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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

BENJAMIN E. STUTZKE, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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## **I. ISSUES PRESENTED**

1. Did the defendant properly waive his right to counsel such that a second waiver of counsel was not required?
2. Did the trial court violate defendant's Sixth Amendment right to counsel by granting defense counsel's motion to withdraw where the record establishes an irreconcilable conflict between counsel and defendant that resulted in a complete breakdown in communication?
3. Did the trial court violate defendant's Sixth Amendment right to counsel when, three years into the case, it finally treated the defendant's dilatory tactics and misconduct as an implied waiver of the right to counsel?
4. Was there sufficient evidence supporting the voyeurism conviction?
5. Did the convictions for stalking and violation of a protection order violate the constitutional prohibition against double jeopardy?
6. Did the trial court exceed its authority by sentencing defendant to an 18-month term of community custody for the stalking offense?

7. Could community custody be ordered on the gross misdemeanor offense of violating a protection order?
8. Does the sexual assault order exceed the term allowed by statute?
9. Should the clerical order in the judgment and sentence describing the stalking conviction as a “domestic violence” case be corrected?

## **II. STATEMENT OF THE CASE**

### 1. Summary of case.

The defendant’s version of the trial facts is acceptable. The main complaints on appeal concern the pretrial procedure and sentencing.

Defendant Stutzke underwent two RCW 10.77 evaluations, each one finding him competent. After discovery and preparation for trial was completed, Stutzke waived jury and proceeded to trial. After trial started, Stutzke, through his attorney, moved to have his right to a jury restored. The trial court granted his request and continued the case at his request. Stutzke then underwent two additional RCW 10.77 evaluations, each one finding him competent. He then moved the trial court to proceed pro se. A colloquy was undertaken and at the conclusion of the hearing he was allowed to waive counsel and proceed pro se; standby counsel was appointed. Stutzke refused to meet with the prosecutor regarding discovery as arranged, and refused to come to court from jail.

After months of self-representation, Stutzke moved for the reappointment of an attorney. The court granted the request and appointed his former standby counsel as his attorney. As trial neared, Stutzke complained about his new counsel, refused to meet with him and refused to come to court from his cell. Because Stutzke refused to meet with counsel and because of allegations that Stutzke made regarding his attorney being under the influence of alcohol in court, and due to the complaints Stutzke placed with Spokane County Human Resources, an investigation by human resources began, and his attorney moved to withdraw from the case.

The trial court authorized the withdrawal, outlined the history of the case, and because the case was three-years-old determined that Stutzke had waived his right to counsel by his conduct. Trial started approximately a week later, at which time Stutzke again waived jury. The trial court convicted Stutzke of voyeurism, violation of a civil anti-harassment protection order, and stalking, but found him not guilty of the attempted residential burglary charge.

## 2. Procedural history

On May 23, 2016, the trial court outlined the history of this case at the time it authorized the withdrawal of counsel and Stutzke's renewed demand to proceed pro se:

THE COURT: Okay. Why don't you have seat. You can make a statement in a little bit. The first thing we need to talk about is you not being represented by an attorney.

So go ahead and have a seat. Let's figure out this attorney issue first.

This case dates back to August of 2013 when it was filed. In August of 2013, there was a summons that was sent out. You failed to respond to the summons. A warrant was issued for your arrest. That warrant was --

THE DEFENDANT: Could you tell me the date again?

THE COURT: That was back in August of 2013.

THE DEFENDANT: August 16th, okay.

THE COURT: At some point a warrant was issued based upon your failure to appear at the arraignment. That warrant was recalled. You were arraigned. You were released on your promise to appear and promise to comply with a number of conditions of release.

There's an allegation that you failed to comply with your conditions of release. Specifically, there's an allegation that you violated the no-contact provision. As a result, a second warrant was issued for your arrest. That warrant was served on November -- right around November 12 of 2013, and a \$100,000 bond was set.

Early on in the case there was a petition to have you evaluated out at Eastern State Hospital. You probably recall that. Your case was on stay until July of 2014. Once it came off stay in December of 2014, we had a discussion about you waiving your right to a jury trial. The Court made a finding that you knowingly, voluntarily, and intelligently waived your right to a jury trial. You made that decision in consultation with your attorney, who was Mr. Harget at the time.

At that point your first trial commenced. Based upon your actions at the first trial, there was some concerns about whether or not you needed to be reevaluated. As a result, a mistrial was declared. You were sent back out to Eastern State Hospital for a second evaluation. That was on December 17th of 2014.

Your case went onto a stay until July 20th of 2015. When you came back off the stay, you made a request for a jury trial after you previously withdrew your request for a jury and agreed to a bench trial. I don't know that you necessarily have the right to rescind that waiver of a jury, but in erring on the side of caution, the Court allowed you to withdraw your waiver of a jury trial and to proceed to trial with the jury.

You then had a conflict with Mr. Harget and asked that you be able to proceed pro se. We had a lengthy discussion on December 15 of 2015 about your right to proceed without an attorney. You have an absolute right to proceed without an attorney as long as you're able to conduct a trial. We went through this discussion and I told you at that point that once you chose to proceed without an attorney, you're not able to go back and get an attorney; that decision is final. You understood that and decided to proceed without an attorney.

After that point, you worked with Ms. Fitzgerald to try and prepare your case for trial. She provided you her discovery. She set up witness interviews. Then on January 12 of 2016 you refused to come to court. The Court had to sign an order authorizing detention services to use any means necessary to bring you into court.

THE DEFENDANT: Your Honor, if I might. Your Honor, can you just --

THE COURT: No. No. You can't interrupt me. You can talk in a minute, sir.

THE DEFENDANT: Okay.

THE COURT: The Court then set a number of hearings to make sure that this was on track since you were incarcerated and trying to represent yourself. We had you brought into Court on January 26th of 2013. On February 11 of 2016, at that point Ms. Fitzgerald informed the Court that you refused to see her and you refused to attend interviews that she'd scheduled.

Then on February 18 of 2016 you decided that you wanted to be represented by an attorney once again and the Court appointed Mr. Charbonneau. The Court was reluctant in doing that because you previously indicated you didn't want an attorney and I told you you can't go back and forth in your representation. The Court was reluctant to do that because it would delay the trial. And as a result of Mr. Charbonneau being appointed, your trial was delayed because he needed time to prepare.

You were then in Court on March 9th for a status hearing, and then on May 13th you alleged that Mr. Charbonneau was intoxicated. Prior to that date you'd refused to meet -- or, I guess after that date you refused to meet with him, and that was before your next pretrial date of May 19th. Mr. Charbonneau indicated you refused to meet with him and he wasn't, therefore, prepared for trial.

And then I received word today that you were refusing to come to court. So, sir, at this point, regardless of whether or not you chose to proceed with or without an attorney, the Court's finding that you've constructively waived your right to an attorney. If the Court were to appoint a conflict attorney to represent you, that attorney would need time to prepare. This case has been going on for almost three years at this point and victims have rights as well. One of those rights is to have this matter resolved in a timely fashion.

So regardless of your desire to proceed with or without an attorney, the Court is finding that you've constructively waived that right and you will be proceeding without an attorney.

With that said, --

THE DEFENDANT: Your Honor, can I -- can I make --

THE COURT: Yes, if your statement is relatively brief.

THE DEFENDANT: Well, there was a -- there was a few instances in that list of -- in that a chronology that were incorrect.

For instance, I didn't ever refuse to meet with Colin. He -- he had set up meetings. All he would send me, correspondence, and he didn't show up. And I was daily calling him and sending him kites and so...

THE COURT: Okay. Well, Ms. Fitzgerald reported that you refused to meet with her as well so it seems like that's somewhat consistent with your behavior.

But beyond that, sir, it's time to proceed to trial. So we'll get you --

THE DEFENDANT: All right. Let's go ahead. I'll start with my opening statement.

THE COURT: Well, it's not time for opening statements. It's time for scheduling at this point. We're going to talk about when this trial will be held.

THE DEFENDANT: Okay. Can I make this statement?

THE COURT: That's the statement that regards to...

THE DEFENDANT: It's in regards to the last two and a half years. I mean, it's similar to what you just went through.

THE COURT: Okay. You can make your statement in a few minutes. I'll give you an opportunity to do that, but we're going to talk about scheduling right now.

So go ahead and have a seat so we can talk about scheduling.

THE DEFENDANT: Okay. Isn't today trial? What are we waiting for?

THE COURT: Well, I was going to talk with Ms. Fitzgerald. The circumstances have changed slightly so we need to talk about scheduling.

So go ahead and have a seat. We'll talk about scheduling.

Ms. Fitzgerald, we don't have enough time next week to have this case heard within one week. I know it was going to go into next week. So my hope was that we could at least get a jury selected and go through pretrial motions, and then perhaps if your witnesses couldn't testify until next week, we can we can take those witnesses next week.

Is there any reason why we couldn't begin with the jury selection and deal with motions in limine today?

[DEPUTY PROSECUTOR] MS. FITZGERALD: No, Your Honor. We can proceed that way. I didn't know if Mr. Stutzke, now that he's representing himself, would want an opportunity to look over the State's motions and jury selection. I don't know what motions he has. I will be making a motion to amend Count I as I stated earlier in his representation. That is based on what he has indicated to me is a defense.

I do have Officer -- he's now a Sergeant Everly, on call, Your Honor. It'll take him about an hour to get here. We still need to conduct a 3.5 with regard to he and Officer Sutter or Deputy Sutter. And I don't know what the Court's position is on additional testimony with regards to the outstanding 404(b) motions. So I'll proceed -- if the Court just wants to do motions and jury selection this week, we could certainly do that. I don't know if the Court wants to give Mr. Stutzke some time or if he wants that, then I don't object to going to the 31st.

I have paired down our witness list significantly, Your Honor. So if we get to -- does the Court only have just the four days next week or really the three? Is that the concern, Your Honor?

THE COURT: Right. We'd only have the three days next week.

MS. FITZGERALD: I can certainly get opening and my witnesses on as well as closing in that time. Again, I would ask that we move to a bigger courtroom. But the State can be ready to proceed with jury selection and motions, probably have another half day of motions at least, Your Honor.

THE COURT: Thank you.

THE DEFENDANT: Your Honor, can I make a few statements in regard to the 404 -- 404(b) evidence?

THE COURT: Well, we're going to talk about that in a few minutes when it comes time for motions in limine.

So, Mr. Stutzke, are you prepared to begin trial today?

THE DEFENDANT: I am, Your Honor.

THE COURT: Okay.

THE DEFENDANT: She was making mention of Officer Everly?

THE COURT: Right. We're going to talk about that in a little bit. We're talking about scheduling right now. So the first thing we're going to do is --

THE DEFENDANT: Okay.

THE COURT: -- select a jury.

THE DEFENDANT: So I just -- can I -- Your Honor, that's my statement, basically. This case has gone on and on

and on. When Mr. Harget was representing me, I was in isolation for 18 months. The cops used to refuse me court. They wouldn't even let me go to court. They would refuse me toilet paper. They would refuse me kites. I'd ask for correspondence. They would ignore me. They would walk by.

I asked classification to move me. They never got back to me. I was -- I was housed next to three very militant individuals who made homosexual innuendos and sang like women.

Mr. Harget, he said, well, the trial's delayed because we need to schedule 10.77s. That took at least a year, a year and a half. I don't know why.

Then we did 10.77s with Debra Brown. I met with her twice, the same individual who had the same exact computer who should have had the exact same file. There's no reason for it to happen a second time.

We did I think -- I believe we did four different 10.77s. All of them came out with the same conclusion, that I was competent to stand trial.

Now, concerning the -- the 404(b) stuff with Officer Everly, that stuff --

THE COURT: We're going to talk about that in a little bit. We're just talking about scheduling right now.

THE DEFENDANT: Okay.

My point is this case either needs to be dropped or it's we need to go to trial. This is -- justice long delayed is no justice at all. If you're -- if you're going to find me guilty after this long, you're just trying to create a career criminal and you're not interested in rehabilitation. This needs to be resolved.

THE COURT: I agree. I agree with that, sir. So we're going to start trial this morning. What we're going to do here

momentarily is move down to Judge Cozza's courtroom because we can't fit 50 jurors in here. We're going to have 50 jurors brought in. At that point it's not going to be a time for you to speak. You'll be able to speak to the jurors later. It's just a time for the Court to give them a questionnaire and then we're going to send them out to complete the questionnaire after which we're going to bring them in individually to ask them some questions.

So go ahead and have a seat, sir. I'll keep you updated as to how this matter proceeds and when you're able to ask questions and speak with the jurors, okay?

THE DEFENDANT: Sorry. I misunderstood a little bit. We're going to go down to Judge Cozza's courtroom, which is courtroom what?

THE COURT: 301, I believe.

Kerbs<sup>1</sup> RP 190-99.

### III. ARGUMENT

#### A. BECAUSE STUTZKE UNEQUIVOCALLY WAIVED HIS RIGHT TO COUNSEL, A SECOND WAIVER OF COUNSEL WAS UNNECESSARY.

Stutzke unequivocally waived counsel on December 15, 2015, some six months before trial on June 23, 2016. CP 23-24; Kerbs RP 55-66. At that time, he was represented by Matthew Harget of the Public Defender's Office. *Id.* Stutzke has not assigned error to these factual findings so they are verities on review. *State v. Eriksen*, 172 Wn.2d 506,

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<sup>1</sup> The Verbatim Report of Proceedings of Korina Kerbs and Tammy McMaster are the only Report of Proceedings referenced herein and are designated by name as "Kerbs RP" (consisting of five volumes, which are consecutively paginated); and "Wilkins RP."

508, 259 P.3d 1079 (2011); *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

The conclusion of law holding the December 15, 2015, waiver of counsel (Harget) was knowingly, voluntarily, and intelligently entered also remains unchallenged. When an appellant fails to raise an issue in the assignments of error, in violation of RAP 10.3(a)(3), *and* fails to present any argument on the issue or provide any legal citation, an appellate court will not consider the merits of that issue. *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995).<sup>2</sup>

This initial waiver of counsel (Hargett) was effective even where defendant stated he did not want the assigned public defender, but “wanted” an attorney.

A defendant in a criminal prosecution has a constitutional right to the assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22. This right is not an absolute right to any particular attorney.

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<sup>2</sup> As relevant here, defendant assigned error solely to the May 23, 2016 withdrawal of defendant’s second counsel, Colin Charbonneau of the Spokane County Public Defender’s Office, and to the trial court’s refusal to appoint new counsel after Charbonneau withdrew. *See* Assignment of Error 1, claiming the trial court failed to make a proper inquiry into the withdrawal of counsel, *and see* Assignment of Error 1 claiming error to the trial court’s refusal to appoint new counsel on the day of trial, May 23, immediately after the *withdrawal* of counsel. Br. of Appellant, at 1.

*State v. DeWeese*, 117 Wn.2d 369, 375-76, 816 P.2d 1 (1991) (citing *United States v. Wheat*, 486 U.S. 153, 159 n.3, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988)). The right to counsel of choice does not extend to a defendant who requires appointed counsel. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) (citing *Wheat*, 486 U.S. at 159).

Whether an indigent defendant's dissatisfaction with court-appointed counsel justifies the appointment of new counsel is within the discretion of the trial court. *State v. Stenson*, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997). Here, Stutzke initially requested the removal of his court appointed counsel four times at the December 4, 2015 pretrial conference.<sup>3</sup> After examining these requests with Stutzke, the trial court found no reason to grant the request and denied the request: "You've been appointed Mr. Harget. I don't see any reason why Mr. Harget's not able to continue on this case. It seems like maybe you're just not fully satisfied with him but that's not a reason..." Kerbs RP 50.

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<sup>3</sup> "I would like to dismiss my public defender." Kerbs RP 38; "I still would like to dismiss my current public defender." Kerbs RP 40; "I think I want to dismiss my attorney." Kerbs RP 41; "Your Honor, that's why I want to dismiss my public defender, because it seems like the State, everyone's kind of in agreement that just keep putting it off, putting it off, putting it off." Kerbs RP 45.

Eleven days later, on December 15, 2015 Stutzke formally requested to proceed without counsel. Kerbs RP 55-68. The trial court conducted a hearing on his motion to proceed pro se. After conducting a proper *Faretta*<sup>4</sup> inquiry and colloquy, the trial court granted Stutzke's motion to proceed pro se. *Id.*, and see CP 23-24 (written waiver). The trial court informed Stutzke of the nature and classification of the charge, the maximum penalty upon conviction, and that technical rules exist that govern the presentation of the case. See *City of Bellevue v. Acrey*, 103 Wn.2d 203, 211, 691 P.2d 957 (1984) (colloquy is preferred means of assuring defendant's understand the risks of self-representation). The trial court informed him of the penalties for conviction(s), that his conviction would result in a requirement of registration as a sex offender, Kerbs RP 58, he would be held to the same standards as an attorney, and the procedural pitfalls of self-representation, Kerbs RP 59-60. The trial court found there was no breakdown in the attorney-client relationship that would justify appointment of different counsel. Kerbs RP 62. The court also informed him that he could not just withdraw his waiver at a later date, that "once you waive your right to an attorney on this matter, it could be

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<sup>4</sup> *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (a criminal defendant has a right to self-representation if he knowingly, intelligently, and voluntarily waive his right to counsel).

waived for the entirety of his case.” Kerbs RP 63. Mr. Stutzke insisted, “I do not wish to proceed with Mr. Harget any longer. I would like to have responsibility of my case.” Kerbs RP 63.

The trial court authorized the waiver and appointed standby counsel. Kerbs RP 63-68. After reading and filling in a two-page waiver form, Stutzke informed the court he still wished to proceed pro se. Kerbs RP 67.

Because the original waiver of counsel was proper, and because reappointment of counsel at a later date was solely at the trial court’s discretion, it necessarily follows that a second waiver of counsel was unnecessary because the reappointment of counsel was not constitutionally mandated by any change in circumstances and was discretionary with the trial court. “Once an unequivocal waiver of counsel has been made, Stutzke may not later demand the assistance of counsel as a matter of right since reappointment is wholly within the discretion of the trial court.” *State v. DeWeese*, 117 Wn.2d at 376-77; and *see, Com. v. Phillips*, 141 A.3d 512, 521 (Pa. Super. Ct. 2016) (“Consistent with the weight of authority, we now hold that once a defendant has made a competent waiver of counsel, that waiver remains in effect through all subsequent proceedings in that case absent a substantial change in circumstances”); *State v. Rhoads*, 813 N.W.2d 880, 887 (Minn. 2012) (“we can see no reason

to require a defendant to renew a valid waiver-of-counsel when nothing has changed since the initial waiver. We therefore hold that as a general rule, a defendant who has knowingly, intelligently, and voluntarily waived his right to counsel need not renew his waiver-of-counsel at subsequent proceedings”). Therefore, a second colloquy with Stutzke was not required when he ultimately represented himself at trial.

**B. THE TRIAL COURT PROPERLY GRANTED DEFENSE COUNSEL’S MOTION TO WITHDRAW WHERE THE RECORD CLEARLY ESTABLISHED AN IRRECONCILABLE CONFLICT BETWEEN COUNSEL AND DEFENDANT RESULTING IN A COMPLETE BREAKDOWN IN COMMUNICATION.**

Appellate counsel for defendant posits that the trial court must determine that an “actual conflict” of interest exists before authorizing a withdrawal of counsel. Br. of Appellant at 20-23. In support, he cites cases dealing with conflicts arising from the prior or current representation of witnesses in a case that may preclude the continued involvement by counsel in that legal matter.<sup>5</sup>

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<sup>5</sup> Br. of Appellant at 20-23, citing *Mickens v. Taylor*, 535 U.S. 162, 171, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002); *State v. Regan*, 143 Wn. App. 419, 428, 177 P.3d 783 (2008); *State v. Vicuna*, 119 Wn. App. 26, 79 P.3d 1 (2003); and *State v. Ramos*, 83 Wn. App. 622, 629, 922 P.2d 193 (1996).

However, this case does not involve a conflict arising from prior representation of a witness, but implicates the complete collapse of the attorney-client relationship. Directly missing the mark, defendant claims that “[t]he most that can be said is that the conflict involved *some sort of claimed ethical violation.*” Br. of Appellant at 21 (emphasis added). This one statement belittles both the sacred nature of the attorney-client relationship and the necessity for preserving the confidences and loyalty of that relationship even after the relationship is irretrievably broken.

The relationship and judicial review of its breakdown.

The lawyer-client relationship stands at the center of the legal system. This relationship involves a sacred trust<sup>6</sup> between a lawyer and a client. This relationship is characterized by open communication and complete confidentiality, which fosters the client’s trust in the lawyer, and the lawyer’s steadfast loyalty to the client. The communications arising from this relationship are protected under common law and by statute.<sup>7</sup>

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<sup>6</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (“The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law”); 8 John Henry Wigmore, *Evidence* § 2290 (McNaughton Rev. 1961) (explaining the history of attorney-client privilege).

<sup>7</sup> RCW 5.60.060(2) provides the rule in Washington:

An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by

*See, Morris v. Slappy*, 461 U.S. 1, 21 n.4, 103 S.Ct 1610, 75 L.Ed.2d 610 (1983) (Brennan, J., concurring, explaining that the lawyer-client relationship “involves not just the casual assistance of a member of the bar, but an intimate process of consultation and planning which culminates in a state of trust and confidence between the client and his attorney” *Id.* at 24 (quoting *Smith v. Superior Court*, 440 P.2d 65, 74 (Cal. 1968))).

This relationship, and its collapse, implicates the Sixth Amendment right to counsel. A defendant’s Sixth Amendment right to counsel is violated if the relationship between attorney and client completely collapses and the trial court refuses to substitute new counsel. *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 722, 16 P.3d 1 (2001). Good cause must be shown to warrant a withdrawal or substitution of counsel, such as an irreconcilable conflict or a complete breakdown in communication between the attorney and the defendant. *State v. Varga*, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). A substitution may be justified when the attorney-client relationship is plagued by things that suggest that

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the client to him or her, or his or her advice given thereon in the course of professional employment.

This same privilege afforded the attorney is also extended to the client under the common law rule. *State v. Emmanuel*, 42 Wn.2d 799, 815, 259 P.2d 845 (1953) (citing *State v. Ingels*, 4 Wn.2d 676, 104 P.2d 944, *cert. denied*, 311 U.S. 708, 61 S.Ct. 318, 85 L.Ed. 460 (1940)).

the attorney cannot provide diligent representation. *In re Stenson*, 142 Wn.2d at 724-31.<sup>8</sup>

This Court reviews a trial court's ruling on a motion to substitute counsel due to an irreconcilable conflict for an abuse of discretion. *State v. Cross*, 156 Wn.2d 580, 607, 132 P.3d 80, *cert. denied*, 549 U.S. 1022 (2006); *State v. Rosborough*, 62 Wn. App. 341, 346, 814 P.2d 679, *review denied*, 118 Wn.2d 1003 (1991). An abuse of discretion occurs if a trial court's decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Additionally, reviewing courts accord appropriate deference to the trial court's determination of the underlying facts. *Cross*, 156 Wn.2d at 607.

At a pretrial hearing on May 13, 2016, Mr. Stutzke claimed Mr. Charbonneau had the smell of alcohol on his breath. Kerbs RP 159-60. He further claimed Mr. Charbonneau was not doing his job, was not seeing him or answering his "kites."<sup>9</sup> *Id.* Berating his attorney, he stated: "I mean, how long is this case going to go on? It's a very simple case. I broke a no-

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<sup>8</sup> However, a defendant must show more than a general loss of trust or confidence. *State v. Schaller*, 143 Wn. App. 258, 268, 177 P.3d 1139 (2007).

<sup>9</sup> A written communication from a defendant sent from the jail to his attorney.

contact order. That's all there is. I mean, what more do we need to do?" Kerbs RP 160. The trial court responded that the delay was because Stutzke had an attorney, then had elected to proceed pro se, and then had requested the reappointment of an attorney. *Id.* Countering, Mr. Stutzke responded that he made a mistake and should have remained pro se. Kerbs RP 161. Continuing, the trial court recounted both its experience with intoxicated individuals and the lack of reason to believe Mr. Charbonneau had been drinking that morning. *Id.* Stutzke offered the trial court an opportunity to test the breath of Mr. Charbonneau by smell or by breath test, an invitation the trial court declined. Kerbs RP 161-62. Stutzke continued, shifting to his most recent failed attempts to obtain a private attorney, to which the trial court responded:

Well, sir, we've been through this. You had an attorney. You didn't want an attorney so you chose to represent yourself. We then had to continue the trial for a long period of time so you could get all the State's exhibits and witnesses and interview them on your own. Then you decided you wanted Mr. Charbonneau so we had to reinvent the wheel once again. So at this point he's going to stay on as your attorney. I don't see any reason that he wouldn't be effective in representing you. And he is prepared for trial in a couple weeks. This matter has drug on for a long time primarily because you either want an attorney or don't want an attorney and you keep finding ways to continue it on. So at this point Mr. Charbonneau will remain your attorney in this matter and it appears that everyone is ready for the 25th.

Kerbs RP 163.

On May 23, 2016, Mr. Charbonneau moved to withdraw, claiming he could “no longer communicate with Mr. Stutzke in any way, shape, or form.” Kerbs RP 183-84. Prior to that date, on May 18, 2016, Mr. Stutzke had refused to meet with Mr. Charbonneau, and had contacted Mr. Charbonneau’s supervisor, and expressed his demand for a new attorney but was told he would not be getting one. Kerbs RP 172. Stutzke admitted he refused to meet with his attorney because Mr. Charbonneau was not confident in his case and appeared that he would not make every effort to defend Stutzke. Kerbs RP 175. Mr. Stutzke stated that Mr. Charbonneau ignored his requests, had not responded to his correspondence, and reiterated that on the morning of May 13 “he had the smell of alcohol on his breath.” Kerbs RP 174. The court responded that it had known Mr. Charbonneau for ten years, that he had spoken with court staff at the May 13 hearing, that court staff reported no smell of alcohol on him, and that he was coherent and appeared normal. Kerbs RP 186. Stutzke responded that he had previously requested a breathalyzer test. *Id.*

In *Stenson*, this Court provided examples of what constituted a complete breakdown of communication between an attorney and client. First, a complete breakdown exists where a defendant refuses to cooperate or communicate with his attorney in any way. *In re Stenson*, 142 Wn.2d at 724 (citing *Brown v. Craven*, 424 F.2d 1166 (9th Cir. 1970)). In the instant

case, Stutzke refused to meet with his attorney. Next, a complete breakdown exists where a defendant has been at odds with his attorney for a period of time and the “relationship was a ‘stormy one with quarrels, bad language, threats, and counter-threats.’” *In re Stenson*, 142 Wn.2d at 724 (quoting *United States v. Williams*, 594 F.2d 1258, 1260 (9th Cir. 1979)). Here, the record establishes utter discord, and allegations of unethical conduct - appearing in court while under the influence of alcohol. Under these facts, the trial court did not abuse its discretion when it authorized withdrawal of counsel. Based on its years-long familiarity with the case, and based upon the above discussions, the trial court did not require a deeper inquiry into the other reasons surrounding the conflict that Mr. Charbonneau was hesitant to reveal due to the Rules of Professional Conduct. Kerbs RP 183.

Nor should the court be required to go into these protected areas when the attorney-client relationship because, while RPC 1.16(7) permits an attorney’s withdrawal for good cause, a lawyer’s full disclosure to the court of the *exact* circumstances precipitating his motion to withdraw would likely violate the confidentiality mandate of Rule 1.6 (preventing a lawyer from revealing information relating to the representation of a client without the client’s informed consent). Indeed, comment 3 to RPC 1.16 suggests that “the lawyer’s statement that professional considerations

require termination of the representation ordinarily should be accepted as sufficient,” noting that “Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.”<sup>10</sup>

The trial court did not abuse its discretion by authorizing the withdrawal of counsel.

**C. THE TRIAL COURT PROPERLY HELD STUTZKE CONSTRUCTIVELY WAIVED HIS RIGHT TO COUNSEL.**

After outlining the procedure of the case, the trial court found that Mr. Stutzke had constructively waived his right to an attorney and would be required to proceed without an attorney.

You were then in Court on March 9th for a status hearing, and then on May 13th you alleged that Mr. Charbonneau was intoxicated. Prior to that date you’d refused to meet -- or, I guess after that date you refused to meet with him, and that was before your next pretrial date of May 19th. Mr. Charbonneau indicated you refused to meet with him and he wasn’t, therefore, prepared for trial.

And then I received word today that you were refusing to come to court. So, sir, at this point, regardless of whether or not you chose to proceed with or without an attorney, the Court’s finding that you’ve constructively waived your right to an attorney. If the Court were to appoint a conflict attorney to represent you, that attorney would need time to prepare. This case has been going on for almost three years at this point and victims have rights as

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<sup>10</sup> While RPC 1.16 does not explicitly mention breakdown of the lawyer-client relationship as an appropriate ground for withdrawal from a representation, the Restatement acknowledges that “[i]rreparable breakdown of the client-lawyer relationship ... is likewise a ground for withdrawal.” Restatement (Third) of the Law Governing Lawyers § 32 cmt. 1 (2000).

well. One of those rights is to have this matter resolved in a timely fashion.

So regardless of your desire to proceed with or without an attorney, the Court is finding that you've constructively waived that right and you will be proceeding without an attorney.

Kerbs RP 193-94.

The case history supports this finding because of Mr. Stutzke's continued refusal to participate in court or cooperate with his attorneys, and his on-going manipulation of the court's process. Warrants were originally necessary to obtain Mr. Stutzke's presence when he failed to appear after promising to do so and failed to comply with the conditions of release. Kerbs RP 190-91 (warrant required on August 16, 2013, and again on November 12, 2013). Orders were necessary to obtain his presence in court from jail when he refused to leave his cell. Kerbs RP 70-71. He waived jury December 1, 2014. CP 15; McMaster RP 5-7. Then, after trial had commenced, he requested to have his right to jury reinstated. McMaster RP 174-78. The trial court acquiesced in his request and continued the case. *Id.* at 176. After additional evaluations regarding competency, on October 30, 2015, Stutzke was back in court with his attorney, Matt Harget, ready for trial, which was set for December 14, 2015. Kerbs RP 34-36.

On December 4, 2015, the parties were in court to request a continuance, at which time Stutzke specifically requested to dismiss his attorney four times. Kerbs RP 38-54. The trial court denied the request. *Id.* On December 15, 2015, the parties were again in court on Stutzke's motion to proceed pro se. Kerbs RP 55-66. After fully discussing the waiver, the trial court authorized the waiver of counsel. *Id.*; CP 23-24. Subsequent to the waiver, Stutzke, pro se, refused to meet with the prosecutor as scheduled for review of discovery and trial exhibits. Kerbs RP 89.

The defendant then requested the reappointment of a public defender on February 18, 2016. Kerbs RP 143-44. Before granting the request, the trial court warned Stutzke:

**THE COURT: We talked earlier when you were waiving your right to an attorney. Number one is you don't have the right to an attorney of your choosing. You have the right to an attorney but you don't get to pick which attorney that is, and unhappiness is not a reason to switch attorneys. Secondly, **having a public defender represent you or not represent you isn't like a light switch where you can turn it on and off. You either need to be represented by an attorney, which you have the right to do, or you need to represent yourself, which you also have a right to do. You can't turn it on and off all the time. Once you make a decision, that decision should be final. You originally asked for an attorney. One was appointed. Then you chose to proceed without one. The Court honored that request and now a week and a half before trial you're requesting an attorney once again. So what I don't want to happen is for you to choose to have an attorney represent you and then choose to waive that again and ask for another continuance. What is your ultimate****

**decision here?** Do you want an attorney or do you not want an attorney?

*Id.* at 144-45 (emphasis added). Mr. Charbonneau, who had been aiding Mr. Stutzke as standby counsel since he had entered his waiver of counsel, was deemed acceptable by Mr. Stutzke. *Id.* at 149.

Then, on May 13, 2016, Stutzke complained about Mr. Charbonneau, stating that he had not been representing him adequately. Kerbs RP 157. He then claimed Mr. Charbonneau had a strong smell of alcohol on his breath. *Id.* at 160. Stutzke then informed the court that he had made a mistake in reacquiring counsel. Kerbs RP 160-61. The defendant then renewed his request for release from custody so that he could acquire work and obtain private counsel. *Id.* at 162. The court indicated it was not going to entertain this oft-repeated request, stating:

THE COURT: Well, sir, we've been through this. You had an attorney. You didn't want an attorney so you chose to represent yourself. We then had to continue the trial for a long period of time so you could get all the State's exhibits and witnesses and interview them on your own. Then you decided you wanted Mr. Charbonneau so we had to reinvent the wheel once again. So at this point he's going to stay on as your attorney. I don't see any reason that he wouldn't be effective in representing you. And he is prepared for trial in a couple weeks. This matter has drug on for a long time primarily because you either want an attorney or don't want an attorney and you keep finding ways to continue it on. So at this point Mr. Charbonneau will remain your attorney in this matter and it appears that everyone is ready for the 25th.

Kerbs RP 163.

Six days later, on May 19, 2016, the parties were back in court at a pretrial conference. At that time, Mr. Charbonneau informed the court that Stutzke had spoken with his supervisor, Ms. Lindholdt, about acquiring a different public defender and was informed he would not be getting a new attorney from the Public Defenders Office. Kerbs RP 172. Thereafter, Mr. Stutzke refused to see Mr. Charbonneau to prepare for trial. *Id.* at 173. Mr. Stutzke then expressed his concern that his attorney was not confident in his case. *Id.* at 175.

After hearing from all parties, the trial court decided to keep things on track as the witnesses were available, and the case was pushing three years old:

At this point we need to keep this thing on track, though, so I want to leave it set for Monday. It sounds like all the witnesses are currently available or will be available during the trial time. And if it does get postponed a week, it could create other problems with the availability of witnesses. This case is pushing three years old. It looks like it was filed back in August of 2013. And for a number of reasons, some of those being 10.77, and others being Mr. Stutzke's choice of representation, it's caused it to be continued. As far as your concerns, Mr. Stutzke, we had a discussion a long time ago when you wanted to get rid of Mr. Harget and we had a lengthy conversation about you representing yourself. You chose to represent yourself. I told you at that point that choice was final. Then you wanted to have an attorney and I told you that you don't have the right to an attorney once you waive that right. But to err on the side of caution, I appointed you an attorney after we had a discussion about how you're not going to be able to waive that right. You can't keep

turning this on or off. And you chose to have an attorney at that time. So at this point the Court's going to allow Mr. Charbonneau to stay on as your attorney of record -

*Id.* at 177.

Predictably, Mr. Stutzke again informed the court that he “still would like to defend [him]self.” *Id.* Thereafter, Spokane County Risk Management become involved because of Mr. Stutzke's claims of his attorney being affected by alcohol while in court, and it was anticipated an investigation was underway regarding these claims. *Id.* at 183-84. The Public Defenders Office was allowed to withdraw, as was Mr. Charbonneau, due to the total breakdown in the attorney-client relationship. After outlining the procedure of the case, the trial court found that Mr. Stutzke had constructively waived his right to an attorney and would be required to proceed without an attorney.

And then I received word today that you were refusing to come to court. So, sir, at this point, regardless of whether or not you chose to proceed with or without an attorney, the Court's finding that you've constructively waived your right to an attorney. If the Court were to appoint a conflict attorney to represent you, that attorney would need time to prepare. This case has been going on for almost three years at this point and victims have rights as well. One of those rights is to have this matter resolved in a timely fashion.

So regardless of your desire to proceed with or without an attorney, the Court is finding that you've

constructively waived that right and you will be proceeding without an attorney.

Kerbs RP 193-94.

The trial court's ruling, that by Mr. Stutzke's demonstrated history of manipulation, Stutzke had constructively waived his right to an attorney, was well-supported by the prolonged procedural history as outlined above. The defendant refused to come to court and refused meet with his own attorney in the remaining days before trial. The defendant demanded self-representation, then requested counsel, after being fully informed and warned of the consequences of continued manipulation of the proceedings, that counsel was not a light switch that he could turn on and off. Stutzke continued flipping the switch, including making unfounded allegations to the court and by initiating some action involving Spokane County Risk Management and the Public Defenders Office after Mr. Charbonneau's supervisor, Ms. Lindholdt, had informed Stutzke he would not be provided with a different public defender. Kerbs RP 183-84.

This calculated activity warranted the trial court's finding that Stutzke had constructively waived counsel because of his conduct. A defendant may lose his or her right to counsel through forfeiture or waiver by conduct. *State v. Afeworki*, 189 Wn. App. 327, 345, 358 P.3d 1186 (2015), *review denied*, 184 Wn.2d 1036 (2016); *United States v. Thomas*,

357 F.3d 357, 362 (3d Cir.2004); *see also DeWeese*, 117 Wn.2d at 379 (“What the defendant cannot obtain because of a lack of a valid reason, that defendant should not be able to obtain through disruption of trial or a refusal to participate. A defendant may not manipulate the right to counsel for the purpose of delaying and disrupting trial”).

“Waiver by conduct” requires that a defendant be warned of the consequences of his actions, including the risks of proceeding pro se. *Tacoma v. Bishop*, 82 Wn. App. 850, 859, 920 P.2d 214 (1996) (citing *United States v. Goldberg*, 67 F.3d 1092, 1101 (3rd Cir. 1995)).<sup>11</sup>

In *Afeworki*, the court explained the doctrine of waiver by conduct, and found that the defendant had waived his right to counsel through his actions. 189 Wn. App. at 347-351. There, as here, counsel had been allowed to withdraw shortly before trial. The court found that the defendant had waived his right to counsel by his conduct, and, importantly, because of the court’s colloquy with defendant regarding waiver of counsel, the defendant was “clearly informed of the peril he faced and the risks and consequences of proceeding pro se.” *Id.* at 350. Here, as in *Afeworki*, Stutzke was warned several times of the dangers of manipulating counsel - he could not use his right to counsel like a light switch: “You can’t keep

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<sup>11</sup> *Bishop* was cited with approval by this Court in *City of Seattle v. Klein*, 161 Wn.2d 554, 562, 166 P.3d 1149 (2007).

turning this on or off. And you chose to have an attorney at that time. So at this point the Court's going to allow Mr. Charbonneau to stay on as your attorney of record," Kerbs RP 177; "[s]o at this point we'll leave Mr. Charbonneau on as you've already chose[n] to waive your right to an attorney and then ask for an attorney subsequent to that," *Id.* at 179. See *United States v. Moore*, 706 F.2d 538, 540 (5th Cir. 1983) ("[A] persistent, unreasonable demand for dismissal of counsel and appointment of new counsel ... is the functional equivalent of a knowing and voluntary waiver of counsel."). Similarly, in *United States v. Sutcliffe*, the Ninth Circuit found the trial court correctly advised the defendant of the risks of self-representation, the nature of the charges against him, and the penalties he faced, and had warned him he would be deemed to have waived his right to counsel if he persisted in sabotaging his relationships with his attorneys. 505 F.3d 944, 955-56 (9th Cir. 2007). Because of the defendant's continued antagonism and manipulative behavior, the appellate court was satisfied that the trial court did not err in finding that the defendant knowingly and intelligently waived his right to counsel through his conduct. *Id.*

Here, the trial court, after exercising the patience of Job, properly found that Mr. Stutzke would not be allowed to further manipulate the right

to counsel for the purpose of delaying and disrupting trial proceedings that had been pending for three years.

**D. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT'S CONCLUSION THAT STUTZKE COMMITTED THE CRIME OF VOYEURISM.**

1. Standard of review regarding sufficiency of the evidence.

The State bears the burden of proving all the elements of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016); U.S. Const. amend. XIV; Wash. Const. art. I, § 3.

A sufficiency of evidence challenge is reviewed *de novo*. *Rich*, 184 Wn.2d at 903. The standard of review for a sufficiency of the evidence assertion in a criminal case is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found each element of the offense proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Rich*, 184 Wn.2d at 903. A defendant challenging the sufficiency of the evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Witherspoon*, 180 Wn.2d 875, 883, 329 P.3d 888 (2014).

The State may establish the elements of a crime by either direct or circumstantial evidence. *State v. Delmarter*, 94 Wn.2d 634, 638,

618 P.2d 99 (1980); *State v. Brooks*, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). “Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact. Instead, they must defer to the factual findings made by the trier-of-fact.” *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009), *review denied*, 168 Wn.2d 1041 (2010). In like manner, the credibility of witnesses and the weight of the evidence is the exclusive function of the trier of fact, and is not subject to review. *See State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The trier of fact may draw inferences from the evidence so long as those inferences are rationally related to the proven facts. *State v. Jackson*, 112 Wn.2d 867, 875, 774 P.2d 1211 (1989). A rational connection must exist between the initial fact proven and the further fact presumed. *Jackson*, 112 Wn.2d at 875.

In review of a trial court’s findings of fact and conclusions of law determined after a bench trial, unchallenged findings of fact are verities on appeal, and in sufficiency of the evidence review, this Court looks to whether the trial court’s findings of fact support the judge’s conclusions of law. *Hill*, 123 Wn.2d at 644; RAP 10.3(g). Here, Stutzke has not assigned error to any of the trial court’s findings of fact. Br. of Appellant at 1-2.

2. Sufficiency of the evidence for the crime of voyeurism.

The defendant was charged in Count I of the information with voyeurism by two alternative means. CP 37.

A person commits the crime of voyeurism if, for the purpose of arousing or gratifying the sexual desire of any person, he or she knowingly views, photographs, or films:

(i) Another person without that person's knowledge and consent while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy; or

(ii) The intimate areas of another person without that person's knowledge and consent and under circumstances where the person has a reasonable expectation of privacy, whether in a public or private place.

RCW 9A.44.115(2)(a)(2003).<sup>12</sup>

Based on the evidence presented at trial, the trial court concluded:

The State has proven beyond a reasonable doubt that on or about August 16, 2013, in the State of Washington, Benjamin Stutzke did, for the purpose of arousing and gratifying his sexual desire, knowingly view Michelle Townshend as well as view Michelle Townshend's intimate areas, without Michelle Townshend's knowledge and consent and under circumstances where Michelle Townshend had a reasonable expectation of privacy.

Therefore, the Court finds Benjamin Stutzke GUILTY of the crime of Voyeurism as charged in Count I.

CP 52 (Conclusions of Law 1-2).

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<sup>12</sup> In 2017, our legislature amended the voyeurism statute to create Voyeurism First Degree, a Class C Felony, and Voyeurism Second Degree, a gross misdemeanor. Laws of 2017, ch. 292 § 1 (effective July 23, 2017). The 2003 version of the statute was used to charge Mr. Stutzke.

In his appeal, the defendant assigns error to the Court's conclusions that Stutzke committed the crime of voyeurism because he claims that the State failed to prove that Mr. Stutzke "viewed" the victim for more than a brief period of time. Br. of Appellant at 28. The defendant claims that RCW 9A.44.115(1)(e)'s definition of "views," which requires "the intentional looking upon another person for more than a brief period of time, in other than a casual or cursory manner, with the unaided eye or with a device designed or intended to improve visual acuity" was not satisfied by the facts presented at trial. Specifically, he contends that the "viewing" must not only be for more than a brief period of time, but also that the viewing of the victim must be "without that person's knowledge for more than a brief period of time." Br. of Appellant at 31.

The meaning of a statute is a question of law reviewed by the court *de novo*. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). The court's purpose in construing statutes is to ascertain and carry out the intent of the legislature. *Id.*; *Dep't of Ecology v. City of Spokane Valley*, 167 Wn. App. 952, 961, 275 P.3d 367 (2012). "The surest indication of legislative intent is the language enacted by the legislature, so if the meaning of a statute is plain on its face, the court gives effect to that plain meaning." *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354

(2010) (internal quotation omitted). In determining a provision's plain meaning, the court looks to the text of the statutory provision in question, as well as "the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Id.*

When a statute is unambiguous, "there is no room for judicial interpretation ... beyond the plain language of the statute." *State v. D.H.*, 102 Wn. App. 620, 627, 9 P.3d 253 (2000). However if, after this inquiry, the statute is susceptible to more than one reasonable meaning, the statute is ambiguous and it is appropriate to resort to aids to construction, including legislative history. *Campbell and Gwinn*, 146 Wn.2d at 11. The fact that two or more interpretations are *conceivable* does not render a statute ambiguous. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305, 268 P.3d 892 (2011).

The voyeurism statute is unambiguous. The phrase "for more than a brief period of time" modifies only the term "views" and does not, as argued by Stutzke, modify the words "consent" or "knowledge." The phrase "for more than a brief period of time" appears *only* in the definition of the term "views." The legislature intended to prohibit only intentional, deliberate, or conscious viewing of another person (without that person's consent), rather than "casual," "cursory," accidental, or passing viewing.

Had the legislature intended the State to prove that the victim did not know of the viewing or did not consent to the viewing “for more than a brief period of time” it would have explicitly modified “consent” and “knowledge” rather than, or in addition to, defining the term “views” in that manner. The State agrees with Stutzke that “the legislature ‘means exactly what it says,’” Br. of Appellant at 30, which, in the case of the voyeurism statute, requires only that the “viewing” must be for more than a brief period of time. This viewing must additionally be without the victim’s knowledge *and* consent.

The State proved beyond a reasonable doubt that Stutzke “viewed” the victim for more than a brief period of time. The trial court specifically found the following facts. The victim opened her bedroom window on the morning of August 16, 2013, at approximately 6 a.m., after using the restroom; she then went back to bed, laying on top of the bed covers while completely naked. CP 46-47 (Findings of Fact 39, 42). She dozed off for a brief period of time; she then awoke to find Mr. Stutzke standing at the open window, about five feet from her, with his hands resting on the window sill. CP 47 (Finding of Fact 4). Ms. Townshend jumped from the bed, while yelling at Mr. Stutzke to leave, and then attempted to close the blinds, resulting in the blinds being pulled from the wall. *Id.* (Finding of Fact 44). Mr. Stutzke responded to Ms. Townshend, by asking “Are you

sure?” *Id.* (Finding of Fact 45). While attempting to close the window, Ms. Townshend’s unclothed midsection was a few feet from Mr. Stutzke’s face. *Id.* “During the entire interaction between Ms. Townshend and Mr. Stutzke ... Mr. Stutzke’s eyes appeared glazed over, his mouth hung open, and his hands rested on the window sill,” and “at no point during the contact did Mr. Stutzke ever divert his eyes or turn his head.” CP 47-48 (Findings of Fact 47-48).

Based on these facts the trial court was justified in determining that Ms. Townshend never provided consent to be viewed by Mr. Stutzke. It is irrelevant when she came to know that he was watching her, because both the viewed person’s knowledge *and* consent are required to avoid liability under the voyeurism statute. Under the plain language of the statute, the “viewing” lasted more than a brief period of time; it lasted long enough for the victim to awake from sleeping, observe Mr. Stutzke, jump out of bed, yell at him to go away, attempt to close the blinds, tear the blinds off the wall, and consequently have Mr. Stutzke brazenly ask if Ms. Townsend was sure she wanted him to leave. As discussed above, the plain language is unambiguous; it does not require the victim’s lack of knowledge or lack of consent continue for any specific amount of time. All that is required is that the viewing must last for longer than an unintentional glance, and the viewing, for however long the duration, must be without the victim’s

consent and knowledge. Sufficient evidence existed for the trial court to conclude that Stutzke was guilty of voyeurism.

**E. MR. STUTZKE CORRECTLY ARGUES THAT HIS CONVICTION FOR VIOLATION OF A PROTECTION ORDER MERGES INTO HIS FELONY STALKING CONVICTION.**

The double jeopardy clauses of the United States and Washington constitutions are the foundation for the merger doctrine. *State v. Parmelee*, 108 Wn. App. 702, 710, 32 P.3d 1029 (2001). The doctrine is a rule of statutory construction and applies only where the legislature has clearly indicated that in order to prove a particular degree of crime, “the State must prove not only that the defendant committed that crime but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes.” *Id.* The merger doctrine is relevant only when a crime is elevated to a higher degree by proof of another crime proscribed elsewhere in the criminal code. *Id.*

In *Parmelee*, Division I of the Court of Appeals addressed whether two convictions for violation of a court order merged with a felony stalking conviction “because the statute requires more than one underlying act-repetitive behavior-to constitute stalking.” *Id.* at 710. This Court held that two of the three convictions for violating the protection orders merged with

the stalking conviction because they were essential elements of the crime of felony stalking. *Id.* at 710-711.

A person commits the crime of stalking if he or she “intentionally and repeatedly” harasses or follows a person, and the person being harassed or followed is placed in reasonable fear of injury. RCW 9A.46.110(1). The stalker must either intend to frighten, intimidate, or harass the person; or know or reasonably should know that the person is afraid, intimidated, or harassed. *Id.* Stalking is a felony if it violates any protective order protecting the person being stalked. RCW 9A.46.110(5)(b)(ii). “Repeatedly harassing” and “repeatedly following” are alternative means of committing stalking. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). For purposes of the crime of stalking, “repeatedly” means to harass or follow “on two or more separate occasions” which are “distinct, individual, [or] noncontinuous.” RCW 9A.46.110(6)(e); *Kintz*, 169 Wn.2d at 548.

The State agrees with the Mr. Stutzke’s analysis on this issue. Judge Cooney found, at most, that two distinct, individual, or noncontinuous instances of harassment occurred on or about August 16, 2013.<sup>13</sup> First the trial court found that the “window” incident occurred,

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<sup>13</sup> The information limits the charging period for all crimes alleged to occurring “on or about August 16, 2013.” CP 37-38.

during which the victim found Mr. Stutzke standing in the frame of her bedroom window watching her as she slept naked. CP 46 (Findings of Fact 39-48). The trial court also found the “shouting” incident occurred, during which the victim heard someone repeatedly yelling her name from Mr. Stutzke’s residence. CP 50 (Findings of Fact 62-65). Each of these incidents would have been in violation of the two-year protection order issued by District Court Judge Patti Connelly Walker on March 15, 2013. CP 45 (Finding of Fact 31). The court also convicted Mr. Stutzke for violating the no contact order on August 16, 2013, as charged in Count II of the information. CP 38, 52 (Conclusions of Law 3-4).

Because the crime of felony stalking requires two or more instances of the harassing or following in violation of a protection order, the State agrees that under *Parmelee* and *State v. Whittaker*, 192 Wn. App. 395, 367 P.3d 1092 (2016), this Court should remand to the trial court with the direction to merge the violation of a court order conviction into the felony stalking conviction and to resentence Mr. Stutzke. *See, Whittaker*, 192 Wn. App. at 417.

**F. MR. STUTZKE CORRECTLY ARGUES THAT THE LENGTH OF COMMUNITY CUSTODY FOR THE STALKING CONVICTION SHOULD BE 12 MONTHS, RATHER THAN THE 18 MONTHS ORDERED BY THE TRIAL COURT.**

The offense of stalking is listed as a “crime against persons” under RCW 9.94A.411(2). RCW 9.94A.701(3)(a) provides “A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for one year when the court sentences the person to the custody of the department for: (a) Any crime against persons under RCW 9.94A.411(2).” Under the plain language of RCW 9.94A.701(3)(a), the term of community custody for stalking is 12 months. Therefore, this Court should remand to the superior court to correct the judgment and sentence to reflect a 12-month term of community custody for the stalking offense.

**G. MR. STUTZKE CORRECTLY ARGUES THAT THE IMPOSITION OF 24 MONTHS OF COMMUNITY CUSTODY ON THE GROSS MISDEMEANOR PROTECTION ORDER VIOLATION WAS INCORRECT.**

Stutzke received a 364 day sentence on his gross misdemeanor conviction for violation a civil protection order. That is the maximum sentence authorized by law. Community custody is not authorized for this gross misdemeanor. Nor would probation be appropriate. If a court imposes a maximum sentence of confinement and actually suspends none of it, the court lacks the authority to impose probation. *State v. Gailus*,

136 Wn. App. 191, 201, 147 P.3d 1300 (2006), *overruled on other grounds* by *State v. Sutherby*. 165 Wn.2d 870, 204 P.3d 916 (2009).

**H. MR. STUTZKE CORRECTLY ARGUES THAT THE SEXUAL ASSAULT PROTECTION ORDER ISSUED IN CONJUNCTION WITH STUTZKE’S SENTENCE EXCEEDS THE STATUTORY MAXIMUM TERM.**

The trial court entered a sexual assault protection order setting an expiration date of August 18, 2026. CP 119-20.<sup>14</sup> The duration of the order is controlled by RCW 7.90.150(6)(c) (“A final sexual assault protection order entered in conjunction with a criminal prosecution shall remain in effect for a period of two years following the expiration of any sentence of imprisonment and subsequent period of community supervision, conditional release, probation, or parole”). The lawful term of community supervision for the voyeurism conviction is one year. Remand for correction and the imposition of a corrected sexual assault protection order is appropriate.

**IV. CONCLUSION**

The trial court properly granted defense counsel’s motion to withdraw where the record established an irreconcilable conflict between counsel and defendant resulting in a complete breakdown in

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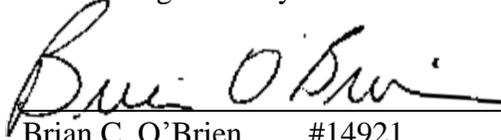
<sup>14</sup> The defendant references the Order as occurring at CP 110-11. The electronically received clerk’s papers received by respondent reference this document as 119-20.

communication. The record supports the trial court's finding that Stutzke constructively waived his right to counsel prior to trial. There was sufficient evidence to support the trial court's conclusion that Stutzke committed the crime of voyeurism. The State agrees there are sentencing errors that are in need of correction.

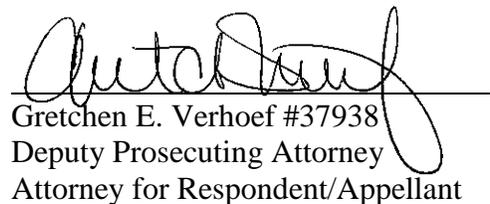
Therefore, the State requests this Court affirm the stalking and voyeurism convictions and remand to the superior court to enter an order vacating the conviction for violating a protection order due to its merger with the stalking conviction and to correct the above-discussed sentencing errors.

Dated this 1 day of August, 2017.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN E. STUTZKE,

Appellant.

NO. 93351-7

CERTIFICATE OF  
SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on August 1, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

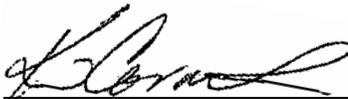
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and a courtesy copy to defendant at [journey.to.the.sc@gmail.com](mailto:journey.to.the.sc@gmail.com).

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Spokane, WA  
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**Appellate Court Case Title:** State of Washington v. Benjamin Eric Stutzke  
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