

FILED
Court of Appeals
Division III
State of Washington
4/9/2018 8:00 AM
No. 35554-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

NOE RUIZ ROQUE,

Appellant.

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

The Honorable Judge Scott R. Sparks

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Roque guilty of felony harassment (domestic violence), where the evidence was insufficient.
2. The trial court erred in finding Mr. Roque guilty of cyberstalking (domestic violence), as charged in count 4, where the evidence was insufficient.
3. The trial court violated Mr. Roque's right to a unanimous jury verdict for cyberstalking (domestic violence), as charged in count 4, because one of the alternative means was not supported by sufficient evidence.
4. The trial court erred by not counting three prior convictions, previously found to be same criminal conduct, as one offense in Mr. Roque's offender score.
5. The trial court erred by counting Mr. Roque's current gross misdemeanor cyberstalking (domestic violence) counts in his offender score.
6. Mr. Roque was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to the imposition of a ten-year domestic violence no-contact order.
7. An award of costs on appeal against Mr. Roque would be improper in the event that the State is the substantially prevailing party.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the trial court erred in finding Mr. Roque guilty of felony harassment (domestic violence) and cyberstalking (domestic violence) as charged in count 4, where the evidence was insufficient.

- a. Whether the trial court erred in finding Mr. Roque guilty of felony harassment (domestic violence), where the evidence was insufficient.
- b. Whether the trial court erred in finding Mr. Roque guilty of cyberstalking (domestic violence), as charged in count 4, where the evidence was insufficient.

Issue 2: In the alternative to Issue (1)(b), whether the trial court violated Mr. Roque's right to a unanimous jury verdict for cyberstalking (domestic violence), as charged in count 4, because one of the alternative means was not supported by sufficient evidence.

Issue 3: Whether the trial court erred in calculating Mr. Roque's offender score.

- a. Whether the trial court erred by not counting three prior convictions, previously found to be same criminal conduct, as one offense in Mr. Roque's offender score.
- b. Whether the trial court erred by counting Mr. Roque's current gross misdemeanor cyberstalking (domestic violence) counts in his offender score.

Issue 4: Whether Mr. Roque was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to the imposition of a ten-year domestic violence no-contact order.

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

C. STATEMENT OF THE CASE

Noe Ruiz Roque and Patricia Campos were in a dating relationship. (RP 166-167, 184-185, 271-272). Ms. Campos later decided to end the relationship. (RP 170-172, 184-187, 223). After that, Mr. Roque sent numerous text messages to Ms. Campos. (RP 174-175, 178, 183, 277). Ms. Campos alleged the text messages contained threats. (RP 174-175, 178-180, 186-187). The text messages were in Spanish. (RP 180, 182, 192, 195, 205, 216-217, 240).

Ms. Campos first reported the text messages she received from Mr. Roque to law enforcement on July 1, 2017. (RP 192). Officers took photos of the text messages on Ms. Campos' phone on this date. (RP 175, 193-197; Pl.'s Ex. 7).

Ms. Campos next reported the text messages she received from Mr. Roque to law enforcement on July 3, 2017. (RP 201). Ellensburg Police Department Officer Ryan Potter met with Ms. Campos around 9:30 p.m. that night at a McDonald's restaurant. (RP 201, 216-217). Officer Potter took photos of the text messages on Ms. Campos' phone on this date. (RP 205-208, 217; Pl.'s Ex. 8).

Officer Potter also contacted Ms. Campos the next day, July 4, 2017, at her residence. (RP 206, 209-210, 218). Mr. Roque was arrested that day. (RP 218-219, 247-248).

The State charged Mr. Roque with one count of felony harassment (domestic violence), alleged as follows:

[O]n or about July 3, 2017, the above-named Defendant, did harass another person, to wit: Patricia Norma Campos, under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person; thereby committing the felony crime of FELONY HARASSMENT; contrary to Revised Code of Washington 9A.46.020(2)(b)(ii) and 10.99.020.

(CP 11).

The State also charged Mr. Roque with two counts of gross misdemeanor cyberstalking (domestic violence) under RCW 9.61.260, alleging one count (Count 3) occurred “on or about July 3, 2017[]” and one count occurred “on or about July 4, 2017[]” (Count 4).¹ (CP 12).

¹ The State also charged Mr. Roque with a second count of felony harassment (domestic violence), but the jury did not reach a verdict on this count, and the Court dismissed this count at sentencing. (CP 11, 143; RP 337-338, 343-344).

The case proceeded to a jury trial. (RP 17-340). Witnesses testified consistent with the facts stated above. (RP 161-282). In addition, Ms. Campos testified as follows:

[The State:] Did he threaten to kill you?

[Ms. Campos:] I don't remember.

[The State:] Okay. How many text messages did he send you when you called the police? How many had he sent you?

[Ms. Campos:] That night? Hundreds.

.....

[The State:] Had you told him that you didn't want to be contacted by him?

[Ms. Campos:] Yes.

(RP 174-175).

Ms. Campos further testified:

[The State:] Okay. Were you ever afraid when he was texting you -- did -- did he ever threaten you in the texts?

[Ms. Campos:] Yes.

[The State:] And were you afraid of those texts?

[Ms. Campos:] Yes, because I believed what he was saying.

[The State:] What did you think he could do to you if he wanted to?

[Ms. Campos:] Exactly what he said.

[The State:] What was?

[Ms. Campos:] I don't remember.

.....

[Ms. Campos:] . . . I was scared he was going to do what he said. He said it was like hunting.

[The State:] Okay. Were you afraid he was going to hunt you?

[Ms. Campos:] That's what he said he was doing.

.....

[The State:] Do you remember what day that was?

[Ms. Campos:] No.

[The State:] Did the text messages continue?

[Ms. Campos:] Yes.

(RP 178-180).

On cross-examination, Ms. Campos testified:

[Defense counsel:] I think you indicated, Ms. Campos, that the thing you were worried about was the idea that Mr. Ruiz Roque was going to hunt you? That's what you testified to? Right?

[Ms. Campos:] What?

[Defense counsel:] You testified that you were concerned that Mr. Ruiz Roque was going to do what he had said he would do?

[Ms. Campos:] Yeah. He said he was going to do it and the way that he acted and things he said, I had no reason to not believe it.

[Defense counsel:] Okay. And that was what he said he was going to do was to hunt you? Right?

[Ms. Campos:] It was through text something in that sort, but that's what it meant.

(RP 186-187).

Officer Potter testified that while he was with Ms. Campos at McDonald's on the night of July 3, 2017, she was receiving text messages. (RP 204-205). He testified he saw a text on her phone he was able to roughly translate into English, as stating "my rifle is ready." (RP 216-217). Officer Potter also testified that he went to Ms. Campos' residence with her that night, and that Ms. Campos was receiving text messages there. (RP 208-209).

Officer Potter testified as follows regarding his contact with Ms. Campos on July 4, 2017:

[The State:] . . . And what happened on July 4th when you made contact with her?

[Officer Potter:] I learned that there was more text messages and there were several phone calls that were made.

[The State:] That continued even after you were there?

[Officer Potter:] Yes, and they started directly after I had left - - the text message and the phone calls started coming in.

(RP 210).

The photos of the text messages on Ms. Campos' phone on July 1, 2017, were admitted at trial as Plaintiff's Exhibit No. 7. (RP 175, 193-197; Pl.'s Ex. 7). The photos of the text messages on Ms. Campos' phone on July 3, 2017, were admitted at trial as Plaintiff's Exhibit No. 8. (RP 205-208; Pl.'s Ex. 8). These exhibits were not translated into English. (Pl.'s Exs. 7, 8). Plaintiff's Exhibit No. 8 contains missed phone calls from July 4, 2017, but it does not contain any text messages from July 4, 2017. (Pl.'s Ex. 8).

Ellensburg Police Department Officer Andrew Hall testified he speaks Spanish and that he translated some of the texts in Plaintiff's Exhibit Nos. 7 and 8 into English. (RP 230-245).

Officer Hall translated "the idea" of a text message sent to Ms. Campos, from Plaintiff's Exhibit No. 7, as follows:

I'm not going to do anything about touching or anything. I'm just going to hunt deer and that's what I'm going to do and see.

(RP 234-235).

He also testified "[t]here was a mention of a rifle []" in a text in Plaintiff's Exhibit No. 7. (RP 235).

Officer Hall testified Plaintiff's Exhibit No. 8 contained a text stating "[t]he rifle is ready." (RP 237). He testified it also contained texts stating "I came by your house right now, okay[,] and then a word that "I think that's a mixture of Spanish and English that would mean watch out for yourself." (RP 234). Officer Hall testified the next text stated "[t]hey don't sleep, perhaps

they're not going to wake up[,]" followed by "[d]on't get near the windows, okay." (RP 238).

Officer Hall continued testifying to the texts contained in Plaintiff's Exhibit No. 8:

And then the one after that . . . "[i]f you - - if you go out right now to bring it and you're going to see that what I do okay. That would be about 2, 3, or 4. You'll see." And then there's one last one here. "Okay, you played with me and now you're going to pay."

....

It's - - it's continued here. "You played with me, and now you're going to pay with me."

....

"Again you're going to see what happens okay" and then "right now that you get here mine is coming" whatever mine is.

....

"Now when you - - when you go, you're going to make it secret. I'm not going to tell you anything because you have something of mine that you'll pay for me - - that you'll pay for" and then "you wanted to bring this game right now and you'll play it until I say. You're not going to know when he's outside, but be careful because until the shadows I'm going to haunt. Nothing messages now look tonight it's going to begin - - the good thing is going to begin" I'd say.

(RP 238-239).

On cross-examination, Officer Hall testified:

[Defense counsel:] And for what you just relayed to us, there was no explicit threat made anywhere in there was there?

[Officer Hall:] As far as an explicit threat? No. . . .

Today, I looked at . . . one that said - - that talked about a rifle being ready.

[Defense counsel:] Okay. And you - - it was your understanding that it was not directed towards Ms. Campos? Is that right?

[Officer Hall:] It was directed towards a third party as written.

(RP 241).

Mr. Roque testified in his own defense. (RP 270-282). He testified he sent messages through Ms. Campos to Billy Martin, who he believed was Ms. Campos' boyfriend. (RP 274-277, 282). He testified this included a message on July 3, 2017, telling him that "the rifle is ready" so that Mr. Martin would leave him alone. (RP 276, 282).

Mr. Roque acknowledged he sent hundreds of text messages to Ms. Campos phone. (RP 277). He testified she sent some back asking that he leave her alone. (RP 277-278, 281). Mr. Roque denied threatening to kill Ms. Campos and denied making any threats to her at all. (RP 282).

The trial court instructed the jury that in order to find Mr. Roque guilty of felony harassment (domestic violence), each of the following elements must be proved beyond a reasonable doubt:

- (1) That on or about July 3, 2017, the defendant knowingly threatened to kill Patricia Campos immediately or in the future;
- (2) That the words or conduct of the defendant placed Patricia Campos in reasonable fear that the threat to kill would be carried out;
- (3) That the defendant acted without lawful authority; and
- (4) That the threat was made or received in the State of Washington.

(CP 91; RP 301).

The trial court instructed the jury that in order to find Mr. Roque guilty of the second count of cyberstalking (domestic violence) (Count 4), each of the following elements must be proved beyond a reasonable doubt:

- (1) That on or about July 4, 2017, the defendant made an electronic communication to another person;
- (2) That at the time the defendant made the electronic communication the defendant intended to harass, intimidate, or torment any other person;
- (3) That the defendant:
 - (a) made the electronic communication repeatedly whether or not a conversation occurred; or
 - (b) threatened to inflict injury on the person called or to whom the electronic communication was made; and
- (4) That the electronic communication was made or received in the State of Washington.

(CP 98; RP 305).

This to-convict instruction also stated:

If you find from the evidence that elements (1), (2), and (4), and any of the alternative elements (3)(a) or (3)(b), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (3)(a) or (3)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt. On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these four elements, then it will be your duty to return a verdict of not guilty.

(CP 98; RP 305-306).

The jury found Mr. Roque guilty as charged. (CP 127-128, 131-134; RP 332-335).

The trial court held the sentencing hearing on September 8, 2017. (CP 140-152; RP 343-353). On the felony harassment (domestic violence) count, the trial court sentenced Mr. Roque to 27 months confinement, based upon an offender score of six. (CP 142-144; RP 343-344, 350-351). The offender score

included one point for each of following prior felony convictions: a violation of the uniform controlled substances act (VUCSA), with a date of crime of July 3, 2014; and three counts of second degree unlawful possession of a firearm, each with the same date of crime of June 28, 2016. (CP 142-144; RP 343-344, 350). The prior sentencing court for the three counts of second degree unlawful possession of a firearm found that these three convictions encompassed the same criminal conduct. *See* Amended Felony Judgment and Sentence and Second Amended Felony Judgment and Sentence in Kittitas County Superior Court No. 16-1-00169-5.²

The offender score also included one point for each of the current gross misdemeanor cyberstalking (domestic violence) counts, characterized by defense counsel as repetitive domestic violence offenses. (CP 140, 142-144; 350-351). Mr. Roque did not object to the inclusion of these convictions in his offender score. (RP 343-353).

Also at sentencing, the trial court entered a separate domestic violence no-contact order. (CP 154-155; RP 352). This no-contact order expires on September 8, 2027, ten years from the date of sentencing. (CP 154). Mr. Roque did not object to the entry of this order. (RP 352).

² On the same day as this opening brief was filed, Mr. Roque filed a Motion to Accept Additional Evidence under RAP 9.11, asking this Court to accept and consider copies of his Amended Felony Judgment and Sentence and Second Amended Felony Judgment and Sentence in Kittitas County Superior Court No. 16-1-00169-5, as additional evidence.

The felony judgment and sentence contains the following boilerplate language: “[a]n award of costs on appeal against the defendant may be added to the total legal financial obligations.” (CP 147). The trial court imposed only mandatory costs. (CP 146).

Mr. Roque appealed. (CP 158). The trial court entered an Order of Indigency, granting Mr. Roque a right to review at public expense. (CP 159-162).

D. ARGUMENT

Issue 1: Whether the trial court erred in finding Mr. Roque guilty of felony harassment (domestic violence) and cyberstalking (domestic violence) as charged in count 4, where the evidence was insufficient.

There was insufficient evidence to support both Mr. Roque’s conviction of felony harassment (domestic violence), and his conviction of cyberstalking (domestic violence) as charged in count 4. Each charge is addressed in turn below.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is “whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). “[A]ll reasonable inferences from the

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

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

“[A] criminal defendant may always challenge the sufficiency of the evidence supporting a conviction for the first time on appeal.” *State v. Sweany*, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011), *aff’d*, 174 Wn.2d 909, 281 P.3d 305 (2012) (citing *State v. Hickman*, 135 Wn.2d 97, 103 n. 3, 954 P.2d 900 (1998)); *see also* RAP 2.5(a)(2) (stating “a party may raise the following claimed errors for the first time in the appellate court . . . failure to establish facts upon which relief can be granted. . . .”). “A defendant challenging the sufficiency of

the evidence is not obliged to demonstrate that the due process violation is ‘manifest.’” *Id.*

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

a. Whether the trial court erred in finding Mr. Roque guilty of felony harassment (domestic violence), where the evidence was insufficient.

There was insufficient evidence to support Mr. Roque’s conviction of felony harassment (domestic violence), because the evidence presented at trial did not establish that Mr. Roque threatened to kill Ms. Campos, or that Ms. Campos was placed in reasonable fear that a threat to kill would be carried out. A rational jury could not have found Mr. Roque guilty of felony harassment (domestic violence). Therefore, the evidence is insufficient to support Mr. Roque’s conviction of felony harassment (domestic violence).

To find Mr. Roque guilty of felony harassment (domestic violence), the jury had to find:

- (1) That on or about July 3, 2017, *the defendant knowingly threatened to kill Patricia Campos* immediately or in the future;
- (2) That the words or conduct of the defendant *placed Patricia Campos in reasonable fear* that the threat to kill would be carried out;
- (3) That the defendant acted without lawful authority; and
- (4) That the threat was made or received in the State of Washington.

(CP 91; RP 301) (emphasis added); *see also* RCW 9A.46.020(2)(b)(ii) (felony harassment, threat to kill).

Our Supreme Court explained the harassment statute requires proof of the following:

[T]hat the perpetrator knowingly threaten to inflict bodily injury by communicating directly or indirectly the intent to inflict bodily injury; the person threatened must find out about the threat although the perpetrator need not know nor should know that the threat will be communicated to the victim; and words or conduct of the perpetrator must place the person threatened in reasonable fear that the threat will be carried out.

State v. Trey M., 186 Wn.2d 884, 905, 383 P.3d 474 (2016) (quoting *State v. J.M.*, 144 Wn.2d 472, 482, 28 P.3d 720 (2001)).

Because the harassment statute criminalizes pure speech, it “must be interpreted with the commands of the First Amendment clearly in mind.” *State v. Kilburn*, 151 Wn.2d 36, 41, 84 P.3d 1215 (2004) (internal quotation marks omitted) (quoting *State v. Williams*, 144 Wn.2d 197, 206-07, 26 P.3d 890 (2001)). Certain kinds of speech are unprotected under the First Amendment, including “true threats.” *Id.* at 42-43. “Washington’s criminal harassment statute clearly prohibits true threats.” *Williams*, 144 Wn.2d at 208. A true threat is defined as follows:

A “true threat” is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted ... as a serious expression of intention to inflict bodily harm upon or to take the life of [another individual].

Id. at 207-08 (internal quotation marks omitted) (citation omitted) (alteration in original).

“Under this standard, whether a true threat has been made is determined under an objective standard that focuses on the speaker.” *Kilburn*, 151 Wn.2d at 44; *see also Trey M.*, 186 Wn.2d at 892-904 (upholding the objective test for determining whether a statement constitutes a “true threat”).

As a threshold matter, as stated in the to-convict instruction, in order to convict Mr. Roque, the threat had to be made to Ms. Campos, not to a third party, such as Billy Martin, the individual Mr. Roque believed was Ms. Campos’ boyfriend. (CP 91; RP 274-277, 284, 301). In addition, Mr. Roque could not be convicted of threatening Mr. Martin, because Mr. Martin did not testify at trial here, and there was no evidence presented that he was made aware of any threats Mr. Roque made to him. *See J.M.*, 144 Wn.2d at 482 (in order find a defendant guilty of felony harassment, the person threatened must find out about the threat); *see also State v. Kiehl*, 128 Wn. App. 88, 94, 113 P.3d 528 (2005) (reversing a conviction for felony harassment against a judge, where the judge “did not testify and no evidence was presented indicating that he was placed in reasonable fear that the threat would be carried out.”).

There was insufficient evidence to convict Mr. Roque of felony harassment (domestic violence) of Ms. Campos, for two reasons: first, he did not threaten to kill Ms. Campos, and second, Ms. Campos was not placed in reasonable fear that a threat to kill would be carried out.

First, a threat “means to communicate, directly or indirectly, the intent . . . [t]o cause bodily injury in the future to the person threatened or to any other person” RCW 9A.04.110(28)(a); *see also* CP 95 (defining threat). Whether a statement is a threat “depends on all the facts and circumstances, and it is not proper to limit the inquiry to a literal translation of the words spoken.” *State v. C.G.*, 150 Wn.2d 604, 611, 80 P.3d 594 (2003).

Mr. Roque did not directly or indirectly threaten to kill Ms. Campos on the date in question, July 3, 2017. Ms. Campos testified she does not remember if Mr. Roque threatened to kill her. (RP 174). She testified Mr. Roque threatened her in text messages he sent to her, but she does not remember what he said, except for testifying “[h]e said it was like hunting.” (RP 178-180). This is not a direct or indirect threat to kill. In addition, it cannot be the basis for a conviction because these texts were not sent on July 3, 2017, the date required for a conviction, but rather, earlier, on July 1, 2017. (RP 175, 192-197, 234-235; Pl.’s Ex. 7).

None of the text messages Mr. Roque sent Ms. Campos on July 3, 2017 contained a direct or indirect threat to kill Ms. Campos. The texts consist of the following: “my rifle is ready[;]” “I came by your house right now”; “watch out for yourself[;]” “[t]hey don’t sleep, perhaps they’re not going to wake up[,]” and “[d]on’t get near the windows[.]” (RP 216-217, 234, 237-238). The texts also included “you played with me and now you’re going to pay[;]” “you’re going to

see what happens[;]” and “[y]ou’re not going to know when he’s outside, but be careful because until the shadows I’m going to haunt.” (RP 238-239).

Officer Hall testified there was not an explicit threat made in these texts, and that the text that talked about a rifle being ready “was directed towards a third party as written.” (RP 241). Thus, these threats were not directed at Ms. Campos. If this Court disagrees, these threats made in text messages Mr. Roque sent Ms. Campos on July 3, 2017 were not direct or indirect threats to kill Ms. Campos. Given the context, they were not threats to end her life. *See C.G.*, 150 Wn.2d at 611 (defining threat).

Second, Ms. Campos was not placed in reasonable fear that a threat to kill would be carried out. As stated above, in order to convict Mr. Roque of felony harassment, the jury had to find “[t]hat the words or conduct of the defendant placed Patricia Campos in reasonable fear that the threat to kill would be carried out[.]” (CP 91; RP 301); *see also* RCW 9A.46.020(2)(b)(ii) (felony harassment, threat to kill). In order to prove this element, “[t]he person threatened must subjectively feel fear and that fear must be reasonable. *State v. E.J.Y.*, 113 Wn. App. 940, 953, 55 P.3d 673 (2002).

In *C.G.*, a juvenile was charged with felony harassment after she made the following threat to her school’s vice-principal: “I’ll kill you Mr. Haney, I’ll kill you.” *C.G.*, 150 Wn.2d at 606-07. At trial, Mr. Haney testified the threat “caused him concern.” *Id.* at 607. The juvenile was convicted as charged, and she

appealed her conviction, arguing “there was insufficient evidence to support her conviction because the State did not prove that Mr. Haney was placed in reasonable fear that she would *kill* him.” *Id.*

On appeal, our Supreme Court held that under the plain language of the harassment statute, RCW 9A.46.020, “the State must prove that the victim is placed in reasonable fear that the threat made is the one that will be carried out.” *Id.* at 610. The Court then reversed the juvenile’s conviction “because there is no evidence that Mr. Haney was placed in reasonable fear that she would kill him.” *Id.*

Here, akin to *C.G.*, there is no evidence that Ms. Campos was placed in reasonable fear that Mr. Roque would kill her. *See C.G.*, 150 Wn.2d at 610. Ms. Campos did not subjectively fear that Mr. Roque would kill her. *See E.J.Y.*, 113 Wn. App. at 953. Ms. Campos testified he does not remember if Mr. Roque threatened to kill her. (RP 174). Although she testified she “believed what he was saying[]” and that he could do “[e]xactly what he said[,]” she testified she does not remember what this was. (RP 178-179). The only thing Ms. Campos testified she was afraid Mr. Roque would do was to hunt her; however, she did not state this placed her in fear for her life, nor did it occur on the charged date in question, July 3, 2017. (RP 175, 178-180, 192-197; Pl.’s Ex. 7).

Based on the foregoing, a rational jury could not have found Mr. Roque guilty of felony harassment (domestic violence). *See Salinas*, 119 Wn.2d at 201

(citing *Green*, 94 Wn.2d at 220-22). The evidence presented at trial did not establish that Mr. Roque threatened to kill Ms. Campos, or that Ms. Campos was placed in reasonable fear that a threat to kill would be carried out. His conviction for felony harassment (domestic violence) should be reversed and dismissed with prejudice. *See Smith*, 155 Wn.2d at 505 (stating this remedy).

b. Whether the trial court erred in finding Mr. Roque guilty of cyberstalking (domestic violence), as charged in count 4, where the evidence was insufficient.

There was insufficient evidence to support Mr. Roque's conviction of cyberstalking (domestic violence), as charged in count 4, because the evidence presented at trial did not establish Mr. Roque committed the crime on date charged, July 4, 2017. A rational jury could not have found Mr. Roque guilty of cyberstalking (domestic violence), as charged in count 4. Therefore, the evidence is insufficient to support Mr. Roque's conviction of cyberstalking (domestic violence), as charged in count 4.

To find Mr. Roque guilty of cyberstalking (domestic violence), as charged in count 4, the jury had to find:

- (1) That on or about July 4, 2017, the defendant made an electronic communication to another person;
- (2) That at the time the defendant made the electronic communication the defendant intended to harass, intimidate, or torment any other person;
- (3) That the defendant:
 - (a) made the electronic communication repeatedly whether or not a conversation occurred; or
 - (b) threatened to inflict injury on the person called or to whom the electronic communication was made; and

(4) That the electronic communication was made or received in the State of Washington.

(CP 98; RP 305); *see also* RCW 9.61.260(1) (cyberstalking).

The exhibits admitted at trial containing text messages sent to Ms. Campos, Plaintiff's Exhibit No. 7 and Plaintiff's Exhibit No. 8, do not contain any text messages from July 4, 2017. (Pl.'s Exs. 7, 8).

The only potential evidence of Mr. Roque sending Ms. Campos text messages on July 4, 2017, is the following testimony of Officer Potter regarding his contact with Ms. Campos that day:

[The State:] . . . And what happened on July 4th when you made contact with her?

[Officer Potter:] I learned that there was more text messages and there were several phone calls that were made.

[The State:] That continued even after you were there?

[Officer Potter:] Yes, and they started directly after I had left - - the text message and the phone calls started coming in.

(RP 210).

There was no evidence of the number of text messages received by Ms. Campos that day; the content of these messages; or even a direct statement that they were from Mr. Roque. (RP 210). Without knowing the content of these text messages, there was insufficient evidence for the jury to find that Mr. Roque, on July 4, 2017, "threatened to inflict injury on the person called or to whom the electronic communication was made." (CP 98; RP 305); *see also* RCW 9.61.260(1)(c).

Thus, in order for the jury to convict Mr. Roque, it had to find that he, on July 4, 2017, made an electronic communication to Ms. Campos, and "made the

electronic communication *repeatedly* whether or not a conversation occurred[.]” (CP 98; RP 305); *see also* RCW 9.61.260(1)(b).

However, Officer’s Potter testimony is insufficient to establish this element. (RP 210). He testified that on July 4th he “learned there was *more text messages* and there were several phone calls that were made []” and “they started directly after I had left - - the *text message* and the phone calls started coming in.” (RP 210) (emphasis added). As noted above, there is no evidence that these text messages were from Mr. Roque. Also, this testimony is insufficient to establish the text messages were made “repeatedly.” *See* CP 98; RP 305; *see also* RCW 9.61.260(1)(b). The single mention of “more text messages” without any testimony as to how many, especially where Officer Potter later uses the singular “text message” descriptor, is insufficient evidence for the jury to find that on July 4, 2017, Mr. Roque “repeatedly” sent electronic communications to Ms. Campos. (RP 210).

Based on the foregoing, a rational jury could not have found Mr. Roque guilty of cyberstalking (domestic violence) as charged in count 4. *See Salinas*, 119 Wn.2d at 201 (citing *Green*, 94 Wn.2d at 220-22). His conviction for cyberstalking (domestic violence) (count 4) should be reversed and dismissed with prejudice. *See Smith*, 155 Wn.2d at 505 (stating this remedy).

Issue 2: In the alternative to Issue (1)(b), whether the trial court violated Mr. Roque’s right to a unanimous jury verdict for cyberstalking (domestic violence), as charged in count 4, because one of the alternative means was not supported by sufficient evidence.

Mr. Roque requests this Court consider this argument, made in the alternative, if it rejects his sufficiency of the evidence argument for cyberstalking (domestic violence), as charged in count 4, presented in Issue (1)(b) above.

Mr. Roque should receive a new trial on the charge of cyberstalking (domestic violence), as charged in count 4, because the jury was not instructed that it had to be unanimous on the means of committing the crime, and sufficient evidence does not support each means put before the jury. The jury was not instructed that it had to be unanimous on whether Mr. Roque (1) made the electronic communication repeatedly whether or not a conversation occurred or (2) threatened to inflict injury on the person called or to whom the electronic communication was made, and sufficient evidence does not establish the second alternative means. Therefore, the lack of a unanimity instruction violated Mr. Roque’s constitutional right to a unanimous jury verdict.

“[T]he right to a unanimous verdict is derived from the fundamental constitutional right to a trial by jury and thus may be raised for the first time on appeal.” *State v. Handyside*, 42 Wn. App. 412, 415, 711 P.2d 379 (1985); *State v. Martin*, 69 Wn. App. 686, 689, 849 P.2d 1289 (1993) (Even if instructing the jury on an alternate means that is unsupported by the evidence was “plainly the result

of oversight, the giving of this erroneous instruction is not trivial... and may be raised for the first time on appeal.”); *see also* RAP 2.5(a).

“An alternative means crime is one where the legislature has provided that the State may prove the proscribed criminal conduct in a variety of ways.” *State v. Armstrong*, 188 Wn.2d 333, 340, 394 P.3d 373 (2017).

Criminal defendants in Washington have a right to a unanimous jury verdict. Wash. Const. art. 1, § 21; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). “But in alternative means cases, where substantial evidence supports both alternative means submitted to the jury, unanimity as to the means is not required.” *Armstrong*, 188 Wn.2d at 340; *see also State v. Woodlyn*, 188 Wn.2d 157, 164, 392 P.3d 1062 (2017) (stating “[w]hen there is sufficient evidence to support each alternative means, Washington defendants do not enjoy a recognized right to express unanimity.”). “When one element of the crime can be satisfied by alternative means, jury unanimity is satisfied if the jury unanimously agrees the State proved that element beyond a reasonable doubt and the evidence was sufficient for each alternative means of committing that element.” *Id.* at 379; *see also Woodlyn*, 392 P.3d at 1067 (stating “[a] general verdict satisfies due process only so long as each alternative means is supported by sufficient evidence.”).

However, “if there is insufficient evidence to support *any* of the means, a ‘particularized expression’ of juror unanimity is required.” *Woodlyn*, 188 Wn.2d

at 165 (quoting *State v. Owens*, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014)). “When there is insufficient evidence to support one of the alternative means charged and the jury does not specify that it unanimously agreed on the other alternative, we are faced with the danger that the jury rested its verdict on an invalid ground.” *Armstrong*, 188 Wn.2d at 343-44. In this situation, the conviction must be reversed. *Id.*

In *Woodlyn*, our Supreme Court rejected a harmless error approach that “a complete *lack* of evidence for one alternative allows courts to ‘rule out’ the possibility that any member of the jury relied on the factually unsupported means.” *Woodlyn*, 188 Wn.2d at 165. Instead, the Court found that “[a]bsent some form of colloquy or explicit instruction, we cannot assume that every member of the jury relied solely on the supported alternative.” *Woodlyn*, 188 Wn.2d at 166.

For cyberstalking (domestic violence), as charged in count 4, the jury was not instructed that it had to be unanimous on whether Mr. Roque (1) made the electronic communication repeatedly whether or not a conversation occurred or (2) threatened to inflict injury on the person called or to whom the electronic communication was made, and sufficient evidence does not establish the second alternative means. Therefore, the lack of a unanimity instruction violated Mr. Roque’s constitutional right to a unanimous jury verdict.

There are no published decisions in Washington on the issue of whether cyberstalking is an alternative means crime. *Cf. State v. Bell*, 70358-7-I, 2014 WL 4715519, at *2-3 (Wash. Ct. App. Sept. 22, 2014) (finding sufficient evidence supported two charged alternative means of cyberstalking); *see also* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority).

Cyberstalking is defined as follows:

- (1) A person is guilty of cyberstalking if he or she, with intent to harass, intimidate, torment, or embarrass any other person, and under circumstances not constituting telephone harassment, makes an electronic communication to such other person or a third party:
 - (a) Using any lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of any lewd or lascivious act;
 - (b) Anonymously or repeatedly whether or not conversation occurs; or
 - (c) Threatening to inflict injury on the person or property of the person called or any member of his or her family or household.

RCW 9.61.260(1); *see also* CP 98; RP 305-306.

Here, the jury was instructed on two of the three statutory alternative means, (b) and (c). *See* CP 98; RP 305-306.

As acknowledged above, “[a]n alternative means crime is one where the legislature has provided that the State may prove the proscribed criminal conduct in a variety of ways.” *Armstrong*, 394 P.3d at 377. “[W]hether a statute provides an alternative means for committing a particular crime is left to judicial determination.” *State v. Butler*, 194 Wn. App. 525, 528, 374 P.3d 1232 (2016)

(citing *State v. Peterson*, 168 Wn.2d 763, 769, 230 P.3d 588 (2010)). Questions of statutory interpretation are reviewed de novo, and statutes are interpreted to give effect to legislative intent. *Id.* (citing *State v. Bunker*, 169 Wn.2d 571, 577-78, 238 P.3d 487 (2010)).

To determine whether a statute contains alternative means, “[t]he statutory analysis focuses on whether each alleged alternative describes distinct acts that amount to the same crime.” *Id.* (internal quotation marks omitted) (quoting *State v. Sandholm*, 184 Wn.2d 726, 734, 364 P.3d 87 (2015)). “The more varied the criminal conduct, the more likely the statute describes alternative means.” *Id.* (citing *Sandholm*, 184 Wn.2d at 734). The analysis focuses on “the different underlying acts that could constitute the same crime.” *Id.* (citing *Owens*, 180 Wn.2d at 96-97). “The various underlying acts must vary significantly to constitute distinct alternative means.” *Id.* (citing *Owens*, 180 Wn.2d at 97). Further, the statutory analysis “place[s] less weight on the use of the disjunctive ‘or’ and more weight on the distinctiveness of the criminal conduct.” *Id.* (citing *Sandholm*, 184 Wn.2d at 726).

Turning to the cyberstalking statute at issue, RCW 9.61.260(1), (1) making the electronic communication repeatedly whether or not a conversation occurred, (2) threatening to inflict injury on the person called or to whom the electronic communication was made, or (3) using any lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of any lewd

or lascivious act describe distinct acts that amount to the same crime. A person could make an electronic communication repeatedly without threatening to inflict injury, and without using any lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of any lewd or lascivious act. *Cf. Butler*, 194 Wn. App. at 530 (in determining identity theft is not an alternative means crime, reasoning “[b]ecause no single action in the statute could be completed without simultaneously completing at least one other action, the various acts are too similar to constitute distinct alternative means.”).

Likewise, a person could make an electronic communication using any lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of any lewd or lascivious act, without threatening to inflict injury; and both could be done with a single electronic communication, as opposed to repeatedly. *See* RCW 9.61.260(1) (criminalizing a single electronic communication: [a] person is guilty of cyberstalking if he or she . . . makes *an electronic communication* to such other person or a third party”).

Accordingly, (1) making the electronic communication repeatedly whether or not a conversation occurred, (2) threatening to inflict injury on the person called or to whom the electronic communication was made, or (3) using any lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of any lewd or lascivious act, are alternative means of committing cyberstalking.

Here, for count 4, the jury was instructed on two of the three alternative means of committing cyberstalking, that Mr. Roque (1) made the electronic communication repeatedly whether or not a conversation occurred or (2) threatened to inflict injury on the person called or to whom the electronic communication was made. (CP 98; RP 305-306). The jury was not provided an instruction that it must be unanimous in its verdict as to these two alternative means. (CP 98; RP 305-306).

Further, there was insufficient evidence to support the alternative means that Mr. Roque threatened to inflict injury on the person called or to whom the electronic communication was made. (CP 98; RP 305-306). There was no evidence presented at trial as to the content of the text message sent to Ms. Campos on the date in question, July 4, 2017; without knowing the content of the text messages, there was insufficient evidence to support a finding that Mr. Roque threatened to inflict injury in this electronic communication. (RP 210).

Therefore, a particularized expression of juror unanimity on the alternative means was required. *Woodlyn*, 188 Wn.2d at 165 (quoting *Owens*, 180 Wn.2d at 95). Because none was given, Mr. Roque's conviction for cyberstalking (domestic violence), as charged in count 4, must be reversed. *See Armstrong*, 188 Wn.2d at 343-44. It cannot be assumed that every member of the jury relied

solely on the supported alternative of making an electronic communication repeatedly. *See Woodlyn*, 188 Wn.2d at 165.

The lack of a unanimity instruction deprived Mr. Roque of his constitutional right to a unanimous jury verdict, and therefore, his conviction for cyberstalking (domestic violence), as charged in count 4, should be reversed and remanded for a new trial.

Issue 3: Whether the trial court erred in calculating Mr. Roque's offender score.

The trial court sentenced Mr. Roque based upon an offender score of six, which included (1) three points for three prior convictions of second degree unlawful possession of a firearm, that the prior sentencing court had found encompassed same criminal conduct, and (2) one point for each of the current gross misdemeanor cyberstalking (domestic violence) convictions. The trial court erred by not counting the three prior convictions of second degree unlawful possession of a firearm as one offense. The trial court also erred by counting the current gross misdemeanor cyberstalking (domestic violence) convictions in Mr. Roque's offender score. Each of these errors is addressed in turn below.

In general, a defendant cannot waive a challenge to a miscalculated offender score. *See In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). A defendant may challenge a sentencing court's calculation of his offender score for the first time on appeal. *State v. Roche*, 75 Wn. App. 500,

513, 878 P.2d 497 (1994). A challenge to the offender score is reviewed de novo.
Id.

The State has the burden to establish on the record the existence and the classification of the convictions relied on in calculating the score. *State v. Ford*, 137 Wn.2d 472, 480-82, 973 P.2d 452 (1999). The current sentencing court must determine the offender score based upon “other current and prior convictions.” *State v. Williams*, 176 Wn. App. 138, 141, 307 P.3d 819 (2013) (citing RCW 9.94A.589(1)(a)).

a. Whether the trial court erred by not counting three prior convictions, previously found to be same criminal conduct, as one offense in Mr. Roque’s offender score.

The trial court erred by not counting the three prior convictions of second degree unlawful possession of a firearm as one offense in Mr. Roque’s offender score, where the prior sentencing court found these three convictions encompassed the same criminal conduct. Therefore, the case should be reversed and remanded for resentencing.

RCW 9.94A.525 provides, in relevant part:

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

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

“If a prior sentencing court found multiple offenses ‘encompass the same criminal conduct,’ the current sentencing court must count those prior convictions as one offense.” *Williams*, 176 Wn. App. at 141 (citing RCW 9.94A.525(a)(i)).

Here, the trial court sentenced Mr. Roque based upon an offender score of six. (CP 142-144; RP 343-344, 350-351). His offender score included three points from prior convictions of three counts of second degree unlawful possession of a firearm. (CP 142-144; RP 343-344, 350-351). Mr. Roque did not object to the inclusion of these three convictions in his offender score. (RP 343-353). However, the prior sentencing court found that Mr. Roque’s three counts of second degree unlawful possession of a firearm encompassed the same criminal conduct. *See* Amended Felony Judgment and Sentence and Second Amended Felony Judgment and Sentence in Kittitas County Superior Court No. 16-1-00169-5.

Because the prior sentencing court found that Mr. Roque’s three counts of second degree unlawful possession of a firearm encompassed the same criminal conduct, the trial court here erred by not counting these three prior convictions as one offense, for sentencing purposes. *See* RCW 9.94A.525(5)(a)(i); *see also Williams*, 176 Wn. App. at 141. Therefore, the case should be reversed and remanded for resentencing.

b. Whether the trial court erred by counting Mr. Roque's current gross misdemeanor cyberstalking (domestic violence) counts in his offender score.

The trial court erred by counting the current gross misdemeanor cyberstalking (domestic violence) convictions in Mr. Roque's offender score, because gross misdemeanor cyberstalking (domestic violence) convictions are not included in the offender score for felony harassment (domestic violence). Therefore, the case should be reversed and remanded for resentencing.

“Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed ‘other current offenses’ within the meaning of RCW 9.94A.589.” RCW 9.94A.525(1). Subject to some exceptions not applicable here, “whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score[.]” RCW 9.94A.589(1)(a). Thus, as acknowledged above, the current sentencing court must determine the offender score based upon “other current and prior convictions.” *Williams*, 176 Wn. App. at 141 (citing RCW 9.94A.589(1)(a)).

In general, when sentencing a nonviolent offense, gross misdemeanor convictions are not included in the offender score. *See* RCW 9.94A.525(7); *see also* RCW 9.94A.030(34) (“‘Nonviolent offense’ means an offense which is not a violent offense.”); RCW 9.94A.030(55) (defining “violent offense,” which does

not include felony harassment). However, “[i]f the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was pleaded and proven . . . [c]ount one point for each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030, was pleaded and proven after August 1, 2011.” RCW 9.94A.525(21)(d).

“Repetitive domestic violence offense” is defined as follows:

“Repetitive domestic violence offense” means any:

- (a)(i) Domestic violence assault that is not a felony offense under RCW 9A.36.041;
- (ii) Domestic violence violation of a no-contact order under chapter 10.99 RCW that is not a felony offense;
- (iii) Domestic violence violation of a protection order under chapter 26.09, 26.10, 26.26, or 26.50 RCW that is not a felony offense;
- (iv) Domestic violence harassment offense under RCW 9A.46.020 that is not a felony offense; or
- (v) Domestic violence stalking offense under RCW 9A.46.110 that is not a felony offense; or
- (b) Any federal, out-of-state, tribal court, military, county, or municipal conviction for an offense that under the laws of this state would be classified as a repetitive domestic violence offense under (a) of this subsection.

RCW 9.94A.030(42).

Here, “the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was pleaded and proven[,]” felony harassment (domestic violence). *See* RCW 9.94A.525(21). Therefore, the trial court could include current gross misdemeanors in Mr. Roque’s offender score, if they are “a repetitive domestic violence offense as

defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030, was pleaded and proven after August 1, 2011.” RCW 9.94A.525(21)(d).

However, cyberstalking (domestic violence) is not “a repetitive domestic violence offense as defined in RCW 9.94A.030.” RCW 9.94A.525(21)(d); *see also* RCW 9.61.260(1) (cyberstalking). The definition of “repetitive domestic violence offense” does not include cyberstalking (domestic violence). *See* RCW 9.94A.030(42).

Because gross misdemeanor cyberstalking (domestic violence) convictions are not repetitive domestic violence offenses, they cannot be included in the offender score for felony harassment (domestic violence). Therefore, the trial court erred by counting the current gross misdemeanor cyberstalking (domestic violence) convictions in Mr. Roque’s offender score. The case should be reversed and remanded for resentencing.

Issue 4: Whether Mr. Roque was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to the imposition of a ten-year domestic violence no-contact order.

Mr. Roque was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to the imposition of a ten-year domestic violence no-contact order. Therefore, the ten-year domestic violence no-contact order should be stricken.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). “A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The claim is reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, Mr. Roque must prove the following two-prong test:

(1) [D]efense counsel’s representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel’s deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

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

“Trial counsel owe several responsibilities to their clients, including the duty to research relevant law.” *State v. Brown*, 159 Wn. App. 366, 371, 245 P.3d 776 (2011) (*citing Kylo*, 166 Wn.2d at 862).

Courts may impose a crime-related prohibition like a no-contact order as a condition of a sentence. *State v. Armendariz*, 160 Wn.2d 106, 120, 156 P.3d 201 (2007). In general, that prohibition may not exceed the statutory maximum sentence for the crime for which the defendant is convicted. *Id.* A trial court may impose a domestic violence no-contact order under RCW 10.99.050 for the statutory maximum of the crime. *See State v. W.S.*, 176 Wn. App. 231, 243, 309 P.3d 589 (2013).

Felony harassment (domestic violence) is a class C felony. RCW 9A.46.020(2)(b). The maximum sentence for a class C felony is five years. RCW 9A.20.021(1)(c).

Here, because the ten-year domestic violence no-contact order exceeded the statutory maximum sentence of five years, defense counsel's failure to object to the entry of this order was deficient performance. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26) (setting forth the two-part test for ineffective assistance of counsel).

Furthermore, defense counsel's failure to object to the ten-year domestic violence no-contact order prejudiced Mr. Roque. Had defense counsel objected, the trial court would not have entered a ten-year domestic violence no-contact order, but rather, would have entered an order within the five-year statutory maximum for the crime of felony harassment (domestic violence). *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26); *see also*

Armendariz, 160 Wn.2d at 120; *W.S.*, 176 Wn. App. at 243; RCW 9A.46.020(2)(b); RCW 9A.20.021(1)(c).

Based on the foregoing, the case should be remanded for the trial court to strike the ten-year domestic violence no-contact order.

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

Mr. Roque preemptively objects to any appellate costs being imposed against him, should the State be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 385-94, 367 P.3d 612 (2016), this Court’s General Court Order issued on June 10, 2016, and RAP 14.2 (amended effective January 31, 2017).

The trial court imposed only mandatory costs. (CP 146). An order finding Mr. Roque indigent was entered by the trial court, and there has been no known improvement to this indigent status. (CP 159-162). To the contrary, Mr. Roque’s report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. Roque remains indigent. His report as to continued indigency shows that he has no income other receiving Medicaid.

The imposition of costs under the circumstances of this case would be inconsistent with those principles enumerated in *Blazina*. See *State v. Blazina*, 182 Wn.2d 827, 835, 44 P.3d 680 (2015). In *Blazina*, our Supreme Court recognized the “problematic consequences” LFOs inflict on indigent criminal defendants. *Blazina*, 182 Wn.2d at 835-37. To confront these serious problems,

the Court emphasized the importance of judicial discretion: “The trial court must decide to impose LFOs and must consider the defendant’s current or future ability to pay those LFOs based on the particular facts of the defendant’s case.” *Blazina*, 182 Wn.2d at 834. Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” *Id.*

The *Blazina* Court addressed LFOs imposed by trial courts, but the “problematic consequences” are every bit as serious with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then “become[s] part of the trial court judgment and sentence.” RCW 10.73.160(3). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants’ ability to successfully rehabilitate in precisely the same ways the *Blazina* court identified for trial costs.

Although *Blazina* applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene our High Court’s reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion *Blazina* held was essential before imposing monetary obligations. This is particularly true where, as here, the trial

court imposed only mandatory costs and entered an Order of Indigency, and Mr. Roque's Report as to Continued Indigency demonstrates a continued inability to pay costs. (CP 159-162).

Furthermore, the *Blazina* court instructed *all* courts to "look to the comment in GR 34 for guidance." *Blazina*, 182 Wn.2d at 838. That comment provides, "The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis." GR 34 cmt. (emphasis added). The *Blazina* court said, "if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person's ability to pay LFOs." *Blazina*, 182 Wn.2d at 839. Mr. Roque met this standard for indigency. (CP 159-162).

This Court receives orders of indigency "as a part of the record on review." RAP 15.2(e); CP 159-162. "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) indigency standard, requires this Court to "seriously question" this indigent appellant's ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839.

It does not appear to be the burden of Mr. Roque to demonstrate his continued indigency given the newly amended RAP 15.2, since his indigency is

presumed to continue during this appeal. Nonetheless, Mr. Roque's report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. Roque remains indigent.

This Court is asked to deny appellate costs at this time. Pursuant to RAP 14.2, effective January 31, 2017, this Court, a commissioner of this court, or the court clerk are now specifically guided to deny appellate costs if it is determined that the offender does not have the current or likely future ability to pay such costs. RAP 14.2. Importantly, when a trial court has entered an order that the offender is indigent for purposes of the appeal, that finding of indigency remains in effect pursuant to RAP 15.2(f), unless the commissioner or court clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency. *Id.*

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

Appellate costs should not be imposed in this case.

E. CONCLUSION

The evidence presented at trial was insufficient to find Mr. Roque guilty of felony harassment (domestic violence) and cyberstalking (domestic violence) as charged in count 4. His convictions for these two counts should be reversed and the charges dismissed with prejudice.

In the alternative, Mr. Roque's conviction for cyberstalking (domestic violence), as charged in count 4, should be reversed and remanded for a new trial, because the lack of a unanimity instruction violated Mr. Roque's constitutional right to a unanimous jury verdict.

At a minimum, this matter should be remanded for resentencing to correct Mr. Roque's erroneous offender score, and to strike the ten-year domestic violence no-contact order.

Mr. Roque also asks this Court to deny the imposition of any costs against him on appeal.

Respectfully submitted this 9th day of April, 2018.


Jill S. Reuter, WSBA #38374

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

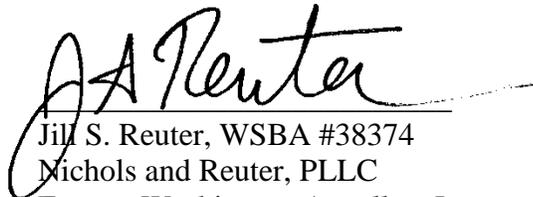
STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 35554-3-III
vs.) Kittitas Co. No. 17-1-00170-7
)
NOE RUIZ ROQUE) PROOF OF SERVICE
)
Defendant/Appellant)
_____)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on April 9, 2018, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Noe Ruiz Roque, DOC No. 386579
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PO Box 769
Connell, WA 99326

Having obtained prior permission, I also served a copy on the Kittitas County Prosecutor's Office at prosecutor@co.kittitas.wa.us using the Washington State Appellate Courts' Portal.

Dated this 9th day of April, 2018.



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April 07, 2018 - 3:03 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35554-3
Appellate Court Case Title: State of Washington v. Noe Ruiz Roque
Superior Court Case Number: 17-1-00170-7

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