SUPREME COURT NO. 99871-0
NO. 54076-2-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

AARON WARKENTIN,

Petitioner.

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

The Honorable David Gregerson, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Aaron Warkentin asks this Court to grant review of the court of appeals' unpublished decision in State v. Warkentin, No. 54076-2-II, filed May 11, 2021 (appendix).

B. ISSUE PRESENTED FOR REVIEW

No published decision has answered the question presented in this case: When does a criminal defendant's expressed dissatisfaction with his appointed counsel triggers the trial court's duty to inquire into whether there has been a breakdown in the attorney-client relationship, necessitating substitution of counsel? This case further involves an issue this Court has never before addressed: What prejudice standard, if any, applies when the trial court fails to make an adequate inquiry into a defendant's request for new counsel? Is this Court's review therefore warranted under both RAP 13.4(b)(3) and (4)?

C. STATEMENT OF THE CASE

The prosecution charged Warkentin with one count of third degree assault after he allegedly pushed a police officer, following

her request for Warkentin to leave property where he was being loud and disorderly. RP 103-11; CP 5.

Before trial, the court ordered Warkentin undergo a competency evaluation, at defense counsel's request. 3/14/19 RP 23. Counsel expressed concern based on Warkentin's current mental health treatment and their interactions over the previous several months. 3/14/19 RP 23. Counsel explained, "I get emails from him and texts that I simply don't understand." 3/14/19 RP 23. Warkentin was opposed to the evaluation, telling the court, "I've been misrepresented. And it's just a fiasco. I'm ready to plead guilty to the terms on the 9th and end it." 3/14/19 RP 24. Western State Hospital ultimately found Warkentin competent to stand trial. 7/30/19 RP 42.

The day Warkentin's jury trial was scheduled to begin, his appointed attorney notified the court, "And my client apparent[ly] wants to say something to the Court. I'm not quite sure what it is." RP 9. Counsel then read a written statement by Warkentin:

> Replace [defense counsel's] bias on his ideas to me. I believe I voiced a concern out loud in court, but not in a particular order, not spending enough time discussing what constitute an assault 3, being flip-

> flopped on outcome of trial, not spending enough time talking to me about the process of proceedings.
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> . . . .
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> Mostly, no advocating, just installing -- instilling a fear of prosecution. He doesn't care when we go to trial, game playing and plan, selling me on the idea of making me lose (inaudible) and thinking being the trial in this course over my (inaudible) and direction. Once I have presented opinions or ideas like apology . . . . Something to fit the crime.

RP 10. Warkentin interjected and continued, "I got the message, but I think it's outlandish to do a trial, spend 30 or 60,000 for -- if I would have assaulted a cop, I think I would have been thrown to the ground immediately." RP 10-11.

The trial court responded, "you're best off not speaking and letting your attorney doing your talking for you," and asked, "What are you specifically asking this Court to do at this time?" RP 11. Warkentin replied:

> Well, I don't -- we're on the same page to go to trial, if that's the course of action that we're going to take. I don't feel comfortable with him at all. I have voiced it twice. Once with an evaluation that I had, just a distrust. We've had a lot of communication gaps. He says that all the time, in fact, that we have -- you're not understanding me. "Do you understand this," over and over again, even in the hall and separate rooms, and apparently, I don't.

> But I thought this assault 3 was a realistic prosecution for a touch, then I would have pleaded -- taken a plea deal a long time ago. I just -- I don't understand it, apparently.

RP 11.

The trial court explained it "stands as a neutral referee" and "expects the attorneys to have engaged in motion practice beforehand." RP 12. The court then informed Warkentin, "So now we're set to go to trial, and that's what we're going to do today." RP 12. The court did not engage in any further inquiry into Warkentin's difficulties with his attorney. RP 12.

The parties proceeded immediately to jury selection, during which Warkentin expressed confusion about the process. RP 17. For instance, during for-cause challenges, Warkentin asked, "What's a challenge?" RP 61. He was ignored. RP 61. Later, during peremptory challenges, Warkentin inquired, "Why are we striking stuff? Why are striking (inaudible) strike anybody." RP 63. He was again ignored. RP 63. At the subsequent CrR 3.5 hearing, the court inquired whether Warkentin needed time to talk to his attorney about testifying. RP 82. Warkentin responded, "It's useless. No." RP 82.

After a single day of trial involving testimony from only two witnesses, the jury found Warkentin guilty as charged. CP 44; RP 102, 119, 191.

At sentencing, there was discussion of Warkentin stipulating to his criminal history, including one 1999 felony conviction. RP 203-04. Warkentin, however, reiterated his request to discharge his attorney. RP 205. He informed the court, "I was planning on firing [defense counsel]. This time -- I tried handing you something last time we were in court and he read it last time. This time, I'd still prefer to hand this to you. Or we can just go with the -- since I've tried to replace him three times just for bad representation and a few other things which I've written down." RP 205. The court responded, "Well, really what's on the table today is the question of sentencing." RP 205.

Defense counsel added, "my client has indicated he does want a new counsel. He's indicated that several times to me and to Your Honor. Probably we should deal with that now." RP 208-09. The court finally inquired, "All right. So, you know, [defense counsel] ably represented you at trial, sir. Why do you want him discharged him [sic] as your attorney at this time?" RP 209.

Warkentin responded:

> I don't even know what the stipulation is, for, about, what's its -- all I know is 1999 the attorney say, "Whatever you do, don't do this." So I remember that was a very painful lesson and this is going through another very painful less which I haven't been advised the ins and outs of what it is and it's just a real quick three-minute conversation, "Do you want to do it or not" -- basically --

RP 209. Warkentin explained, "it was a very bad relationship from the get-go. I just felt like I was sold a ticket on the Titanic." RP 210. Defense counsel agreed "there's got to be some communications problems there or something," explaining he met with Warkentin in jail and they discussed the stipulation. RP 210-11. Warkentin informed the court, "He can stay as long as I'm sure I understand." RP 210.

The court continued sentencing for Warkentin's criminal history to be proven, and ruled Warkentin's motion to substitute counsel was withdrawn. RP 211-14. At subsequent hearing to continue sentencing again, Warkentin told the court, "The last time we spoke, I wanted to replace [my attorney]. Still want to do that." RP 216. The court responded, "Well, we're at sentencing now. We're not going to -- we've come this far." RP 216.

When Warkentin was finally sentenced, the trial court imposed an exceptional sentence downward of 62 days in confinement, with credit for time served. CP 51-53.

On appeal, Warkentin challenged the trial court's failure to adequately inquire into his request for new counsel. Br. of Appellant, 8-15. Warkentin expressed concern about his attorney's bias, their mutual distrust, and their failure to communicate. RP 10-11. Warkentin also indicated concern about negotiating a plea versus going to trial, further indicating problems with communication. RP 10-11. While Warkentin's request for new counsel may have been inarticulate, he maintained that his stated concerns implicated the potential need for substitution of counsel, which in turn triggered the trial court's duty to inquire. Br. of Appellant, 12-13.

The court of appeals rejected Warkentin's argument, reasoning he "did not make a motion to appoint new counsel. There was nothing filed with the trial court." Opinion, 4. The court emphasized "Warkentin's written statement was vague and confusing." Opinion, 4. The court speculated "Warkentin's dissatisfaction seem[ed] to be from not understanding why he was

being charged and going to trial for something he did not consider a third degree assault." Opinion, 4. The court of appeals therefore concluded the trial court did not abuse its discretion by proceeding to trial, "[b]ecause Warkentin never actually asked the trial court to replace his counsel and did nothing more than express his general dissatisfaction with the case." Opinion, 4-5.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court's review is necessary to answer the unresolved question of when a criminal defendant's expressed dissatisfaction with his attorney triggers the trial court's duty to inquire into a possible breakdown in the attorney-client relationship.

It is well established that indigent defendants must have new counsel where there is "good cause to warrant substitution of counsel," such as (1) a conflict of interest, (2) an irreconcilable conflict, or (3) a complete breakdown in communication between the attorney and the defendant. State v. Stenson, 132 Wn.2d 668, 733-34, 940 P.2d 1239 (1997). The trial court's refusal to appoint new counsel in such circumstances violates the accused's constitutional right to counsel, "even if no actual prejudice is shown." State v. Cross, 156 Wn.2d 580, 606, 132 P.3d 80 (2006).

It is also well settled that, when a defendant requests new counsel, the trial court must make a "penetrating and comprehensive examination" into the reasons for the defendant's dissatisfaction with his attorney. State v. Dougherty, 33 Wn. App. 466, 471, 655 P.2d 1187 (1982). "An adequate inquiry must include a full airing of the concerns (which may be done in camera) and a meaningful inquiry by the trial court." Cross, 156 Wn.2d at 610. The court should examine "both the extent and nature of the breakdown in communication between attorney and client and the breakdown's effect on the representation the client actually receives." In re Pers. Restraint of Stenson, 142 Wn.2d 710, 724, 16 P.3d 1 (2001).

Federal courts similarly recognize the trial court's inquiry must provide a "'sufficient basis for reaching an informed decision.'" United States v. Adelzo-Gonzalez, 268 F.3d 772, 777 (9th Cir. 2001) (quoting United States v. McClendon, 782 F.2d 785, 789 (9th Cir. 1986)). In most cases, "a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions." Id. at 777-78; see also United States v. Lott, 310 F.3d 1231, 1249-50 (10th Cir. 2002) (a private,

in-depth hearing is typically "crucial" in making this determination). "[P]erfunctory inquiries" are insufficient. Adelzo-Gonzalez, 268 F.3d at 778.

What has not been addressed in any published case law in Washington is when an indigent defendant's expressed dissatisfaction with his appointed counsel triggers the trial court's duty to inquire. There is no dispute Warkentin did not file a written motion for new counsel. But should such a motion be required before the trial court must inquire? There is also no dispute Warkentin's expressed concerns were sometimes vague and confusing. But, again, how clearly must the accused state his request for new counsel? Must certain magic words be uttered? If so, it is crucial for defense attorneys and criminal defendants to have this Court's guidance on the subject.

These questions are especially important in cases like Warkentin's, where the defendant may be struggling with mental health issues or cognitive limitations, which in turn can impact attorney-client communication. How can a defendant who is struggling to communicate with his attorney be expected to bring an articulate motion for substitution of counsel? Very recently,

this Court held a parent's intellectual disabilities impacts how the Department of Children, Youth, and Families must interact with and provide services to that parent. In re Termination of M.A.S.C., __Wn.2d__, __P.3d__, 2021 WL 2006591, at *6 (2021). Similar concerns are implicated with the breakdown of the attorney-client relationship.

This Court's review is further warranted to determine whether the defendant needs to demonstrate any prejudice when the trial court fails to adequately inquire into his request for new counsel. In State v. Lopez, Division Three held "[t]he 'peremptory denial' of a defendant's request for new counsel is harmful only if counsel's performance actually violated the defendant's Sixth Amendment right to effective assistance of counsel." 79 Wn. App. 755, 768, 904 P.2d 1179 (1995) (quoting United States v. Morrison, 946 F.2d 484, 499 (7th Cir. 1991)), overruled on other grounds by State v. Adel, 136 Wn.2d 629, 965 P.2d 1072 (1998). The Lopez court therefore required a showing a deficient performance and prejudice under the Strickland[1] standard. Id.

[1] Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

In an unpublished decision, Division Two disagreed with this holding of Lopez: "[T]o the extent that [Lopez] may require a constitutional harmless error analysis, we disagree with that conclusion when the trial court fails to make an adequate inquiry." State Gambill, No. 44816-5-II, 2015 WL 263707, at *3 n.5 (Jan. 21, 2015).

The rule of Lopez is a bad one. The harmless error standard in Lopez essentially renders a nullity the trial court's duty to inquire. It reduces failure to inquire to an ineffective assistance claim, which can be exceedingly difficult to establish on direct appeal, given the "strong presumption counsel's representation was effective." State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). If the matter simply comes down to showing ineffective assistance of counsel, then the factors a reviewing court must assess—extent of conflict, adequacy of inquiry, and timeliness of request—are superfluous. Cross, 156 Wn.2d at 607.

The Tenth Circuit explained, "A defendant who cannot communicate with his attorney cannot assist his attorney with preparation of his case, including suggesting potential witnesses

to call and trial strategies to pursue, discussing whether the defendant himself should testify, and helping formulate other bread-and-butter decisions that can constitute the core of a successful defense." Lott, 310 F.3d at 1250. Many if not all of these essential components of an adequate defense would be impossible to establish on direct appeal—*because of the trial court's error in failing to inquire.*

This Court has considered a similar issue in the context of a defendant's request to proceed pro se. The trial court must determine, "usually by colloquy," whether the defendant's waiver of counsel and request to proceed pro se is unequivocal, timely, as well as knowing, intelligent, and voluntary. State v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714 (2010). This Court emphasized the trial court "cannot stack the deck against a defendant by not conducting a proper colloquy to determine whether the requirements for waiver are sufficiently met." Id. at 506. Where a trial court fails to adequately inquire and there is no evidence to the contrary, "the only permissible conclusion" is the request was valid. Id. No harmless error analysis ensues. Id. at 510.

The right to self-representation and the right to counsel stem from the same constitutional provisions—the Sixth Amendment and article I, section 22. Madsen, 168 Wn.2d at 503. There is no reason they should be treated differently in this context. The deck should not be stacked against a defendant who requests new counsel by requiring the defendant to demonstrate ineffective assistance of counsel after the trial court refuses to conduct an adequate inquiry.

Furthermore, excusing a trial court's failure to inquire unless ineffective assistance of counsel can be shown implicates the accused's constitutional right to appeal "in all cases," also contained in article I, section 22. "A criminal defendant is constitutionally entitled to a record of sufficient completeness to permit effective appellate review of his or her claims." State v. Tilton, 149 Wn.2d 775, 781, 72 P.3d 735 (2003) (internal quotation marks omitted) (quoting State v. Thomas, 70 Wn. App. 296, 298, 852 P.2d 1130 (1993)).

The lack of record on a motion for new counsel should itself establish prejudice, because it infringes the defendant's right to effective appellate review. For instance, had the trial court

actually inquired and discovered a complete breakdown in communication between Warkentin and his attorney, a refusal to appoint new counsel would necessitate reversal without any showing of prejudice. Cross, 156 Wn.2d at 606. Review is warranted on this additional basis, where Lopez is the only published case addressing the prejudice standard for the trial court's failure to inquire.

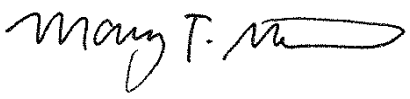
E. CONCLUSION

For the reasons discussed above, this Court should grant review, reverse the court of appeals, and remand for a new trial or, alternatively, remand for an evidentiary hearing on Warkentin's request for new counsel.

DATED this 8th day of June, 2021.

Respectfully submitted,

NIELSEN KOCH, PLLC



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Appendix

Filed
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Court of Appeals
Division Two

May 11, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. AARON FREDERICK WARKENTIN, Appellant,	No. 54076-2-II UNPUBLISHED OPINION

LEE, C.J. — Aaron F. Warkentin appeals his conviction and sentence for third degree assault, arguing that the trial court erred by failing to inquire into his motion for new counsel and by imposing discretionary legal financial obligations (LFOs) after finding that he is indigent.[1] We affirm Warkentin's conviction but remand to the trial court to strike the discretionary LFOs.

FACTS

On January 3, 2019, the State charged Warkentin with third degree assault.

[1] Warkentin also filed a Statement of Additional Grounds (SAG) under RAP 10.10. Under RAP 10.10(c), a SAG must inform this court of the nature and occurrence of the alleged errors. Warkentin's vague references to statements made by defense counsel or plea agreements do not inform this court of the nature and occurrence of the alleged errors as required by RAP 10.10(c). Furthermore, the majority of allegation in Warkentin's SAG refer to matters outside the record before this court. We do not consider matters outside the record in a direct appeal. *State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995). Issues that rely on matters outside the record must be raised in a personal restraint petition. *Id*. Therefore, we do not consider the claims made in Warkentin's SAG.

On the day of Warkentin's jury trial, the State and defense counsel both stated that they were ready to proceed to trial, but defense counsel informed the trial court that Warkentin had something he wanted to say. Warkentin asked counsel to read a written statement to the court:

> "Replace [defense counsel's] bias on his ideas to me. I believe I voiced a concern out loud in court, but not in a particular order, not spending enough time discussing what constitute an assault 3, being flip-flopped on outcome of trial, not spending enough time talking to me about the process of proceedings."
>
> "One day, there was an armament while I was in custody. No prosecutor was present. He said, 'I don't know why we are before you,' something about an assault 2, Your Honor. I was on vacation.
>
> "Mostly, no advocating, just installing—instilling a fear of prosecution. He doesn't care when we go to trial, game playing and plan, selling me on the idea of making me lose (inaudible) and thinking being the trial option in this course over my (inaudible) and direction. Once I have presented opinions or ideas like apology—"

I VRP (Sept. 9, 2019) at 10. Warkentin interrupted counsel and stated,

> I think this was going along (inaudible) sorry—out of me enough that—showing up 30 times. I'm not a habitual offender. I got the message, but I think it's outlandish to do a trial, spend 30 or 60,000 for—if I would have assaulted a cop, I think I would have been thrown to the ground immediately. Something—they are that smart. I give them all that and then some.

I VRP (Sept. 9, 2019) at 10-11.

The trial court reminded Warkentin that everything he was saying was on the record. The trial court then asked, "What are you specifically asking this Court to do at this time?" I VRP (Sept. 9, 2019) at 11. Warkentin responded,

> Well, I don't—we're on the same page to go to trial, if that's the course of action that we're going to take. I don't feel comfortable with him at all. I have voiced it twice. Once with an evaluation that I had, just a distrust. We've had a lot of communication gaps. He says that all the time, in fact, that we have—you're not understanding me. "Do you understand this," over and over again, even in the hall and separate rooms, and apparently, I don't.
>
> But I thought this assault 3 was a realistic prosecution for a touch, then I would have pleaded—taken a plea a long time ago. I just—I don't understand it, apparently. That's why the (inaudible) or pencil in writing is.

I VRP (Sept. 9, 2019) at 11.

The trial court told Warkentin that the prosecuting attorney decides what charges are filed and pursued. The trial court also stated that defense counsel had the ability to bring a motion to dismiss if he thought such a motion would be appropriate. The trial court further stated, "So now we're set to go to trial, and that's what we're going to do today." I VRP (Sept. 9, 2019) at 12.

A jury found Warkentin guilty of third degree assault. The trial court imposed an exceptional sentence downward. At sentencing, the trial court found that Warkentin was indigent under RCW 10.101.010(3). Despite finding Warkentin indigent, the trial court imposed a $200 criminal filing fee, $250 jury demand fee, and a $1,400 court-appointed attorney fee. The trial court also imposed community custody supervision fees.

Warkentin appeals.

ANALYSIS

Warkentin argues that the trial court erred by failing to inquire into his motion for new counsel. Warkentin also argues that the trial court erred by imposing discretionary LFOs. We affirm Warkentin's conviction but remand for the trial court to strike the discretionary LFO's.

A. FAILURE TO INQUIRE

Warkentin argues that the trial court erred by failing to make a full and adequate inquiry into his motion for new counsel. However, because Warkentin did not make a motion for new counsel, the trial court did not err. Accordingly, we affirm Warkentin's third degree assault conviction.

A criminal defendant's right to counsel is guaranteed under the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution. However, this right is not absolute and indigent defendants do not have the right to counsel of their choice. *State*

v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). To justify replacing appointed counsel, a defendant must show good cause. *Id*. Good cause includes a conflict of interest, irreconcilable conflict, or a complete breakdown in communication. *Id*.

Failure to substitute counsel violates the right to counsel when the relationship between counsel and the defendant has completely collapsed. *State v. Cross*, 156 Wn.2d 580, 606, 132 P.3d 80, *cert. denied*, 549 U.S. 1022 (2006). The relationship must be so diminished as to prevent presentation of an adequate defense. *State v. Stenson*, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). General dissatisfactions, distrust, or loss of confidence is not sufficient cause to appoint new counsel. *Varga*, 151 Wn.2d at 200.

We review a trial court's decision regarding replacement of counsel for an abuse of discretion. *Id*. When reviewing the denial of a motion to replace counsel, we consider (1) the extent of any conflict between the defendant and counsel, (2) the adequacy of the trial court's inquiry into that conflict, and (3) the timeliness of the motion to appoint new counsel. *Cross*, 156 Wn.2d at 607.

Here, Warkentin did not make a motion to appoint new counsel. There was nothing filed with the trial court. And Warkentin's written statement was vague and confusing. The trial court gave him an opportunity to clarify his request by asking, "What are you specifically asking this Court to do at this time?" I VRP (Sept. 9, 2019) at 11. Warkentin did not respond by asking for new counsel. Based on the exchange, Warkentin's dissatisfaction seems to be from not understanding why he was being charged and going to trial for something he did not consider a third degree assault.

Because Warkentin never actually asked the trial court to replace his counsel and did nothing more than express his general dissatisfaction with his case, the trial court did not abuse its

discretion by proceeding to trial.[2] Accordingly, we affirm Warkentin's conviction for third degree assault.

B. DISCRETIONARY LFOS

Warkentin argues that the trial court improperly imposed discretionary LFOs after finding that he is indigent. The State concedes that discretionary LFOs should be stricken. We agree and remand to the trial court to strike the discretionary LFOs.

Under RCW 10.01.160(3), the trial court may not impose discretionary costs on indigent defendants. RCW 36.18.020(2)(h) provides that a criminal filing fee cannot be imposed on a defendant who is indigent under RCW 10.101.010(3). And the court appointed attorney fee, jury demand fee, and community supervision fee are all discretionary LFOs. *See* RCW 10.01.160(2)-(3); RCW 10.46.190; RCW 9.94A.703(2)(d).

[2] Even if we were somehow able to construe Warkentin's statements as a motion to replace counsel, the trial court did not abuse its discretion by denying the motion. When reviewing the denial of a motion to replace counsel, we consider (1) the extent of any conflict between the defendant and counsel, (2) the adequacy of the trial court's inquiry into that conflict, and (3) the timeliness of the motion to appoint new counsel. *Cross*, 156 Wn.2d at 607.

Here, Warkentin did not identify any irreconcilable conflict or complete breakdown of communication. He only expressed some distrust and general dissatisfaction with the fact that his suggestions to avoid a trial, such as providing an apology, were not well received or acted upon. Moreover, the trial court gave Warkentin an opportunity to clarify what he was asking of the court. And Warkentin told the trial court he agreed with going to trial. Furthermore, Warkentin's request was not timely. Warkentin did not make his request until the morning of trial, so any replacement of counsel would likely have required a continuance. Warkentin's complaints actually included how many times he had already had to go to court. Replacing counsel would have only delayed resolution of the case and increased the number of times Warkentin would have to appear. Thus, given the relevant factors, of which adequacy of the trial court's inquiry is only one consideration, even if Warkentin's statements can somehow be construed as a motion, the trial court did not abuse its discretion by denying Warkentin's request for new counsel.

Because the trial court imposed discretionary LFOs on a defendant that the court found to be indigent under RCW 10.101.010(3), we accept the State's concession. Accordingly, we remand to the trial court to strike the discretionary LFOs.

We affirm Warkentin's conviction but remand to the trial court to strike the discretionary LFOs.

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.

Lee, C.J.

We concur:

Worswick, J.

Sutton, J.

NIELSEN KOCH P.L.L.C.

June 09, 2021 - 11:35 AM

Transmittal Information

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