95505-1

Supreme Court No. _____
Court of Appeals No. 49075-7-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LERONE MAJOR, JR.

Petitioner.

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

The Honorable Carol Murphy, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Lerone Major, Jr., through his attorney, Lisa E. Tabbut, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Mr. Major seeks review of the December 5, 2017, unpublished opinion of Division Two of the Court of Appeals (attached as appendix).

C. ISSUES PRESENTED FOR REVIEW

1. Whether this Court should, under RAP 13.4(b)(3), accept review of defense counsel's ineffectiveness in failing to object to violations of his granted motion in limine prohibiting witnesses from referring to Mr. Major's wife, Jazmine Graves, as the "victim?"

2. Whether this Court should accept review, under RAP 13.4(b)(4), of the appellate court's remand for clarification and resentencing when the trial court lacks statutory authority to impose suspended sentences, community custody, and community custody conditions on Mr. Major's four misdemeanor convictions because the court ordered Major serve the maximum 364-day sentences on each misdemeanor concurrent with Major's 19-month felony sentence?

D. STATEMENT OF THE CASE

Jazmine Graves and Lerone Major met in September 2013 and married in March 2015. RP 5/10 at 6-7. Also in March, an incident occurred after Mr. Major brought an intoxicated woman to his apartment parking lot. That occurrence led to Mr. Major being prosecuted for a domestic violence offense and a post-conviction domestic violence no-contact order being issued prohibiting Mr. Major from contact with Graves or being within 500 feet of her residence. RP 5/11 at 43-46.

Graves made at least six unsuccessful attempts to have the no-contact order rescinded as she did not want it. RP 5/11 at 10-11.

Graves stopped living in the shared apartment around July or August 2015. RP 5/10 at 9. She moved in with her parents but still kept furniture and personal items such as clothing in the apartment even though she no longer considered it her home. RP 5/10 at 10. Mr. Major updated the apartment lease to reflect he was the only tenant. RP 5/11 at 108.

On September 1, 2015, Mr. Major was in the apartment's living room watching a movie when Graves showed up. RP 5/11 at 64, 66. She went into the bedroom, shut the door, and gathered clothing. RP 5/10 at

11. Mr. Major opened the bedroom door and told her to leave. She refused to do so. RP 5/10 at 14.

The couple argued. RP 5/10 at 14. Per Graves, Mr. Major got in her face. RP 5/10 at 30. She shoved him into a wall and he went "crazy." Id. at 14, 30. He swung at her and slapped her face. Id. at 31. Graves hit and slapped Mr. Major. Id. at 31. Mr. Major defended himself by raising his arms to deflect his wife's blows and to hold her back from hitting him. RP 5/11 at 101. At one point, a movement of his hand knocked Graves' glasses off her face. Id. at 102. Mr. Major may also have had his hand on Graves' neck while trying to hold her back from pushing him. Id.

Mr. Major grabbed for a phone he believed was his. RP 5/11 at 99. Mr. Major and Graves had phones that looked very much alike. Graves complained Mr. Major had taken her phone. The couple argued over the phone until Mr. Major agreed to look at the distinguishing name on the back of the phone. Mr. Major apologized for his mistake and gave the phone back to Graves. RP 5/10 at 34-35.

Graves wanted Mr. Major out of the apartment. She went into the bathroom and called 911. RP 5/10 at 37. While she was on the phone, the couple argued and the call disconnected. RP 5/10 at 37-40. Graves

attributed the disconnected call to her phone running out of battery. RP 5/10 at 110.

Mr. Major got dressed to leave. RP 5/10 at 48. The 911 operator called back. Graves continued to tell the operator she wanted Mr. Major out of the apartment. Id. at 49. Graves pushed and shoved Mr. Major again before he left the apartment. Id. The police stopped Mr. Major's car several blocks from the apartment and arrested him. RP 5/10 at 77-79; RP 5/11 at 111.

Graves' family took her to the hospital. RP 5/10 at 60-61. Officer Bartz took pictures of Graves at the hospital. RP 5/11 at 35-36. In describing the pictures, the officer called Graves "victim Jazmine." Id. at 37, 38. 39. This characterization of Graves as the victim violated a motion in limine prohibiting any reference to Graves as a victim. RP 5/9 at 9. Defense counsel failed to object to the prohibited characterization. Id.

Mr. Major argued in closing that Graves had lingering anger over the March 2015 incident with the woman in the parking lot. Because she gave inconsistent versions of what happened in the apartment on September 1, her testimony was unreliable and unbelievable. Additionally Mr. Major acted in self-defense. RP 5/12 at 164-76.

The jury found Mr. Major guilty of a felony violation of a no contact order, two counts of assault in the fourth degree, misdemeanor violation of a no contact order, and interfering with the reporting of domestic violence. RP 5/12 at 184-85; CP 4-5, 12, 14, 16, 18, 20.

The court imposed a 19-month sentence on the felony violation of the no contact order plus 12 months of community custody. RP 6/14 at 19; CP 29-30. The court agreed with the parties that counts 3 and 5 (felony violation of the no contact order and assault in the fourth degree) constituted the same criminal conduct. RP 6/14 at 16; CP 26. The court imposed the maximum 364-day sentence on each of the four misdemeanors (counts 4-7) and ordered the sentences served concurrently with the 19-month felony sentence. CP 29-30. The court also purportedly suspended each misdemeanor's 364-day maximum sentence on the condition that Mr. Major abide by 12 months of community custody on each count. RP 6/14 at 19-20; CP 30.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Defense counsel's failure to effectively represent Mr. Major by objecting to inadmissible victim characterization evidence requires review and reversal.

Defense counsel successfully moved in limine to prevent any reference to Graves as the "victim". RP 5/9 at 8-9. The state violated this

motion in limine when Officer Bartz several times referred to "victim Jazmine" in describing her injuries. RP 5/11 at 37-39.

To preserve for appeal a violation of a motion in limine, the party who successfully brought the motion must properly object during the violation. *State v. Sullivan*, 69 Wn. App. 167, 171-172, 847 P.2d 953 (1993); *State v. Weber*, 159 Wn.2d 252, 271-272, 149 P.3d 646 (2006); *See also* Karl B. Tegland, 5D Washington Practice: Evidence Law and Practice, ER 103 at § 109:9 (2016 update) (If the court grants a motion to exclude evidence but then admits evidence that arguably violates the pretrial order, opposing counsel should renew the objection to make a record for appeal.).

Here, although defense counsel prevailed on his motion to exclude reference to Graves as the "victim," he failed to object when that motion was violated. RP 5/11 at 37-39. As in *Weber*, the requirement to object is mandatory and failing to object denies the defendant the right to directly raise the issue on appeal. *Weber*, 159 at 271-72.

Because counsel was not excused from objecting to Officer Bartz's improper characterization, counsel's failure to object and request a curative instruction, or move for a mistrial, was ineffective assistance of

counsel. An objection would have allowed the trial court to advise the jury to disregard the improper characterization or grant a mistrial.

Under RAP 2.5 when a trial attorney fails to make an objection and preserve an issue for review, the issue may be raised if it is a manifest error affecting a constitutional right. Denial of effective assistance of counsel is a manifest error affecting a constitutional right which may be raised for the first time on appeal. *State v. Greiff*, 141 Wn.2d 910, 924, 10 P.3d 390 (2000).

The Sixth Amendment to the United States Constitution and Washington Constitution Article 1, § 22 guarantee a defendant the right to effective assistance of counsel. To prevail on a claim of ineffective assistance, a defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Review of defense counsel's performance is deferential, and presumed reasonable. *Strickland*, 466 U.S. at 689; *State v. McFarland*, 127 Wn.2d 322, 335-336, 899 P.2d 1251 (1995). To rebut this presumption, the defendant must establish the absence of any "conceivable legitimate tactic explaining counsel's

performance." *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011). To establish prejudice, a defendant must show a reasonable probability that the trial outcome would have been different absent counsel's deficient performance. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Failure on either prong of the test is fatal to a claim of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697.

Counsel's failure to object to Officer Bartz's violation of the motion in limine, fell below an objective standard of reasonableness. The sole purpose of bringing the motion in limine was to prevent the jury from being subject to an improper opinion of Mr. Major's guilt. *State v. Dolan*, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003) (a witness may not give, directly or by inference, an opinion on a defendant's guilt). Officer Bartz's characterization of Graves as the "victim" was a direct comment on Mr. Major's guilt.

In her testimony, Graves characterized herself as both the aggressor and a mutual participant in the pushing and shoving with Mr. Major. When she felt her husband was too close to her, she started the physical interaction by shoving him into a wall. By her testimony, the couple mutually battled by pushing, slapping, and hitting each other. Mr. Major characterized his actions as defensive. Ms. Graves' actions

required him to defend himself by holding his hands and arms up to ward off blows and to push Ms. Graves back in defense of himself.

Officer Bartz did not witness the couple's interaction. He had no place in characterizing Graves as the victim in this two person confrontation. Guilt is for the jury to decide and not for the officer's speculation. *Dolan*, 118 Wn. App. at 328-29.

Defense counsel properly raised the motion in limine to prevent just the characterization Officer Bartz provided. Defense counsel was ineffective in failing to object and preserve the error for review. It was deficient representation. *Matter of Pirtle*, 136 Wn.2d 467, 489, 965 P.2d 593 (1998). Failure to object was not a reasonable trial tactic.

This is similar to a situation where defense counsel unsuccessfully moved to suppress evidence on an incorrect basis instead of the correct basis that the trial court likely would have granted. *State v. Hamilton*, 179 Wn. App. 870, 882, 320 P.3d 142 (2014). In *Hamilton*, this Court held that defense counsel was ineffective for failing to move to suppress on the correct grounds and the defendant was prejudiced because the outcome likely would have differed. *Id.* at 888.

Here too, had counsel timely objected to the violation of the motion in limine, the trial court would likely have provided a remedy

because it had agreed that admission of the officer's opinion testimony was overly prejudicial and improper and invaded the jury's exclusive province of finding fact and determining guilt. Graves and Mr. Major were the only two people in the apartment. Graves' injuries, as documented in photographs and described by Officer Bartz, did not dictate the "victim" conclusion. Rather, they could have occurred via the mutual pushing, slapping, and hitting described by Graves and during the defensive actions described by Mr. Major. Neither explanation was determinative. It was not Officer Bartz's right to take a side and offer an opinion on who was the victim and, by inference, who was the aggressor to be charged with multiple crimes.

Without Officer Bartz's testimony casting Graves as the victim, or with a proper objection, whether the remedy would have been to grant a mistrial, or strike the testimony with a curative instruction, the outcome likely would have differed because of the she-said, he-said facts. It is reasonably likely that the jury would have acquitted if they had not been led to believe that in Officer Bartz's professional police officer opinion, Graves was the victim of Mr. Major's aggression.

2. The trial court lacks authority to suspend any portion of the misdemeanor sentences, or impose misdemeanor community custody, because the court sentenced Mr. Major to serve the misdemeanors concurrent with the 19 month felony sentence. Remand to the trial court for clarification is an incorrect remedy.

A court can grant probation by "suspend[ing] the imposition or the execution of the sentence." RCW 9.95.210(1). But if a court imposes a maximum sentence of confinement and suspends none, the court lacks the authority to impose probation. *State v. Gailus*, 136 Wn. App. 191, 201, 147 P.3d 1300 (2006), *overruled on other grounds by State v. Sutherby*, 165 Wn.2d 870, 204 P.3d 916 (2009). The sentence and community custody imposed for the misdemeanor convictions under counts 4, 5, 6, and 7 violates the rule of *Gailus*.

Counts 4, 5, 6, and 7, charging violation of a no contact order, assault in the fourth degree, and interfering with reporting of domestic violence, are all gross misdemeanor offenses. RCW 26.50.110(1); RCW 9A.36.041; RCW 9A.36.150. A gross misdemeanor is punishable by imprisonment for a maximum term of 364 days. RCW 9A.20.021(2).

The court at section 4.5(a) of the judgment and sentence, imposed a sentence of 19 months on felony count 3 and 364 days each on counts 4, 5, 6, and 7. CP 29. The court ordered all counts "shall be

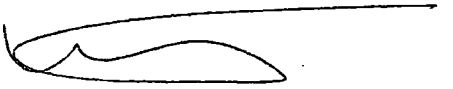
served concurrently." CP 30. The court also purportedly suspended the time on the four misdemeanor counts - 4, 5, 6, and 7 - on condition that Mr. Major abide by 12 months of community custody on each count. CP 30.

However, because the court ordered the maximum 364 days sentence on each misdemeanor to be served concurrent with the 19-month felony sentence, no time remains to suspend on the four misdemeanor sentences. CP 29-30. Because the sentence suspends no jail time, the case should be remanded only to strike the "suspended" language and vacate all misdemeanor community custody obligations. *Gailus*, at 201. Clarification of the trial court's sentence is otherwise unwarranted.

F. CONCLUSION

This court should accept review and reverse Mr. Major's convictions. Alternatively, this court should find *Gailus* limits the total term of community custody to 12 total months and only on the felony. Remand is only necessary to strike the misdemeanor community custody.

Respectfully submitted January 4, 2018.



LISA E. TABBUT/WSBA 21344
Attorney for Lerone Major, Jr.

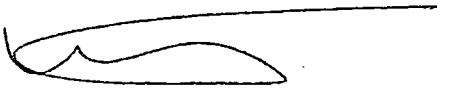
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares:

On today's date, I efiled the Petition for Review to (1) Thurston County Prosecutor's Office, at paoappeals@co.thurston.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Lerone Major, 3339 Kona Street NE, Lacey, WA 98816.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed January 4, 2018, in Winthrop, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Lerone Major, Jr., Petitioner

Filed
Washington State
Court of Appeals
Division Two

December 5, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LERONE MAJOR, JR., Appellant.	No. 49075-7-II UNPUBLISHED OPINION

MELNICK, J. — Lerone Major Jr. appeals his convictions and sentence for assault in violation of a no contact order, violation of a post-conviction no contact order, two counts of assault in the fourth degree, and interfering with the reporting of domestic violence.

We conclude that Major did not receive ineffective assistance of counsel and affirm his convictions. Because the judgment and sentence is unclear as to what the sentencing court intended as to suspended time and community custody, we remand to the trial court to resentence Major.[1]

FACTS

Major and Jazmine Graves married on March 1, 2015. As of May 11, a domestic violence no contact order prohibited Major from having any contact with Graves. By August 1, Graves had vacated the marital residence. On that date, Graves, seven months pregnant, returned to the marital

[1] Major also asks us to waive appellate costs. Pursuant to RAP 14.2, we will defer to a commissioner if the State files a cost bill and Major objects.

residence to retrieve some personal belongings. She found Major there watching television. Graves reported what happened next to a 911 operator and to Officer Joshua Bartz. She provided a different version of events at trial.

I. GRAVES' ACCOUNT OF EVENTS

The following is Graves's description to a 911 operator and to Bartz on August 1. Both took Graves's statements and recorded them. The jury heard both recordings.

After Graves returned to the marital residence, she went into the bedroom to retrieve her belongings and closed the door. Major confronted Graves about locking him out of the bedroom and demanded she leave the apartment. Graves responded that she came to get her belongings. Major "got in [her] face" and repeated that she shouldn't be there so Graves pushed him away. Report of Proceedings (RP) (May 11, 2016) at 67.

Major became angry and started punching Graves and slapping her face. He knocked off her glasses. When Graves tried to escape, Major pushed her away. Major then took Graves's cell phone and refused to return it, claiming it was his phone.

After a brief scuffle over the phone, Graves convinced Major to look at its back, where he saw a label identifying it as Graves's phone. Major then returned the phone and apologized. Graves went into another room and called 911. Midway through the call, Major took the phone from Graves's hand and threw it against the wall, cutting off the call. He then punched Graves in the face and choked her so that she could not breathe.

The 911 operator called Graves back and Major started to leave. As Graves attempted to lock the door behind Major, he punched her in the face again. He then left the apartment. Graves told both the 911 operator and Bartz that she knew a no contact order existed.

The police contacted Graves and agreed to meet with her at the hospital. While at the hospital, Graves received six calls to her cell phone from the same number. She identified the caller by voice as Major and immediately hung up after the first call. She did not answer the remaining calls.

At trial, Graves told a different version of events. She took more responsibility for the violent encounter, downplayed her injuries, and indicated confusion as to whether there had been a no contact order in place. She stated that, because of a medical condition that occurs when she gets angry, she blacked out through much of the incident. She also testified that she responded to Major's slapping and punching by "swinging back." RP (May 10, 2016) at 31.

Graves explained that the 911 call was cut short because her cell phone battery died, not because Major threw the phone. She testified that she defended herself from Major with a large cooking fork. Graves reiterated that Major punched her numerous times and choked her. She also affirmed that she had received calls from Major when she was at the hospital.

Because Bartz took extensive photographs of Graves's injuries, the jury saw corroboration of Graves's original account. Bartz also testified that Graves's reports of being choked by Major were consistent with his training about strangulation and choking allegations.

II. MAJOR'S ACCOUNT OF EVENTS

The police stopped Major when he left his apartment at approximately 10:27 P.M. after the incident. Major told Officer Alicia Howard that he had argued with Graves about her phone and that she "went crazy" and started scratching him. RP (May 10, 2016) at 80. He claimed that the only physical contact he had with Graves occurred when he "batted her hands away." RP (May 10, 2016) at 80. Major told Howard that he knew about the no contact order.

Major testified and confirmed that he had had a physical confrontation with Graves. He asserted that Graves had physically attacked him when she tried to retrieve her phone from him. He believed the phone belonged to him. Major admitted he struck Graves when she reached for the phone, but did so accidentally. Major told the jury he used force to stop Graves and "jabbed her neck" causing her to "start gasping." RP (May 11, 2016) at 102. He denied squeezing her throat. Major said any other physical contact resulted as he attempted to block her blows.

III. MAJOR'S CRIMINAL CHARGES, TRIAL, AND SENTENCING

On August 4, the State charged Major with burglary in the first degree, assault in the second degree with an aggravating factor based on the victim's pregnancy, an assault that violated the no contact order, violation of a post-conviction no contact order, two counts of assault in the fourth degree, and interfering with the reporting of domestic violence.[2] All but the last charge included domestic violence allegations.[3]

Pretrial, the judge granted Major's motion in limine, which forbade "[a]ny reference to the complaining witness as the 'victim.'" Clerk's Papers (CP) at 40; *see also* RP (May 9, 2016) at 9 (trial court granting motion). During the trial, on direct examination, Bartz referred to Graves as "victim Jazmine" three times while he described the photographs of her injuries. RP (May 11, 2016) at 37-39. Major's attorney did not object to any of these statements.

The jury found Major guilty of assault in violation of a no contact order, violation of a post-conviction no contact order, two counts of assault in the fourth degree, and interfering with the reporting of domestic violence. The first charge is a felony; the others are gross misdemeanors.

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[2] RCW 9A.52.020(1), 9A.36.021(1)(g), 9.94A.535(3)(c), 26.50.110(4), 26.50.110(1), 9A.36.041 9A.36.150.

[3] RCW 10.99.020(5).

Through a special verdict form, it also found that Major and Graves were members of the same family or household. It found Major not guilty of burglary in the first degree and assault in the second degree.

Major received a sentence of nineteen months on the felony and 364 days on each of the gross misdemeanors. The court suspended the sentences on the gross misdemeanors for two years and imposed an additional twelve months of community custody on each count. The trial court used one judgment and sentence for all of the counts. It did not clearly indicate whether it intended the suspended misdemeanor jail time to run concurrently or consecutively to the imposed felony time. Major appeals.

ANALYSIS

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Major argues that he received ineffective assistance of counsel because his attorney failed to object three times when a witness used the term "victim" in violation of a ruling in limine. We disagree.

A. STANDARD OF REVIEW

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011).

We review claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on a claim of ineffective assistance of counsel, the defendant must show both (1) that defense counsel's representation was deficient, and (2) that the deficient representation prejudiced the defendant. *Grier*, 171 Wn.2d at 32-33. Representation

is deficient if, after considering all the circumstances, the performance falls "'below an objective standard of reasonableness.'" *Grier*, 171 Wn.2d at 33 (quoting *Strickland*, 446 U.S. at 688). Prejudice exists if there is a reasonable probability that, except for counsel's errors, the results of the proceeding would have differed. *Grier*, 171 Wn.2d at 34. If either prong is not satisfied, the defendant's claim fails. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

A defendant faces a strong presumption that counsel's representation was effective. *Grier*, 171 Wn.2d at 33. Legitimate trial strategy or tactics cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

There is "no claim for ineffective assistance of counsel when the challenged action goes to a legitimate trial strategy or tactic." *State v. Kolesnik*, 146 Wn. App. 790, 801, 192 P.3d 937 (2008). Further, the "decision whether to object is a classic example of trial tactics, and only in egregious circumstances will the failure to object constitute ineffective assistance of counsel." *Kolesnik*, 146 Wn. App. at 801.

"Conversely, a criminal defendant can rebut the presumption of reasonable performance by demonstrating that 'there is no conceivable legitimate tactic explaining counsel's performance.'" *Grier*, 171 Wn.2d at 33 (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). Strategic decisions must be reasonable. *Grier*, 171 Wn.2d at 34.

B. No Deficient Representation

Major argues that his trial attorney's failure to object when a witness referred to Graves as "victim Jazmine" was not a reasonable trial strategy and constituted deficient representation. We disagree.

Major's attorney did object to violations of the trial court's ruling in limine three times over the course of the trial, indicating that his failure to do so with regard to the "victim" label was a calculated decision on his part. One of these objections occurred mere moments after Bartz's reference to Graves as "victim Jazmine" when he began to describe the incident as a "domestic violence situation." RP (May 11, 2016) at 41. Defense counsel's repeated diligent objections throughout the trial further indicate that his failure to object to a particular violation was more likely strategic than deficient.

In an effort to meet his burden to show "egregious circumstances," Major points to the conceded fact that an objection would have been sustained. Thus, Major argues, there could have been no reasonable strategic basis for his trial attorney not to object. However, several strategic explanations exist for the attorney's decision to not object. Some of them follow. The lawyer may not have wanted to bring further attention to the use of the term "victim" by objecting to it. He also may not have wanted to alienate the jury by objecting too frequently. The failure to object had a conceivable strategic basis and did not rise to the "egregious circumstances" required to warrant a reversal. *Kolesnik*, 146 Wn. App. at 801. Major's counsel was not deficient.

C. OPINION EVIDENCE

Major characterizes Bartz's description of Graves as "victim Jazmine" as impermissible opinion evidence. However, Major did not brief whether Bartz's testimony met the Washington test for opinion evidence. *See State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). Rather, Major conclusively identifies Bartz's statement as impermissible opinion evidence of a defendant's guilt without citing to any authority.

RAP 10.3(a)(6) directs each party to supply in its brief, "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." We do "not consider conclusory arguments unsupported by citation to authority." *State v. Mason*, 170 Wn. App. 375, 384, 285 P.3d 154 (2012). "'[P]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.'" *Mason*, 170 Wn. App. at 384 (quoting *West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012)).

Because Major has not cited to any authority or provided any substantive argument that Bartz's testimony constituted improper opinion evidence, we do not consider the issue further.

II. MAJOR'S SENTENCE

Major argues that the trial court lacked authority to condition his suspended sentence on the gross misdemeanors on his completion of 12 months of community custody. He bases this argument on *State v. Gailus*, where the court concluded that the "imposition of probation is not authorized when the maximum jail sentence is imposed on the offender." 136 Wn. App. 191, 201, 147 P.3d 1300 (2006) *overruled on other grounds by State v. Sutherby*, 165 Wn.2d 870, 204 P.3d 916 (2009),

The applicability of *Gailus* to this case depends on our de novo interpretation of the trial court's sentence. Because we cannot discern what the court intended, we remand for clarification and resentencing.

A. STANDARD OF REVIEW

Whether a sentencing court imposed an unauthorized sentence is a question of law we review de novo. *State v. Murray*, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003). We review alleged sentencing errors based on the principles that (1) a sentence in excess of statutory authority is subject to collateral attack and (2) a defendant cannot agree to punishment in excess of statutory

authority. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) *superseded by statute on other grounds*, LAWS OF 2008, ch. 231, § 4, *as recognized in State v. Cobos*, 182 Wn.2d 12, 15-16, 338 P.3d 283 (2014).

B. APPLICABILITY OF *GAILUS*

In *Gailus*, the trial court sentenced the defendant to a total of 12 months for his ten felony convictions, and a maximum one year for each of his two gross misdemeanor convictions. 136 Wn. App. at 200. The trial court ordered "that the gross misdemeanor sentences run consecutively to each other and consecutively to his felony convictions." *Gailus*, 136 Wn. App. at 200. It then suspended the two 12 month gross misdemeanor sentences on the condition that the defendant serve 24 months in custody and complete 48 months of probation. *Gailus*, 136 Wn. App. at 201.

The sentence was vacated because the suspension of two consecutive 12 month sentences conditioned upon 24 months in custody "did not actually suspend any jail time." *Gailus*, 136 Wn. App. at 201. Because the court's authority to impose probation was conditioned on suspended time, the court vacated the defendant's probation. *Gailus*, 136 Wn. App. at 201. Thus, *Gailus* held that a sentencing court that orders a defendant to serve the maximum sentence for his conviction does not suspend any jail time. 136 Wn. App. at 201. It also held that a sentencing court cannot order probation if it does not suspend any jail time. *Gailus*, 136 Wn. App. at 201.

In the current case, the trial court sentenced Major to 19 months custody on his felony count, and 364 days custody on each misdemeanor count. Neither the transcript of the sentencing

hearing nor the judgment and sentence form make entirely clear whether the judge intended for the misdemeanor sentences to run concurrently to the felony sentence, or only concurrent to one another.[4] The form used by the trial court stated that the sentences on counts four through seven were suspended for 24 months, but also stated that "[a]ll counts shall be served concurrently." CP at 30. The judge also sentenced Major to 12 months of community custody on each count.[5]

If the time on Major's misdemeanor sentences was to run concurrently with his felony sentence, this case presents the same situation as *Gailus*. The trial court would have ordered the defendant to serve the full time it was suspending, thus leaving no suspended time. However, it seems more likely that the court intended the gross misdemeanor sentences to run concurrently to one another, but not concurrent with the felony sentence, despite the preprinted language on the modified judgment and sentencing form.

Because the sentencing court's sentence is unclear, we remand for resentencing.[6]

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[4] The trial judge used a modified version of the "Felony Judgment and Sentence – Prison" form that contained a section providing for "Non-Felony Counts." CP at 24, 30. The form does not make clear whether the suspended misdemeanor sentences were intended to run concurrently with the 19 month felony sentence.

[5] Although neither party has raised the issue, the trial court erred by sentencing Major to community custody on the misdemeanor counts because community custody applies only to felonies. *See* RCW 9.94A.505 (permitting community custody sentence "[w]hen a person is convicted of a felony" as part of the Sentencing Reform Act); *State v. Snedden*, 149 Wn.2d 914, 922, 73 P.3d 995 (2003) ("[T]he [Sentencing Reform Act] . . . only applies to felonies.").

[6] Major also assigns error to the trial court's suspension of his misdemeanor sentences. Because we are remanding the case for resentencing, we do not address this argument.

We affirm Major's convictions and remand for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Johanson, P.J.

Lee, J.

LAW OFFICE OF LISA E TABBUT

January 04, 2018 - 11:21 AM

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