather, depending upon the circumstances extant, the trial court may require the defendant to proceed pro se or may require the attorney to continue representing the defendant. The trial court is in the best position to consider the appropriate options.

...

In this case, the burden is on Fualaau to demonstrate, from the record, that an actual conflict of interest adversely affected his attorney's performance

State v. Colbert, 17 Wn. App. 658, 664, 564 P.2d 1182 (1977):

The defendant is entitled to a fair and unbiased trial. State v. Beard, 74 Wn.2d 335, 444 P.2d 651 (1968). He is not entitled to a perfect trial. A perfect trial is always sought but seldom, if ever, attained.

And as was so pointedly stated by this court in State v. Sorenson, 6 Wn.App. 269, 272, 492 P.2d 233 (1972) "We have examined the entire record and find the claimed error to be without merit. As the court observed in State v. Thomas, *Supra*, 71 Wn.2d at 472, 429 P.2d at 233,

'(s)ome defendants are, in fact, guilty and no amount of forensic skill is going to bring about an acquittal.'"

In the matter before this court clearly the defendant brought these alleged errors upon himself; State v. Barnett, 104 Wn.App. 191, 200, 16 P.3d 74 (Div. 3 2001) "The doctrine of invited error precludes review of Mr. Barnett's assigned error. The doctrine of invited error prevents a party from setting up an error at trial and then complaining of it on appeal. A potential error is deemed waived "if the party asserting such error materially contributed thereto." (Citations omitted.) In re Personal Restraint of Thompson, 141 Wn.2d 712, 10 P.3d 380 (2000) "In these invited error doctrine cases, the defendant took knowing and voluntary actions to set up the error; where the defendant's actions were not voluntary, the court did not apply the doctrine."

Linares attorney struggled with issues that were put into place by Linares. He did what he could do with what he was given. This was a case where an inmate assaulted guards in jail and all but the actual assault which occurred outside the view of the surveillance camera's was placed on the record. Linares refused to work with his own attorney, he refused to come to trial or wear the clothing that was set out for him. Finally, when he was convicted of his actions and was not given his way he once again physically struck out. This time the object of his ire was his own

attorney. He should not be rewarded for his actions.

2. RESPONSE TO ALLEGATION THE COURT ERRED WHEN IT IMPOSED AN EXCEPTIONAL SENTENCE.

Linares' second allegation is that the trial court improperly imposed an exceptional sentence in both of his cases, which were both convictions for Third Degree Assault. He claims that when the trial court ran the sentences for those cases consecutive to the sentence previously imposed in his Assault Second Degree conviction, this was an exceptional sentence. The Second Degree Assault conviction is the subject of an appeal before this court, COA #35374-5-III.

Linares' second-degree assault occurred on February 4, 2016, he was found guilty on April 17, 2017 and the judgment and sentence in the second degree assault, COA 35374-5-III, was entered on May 25, 2017. The third-degree assault in this case occurred on April 27, 2016, he was found guilty on May 31, 2017 and the judgment and sentence in this case was entered on August 17, 2017. (Appendix C, CP 86)

When the trial court imposed the sentence, it ruled in Linares' favor and reduced his point total to 9 and ran the sentences for both of the Assault Third Degree convictions concurrently. The State had argued that due to Linares' high point total, in excess of 9, and the nature of the two

assaults, that the court should impose an exceptional sentence. Linares obviously objected. Hearing RP 205-14

There was very in-depth discussion regarding the State's request for an exceptional sentence. The court took briefing from both sides as well as exhibits which addressed Linares' criminal history. In the end the court ruled that one previous crime should not be counted at all and that two others should be considered same course of conduct and not counted separately. This ruling reduced Linares' point total to 9.5 and as this court is aware, point totals are "rounded down" for sentencing. Therefore, this defendant no longer had a point total that was in excess of 9 which would qualify for consideration under the commonly known phrase of "free crimes."

It is of utmost importance for this court to note that at no time during this sentencing does the trial court state it is imposing an exceptional sentence. The court does not state the reason it is running these concurrent sentences consecutive to the sentence in the unrelated Second Degree Assault because there are facts to support an exceptional sentence. The court does not set forth a factual basis nor does it state findings and conclusions, nor did it ask for those to be prepared by the State. The trial court discusses the imposition of an exceptional sentence in Linares' previous case where he was convicted of Second Degree

Assault but not for this crime before this court in this appeal. Hearings
RP 214-5. When Linares' counsel for sentencing asks the court about this
conversation is as follows:

MR. KELLEY: The argument by the Defendant that the
2nd Degree Assault conviction would be considered a
current offense and, therefore, be presumed concurrent
-- the Court isn't agreeing with that analysis?

THE COURT: I do not agree with that analysis.

MR. KELLEY: Okay.

THE COURT: The facts in the 2nd Degree Assault case
involve in position (imposition) of an exception(al)
sentence in that case, based upon specific finding of the
jury in that particular circumstance. It was not based
upon an analysis of criminal history or based on a
request in that regards. Hearing RP 214-5.

The trial court simply states:

THE COURT:...That brings us to an offender score of
nine under this Court's analysis. The Court is going to
find in this particular circumstance that the range is 51 to
60 months. The Court will sentence Mr. Linares to a term
of 60 months on Count 1 -- or actually, 60 months under
Cause No. 16-1-00804-39, and 60 months on 16-1-
02276-39, that they will run concurrent. They will not
run, however, concurrent with his other conviction for
2nd Degree Assault, which that's going to run
consecutive.

So, it's the order of this Court that the total
period of confinement on both is 60 months, to run
concurrent for each charge.

The trial court was adamant that the sentences for these two assault
convictions should run consecutive to the previous assault:

THE COURT: It is the Court's intent to run it
consecutive, there's no question of that. The 2nd Degree

Assault stands upon its own facts and the sentence that the court rendered in that particular case, I felt, were justified under the facts and circumstances of this case. These cases then, in fact, arose from conduct while he was incarcerated. In this particular case, both violent assaults upon Corrections staff and the Court, in this case, is exercising its discretion to run those convictions concurrent to the 2nd Degree Assault. They'll run -- excuse me, the Court is choosing to run consecutive is what I meant to say -- to the 2nd Degree Assault, but they will run concurrent with one another. Hearing RP 217-18.

There are several sections of the Revised Code which allow a court to impose a sentence such as was done herein.

RCW 9.94A.535(2)(c) provides that the trial court may impose an aggravated exceptional sentence without a finding of fact by a jury "[if] the defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." A trial court may impose an exceptional sentence without entering findings if in support of its imposition of consecutive sentences under RCW 9.94A.589(3), a trial court "expressly order" a defendant to serve consecutive sentences.

Because of the trial court's ruling regarding Linares criminal history, reducing his score to 9, RCW 9.94A.535(2)(c) would not be a valid basis for an increase in his sentence, likewise it would appear that because Linares was on community custody that RCW 9.94A.589(3) would not be applicable.

Linares argues he was not on community custody at the time of this sentencing, this is patently incorrect. The court and even Linares' trial attorney concurred with that, "And at the time of these 3rd Degree Assaults in 16-1-00804-39 and Ms. Holbrook's case, which is 16-1-02276-39, he was still on community custody..." RP 158..." ...the State Community Corrections Officer to Mr. Linares did provide an affidavit indicating that Mr. Linares was, in fact, on community custody at the time he committed both the Assaults in the 3rd Degree. I'll pause for them to --" RP 182

THE COURT:...First of all, let me start by stating that absent the juvenile convictions, **both sides agree that Mr. Linares's criminal history and the fact that he was on community custody at the time that the 3rd Degree Assaults occurred** within the Yakima County Department of Corrections puts him at an offender's score of eight. Hearing RP 206 (Emphasis added.)

...

THE COURT: ...Now, the Court's not inclined to do that for the following reason. He's still on community custody. All of this time period is tolled and so he's still on community custody from the two cases that he was placed on -- that are referenced in Exhibit B, which is the statement from the Corrections Officer. Hearing RP 216, 218-9

The State addressed what it referred to as the "default" position in an instance such as this and referred specifically to a case that the court had issued and opinion on. That other Yakima County case, State v. Mata, 180 Wn.App. 108, 321 P.3d 291 (Div. 3 2014) published in part which the State would direct this court, pursuant to GR 14.19(a) to

consider as nonbinding authority and accord such persuasive value as this court deems appropriate, was asked to address a similar issue. In that case, this court stated:

...the default provision applicable to defendants in Mr. Mata's situation is RCW 9.94A.589(2)(a). It provides in relevant part that "whenever a person while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms." The result is consecutive sentencing. See State v. Mahone, 164 Wn. App. 146, 152, 262 P.3d 165 (2011). While the trial court might have lacked the discretion provided by RCW 9.94A.589(3) that was urged by the State, the default result is the consecutive sentencing reflected in the judgment and sentence. Any mistaken reasoning was harmless.

This is exactly what occurred in this case. The court stated that it had imposed an exceptional sentence on Linares in the second degree assault case and that sentence having been imposed prior to the sentencing in this case the court simply stated the law, "the latter term shall not begin until expiration of all prior terms." The result is consecutive sentencing."

The attorneys for the State and Linares discuss the imposition of an exceptional sentence that the State initially requested based on what, at the time, was believed to be a point total in excess of nine. The judgement and sentence document has an "x" in at subsection 2.7 found at CP 87 indicating that there was an exceptional sentence imposed. This

scriveners error should be corrected because there was no exceptional sentence imposed.

As this court can see, the Court's statement regarding imposition of this sentence was unequivocal, "It is the Court's intent to run it consecutive, there's no question of that." State v. Perez, 69 Wn. App. 133, 140, 847 P.2d 532 (1993) allows this court to uphold the actions of a trial court even if the underlying rationale is not supported if "[w]e are satisfied that the trial court would have followed the State's recommendation and imposed the same sentence absent the improper factor. Therefore, we need not remand for further consideration. State v. Fisher, 108 Wn.2d 419, 429-30, 430 n.7, 739 P.2d 683 (1987). State v. Drummer, 54 Wn. App. 751, 760, 775 P.2d 981 (1989)." See also State v. Davis, 53 Wn. App. 306, 316, 766 P.2d 1120 (1989).

The trial court did not impose an exceptional sentence. It imposed a sentence mandated by the laws of this state. This court should affirm the actions of the trial court.

IV. CONCLUSION

For the reasons set forth above this court should deny this appeal. The record supports the actions of the trial court in both allegations. There was nothing in this record which would support Linares's allegation that the trial erred when it denied his requests for a new attorney. This

defendant was disruptive throughout this case; to the point that more than one judge ruled that his actions were being done to impede the trial. When Linares finally physically lashed out it was past the time where substantive actions were being taken. And the attorney who was appointed to represent him for sentencing was able to argue his client's case and successfully convince the trial court to reduce the defendant's point total to a number greatly reducing Linares' chances of receiving an exceptional sentence.

The sentence which was imposed was not an exceptional sentence. The record does not contain a single instance of trial court stating that it was imposing the sentences here consecutively to the previous sentence as an exceptional sentence.

The actions of the trial court should be upheld, and this appeal should be dismissed.

Respectfully submitted this 16th day of October 2018,

s/ David B. Trefry
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APPENDIX A

THE COURT: Now, in this particular case where you are charged with third degree assault, can you explain to me why you believe you need to be appointed another attorney?

MR. LINARES: I would like another attorney. The continuances, me not being in a couple of my courts, I can't -- I can't communicate with this attorney. I would like another attorney.

THE COURT: Mr. Linares, is it your choice not to communicate with Mr. Therrien-Power?

MR. LINARES: I just -- I just -- I would like another attorney. I just can't. I would like another attorney.

THE COURT: Well, you indicated that one of the reasons that you want a new attorney is that you cannot communicate with Mr. Therrien-Power, your present court-appointed attorney. The inability to communicate, is that your desire that you do not want to talk with him?

MR. LINARES: Well, I -- I would like another attorney. I haven't been coming to all my courts, not for this case. For the last case, the Assault 2, I wasn't there

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for all my courts. I wasn't in court for all my courts.

The continuances that I haven't been wanting to do, I've been wanting another attorney. I can't communicate with --I just don't communicate with this attorney. I would like

another attorney.

THE COURT: When you say you do not communicate with him, is that your choice not to communicate?

MR. LINARES: It's not really my choice. I just don't.

THE COURT: Well, do you speak with him?

MR. LINARES: I don't want to. I don't. I don't.

THE COURT: Okay. Do you understand that if you don't communicate with him and you don't speak with him that it makes it more difficult for him to prepare your case and your defense for trial?

MR. LINARES: I do. I just don't. I would like another attorney.

THE COURT: Okay. The court has previously denied your request for a new attorney, and the court will deny your request for a new attorney today. Now --MR. LINARES: Could I have -- could I have a continuance, a continuance for me to have time to get an attorney?

THE COURT: You're asking if the court --MR. LINARES: If I'm unable to be able to get

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another attorney, could I get more time to get an attorney, a lawyer?

THE COURT: Are you going to be able to hire your

own attorney?

MR. LINARES: Well, that's why I'm asking for a continuance or more time for me to get a lawyer.

THE COURT: Okay. My question to you is -- I'm trying to evaluate your request for a continuance. Do you have the ability to hire an attorney?

MR. LINARES: I'm gonna try -- I'm gonna try to get another lawyer. I'm gonna try to get a lawyer.

THE COURT: Do you have funds available to you to hire an attorney?

MR. LINARES: I'm going to -- I'm going to get an attorney.

THE COURT: You're indicting that you want to hire an attorney; is that correct?

MR. LINARES: If that's what it takes, yeah. I'm gonna get an attorney.

THE COURT: Okay. Do you have money to hire an attorney?

MR. LINARES: I'm going to figure that out. I'm going to try to get another attorney.

THE COURT: Do you own any property?

MR. LINARES: I don't.

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THE COURT: Do you have any savings accounts?

MR. LINARES: I don't.

THE COURT: Do you have any checking accounts?

MR. LINARES: I don't.

THE COURT: Okay. Do you have anybody that's holding money for you?

MR. LINARES: No.

THE COURT: Okay. Do you have any money at all presently to hire an attorney?

MR. LINARES: What was that again?

THE COURT: Do you have any money at all to hire an attorney?

MR. LINARES: I could hire -- I could get an attorney.

THE COURT: My question is do you have any money?

MR. LINARES: I'm gonna try to get -- I'm gonna try to get a new attorney.

THE COURT: And how long do you believe it's necessary -- how long do you need to hire a new attorney?

MR. LINARES: As long as you could give me.

THE COURT: Okay. And what assurances would I have that you would be able to hire an attorney within that period of time?

MR. LINARES: Well, as of right now I just -- I've been wanting another attorney. I've been wanting another

DISCUSSION RE DEFENDANT'S REQUEST FOR NEW COUNSEL

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attorney. I want -- if you could give me some time, give me a continuance to get another attorney.

THE COURT: Mr. Linares, you complained to this court that you want a new attorney because your attorney has requested continuances in the past when you didn't want the case continued. Why are you now asking for a continuance? Why do you believe that that's appropriate now on the day of trial?

MR. LINARES: For me to get an attorney, for me to get a lawyer.

THE COURT: The court is satisfied that your request for a continuance in this case is simply an attempt by you to delay these proceedings further. The court has also previously denied your request not only in this case but in other cases of your request for a new attorney. The court has found in the past and I have found in the past and do find today that your request for an attorney, a new attorney, is simply a delay tactic in this particular circumstance.

This case has been pending for a considerable period of time. The court also finds that you have repeatedly throughout this case and in other cases have insisted that you go to trial and that the court grant no continuances under any circumstances. Now we find ourselves in a

situation where you're asking that we delay this.

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The court finds that you have not satisfied me that you have the ability to hire another attorney. The court also has denied your request for a new court-appointed attorney. So the court at this time, based on those findings, will deny your request for a continuance.

MR. LINARES: If I get a continuance or get another attorney, I would appreciate it.

THE COURT: I have denied your request.

MR. LINARES: I would like another attorney or a continuance to get another lawyer.

THE COURT: And I have said no. That's not going to happen. We are going to go to trial today.

Now, do you wish to appear at time of trial?

MR. LINARES: What's that?

THE COURT: We're going to go to trial today. Do you want to be there?

MR. LINARES: I don't without another attorney.

THE COURT: Okay. Do you understand that the Constitution of the United States and the Washington State Constitution grants you the absolute right to be present during trial? Do you understand that?

MR. LINARES: What's that?

THE COURT: The Constitution of the United States and the Washington State Constitution guarantees you the right to be present at time of trial. Do you understand?

DISCUSSION RE DEFENDANT'S PARTICIPATION AT TRIAL

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MR. LINARES: I do. I just want another attorney.

THE COURT: Okay. We are going to proceed with trial today. My question to you is do you wish to participate in that trial?

MR. LINARES: No, I don't --THE COURT: All right.

MR. LINARES: -- until I get another attorney.

THE COURT: Is this a decision that you are making voluntarily, your decision not to appear?

MR. LINARES: Yes, yes. I would like a lawyer. I would like a lawyer or a continuance to get another lawyer. If I'm not going to get -- I would like another lawyer. I would like another lawyer.

THE COURT: The court has already determined that I'm not going to appoint a new attorney for you.

MR. LINARES: Well, that's why -- if you don't want a court-appoint attorney for me, I would like a continuance for me to get a lawyer.

THE COURT: And I have denied that request. We are going to go to trial today. I just want to make sure that you understand that you have an absolute right to be

present today at time of trial.

We started the trial already, and we're discussing whether or not you want to appear. We're going to start with jury selection after we decide some pretrial motions.

DISCUSSION RE DEFENDANT'S PARTICIPATION AT TRIAL

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Do you wish to be present for those pretrial motions and jury selection?

MR. LINARES: I don't.

THE COURT: Okay. If we are to start the trial today with opening statements and the presentation of witnesses, do you wish to be present for the trial during that time period?

MR. LINARES: What?

THE COURT: If we start with opening statements and presentation of evidence, do you wish to be present at trial for that?

MR. LINARES: What's that?

THE COURT: One more time. I want you to listen carefully, Mr. Linares.

Do you wish to be present for opening statements and presentation of evidence at trial today, yes or no?

MR. LINARES: What?

THE COURT: Mr. Linares, I'm getting the impression that you're kind of playing games with the court

right now.

MR. LINARES: I ain't playing games with you.

THE COURT: Do you want to be present for the trial today?

MR. LINARES: No, I don't until I get another attorney?

DISCUSSION RE DEFENDANT'S PARTICIPATION AT TRIAL

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THE COURT: Is this a decision you are making voluntarily?

MR. LINARES: Yes.

THE COURT: Mr. Linares, the court is going to grant your request, and we will not bring you over, then, for jury selection and pretrial motions. I want you to understand that at any time should you change your mind that you are to notify jail staff. We will make immediate arrangements to transport you over for trial so that you can be present. Do you understand?

MR. LINARES: Yes, I do.

THE COURT: Okay. I will ask counsel to contact you this afternoon and see if you desire to participate. Counsel will be in contact with you periodically to discuss this trial with you and to address issues that may come up. I encourage you to cooperate with your counsel.

MR. LINARES: That's not going to happen, Judge.

I would like another attorney or a continuance for me to get another attorney. I don't want to continue my courts until I get another attorney. I just don't want him as an attorney. I don't want him -- I would like another attorney.

THE COURT: The court has denied your request for --MR. LINARES: Or a continuance for me to get a
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lawyer.

THE COURT: The court has denied your request for a new attorney. The court has denied your request for continuance. We are going to proceed to trial. Do you wish to be present at trial?

MR. LINARES: No, I don't until I get another lawyer.

THE COURT: All right. We will be in recess. We will reconvene across the street at the main courthouse, Courtroom No. 3, within the next 15 minutes.

Mr. Therrien-Power.

MR. THERRIEN-POWER: Your Honor, if I may, I would like the opportunity just to stop by, once they put him in his cell, to speak with him. I'll make an attempt to speak with him.

APPENDIX B

THE COURT: A couple of concerns that — well, actually, a couple of comments, first of all. Mr. Linares did not appear for trial on either of the two cases that the State proceeded with. But Mr. Linares was cooperative in coming down each morning before those trials and explaining to us that he didn't want to go to trial and was waiving his right to appear. So, I don't know that I can necessarily draw a correlation between that and his (indiscernible).

MR. THERRIEN-POWER: I think that (indiscernible) because the first time we did have to get a Court order. I think he refused, I think, the first day of trial or I can't remember on that.

THE COURT: Yeah, you are right on that, yeah. What I, the Court is inclined to do at this point — I understand that Judge Harthcock is not going to be available next week, so between Judge Elofson and myself, we're probably going to begin to be splitting up those dockets — criminal dockets — next week. I would like to proceed perhaps with the sentencing Wednesday afternoon. Mr. Therrien-Power, a couple things that the Court is concerned about as far as your continuing representation of Mr. Linares. I think the Court can understand Mr. Linares's frustrations. The Court has continually found that his request for an attorney was simply not approved and that — I don't know that whether or not that evidence is a frustration or his acts today, but do you

believe that you are in a position that you can continue to represent the best interest of your client, despite the fact that he may have attempted or, in fact, kicked you today? Again, I didn't see the episode, I couldn't -- I wasn't looking in that direction, frankly.

MR. THERRIEN-POWER: For the record, he did kick me. He was able to successfully strike me on the lower leg. Yes, Your Honor, I can represent him. Nothing's going to change in my sentencing argument. It's a -- this is a simple case, should be a 20-minute sentencing.

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I will have to give a statement in regards to what happened in Court today, I expect. And I expect to cooperate with law enforcement -- that will be up to the State. But, yes, I can. I'm just raising the issue of the fairness issue because I think that's the only issue that needs to be raised, if I believe that I can do this and I do.

I think I can -- throughout this case, I've had a tough relationship with my client. There has never -- except for at the very inception of this case -- not been that type of a relationship. And I don't think that's changed in any way, shape, or form. So, yes, Your Honor, I can. And I'll leave any other appointee to the Court's discretion and that's what Mr. Kelley advised me as well, so I don't know what other answer I can give. I'll answer other questions

you have.

THE COURT: Okay. The Court does not have any other questions at this point in time. I will set the matter for a sentencing hearing then on Wednesday, June 14th. Are you going to be available then, Ms. Holbrook?

RP 133-35

APPENDIX C

FILED
JANELLE RIDDLE, CLERK

PJ

'17 MAY 25 P2:17

SUPERIOR COURT
YAKIMA CO. WA

SUPERIOR COURT OF WASHINGTON FOR YAKIMA COUNTY

STATE OF WASHINGTON

NO. 16-1-00255-39

Plaintiff,

FELONY JUDGMENT AND SENTENCE
(FJS)

vs.

JOSE PEDRO LINARES

Prison
 Community Custody Ordered
 Clerk's Action Required: 4.D.8 (Payroll
Deduction); 5.2 (NLVR); 5.3 (NTIPF);

Defendant.

SID NO.: WA20526112
Motor Vehicle Involved: No
D.L.#: LINARJP111RG; DOC: 330280;
DOB: 12/7/1989; SEX: Male; RACE: Hispanic

I. HEARING

1.1 Hearing: A sentencing hearing was held May 25, 2017. Present were the defendant, DAVID M. THERRIEN-POWER, attorney for the defendant, and TROY J. CLEMENTS, Deputy Prosecuting Attorney.

1.2 Allocution: The defendant was given the right of allocution and asked if any legal cause existed why judgment should not be entered. There being no reason why judgment should not be pronounced, the Court makes the following findings and judgment.

II. FINDINGS

Based on testimony heard, statements by the defendant and/or victims, argument of counsel, any pre-sentence report, and case record to date, the court finds:

2.1 Current Offense(s): On April 17, 2017, the defendant was found guilty by a jury verdict of:

Count 1 SECOND DEGREE ASSAULT
RCW 9A.36.021(1)(c) and 9.94A.535(3)(aa)
Date of Crime: February 4, 2016
Law Enforcement Incident No.: Sunnyside PD #16S00930

2.2 Special Findings: The Court makes the following special findings, based either upon a special verdict or upon the Court's own review of the evidence:

The defendant committed the crime in Count 1 while armed with a **deadly weapon** other than a firearm, as defined by RCW 9.94A.825 and RCW 9.94A.533.

ORIGINAL

35374-5 000111

The jury by special verdict found an aggravating circumstance beyond a reasonable doubt: that the defendant committed the offense in Count 1 with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership. (RCW 9.94A.535(3)(aa).)

The defendant is a criminal street gang member or associate as defined by RCW 9.94A.030.

2.3 Criminal History: Prior criminal history used in calculating the offender score (RCW 9.94A.525):

| Crime | Date of Sentence | Sentencing Court (County & State) | Date of Crime | Adult or Juvenile | Type of Crime* |
|--|------------------|-----------------------------------|---------------|-------------------|----------------|
| Felony Viol NCO/PO - DV 14-1-00497-0 DV | 6/10/2014 | Yakima , WA | 4/6/2014 | Adult | NV |
| Felony Viol NCO/PO - DV 14-1-00194-6 DV | 2/21/2014 | Yakima , WA | 12/14/2013 | Adult | NV |
| Possess Cont Sub - Meth 13-1-00742-3 | 9/4/2013 | Yakima , WA | 5/11/2013 | Adult | Drugs |
| Felony Viol NCO/PO - DV 12-1-01721-8 DV | 1/18/2013 | Yakima , WA | 11/5/2012 | Adult | NV |
| Attempt to Elude 10-1-00062-9 | 3/2/2010 | Yakima , WA | 3/16/2009 | Adult | NV |
| TMVWOP 2 08-1-01419-9 | 8/13/2008 | Yakima , WA | 7/14/2008 | Adult | NV |
| Second Degree Theft 06-8-00007-8 | 1/26/2006 | Adams , WA | 9/9/2005 | Juve | NV |
| Residential Burglary 05-8-00114-6 | 6/23/2005 | Walla Walla , WA | 5/23/2005 | Juve | NV |
| TMVWOP 2 05-8-00114-6 | 6/23/2005 | Walla Walla , WA | 5/23/2005 | Juve | NV |

2.4 Other Current Convictions under other cause number(s) used to determine offender score:

| Crime | Cause Number | Court (County and State) |
|-------|--------------|--------------------------|
| None | | |

2.5 Sentencing Data: The following is the defendant's standard range for each crime pursuant to RCW 9.94A.510:

| Count | Offender Score | Seriousness Level | Standard Range | Enhancements* | Enhanced Range | Maximum Term |
|-------|----------------|-------------------|----------------|---------------|----------------|--------------|
| 1 | 8.5 | IV | 53-70 mos | 24 mos | 77-94 mos | 10 yrs |

(D) Other deadly weapon (RCW 9.94A.533(4))

The defendant committed a current offense while on community placement, community custody, or community supervision, which added one point to the defendant's offender score. RCW 9.94A.525(19).

2.6 Exceptional Sentence: Substantial and compelling reasons exist which justify an exceptional sentence. Pursuant a jury finding by special verdict of the aggravating circumstance in 9.94A.535(3)(aa), the Court finds that an exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

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 the legal financial obligations imposed herein. RCW 10.01.160.

III. JUDGMENT

3.1 Guilty: IT IS ADJUDGED that the defendant is guilty of the counts and charges listed in paragraph 2.1.

3.2 Exceptional Sentence: Pursuant a jury finding by special verdict of the aggravating circumstance in 9.94A.535(3)(aa), the Court is justified in entering an exceptional sentence of 120 Months , which is 26 months above the standard range of 53-70 Months.

3.4 Not Guilty of Counts: The defendant is found not guilty of Count 2.

IV. SENTENCE AND ORDER

IT IS ORDERED that the defendant serve the sentence and abide by the conditions set forth below.

A. CONFINEMENT

4.A.1 Confinement: The defendant is sentenced to the following term of confinement:

**70 Months Base Sentence plus 24 Months Deadly Weapon Enhancement plus
26 Months Exceptional Sentence based on Aggravating Circumstance on Count 1**

Credit for Time Served in the Yakima County Jail: The defendant shall be given credit for TBD. days served on this charge only. The defendant shall be given credit for good behavior as administered and computed by the Yakima County Department of Corrections.

Credit for Good Behavior: The defendant shall receive no credit for good behavior on the deadly weapon.

4.A.2 Concurrent or Consecutive:

Consecutive: The base sentence confinement time, the deadly weapon enhancement confinement time and the exceptional sentence confinement time shall run consecutive for a **TOTAL TERM of 120 MONTHS**

Consecutive With Other Sentences: Unless otherwise specified here, this sentence shall be consecutive with prior sentences.

4.A.3 Means of Confinement: The defendant shall serve this sentence as follows:

Total Confinement: The defendant shall serve the balance of confinement in a prison operated by the Washington State Department of Corrections because the term of confinement is over one year.

B. SUPERVISION BY THE DEPARTMENT OF CORRECTIONS

4.B.1 Community Custody: The defendant shall serve community custody for a period of 18 months on Count 1, pursuant to RCW 9.94A.701 to commence upon the date of this order and shall comply with the conditions and crime related prohibitions as set forth below. During the time the defendant is in total or partial confinement pursuant to this sentence or a violation of the sentence, the period of community custody shall toll. The defendant shall report, in person, within 24 hours of this order or release from incarceration, whichever is later, to the Washington State Department of Corrections, 210 North Second Street, Yakima, Washington.

4.B.1 No Community Custody or Probation: Based on the statutory maximum sentence imposed, the defendant shall not be subject to community custody or probation by agreement of the parties.

C. SENTENCE CONDITIONS

4.C.1 DNA Testing: The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. If you are out of custody at the time of sentencing, you will immediately report to the front desk of the Yakima County Jail for the taking of a DNA sample. RCW 43.43.754.

4.C.2 Conditions of Community Custody or Probation: While the defendant is on community custody, community placement, or probation, the defendant shall comply with each of the conditions below.

- Report to and be available for contact with the assigned community corrections officer as directed.
- Cooperate fully with the supervising Community Corrections Officer.
- Perform such affirmative acts necessary for the Department of Corrections to monitor compliance with the court's orders.
- Work at Department of Corrections-approved education, employment and/or community service.
- Do not unlawfully possess or consume any controlled substances except pursuant to a lawfully issued prescription.
- Pay supervision fees as determined by the Department of Corrections.
- Residence location and living arrangements are subject to the prior approval of the Department of Corrections while in community custody.
- Allow home visits by the Department of Corrections to monitor compliance with supervision. Home visits must include access for the purposes of visual inspection of all areas of the residence in which the defendant lives or has exclusive or joint control or access.
- Not own, use, or possess, including constructively, any firearm or ammunition.
- Maintain law-abiding behavior and commit no new crimes.
- If the defendant is or becomes subject to court-ordered mental health or chemical dependency treatment, the defendant must notify the Department of Corrections, and the defendant's treatment information must be shared with the Department of Corrections for the duration of the defendant's incarceration and supervision. RCW 9.94A.562.
- Have no direct or indirect contact with Eric A. Ruiz.
- Obey all no contact, protection, and/or anti-harassment orders now or hereafter in effect.
- Report for urinalysis as ordered by the Department of Corrections.
- Submit to regular polygraph examinations about drug and alcohol usage upon the request of the supervising Community Corrections Officer.
- Do not possess or consume any alcohol or intoxicating beverages, and submit to a breath alcohol analysis upon the request of the supervising Community Corrections Officer.
- Not knowingly associate or communicate with other criminal street gang members or associates, except as authorized by law enforcement officials, prosecutorial authorities, or the court, for the purpose of aiding in the investigation of criminal activity.
- Wear no clothing associated with or signifying membership in a criminal street gang.
- Report to the Sunnyside Police Department with a copy of your terms and conditions of community custody and show proof to your community custody officer within fourteen(14) days of release from prison.
- Do not obtain any new tattoos, brands, burns, piercings or any voluntary scarring related to gang membership or association.

Other: _____

4.C.2 No Conditions: Because there is no supervision ordered, the defendant must only complete any incarceration ordered and pay all financial obligations.

D. FINANCIAL OBLIGATIONS

4.D.1 Financial: The defendant shall pay financial obligations and abide by the conditions as set forth below. The defendant shall be under the jurisdiction and supervision of this Court for purposes of payment of financial obligations ordered until they are paid. The defendant shall report to the Yakima County Clerk, Yakima County Courthouse, Room 323, 128 North Second Street, Yakima, WA, within 24 hours of this order or release from incarceration, whichever is later. The defendant must notify the Yakima County Clerk's Office of changes in address or employment. During the period of repayment, the county clerk may require the offender to report to the clerk for the purpose of reviewing the appropriateness of the collection schedule for the legal financial obligation. During this reporting, the offender is required under oath to respond truthfully and honestly to all questions concerning earning capabilities and the location and nature of all property or financial assets. The offender shall bring all documents requested by the county clerk in order to prepare the collection schedule. RCW 9.94A.760(7)(b).

4.D.2 Jurisdiction: All legal financial obligations for an offense committed on or after July 1, 2000, may be enforced at any time the offender remains under the court's jurisdiction. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. The clerk of the court is authorized to collect unpaid financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her financial obligations. RCW 9.94A.753(4) and RCW 9.94A.760(4).

4.D.3 Restitution, Costs, Assessments, and Fine: Defendant shall pay the following to the Yakima County Superior Court Clerk, Room 323, Yakima County Courthouse, Yakima, WA 98901:

| | | | |
|-----|----|---------------------|--|
| RTN | \$ | -0- | Restitution distributed to: _____, subject to modification. Restitution shall be joint and several with any codefendant. |
| PCV | \$ | 500.00 | Crime Penalty Assessment – felony or gross misd. (RCW 7.68.035) |
| FRC | \$ | 200.00 | Criminal filing fee |
| PUB | \$ | 600.00 | Court appointed attorney recoupment (RCW 9.94A.760) |
| DNA | \$ | 100.00 | DNA collection fee (any felony committed after 7/1/02) (RCW 43.43.7541) |
| JFR | \$ | 250.00 | Jury fee |
| | \$ | 1,650.00 | TOTAL |
| | | 700. ⁰⁰ | RAB |

4.D.4 Costs of Incarceration: In addition to the above costs, the court finds that the defendant has the means to pay for the costs of incarceration, in prison at a rate of \$50.00 per day of incarceration or in the Yakima County Jail at the actual rate of incarceration but not to exceed \$100.00 per day of incarceration (the rate in 2016 is up to \$87.95 per day), and orders the defendant to pay such costs at the statutory rate as assessed by the Clerk. Such costs are payable only after restitution costs, assessments and fines listed above are paid. RCW 9.94A.760(2).

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.

4.D.6 **Forfeiture of Funds:** The financial obligations ordered above, in part or in full, shall be paid from defendant's funds held by _____ who is ordered to pay such funds to the Clerk of the above Court. Any balance shall be paid by the defendant.

4.D.7 Payments: Unless provided above, the Yakima County Clerk shall, after investigation, set a minimum monthly payment for the defendant to pay towards the financial obligations. The Clerk may modify the monthly payment amount. Payments shall first apply to any restitution. Costs and assessments

shall be paid in 180 days after restitution is paid in full/release. All other fees shall be paid in 270 days after restitution is paid in full/release. The defendant shall pay financial obligations to the Clerk of the Court, Room 323, Yakima County Courthouse, Yakima, Washington.

4.D.8 Payroll Deduction: Without further notice, the Yakima County Clerk may issue a Notice of Payroll Deduction at any time until all financial obligations are paid. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

4.D.9 Interest, Judgment, and Collection: The financial obligations listed herein shall bear interest from the date hereof until paid in full at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total financial obligations. RCW 10.73.160. The financial obligations listed above may be enforced in the same manner as a civil judgment. The defendant shall pay the costs of services to collect unpaid legal financial obligations.

4.D.10 Petition For Remission: The defendant, if not in willful default on financial obligations due hereunder, may at any time petition the court for remission of all or part of the financial obligations due, except restitution or interest on restitution, or to modify the method of payment under RCW 10.01.160 through RCW 10.01.180 and RCW 10.73. Non-restitution interest may be waived only after the defendant has either (a) paid the principal amount in full or (b) made at least fifteen monthly payments within an eighteen-month period, as set by the Clerk, and further payment of interest will cause a significant hardship. RCW 10.82.090.

V. NOTICES

The defendant, by signing below, acknowledges each of the statements in this section.

5.1 Collateral Attack: The defendant may not file a petition or motion for collateral attack on a judgment and sentence in a criminal case more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction. For purposes of this section, "collateral attack" means any form of post-conviction relief other than a direct appeal. "Collateral attack" includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw a guilty plea, a motion for a new trial, and a motion to arrest judgment under RCW 10.73.090 and RCW 10.73.100.

5.2 Loss of Voting Rights: The defendant understands and acknowledges that:

1. The defendant's right to vote is lost because of this felony conviction.
2. If the defendant is registered to vote, his or her registration will be canceled.
3. The defendant's right to vote is provisionally restored as long as the defendant is not under the authority of the department of corrections.
4. The defendant must reregister before voting.
5. The provisional right to vote may be revoked if the defendant fails to comply with all the terms of his or her legal financial obligations or an agreement for the payment of legal financial obligations.
6. The defendant's right to vote may be permanently restored by one of the following for each felony conviction:
 - a. A certificate of discharge issued by the Yakima County Superior Court, as provided in RCW 9.94A.637; or
 - b. A court order issued by the Yakima County Superior Court restoring the defendant's right to vote, as provided in RCW 9.92.066; or
 - c. A final order of discharge issued by the indeterminate sentence review board, as provided in RCW 9.96.050; or
 - d. A certificate of restoration issued by the governor, as provided in RCW 9.96.020.
7. Voting before the right to vote is restored is a class C felony under RCW 29A.84.660.

5.3 Firearms: The defendant understands that he or she must immediately surrender any concealed pistol license and may not own, use, or possess any firearm unless the right to do so is restored by a court of record. (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

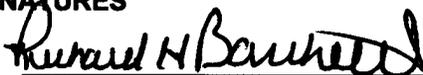
5.4 Sentence Condition Violation: Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement for any violation related to a felony charge. RCW 9.94A.633. Any violation of this Judgment and Sentence is punishable by up to the total number of confinement days suspended for any violation related to a non-felony charge.

5.5 Successful Completion: Upon successful completion of the requirements of the sentence, the defendant shall be eligible for a certificate of discharge. RCW 9.94A.637.

5.6 Restitution Hearing: If this box is checked and initialed here _____ then the defendant gives up or waives the right to be present at any restitution hearing.

VI. SIGNATURES

DATED: May 25, 2017



JUDGE

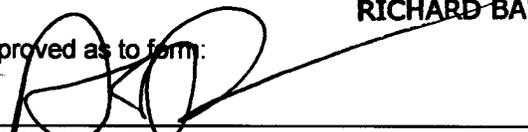
RICHARD BARTHELD

Presented by:



TROY J. CLEMENTS
Deputy Prosecuting Attorney
Washington State Bar No. 34399

Approved as to form:



DAVID M. THERRIEN-POWER
Attorney for Defendant
Washington State Bar No. 40627

Acknowledging the notices in Section V and receiving a copy:

DEFENDANT

INTERPRETER'S DECLARATION: I am a certified interpreter or have been found otherwise qualified by the court to interpret in the _____ language, which the defendant understands, and I have translated the notices in section V for the defendant from English into that language. The defendant acknowledged his or her understanding of both the translation and the subject matter of this document. I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Interpreter

Print Name

Date and Place

VII. WARRANT OF CONFINEMENT

THE STATE OF WASHINGTON

TO: The Yakima County Sheriff
TO: The Yakima County Department of Corrections
TO: The Washington State Department of Corrections

The defendant has been convicted in the Superior Court of the State of Washington of the crim of:

COUNT 1 - SECOND DEGREE ASSAULT

and the court has ordered that the defendant be punished as set out in the attached Judgment and Sentence.

YOU ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence.

DATED: May 25, 2017

By the Direction of the Honorable

RICHARD BARTHELD

JUDGE

JANELLE RIDDLE, Clerk

By:

Deputy Clerk



Defendant: JOSE PEDRO LINARES

SID: WA20526112



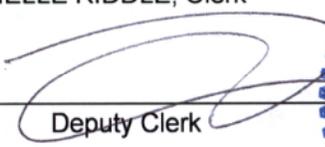
FINGERPRINT CERTIFICATE OF ATTESTATION

STATE OF WASHINGTON)
)
 County of Yakima) ss.

I, JANELLE RIDDLE, Yakima County Clerk and ex-officio Clerk of the Superior Court, hereby attest that the fingerprints appearing on this certificate are the fingerprints of the above-named defendant, and were affixed in open court on May 25, 2017.

DATED: May 25, 2017

JANELLE RIDDLE, Clerk

By: 
 Deputy Clerk



Address of Defendant:

DECLARATION OF SERVICE

I, David B. Trefry, state that on this date I emailed a copy of the Respondent's Brief to: Ms. Tanesha Canzater at Canz2@aol.com

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

DATED this 16th day of October, 2018 at Spokane, Washington,

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

YAKIMA COUNTY PROSECUTORS OFFICE

October 16, 2018 - 5:05 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35484-9
Appellate Court Case Title: State of Washington v. Jose Pedro Linares
Superior Court Case Number: 16-1-00804-1

The following documents have been uploaded:

- 354849_Briefs_20181016170429D3759701_5353.pdf
This File Contains:
Briefs - Respondents
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A copy of the uploaded files will be sent to:

- Canz2@aol.com
- joseph.brusic@co.yakima.wa.us
- tcanzater63@gmail.com

Comments:

Sender Name: David Trefry - Email: David.Trefry@co.yakima.wa.us
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