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No. 55074-8-1

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

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STATE OF WASHINGTON,

Respondent,

v.

ISMAEL ARMENDARIZ,

Appellant.

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

The Honorable Robert Alsdorf

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BRIEF OF APPELLANT

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## A. ASSIGNMENTS OF ERROR

1. Mr. Armendariz's constitutional right to effective assistance of counsel was violated when his trial court did not instruct the jury by defining lawful force in resisting arrest.

2. The trial court erred by admitting Mr. Armendariz's invitation to fight a police officer while in handcuffs in the holding cell several minutes after the charged offenses.

3. The sentencing court erred by ordering Mr. Armendariz to have no contact with Diana Truong for five years pursuant to his conviction for third degree assault of a police officer.

3. The sentencing court erred by ordering Mr. Armendariz to have no contact with Diana Truong as a condition of community placement for a third degree assault that was not a crime of domestic violence.

4. The sentencing court erred by ordering Mr. Armendariz to participate in domestic violence batterer's treatment as a condition of community custody for a third degree assault that was not a crime of domestic violence

## B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A criminal defendant's federal and state constitutional right to counsel includes the right to effective assistance of counsel.

Mr. Armendariz was charged with third degree assault on a police officer when a police officer's aggressive attempt to arrest Mr. Armendariz placed him in fear for his life, yet defense counsel did not request an instruction such as WPIC 17.02.01, explaining the right to self defense in that situation. Was Mr. Armendariz's constitutional right to a fair trial violated by his lawyer's deficient performance?

2. Evidence of a criminal defendant's other misconduct is not admissible to show bad character and is only admissible if it helps prove an essential ingredient of the charged offense. While Mr. Armendariz was handcuffed in the police holding cell several minutes after his arrest, he offered to fight with one of the arresting officers using inflammatory language. Did the admission of this other misconduct prejudice the jury by implying Mr. Armendariz was the type of person who liked to fight with police officers?

3. The Sentencing Reform Act permits the court to order an offender to have no contact with the crime victim or with a class of people. Mr. Armendariz was convicted of third degree assault for fighting with Seattle Police Officer Jason Chittenden. Did the court exceed its statutory authority by ordering Mr. Armendariz to have

no contact with Diana Truong for five years and as a condition community custody for third degree assault of Officer Chittenden?

4. RCW 9.94A.505 (effective until July 1, 2004) authorizes the court to order an offender to participate in a domestic violence treatment program only when the offender is being sentenced for a crime of domestic violence. Mr. Armendariz was convicted of a third degree assault on a police officer who was not a family member, and the crime was therefore not a crime of domestic violence. Did the sentencing court err in ordering Mr. Armendariz to both participate in and successfully complete domestic violence treatment?

### C. STATEMENT OF THE CASE

Ismael Armendariz was charged with one count of assault in the third degree on Seattle Police Officer Jason Chittenden and one count of violating a court-issued no-contact order protecting Diana Nonas-Truong. CP 1-2.

Ms. Truong and Mr. Armendariz were in a happy relationship for over nine years. RP 40, 92-93.<sup>1</sup> Mr. Armendariz was very close

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<sup>1</sup> The verbatim report of proceedings is contained in two volumes. The first volume contains August 26, 2004; August 30, 2004 (AM); August 31, 2004; and September 24, 2004. Unfortunately, the court reporter did not include the afternoon of August 30 in the original volume, and it is in a separate volume,

to Ms. Truong's sons, who viewed him as a father, and he had a good relationship with her other family members and even her ex-husband. RP 40, 104-05. Toward the end of the relationship, however, things were shaky and Ms. Truong got scared. RP 93.

In November, 2003, Seattle Municipal Court issued an order prohibiting Mr. Armendariz from coming closer than 500 feet to Ms. Truong. Ex. 8; RP 41-42. The no contact order was apparently valid on January 3, 2004, but Ms. Truong nonetheless invited Mr. Armendariz to her home to see her sons, one of whom was leaving for California. RP 5, 49, 105-06. According to Mr. Armendariz, Ms. Truong told him she had gone to court and the order had been lifted. RP 42, 52-53. That afternoon, Mr. Armendariz and Ms. Truong decided to end their relationship, and Mr. Armendariz left the apartment. RP 109-10. He returned in the evening to pick up tools he needed for work. RP 42-43.

Ms. Truong heard pounding on the door that evening, but decided to ignore it and took a shower. RP 94-95. When she finished her shower, Ms. Truong found three police officers at her door who asked if she was OK and if she knew her apartment had

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which begins at page 91. The page numbers for the verbatim report of proceedings are thus not in chronological order, but are otherwise clear.

a broken window. RP 95-96, 142. Ms. Truong was surprised to learn her bedroom window was broken. RP 95-96.

Jason Chittenden, one of the three Seattle Police officers, remained in the apartment with Ms. Truong; the other officers searched for Mr. Armendariz. RP 32-33, 98, 142-43. Officer Chittenden locked the door and talked with Ms. Truong, and after a few minutes they heard Mr. Armendariz shouting and pounding on the door and windows. RP 98-99, 143-44. Officer Chittenden wanted to arrest Mr. Armendariz, and he called for additional officers because he feared Mr. Armendariz might be combative. RP 144-45. But when Officer Chittenden thought it sounded like Mr. Armendariz was moving away from the door, the officer decided to arrest Mr. Armendariz before he could leave. RP 145-47.

As Officer Chittenden opened the apartment door, the door flew open, hitting the officer in the head. RP 106-07, 147. When he noticed Mr. Armendariz just standing in the doorway, the officer immediately grabbed Mr. Armendariz, pulled him inside the living room, and threw him to the floor. RP 46-47, 148. Officer Chittenden claimed he yelled, "police," but Mr. Armendariz and Ms. Truong never heard Officer Chittenden say he was a police officer

or inform Mr. Armendariz he was under arrest. RP 43, 57, 100, 107.

Officer Chittenden and Mr. Armendariz struggled for several minutes on the floor, each trying to gain control over the other. RP 100, 149, 161. Officer Chittenden called for emergency help via his police radio, and claimed Mr. Armendariz said, "Yeah, you'd better call for help, bitch." RP 154. Mr. Armendariz never struck the officer, but Officer Chittenden punched Mr. Armendariz so hard he injured his hands. RP 156-57, 161-62.

In response to police radio broadcast of Officer Chittenden's call for help, several officers quickly arrived at the apartment. RP 34, 114-15, 123-24. When Officer Ian Polhemus arrived, he saw Officer Chittenden holding Mr. Armendariz in a "bear hug" with arms and legs wrapped around him. RP 34-35, 117-18, 155. Officer Chittenden also used a scissor lock. RP 155. Officer Polhemus grabbed Mr. Armendariz and tried to pull his arms behind his back. RP 119, 128, 130, 152-53. Eventually more officers arrived and placed Mr. Armendariz under arrest. RP 36, 153-54.

The officers continued to manhandle Mr. Armendariz even after he had been handcuffed and subdued. RP 45, 62-63, 108. Over defense objection, the trial court permitted one officer to

testify that 20 to 30 minutes after the arrest, when Mr. Armendariz was in a holding cell, he invited that officer to take off the handcuffs and fight him. RP 130-33.

Mr. Armendariz explained that he was at the apartment door when it suddenly opened and a man grabbed him by his shirt and threw him to the floor. RP 43-44. Mr. Armendariz said he was so startled he was "in shock" and as the officer fell on top of him, Mr. Armendariz believed his life was in danger. RP 44. As he struggled with the man on the floor, Mr. Armendariz realized the man was a policeman and asked him what he was doing but received no response. RP 44, 46, 60. Mr. Armendariz related that he would have complied if the officer had told him he was the police and to put his hands behind his back. RP 57. Mr. Armendariz was taken to the hospital; he was bleeding, had a loose tooth and his entire body was bruised. RP 45, 62.

Mr. Armendariz was convicted as charged. CP 30, 31, 38, SuppCP \_\_\_\_ (Verdict Form B, sub. no. 35D). The court sentenced Mr. Armendariz to 3 months confinement followed by 12 months community custody for assault in the third degree. CP 34; RP 87-88. For violating a no contact order, a gross misdemeanor, the court imposed a 12-month suspended sentence on the condition

Mr. Armendariz serve 5 months in jail. CP 38-39; RP 87-90.

Although Ms. Truong requested a 2-year no-contact order, the court ordered Mr. Armendariz have no contact with her for 5 years. RP 88-89; CP 34. In addition, the court ordered Mr. Armendariz participate in domestic violence treatment for both offenses. CP 37, 39. This appeal follows. CP 41-51.

#### D. ARGUMENT

##### 1. MR. ARMENDARIZ'S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED WHEN HIS ATTORNEY DID NOT PROPOSE A SELF-DEFENSE INSTRUCTION FOR ASSAULT IN THE THIRD DEGREE

a. Mr. Armendariz had a constitutional right to effective assistance of counsel. A criminal defendant's right to counsel is protected by the Sixth and Fourteenth Amendments to the United States Constitution and article 1, section 22 of the Washington Constitution. Counsel plays a critical role in due process, helping to ensure that the adversarial process is fair. Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The right to counsel thus necessarily includes the right to effective assistance of counsel. Strickland, 466 U.S. at 685-86.

When a criminal defendant alleges his trial counsel was ineffective, appellate courts review the claim utilizing the Strickland

test. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). The court must determine (1) was the attorney's performance below objective standards of reasonable representation, and, if so, (2) did counsel's deficient performance prejudice the defendant. Strickland, 466 U.S. at 687-88; Thomas, 109 Wn.2d at 226. In reviewing the first prong, courts presume counsel's representation was effective. Strickland, 466 U.S. at 689; Thomas, 109 Wn.2d at 226. To show prejudice under the second prong, the defendant must demonstrate that "counsel's errors were so serious as to deprive the defendant or a fair trial." Strickland, 466 U.S. at 687.

b. Mr. Armendariz's counsel's performance was deficient because he did not propose a jury instruction addressing self defense. At common law, a citizen had the right to resist an unlawful arrest. State v. Valentine, 132 Wn.2d 1, 9-20, 935 P.2d 1294 (1997) (discussing common law rule, its historical background and modern application). In modern-day Washington, however, courts have decided that permitting a suspect to resist an arrest he believes is unlawful would promote violence. Valentine, 135 Wn.2d at 20-21, citing State v. Holeman, 103 Wn.2d 426, 430, 693 P.2d 89 (1985) and State v. Westlund, 13 Wn.App. 460, 467, 536 P.2d

20, rev. denied, 85 Wn.2d 1014 (1975). An arrestee who is danger of imminent serious injury or death, however, retains the right to act in self defense. Valentine, 135 Wn.2d at 20-21.

This rule is so well known it is included in the Washington Pattern Jury Instructions. WPIC 17.02.01 reads:

It is a defense to the charge of \_\_\_\_\_ that force [used] [attempted] [offered to be used] was lawful as defined in this instruction.

A person may [use] [attempt to use] [offer to use] force [to resist] [to aid another in resisting] an arrest [by someone known by the person to be a [police] [corrections] officer] only if the person being arrested is in actual and imminent danger of serious injury. The person [using] [or] [offering to use] the force may employ such force and means as a reasonably prudent person would use under the same or similar circumstances.

The [State] [City] [County] has the burden of proving beyond a reasonable doubt that the force [used] [attempted] [offered to be used] by the defendant was not lawful. If you find that the [State] [City] [County] has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of guilty.

WPIC 17.02.01 (1998 Pocket Part). Mr. Armendariz's attorney did not request this instruction.<sup>2</sup>

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<sup>2</sup> Since the Committee revision of WPIC 17.02.01, the Washington Supreme Court held that the defendant need not be aware the person assaulted is a police officer to be guilty of third degree assault under RCW 9A.36.031(1). State v. Brown, 140 Wn.2d 456, 998 P.2d 321 (2000). By omitting the words, "someone known by the person to be", the instruction is still valid and applicable in this case.

The failure of defense counsel to propose an appropriate jury instruction may be deficient performance. In Thomas, defense counsel failed to propose an instruction explaining the subjective elements of the felony flight statute despite raising a defense of diminished capacity based upon intoxication. 109 Wn.2d at 226-27. The Washington Supreme Court concluded that “a reasonably competent attorney would have been sufficiently aware of the relevant legal principles to enable him or her to propose and instruction based upon pertinent cases.” Id. at 229.

This Court has also found the failure to offer a jury instruction defining a lesser-included offense was ineffective assistance of counsel in State v. Ward, 125 Wn.App. 243, 104 P.3d 670 (2004). Ward raised a self-defense claim to two counts of second degree assault, and the State argued that counsel’s failure to request a jury instruction on the lesser-included offense of unlawful display of a weapon was a tactical decision. 104 P.3d at 671-73. This Court, however, concluded defense counsel’s failure was ineffective assistance of counsel, as self-defense was applicable to both assault and unlawful display of a weapon and because of the great difference in punishment Ward faced for the greater and lesser offenses. Id. at 673-74. Finally, noting the jury’s

question concerning the elements of second degree assault and the court's comments at sentencing, this Court concluded the result of the trial could have been different with the proper instructions. Id. at 673.

Here, a modified self defense instruction was warranted by the facts of the case. Officer Chittenden testified that he grabbed Mr. Armendariz, pulled him inside the house and threw him to the floor before telling him he was under arrest. RP 147-48. The officer wrestled on the ground with Mr. Armendariz and held him tightly in a bear hug. RP 34-35, 117-18, 155. Mr. Armendariz was afraid for his life during the fight. RP 44. A reasonably competent attorney would have been aware of his client's testimony before trial, consulted the readily available pattern instructions, and offered an instruction on the only available defense.

Moreover, counsel was alerted to the issue of self defense when the State moved to exclude such a defense prior to trial. The trial court granted the motion at that time, but made it clear that self defense could be raised if the facts elicited at trial supported it. RP 17-20. In light of Mr. Armendariz's testimony, his attorney's failure to propose a modified self defense instruction appropriate to assault on a police officer was deficient performance.

c. Mr. Armendariz was prejudiced by his counsel's deficient performance. Given the facts of the case, the Court cannot be convinced the jury verdict would have been the same if the jury had been instructed on self defense. Rather than tell Mr. Armendariz he was under arrest, Officer Chittenden grabbed Mr. Armendariz, pulled him into the apartment, threw him to the floor, and tried to physically control him. Officer Chittenden described the fight as two men struggling to control the other. RP 149, 161. And while Mr. Armendariz did not strike the officer, Officer Chittenden punched Mr. Armendariz, describing his actions as "pain distraction compliance." RP 119-20, 156-57, 161-62. Mr. Armendariz was bruised all over after the fight. RP 162. In contrast, Officer Chittenden was hurt on his head when door flew open and on his hands from punching Mr. Armendariz or hitting the furniture during the struggle. RP 147-48, 162.

The instruction defining assault told the jury that mutual combat is not an assault. CP 18. See State v. Simmons, 59 Wn.2d 318, 388, 368 P.2d 378 (1962); State v. Shelley, 85 Wn.App. 24, 929 P.2d 489, rev. denied, 133 Wn.2d 1010 (1997). The instruction also stated that assault is an act "with unlawful force." CP 18. The jury's question to the court during deliberation asking the definition

of “unlawful force” demonstrates the jury was struggling with whether the force used by the police officer and the defendant was lawful. CP 18, 28.

Mr. Armendariz testified that he did not understand what was happening and felt his life was in danger. Because defense counsel did not propose a modified self defense instruction, the jury had little choice but to convict Mr. Armendariz of third degree assault. This Court cannot be confident that the jury would have reached the same verdict absent defense counsel’s failure to propose the proper modified self-defense instruction. Mr. Armendariz’s conviction for third degree assault should be reversed and remanded for a new trial. Thomas, 109 Wn.2d at 232; Ward, 109 P.3d at 673.

2. MR. ARMENDARIZ WAS PREJUDICED BY THE  
ADMISSION OF HIS POST-ARREST STATEMENTS AS  
PART OF THE RES GESTAE OF THE ASSAULT

Seattle Police Officer Brett Minstead testified he helped put Mr. Armendariz in the police holding cell, 20 to 30 minutes after the police had arrested Mr. Armendariz and removed him from the apartment. RP 130, 133. Officer Minstead related Mr. Armendariz stated, “Come on bitch. Take these handcuffs off and we can go at it.” RP 132. This statement was not directed at Officer Chittenden,

who was not present. RP 125, 154. The State asserted the statement showed Mr. Armendariz's lack of cooperation with the police and "overall demeanor" that evening. RP 137. Over defense objection, the court admitted the statement as part of the "res gestae" of the offense. RP 130-31, 136-38.

a. Mr. Armendariz's statement when placed in a holding cell was irrelevant evidence of other misconduct. Only relevant evidence is admissible in Washington. ER 402; State v. Harris, 97 Wn.App. 865, 868, 989 P.2d 553 (1999), rev. denied, 140 Wn.2d 1017 (2000). Evidence is relevant if it tends to "make the existence of any fact that is of consequence to the determination of the action more or less probable that it would be without the evidence." ER 401. Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403.

In addition, evidence of a defendant's other misconduct is not admissible to prove the defendant's character. ER 404; State v. Everybodytalksabout, 145 Wn.2d 456, 464, 39 P.3d 294 (2002); State v. Smith, 106 Wn.2d 772, 775, 725 P.2d 951 (1986).

Evidence of other misconduct may not be used to demonstrate the defendant is a dangerous person or the type of person who would

commit the charged offense. Everybodytalksabout, 145 Wn.2d at 466. The rule, however, permits evidence of other misconduct when relevant to prove an essential ingredient of the offense charged:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of the person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b).

In determining if evidence of other misconduct is admissible under ER 404(b), the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purposes for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002), citing State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). In doubtful cases, the evidence should be excluded. Thang, 145 Wn.2d at 642, citing Smith, 106 Wn.2d at 776. This Court reviews admission of evidence for an abuse of discretion. Thang, 145 Wn.2d at 642.

What Mr. Armendariz said 20 to 30 minutes after the assault was not relevant to prove any essential element of assault on a police officer. His demeanor and attitude after he had been subdued and arrested by approximately six police officers could easily have been different than his attitude at the time of the offense. Thus, his attitude in the holding cell does not help prove intent or any other mental state at the time of the offense.

b. Mr. Armendariz's statements 20 to 30 minutes after his arrest were not part of the *res gestae* of the assault. Under the *res gestae* exception to ER 404(b), evidence of another crime may be admitted where it is "a 'link in the chain' of an unbroken sequence of events surrounding the charged offense . . . 'in order that a complete picture be depicted for the jury.'" (Emphasis added). *State v. Brown*, 132 Wn.2d 529, 571, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998), quoting *State v. Tharp*, 96 Wn.2d 591, 594, 637 P.2d 961 (1981). The evidence must still be relevant to a material issue and its probative value must outweigh its prejudicial effect. *Id.*

Thus, in *Brown*, evidence of the defendant's assault on one woman was admissible in his trial for raping and killing a different woman because the defendant used the murder victim to finance

his trip to join the other woman; the crimes themselves were “linked in significant ways.” Brown, 132 Wn.2d at 572-76. The res gestae evidence demonstrated the “immediate context within which [the] charged crime took place,” not the context in which it was discovered and investigated. Id. at 576. Similarly, in State v. Elmore, the defendant’s prior molestation of the murder victim was admissible at a death penalty proceeding only because the defendant killed the victim to keep her from disclosing the abuse. 139 Wn.2d 250, 285-87, 985 P.2d 289 (1999), cert. denied, 531 U.S. 837 (2000).

But Mr. Armendariz’s statement to Officer Milstead was part of the chain of events that occurred after Mr. Armendariz was arrested and securely in police custody. It was thus part of his arrest, not the offense itself. The jury did not need to learn Mr. Armendariz’s demeanor after he was arrested to decide if he assaulted Officer Chittenden. Mr. Armendariz’s holding cell statement was unrelated to the assault and thus was inadmissible as res gestae.

c. The improper admission of Mr. Armendariz’s inflammatory statement violated his right to a fair trial. Erroneous admission of ER 404(b) evidence requires reversal if there is a

reasonable probability the error materially affected the trial. State v. Pogue, 104 Wn.App. 981, 988, 17 P.3d 1272 (2001). Here, the erroneous admission of Mr. Armendariz's invitation to fight with Officer Milstead while he was handcuffed in a police holding cell told the jury Mr. Armendariz was the kind of man who likes to fight with police officers, and the court gave no limiting instruction suggesting otherwise. Thus, the error clearly affected the trial and the jury's consideration of Mr. Armendariz's testimony in his own defense. Mr. Armendariz's conviction for assault in the third degree should be reversed and remanded for a new trial.

3. THE SENTENCING COURT LACKED AUTHORITY TO ORDER MR. ARMENDARIZ TO HAVE NO CONTACT WITH MS. TRUANG FOR THE CRIME OF ASSAULTING A POLICE OFFICER

The trial court ordered Armendariz to have no contact with Ms. Truong for a period of five years as part of his sentence for third degree assault and also included no contact with Ms. Truong as a condition of community custody. Ms. Truong, however, was not the victim of the third degree assault, and the assault was not a crime of domestic violence. The trial court lacked statutory authority to order no contact with Ms. Truant as part of a sentence for third degree assault, and that no contact order must be deleted.

Mr. Armendariz was convicted of one felony, assault in the third degree. RCW 9A.36.031(2). Because assault in the third degree is classified as a crime against a person, the court may order up to one year of community custody in addition to a sentence of confinement for one year or less. RCW 9.94A.505(2)(a)(iv)(effective until July 1, 2004) (court must sentence pursuant to RCW 9.94A.545 where term of confinement one year or less); RCW 9.94A.411 (defining crimes against persons for purposes of prosecution standards); RCW 9.94A.545 (authorizing up to one year community custody for crimes against persons). RCW 9.94A.545 permits the court to order conditions of community custody as found at RCW 9.94A.715 and RCW 9.94A.720.

RCW 9.94A.720 provides that for offenses occurring after June 6, 1996, the Department may include a condition of community placement "prohibiting the offender from having contact with any other specified individuals or specific class of individuals." RCW 9.94A.720(c). RCW 9.94A.715(2)(a) refers to the conditions listed at RCW 9.94A.700(4) and (5). RCW 9.94A.700(5) permits the court to order, among other special conditions, that the offender

not have contact with the crime victim or a specified class of individuals:

As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions: . . .

(b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals.

RCW 9.94A.700(5)(b). This court reviews sentencing conditions for abuse of discretion. State v. Crockett, 118 Wn.App. 853, 856, 78 P.3d 658 (2003).

In State v. Riles, 135 Wn.2d 326, 346, 957 P.2d 655 (1998), the court reviewed the trial court's sentencing authority under former RCW 9.94A.120(9)(c)(ii), which permitted the court to require offenders "not [to] have direct or indirect contact with the victim or the crime or a specified class of individuals." This language is identical to current RCW 9.94A.700(5)(b). The court concluded that an offender who had been convicted of raping an adult woman could not be ordered to have no contact with "any minor children." 135 Wn.2d at 349. Such a restraint upon the defendant's First Amendment right to free association was unreasonable and unrelated to the State's need to protect the

public. Id. at 350. The court therefore vacated the order prohibiting all contact with children. Id.

Mr. Armendariz was convicted of third degree assault for assaulting a police officer, Jason Chittenden. CP 1, 17, 19, 30. He was not convicted of assaulting Ms. Truong. Id. Ms. Truong was not the crime victim, nor was she a specified class of individuals. Thus, the sentencing court lacked authority to order Mr. Armendariz to have no contact with Ms. Truong for five years as part of his SRA sentence for third degree assault of a police officer. Mr. Armendariz's case must be remanded for the superior court to delete the no contact order from the Judgment and Sentence. Riles, 135 Wn.2d at 350; CP 34, 37.

4. THE SENTENCING COURT LACKED STATUTORY AUTHORITY TO ORDER MR. ARMENDARIZ TO PARTICIPATE IN AND SUCCESSFULLY COMPLETE DOMESTIC VIOLENCE PERPETRATORS TREATMENT AS A CONDITION OF COMMUNITY PLACEMENT FOR ASSAULTING A POLICE OFFICER

The sentencing court also required Mr. Armendariz to participate in and successfully complete domestic violence treatment was a condition of community placement for assault in the third degree. Because the victim of the third degree assault was Officer Chittenden, the offense was not a crime of domestic

violence and the court lacked statutory authority to order the treatment program.

The SRA governs felony sentencing in Washington. RCW 9.94A.505 (effective until July 1, 2004) permits the court to order an offender to participate in a domestic violence perpetrator program in limited circumstances.

In sentencing an offender convicted of a crime of domestic violence, as defined in RCW 10.99.020, if the offender has a minor child, or if the victim of the offense for which the offender was convicted has a child, the court may, as part of any term of community supervision, community placement, or community custody, order the offender to participate in a domestic violence perpetrator program approved under RCW 26.50.150.

RCW 9.94A.505(11). The definition of “domestic violence” in RCW 10.99.020 includes third degree assault when it is committed by one family or household member against the other. Former RCW 10.99.020(3).<sup>3</sup>

As mentioned above, RCW 9.94A.545, RCW 9.94A.715 and RCW 9.94A.720 control the court’s power to order various conditions of community placement in this case. Although RCW

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<sup>3</sup> Former RCW 10.99.020, effective at the time of Mr. Armendariz’s January 2, 2004, offense, was amended effective June 10, 2004, to add additional definitions and to renumber the existing ones. The amendments do not affect the definitions at issue here, except that “domestic violence” is now found at RCW 10.99.020(5) and “family and household members” is defined at RCW 10.99.020(3).

9.94A.715(2)(b) does mention “rehabilitative programs,” there is no mention of domestic violence treatment as in RCW 9.94A.505(11). RCW 9.94A.505 (effective until July 1, 2004); RCW 9.94A.545; RCW 9.94A.715; RCW 9.94A.720. When the Legislature uses specific terms in one part of a statute, the absence of those terms in another part of the statute is presumed to be intentional. State v. Roggenkamp, 153 Wn.2d 614, 625, 106 P.3d 196 (2005); State v. Hutsell, 120 Wn.2d 913, 921, 845 P.2d 1325 (1993). And when legislation specifically delineates the class of people it operates on, this Court must infer other classes of people are excluded. Snohomish County v. Anderson, 123 Wn.2d 151, 157, 867 P.2d 116 (1994). Thus, the language of the statute reveals the Legislature only intended to give the court authority to order domestic violence perpetrators treatment for felony offenders who commit crimes of domestic violence.

Additionally, when there are two possible interpretations of a statute, the rule of lenity requires this Court to interpret the SRA in favor of the criminal defendant. Riles, 135 Wn.2d at 341. This Court should thus construe “rehabilitative” programs to exclude domestic violence treatment because it is specifically mentioned

only for crimes of domestic violence where the perpetrator or victim has minor children.

The SRA also requires that conditions of community custody be related to the facts of the offense. RCW 9.94A.715(2)(a); Crockett, 118 Wn.App. at 857; State v. Jones, 118 Wn.App. 199, 207-08, 76 P.3d 258 (2003). The conditions of community custody may only include rehabilitative programs “reasonably related to the circumstances of the crime, the offender’s risk of reoffending, or the safety of the community.” RCW 9.94A.715(2)(a).

Here, the court ordered Mr. Armendariz to complete domestic violence batterers treatment program as a condition of community placement for third degree assault, not as a condition of probation for violation of a no contact order. CP 36, 38-40. Domestic violence counseling, however, is not “reasonably related” to Mr. Armendariz’s risk of again assaulting a police officer and is thus not reasonably related to his crime.

The sentencing court did not have statutory authority to order Mr. Armendariz to participate in domestic violence treatment as a condition of community placement because he did not commit a crime of domestic violence when he assaulted Officer Chittenden.

Mr. Armendariz's case must be remanded for the superior court to delete this condition of community placement.

E. CONCLUSION

Mr. Armendariz's conviction for third degree assault must be reversed and remanded for a new trial because he did not receive the effective assistance of counsel guaranteed by the federal and state constitutions and because admission of his irrelevant invitation to fight a police officer after his arrest unduly prejudiced the jury against him.

Additionally, the requirements that Mr. Armendariz have no contact with Ms. Truong participate in and successfully complete domestic violence treatment must be deleted from his sentence for second degree assault.

DATED this 6<sup>th</sup> day of June, 2005.

Respectfully submitted,



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Attorney for Appellant  
Washington Appellate Project

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 55074-8-1
	)	
ISMAEL ARMENDARIZ,	)	
	)	
APPELLANT.	)	

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**DECLARATION OF SERVICE**

I, MARIA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 6<sup>TH</sup> DAY OF JUNE, 2005, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S OPENING BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KING COUNTY PROSECUTOR'S OFFICE  
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SIGNED IN SEATTLE, WASHINGTON THIS 6<sup>TH</sup> DAY OF JUNE, 2005.

x \_\_\_\_\_ 

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