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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 35807-1-III

STATE OF WASHINGTON, Respondent,

v.

TALON CUTLER-FLINN, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

How many punches can be separately penalized in a fight? For three separate domestic altercations with his girlfriend, the State charged Talon Cutler-Flinn with fourth degree assault and second degree assault arising from the same conduct. Because the multiplication of charges for conduct that comprised the same unit of prosecution should have merged, or alternatively counted as the same criminal conduct at sentencing, reversal is required. Additional sentencing errors also require remand, and the conviction for attempted first degree murder should be reversed for insufficient evidence of Cutler-Flinn's intent to kill.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: Cutler-Flinn's duplicitous convictions for second degree assault and fourth degree assault on three occasions for the same altercations should merge.

ASSIGNMENT OF ERROR NO. 2: Cutler-Flinn's convictions for second degree assault and fourth degree assault arising from the same altercations on three occasions violate the constitutional prohibition against double jeopardy.

ASSIGNMENT OF ERROR NO. 3: The trial court erred in entering a lifetime no-contact order prohibiting Cutler-Flinn from contacting his unborn child when the order unreasonably interferes with Cutler-Flinn's constitutional right to parent.

ASSIGNMENT OF ERROR NO. 4: The trial court erred in entering a lifetime anti-harassment no-contact order prohibiting Cutler-Flinn from contacting the mother of his ex-girlfriend when she was neither a victim of the crimes, nor the victim of any harassing or threatening conduct by Cutler-Flinn.

ASSIGNMENT OF ERROR NO. 5: The trial court erred in entering a lifetime no-contact order prohibiting Cutler-Flinn from contacting McKay's "family" when the prohibition is not crime-related and is too vague to give notice of what conduct is prohibited.

ASSIGNMENT OF ERROR NO. 6: The trial court's imposition of discretionary legal-financial obligations (LFOs) after sentencing Cutler-Flinn to over 40 years in prison is clearly erroneous.

ASSIGNMENT OF ERROR NO. 7: Insufficient evidence supports the trial court's finding of fact no. 4 that Cutler-Flinn acted with premeditated intent to kill.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether separate acts occurring during the same physical altercation constitute separate crimes.

ISSUE NO. 2: Whether the conditions of sentence are related to the circumstances of the crime and reasonably tailored to furthering the State's legitimate interests.

ISSUE NO. 3: Whether the conditions of sentence give fair notice of the conduct that is prohibited.

ISSUE NO. 4: Whether an adequate *Blazina* inquiry is conducted when the sentencing court asks only whether the defendant is able-bodied, when a 40-year prison sentence is imposed and the trial record reflects a paucity of resources available to the defendant.

ISSUE NO. 5: Whether there is sufficient evidence strongly corroborating the defendant's premeditated intent to kill when the defendant explains to the victim how he could have killed her but did not.

IV. STATEMENT OF THE CASE

The State charged Talon Cutler-Flinn with multiple crimes arising from domestic disputes with his ex-girlfriend, Stacey McKay. CP 92. Specifically, the information alleged that on or between November 7 and

23, 2016, Cutler-Flinn assaulted McKay in the fourth and second degrees; on or between December 15 and 24, 2016, Cutler-Flinn assaulted McKay in the fourth and second degrees; and on January 1, 2017, Cutler-Flinn assaulted McKay in the fourth and second degrees and attempted to murder her in the first degree.¹ CP 92-102. The second degree assaults were premised upon acts of strangulation. CP 92-102.

Cutler-Flinn waived his right to a jury trial and proceeded to a trial by the court. CP 106, I RP 6. He also conceded guilt as to several counts, proceeding to trial only on the assaults and the attempted murder charges. I RP 5.

McKay testified at trial about the incidents. The first occasion occurred around Thanksgiving, when they argued and the fight escalated to physical violence. I RP 40. In that fight, she accused Cutler-Flinn of grabbing her, pinning her to the ground punching her in the stomach, choking her enough to cut off her breathing for a little bit, and then slapping her face hard enough to cause a black eye. I RP 41-43. She was able to fight him off and Cutler-Flinn subsequently told her it would never happen again. I RP 43-45.

¹ The State also charged Cutler-Flinn with first degree kidnapping and with three violations of an order of protection. CP 92-102. Those convictions are not at issue in this appeal.

The second incident occurred in December sometime before Christmas, after they had visited a bar and argued about attention Cutler-Flinn believed she was paying to other men. I RP 46, 49. While they were in the car on the way home, she made a comment about the argument and Cutler-Flinn braked the car, put it in park, and began to hit her. I RP 47. During this altercation, Cutler-Flinn climbed on top of her in the passenger seat and hit her in the face and ribs, choked her, and said she was going to die. I RP 47. He continued to hit her after pulling the car into the garage, but eventually they got out went inside the house and there was no evidence of any further violence once they exited the car. I RP 48. They broke up that night but reconciled the next morning. I RP 48-49.

On Christmas eve, McKay discovered she was pregnant and informed Cutler-Flinn. I RP 108-09. She reported he was happy about the news. I RP 110. Cutler-Flinn had been working at McDonalds, but he quit his job and got a paper route at night so that he could stay home with McKay's daughter during the day while McKay worked. I RP 51. The job was supposed to start the following day, January 1. I RP 52.

The night before, Cutler-Flinn asked her to wake him up at 11:30 so that he had time to arrive. I RP 52. Instead, McKay fell asleep without setting the alarm, and they woke up at 6:44 the following morning. I RP

52. Cutler-Flinn immediately began to yell about being late, and McKay responded that he needed to be responsible for his own life and do things for himself. I RP 52-53. This made Cutler-Flinn angry and he grabbed her, slid her off the bed, and began to hit and choke her. I RP 53-54. According to McKay, he avoided hitting her face so that nobody would know about the assault, but he pinned her down and hit her high on the stomach five times, saying he wanted the baby to die. I RP 54.

As they struggled, Cutler-Flinn put his arm around her neck and asked how long she could go without breathing, counting aloud. I RP 55. McKay reported that she nearly blacked out and urinated in her shorts. I RP 56. Aware that she had lost bladder control, Cutler-Flinn said that's what real fear is. I RP 56. He then bound her, tying her hands behind her back and tying a sock in her mouth as a gag. I RP 57. At his direction, McKay crawled into her daughter's room² where he cleaned her with a baby wipe and changed her shorts. I RP 59. He then took her out to the car they had borrowed from McKay's mother and put her on the back floorboard, telling her she was going to die for real. I RP 59.

Cutler-Flinn began driving. I RP 62. Periodically, McKay was able to work the gag out of her mouth and talk to him, but he would

² McKay's daughter was not at home at the time. I RP 74-75.

replace the gag and tell her to shut up. I RP 62-63. McKay did not know where they were, but at one point she could see mountains outside and knew they were on a small road. I RP 63. She was able to get her hands free and she reached around the seat to try to get the tie around Cutler-Flinn's neck. I RP 63-64. He stopped the car, climbed into the back seat, and began to hit and choke her again. I RP 64. That time, McKay felt like she passed out because she came to and momentarily did not remember what had happened. I RP 65. Cutler-Flinn asked her if she was good, then retied her hands and continued driving. I RP 65. Later he told her that she had turned blue and that's when he let go; if he hadn't, she would have turned purple and died. I RP 69. She also lost control of her bladder again, and Cutler-Flinn pulled the car over to clean her again and put a pair of his jeans on her. I RP 70. He threw her soiled pants over a fence on the side of the road. I RP 70.

Eventually, Cutler-Flinn reached the end of the road and stopped the car. I RP 66. He opened the back door and took McKay out, placing her over his shoulder, and he began to walk. I RP 66. They were out in the country, walking toward a field, and McKay described thorns that cut her skin and got caught in her hair as Cutler-Flinn walked through them. I RP 66-67. Eventually he threw her down in the snow and walked away, but then returned to take off her engagement ring and told her he intended

to keep a promise he had made to give the ring to her grandmother if they did not get married. I RP 67.

Cutler-Flinn then walked far enough away that McKay could not hear him anymore, and she began to panic because her hands were tied too tight to untie herself. I RP 68. She began to yell to Cutler-Flinn for help, and he returned. I RP 68. Although he told her he had begun to drive away before deciding to come back, McKay did not believe him because he came back as soon as she started yelling. I RP 68. He put her over his shoulder again and carried her back to the car, telling her that they had all day and had just gotten started. I RP 68-69.

At McKay's request, Cutler-Flinn drove to a store near her house to buy her a Red Bull. I RP 70-71. Then, he took her home. I RP 71. McKay spent most of the day playing video games. I RP 72. McKay had been scheduled to work that day, but Cutler-Flinn called her employer to report that she would not be able to go in that day. I RP 74. At one point, McKay's mother came over to retrieve her credit card and spoke with Cutler-Flinn, and then left again. I RP 72. Later in the evening, they were hungry and Cutler-Flinn left her alone to go to Walmart to attempt to cash a check, but was unsuccessful. I RP 73. He returned home to get her, and they ran more errands before returning home to watch TV. I RP 73-74,

76. Eventually, McKay persuaded Cutler-Flinn to let her go to her mother's house to give her daughter a kiss goodnight. I RP 76-77. When she got to her mother's house, she told her mother what had happened, and her mother called the police. I RP 78.

The responding police officer escorted McKay to the hospital, where numerous marks and bruises on her body were documented. I RP 81-87. Police were later able to retrace the route taken that day and recover a number of items that corroborated McKay's story, including the soiled underwear, a bloody sock on the vehicle floorboard, part of a purse strap McKay had described being used to tie her, and the pants Cutler-Flinn threw over the fence. I RP 196-97, 198, 200, 209, 212, 214, 222-23, 235-36. They also found footprints and indentations in the snow in a remote area matching McKay's description, and retrieved some hairs from the snow. I RP 223-28.

At the conclusion of the trial, the trial court found Cutler-Flinn guilty on all counts. I RP 285-86. It entered findings of fact and conclusions of law in support of its verdict. I RP 155. The finding pertinent to this appeal is Finding no. 4,³ which states:

³ The findings of fact contain a series of six preliminary findings of fact numbered 1-6, followed by conclusory findings that the evidence satisfied the elements of each individual charge and that the conduct in each charge constituted separate and distinct

4. A central question presented in this case is whether there was sufficient evidence provided to the Court which would support a finding that the Defendant abducted Ms McKay with the intent to kill her. In this regards the Court finds that the evidence is clear and irrefutable that the Defendant so intended. The Defendant's own statements to the victim prove this: "this time she was going to die for real," his statements about "needing a shovel," his statement that she would soon "meet God," and that she would "never see her child again."

The prior incidents consisted of varying degrees of assaultive behavior BUT the incidents on the lonely road on January 1, 2017 were different. They were intended to be final. This time the Defendant strangled his victim to the point of unconsciousness: this time he strangled her until, in his own words as related by Ms McKay, she turned "blue" and soiled herself. The Court finds that the evidence supports a finding that, in fact, the Defendant believed that at that point he had killed Ms McKay. The Defendant demonstrated this belief when he waited after he had strangled her and when she recovered asked "You good?"

As finder of fact, the Court finds that the testimonial, physical, and circumstantial evidence, demonstrate the Defendant's clear, premeditated intent to cause the death of Stacey McKay.

CP 156-57.

At sentencing, Cutler-Flinn argued that the assaults that occurred on the same date, as well as the kidnapping and attempted murder charges,

conduct from the other charges that are also numbered 1-11. CP 156-59. For purposes of this appeal, because the second findings are actually conclusions of law, and to avoid confusion in referencing different findings that are identified by the same number, Cutler-Flinn has only specifically assigned error to Finding of Fact no. 4 and separately challenges the conclusion that each of the incidents constitutes separate and distinct conduct as a question of law.

constituted the same criminal conduct. CP 148, 149-50. Counsel also asked the court to impose a mitigated sentence downward based upon the multiple offense policy mitigator. CP 150-51. Cutler-Flinn also allocated and expressed remorse for his conduct and responsibility for what happened. I RP 329-33.

The court found the criminal acts to be separate and distinct. I RP 294. Accordingly, the court imposed a consecutive sentences of 68 months and 399 months on the kidnapping and attempted murder charges respectively, with 84 months for the second degree assault counts running concurrently, consecutive to 364 days for the three fourth degree assault counts (running concurrently to each other), and consecutive to another 364 days for the three protection order violations (running concurrently to each other), for a total sentence of 491 months less 2 days. CP 164. These sentences were premised upon scores of 12 for the attempted murder and 14 for the assaults, including the misdemeanor assault convictions in the score as repetitive domestic violence offenses. CP 127, 136, 150. On the face of the judgment and sentence, the court entered a lifetime no contact order protecting “the victim and her family.” CP 163. It also entered a separate harassment no-contact order prohibiting contact with Lori McKay, the victim’s mother, for life. CP 172-73. Prior to imposing LFOs, the court stated:

With respect to the legal financial obligations, the testimony at trial was that you're an able bodied individual, but for incarceration, you're able to work. Is that accurate? Given that, I'm gonna impose the legal financial obligations as set forth by the State.

I RP 335. Without further inquiry, it imposed a total of \$2,815.00 in LFOs including multiple discretionary obligations, including \$150 in sheriff service fees, \$750 in court appointed attorney fees, \$100 in domestic violence assessment, and \$15 for a DV protection order violation assessment. CP 177. Cutler-Flinn did not object.

Cutler-Flinn now appeals and has been found indigent for that purpose. CP 174, 189.

V. ARGUMENT

Multiple errors affect the convictions, offender score, and sentence conditions imposed in this case. For the reasons set forth below, the convictions for fourth degree assault and attempted murder in the first degree should be vacated and dismissed, and the case should be remanded for resentencing.

1. The convictions for fourth degree assault violate double jeopardy when Cutler-Flinn was also convicted of second degree assault for the same altercations because the acts on each date constitute a single course of conduct.

Under the federal and Washington State constitutions, a person cannot receive multiple punishments for the same conviction without running afoul of the prohibition against double jeopardy. U.S. Const. Amend. V; Wash. Const. art. I, § 9; *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 980, 329 P.3d 78 (2014). Alleged double jeopardy violations are reviewed *de novo*. *Id.* at 979-80 (citing *State v. Hughes*, 166 Wn.2d 675, 681, 212 P.3d 558 (2009)).

The guarantee against double jeopardy protects persons from multiple punishments for the same offense. *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995) (citing *Wahlen v. U.S.*, 445 U.S. 684, 688, 100 S. Ct. 1432, 1436, 63 L.Ed.2d 715 (1980)). Double jeopardy prevents cumulative punishment if offenses are legally identical and are based on the “same act or transaction.” *State v. Gocken*, 127 Wn.2d 95, 101, 896 P.2d 1267 (1995) (quoting *Blockburger v. U.S.*, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306 (1932)). Offenses are not legally identical if each offense contains an element not contained in the other. *Gocken*, 127 Wn.2d at 101.

Where offenses are not legally identical, but where the same conduct violates multiple statutory violations, the merger doctrine may apply. Merger is a doctrine of statutory interpretation “used to determine

whether the Legislature intended to impose multiple punishments for a single act that violates several statutory provisions.” *State v. Michielli*, 132 Wn.2d 229, 238, 937 P.2d 587, 592 (1997) (quoting *State v. Vladovic*, 99 Wn.2d 413, 419 n. 2, 662 P.2d 853 (1983)). The court looks to the language and intent of the statutes proscribing the offenses to determine whether multiple offenses may be punished cumulatively. *Calle*, 125 Wn.2d at 777. When the conduct of one offense elevates the degree of the second offense, the offenses merge to avoid double jeopardy. *Vladovic*, 99 Wn.2d at 419.

When a defendant is convicted of multiple counts of the same statutory provision, courts evaluate what unit of prosecution the legislature intended to be punishable under the statute. *State v. Tili*, 139 Wn.2d 107, 113, 985 P.2d 365 (1999) (quoting *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998)). The unit of prosecution may be a single act, or a course of conduct. *State v. Morales*, 174 Wn. App. 370, 384, 298 P.3d 791 (2013). In answering whether a statute penalizes a discrete act or a continuing course of conduct, the courts have noted that “a unit of prosecution that results in additional charges based on variables that are secondary can result in convictions that are disproportionate to an offender’s conduct.” *Morales*, 174 Wn. App. at 387-88. Moreover, a defendant should not be convicted “for every punch thrown in a fistfight.”

Villanueva-Gonzalez, 180 Wn.2d at 985 (quoting *Tili*, 139 Wn.2d at 116).

When the statute is ambiguous as to the unit of prosecution, the rule of lenity applies and the construction that favors the defendant should be adopted. *Villanueva-Gonzalez*, 180 Wn.2d at 984; *Tili*, 139 Wn.2d at 113; *Adel*, 136 Wn.2d at 364-35.

In *Villanueva-Gonzalez*, the Washington Supreme Court considered whether convictions for fourth degree assault and second degree assault that arose from the same altercation violated double jeopardy. There, the defendant pulled his girlfriend out of a room and headbutted her, breaking her nose, and then grabbed her around the neck and held her down, causing her to have difficulty breathing. *Villanueva-Gonzalez*, 180 Wn.2d at 978. A jury convicted him of fourth degree assault for grabbing her neck, and second degree assault for headbutting her. *Id.* at 979.

In concluding that the two convictions violated double jeopardy, the *Villanueva-Gonzalez* Court first rejected the conventional *Blockburger* “same elements” test in favor of the “unit of prosecution” test to evaluate what act or course of conduct the legislature intended to punish. *Id.* at 981-82, 986. It declined to adopt a bright-line rule to evaluate whether multiple assaultive acts constitute a single course of conduct, instead

adopting a totality of the circumstances test. *Id.* at 985. It identified helpful factors, including the length of time over which the acts took place, whether they occurred in the same location, the intent or motivation for the various acts, whether the acts were interrupted by intervening events, and whether there was an opportunity for the defendant to reconsider his actions. *Id.* However, it also expressly rejected the notion that a mechanical balancing of the factors should drive the determination, as well as the idea that any one factor is dispositive. *Id.*

Applying the *Villanueva-Gonzalez* “totality of the circumstances” test in the present case results in the conclusion that each altercation occurring on a single date constituted the same course of conduct. During the incident in November, the evidence showed that Cutler-Flinn grabbed McKay and pinned her to the ground, hit her about the body several times, choked her, and slapped her in the face, at which point McKay got up and the incident ended. RP 40-44; CP 123. Similarly, during the December incident, the fight began in the car when they returned home from the bar and concluded when McKay got out of the car and went into the house. During that incident, again, Cutler-Flinn apparently hit McKay and climbed on top of her in the car seat to choke her. RP 46-48; CP 123. In both cases, the assaultive acts took place over a short period of time as part of a single altercation that continued uninterrupted. Under

Villanueva-Gonzalez, both incidents constituted a single course of conduct and Cutler-Flinn's convictions for fourth degree assault arising from the same incidents violate double jeopardy. Accordingly, they must be vacated.

With respect to the January 1 incident, the evidence established two separate acts of strangulation, the first occurring in the home and the second occurring sometime later when McKay was bound in the car and Cutler-Flinn was driving her into the mountains. RP 54-56, 64-65. Both were accompanied by Cutler-Flinn hitting McKay. But the State expressly relied upon only the first altercation in the home to support the charges of fourth and second degree assault, relying upon the second act of strangulation to support the charge of attempted murder. CP 123-24. That altercation, like the incidents in November and December, occurred over a short period of time in their bedroom without interruption. Accordingly, the third conviction for fourth degree assault likewise comprises the same course of conduct as the act of strangulation that occurred in the home and must be vacated.

In all three instances, as in *Villanueva-Gonzalez*, the State sought to multiply the punishments imposed on Cutler-Flinn for what amounted to individual punches in a fistfight. Because the unit of prosecution is the

entire altercation, and not each discrete act committed within it, two assault convictions for each altercation impermissibly imposes multiple punishments for the same crime. Accordingly, the lesser offenses, the three fourth degree assault convictions, must be vacated.

2. The trial court's imposition of no-contact orders against McKay's mother, her "family," and Cutler-Flinn's child, are not crime-related and lack justification in law.

Courts have authority to impose crime-related prohibitions under the Sentencing Reform Act. RCW 9.94A.505(9); RCW 9.94A.703(3)(f). Crime-related prohibitions are an abuse of discretion when there is no evidence in the record "that the circumstances of the crime related to the community custody condition." *State v. Irwin*, 191 Wn. App. 644, 656-57, 364 P.3d 830 (2015).

a. The no-contact restriction and associated anti-harassment order against Lori McKay is not crime-related and not authorized by statute.

The sentencing court has statutory authority to impose a no-contact order under the Sentencing Reform Act as a crime-related prohibition. RCW 9.94A.505(9); *State v. Armendariz*, 160 Wn.2d 106, 114, 156 P.3d

201 (2007). The order may extend no longer than the statutory maximum term for the crime. *Armendariz*, 160 Wn.2d at 119.

Additionally, where the defendant is convicted of a domestic violence offense and a condition of the sentence restricts the defendant's ability to contact the victim, the condition "shall be recorded" and a written copy of the order provided to the victim. RCW 10.99.050(1). In such cases, the issuance of a separate domestic violence no-contact order is the mechanism of "recording" the no-contact condition of sentence. *State v. Granath*, 190 Wn.2d 548, 555, 415 P.3d 1179 (2018).

Neither of these sources of authority permit the lifetime no-contact order entered as to Lori McKay, the victim's mother. She was not the victim of the offenses, so the order was not authorized under 10.99.050(1). Moreover, prohibiting contact with Lori McKay has no ascertainable relationship to the circumstances of the crime, as there is no indication that contact with her had anything to do with its commission. She testified at trial about her suspicions of domestic violence, her previous conversations about them with her daughter, the bruises she saw, and her innocuous contact with Cutler-Flinn on the date of the offense. RP 144-57. No evidence suggested any more than a collateral relationship with the events of the crime by virtue of the fact that the victim was her daughter; she did

not witness them, nor does the record suggest was she threatened or harassed by Cutler-Flinn at any point. Nothing in the circumstances of the crime suggest that such an order is necessary for Lori McKay's safety. Absent such a showing, the no-contact condition is not crime-related and must be stricken.

Moreover, the court's entry of a separate anti-harassment no-contact order lacks any basis in law. Anti-harassment no-contact orders are authorized under chapter 10.14 RCW, which sets forth specific proceedings and standards applicable to granting such orders. A party may seek an anti-harassment order by petition to the court alleging harassment. RCW 10.14.040. A temporary order may be entered *ex parte*, but a permanent order may only be issued after a hearing based upon a finding by a preponderance of the evidence that the respondent has committed unlawful harassment against the petitioner. RCW 10.14.080. None of these procedures preceded the sentencing court's entry of the anti-harassment order in this case.

Neither was there any showing of harassment by Cutler-Flinn directed toward Lori McKay that would establish a substantive basis for such relief. Unlawful harassment consists of "a knowing and willful course of conduct directed at a specific person which seriously alarms,

annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose.” RCW 10.14.020(2). At no point did Lori McKay describe any such conduct by Cutler-Flinn toward her.

Because the sentence condition prohibiting contact with Lori McKay is not crime-related, and because the separate anti-harassment order prohibiting Cutler-Flinn from contacting Lori McKay for life satisfies neither the procedural nor the substantive requirements for such an order, the condition and the order must be vacated.

- b. The no-contact restriction against McKay’s “family” is unconstitutionally vague.

Community custody conditions are unconstitutionally vague if they do not describe the defendant’s obligation with sufficient definiteness that an ordinary person can understand what is prohibited, or fail to provide sufficient standards of guilt to prevent arbitrary enforcement. *See State v. Bahl*, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008). Where resolution of the challenge to a condition involves a legal question that does not require further factual development, pre-enforcement review of the condition is appropriate. *Id.* at 751-52. Community custody conditions are not presumed to be valid, and they will be reversed if they are manifestly unreasonable. *Id.* at 753. Community custody conditions may be

challenged as vague for the first time on appeal. *State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712 (2018).

Here, the sentence condition prohibits Cutler-Flinn from having contact with McKay's "family" for life. The condition does not define McKay's "family" or provide any standard to ascertain which individuals are subject to the prohibition, leaving Cutler-Flinn with inadequate standards to guide his conduct.

"Family" can be defined narrowly or broadly as a nuclear unit of parents and children living in the same household, or it may refer more broadly to a larger group of individuals sharing ancestry or connections through marriage. *See generally* Merriam-Webster Dictionary, *available online at* <https://www.merriam-webster.com/dictionary/family> (last viewed August 9, 2018); *see also* Black's Law Dictionary (10th ed. 2014), "family." "Family" may include parents, children, grandparents, cousins, step-family, former spouses, unmarried cohabitants, nieces and nephews, their spouses, and so on, to a nearly infinite degree.

Because the condition does not establish the nature or degree of relationship required to constitute "family," the authority to determine who constitutes McKay's family or not and therefore whom Cutler-Flinn may lawfully contact is delegated to the community custody officer and

creates a substantial risk of arbitrary enforcement. *See Padilla*, 190 Wn.2d at 682 (even though condition defined “pornography,” determination of whether nude images such as Michelangelo’s David or simulated sex on Game of Thrones constituted “pornography” could lie with the officer’s personal judgment as to whether the material is titillating). Here, whether Cutler-Flinn could lawfully contact McKay’s second cousin, or the child of a long-term ex-boyfriend, or even her grandparents, is unclear from the order and would largely depend upon the individual determination of a community custody officer.

In a small community, where people often share more connections with each other through blood and various relationships than in larger and more diverse urban settings, the challenge of evaluating who can permissibly be spoken to and who must be avoided poses a significant risk. Because the prohibition against contacting McKay’s “family” does not establish an adequate standard to evaluate who constitutes “family” for purposes of the condition, and thereby creates a risk of arbitrary enforcement, the condition is impermissibly broad and must be stricken.

- c. The no-contact restriction against Cutler-Flinn’s child with McKay is neither crime-related nor narrowly drawn.

Crime-related prohibitions are viewed with skepticism when they affect a fundamental right, such as the right to parent one's children. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008); *State v. Ancira*, 107 Wn. App. 650, 653-54, 27 P.3d 1246 (2001). Washington courts are reluctant to approve no-contact restrictions with individuals who are not themselves the victims of the crime. *Warren*, 165 Wn.2d at 33. To support such a condition, evidence in the record must show that prohibiting Cutler-Flinn from contacting his child is reasonably necessary for his child's safety. *Ancira*, 107 Wn. App. at 654; *State v. Letourneau*, 100 Wn. App. 424, 439, 997 P.2d 436 (2000). Additionally, the restriction must be narrowly drawn, with no reasonable alternative way to achieve the State's interest. *Warren*, 165 Wn.2d at 34-35.

The record in the present case reflects no asserted State interest supporting the prohibition. There is no evidence that Cutler-Flinn has ever abused children in any way, nor that he presents a risk of harm to them. Absent such evidence, the condition is not reasonably necessary to prevent harm to the child. *See Letourneau*, 100 Wn. App. at 439. Nor is the risk that the child may witness domestic violence sufficient to justify the severe sanction of a lifetime prohibition against parenting one's own children. *See Ancira*, 107 Wn. App. at 654-55.

The appropriate forum to address a parent's contact with children is family or dependency court. *Ancira*, 107 Wn. App. at 655-56. In the present case, the lifetime prohibition against contact with Cutler-Flinn's biological child, who was not a victim of the crime, is not reasonably related to a legitimate State interest in preventing harm to the child and unlawfully interferes with his fundamental right to parent the child. The condition must be stricken.

3. Assessing discretionary LFOs after imposing a 40-year prison sentence and after inquiring solely whether Cutler-Flinn was able-bodied at the time of sentencing was clearly erroneous.

In general, the court's exercise of discretion to impose LFOs is reviewed for abuse of that discretion. *State v. Clark*, 191 Wn. App. 369, 372, 362 P.3d 309 (2015), *review granted in part and remanded on other grounds*, 187 Wn.2d 1009 (2017). However, the legal question of whether a sentencing court's inquiry is adequate under *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015) is reviewed *de novo*. *State v. Glover*, __ Wn. App. __, 423 P.3d. 290, slip op. no. 49944-4-II (August 7, 2018). Moreover, the court may only impose discretionary LFOs when it determines the defendant has the ability to pay them, a determination which is reviewed under a clearly erroneous standard. *State v. Bertrand*,

165 Wn. App. 393, 403-04, 267 P.3d 511 (2011), *review denied*, 175 Wn.2d 1014 (2012).

In *Glover*, as in this case, the sentencing court imposed discretionary LFOs based solely on a colloquy about the defendant's work history and ability to work. *Slip op.* at 5. While these questions are certainly among the factors courts are to consider under *Blazina*, that case requires the sentencing court to also consider other debts, assets, as well as whether the defendant is presently indigent. *Id.*, *slip op.* at 6. Nothing in the record reflects that the sentencing court considered these required factors here, even though it was aware from the trial testimony that Cutler-Flinn had not been consistently employed and needed to borrow McKay's mother's car and credit card. *Blazina* also compels the court to consider the effects of incarceration on the defendant's ability to pay discretionary LFOs. 182 Wn.2d at 838. The sentencing court here imposed a sentence of over 40 years, at the conclusion of which Cutler-Flinn will be in his 60s with little to no work history.

Here, the record reflects that the sentencing court's inquiry was plainly inadequate under the express requirements of *Blazina*. Moreover, the court's conclusion that Cutler-Flinn had the ability to pay discretionary LFOs is plainly erroneous in light of the information presented during the

trial as well as the court's finding that Cutler-Flinn was indigent for appeal purposes. The discretionary LFOs should, accordingly, be stricken.

4. Insufficient evidence supports the trial court's finding that Cutler-Flinn acted with intent to kill McKay when he repeatedly stopped short of killing her and eventually took her home.

The State must prove every element of a charge beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983). In a challenge to the sufficiency of the evidence, the reviewing court considers whether any rational trier of fact could have found guilt beyond a reasonable doubt, viewing the evidence in the light most favorable to the State. *State v. Roth*, 131 Wn. App. 556, 561, 128 P.3d 114 (2006). Circumstantial evidence is as reliable as direct evidence and the reviewing court defers to the trier of fact on questions of credibility, resolving conflicting evidence, and persuasiveness. *State v. A.T.P.-R.*, 132 Wn. App. 181, 184-85, 130 P.3d 877 (2006).

In addition, the trial court's findings must be supported by substantial evidence in the record. *State v. Luther*, 157 Wn.2d 63, 78, 134 P.3d 205 (2006). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth or correctness of the matter. *ZDI Gaming, Inc. v. State ex rel. Wash. State Gambling Comm'n*, 151 Wn. App. 788,

807, 214 P.3d 938 (2009), *affirmed*, 173 Wn.2d 608 (2012). When findings are erroneously labeled as conclusions and vice versa, the reviewing court evaluates them as they actually are, not as how they are labeled. *Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wn. App. 408, 417-18, 225 P.3d 448, *review denied*, 169 Wn.2d 1014 (2010) (“A finding of fact is an assertion that evidence shows something occurred or exists, independent of an assertion of its legal effect.”). The findings of fact must support the elements of the crime beyond a reasonable doubt. *State v. Alvarez*, 105 Wn. App. 215, 220, 19 P.3d 485 (2001).

In the case of the specific intent to kill, evidence is to be gathered from all of the circumstances of the case, including the infliction of injury. *State v. Mitchell*, 65 Wn.2d 373, 374, 397 P.2d 417 (1964). A person commits an attempted first degree murder when, with premeditated intent to cause another’s death, he takes a substantial step toward causing the person’s death by means of conduct that is strongly corroborative of the alleged criminal purpose. *State v. Barajas*, 143 Wn. App. 24, 36, 177 P.3d 106 (2007), *review denied*, 164 Wn.2d 1022 (2008); *State v. Price*, 103 Wn. App. 845, 851-52, 14 P.3d 841 (2000), *review denied*, 143 Wn.2d 1014 (2001). Typically, in cases where the accused has fired a gun at the victim, the circumstances are sufficient to establish intent to kill. *See, e.g.*,

State v. Elmi, 138 Wn. App. 306, 313-14, 156 P.3d 281 (2007), *affirmed*, 166 Wn.2d 209 (2009); *Price*, 103 Wn. App. at 852-53.

Here, while the evidence certainly supports an inference that Cutler-Flinn intended to terrorize McKay, his actions are not strongly corroborative of an intent to kill her. To the contrary, despite having ample opportunity to do so, Cutler-Flinn consistently and repeatedly refrained from taking the additional step that would result in McKay's death. The trial court's finding no. 4 relied heavily upon Cutler-Flinn's words and his act in strangling McKay to unconsciousness as evidence of his intent to kill her. But the record reflects that Cutler-Flinn deliberately stopped short of killing McKay when she passed out, telling her that if he had continued to hold her throat she would have turned purple and died. It also shows that not only did Cutler-Flinn not abandon McKay in the snow to die like he said he was going to, even McKay did not believe him. Indeed, people often threaten to kill other people without intending to actually do so, for the purpose of inflicting fear. *See, e.g., State v. C.G.*, 150 Wn.2d 604, 610, 80 P.3d 594 (2003) (discussing the primary harm of threats to kill as engendering fear). The saying goes, "Talk is cheap," particularly when the related conduct demonstrates that the speaker is insincere.

While there is ample evidence that Cutler-Flinn committed a number of serious, violent crimes against McKay, the charge of attempted first degree murder required proof beyond a reasonable doubt that he planned and intended to kill her. Viewing the circumstances as a whole, Cutler-Flinn's actions were not strongly corroborative of a premeditated intent to kill, and the evidence is insufficient to convince a fair-minded person that they were. Because the evidence is insufficient to support the trial court's finding that Cutler-Flinn acted with premeditated intent to kill McKay, the attempted first degree murder conviction must be reversed.

5. Appellate costs should not be imposed.

In the event Cutler-Flinn does not prevail in this proceeding, appellate costs should not be imposed. Cutler-Flinn has been found indigent for this proceeding, and that presumption continues throughout the appeal. RAP 15.2(f). His report as to continued indigency is filed contemporaneously with this brief, as required by the court's General Order dated June 10, 2016. Absent a showing of a significant improvement in his financial circumstances since she was determined to be indigent, a cost award would be inappropriate under RAP 14.2.

VI. CONCLUSION

For the foregoing reasons, Cutler-Flinn respectfully request that the court REVERSE his conviction for attempted first degree murder, VACATE his convictions for fourth degree assault, and REMAND the case for resentencing with instructions to STRIKE the unsupported conditions of sentence and discretionary LFOs.

RESPECTFULLY SUBMITTED this 31 day of August, 2018.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed and sworn this 31 day of August, 2018 in Walla Walla, Washington.



Andrea Burkhart

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