

No. 95528-0

No. 75537-4

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

STATE OF WASHINGTON, Respondent,

v.

MICHAEL IAN BURNS, Appellant.

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Court of Appeals
Division I
State of Washington

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the trial court abused its discretion in denying defendant's motion to represent himself where given defendant's puzzling responses to questions during the colloquy, the court could not find that the defendant was making a knowing and intelligent waiver of his right to counsel.
2. Whether defendant may raise a confrontation claim for the first time on appeal where such a claim is forfeited if not raised below and any alleged error would not have been manifest under RAP 2.5 because the judge could have presumed that defense counsel was not raising the issue in order to avoid the possibility of the victim testifying at trial.
3. Whether the trial court abused its discretion in finding that defendant's convictions for assault in the second degree and felony violation of a no contact order were not the same course of criminal conduct where the statutory intent of the one is to assault someone and is to violate the terms of an order on the other.
4. Whether the appellate court should require the defendant to file a declaration or statement under penalty of perjury before considering his request not to impose appellate costs where he did not file one with his motion for an order of indigency, as contemplated by RAP 15.2.

C. FACTS

1. Procedural facts

On November 17, 2015 Burns was charged with Assault in the Second Degree, in violation of RCW 9A.36.021(1)(g), a class B Felony, and Violation of a No Contact Order, in violation of RCW

26.50.110(1),(5), a class C felony, along with domestic violence allegations, for his actions on or about November 14, 2017. CP 138-40¹. He was tried in June of 2016 and found guilty of both offenses by a jury on June 16, 2016. 12RP 509-514². After having found that his offenses did not constitute the same course of criminal conduct, the judge imposed a standard range sentence of 50 months on the second degree assault and 57 months on the felony violation of a no contact order. CP 96-97; 13RP 372, 395. The judge also ordered a mental health evaluation. CP 98; 13RP 398.

2. Substantive Facts

On November 14, 2015 Carol Donovan, who lived kitty corner upstairs from her neighbor Christina Jackson in a condominium complex, heard a lot of commotion from Jackson's unit around dinnertime. 10RP 249-53. She heard loud yelling and crashing and then it seemed to subside for about 5 minutes. 10 RP 253, 263. Then she heard a noise outside and voices and someone coming up the stairs, so she opened the door and saw Jackson, barefoot, struggling to ascend the stairs as Burns was reaching

¹ Some language in the information was amended before trial. CP 25-27.

² The verbatim report of proceedings is referenced as follows: 1RP – Nov. 16, 2015; 2RP Nov. 20, 2015 and Feb. 7, 2016; 3RP - Dec. 10, 2015; 4RP – Dec. 30, 2015 and Jan. 7, 2016; 5RP – Jan.13, 2016; 6RP – April 4, 2016; 7RP April 21, 2016; 8RP – May 3, 2016; 9RP – June 13, 2016; 10RP – June 14, 2016; 11RP June 15, 2016; 12RP – June 16, 2016; and 13RP – July 13, 2016.

for and trying to grab Jackson's foot. 10RP 253-55. Jackson managed to get free, and called out to Donovan, "He's trying to kill me. Call the police." 10RP 254. Donovan was familiar with Burns as she had seen him around the building a number of times, over the course of a year, and had seen him with Jackson before. 10RP 255-56, 269-70.

Donovan grabbed Jackson by the arm and pulled Jackson into her apartment, closed and locked the door. 10RP 254. Jackson was extremely upset and was crying and having trouble breathing. 10RP 254. When Donovan asked Jackson if she was okay, Jackson said, "He choked me, he was choking me," and pulled her hair to the side to show Donovan red marks that were on her throat. 10RP 254-55, 258. After she attended to Jackson, giving her water and Kleenex, Donovan called 911 and Jackson requested medical assistance. 10RP 256. Jackson's hair was a mess and she appeared to have some blood on her face in addition to the red marks on the side of her neck. 10RP 257-59. Jackson told Donovan that she was starting to calm down, that she felt safe where she was. 10RP RP 259.

When Donovan asked her what happened, Jackson said that she had gotten into a fight, they were in the bedroom, he had choked her, she had blacked out, and then came to and kicked him and ran out into the stairwell. 10RP 260, 266. Jackson also told Donovan that Burns had been living with her and that they had been drinking that night. 10RP 264. The

police arrived and paramedics came and attended to Jackson. 10RP 260-62.

Officer Poortinga responded to the scene around 7:45 p.m. because dispatch had received a phone call in which they heard a female yelling, “Get away from me!” and another person had called and reported an assault on Jackson. 10RP 275-76. He initially went to Jackson’s unit to talk to Burns because he thought Burns might still be there. 10RP 278-79. After that unit was cleared, he went up to Donovan’s unit. 10RP 279, 281. When he contacted Jackson, she was still crying and very upset. 10RP 280. He observed some injuries to her neck, including on the left side and toward the front as well a slight abrasion to her left cheek/jaw area, and she complained that her head, neck and chest were very sore. 10RP 280-81, 285-86, 303.

Officer Poortinga spoke with Jackson about what happened, and Jackson told him she had met Burns several years before, they had dated and lived together for two of those years. 10RP 299. She said Burns had been staying with her for about two weeks, but that recently she had been trying to get him to leave. 10RP 294, 299. Burns had refused to leave and they had been discussing his leaving that day when Burns had gotten agitated and snapped. He had gotten on top of her, with his knee on her chest, and covered her nose with one hand and gripped her neck with the

other. 10RP 299-300. She said it felt like Burns was pushing all his body weight on her neck and that she couldn't breathe. 10RP 300. She tried to plead with Burns but she couldn't really speak. She blacked out for a couple seconds and then regained consciousness. 10RP 300. As Burns walked around the bed, she asked him what had happened and Burns attacked her again, pushing against her forehead, nose and mouth, causing her to black out again. 10RP 300. After she regained consciousness again, Burns attacked her again, harder than before, and told her he was already going to prison, so he might as well make it worth it by killing her. 10RP301. Jackson said she was able to kick him off and break free, and then she ran out the door. 10RP 302.

Another officer who took photos of her injuries observed some fresh blood to Jackson's jawline, pinkness to one side of her throat and broken capillaries to the other side, although the photos didn't show the injuries very well. 10RP 313-15; Supp CP __, Sub Nom. 76, Ex. 7 & 8.

Officer Poortinga confirmed that there was an order prohibiting Burns from having contact with Jackson. 10RP 287-93. Burns was later found hiding at his father's motel room. 10RP 338-41. Burns had previously been convicted three times of violating no contact orders that prohibited him from contacting Jackson. 10RP 218-222, 235-43.

D. ARGUMENT

- 1. The trial court did not abuse its discretion in denying Burns's motion to represent himself because it could not find that he was able to knowingly and intelligently waive his right to counsel given his lack of understanding of the charges against him and what it would mean to represent himself.**

Burns asserts that the trial court abused its discretion in denying his request to represent himself because his request was timely and unequivocal. After engaging in an extensive colloquy with Burns, Judge Garrett could not find that he was knowingly and intelligently waiving his right to counsel given some of his perplexing responses to her questions, which indicated he wasn't sure whether he had two or three pending cases, thought that a corporation was involved in the prosecution, that the prosecution related to a contract and that he didn't fully comprehend what would be required of him to represent himself. The judge did not abuse her discretion in finding that he was not knowingly and intelligently waiving his right to counsel, which required her denying his request to represent himself. Moreover, Burns had an adequate remedy which was to renew his motion, which he did. Judge Montoya-Lewis also could not find that he was knowingly and intelligently waiving his right to counsel. Burns does not contest her denial of his motion to represent himself.

A criminal defendant has a right to represent him or herself pursuant to the Sixth Amendment. Faretta v. California, 422 U.S. 806, 819-21, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). A defendant may waive his converse right to counsel and proceed pro se, but s/he must do so unequivocally³. DeWeese, 117 Wn. 2d at 377; State v. Silva, 108 Wn. App. 536, 539, 31 P.3d 729 (2001). “This right is so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice.” State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). The only grounds upon which a court may deny a request to proceed pro se are that the request is untimely, equivocal, involuntary, or “made without a general understanding of the consequences.” *Id.* at 504-05. A request to proceed pro se combined with a request for alternative counsel may, but not necessarily, indicate that the request is equivocal. State v. Stenson, 132 Wn.2d 668, 740-41, 940 P.2d 1239 (1997). A court may set over a request to go pro se if it is not

³ The requirement that the request be unequivocal stems from the tension between the defendant’s right to counsel and the right to self-representation. Because of this conflict, a defendant’s request for self-representation can be a “heads I win, tails you lose” proposition for a trial court. If the court too readily accedes to the request, an appellate court may reverse, finding an ineffective waiver of the right to counsel. But if the trial court rejects the request, it runs the risk of depriving the defendant of his right to self-representation. ... To limit baseless challenges on appeal, courts have required that a defendant’s request to proceed pro se be stated unequivocally. State v. DeWeese, 117 Wn.2d 369, 377, 816 P.2d 1 (1991) (internal citations omitted) (quoting State v. Imus, 37 Wn. App. 170, 179–80, 679 P.2d 376 (1984)).

prepared to address the issue. Madsen, 168 Wn.2d at 504. A trial court’s decision regarding a request to go pro se, i.e., waiver of the right to counsel, is reviewed for an abuse of discretion. In re Rhome, 172 Wn.2d 654, 667, 260 P.3d 874 (2011). “Discretion is abused if a decision is manifestly unreasonable or ‘rests on facts unsupported in the record or was reached by applying the wrong legal standard.’” Madsen, 168 Wn.2d at 504.

A waiver of either the right to counsel must be knowing, intelligent, and voluntary. Faretta, 422 U.S. at 835. The focus of the waiver of the right to counsel inquiry is to ensure that a defendant is “aware of the dangers and disadvantages of self-representation, so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open.’” *Id.*; *accord*, City of Bellevue v. Acrey, 103 Wn.2d 203, 691 P.2d 957 (1984). While a colloquy is the preferred means of ensuring a valid waiver of the right to counsel, the court may look to evidence in the “record that shows the defendant’s actual awareness of the risks of self-representation.” Acrey, 103 Wn.2d at 211. If a colloquy is conducted, it should generally address the nature and classification of the charges, the maximum penalty upon conviction, as well as advise the defendant that there are technical rules that apply to the presentation of evidence. *Id.*

The validity of a waiver of the right to counsel depends upon the facts and circumstances of the individual case. DeWeese, 117 Wn.2d at 378. In order to constitute a valid waiver, the defendant must understand the seriousness of the offense(s) charged, the possible maximum penalty, and the “existence of technical procedural rules governing the presentation of his defense.” *Id.* The trial court’s determination as to whether the defendant’s waiver is intelligent is “an *ad hoc* determination which depends upon the particular facts and circumstances of the case, including the background, experience and conduct of the accused.” In re Rhome, 172 Wn.2d at 663 (quoting State v. Hahn, 106 Wn.2d 885, 900, 726 P.2d 25 (1986)). The validity of the waiver is determined based on the defendant’s knowledge at the time of the waiver. State v. Modica, 136 Wn. App. 434, 445, 149 P.3d 446 (2006), *aff’d*, 164 Wn.2d 83 (2008).

“A trial court may consider a defendant’s mental health history and status when competency has been questioned, even where the defendant has been found competent to stand trial.” In re Rhome, 172 Wn.2d at 667. The trial court may take into consideration that a defendant’s mental capacity may have “serious and negative effects” on the defendant’s ability to conduct his or her defense. *Id.* at 669; *see also*, Indiana v. Edwards, 554 U.S. 164, 177-78, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008). Where there is a concern as to the defendant’s mental health, the trial court

may inquire further in order to ensure a valid waiver of the right to counsel. In re Rhome, 172 Wn.2d at 669.

Here, the record shows that two judges who considered Burns's request to go pro se had concerns about his mental capacity to knowingly and intelligently waive his right to counsel. At his initial arraignment, the public defender indicated that Burns refused to discuss the case with him because he didn't want the public defender to represent him, he wanted to represent himself. 2RP 3. When the judge twice requested Burns's name, Burns said, "I am me." 2RP 3. When the judge directed the public defender to represent Burns, Burns interrupted the public defender and stated, "I'm not here to enter a plea to this." RP 2RP 3-4. After the judge read the charges to him and entered a plea of not guilty on his behalf, Burns informed the judge he had fired the attorney within 72 hours of being held and that he was there to challenge subject matter jurisdiction. 2RP 4-7. The judge instructed him to discuss that with his attorney, and then after Burns refused to answer some additional questions, Burns asked the judge, "The question is why won't you answer my question." 2RP 7-9. When asked if Burns had any other questions, Burns said, "Hmm, the trickery and bargaining you guys are making available is kind of a putrid in my eyes." 2RP 9. The judge then terminated the hearing. Burns

refused to sign either the no contact order or trial setting order, but did interject, “I am not a corporation, Your Honor.” 2RP 9-10.

At a hearing to review legal representation a few weeks later before Judge Montoya-Lewis, Burns informed the judge that he wanted to request new legal representation because he hadn’t been represented in the way he saw fit. 3RP 17. The public defender informed the court she had represented Burns as she was required to and that she was prepared to continue representing him. 3RP 17-18. The judge informed Burns that he wasn’t entitled to an attorney of his own choosing and that it didn’t appear the attorney- client relationship was not functional. 3RP 18. After the judge denied Burns’ request for a new public defender, Burns asked, “Considering that I’m not binded to any contracts, I want to know who here today has a claim against me?” 3RP 19.

A couple weeks later, a disagreement arose between Burns and his public defender because the public defender wanted a continuance on all three of Burns’s cases in part because the new charges, the ones in this case, included a strike offense. 4RP 4-5. Burns informed the court that two of the cases had been pending for six months and he was ready to go to trial on all three cases. 4RP 5. When the judge granted the continuance because of the new strike offense, Burns informed him that he was prepared to relieve counsel of her duties. 4RP 7 The judge informed him

he could file a motion to represent himself, but the judge strongly advised against it particularly given the new strike offense. Burns told the court that if he had access to law library material, he could go to trial because “a monkey could be prepared to go to trial on all three,” and because there was no evidence. 4RP 7-8. The judge again urged Burns to consult with his attorney, to which Burns replied that she was not doing the one thing he asked her and that she was trying to get him into the “state’s hands,” and that wasn’t going to happen. 4RP 8. He again refused to sign an order. 4RP 9.

The next day, he filed a message with the Superior Court Clerk that stated (verbatim):

I rebut yesterday’s motion in court and don’t agree with the continuance. I object to my third party appealing and trying to open a contract. I wish to fire my public defender. I have not signed any contracts and demand for any to be recinded. The Sheriff/deputy took the copy of the unsigned motion in court.

CP 6.

A week later at a hearing regarding status of representation, the judge asked what Burns wanted to say, noting that he had seen something about a contract and subject matter jurisdiction and summary judgment. 4RP 10. Referring to himself in the third person, Burns stated, “For one, Your Honor, Mr. Burns was not intellectually and completely aware of

what was going on the whole time, so now that he has become self aware, he is here today to address the court and take care of some business...”

He continued:

Well, for one, you got my rebuttal for what happened on matters that happened on twenty thirty and I also have something written for the court. Um it goes: Your offer of contract for subject matter jurisdiction and summary judgment is hereby rejected and returned to you unsigned in full accord with truth and lending. You are ordered to prove up the claim to cease and desist under the teller of law. Any further correspondence from the sender signed and dated here must be signed under penalties of perjury. If you are or your agent here are representing me or Michael I. Burns, you are hereby fired without prejudice without recourse. Michael I. Burns with the Power of Attorney In Fact.

4RP 11-12. Burns then indicated “Mr. Burns” was there to fire his public defender and to go pro se. 4RP 12. The judge indicated he could not do the necessary colloquy because it had not been noted up for that and informed the public defender to get a special set. 4RP 12-13. Burns informed the judge that “Mr. Burns is not okay with any of that.” 4RP 13.

A week later, Judge Garrett held the hearing on Burns’s request to represent himself. Burns indicated that he wanted to go pro se “for reasons other than just becoming aware of certain things,” and that he would prefer to handle his own “business considering certain matters especially when I’ve gotten lied to, threatened and coerced into certain things that I wasn’t aware of at the time but I am aware of now.” 5RP 2.

After the judge informed him that she was going to explain the process and then would ask about him about the lies and threats, Judge Garrett informed Burns of the charges and the maximum penalties for them. 5RP 3-4. Burns requested to speak and stated, “These matters being spoken of do not pertain to me, okay?” 5RP 5-6. When the judge inquired why not, Burns stated, “Because they don’t. I’m not a corporate entity, I’m a human being, and I’m not contracted into your place of business. Furthermore, I will not be contracted in your place of business, okay.” When the judge explained that the law did not require a contract in order to charge him with a crime and explained that he was facing serious time and that she needed to go through the charges and sentencing consequences with him, Burns replied that he understood that “someone” could be charged with those matters and face serious time, but that they did not pertain to him and that he wasn’t going to allow this. 5RP 7. He reiterated that he wanted to go pro se.

The judge then went through all the charges and maximum sentences on each and advised Burns regarding consecutive versus concurrent sentences. 5RP 8-10. When the judge asked Burns what his educational background was, Burns replied, “I don’t think that really matters.” 5RP 11. After the judge explained why she wanted to know that, Burns said, “I will tell you but may I say something? I think I’m highly

educated enough to represent myself because other than maybe a little looking into a few things about the law I think I can handle it because it's mostly just keeping your composure and acting." 5RP 11. After reminding Burns not to interrupt her, Judge Garrett explained that in order to try a case, he would need to understand the rules of evidence and rules of procedure, that the judge would not be permitted to help him and that he would be held to the same standard as the prosecutor. 5RP 12-13. Burns informed the judge that he understood the sentencing consequences, but that he had a right to be represented as he saw fit and the only person who could do that was him. 5RP 13.

The judge then inquired about his comments about lies and threats, to which he responded:

My lawyer. She came to visit me and wanted to show me the sentencing range, which doesn't bother me, I don't even want to listen to it because I will handle this matter and it will unfold in according to how I have it planned and, you know, she threatened me with bail jumping and other charges and just, you know, she has tried to get me to sign this contract that I'm not going to -- and furthermore, her and Mr. Quinn have coerced me into opening a contract without my knowledge or consent and I shot that down.

5RP 14. When the judge told Burns she didn't understand what he meant by contract, Burns stated, "It's a contracts in the corporation and I'm not buying." 5RP 15. When asked what corporation he meant, Burns said:

It's, the corporation is the United States, Your Honor, and I am not a citizen of that corporation. So I am not, I'm here to stand here today and tell you that I want to represent myself as pro se and I'm not buying into the company, okay? And I demand...

5RP 15. When the judge asked if Burns thought there was a corporation involved in prosecuting the charges, Burns indicated there always was.

5RP 15.

Judge Garrett then inquired of the public defender if she had spoken with Burns enough to determine if he was capable of assisting her at trial, to which the public defender responded that she had had extensive conversations with him and that she did not have a reason to seek an evaluation. 5RP 15-16. After the judge asked Burns about the threat regarding bail jumping, the public defender interjected that she didn't think that Burns should respond due to attorney-client privilege and the potential for Burns to incriminate himself. 5RP 16. At this point the prosecutor interjected and informed the judge that Burns had previously sought new counsel, but that this was the first they were hearing about corporations and things, and he was concerned as to whether Burns could voluntarily, knowingly and intelligently waive his right to counsel given those statements. 5RP 17-18. When Burns indicated that he would love to waive counsel, the judge informed him that the question is whether he was able to with a full understanding of the situation, and that she was

concerned he didn't have a "full understanding of the situation" he was in because, in addition to being impatient with the court, he indicated that the potential penalty didn't matter to him, that he thought there was a corporation involved that he didn't want to be a part of and that the corporation had something to do with his trial, and that he didn't appear to understand that the charges applied to him, despite her attempt to explain that they did. 5RP 19-20. Burns then stated, "It's not a case, Your Honor." 5RP 20. The judge then explained she was concerned he didn't understand how the criminal system works and the potential consequences. Burns commented, "Your Honor, from what I just said I, my understanding, is that Mr. Burns is contracted into two cases that have been globalized into one matter, okay. There is a matter at your fingertips that is not a case yet, I have rejected the contract for it to become a case and --." The judge directed Burns repeatedly to stop talking because she was concerned he might incriminate himself. 5RP 21. She indicated that there were three cases and that he was the one charged with those crimes, that he kept referring to "Mr. Burns" as if he were a different person, to which Mr. Burns interjected, "He is, he's not me." 5RP 21. He continued, "That's a corporate entity, that is a false reality, okay. You understand?" 5 RP 22.

When the judge informed the parties that she was denying Burns' motion to waive his right to counsel and to proceed pro se because he didn't appear to understand the nature of the charges and seriousness of the situation, Burns kept interrupting the judge despite being told to stop. 5RP 22. The judge indicated that she was denying the motion because she didn't think Burns was "competent" to represent himself. She also indicated she would leave it to counsel to consider any competency concerns, but would rely on counsel's assessment regarding competency. 5RP 22. Burns interrupted the judge again, so the judge recessed because of his behavior. 5RP 23. After a brief break, Burns interrupted the public defender, stating, "It is in recess because you people are liars and you don't know what ...". 5RP 23. The judge then instructed the deputy to return Burns to the jail, but Burns continued:

You guys are liars, you guys need to release me. There has been no claim, there has been no claim put against me. Okay? And you guys do not have a contract over my head. Okay? So you have no right to hold me. You people are sick.

5RP 23. After Burns left the courtroom, the judge mentioned the issue of competency again, to which the public defender responded she knew the procedure to request a competency evaluation. 5RP 23-24. The judge indicated that the findings for the order should be that the "Court does not find that Mr. Burns is sufficiently knowledgeable about the nature of the

charges against him and the legal processes that lead to trial and criminal matters for the Court to believe that he is making a knowing waiver of his right to counsel.” 5RP 24. The judge also indicated that Burns could raise the issue again later. 5RP 24.

Prior to entry of the written order, Burns filed another message with the Superior Court Clerk, which stated:

I reserve the right to counsel and am hereby relieving counsel of there duties. I am not incompetit to handle my own Affairs. I object to the matters of 1-13-16, and the prosecutor, public deffender, and judge trying to lie and trick me into a contract. Contract rejected. 15-1-01383-4
NO MORE!

CP 7. The written order indicated that the judge was denying Burns’s motion to represent himself based on the following findings:

That the defendant’s interaction with the court raises significant concerns about the defendant’s appreciation of the nature of the criminal charges against him, the potential consequences of proceeding pro se, and the standard of legal advocacy to which he would be held, including knowledge of courtroom procedures and rules.

(1) That the court was unable to find that the defendant was able to knowingly and voluntarily waive his right to counsel at this time.

CP 8-9.

On March 3rd, Burns filed a message directed to Judge Garrett, entitled “Business Proposal.” In it he stated:

I need forms to file to go pro se. This Lawyer is handling my business affairs without my consent. I have been

infringed on without knowledge of this. This public defender has tried to coirce, and threaten me into entering into contracts in which she has. But not this time, She threatened me into other contracts by altering my state of being. I will not enter anything or bind myself to anything in fiction. She is not representing my best interest or as i see fit. I would hope the court can come to a solid realization, that ficticious paperwork is a fabrication not factual evidence of a crime. I will not let Whatcom County's STATE Department mess with me any longer. Furthermore, The city of Bellingham will have civil and criminal issues to contend with because of altering my state being. For there benefit at my expense. All rights reserved and reinstated.

CP 10-11. From March 7th – April 1st, Burns filed numerous kites with the Superior Court Clerk. In them Burns continued to assert he had a conflict with counsel, that he wanted to go pro se and again mentioned contracts and business affairs. CP 14-21.

On May 3rd, Burns renewed his request to represent himself.

When Judge Montoya-Lewis asked him to tell her about his request, he stated:

Well, I'm in extreme conflict with Ms. Paige due to the fact that any of presentment of state contract entered into in the past has been done unconscionably and under duress and furthermore I just – I – this is more of a hearing to ask for different representation.

8RP 38. When the judge started upon the colloquy for self-representation, the public defender interjected and clarified that what Mr. Burns was requesting was different representation. 8RP 39. When Judge Montoya-

Lewis inquired about the issue with the public defender, Burns said that anything that had been entered into in the past was “unintentional, unknowing, and just involuntary,” but that he wasn’t talking about continuances. 8RP 40.

Burns then informed the court that he had the prosecutor’s oath of office and requested to read some of it into the record. 8RP 41. After he was permitted to do so, the judge asked him what his concern was. He answered, “My concern is, are these matters of substance or form?” 8RP 42. The judge asked him to clarify what he meant, and he stated that he didn’t know, that’s what he was asking and he asked the prosecutor to inform him of the “nature and cause of the accusations” that had been charged. 8RP 42. The judge inquired if he had gone over the charges with his attorney, and Burns responded that was the question he had for the prosecutor. 8RP 42. Burns acknowledged he had gone over charges, but then complained about the public defender’s representation of him. 8RP 43. When the judge asked him to give her one example of something he had asked the public defender to do that wasn’t done, Burns responded, “Wow. Pure validity of the whole situation and its entirety.” 8RP 43-44. When asked what a different attorney could do for him, Burns continued to reference his being forced to sign things that he didn’t want to and that previous ones were unconscionable and made under duress. 8RP 44. The

judge and Burns discussed further the issue of things he had been forced to sign, Burns at one point commented: “There’s got to be a little more validity to this whole situation otherwise it doesn’t exist.” 8RP 47. The public defender then informed the judge that she had consulted with her supervisor and a determination had been made not to change counsel, but that another attorney was going to assist her, but that Burns still was unhappy with her. 8RP 48-49.

After denying his motion for different representation and hearing additional complaints about the public defender, the judge explained that if he wanted to represent himself, she would need to go through some questions with him. 8RP 49-51. After Burns stated if he couldn’t get the public defender removed, he wanted to represent himself, the judge informed Burns she could appoint standby counsel and then inquired if Burns was listening to her, to which Burns replied that he was. 8RP 52-53. When asked to tell her a little bit about the rules of evidence that he would be required to abide by, Burns said he had never looked at them and would need to get a copy. 8RP 53. When asked if he would be ready to go to trial on the current date, Burns said he would be. 8RP 53-54. When asked how, without discussing the underlying case, he would prepare for trial, Burns said:

I know that up until trial we're not supposed to discuss certain things because there's an underlying cause here and nobody seems to want to talk about that underlying cause. Well, that's what I came here today to discuss. ... And the only thing that Ms. Paige has been doing is focusing on that underlying cause that nobody seems to want to discuss. So she in turn is not doing anything other than rep – or presenting form to me that I will not enter into.

8RP 54-55. When asked about witnesses, Burns said that he had thought about that a lot, but he didn't think "there is witnesses on any form or any of these matter (sic) at their entirety." 8RP 55. When asked about picking a jury, he said he would ask them questions, but declined to "divulge" an example of such questions. 8RP 56. When asked if he was aware of the punishment he was facing, he stated, "Like I said, as Ms. Paige has not done her job in telling me certain things other than just discussing a form, yeah, it's been a battle all its own." 8RP 56. When asked if he was aware of the charges against him, Burns indicated he wasn't quite sure because when he was picked up, a "certain amount" was forfeited "which in turn did something and at that time I wasn't completely and fully aware of what the man had done..." 8RP 56.

Burns went on to discuss bail that had been set on his previous cases, and when asked if he knew what the charges were in those two cases, he stated he thought so but wasn't sure because of the discovery he had been given. 8RP 57-58. The prosecutor requested the motion be

denied because Burns had not “demonstrated a true awareness of the potential risks and disadvantages of self-representation.” The public defender volunteered that Burns continued to believe that there were only two cases pending, and that the third case involved a strike offense. 8RP 59. Burns indicated that just because there were three packets of paperwork did not mean that they were all pending, and that he was only aware of two. 8RP 60. When the judge informed him there were in fact three cases pending, he replied, “It’s just paperwork.”

Noting that Judge Garrett had previously denied a request, Judge Montoya-Lewis ruled:

I cannot find, Mr. Burns, that you’re able to knowingly and intelligently waive your right to counsel at this time and proceed pro se because it appears you don’t understand that there are three cases pending against you, but also the nature of those charges and they’re extremely serious cases that could subject you to very serious penalties and you seem unable to really understand that. And beyond that, your ability to assess what the rules of evidence are and the technical requirements associated with presenting a case to a jury, the Court cannot find that there’s a knowing and intelligent waiver here.

8RP 61. After informing the judge that it was his life, Burns told her, “Well, if you’re aware of that then you are – you ought to know that as a human being I should be able to not be imposed on completely as I’m not a creature of this planet.” 8RP 63.

Burns only asserts that Judge Garrett erred in denying his motion to represent himself. He asserts that since it was a timely and unequivocal request that he should have been permitted to represent himself. Contrary to his assertion, Judge Garrett did articulate why she denied his motion, because she could not find that he was knowingly and intelligently waiving his right to counsel. The judge found that Burns did not appreciate the “nature of the criminal charges against him, the potential consequences of proceeding pro se, and the standard of legal advocacy to which he would be held, including knowledge of courtroom procedures and rules,” and therefore could not find that he was knowingly and intelligently waiving his right to counsel. While the judge was apparently concerned about Burns’s competency to assist counsel and to stand trial, the public defender indicated that she was familiar with the procedure to obtain a competency evaluation and did not intend to seek one at the time, so the judge left the competency to stand trial issue with Burns’s attorney. Although the judge decided not to order an evaluation, that doesn’t mean that she couldn’t take his mental capacity into consideration in determining whether he was making a knowing, intelligent and voluntary waiver of his right to counsel. *See, State v. Englund*, 186 Wn. App. 444, 345 P.3d 859 (2015), *rev. den.*, 183 Wn.2d 1011, 352 P.3d 188 (2015) (“trial courts may limit the right to self-representation when there is a

question about the defendant's *competency to act as his own counsel.*") (emphasis added).

This case is similar to the Englund case. After having had a couple changes of attorneys and upon the court permitting the last attorney to withdraw, the defendant moved to represent himself. Englund, 186 Wn. App. at 450. The court deferred the colloquy until the defendant filed a written motion. *Id.* At the next hearing regarding the status of representation, the court engaged in a colloquy about going pro se despite no motion having been filed. During the colloquy, the defendant, who was charged with unlawful possession of a firearm, kept interjecting that he had gun rights in response to questions about the rules of evidence and procedure, and stated that the evidence wasn't against him, that he had done nothing wrong. *Id.* at 451-52. The judge found that the defendant did not have the capacity to understand and follow the procedural rules and thus would not be able to present a defense. *Id.* at 451. After new counsel was on board, the defendant was evaluated for competency to stand trial and was found competent. *Id.* at 453. The defendant, however, did not believe the attorney represented him and continued to deny that he had assaulted anyone. The attorney then moved for reconsideration regarding the defendant's motion to represent himself, noting that the defendant intended not to cooperate with her. *Id.* The court heard from the defendant

at a subsequent hearing, but denied the motion to reconsider as untimely. Id. at 453-54.

On appeal, the court found that the deferral of the initial request to go pro se was not a denial and was not an abuse of discretion because the court was permitted to delay hearing such a motion when it was reasonably unprepared to hear it. Id. at 456. The court also held that the judge properly considered the defendant's mental capacity in determining whether to permit the defendant to represent himself at the subsequent hearing. Noting that competency to stand trial does not "automatically equate to a right to self-representation," the court found that the defendant had clearly shown a lack of capacity to present a defense because he could not articulate why he wanted a different attorney, he was unresponsive to questions about his knowledge of the rules of evidence and criminal procedure, and did not appear to understand some of the basic questions posed to him. Id. at 457-58. It noted that the defendant was so focused on his gun rights that his responses did not relate to the questions he was asked. Id. at 458.

Burns seems to assert that the judge here could not take into consideration his mental capacity to defend himself at trial because he was not determined to be incompetent and the judge did not seek to evaluate him for competency to stand trial. However, competency to stand trial and

competency, i.e., mental capacity, to represent oneself at trial are two different standards. One does not equate with the other. Judge Garrett was not required to have Burns evaluated for competency to assist his attorney at trial, which the public defender did not appear to question, in order to consider his mental capacity to present a defense and to knowingly and intelligently waive his right to counsel. As in England, Burns's responses to a number of basic questions did not make sense. He claimed the charges didn't relate to him, he was fixated on a corporation being involved in the prosecution and some kind of contract(s) that he did not agree with or had been forced to sign. He did not understand that he was charged with the current case, believing instead that he had only two pending cases, instead of the three. Judge Garrett did not abuse her discretion in following the presumption against finding a waiver of the right to counsel.

Moreover, the judge permitted Burns to raise the issue of self-representation again, which he did before Judge Montoya-Lewis. He does not contest the validity of Judge Montoya-Lewis's denial of his request to represent himself based on her determination that his waiver of the right to counsel was not knowing and intelligent. Even if Judge Garrett had erred in her determination, Burns had an adequate remedy below, one that he pursued, the outcome of which he does not dispute. The judges did not

abuse their discretion in finding that his waiver of the right to counsel was not knowing and intelligent, thus resulting in a denial of his request to represent himself.

2. Burns may not raise a confrontation claim now because he did not assert it below, and even if he could raise his claim pursuant to RAP 2.5, Burns opened the door to the majority of Jackson's statements.

Burns asserts that the admission of Jackson's statements to her neighbor Donovan and to Officer Poortinga violated the confrontation clause and that he may raise it on appeal pursuant to RAP 2.5. Burns did not assert at trial that admission of Jackson's statements to either the neighbor or to Officer Poortinga violated his right to confrontation. He therefore may not raise this issue for the first time on appeal. Any error would not have been manifest in the trial court under RAP 2.5 because the trial court could assume defense counsel was making a strategic decision not to assert such a claim because then the State could have decided to make further efforts to produce Jackson to testify, which would not have been in Burns's best interest. Finally, Jackson's statements to neighbor Donovan were not testimonial and therefore their admission did not violate the confrontation clause. Burns acknowledges that one of the statements Officer Poortinga testified to was probably elicited as part of an initial, on-going emergency response, and therefore not testimonial. The

rest, the most significant statements Jackson made to the officer were elicited by the prosecutor *after* defense counsel had inquired into her statements on cross-examination, and therefore counsel opened the door to those statements, and cannot complain now that they were inadmissible. Finally, even if admission of some of the statements violated the confrontation clause, any error was harmless because there was other evidence supporting the conviction beyond a reasonable doubt.

a. Burns may not raise a Confrontation Clause violation for the first time on appeal

Under the Sixth Amendment to the U.S. Constitution and Art. 1 Section 22 of the State Constitution a defendant has a right to confront the witnesses against them. However, the right must be asserted at trial or is lost. “A clear line of decisions—*Melendez-Diaz*, *Bullcoming*, *Jasper*, and *Hayes*—requires that a defendant raise a Sixth Amendment confrontation clause claim at or before trial or lose the benefit of the right.” State v. O’Cain, 169 Wn. App. 228, 248, 279 P.3d 926 (2012)⁴. A confrontation clause claim is also lost under Art. 1 Section 22 if not asserted at trial. Id. at 252.

⁴ Division II while approving the reasoning of Division I’s analysis in O’Cain regarding the ability to assert a confrontation clause claim for the first time on appeal, declined to follow it. State v. Hart, 195 Wn. App. 449, 458 n.3, 381 P.3d 142 (2016), review denied, 187 Wn.2d 1011, 388 P.3d 480 (2017).

Burns asserts he may raise this issue for the first time on appeal under RAP 2.5. However, as noted in O’Cain and State v. Fraser, 170 Wn. App. 13, 25-26, 282 P.3d 152 (2012), the confrontation right is forfeited, not just simply waived, upon failure to assert it at trial. O’Cain, 169 Wn. App. at 247-48. Even if Burns could assert it under RAP 2.5, he has failed to show that the alleged error was manifest, i.e., whether it is obvious on the record. Fraser, 170 Wn. App. at 27. “It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object.” *Id.* (quoting State v. O’Hara, 167 Wn.2d 91, 100, 217 P.3d 756 (2009)). On appeal the court considers whether the trial court could have corrected the error given what it knew at the time. *Id.*

Here, if the public defender has asserted a confrontation clause violation, the State would have been forced to decide whether to call Jackson or forego the evidence. The facts show that while Jackson decided not to respond to the subpoena, the prosecutor knew where she lived, had been in recent contact with her and had been prepared to send a deputy to give her a ride to the courthouse. 11RP 359-60, 378-79. Burns has not asserted that counsel was ineffective in failing to raise such a claim, and counsel clearly could have strategically chosen not to assert a

confrontation clause knowing full well the State might then actually produce the victim as a witness. Presumably the court would also be aware that counsel could have that very strategic reason for not raising a confrontation clause objection, and therefore any alleged error was not manifest.

Burns asserts the violation was manifest because Jackson's statements to the officer and her neighbor were the only evidence of the assault. As set forth below, Jackson's statements to her neighbor that Burns choked her and she had blacked out clearly were not testimonial. There was also the additional, photographic evidence, the statement "Get away from me!" Jackson made while on the phone with the 911 dispatcher, her statement in the hallway that Burns was trying to kill her, as well as the neighbor's and officer's testimony about the injuries they saw on Jackson's neck and face. Therefore, even if some of Jackson's later statement to the officer was testimonial, he has failed to demonstrate any error actually prejudiced him.

b. Jackson's statements to her neighbor were not testimonial.

Even if Burns could assert a confrontation clause claim for the first time on appeal, Jackson's statements to her neighbor were not testimonial as they were not statements made "under circumstances that would lead an

objective witness reasonably to believe that the statement would be available for use at a later trial,” as Burns contends. A reasonable person in Jackson’s shoes, under the circumstances, would not have foreseen that her statements made to a neighbor right after she fled from Burns, while under stress of the incident, were statements that would be used, or available for use, as evidence in a later prosecution. Their admission did not violate the Confrontation Clause.

Confrontation clause claims are reviewed de novo. Mason, 160 Wn.2d at 922. Admission of testimonial statements violates a defendant’s confrontation clause rights unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness regarding the statement. Crawford v. Washington, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Testimonial statements are typically those that are solemn declarations that are made for the purpose of proving some fact, and include: (1) ex parte in-court testimony; (2) extrajudicial statements like affidavits; and (3) “statements made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” State v. Chambers, 134 Wn. App. 853, 860–61, 142 P.3d 668 (2006). “Casual remarks made to family, friends and nongovernmental agents are generally not testimonial statements because they were not made in contemplation of

bearing formal witness against the accused.” State v. Shafer, 156 Wn.2d 381, 389, 128 P.3d 87 (2006).

When a person makes a statement to a nongovernmental witness, the court applies a “declarant-centric standard” in determining whether the statement is testimonial. State v. Hurtado, 173 Wn. App. 592, 599, 294 P.3d 838, *rev. den.*, 177 Wn.2d 1021 (2013).

‘The proper test to be applied in determining whether the declarant intended to bear testimony against the accused is whether a reasonable person in the declarant's position would anticipate his or her statement being used against the accused in investigating and prosecuting the alleged crime. This inquiry focuses on the declarant's intent by evaluating the specific circumstances in which the out-of-court statement was made.’

Id. (quoting Shafer, 156 Wn.2d 390 n.8). In other words, the test for nongovernmental witnesses is whether a reasonable person in the declarant’s position would think h/she was “making a record of evidence for a future prosecution” when h/she made the statement. *Id.* at 602.

Burns asserts that Jackson’s statements to her neighbor about what happened in the apartment⁵ are testimonial because the *neighbor* would have considered Jackson’s statements to her about what had happened available for use in a later prosecution. Burns, however, focuses on the wrong person in applying the testimonial test. The issue is whether

⁵ Burns apparently does not contest Jackson’s statements to Donovan made in the stairway: “He’s trying to kill me! Call the police!” The public defender objected based on hearsay, but was overruled based on their being excited utterances. 10RP 254.

Jackson, or a reasonable person in her shoes, would have foreseen that her statements would be used as evidence in a future prosecution.

Donovan heard loud yelling and crashing coming from Jackson's apartment and then a few minutes later she heard yelling and someone coming up the stairs towards her apartment. After she opened her door, Donovan saw Burns grabbing for Jackson as she struggled to get up the stairs. Jackson exclaimed, "He's trying to kill me! Call the police!" Donovan pulled Jackson, who was extremely upset and crying, inside her apartment, locked the door and asked her if she was okay. Jackson replied, "He choked me." At the time she said this, she was having difficulty breathing. After Donovan called 911 Jackson was still upset and crying. Donovan asked her again if she was okay, and Jackson said she was calming down and she felt safe there. Donovan asked her what happened⁶, and Jackson said that she had gotten into a fight in her bedroom, that Burns had choked her, she blacked out, she came to, kicked him and then had run out of the apartment into the stairway. Donovan didn't know where Burns went after she closed the door. On cross examination, Burns's attorney asked whether Jackson had told her they'd

⁶ Burns's attorney objected on the grounds of hearsay, which was overruled.

been drinking beer and how many times Jackson had told her that she had lost consciousness, and Donovan responded once. 2RP 264-66.

The statements Jackson made to Donovan about what happened in the apartment were made to a neighbor, not a police officer. They were made within a very short period of time after Jackson had been assaulted, soon after she had reached what she felt was a safe place. Her initial statement, while showing Donovan the marks on her throat, that Burns had choked her was not in response to a question designed to elicit information about what had happened. She was still under stress of the incident when she made the later statements that Burns had choked her and that she had blacked out. A reasonable person in Jackson's shoes would not have believed that she was making statements that would be used later in a prosecution against Burns. *See, Shafer*, 156 Wn.2d at 389-91 (child's statements to her mother the morning after the sex abuse although not entirely spontaneous were not testimonial, and child's statements to family friend a week after defendant was arrested were not testimonial because child would not have known that her statements would be used later in the prosecution even though the friend had previously worked as an informant).

- c. *Burns opened the door to most of Jackson's statements to the police officer and the other statement was not testimonial.*

Burns asserts all of the statements Jackson made to Officer Poortinga were testimonial as well. Burns opened the door to the officer's testimony regarding Jackson's statement to him about what happened by initially inquiring into it on cross examination.⁷ Apparently defense counsel understood she had opened the door because she did not object when it was clear the prosecutor intended to elicit further information about the statement after counsel had asked the officer about the number of times Jackson said she had been choked to unconsciousness and other questions about her statement. The only other statement that was elicited, on direct, was a statement regarding how she was feeling at that time, which was not a testimonial statement.

In Davis v. Washington, the U.S. Supreme Court described "testimonial" statements to law enforcement as those that are made when there is no ongoing emergency and the primary purpose of the police interrogation "is to establish or prove *past* events potentially relevant to later criminal prosecution." Mason, 160 Wn.2d at 918-19 (quoting Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 2273-74, 165 L.Ed.2d 224

⁷ Defense counsel also opened the door to statements Jackson made at her interview about her injuries by inquiring into other statements she made at the interview. 11RP 400-02.

(2006)) (emphasis added). Conversely if the purpose of the statements is to assist police in meeting an ongoing emergency, they are not testimonial. State v. Pugh, 167 Wn.2d 825, 832, 225 P.3d 892 (2009). The court considers four factors in determining whether the primary purpose of police questioning is to assist them to meet an ongoing emergency: 1) whether the declarant is speaking of events as they are occurring or is describing past events; 2) “whether a reasonable listener would recognize that the speaker is facing an ongoing emergency”; 3) whether the questions and responses show that the statements were necessary to resolve the ongoing emergency or only to determine what had occurred; and 4) how formal the questioning was. *Id.* This is an objective analysis, from the standpoint of the person at the time the statements were made, taking into consideration the individuals’ statements, their conduct and the circumstances at the time of the interaction. State v. Perez, 184 Wn. App. 321, 339, 337 P.3d 352 (2014), *rev. den.*, 182 Wn.2d 1017 (2015). The fact that statements concern recent past events does not necessarily render them testimonial where an ongoing emergency still exists. *Id.* at 340. For example statements made within minutes of an assault may be considered as having been made contemporaneously with the assault. *Id.*

Inadmissible evidence may be admitted if a party “opens the door”:

A party may introduce inadmissible evidence if the opposing party has no objection, or may choose to introduce evidence that would be inadmissible if offered by the opposing party... The introduction of inadmissible evidence is often said to “open the door” both to cross-examination and to the introduction of normally inadmissible evidence to explain or contradict the initial evidence.

State v. Avendano-Lopez, 79 Wn. App. 706, 714, 904 P.2d 324 (1995), *rev. den.*, 129 Wn.2d 1007 (1996). “Fairness dictates that the rules of evidence will allow the opponent to question a witness about a subject matter that the proponent first introduced through the witness.” State v. Gallagher, 112 Wn. App. 601, 610, 51 P.3d 100 (2002), *rev. den.*, 148 Wn.2d 1023 (2003).

On direct Officer Poortinga testified that he initially responded to Jackson’s apartment because he thought Burns might still be there and that was where the original 911 call came from. When he didn’t find Burns there, he went to Donovan’s apartment and other units were dispatched to try to locate Burns. 10RP 279, 282. He found Jackson distraught and crying. He observed some kind of injury to her neck, and Jackson told him her head, neck and chest were very sore. The officer testified that Jackson’s statement was consistent with the statement that Donovan gave him. *On cross-examination, defense counsel* elicited that Jackson had told him Burns had been staying in the apartment for about two weeks, and that he thought Jackson had told him she’d been choked to the point of losing

consciousness three times. 10RP 294-96. On redirect, the prosecutor prefaced his questions about what Jackson had told the officer with the comment that counsel had broached the subject of the statement Jackson had given to the officer. 10RP 298. Without objection, the officer then testified about what Jackson had told him about her relationship with and what had happened that day and evening.

Jackson's statement to the officer in which she complained her chest and neck were sore was a statement about her current condition and not an assertion as to a past fact, or how she came to be injured. Burns acknowledges this when he argues that Jackson's statement about present facts did not make the rest of her statements testimonial. Burns had not been caught and an ambulance had not arrived to treat her injuries yet. While she was speaking to an officer and she obviously felt safer, this is not the kind of formal written, affidavit that was at issue in the Hammon v. Indiana⁸ case cited by Burns. The prosecutor clearly avoided the substance of Jackson's statements until defense counsel elicited the officer's testimony about the statements on cross-examination. Defense counsel clearly opened the door to having the rest of the statement admitted⁹ and was aware that she had because she did not object.

⁸ Hammon v. Indiana was the companion case to Davis v. Washington cited *supra* herein.
⁹ See ER 106.

Jackson's statement about how she was feeling was not testimonial, and the other statements elicited on redirect were admissible because defense opened the door.

d. Any error in admission of some of Jackson's statements was harmless.

Confrontation clause violations are subject to harmless error analysis. State v. Flores, 164 Wn.2d 1, 18, 186 P.3d 1038 (2008). Such an error is harmless if the properly admitted evidence is so overwhelming as to necessarily lead to a finding of guilt. Id. at 18-19.

“Confrontation Clause errors [are] subject to Chapman harmless-error analysis.” ... Under this standard, the State must show “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” ...

Whether such an error is harmless in a particular case depends upon a host of factors ... includ[ing] the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

State v. Jasper, 174 Wn. 2d 96, 117, 271 P.3d 876 (2012) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)) (internal citations omitted).

Even if Burns had not opened the door to Jackson's statements to the officer about what had happened, the evidence was harmless beyond a reasonable doubt. Jackson's statement to her neighbor that he had choked

her and she had lost consciousness was not testimonial. That statement combined with the testimony that the neighbor had seen Burns trying to grab Jackson, that Jackson had said that he was trying to kill her and that her neck hurt, along with the evidence of the injuries to her neck and face, Jackson's statement to the dispatcher that Burns had assaulted her established beyond a reasonable doubt that Burns had assaulted her by strangulation or suffocation. He does not appear to contest the evidence regarding the violation of a no contact order.

3. The trial court didn't abuse its discretion in finding that Burns's convictions for second degree assault and felony violation of a no contact order are not the same criminal conduct because the statutory intents differ.

Burns asserts that the court erred in counting his second degree assault and felony violation of a no contact order separately for offender score purposes. He claims that the two offenses are the same criminal conduct because the two offenses were part of a continuing course of conduct, his objective was to assault Jackson and the violation of the no contact order furthered his assault of her. The two offenses, however, do not have the same statutory intent when viewed objectively. One requires the intent to assault, i.e., harm, someone, while the other is to violate the terms of an order. As the statutory intents differ, the trial court did not

abuse its discretion in finding that Burns had not met his burden to show that the two offenses were the same criminal conduct.

The determination as to whether offenses constitute the same course of criminal conduct involves both factual findings and court discretion. State v. Beasley, 126 Wn. App. 670, 685-86, 109 P.3d 849, *rev. den.*, 155 Wn.2d 1020 (2005). If the record adequately supports either a finding of same criminal conduct or separate conduct, “the matter lies in the court’s discretion.” State v. Graciano, 176 Wn.2d 531, 538, 295 P.3d 219 (2013); *see also*, State v. Rodriguez, 61 Wn. App. 812, 816, 812 P.2d 868, *rev. den.*, 118 Wn.2d 1006 (1991) (if the facts support both a finding that the criminal intent was the same and that it was different, the determination regarding “same criminal conduct” is left to the trial court’s discretion). The defendant bears the burden of proving that the offenses encompassed the same criminal conduct. Graciano, 176 Wn.2d at 539-40. If the record is unclear as to whether all the factors of same criminal conduct have been met, the trial court does not abuse its discretion in concluding that the defendant failed to meet his/her burden. *Id.* at 541.

Under the Sentencing Reform Act (“SRA”), offenses are presumed to be separate unless the court makes a specific finding that they encompass the same criminal conduct. RCW 9.94A.589(1)(a); State v. Nitsch, 100 Wn. App. 512, 520-21, 997 P.2d 1000, *rev. den.*, 141 Wn.2d

1030 (2000). “Same criminal conduct,” means “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim”. RCW 9.94A.589(1)(a). The absence of any one of these factors precludes a finding of “same criminal conduct.” State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). In order to make this determination, courts are to consider whether one offense furthered the other. Graciano, 176 Wn.2d at 540. The “same criminal conduct” phrase is “construed narrowly to disallow most claims that multiple offenses constitute the same criminal act...” Porter, 133 Wn.2d at 181.

A defendant’s intent is to be viewed objectively, not subjectively. Rodriguez, 61 Wn. App. at 816. The court is to decide whether the intent, when viewed objectively, changed from one crime to the next. State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). The court first determines whether the underlying statutes, objectively viewed, involve the same intent. State v. Chenoweth, 185 Wn.2d 218, 223, 370 P.3d 6 (2016); *accord*, Rodriguez, 61 Wn. App. at 816. If the statutory intents are not the same, the offenses are counted separately. *Id.* If the statutory intents are the same, then the court determines whether the specific defendant’s intent changed from one crime to the next under the facts of the case. Rodriguez, 61 Wn. App. at 816.

While simultaneity is not required to show “same time,” incidents that occur close in time are separate and distinct if they are not part of an uninterrupted, continuous sequence of conduct. State v. Price, 103 Wn. App. 845, 856-57, 14 P.3d 841 (2000), *rev. den.* 143 Wn.2d 1014 (2001). Frequently the issue of “same time” will be intermingled with the question of “same intent” when there is a course of criminal activity over a period of time. State v. Burns, 114 Wn.2d 314, 319, 788 P.2d 531 (1990).

The formation of a new, independent intent after the commission of one crime constitutes a different objective intent. The formation of a new intent is supported if the evidence shows that the criminal acts “were sequential, and not simultaneous or continuous.” State v. Tili, 139 Wn.2d 107, 124, 985 P.2d 365 (1999) (quoting State v. Grantham, 84 Wn. App. 854, 856-57, 932 P.2d 657 (1997)). If the evidence shows that the defendant had the “time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act,” then, objectively, the defendant formed a new, independent criminal intent when he committed his next criminal act. *Id.* at 123-24 (quoting Grantham, 84 Wn. App. at 859). However, if the evidence shows that the criminal acts were uninterrupted, continuous and committed within an extremely short period of time, it is unlikely that the defendant formed a new criminal intent. Tili, 139 Wn.2d at 124.

Burns asserts his convictions for assault in the second degree, by strangulation and/or suffocation, and felony violation of a no contact order based on two prior convictions of violating no contact orders should have been considered the same for offender scoring purposes. The statutory intent, when objectively viewed for second degree assault, is the intent to assault someone. RCW 9A.36.021(1)(g); *see State v. Reed*, 168 Wn.App. 553, 574-75, 278 P.3d 203 (2012). The statutory intent for felony violation of a no contact order, objectively viewed, is the intent to violate the terms of an order. RCW 26.50.110(1), (5); *see, State v. Sisemore*, 114 Wn. App. 75, 77-78, 55 P.3d 1178 (2002) (violation of no contact order statute required proof of purposeful contact in violation of the order). The two statutory intents are not the same. Even if the statutory criminal intents were the same, under the facts Burns's violation of the terms of the order and his assault were not the same course of criminal conduct because his intent in contacting Jackson and coming to her residence did not necessarily involve the intent to assault her as the evidence was that he had been at the residence for a while and that he only became assaultive after Jackson asked him to leave and he refused. *See, State v. Hood*, 196 Wn. App. 127, 137, 382 P.3d 710 (2016), *rev. den.*, 187 Wn.2d 1023 (2017) (court did not abuse its discretion in finding that burglary and violation of a no contact order were separate offenses where the court may

have found that defendant developed intent to assault victim after he unlawfully entered her condo). Therefore the trial court did not abuse its discretion in counting the two offenses separately for offender score purposes.

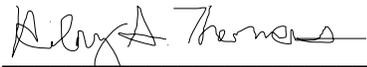
4. Burns should file a document under penalty of perjury since he did not at the trial court level before the Court considers not awarding appellate costs.

Burns asserts that appellate costs should not be awarded. While the prosecutor only requested and the judge only imposed mandatory legal financial obligations, Burns was only 25 at the time of sentencing. 13RP 378, 383, 397. He did not file a statement under penalty of perjury in order to pursue an order of indigency on appeal, his public defender did. CP 133-35. While Burns is presumed to be indigent throughout his appeal because he obtained an order of indigency for purposes of appeal, pursuant to RAP 15.2(f), RAP 15.2 and the associated forms contemplate that the *defendant* shall sign an affidavit or declaration when moving for an order of indigency. RAP 15.2(a) (emphasis added). As none was filed below, the State respectfully asks that Burns be required to file a document that is signed under penalty of perjury in support of his motion for order of indigency before this Court considers not imposing appellate costs.

E. CONCLUSION

The State respectfully requests this Court to deny Burns's appeal and affirm his convictions for second degree assault and felony violation of a no contact order and his sentence.

Respectfully submitted this 18th day of April, 2017.



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CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

TDA Stank

Legal Assistant

4/18/17

Date