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Court of Appeals  
Division III  
State of Washington  
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**NO. 37043-7**

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**COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III**

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**STATE OF WASHINGTON, Respondent,**

**v.**

**ROBERT GAGE SREGZINSKI, Appellant.**

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**BRIEF OF RESPONDENT**

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**A. IDENTITY OF RESPONDENT**

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

**B. RELIEF REQUESTED.**

Respondent asserts that no error occurred in the conviction of the Appellant. The imposition of interest on non-restitution legal financial obligations may be corrected on the judgment and sentence.

**C. ISSUES**

1. The appellant's guilty plea was made freely, voluntarily and intelligently.
2. The sentence condition of "alcohol/drug" treatment was properly imposed.
3. The sentencing provision for supervision fees was properly set forth.
4. The State concedes that the trial court lacked authority to impose interest on non-restitution legal financial obligations.
5. The trial court did not abuse its discretion in entering a civil anti-harassment protection order as part of this criminal proceeding.

**D. STATEMENT OF THE CASE**

The appellant's statement of the case is essentially correct, but leaves out some important facts that bear directly on the issue on appeal.

The crimes to which the appellant plead guilty were committed on or about 22<sup>nd</sup> April, 2016. The Information was not filed until 7<sup>th</sup> November, 2017. CP 5. He did not plead guilty until 20<sup>th</sup> May, 2019. CP 18-30. An Amended Information, conforming with the plea agreement between the appellant and the State, was filed on the same date. CP 16-17.

Three waivers of speedy trial were entered. CP 9,10,11.

During the two years, from filing the charge, until the case was resolved, the record makes clear that there were intensive negotiations between the appellant's attorney and the State, as well as various hearings, motions, etc. The appellant was not sentenced until 31<sup>st</sup> July, 2019. CP 76.

The State amended the Information, pursuant to the plea agreement, at the Change of Plea hearing. RP 1. Trial counsel indicated there was no objection to the entry of the Amended Information. RP 2. In fact, counsel for the appellant at the trial level, Julie A. Carlson Straube, indicated that the "change of plea comport(s) to the Amended Information." RP 2.

The plea agreement between the State and the appellant was a plea to reduce Count I from Murder in the First Degree to Manslaughter in the First Degree, and amending Count II, to Assault in the Second Degree, and dismissing the remaining counts. CP 22. RP 1. In addition, the defense would request the low end of the range, and the State would request a standard range sentence, with the counts to run concurrent. CP 22.

The Amended Information contains the language, in Count II, naming Sara Hickman-Morse, as the victim of the crime of Assault in the Second Degree. CP 16-17. RP 2.

During the allocution for the guilty plea, the appellant's trial attorney, Julie Carlson-Straube, indicated that she and her client thoroughly reviewed the Change of Plea form, more than once. RP 2.

The Change of Plea form itself, above the appellant's signature, states: "My lawyer has explained to me, and we have fully discussed, all of the above paragraphs...I understand them all. I have been given a copy of this "Statement of Defendant on Plea of Guilty". I have no further questions to ask the judge." CP 27.

The judge questioned the appellant about each of the applicable paragraphs during the allocution. The appellant indicated, at each point,

that he understood the paragraphs, and in total had discussed it with his attorney. RP 4-8.

Ms. Carlson Straube read the allocution for both counts, and the appellant indicated he agreed with her statement of the facts, by entering his guilty pleas. RP 8.

The trial court made additional findings, as set forth in appellant's brief. Namely, that the court was familiar with the facts of the case, having been assigned it from the date of the appellant's first appearance. RP 9.

The Report of Proceedings, and both the Guilty Plea and Judgment and Sentence, indicate that Judge John W. Lohrmann took the change of plea and sentenced the appellant, contrary to appellant's assertion on the cover page of his Brief. RP 1. The court incorporated the Affidavit on Probable Cause by reference. RP 9.

During the Sentencing Hearing, the defendant admitted to some of the facts of the case, and indicated he was "willing to do the time". RP 12. He advocated for a low-end standard range sentence for himself. RP 12-14.

The court sentenced the appellant to the top end of the standard range, or 280 months, on Count I. RP 29.

At sentencing, the court did find the defendant indigent. RP 26. The court also indicated that the defendant was “highly intelligent” and had “good earning capacity”. RP 28. The court stated it was imposing the mandatory fines. The court struck all other costs, and recalculated the appellant’s total financial obligations at \$500. CP 78.

In addition, as the defendant had pleaded guilty to a serious offense involving Sara Hickman-Morse, the court ordered a Order of Protection as part of the conditions of his judgment and sentence. RP 31.

## **E. ARGUMENT**

### **1. The appellant’s plea was made knowingly, voluntarily and intelligently.**

When a defendant pleads guilty, there is a strong presumption that plea is voluntary.

The defendant’s signature on a plea agreement is “strong evidence” the plea is voluntary. *State v. Branch* 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). And when the court inquires into the voluntariness of the plea on the record, as it did here, the presumption of voluntariness is warranted. *State v. Perez* 33 Wn.App. 258, 262, 654 P.2d 708 (1982).

A “knowing and intelligent” surrender of one’s constitutional rights is also required. CrR 4.2(f) sets forth the conditions under which a defendant may withdraw a plea of guilty. This rule provides as follows:

“The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. If the defendant pleads guilty pursuant to a plea agreement and the court determines under RCW 9.94A.090 that the agreement is not consistent with (1) the interests of justice or (2) the prosecuting standards set forth in RCW 9.94A.430–460, the court shall inform the defendant that the guilty plea may be withdrawn and a plea of not guilty entered. If the motion for withdrawal is made after judgment, it shall be governed by CrR 7.8” CrR 4.2(f).

The four indicia of manifest injustice recognized by the courts are:

- (1) denial of effective assistance of counsel; (2) failure of the defendant or one authorized by him to do so to ratify the plea; (3) involuntary plea; and
- (4) violation of plea agreement by the prosecution. *State v. Taylor*, 83 Wn.2d 594, 597, 521 P.2d 699 (1974).

“Plea agreements are contracts.” *State v. Mollichi*, 132 Wash.2d 80, 90, 936 P.2d 408 (1997). Just as there is an implied duty of good faith and fair dealing in every contract, *Badgett v. Security State Bank*, 116 Wash.2d 563, 569, 807 P.2d 356 (1991), the law imposes an implied promise by the State to act in good faith in plea agreements. *State v. Marler*, 32 Wash.App. 503, 508, 648 P.2d 903 (1982). See also *Correale v. United States*, 479 F.2d 944, 947 (1st Cir.1973); *United States v. Bowler*, 585 F.2d 851, 854 (7th Cir.1978); *United States v. Ailsworth*, 927 F.Supp. 1438, 1445 (D.Kan.1996); *United States v. Rexach*, 896 F.2d 710, 714

(2d Cir.), *cert. denied*, 498 U.S. 969, 111 S.Ct. 433, 112 L.Ed.2d 417 (1990); *United States v. Jones*, 58 F.3d 688, 692, 313 U.S.App. D.C. 128 (1995).”

*State v. Sledge*, 133 Wn. 2d 828, 838–39, 947 P.2d 1199, 1204 (1997), *as amended* (Jan. 28, 1998).

A plea is considered “involuntary” if the defendant did not understand either the nature of the charges nor the consequences of the plea. CrR 4.2(d); *In re Personal Restraint of Hews*, 108 Wn.2d 579, 590, 741 P.2d 983 (1987); *State v. Barton*, 93 Wn.2d 301, 306, 609 P.2d 1353 (1980); *State v. Smith*, 74 Wn.App. 844, 848, 875 P.2d 1249 (1994).

In determining whether a plea was voluntary, courts consider the totality of the circumstances including oral and written statements of the defendant and the charging document. *State v. Branch*, 129 Wn.2d 635, 642–43, 919 P.2d 1228 (1996); *State v. Smith*, 74 Wn.App. at 849, 875 P.2d 1249.

The appellant relies on *State v. S.M.* 100 Wn.App. 401, 413, 996 P.2d 1111 (2000). The reliance on this case is misplaced, as the facts are strikingly different than the facts in the instant case.

First, the appellant, S.M. was a juvenile, 12 years old. *S.M.*, *Id.* at 403. Second, the appellant filed an affidavit, along with his mother, and a

lengthy hearing was held, both indicating that his appointed attorney had not sufficiently advised him of his rights, had not explained what his guilty plea meant, had not explained the factual basis for the plea, but rather had his legal assistant review the procedure prior to the entry of the plea. *Id.* at 404-408.

The court in *S.M.* found that the appellant received ineffective assistance of counsel during the plea process. “Because counsel’s performance was deficient and because there is a reasonable probability that this deficiency prejudiced S.M., we find a violation of S.M.’s Sixth Amendment right to counsel. This defect constitutes a manifest injustice. Consequently, the trial court erred in denying S.M.’s motion to withdraw his plea.” *State v. S.M., Id.* at 412.

Third, the court engaged in only a brief colloquy with the appellant, did not review the standard range, the collateral consequences of the plea, nor did the court ensure that S.M. had an adequate understanding of the facts. *Id.* at 403-404.

In the instant case, there is no claim of ineffective assistance of counsel. There was no motion in the trial court to withdraw the plea, based

either on ineffective assistance or material misunderstanding of any of the consequences of the plea.

Although the appellant claims he can “review the plea for the first time on appeal” (Appellant’s Brief at 9), there is no basis to do so here, nor is there a record by which the Court of Appeals can verify any of the appellants claims regarding any purported lack of understanding of the law surrounding his guilty plea. In fact, the briefing by the appellant does not indicate any confusion or lack of awareness by the appellant as to either the nature of the charges or the facts relating to them.

There is no manifest injustice shown, as the defendant got the “benefit of his bargain”: i.e. the standard range he bargained for, the collateral consequences of which both his attorney and the court informed him, as well as the sentences in the two counts running concurrently. The defendant did not receive any collateral consequences he was not informed of, nor was any alleged deficiency in the statement of defendant on plea of guilty materially adverse to his interests. In other words, despite the guilty plea being inartfully drafted by his counsel at the trial court level, it did not induce him to take a deal he otherwise would not have entered into,

nor did it result in consequences or a greater sentence than he was advised of at the time of the entry of his plea.

In addition, the record that does exist, at the change of plea hearing, indicates Judge Lohrmann thoroughly and carefully explained the change of plea form to the appellant, repeatedly asked him if he had any questions, verified that counsel had reviewed with him all of facts, all of the consequences, and was satisfied at the trial level that the plea was knowing, intelligent and voluntary.

Finally, the trial judge indicated that he was very familiar with the case, had reviewed the probable cause affidavit, and was satisfied there was a factual basis for the plea. The probable cause affidavit is therefore incorporated by reference, since appellant has listed that in the Clerk's Papers for the Court of Appeals to review. CP 1-4.

Likewise, the appellant's reliance on *McCarthy v. United States*, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2<sup>nd</sup> 418 (1969) is equally misplaced. In that case, the appellant decided to, seemingly spontaneously in open court, plead guilty to certain counts in exchange for certain other counts being dismissed. *Id.* 46-462. There apparently was no Statement of Offender on Plea of Guilty document filed, there was no factual basis at all

for the crimes to which the appellant was pleading guilty, there was no indication counsel had adequately advised him of the facts and the law. *Id.*

At sentencing however, the appellant stated that he did not “intend” certain criminal acts, and his crime was as a result of “serious illness”. *Id.* The court went on to make certain factual findings as a result of a presentence investigation, and refused to allow the appellant to withdraw his pleas. *Id.*

That is patently not the case here. The factual basis, as listed in the Probable Cause affidavit, does support a conviction for Assault in the Second Degree. The appellant aimed a shotgun at the victim in Count I, with Sara Hickman Morse standing less than 6 inches away from the victim, fully in the “blast zone” of the shotgun.

“Sregzinski and Witness B were in the front room when Gabriel came out of the bathroom. Sregzinski confronted Gabriel in the front room while he was holding the shotgun and told Gabriel to sit down. Gabriel refused. Gabriel told Sregzinski he was going to have to shoot him and walked toward Sregzinski. Sregzinski shot Gabriel with the shotgun at close range.

Witness B was near Sregzinski and Gabriel but turned their head prior to the shotgun blast. Blood spatter from the forceful impact of the close range gun shot went onto Witness B’s clothing, hair, and face. Gabriel told Witness B to call the police as blood came out of his mouth. Gabriel

collapsed to the ground. Witness A came out of their bedroom after they heard the sound and saw Gabriel's lifeless body lying on the ground."

CP 2.

It was understood by all parties that Sara Morse Hickman was Witness B, and such was indicated at the sentencing hearing. RP 21. Those facts were not objected to by appellant's counsel, nor was the court's reliance on the Affidavit of Probable Cause objected to. And certainly, by admitting to Count I, the appellant implicitly admitted he knew who Witness B was, since Witness B was right there, in the room, standing next to the victim when the appellant fired the killing shot.

Finally, when appellant's trial counsel drafted the Statement of Offender on Plea of Guilty, she indicated she reviewed it with him, and the court specifically asked if his attorney had reviewed the statement with him. RP 2-3, 5, 8.

Appellant cites *State v. Walsh*, 143 Wn.2d. 1, 17 P.3<sup>rd</sup> 591 (2001) for the proposal that an appellant's lack of understanding of the charges allows for reversal on appeal. However, the fact of that case, and the holding, are not on all-fours with the instant case

In *Walsh*, the court held:

“The defendant agreed to plead guilty to second-degree rape in exchange for the prosecutor's promise to recommend a sentence at the low end of the standard range. However, the parties were mistaken about the proper standard range sentence--the standard range is higher than contemplated by the plea agreement. We hold that the plea agreement was not voluntary and that the defendant is entitled to challenge the plea's validity for the first time on appeal.”

*Walsh*, Id. at 3–4.

In the instant case, again, there was no material mistake by the parties as to any issue regarding the standard range, the sentence, the State's recommendations, or the collateral consequences that would permit review of the factual basis for the plea for the first time on appeal.

The appellant can not show that there was any misunderstanding that created a manifest injustice necessitating the plea to Count II be withdrawn.

In fact, this issue on appeal seems to be an attempt by appellant to “renegotiate” the plea agreement, long after it was finalized. Certainly, removing a count will result in a lower standard range than the one appellant agreed to and was sentenced to.

Appellant should not be able to exercise “buyers remorse” at this late stage. Appellant can point to no material interest that was affected by his counsel’s inartful drafting of the plea language.

**2. The trial court did not err in imposing drug/alcohol treatment.**

“The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to:...(5) Offer the offender an opportunity to improve himself or herself;...(7) Reduce the risk of reoffending by offenders in the community.” RCW 9.94A.010.

The appellant relies on *State v. Warnock*, 174 Wn.App. 608, 299 P.3<sup>rd</sup> 1173 (2013). However:

“(Appellant) next relies on *Warnock* and *State v. Kinzle*, 181 Wn. App. 774, 326 P.3d 870 (2014), to argue that imposition of a chemical dependency evaluation condition is improper when only alcohol, but not drugs, contributed to the offense. However, both *Warnock* and *Kinzle* were decided under a prior version of RCW 9.94A.607(1), which we determined required that the evaluation be limited to alcohol if there was no evidence that drugs contributed to the crime. *Warnock*, 174 Wn. App. at 614; *Kinzle*, 181 Wn. App. at 786. In 2015, the legislature amended that statute to allow a sentencing court to impose a chemical dependency evaluation when an offender has “any chemical dependency” and “regardless of the particular substance that contributed to the commission of the offense.” Because the amended version of RCW 9.94A.607(1) applies here, *Warnock* and *Kinzle* do not control.”

*State v. Luna, Unpublished Opinion pursuant to GR 14.1* 11Wn.App.2<sup>nd</sup> 1010 (Nov. 4, 2019).

Although this case cannot be cited as authoritative precedent, *Luna* is illustrative of the change in the statute concerning imposition of community corrections conditions.

In the instant case, the “/” usually is read to mean “and/or”. This will depend on the needs of the individual and resources of the community.

“...A rehabilitative program may include a directive that the offender obtain an evaluation as to the need for chemical dependency treatment related to the use of alcohol or controlled substances, regardless of the particular substance that contributed to the commission of the offense.” RCW 9.94A.607(1).

Certainly, the imposition of a treatment program, as deemed necessary by the Department of Correction when on probation, assists in implementing the legislative intent of the Sentencing Reform Act. It ensures the offender an “opportunity to improve him or herself” and “reduce(s) the risk of reoffending”.

Appellant’s only quibble with the imposition of probation conditions seems to be the slash language, that includes possible alcohol treatment, along with drug treatment.

Drugs certainly contributed to these crimes, and appellant concedes as much.

Since the defendant's substance abuse issue seems to be primarily with drugs (specifically methamphetamine), it is unlikely he will be required to participate in an alcohol treatment evaluation or subsequent treatment, where it is not deemed necessary (and thereby conserving limited community resources). However, the statute does give DOC the scope to be able to fully assess the appellant's needs upon release, and require treatment as necessary.

**3. The court did not err in imposing mandatory court costs.**

(1)(a) When any person is found guilty in any superior court of having committed a crime, except as provided in subsection (2) of this section, there shall be imposed by the court upon such convicted person a penalty assessment. The assessment shall be in addition to any other penalty or fine imposed by law and shall be five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor and two hundred fifty dollars for any case or cause of action that includes convictions of only one or more misdemeanors.

RCW 7.68.035(1)(a).

The \$500 victim penalty assessment is mandatory, as demonstrated by the legislature's use of the word "shall".

The appellant then complains that the Judgment and Sentence orders him to pay the costs of supervision. Unless and until the legislature removes that language from the statute, that cost is legitimately ordered, *if* the Department of Community Corrections elects to impose it. This can reasonably be said not to be a cost imposed by the court, but rather by DOC. The language in the J&S merely gives the Department the authority to impose it if it so chooses.

In addition, the court can later take into account the appellant's inability to pay and/or indigency, and modify the terms of the non-restitution, non-mandatory financial obligations:

'(f) If the court finds that the violation was not willful, the court may, and if the court finds that the defendant is indigent as defined in RCW 10.101.010(3) (a) through (c), the court shall modify the terms of payment of the legal financial obligations, reduce or waive nonrestitution legal financial obligations, or convert nonrestitution legal financial obligations to community restitution hours, if the jurisdiction operates a community restitution program, at the rate of no less than the state minimum wage established in RCW 49.46.020 for each hour of community restitution. The crime victim penalty assessment under RCW 7.68.035 may not be reduced, waived, or converted to community restitution hours.'

RCW 9.94B.040(f)

A defendant may also request that his court costs be amended or remitted:

A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

RCW 10.01.160(4). In making this determination, the court looks at whether a manifest hardship would occur at the time that the government would seek to collect on the obligation, not at the time of sentencing, or at any other time where his future ability to pay is speculative at best. *State v. Baldwin*, 63 Wn.App. 303, 310-11, 818 P.2d 1116 (1991).

As the court did not strike that language out, the court, in its discretion, intended to grant DOC the ability to impose those costs in the future. The court noted, as stated above, that the appellant is "highly intelligent" and has the capability to earn, although that capability is limited while incarcerated.

The appellant is not without a remedy, should he remain indigent upon release. The language in the Judgment and Sentence merely grants DOC the ability to request those costs, not that there will be no further inquiry into the appellant's ability to pay them.

**4. The State concedes that the trial court lacked authority to impose interest on non-restitution legal financial obligations.**

RCW 10.82.090(1) provides that as of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations. The only legal financial obligation imposed in this case is the \$500.00 crime victim penalty.

**5. The trial court did not err in entering the No Contact Order appended to the Judgment and Sentence.**

“(9) As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter...” RCW 9.94A.505(9).

“(6) The court, in granting an ex parte temporary antiharassment protection order or a civil antiharassment protection order, shall have broad discretion to grant such relief as the court deems proper...” RCW 10.14.080(6)

The Washington State Supreme Court has upheld the authority of a sentencing court to issue No Contact Orders as part of the Judgment and Sentence:

“Instead, we interpret RCW 9.94A.505(8) as continuing to provide trial courts with independent authority to impose crime-related

prohibitions, including no-contact orders”. *State v. Armendariz*, 160 Wash. 2d 106, 118, 156 P.3d 201, 207 (2007)

The *Armendariz* opinion goes on to hold:

“The plain language of the SRA supports the conclusion that trial courts may impose crime-related prohibitions, including no-contact orders, for a term of the maximum sentence to a crime. The SRA's legislative history and its interpretation by the SGC further support the conclusion that RCW 9.94A.505(8) is intended to provide trial courts with authority to impose such orders. Moreover, these same sources support the conclusion that such orders may last for the statutory maximum for the defendant's crime. Thus, we hold that the trial court in the present case did not exceed its authority under the SRA in imposing a five-year no-contact order as part of Armendariz's sentence for third-degree assault.”

*Id* at 120.

As far as a limit on the court’s authority, independent from conditions of community custody, the *Armendariz* court stated:

“(The) trial court authority to impose crime-related prohibitions, including no-contact orders, under RCW 9.94A.505(8), is independent of authority to impose conditions of community custody. This being so, it would be illogical to limit the effectiveness of orders imposed under RCW 9.94A.505(8) to a defendant's community custody term. In contrast, a time limit concomitant with the statutory maximum for the defendant's crime is logical as well as supported by the plain language of the SRA, its legislative history, and its interpretation by the SGC.”

*Id.* at 119.

In the instant case, the appellant had previously threatened Sara Morse Hickman’s life. CP 1-4. She had been the target of ongoing

harassment from the appellant. RP 21-22. The appellant did not contest this recitation of the facts of the case at sentencing.

In addition, the court can enforce the No Contact Order, even though it is not “technically” part of the conditions of sentence.

In a footnote to *Armendariz*, the Supreme Court stated:

“...However, as the Court of Appeals concluded in *Acrey*, the SRA does contain a mechanism for trial court enforcement of crime-related prohibitions unrelated to community custody. *See Acrey*, 135 Wash.App. at 945–46, 146 P.3d 1215 (discussing court's ability to enforce such orders under RCW 9.94A.634(1)).”

*Armendariz*, Id. at 114, footnote 7.

As a practical matter, the imposition of an Anti-harassment Order grants law enforcement the ability to provide relief to the protected party, and enforce the court's order of no contact. Even though the instant case does not include domestic violence, as contemplated by RCW 10.99 *et seq*, Sara was the victim of a violent crime, and an eyewitness to homicide. The argument that the court lacks the authority to protect her

from further harassment, as well as provide her with a remedy, is distasteful.

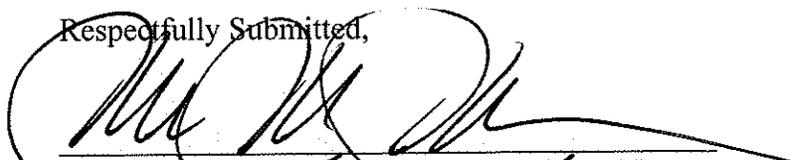
The appellant admitted to the amended charges. There was no argument that he would like to continue to have contact with Sara, against her wishes. The court has broad discretion to enter these orders. A finding of probable cause, as well as proof beyond a reasonable doubt, was made by the court upon entry of the appellant's guilty plea. This is a higher burden than that needed to sustain an Anti-Harassment Order.

**F. CONCLUSION**

For the forgoing reasons, the appellant's convictions and sentences for Manslaughter in the First Degree and Assault in the Second Degree, should be affirmed.

DATED this 12th day of July, 2020.

Respectfully Submitted,



MICHELLE M. MULHERN WSBA# 23185  
Deputy Prosecuting Attorney

Certificate of e-mailing and Mailing

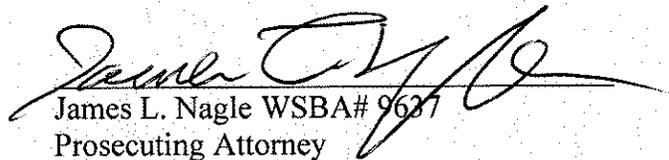
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James L. Nagle WSBA# 9637  
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# WALLA WALLA COUNTY PROSECUTING ATTORNEY

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## Transmittal Information

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 37043-7  
**Appellate Court Case Title:** State of Washington v. Robert Gage Sregzinski  
**Superior Court Case Number:** 17-1-00389-9

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### Comments:

Respondent's Brief and Notice of Appearance by Michelle M. Mulhern, Dep. Pros. Atty.

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