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COA NO. 36832-7-III

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

STATE OF WASHINGTON,

Respondent,

v.

VLADIMIR BORISOV,

Appellant.

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

The Honorable Gary Libey, Judge

BRIEF OF APPELLANT (CORRECTED)

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TABLE OF CONTENTS

	Page
A. <u>ASSINGMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	3
C. <u>ARGUMENT</u>	8
1. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT VIOLATED BORISOV’S DUE PROCESS RIGHT TO A FAIR TRIAL.	8
a. The prosecutor committed misconduct in misstating the voluntary intoxication standard.	8
b. The error is preserved for appeal and reversal is required because the misconduct prejudiced the outcome.	12
c. In the alternative, counsel was ineffective in failing to object to the misconduct or request curative instruction.	14
2. THE COURT EXCEEDED ITS STATUTORY AUTHORITY IN IMPOSING A 364-DAY SENTENCE FOR A MISDEMEANOR CONVICTION.	17
3. BECAUSE DRUGS DID NOT CONTRIBUTE TO THE OFFENSE, THE CONDITION REQUIRING EVALUATION AND TREATMENT FOR SUBSTANCE ABUSE MUST BE NARROWED TO EVALUATION AND TREATMENT FOR ALCOHOL.	19
4. THE COURT ORDER REQUIRING BORISOV TO READ AND REPORT ON BOOKS OF DOMESTIC VIOLENCE VIOLATES HIS FIRST AMENDMENT RIGHT TO FREE SPEECH.	22

TABLE OF CONTENTS (CONT'D)

Page

a. The judge's personal investigation violated the appearance of fairness doctrine, the Code of Judicial Conduct, and ER 605.....	22
b. The sentencing condition must be stricken because it does not tend to prevent the commission of future crimes.	27
c. The sentencing condition must be stricken because it violates Borisov's First Amendment right to free speech.	30
D. <u>CONCLUSION</u>	35

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Adoption of B.T.</u> 150 Wn.2d 409, 78 P.3d 634 (2003).....	26
<u>In re Estate of Hayes</u> 185 Wn. App. 567, 342 P.3d 1161 (2015).....	27
<u>In re Pers. Restraint of Carle</u> 93 Wn.2d 31, 604 P.2d 1293 (1980).....	18
<u>In re Pers. Restraint of Cross</u> 180 Wn.2d 664, 327 P.3d 660 (2014).....	15
<u>In re Pers. Restraint of Glasmann</u> 175 Wn.2d 696, 286 P.3d 673 (2012).....	13, 14
<u>In re Pers. Restraint of Rainey</u> 168 Wn.2d 367, 229 P.3d 686 (2010).....	31, 35
<u>In re Pers. Restraint of Swagerty</u> 186 Wn.2d 801, 383 P.3d 454 (2016).....	18
<u>In re Postsentence Review of Leach</u> 161 Wn.2d 180, 163 P.3d 782 (2007).....	18
<u>Slattery v. City of Seattle</u> 169 Wash. 144, 13 P.2d 464 (1932)	13
<u>State v. Allen</u> 182 Wn.2d 364, 341 P.3d 268 (2015).....	13
<u>State v. Bahl</u> 164 Wn.2d 739, 193 P.3d 678 (2008).....	32
<u>State v. Barklind</u> 12 Wn. App. 818, 532 P.2d 633 (1975) <u>aff'd</u> , 87 Wn.2d 814, 557 P.2d 314 (1976).....	28

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>WASHINGTON CASES (CONT'D)</u>	
<u>State v. Case</u> 49 Wn.2d 66, 298 P.2d 500 (1956).....	13
<u>State v. Coates</u> 107 Wn.2d 882, 735 P.2d 64 (1987).....	10
<u>State v. Conklin</u> 79 Wn.2d 805, 489 P.2d 1130 (1971).....	10, 12
<u>State v. Davenport</u> 100 Wn.2d 757, 675 P.2d 1213 (1984).....	8, 13
<u>State v. Deskins</u> 180 Wn.2d 68, 322 P.3d 780 (2014).....	27, 28
<u>State v. Emery</u> 174 Wn.2d 741, 278 P.3d 653 (2012).....	13, 15
<u>State v. Fisher</u> 165 Wn.2d 727, 202 P.3d 937 (2009).....	12
<u>State v. Fleming</u> 83 Wn. App. 209, 921 P.2d 1076 (1996) <u>review denied</u> , 131 Wn.2d 1018, 936 P.2d 417 (1997)	12
<u>State v. Gotcher</u> 52 Wn. App. 350, 759 P.2d 1216 (1988).....	9
<u>State v. Halstein</u> 122 Wn.2d 109, 857 P.2d 270 (1993).....	30
<u>State v. Horton</u> 116 Wn. App. 909, 68 P.3d 1145 (2003).....	16
<u>State v. Johnson</u> 180 Wn. App. 318, 327 P.3d 704 (2014).....	19

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>WASHINGTON CASES (CONT'D)</u>	
<u>State v. Jones</u> 118 Wn. App. 199, 76 P.3d 258 (2003).....	20, 21
<u>State v. K.H.-H.</u> 185 Wn.2d 745, 374 P.3d 1141 (2016).....	30, 31, 32, 33, 34
<u>State v. Kinzle</u> 181 Wn. App. 774, 326 P.3d 870 (2014) <u>review denied</u> , 181 Wn.2d 1019, 337 P.3d 325 (2014)	21
<u>State v. Kruger</u> 116 Wn. App. 685, 67 P.3d 1147 <u>review denied</u> , 150 Wn.2d 1024, 81 P.3d 120 (2003)	10, 12
<u>State v. Kyllo</u> 166 Wn.2d 856, 215 P.3d 177 (2009).....	15
<u>State v. Motter</u> 139 Wn. App. 797, 162 P.3d 1190 (2007).....	20
<u>State v. Munoz-Rivera</u> 190 Wn. App. 870, 361 P.3d 182 (2015).....	21
<u>State v. Neidigh</u> 78 Wn. App. 71, 95 P.2d 423 (1995).....	15
<u>State v. Olsen</u> 189 Wn.2d 118, 399 P.3d 1141 (2017).....	34
<u>State v. Padilla</u> 190 Wn.2d 672, 416 P.3d 712 (2018).....	30
<u>State v. Paulson</u> 131 Wn. App. 579, 128 P.3d 133 (2006).....	18
<u>State v. Richard</u> 4 Wn. App. 415, 482 P.2d 343 (1971).....	10

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>WASHINGTON CASES (CONT'D)</u>	
<u>State v. Riles</u> 135 Wn.2d 326, 957 P.2d 655 (1998).....	31
<u>State v. Riley</u> 121 Wn.2d 22, 846 P.2d 1365 (1993).....	31
<u>State v. Romano</u> 34 Wn. App. 567, 662 P.2d 406 (1983).....	25
<u>State v. Ross</u> 129 Wn.2d 279, 916 P.2d 405 (1996).....	30
<u>State v. Sanchez Valencia</u> 169 Wn.2d 782, 239 P.3d 1059 (2010).....	20, 31
<u>State v. Saunders</u> 132 Wn. App. 592, 132 P.3d 743 (2006).....	18
<u>State v. Shelton</u> 71 Wn.2d 838, 431 P.2d 201 (1967).....	10
<u>State v. Summers</u> 60 Wn.2d 702, 375 P.2d 143 (1962).....	29
<u>State v. Thierry</u> 190 Wn. App. 680, 360 P.3d 940 (2015) <u>review denied</u> , 185 Wn.2d 1015, 368 P.3d 171 (2016).....	16
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	15
<u>State v. Walker</u> 182 Wn.2d 463, 341 P.3d 976 (2015).....	12
<u>State v. Warnock</u> 174 Wn. App. 608, 299 P.3d 1173 (2013).....	19, 20, 21

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>WASHINGTON CASES (CONT'D)</u>	
<u>State v. Warren</u> 165 Wn.2d 17, 195 P.3d 940 (2008).....	31
<u>State v. Williams</u> 97 Wn. App. 257, 983 P.2d 687 (1999).....	28
<u>Swak v. Dep't of Labor & Indus.</u> 40 Wn.2d 51, 240 P.2d 560 (1952).....	26
<u>Vandercook v. Reece</u> 120 Wn. App. 647, 86 P.3d 206 (2004).....	27
<u>FEDERAL CASES</u>	
<u>Ashcroft v. Free Speech Coalition</u> 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).....	30
<u>Burns v. Gammon</u> 260 F.3d 892 (8th Cir. 2001)	16
<u>Greer v. Miller</u> 483 U.S. 756, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987).....	8
<u>Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31</u> ___ U.S. ___, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018).....	30
<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	14, 15
<u>United States v. Clark</u> 918 F.2d 843 (9th Cir. 1990)	32
<u>United States v. Consuelo-Gonzalez</u> 521 F.2d 259 (9th Cir. 1975)	32
<u>United States v. Keys</u> 133 F.3d 1282 (9th Cir. 1998)	32

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>OTHER JURISDICTIONS</u>	
<u>In re Richardson</u> 247 N.Y. 401, 160 N.E. 655 (N.Y. 1928).....	25
<u>Redewill v. Superior Court of Maricopa County</u> 43 Ariz. 68, 29 P.2d 475 (Ari. 1934)	29
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
13 Washington Practice: Criminal Practice and Procedure § 4505 (3d ed. 2004)	15
CJC 2.9.....	26
ER 605	1, 2, 22, 26, 27
Juvenile Justice Act	33, 34
Karl B. Tegland, 5D Wash. Prac., Handbook Wash. Evid. ER 605 (2019 ed.)	26
RCW 9.94A.703	19
RCW 9A.....	17
RCW 9A.08.010	11, 12
RCW 9A.16.090	10
RCW 9A.20.021	17
RCW 9A.36.031	11
RCW 9A.76.040	11, 17
U.S. Const. amend. I	2, 30, 31, 34
U.S. Const. amend. VI	14

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHER AUTHORITIES (CONT'D)</u>	
U.S. Const. amend. XIV	8
Wash. Const. art. I, § 3	8
Wash. Const., art. I, § 22	14

A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct in closing argument violated appellant's due process right to a fair trial.

2. Defense counsel's failure to object to or request a curative instruction for the prosecutorial conduct violated appellant's right to effective assistance of counsel.

3. The court erred in imposing a sentence for the misdemeanor conviction that exceeds the statutory maximum.

4. As a condition of community custody, the court erred in ordering appellant to "obtain a substance use disorder evaluation and comply with recommended treatment." CP 65.

5. The court violated the appearance of fairness doctrine, the Code of Judicial Conduct, and ER 605 in sentencing appellant.

6. As a condition of the misdemeanor sentence, the court erred in ordering appellant to "read three books on domestic violence and how it affects children. He is ordered to write 3 book reports on said books at least 5 pages in length each." CP 67.

Issues Pertaining to Assignments of Error

1. Whether the prosecutor committed misconduct in closing argument by misstating the voluntary intoxication standard in relation to the intent element, requiring reversal of the convictions due to the

incurable nature of the misconduct and a substantial likelihood that it affected the verdict? Alternatively, whether defense counsel was ineffective in failing to object to the prosecutor's misconduct or request a curative instruction?

2. The offense of resisting arrest is a misdemeanor, not a gross misdemeanor. Must appellant's 364-day sentence for resisting arrest be vacated because the court lacked authority to impose it?

3. Whether the community custody condition requiring substance abuse evaluation and treatment must be narrowed to encompass only alcohol evaluation and treatment, because there is no substantial evidence that drugs contributed to the offense?

4. Whether the judge violated due process, ER 605 and the appearance of fairness requirement by conducting a personal investigation into the circumstances of the case and reporting his findings at sentencing?

5. Whether the probation condition requiring appellant to read and report on books of domestic violence must be stricken because it (1) stems from the court's improper personal investigation; (2) does not tend to prevent the commission of future crimes; or (3) violates appellant's First Amendment right to free speech?

B. STATEMENT OF THE CASE

Vladimir Borisov called law enforcement for assistance in resolving a "civil issue." 1RP 103, 114. Officer Alcantar of the Colfax Police Department contacted him at his residence. 1RP¹ 100-02. Borisov invited Alcantar onto the porch. 1RP 103-04. Borisov's wife and their son, who Alcantar estimated to be between 8-12 years old, were at the residence. 1RP 106. Borisov and his wife were going through a divorce. 1RP 121.

Borisov appeared intoxicated. 1RP 115. He was stumbling and needed to use objects to brace himself. 1RP 115. He spoke loudly and kept repeating himself. 1RP 115. Borisov admitted to consuming alcohol that evening. 1RP 104. He drank hard alcohol while speaking to Alcantar. 1RP 104-05. Borisov's mood fluctuated between being calm and being abrasive and aggressive, which was consistent with the officer's "training and experience with people who consume alcoholic beverages." 1RP 105. Borisov said he did not like "men in uniform" and "hates cops." 1RP 105.

Officer Alcantar tried to reach an agreement over who would stay at the residence and who would leave in relation to "the best outcome for

¹ The verbatim report of proceedings is cited as follows: 1RP - one volume consisting of 5/3/19, 5/13/19, 5/17/19; 2RP - 5/10/19.

their child."² 1RP 106-07. Borisov was concerned about his wife "staying the night." 1RP 107. Borisov directed Alcantar to speak with his wife and to speak with him later by knocking on his door. 1RP 107-08. Alcantar asked which door he should knock on, given that it was an apartment building. 1RP 107. Borisov said something like nobody comes in the residence and he'd kill somebody if they did. 1RP 107-08. Borisov went inside. 1RP 107. Meanwhile, Officer Handley of the Colfax Police Department arrived to assist. 1RP 106, 108. Handley contacted Borisov at the door, while Alcantar spoke with the wife, about 25 yards away. 1RP 108, 126.

Officer Handley smelled alcohol on Borisov. 1RP 127. Borisov talked about a parenting plan and that his wife had to leave by 9 p.m. but could come back at 7 a.m. to make breakfast for their son and take him to school. 1RP 133-34. He would do it if she did not want to. 1RP 149.

Handley's body camera footage of the encounter was admitted at trial as Exhibit 1. 1RP 131-32. During the conversation, Borisov slammed the door to his apartment. 1RP 127. Handley asked if he was trying to escalate the situation. 1RP 128, 136. Borisov said he wasn't. 1RP 136. He said his wife could see their son any time she wanted as long

² Borisov was the only one on the lease for the apartment. 1RP 114. His wife had resided there at one time and, to Alcantar's knowledge, she resided there that day. 1RP 120.

as she was sober. 1RP 136. Handley asked if Borisov was sober. 1RP 136. Borisov said he had been drinking. 1RP 137. Handley said, "I meant dope," and asked if he was doing meth or heroin. 1RP 128, 137, 157. Borisov became upset, said "fuck you" and told Handley to "get the fuck off my porch." 1RP 128, 137. Handley did not respond. 1RP 157. Borisov again yelled at Handley to get off his porch. 1RP 157-58. Handley could have left at that point. 1RP 160. But again, Handley did not respond. 1RP 158. Borisov then pushed Handley on the shoulder. 1RP 158. As described by Handley, Borisov "grabbed me by my left shoulder and tried to push me." 1RP 128.

Officer Handley grabbed Borisov, pushed him up against the wall and told Borisov not to touch him. 1RP 129, 158-59. Borisov, holding a Pellegrino water bottle in his hand, asked if he wanted to be cracked with the bottle. 1RP 128, 151. Handley tried to throw him to the ground. 1RP 159. Handley and Borisov wrestled. 1RP 109. Officer Alcantar came over and took Borisov to the ground. 1RP 109, 129-30. Further struggle ensued. 1RP 130. Alcantar told him he was under arrest for assault. 1RP 110. Borisov actively resisted by tensing his muscles and moving away. 1RP 110. Borisov repeatedly shouted "Stop." 1RP 110, 151-54. He also said he wanted a lawyer. 1RP 110, 152. Borisov was handcuffed but continued to struggle. 1RP 110, 130.

Deputy Olin of the Whitman County Sheriff's Office arrived. 1RP 106, 111. Borisov calmed down after Olin pointed a taser at him. 1RP 111. Olin and Alcantar escorted Borisov to a patrol car. 1RP 164. Olin's body camera footage was admitted as Exhibit 2. 1RP 167. Borisov did not cooperate. 1RP 164. He yelled and cursed. 1RP 164. He would not move under his own power. 1RP 164. Alcantar forced him into the vehicle and shut the door. 1RP 164. Borisov hit the window. 1RP 164. Olin opened the door to talk to him. 1RP 164. Borisov kept moving out of the vehicle. 1RP 165. Olin tried to put him far enough inside to shut the door. 1RP 165.

Olin claimed that when he turned to speak with Handley, Borisov kicked him on his side. 1RP 165, 178. Alcantar claimed he saw Borisov jab his leg out and Olin move back. 1RP 112-13. He thought Olin had been kicked, though he acknowledged it was tough to figure out exactly what happened. 1RP 119. Olin told Borisov that another charge would be forwarded to the prosecutor. 1RP 165-66. Borisov continued to speak and asked for a lawyer. 1RP 166. He was concerned about who would take care of his child and wanted to be back by 9 p.m., when his wife had to leave. 1RP 174-75. At the jail, Borisov denied kicking Olin and asked why he would say he did. 1RP 184. Once Borisov was taken to jail,

Officer Handley returned to the residence to check the parenting plan and the child's welfare.³ 1RP 156.

The State charged Borisov with one count of third degree assault against Officer Handley, one count of third degree assault against Deputy Olin, and one count of resisting arrest. CP 6-8. The court gave a voluntary intoxication instruction, which provides: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent." CP 49 (Instruction 13). The court also instructed the jury that it is a defense to third degree assault when force is used to prevent a malicious trespass. CP 50 (Instruction 14).

The jury acquitted Borisov of assaulting Deputy Olin. CP 60. It found him guilty of committing third degree assault against Officer Handley and resisting arrest. CP 59, 61. For the assault conviction, the court sentenced Borisov to 60 days in jail and 12 months of community custody. CP 64-65. For the resisting arrest conviction, the court sentenced Borisov to 364 days in jail with 300 days suspended. CP 64; 1RP 245. This appeal follows. CP 82-94.

³ In response to the prosecutor's question, Handley stated he was presented with paperwork about a parenting plan that evening. 1RP 155. Defense counsel objected to relevance and the question was withdrawn. 1RP 155.

C. **ARGUMENT**

1. **PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT VIOLATED BORISOV'S DUE PROCESS RIGHT TO A FAIR TRIAL.**

Prosecutorial misconduct can violate the due process right to a fair trial. Greer v. Miller, 483 U.S. 756, 765, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. XIV; Wash. Const. art. 1, § 3. In this case, the prosecutor committed misconduct by misstating the voluntary intoxication standard. Whether Borisov was so intoxicated that he did not form the intent to commit the crimes was a central issue at trial. The misconduct violated Borisov's right to a fair trial, requiring reversal of the conviction. In the alternative, defense counsel was ineffective in failing to object to the misconduct or request a curative instruction.

a. **The prosecutor committed misconduct in misstating the voluntary intoxication standard.**

The prosecutor addressed the voluntary intoxication standard in closing argument. It is set forth in full to provide the complete context for the argument and the location of misconduct within:

No. 13, this is voluntary intoxication. No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent.

Now the definition of assault, it has to be an intentional touching or striking that is harmful or offensive. Look at the things he did that night. He called the police. He talked to the police. He asked them questions, they asked him questions. He responded, (inaudible). He had some (inaudible). There's no question he had been drinking. He admitted to it. There's a bottle of alcohol out there. He smells like alcohol, and is holding onto things. No question that alcohol's at play. *But it's got to be enough alcohol to destroy the intent to do something.* Well, he's worried about his -- his wife being there; she's not supposed to be there, according to him. He -- his intention is to make sure she's not there. So, -- what does he do? He calls law enforcement.

When he doesn't think the cops should be on his property any more he intends to get 'em off. He -- What does he do? He gets mad. It's not an appropriate response to start yelling and screaming and shoving someone the second they ask something you don't think is right. But he does. He intends to get them off the property.

His language, he repeats himself, some of the words are out of order. There's -- there's some signs of intoxication here. But it's the state's position that it's not enough to not form that intent to commit these crimes. That's just not there. He did several things that night. He's able to -- he is to stand, he is able to talk. Slurring, there's other signs of belligerence, but just not enough.

You don't have to find that the alcohol -- was enough to exacerbate, or to make him angry, or that he's violent when he's drunk. That's not the issue here. *It has to be so much that he can't form an intent to do something. That's just not here.* 1RP 215-17 (emphasis added).

A prosecutor may not misstate the law and thereby mislead the jury.

State v. Gotcher, 52 Wn. App. 350, 355, 759 P.2d 1216 (1988). To understand how the prosecutor misstated the law on voluntary intoxication, it is first necessary to address established law on the issue.

"[E]vidence of voluntary intoxication is relevant to the trier of fact in determining in the first instance whether the defendant acted with a particular degree of mental culpability." State v. Coates, 107 Wn.2d 882, 889, 735 P.2d 64 (1987). RCW 9A.16.090 provides "whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his intoxication may be taken into consideration in determining such mental state." Thus, "[a] defendant is entitled to a voluntary intoxication instruction when (1) the crime charged includes a mental state, (2) there is substantial evidence of drinking, and (3) there is evidence that the drinking affected the defendant's ability to form the requisite intent or mental state." State v. Kruger, 116 Wn. App. 685, 691, 67 P.3d 1147, review denied, 150 Wn.2d 1024, 81 P.3d 120 (2003).

The jury is to consider the "effect of intoxication upon the formation of criminal intent." State v. Conklin, 79 Wn.2d 805, 808, 489 P.2d 1130 (1971); see also State v. Shelton, 71 Wn.2d 838, 841, 431 P.2d 201 (1967) (the issue is whether "the person is intoxicated to the extent of being unable to form the intent which is an element of the crime charged."); State v. Richard, 4 Wn. App. 415, 420, 482 P.2d 343 (1971) (question for the jury is "whether the defendant had committed the crimes with the requisite criminal intent."). "A person acts with intent or

intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a); CP 46 (Instruction 10).

To establish third degree assault, the State needed to prove that Borisov intentionally touched or struck Officer Handley with unlawful force. RCW 9A.36.031(1)(g); CP 42, 45. To establish the offense of resisting arrest, the State needed to prove Borisov intentionally attempted to prevent an officer from lawfully arresting him. RCW 9A.76.040(1); CP 44.

The question in this case, then, was whether Borisov formed an intent to assault the officer and to resist arrest despite his intoxication. The prosecutor, though, argued that to find in favor of Borisov, the jury needed to find that Borisov lacked the ability to form the intent to do "something," which is much broader than whether he lacked the ability to form the intent to commit a crime: (1) *"But it's got to be enough alcohol to destroy the intent to do something."*; (2) *"It has to be so much that he can't form an intent to do something. That's just not here."* 1RP 216-17. The prosecutor argued Borisov was able to stand and talk and so the jury should find Borisov intended to commit the crimes. 1RP 215-17. The prosecutor conflated what ought to be two separate things to arrive at a conclusion that if Borisov had the intent to do anything despite being

intoxicated, he harbored the requisite criminal intent to commit the criminal acts. A person can have the intent to do all sorts of non-criminal things, like walking and talking, but still lack the intent to commit a crime. The required mental state is the intent to commit the crime, not the intent to do something else. The prosecutor in effect told the jury that it should find Borisov had criminal intent if he was capable of forming the intent to do anything. That is not the law. The question for the jury is whether intoxication affected the requisite criminal intent. Conklin, 79 Wn.2d at 808; Kruger, 116 Wn. App. at 691; RCW 9A.08.010(1)(a).

b. The error is preserved for appeal and reversal is required because the misconduct prejudiced the outcome.

Defense counsel did not object to the misconduct. Appellate review remains available in the absence of objection if the misconduct is so flagrant and ill-intentioned that no curative instruction could have erased the prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). "[T]he failure to object will not prevent a reviewing court from protecting a defendant's constitutional right to a fair trial." State v. Walker, 182 Wn.2d 463, 477, 341 P.3d 976 (2015).

Disregard of a well-established rule of law is deemed flagrant and ill-intentioned misconduct. State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018, 936 P.2d 417 (1997).

A prosecutor's misconduct is also flagrant and ill-intentioned where case law and professional standards available to the prosecutor clearly warned against the conduct. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 707, 286 P.3d 673 (2012). Case law in existence well before Borisov's trial, such as that cited in this brief, clearly defined the applicable law and warned against the prosecutor's misconduct in this case.

The misconduct here was not the type to be remedied by a curative instruction. "The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012) (quoting Slattery v. City of Seattle, 169 Wash. 144, 148, 13 P.2d 464 (1932)). Prosecutors, in their quasi-judicial capacity, usually exercise a great deal of influence over jurors. State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956). A prosecutor's misstatement of the law is a particularly serious error with "grave potential to mislead the jury." Davenport, 100 Wn.2d at 763. The cumulative effect of misconduct in the form of misstating the law can overwhelm the power of instruction to cure. State v. Allen, 182 Wn.2d 364, 376, 341 P.3d 268 (2015) (reversing where prosecutor repeatedly misstated knowledge standard). The prosecutor's misstatements of the law in Borisov's case were repeated. The

prosecutor's improper argument went to a key issue in the case: whether Borisov acted with intent in committing the crimes.

Reviewing claims of prosecutorial misconduct is not a matter of determining whether there is sufficient evidence to convict. Glasmann, 175 Wn.2d at 710. Rather, the standard for showing prejudice is a substantial likelihood that the misconduct affected the verdict. Id. at 711.

There was evidence from which a reasonable jury could decide the State had not proven the intent element beyond a reasonable doubt because Borisov was intoxicated. The State's improper argument, which invited the jury to equate the ability to form criminal intent with the ability to form intent to do anything, made it easier for the jury to return guilty verdicts. Under these circumstances, there is a substantial likelihood that the prosecutor's misconduct affected the outcome.

c. In the alternative, counsel was ineffective in failing to object to the misconduct or request curative instruction.

Defendants are guaranteed 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); U.S. Const. amend. VI; Wash. Const., art. I, § 22. In the event this Court finds proper objection or request for a curative instruction could have cured the prejudice resulting from the misconduct, then defense counsel was ineffective in failing to take such action.

Defense counsel is ineffective where (1) the attorney's performance is deficient and (2) the deficiency prejudices the defendant. Strickland, 466 U.S. at 687. Deficient performance is that which falls below an objective standard of reasonableness. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Only legitimate trial strategy or tactics constitute reasonable performance. State v. Kyлло, 166 Wn.2d 856, 869, 215 P.3d 177 (2009). "If a prosecutor's remark is improper and prejudicial, failure to object may be deficient performance." In re Pers. Restraint of Cross, 180 Wn.2d 664, 722, 327 P.3d 660 (2014).

When a prosecutor resorts to improper argument, defense counsel has a duty to interpose a contemporaneous objection "to give the court an opportunity to correct counsel, and to caution the jurors against being influenced by such remarks." Emery, 174 Wn.2d at 761-62 (quoting 13 Washington Practice: Criminal Practice and Procedure § 4505, at 295 (3d ed. 2004)). Defense attorneys must be ever vigilant in defending their clients' rights to fair trial, including being aware of the law and making timely objections in response to misconduct. State v. Neidigh, 78 Wn. App. 71, 79, 95 P.2d 423 (1995).

No legitimate reason supported the failure of counsel to properly object or request curative instruction given the prejudicial nature of the prosecutor's comments. The prosecutor's argument was improper. If an

objection and instruction could have redirected the jury to the proper considerations and cured the prejudice resulting from the improper comments, then counsel had no legitimate tactical reason for not objecting. See State v. Horton, 116 Wn. App. 909, 921-22, 68 P.3d 1145 (2003) (defense counsel deficient in failing to object to prosecutor's improperly expressed personal opinion about defendant's credibility during closing argument); Burns v. Gammon, 260 F.3d 892, 895-96 (8th Cir. 2001) (had counsel objected and prompted a curative instruction in response to the prosecutor's improper comment, prejudice would have been avoided).

Defense counsel's deficient performance prejudiced Borisov because the case turned on whether the State proved criminal intent. Borisov's voluntary intoxication claim was the contested issue at trial and the misconduct attached itself to that same issue. The jury normally places great confidence in the faithful execution of the obligations of a prosecuting attorney. State v. Thierry, 190 Wn. App. 680, 694, 360 P.3d 940 (2015), review denied, 185 Wn.2d 1015, 368 P.3d 171 (2016). As a result, the jury can be expected to view the prosecutor's interpretation of the law as set forth in the instructions as an accurate statement of the law. The misconduct here undercut the correct standard for determining the voluntary intoxication issue and, by extension, the correct standard for determining the criminal intent element of the charges. Reversal is required because defense counsel

incompetently failed to object to misconduct and there is a reasonable probability the failure to object affected the outcome.

2. THE COURT EXCEEDED ITS STATUTORY AUTHORITY IN IMPOSING A 364-DAY SENTENCE FOR A MISDEMEANOR CONVICTION.

The court erroneously imposed a 364-day sentence for Borisov's misdemeanor conviction for resisting arrest. Reversal and remand is required to sentence Borisov within the statutory limit.

Borisov was convicted of resisting arrest. CP 61. The judgment and sentence designates the offense as a gross misdemeanor. CP 62. And the court treated the offense as if it were a gross misdemeanor, imposing a sentence of 364 days in jail with 300 days suspended.⁴ CP 64; 1RP 245.

By statute, the offense of resisting arrest is only a misdemeanor. RCW 9A.76.040(2). As such, the maximum term for this offense is 90 days. RCW 9A.20.021(3) provides: "Every person convicted of a misdemeanor defined in Title 9A RCW shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than ninety days, or

⁴ RCW 9A.20.021(2) provides "Every person convicted of a gross misdemeanor defined in Title 9A RCW shall be punished by imprisonment in the county jail for a maximum term fixed by the court of up to three hundred sixty-four days, or by a fine in an amount fixed by the court of not more than five thousand dollars, or by both such imprisonment and fine."

by a fine in an amount fixed by the court of not more than one thousand dollars, or by both such imprisonment and fine."

A trial court's authority to impose conditions of sentence is limited to the authority provided by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). "If the trial court exceeds its sentencing authority, its actions are void." State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). The court lacked authority to sentence Borisov to a term of one year on his misdemeanor conviction. See State v. Saunders, 132 Wn. App. 592, 608, 132 P.3d 743 (2006) (trial court exceeded authority when it imposed 12-month suspended sentence for misdemeanor charge).

"When a sentence has been imposed for which there is no authority in law, the trial court has the power and duty to correct the erroneous sentence." In re Pers. Restraint of Swagerty, 186 Wn.2d 801, 810, 383 P.3d 454 (2016) (quoting In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980)). Remand for sentencing within the lawful range is required, as is correction of the judgment and sentence to reflect the proper misdemeanor classification for the resisting arrest offense.

3. BECAUSE DRUGS DID NOT CONTRIBUTE TO THE OFFENSE, THE CONDITION REQUIRING EVALUATION AND TREATMENT FOR SUBSTANCE ABUSE MUST BE NARROWED TO EVALUATION AND TREATMENT FOR ALCOHOL.

As a condition of community custody, the court ordered Borisov to "obtain a substance use disorder evaluation and comply with recommended treatment." CP 65. This condition is unauthorized to the extent it permits evaluation and treatment for drugs. Evaluation and treatment should be limited to alcohol.

Whether the court had statutory authority to impose a sentencing condition is reviewed de novo. State v. Johnson, 180 Wn. App. 318, 325, 327 P.3d 704 (2014). The trial court's decision is reviewed for abuse of discretion only if it had statutory authorization. Id. at 326. Defense counsel did not object to these conditions below, but an unlawful sentence may be challenged for the first time on appeal. State v. Warnock, 174 Wn. App. 608, 611, 299 P.3d 1173 (2013).

The court is authorized to require an offender to "[p]articipate in crime-related treatment or counseling services" and in "rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." RCW 9.94A.703(3)(c), (d). But court-ordered substance abuse evaluation and treatment must address an issue that

contributed to the offense. State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003). Alcohol and drugs are not interchangeable terms in this context. Warnock, 174 Wn. App. at 613-14 (recognizing a difference between controlled substances and alcohol); State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007) (distinguishing between "substance abuse" and "alcohol" treatment as a condition of community custody), overruled on other grounds by State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010).

Evidence shows Borisov was drinking alcohol at the time of the offense. Borisov told police he had been drinking. 1RP 104, 137. He drank alcohol in front of the officer. 1RP 104-05. Police observed signs of alcohol intoxication based on training and experience. 1RP 105. But there is no substantial evidence that Borisov was under the influence of a controlled substance. At most, the evidence shows that Officer Handley asked Borisov if he was under the influence of drugs. 1RP 128, 137, 157. Borisov got mad and did not answer the question. 1RP 128, 137. No officer testified at any time to a belief that Borisov was under the influence of a controlled substance. The jail booking sheet asks whether the arrestee appears to be under the influence of "intoxicants or drugs." CP 96. Alcohol is the only thing specified. CP 96. The police report also describes alcohol as the only thing involved. CP 97. At sentencing, the court commented that Borisov's

conduct was "obviously alcohol or drug-infused." 1RP 244. It was obviously alcohol infused, but there is no actual evidence to back up the suggestion that it was drug infused.

Because there is no evidence that a substance other than alcohol contributed to Borisov's offense, evaluation and treatment must be restricted to alcohol. State v. Munoz-Rivera, 190 Wn. App. 870, 893, 361 P.3d 182 (2015) (condition requiring substance abuse evaluation and treatment needed to be restricted to alcohol where there was no evidence substances other than alcohol contributed to crimes); Warnock, 174 Wn. App. at 614 (same); State v. Kinzle, 181 Wn. App. 774, 786, 326 P.3d 870 (2014), review denied, 181 Wn.2d 1019, 337 P.3d 325 (2014) (same); Jones, 118 Wn. App. at 207-08 (trial court improperly imposed a condition requiring alcohol counseling when there was evidence that methamphetamines, but not alcohol, contributed to the offense).

The remedy is to remand with directions to amend the judgment and sentence to strike the reference to "substance use disorder" and impose only an alcohol assessment and any recommended alcohol treatment. Warnock, 174 Wn. App. at 614; Munoz-Rivera, 190 Wn. App. at 894; Kinzle, 181 Wn. App. at 786.

4. THE COURT ORDER REQUIRING BORISOV TO READ AND REPORT ON BOOKS OF DOMESTIC VIOLENCE VIOLATES HIS FIRST AMENDMENT RIGHT TO FREE SPEECH.

As a condition of the misdemeanor sentence, the judge ordered Borisov to "read three books on domestic violence and how it affects children. He is ordered to write 3 book reports on said books at least 5 pages in length each." CP 67; IRP 246.⁵ The condition is invalid because it is the result of the judge's personal investigation into the case, which is prohibited by the appearance of fairness doctrine, the Code of Judicial Conduct, and ER 605. The condition is also infirm because it does not tend to prevent the commission of future crimes. Alternatively, it must be stricken because it violates Borisov's fundamental right to free speech.

a. The judge's personal investigation violated the appearance of fairness doctrine, the Code of Judicial Conduct, and ER 605.

At the sentencing hearing, the judge pronounced Borisov's conduct disturbing, disgusting and dangerous, and, of greatest concern, it took place "within the hearing of your son who is eight years old." IRP 244. The judge asked "How do you think your son felt seeing or hearing his father engage in a loud, historical [sic?] screaming confrontation with the

⁵ One judgment and sentence form — a felony form — was used for both the felony and the misdemeanor sentences. CP 62-72. The court said at the sentencing hearing that this condition was part of the misdemeanor judgment and sentence. IRP 246.

police, and fighting with the police on the front porch of your apartment[?]"

No evidence was presented as to whether Borisov's son saw or heard what happened. The only evidence was that his son was at the residence, but there was no evidence that he was outside and no evidence of whether he could see or hear what was going on while inside the residence. 1RP 106.

The judge continued:

The police you called to enforce an alleged parenting plan -- of which by the way there was none, and there is none -- you claimed and reported to the officers that your wife was court-ordered limited in her contact with you, your son and your home. And that was an outright lie. You apparently called the police to engage in aggressive behavior either with them or for them to contact your wife with inaccurate information for some plan, perhaps to get an advantage over your divorce case.

Your parenting plan, the proposed parenting plan that you called the police on, was not a court-ordered parenting plan, it was a proposed parenting plan, and in it you will see on page 6 of what you signed that your wife is to have all the weekends and weekdays with your son. That's what you signed and that's what you have filed with the superior court clerk. Yet you called the police to engage with them false information pertaining to your parenting plan with your -- wife. 1RP 244-45.

The court then imposed sentence, including the condition that he read books on domestic violence and report on them:

And I want to have him, in the -- in the misdemeanor judgment and sentence as part of that I want

him to read at least three books on subjects such as the impact of domestic violence on children, how to be a mature parent, how to be a responsible citizen, and that's going to be his homework to file book reports five pages in length on each of the three subjects that I mentioned, the impact of domestic violence on children, how to be -- become or be a mature parent, and how to be a responsible citizen. 1RP 246.

The written order in the judgment and sentence provides that Borisov is to "read three books on domestic violence and how it affects children. He is ordered to write 3 book reports on said books at least 5 pages in length each." CP 67.

Evidence at trial showed Borisov told police that a parenting plan restricted his wife's access to the residence to certain hours. 1RP 133-34. Neither party at any time presented evidence that there was no parenting plan, or that a proposed parenting plan permitted Borisov's wife to be with the child on "all weekdays and weekends." The police report does not contain any facts asserted by the judge on this point. CP 97-98. The proposed parenting plan filed in family court was not offered as an exhibit by the parties or even referenced by them at the sentencing hearing.⁶ It is clear that the judge, ex parte, consulted the judicial record in the dissolution proceeding in preparation for sentencing. There was no other basis for his source of knowledge. The judge reported the results of his

⁶ The judge did not file the described parenting plan as a sentencing exhibit.

personal investigation and relied on them for sentencing, including imposition of the condition that Borisov read and report on books of domestic violence. In so doing, the judge functioned as a prosecutor, not a judge.

As Judge Benjamin Cardozo wrote nearly 100 years ago, centuries of common law tradition teach that "[t]he function of judges is to determine controversies. . . . They are not adjuncts or advisors, much less investigating instrumentalities. . . . The judge is . . . [not] a prosecutor. . . . He is [not] to follow trails of suspicion, to uncover hidden wrongs, to build up a case as a prosecutor builds one. . . . [H]is conclusion is [not] to be announced upon a case developed by himself." In re Richardson, 247 N.Y. 401, 411-12, 160 N.E. 655 (N.Y. 1928) (citations omitted).

"In determining the proper sentence, a trial court is vested with broad discretion and can make whatever investigation it deems necessary or desirable." State v. Romano, 34 Wn. App. 567, 568, 662 P.2d 406 (1983). "However, the court should not conduct a personal investigation of the defendant and should avoid whenever possible receiving ex parte statements concerning the defendant." Id. at 568-69. When that happens, a judge violates the appearance of fairness. Id. at 569.

The bar against personal investigation is reflected in the Code of Judicial Conduct, which plainly prohibits what the judge did here: "A

judge shall not investigate facts in a matter pending or impending before that judge, and shall consider only the evidence presented and any facts that may properly be judicially noticed, unless expressly authorized by law." CJC 2.9(C). "The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic." CJC 2.9 (Comment 6).

The judge could not consult the record from the dissolution proceeding to make a decision in the criminal proceeding. The law on this point is clear: "[C]ourts of this state cannot, while trying one cause, take judicial notice of records of other independent and separate judicial proceedings even though they be between the same parties." Swak v. Dep't of Labor & Indus., 40 Wn.2d 51, 54, 240 P.2d 560 (1952); accord In re Adoption of B.T., 150 Wn.2d 409, 415, 78 P.3d 634 (2003).

ER 605, meanwhile, commands "The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point." "Rule 605 has been interpreted broadly as not only barring testimony by the judge, but also barring the judge from personally gathering evidence in addition to the evidence presented in open court." Karl B. Tegland, 5D Wash. Prac., Handbook Wash. Evid. ER 605 (2019 ed.). "This evidentiary rule can apply even when the trial judge does not formally testify, but inserts his or her own personal experience

into the decision-making process." In re Estate of Hayes, 185 Wn. App. 567, 599, 342 P.3d 1161 (2015). Here, the judge inserted his personal investigation into the decision-making process. The judge, in reciting what he had learned from his personal investigation into the dissolution record, became a witness against Borisov at the sentencing hearing. The judge in effect testified against him based on his ex parte discovery.

ER 605 error is harmless only if the trial court would necessarily have arrived at the same conclusion in the absence of the error. Hayes, 185 Wn. App. at 599 (citing Vandercook v. Reece, 120 Wn. App. 647, 652, 86 P.3d 206 (2004)). The judge's personal investigation was prejudicial. As a result of the personal investigation, the judge accused Borisov at sentencing of lying to police and trying to gain an advantage over his wife in the dissolution proceeding. The record shows the judge relied on that investigation, at least in part, to impose the domestic violence condition at issue here. The condition should be stricken because it results from the ER 605 and related appearance of fairness violations.

b. The sentencing condition must be stricken because it does not tend to prevent the commission of future crimes.

Probation conditions are reviewed for abuse of discretion. State v. Deskins, 180 Wn.2d 68, 77, 322 P.3d 780 (2014). "[A] court may impose probationary conditions that bear a reasonable relation to the defendant's

duty to make restitution or that tend to prevent the future commission of crimes." Id. (quoting State v. Williams, 97 Wn. App. 257, 263, 983 P.2d 687 (1999)). Although a sentencing court has broad discretion when it comes to conditions of a suspended sentence, that discretion is not unfettered. "[R]easonableness is the test of the propriety of a condition of probation." State v. Barklind, 12 Wn. App. 818, 823, 532 P.2d 633 (1975), aff'd, 87 Wn.2d 814, 557 P.2d 314 (1976).

Here, nothing in the record shows Borisov committed an act of domestic violence against his wife or son, either on the night in question or at any other time. No physical violence. No threat. The condition requiring Borisov to read and report on books of domestic violence does not tend to prevent the future commission of crimes because it is predicated on preventing domestic violence, of which there is no history.⁷

In Deskins, a probation condition that prohibited the defendant from living with animals was upheld as tending to prevent the commission of future crimes because she had been convicted of animal cruelty and "[h]er illegal animal keeping practices harmed not only her own dogs and those in the neighborhood but also the livestock that lived on the property." Deskins, 180 Wn.2d at 78-79. That is a far cry from Borisov's

⁷ As recited by the prosecutor at sentencing, Borisov has a misdemeanor history, but none of them involve domestic violence. 1RP 243.

situation. He was not convicted of a crime of domestic violence. His yelling, threats and assault were directed toward police, not his wife or son.

In State v. Summers, 60 Wn.2d 702, 707, 375 P.2d 143 (1962), the Supreme Court struck down a probation condition that required the defendant to make child support payments. Summers relied on Redewill v. Superior Court of Maricopa County, 43 Ariz. 68, 81, 29 P.2d 475 (Ariz. 1934), which recognized a probation condition is appropriate when it causes "a defendant to make reparation for any crime which he may have committed, or to restrain him or others from the commission in the future of other crimes," but "where the condition has no bearing on either of these two matters, but relates only to a future moral and not legal obligation, we think it is an abuse of the discretion vested in the trial court to fix such condition in the first place."

The judge's condition is along these same impermissible lines. The judge, as expressed through his oral remarks at sentencing, wanted to make Borisov a better person, someone who was a responsible member of society and a mature parent. 1RP 246. Those are moral obligations, not legal ones. The condition is untethered from the legitimate goals of probation. It should be stricken because it is unreasonable.

c. The sentencing condition must be stricken because it violates Borisov's First Amendment right to free speech.

Even if the condition satisfies the ordinary, non-constitutional standard for assessing probation conditions, it does not survive constitutional scrutiny. "A trial court abuses its discretion if it imposes an unconstitutional condition." State v. Padilla, 190 Wn.2d 672, 677, 416 P.3d 712 (2018).

The First Amendment to the U.S. Constitution prohibits the government from proscribing speech or expressive conduct. State v. Halstein, 122 Wn.2d 109, 121, 857 P.2d 270 (1993). "As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear." Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002). Freedom of speech under the First Amendment includes the right to not speak. Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31, ___ U.S. ___, 138 S. Ct. 2448, 2463, 201 L. Ed. 2d 924 (2018). The First Amendment protects against compelled speech, and it applies to the sentencing context. State v. K.H.-H., 185 Wn.2d 745, 749, 374 P.3d 1141 (2016).

A convicted defendant's constitutional rights, including First Amendment rights, are subject to infringement. Id.; State v. Ross, 129 Wn.2d 279, 287, 916 P.2d 405 (1996). But the infringements themselves

must be constitutional. "The extent to which a sentencing condition affects a constitutional right is a legal question subject to strict scrutiny." In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). Sentencing conditions that affect a constitutional right "must be 'sensitively imposed' so that they are 'reasonably necessary to accomplish the essential needs of the State and public order.'" Id. (fundamental right to parent) (quoting State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008) (fundamental right to marriage); see also State v. Riles, 135 Wn.2d 326, 350, 957 P.2d 655 (1998) (First Amendment freedom of association), abrogated on other grounds by State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010); State v. Riley, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993) (First Amendment freedom of association). Such conditions must be narrowly drawn. Warren, 165 Wn.2d at 34. "There must be no reasonable alternative way to achieve the State's interest." Id. at 34-35.

In K.H.-H., the Supreme Court held a disposition condition requiring a juvenile — who was adjudicated guilty of assault with sexual motivation — to write an apology letter to the victim did not violate his constitutional free speech rights under the First Amendment. K.H.-H., 185 Wn.2d at 746-47. In reaching that result, the Court considered two legal standards in assessing the constitutionality of the apology condition.

K.H.-H. first addressed United States v. Clark, another apology case, which set forth this test: "whether the limitations are primarily designed to affect the rehabilitation of the probationer or insure the protection of the public." United States v. Clark, 918 F.2d 843, 848 (9th Cir. 1990) (quoting United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 n. 14 (9th Cir. 1975)), overruled on other grounds by United States v. Keys, 133 F.3d 1282 (9th Cir. 1998). Under this test, "a court asks whether the sentencing judge imposed the conditions for permissible purposes, and then determines whether the conditions are reasonably related to those purposes." K.H.-H., 185 Wn.2d at 750. The condition must be "related to the underlying crime." Id. at 753.

K.H.-H. also cited State v. Bahl, 164 Wn.2d 739, 757, 193 P.3d 678 (2008), where the court held sentence conditions that implicate free speech rights must be narrowly tailored to serve an important government interest and must be reasonably necessary to achieving that interest. According to K.H.-H., Clark and Bahl "embrace a somewhat similar approach." K.H.-H., 185 Wn.2d at 751. In assessing the apology condition at issue in K.H.-H., the result under either analysis was the same. Id. at 752.

The Court held "a juvenile court can impose and require reasonable conditions that are related to the crime of which the offender

was convicted and that further the reformation and rehabilitation of the juvenile." Id. at 755. It emphasized juvenile courts have wide discretion in fashioning sentencing conditions because "juveniles are, by their very nature, still developing. The [Juvenile Justice Act] recognizes the differences between adults and juveniles and embraces rehabilitation as a primary goal rather than a focus primarily on punishment." Id. at 755.

The condition requiring an apology was "related to the crime of which the offender was convicted and furthers the reformation and rehabilitation of the juvenile, the purpose of the underlying JJA." Id. at 754. "The apology letter condition primarily aims to rehabilitate the juvenile offender but also acknowledges the victim's interest in receiving the apology." Id. K.H.-H refused to accept the consequences of his harmful conduct (assault with sexual motivation), so the condition was "reasonably necessary for K.H.-H. to recognize what he did was wrong and to acknowledge his behavior." Id. at 756. Further, "[a]n apology allows the victim to hear an acceptance of responsibility from the very person who inflicted the harm," which "is particularly important where both the victim and perpetrator are juveniles." Id.

The Court summed up: "The outward manifestation of accepting and apologizing for the consequences of one's actions is a rehabilitative step that attempts to improve K.H.-H.'s character and outlook. Such a

condition is reasonably related to the purpose of K.H.-H.'s rehabilitation and the crime here." Id.

Given the extent to which K.H.-H focused on the ability of the juvenile court to fashion a disposition that responds to juvenile needs in light of the purposes of the Juvenile Justice Act, the extent to which its analysis applies to Borisov, an adult sentenced in adult court, is circumspect. More than that, K.H.-H addressed a condition requiring an apology to the victim and its legal analysis reflects its focus on that particular condition. Such a condition is not at issue in Borisov's case.

Still, rehabilitation is a goal of probation. State v. Olsen, 189 Wn.2d 118, 127-28, 399 P.3d 1141 (2017). Even assuming Borisov's First Amendment challenge is amenable to the general standard employed in K.H.-H, the condition at issue here cannot stand. K.H.-H requires that a condition affecting a First Amendment right be reasonably related to the crime of conviction. K.H.-H., 185 Wn.2d at 754, 756. That requirement, by itself, is enough to resolve the argument in Borisov's favor. Borisov's crimes of conviction were assault against a police officer and resisting police arrest. The condition requiring him to read and report on books about domestic violence and how it affects children is not reasonably related to those crimes. If Borisov is in need of rehabilitation, such rehabilitation would be measured against the crimes for which he was

convicted. The condition imposed here, focusing on his family, does nothing to rehabilitate Borisov's criminal actions directed towards the police. The State has no essential need for a condition geared toward ameliorating a non-existent domestic violence problem untethered from the crimes of conviction. The condition must be stricken because it is not "reasonably necessary to accomplish the essential needs of the State and public order." Rainey, 168 Wn.2d at 374.

D. CONCLUSION

For the reasons stated, Borisov requests reversal of the convictions. If this Court declines to reverse the convictions, then remand for resentencing on the misdemeanor count and correction of sentencing errors is appropriate.

DATED this 21st day of December 2019

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