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CLERK OF SUPREME COURT  
STATE OF WASHINGTON

No. \_\_\_\_\_

Court of Appeals No. 55074-8-1

OF THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ISMAEL ARMENDARIZ,

Petitioner.

FILED  
COURT OF APPEALS  
2006 MAR 14 AM 10:57

PETITION FOR REVIEW

ELAINE L. WINTERS  
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711



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A. IDENTITY OF PETITIONER

Ismael Armendariz, defendant and appellant below, seeks review of the Court of Appeals decision terminating review designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Armendariz seeks review of the Court of Appeals decision dated February 13, 2006, affirming his conviction and sentence for assault in the third degree. State v. Ismael Armendariz, Court of Appeals No. 55074-8-1.

A copy of the Court of Appeals decision is attached as an appendix to this petition.

C. ISSUES PRESENTED FOR REVIEW

1. Where the Sentencing Reform Act authorizes the superior court to order an offender to have no contact with the crime victim or a class of individuals as a condition of community placement, may the court order the offender to have no contact with a specific individual who is not the victim of the crime?

2. Does the Sentencing Reform Act authorize the court to impose an order prohibiting contact with an individual for the maximum term when the maximum term exceeds the term of community custody?

3. Does the Sentencing Reform Act authorize the court to require an offender to participate in and successfully complete a domestic violence batterers treatment program as a condition of community placement for a non-domestic violence offense?

4. Was Mr. Armendariz's challenge to fight an officer approximately 30 minutes after he was arrested part of res gestae of an earlier assault on a different police officer in a different location? Was the admission of the challenge to fight harmless where the evidence showed Mr. Armendariz struggled against his arrest but did not assault the first police officer?

D. STATEMENT OF THE CASE

Towards the end of her happy ten-year relationship with Ismael Armendariz, Diana Nonas-Truong became scared, and in November, 2003, she obtained a Seattle Municipal Court order prohibiting Mr. Armendariz from coming closer than 500 feet from her. Ex. 8; RP 40-42, 92-93, 104-06. Ms. Truong nonetheless invited Mr. Armendariz to her home on January 3, 2004, to see her adult sons, who viewed Mr. Armendariz as a father. RP 5, 49, 104-06.

Later that evening, Ms. Truong discovered three Seattle police officers in her home, apparently called because of a broken

window. RP 94-96, 142. One officer, Jason Chittenden, remained in the living room with Ms. Truong while the others left to look for Mr. Armendariz. Mr. Armendariz later arrived and knocked loudly at the front door. RP 98-99, 143-44.

Officer Chittenden unlocked the door, and it flew open, hitting him in the head. RP 106-07, 147. Mr. Armendariz was in the door way, and Officer Chittenden grabbed him and threw him onto the apartment floor. RP 46-47, 148. Mr. Armendariz and Officer Chittenden struggled on the floor, each trying to gain control over the other. RP 100, 149, 161. Mr. Armendariz did not strike the officer, but Officer Chittenden struck Mr. Armendariz so hard that he injured his own hands. RP 156-57, 161-62. Officer Chittenden also employed techniques such a bear hug and scissor lock to try to control Mr. Armendariz. RP 34-35, 117-18, 155.

Eventually other officers arrived and subdued Mr. Armendariz, but they manhandled him even after he was in handcuffs. RP 36, 45, 62-63, 108, 153-54. Over defense objection, one officer testified that 20 to 30 minutes after they removed Mr. Armendariz from the apartment, Mr. Armendariz invited the officer to take off the handcuffs and fight him in the holding cell. RP 130-33. Mr. Armendariz was later taken to the

hospital; he was bleeding, he had a loose tooth, and his entire body was bruised. RP 45, 62.

Mr. Armendariz was convicted by a jury of third degree assault of a police officer, a felony, and violating a no-contact order protecting Ms. Truong, a misdemeanor. CP 1-2, 30, 31, 38, 54. His sentence for the assaulting Officer Chittenden included the requirement he participate in domestic violence perpetrators counseling and have no contact with Ms. Truong for five years.<sup>1</sup> CP 32, 34, 37.

On appeal, Mr. Armendariz argued the sentencing court exceeded its statutory authority by ordering domestic violence counseling and a five-year no-contact order for the crime of assaulting a police officer. Brief of Appellant at 19-26. The Court of Appeals concluded the counseling and no-contact orders fell within the court's authority to order rehabilitative programs that were related to the circumstances of the offense, the risk of re-offense, or public safety. Slip Op. at 8-9.

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<sup>1</sup> For the misdemeanor offense, the court imposed a 12-month suspended sentence on the condition Mr. Armendariz serve 5 months in jail, concurrent to the felony, participate in a state-certified domestic violence program, and have no contact with Ms. Truong. CP 38-40. He does not challenge this sentence.

Concerning his assault conviction, Mr. Armendariz argued the trial court improperly admitted his statement in the holding cell several minutes after his arrest as part of the res gestae of the crime. Brief of Appellant at 14-19. The Court of Appeals did not decide if the court erred by admitting the statement, concluding any error was harmless. Slip Op. at 5-7. The Court of Appeals also rejected Mr. Armendariz's argument that his trial attorney did not provide effective assistance of counsel by failing to offer a self-defense instruction. Slip Op. at 3-4. Mr. Armendariz now seeks review in this Court.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THIS COURT SHOULD ACCEPT REVIEW TO DETERMINE IF THE SRA PERMITS THE COURT TO ORDER AN OFFENDER TO HAVE NO CONTACT WITH A WITNESS AND WHETHER THE NO CONTACT ORDER MAY EXCEED THE PERIOD OF COMMUNITY CUSTODY

The sentencing court ordered Mr. Armendariz to have no contact with Ms. Truong for five years as part of his sentence for assaulting a police officer. The section of the Sentencing Reform Act (SRA) applicable to Mr. Armendariz's case, however, only authorizes the court to prohibit the offender from having contact with crime victims and other "classes" of individuals, and no statute

authorizes a no-contact order to extend beyond the term of community supervision. This Court should accept review to settle this question of statutory interpretation which is important to courts throughout the State sentencing offenders under the SRA and because the Court of Appeals statutory analysis conflicts with this Court's decisions governing statutory construction. RAP 13.4(b)(1), (4).

The superior court's authority to sentence an offender is governed by statute. State v. Hughes, 154 Wn.2d 118, 149, 110 P.3d 192 (2005); State v. Law, 154 Wn.2d 85, 92, 110 P.3d 717 (2005); State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986), cert. denied, 479 U.S. 930 (1986). For an offender in Mr. Armendariz's position, RCW 9.94A.700(5) permits the court to order, among other special conditions of community placement, that the offender not have contact with the crime victim or with a specified class of individuals.<sup>2</sup> The statute provides:

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

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<sup>2</sup> RCW 9.94A.505(2)(a)(iv) (effective until July 1, 2004) gave the superior court power to order one year community custody. RCW 9.94A.545 authorized the court to order conditions of community custody as found at RCW 9.94A.715 and RCW 9.94A.720.

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

RCW 9.94A.700(5)(b). On appeal Mr. Armendariz argued the no-contact order in his case was improper because Ms. Truong was not the victim of the assault against Officer Chittenden and she was also not a "class of individuals." The Court of Appeals decided the question by ignoring RCW 9.94A.700(5)(b) and looking instead to section (e), which more generally permits the sentencing court to order the offender to comply with any "crime-related prohibition." Slip Op. at 7-8.

The Court of Appeals analysis ignores fundamental rules of statutory construction. "Statutes must be interpreted and construed so that all the language used is given effect with no provision rendered meaningless." Gorman v. Garlock, Inc., 155 Wn.2d 198, 210, 118 P.3d 311 (2005), quoting Davis v. Dep't. of Licensing, 137 Wn.2d 957, 963, 977 P.2d 554 (1999). A conflict between a general and a specific statute is generally resolved in favor of the more specific legislation. Gorman, 155 Wn.2d at 210-11; State v. J.P., 149 Wn.2d 444, 454, 69 P.3d 318 (2003). The Court of Appeals logic, however, renders the specific language concerning no-contact orders in RCW 9.94A.700(5)(b) superfluous. Where the

Legislature specifically lists the people whom the court may protect with a no-contact order in one subsection of a statute, the court may not derive authority to add other individuals to that list from a different general subsection.

Furthermore, a no contact order with Ms. Truong is not a “crime-related prohibition” for an assault on Officer Chittenden, as a “crime-related prohibition” must be “directly related to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(12). Ms. Truong was not hurt as a result of the assault on Officer Chittenden, and an order prohibiting contact with her was not “directly related” to the third degree assault.

In addition to the no contact order that was a condition of Mr. Armendariz’s community custody, the superior court also entered a separate five-year no contact order. CP 34. The SRA, however, does not provide the authority for a five-year no-contact order in this case. Five years is the statutory maximum term for third degree assault, but will exceed Mr. Armendariz’s term of confinement plus community custody, which totals only 15 months. RCW 9A.20.021(1)(c); RCW 9A.36.031(2); CP 34.

The SRA formerly authorized the superior court to order the offender to have no contact with a witness for a period up to the maximum term. Former RCW 9.94A.120(20) read:

As a part of any sentence, the court may impose and enforce an order that relates directly to the circumstances of the crime for which the offender has been convicted, prohibiting the offender from having any contact with other specified individual or a specific class of individuals for a period not to exceed the maximum allowable sentence for the crime, regardless of the expiration of the offender's term of community supervision or community placement.

Former RCW 9.94A.120(20). The statute, however, was amended effective July 1, 2001, to eliminate the provision concerning no contact orders. After amendment, the statute stated:

As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.

Former RCW 9.94A.120(8); Laws of 2000 ch 28 § 5, now codified at RCW 9.94A.505(8).

In the absence of statutory authority to order the offender to have no contact with an individual for the maximum term, the court's authority is limited to the period of community custody or other form of supervision. The five-year no-contact order in this case is thus void, and may be addressed in this petition for review. See State v. Ford, 137 Wn.2d 472, 477-78, 484-85, 973 P.2d 452

(1999). This Court should accept review to determine whether the superior had statutory authority to order a no-contact order for the statutory maximum and to order a no-contact order with Ms. Truong when she was not the crime victim. RAP 13.4(b)(1), (4).

2. THIS COURT SHOULD ACCEPT REVIEW TO  
DETERMINE IF THE SRA AUTHORIZES THE  
COURT TO ORDER DOMESTIC VIOLENCE  
COUNSELING FOR NON-DOMESTICE VIOLENCE  
OFFENSES

Mr. Armendariz was ordered to participate in domestic violence perpetrators counseling for a third degree assault that was not a domestic violence offense. His case involves interpretation of the SRA, an issue affecting numerous sentences throughout Washington, and this Court should accept review because it is an issue of substantial public importance. RAP 13.4(b)(4). In addition, the Court of Appeals analysis of the SRA conflicts with decisions of this Court discussing the canons of statutory construction. This Court should accept review because the Court of Appeals decision is in conflict with decisions of this Court. RAP 13.4(b)(1).

As mentioned above, the superior court's power to sentence is governed by the SRA. The roadmap for felony sentencing under

is found at RCW 9.94A.505.<sup>3</sup> RCW 9.94A.505 authorizes the superior court to impose and enforce crime-related prohibitions and affirmative conduct "as provided in this chapter." RCW 9.94A.505(8). The statute specifically provides for domestic violence treatment as condition of community supervision, community custody or community placement in only one circumstance: when the offender has been convicted of a crime of domestic violence as defined by RCW 10.99.020 and the offender or victim has a minor child. RCW 9.94A.505(11).

Mr. Armendariz was not convicted of a crime of domestic violence as defined by RCW 10.99.020, which includes third degree assault only when "committed by one family or household member against another." Former RCW 10.99.020(3)(c).<sup>4</sup> Mr. Armendariz and Officer Chittenden were not members of the same family or household. Thus, the superior court lacked statutory authority to require domestic violence treatment as a condition of community custody.

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<sup>3</sup> Mr. Armendariz's offenses occurred in January, 2004, so the version of RCW 9.94A.505 effective until July 1, 2004, controls. CP 1, 19, 31. In Mr. Armendariz's case, it provides he must be sentenced within the standard range established in RCW 9.94A.510 and pursuant to RCW 9.94A.545. RCW 9.94A.505(2)(a).

<sup>4</sup> Amendments to RCW 10.99.020 effective after the date of Mr. Armendariz's offense place the definition of "domestic violence" at RCW 10.99.020(5) and add a new definition of "family and household members" at RCW 10.99.020(3).

The Court of Appeals held that the superior court properly ordered Mr. Armendariz to undergo domestic violence counseling for assault on a police officer because the counseling was rehabilitative treatment reasonably related to the crime. Slip Op. at 8-9, citing RCW 9.94A.715(2)(b). RCW 9.94A.715(2)(b) does refer to “rehabilitative programs,” but the statute does not mention “domestic violence treatment” as does RCW 9.94A.505(11).

In interpreting a statute, this Court looks at the plain meaning of the language used by the Legislature and assumes the Legislature meant what the statute says. State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005); State v. Delgado, 148 Wn.2d 723, 727-28, 63 P.3d 792 (2003). When the Legislature uses specific language in one section of a statute and does not use that language in a different section of the same statute, this Court assumes the omission is intentional. Jacobs, 154 Wn.2d at 603; Delgado, 148 Wn.2d at 728-29.

In Delgado, this Court addressed a different section of the SRA, the “two strike” statute mandating a sentence of life without the possibility of parole for a second sex offense, former RCW 9.94A.030(27). The definition of persistent offender for “two strike” purposes expressly listed the qualifying prior offenses and did not

include comparable out-of-state crimes. Delgado, 148 Wn.2d at 726-27. This was in contrast to the definition of persistent offender under the “three strike” statute, which included a comparability clause. Id. at 728, citing former RCW 9.94A.030(23), (27). Pointing out the Legislature knew how to include a comparable out-of-state conviction in the definition of persistent offender, this Court concluded the omission was intentional. Id. at 728-29.

Thus, the Legislature knew how to include comparable offenses in the definition of persistent offender. Yet, the legislature neither directly included a comparability clause, nor incorporated the definition of “most serious offense,” into the definition of two-strike persistent offenders directly following the three-strike definition. “Under *expressio unius est exclusio alterius*, a canon of statutory construction, to express one thing in a statute implied the exclusion of the other.” We therefore presume the absence of such language in the two-strike scheme was intentional.

Id., citing Detention of Williams, 147 Wn.2d 476, 491, 55 P.3d 597 (2002).

This Court similarly stated in Jacobs that the use of certain statutory language in one instance and different language in another demonstrates a different intent. Jacobs, 154 Wn.2d at 603, citing Detention of Swanson, 115 Wn.2d 21, 27, 804 P.2d 1 (1990). Accord, Public Utility District No. 1 of Pend Oreille County v. Department of Ecology, 146 Wn.2d 778, 797, 51 P.2d 744 (2002).

Here, the Legislature specifically authorized the superior court to order an offender to undergo domestic violence treatment only when the offender commits a crime of domestic violence and the offender or the victim has a minor child. RCW 9.94A.505(11). The Court of Appeals opinion, however, ignores the differences between RCW 9.94A.505(11) and RCW 9.94A.715. By ignoring the statutory differences and the applicable canons of statutory construction, the Court of Appeals opinion conflicts with opinions of this Court, such as Jacobs and Delgado, and this Court should accept review. RAP 13.4(b)(1).

The Court of Appeals reasoned that RCW 9.94A.715(2)(a) permits the superior court to order an offender to “participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstance of the offense, the offender’s risk of reoffending, or the safety of the community,” and domestic violence counseling was reasonably related to Mr., Armendariz’s offense. RCW 9.94A.715(2)(a); Slip Op. at 9. The crime here, however, was assault on a police officer. Domestic violence counseling is not related to the circumstances of the assault and it is unlikely reduce Mr. Armendariz’s risk of assaulting a police officer in the future. This Court should accept review to

assist the lower courts in determining what rehabilitative programs may be ordered pursuant to RCW 9.94A.715(2)(a). RAP 13.4(b)(4).

3. MR. ARMENDARIZ'S HOLDING CELL STATEMENT WAS NOT PART OF THE RES GESTAE OF THE ASSAULT AND ITS ADMISSION WAS NOT HARMLESS

Mr. Armendariz's statement to a police officer while being held in police custody several minutes after the offense was not part of the res gestae of the assault, and the superior court erred by admitting the prejudicial statement. The Court of Appeals declined to decide if the court's ruling was incorrect, instead holding any error was harmless. Slip Op. at 6-7. This Court should accept review to provide guidance to the lower courts concerning the res gestae rule and application of the harmless error standard. RAP 13.4(b)(4).

After he had been arrested and was in a holding cell, Mr. Armendariz reportedly challenged one of the arresting officers by stating, "Come on bitch. Take these handcuffs off and we can go at it." RP 132. Evidence of another crime or bad act may be admitted in court under the res gestae exception to ER 404(b) only where it is "a 'link in the chain' of an unbroken sequence of events surrounding the charged offense." State v. Brown, 132 Wn.2d 529,

571, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998), quoting State v. Tharp, 96 Wn.2d 591, 594, 637 P.2d 961 (1981). The purpose of the rule is to give a complete picture of the event to the jury. Id. The evidence must still be relevant to a material issue and its probative value must outweigh any prejudicial effect Id.

This statement was not part of the res gestae of the assault on a different officer, occurring 30 or more minutes earlier. Mr. Armendariz's demeanor and attitude after he had been both subdued and manhandled by approximately six police officers could easily have been different than his attitude during the assault. See 8/30/04 RP 108 (police officers abusive to Mr. Armendariz even after he was tied up); Slip Op. at 6.

The Court of Appeals conclusion that the statement was harmless is incorrect. Officer Chittenden immediately grabbed Mr. Armendariz and tried to throw him on the floor without stating Mr. Armendariz was under arrest. 8/30/04 RP 107, 158-59. Officer Chittenden testified Mr. Armendariz never struck him, but they were engaged in a struggle for control. Id. at 161. Officers who arrived to help Officer Chittenden described Mr. Armendariz as non-compliance rather than assaultive. 8/30/04 RP 117-18, 124.

In the absence of evidence that Mr. Armendariz was assaulting Officer Chittenden instead of simply resisting arrest, the Court of Appeals conclusion the introduction of the prejudicial holding cell statement is incorrect. This Court should accept review to both clarify the res gestae exception to ER 404(b) and to determine if the error was harmless in this case. RAP 13.4(b)(4).

F. CONCLUSION

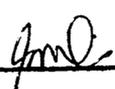
Mr. Armendariz's case raises important issues concerning the sentencing power of the superior court under the SRA and the Court of Appeals analysis of the applicable statutes conflicts with this Court's opinions addressing statutory construction. In addition, the admission of his holding cell challenge to fight a police officer was not part of the res gestae of his alleged assault on a different officer and its admission without a limiting instruction was not harmless. This Court should accept review.

Respectfully submitted this 14<sup>th</sup> day of March, 2006.

For my I deposited in the mail of the United States of America a properly stamped and addressed envelope directed to the attorneys of record of plaintiff/defendant containing a copy of the document to which this declaration is attached.

  
Elaine L. Winters – WSBA #7780  
Washington Appellate Project  
Attorneys for Petitioner

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
Name \_\_\_\_\_

MAR 14 2006  
Date \_\_\_\_\_

Done in Seattle, Washington

APPENDIX

COURT OF APPEALS DECISION

February 13, 2006

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Washington Appellate Project

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	DIVISION ONE
Respondent,	)	
	)	No. 55074-8-1
vs.	)	
	)	
ISMAEL ARMENDARIZ,	)	
	)	<b>UNPUBLISHED OPINION</b>
Appellant.	)	
	)	
	)	FILED: February 13, 2006
_____	)	

**PER CURIAM** — Ismael Armendariz challenges his conviction and sentence for third degree assault of a police officer. We hold that Armendariz's counsel acted reasonably by not requesting a self-defense instruction, any error in admitting Armendariz's postarrest statement into evidence was harmless, and the court did not exceed its sentencing authority by placing certain conditions on Armendariz's term of community custody. We affirm.

I.

In November 2003, the Seattle Municipal Court issued an order forbidding Armendariz from having contact with Diane Nonas-Truong. The order remained in effect until May 2004. Despite the no-contact order, Armendariz went to

Nonas-Truong's residence in January 2004. After arguing with Nonas-Truong, Armendariz left.

That same evening, officers responded to a 911 call reporting potential domestic violence at Nonas-Truong's residence. When they arrived, Officer Jason Chittenden went inside to speak with Nonas-Truong while the other officers conducted an area check around the building. Officer Chittenden closed and locked the door. Several minutes later, Armendariz returned and began yelling and pounding on the door and windows.

Officer Chittenden called for fast backup. But, because he believed Armendariz was about to flee, Officer Chittenden did not wait for backup to arrive before opening the door to arrest Armendariz. When Officer Chittenden opened the front door, Armendariz was there waiting, and the two men began struggling. The men wrestled and fought on the floor until responding officers gained control of Armendariz and secured his arrest. Both Officer Chittenden and Armendariz were injured in the struggle and received medical treatment for their injuries.

Armendariz was charged with third degree assault for the incident with Officer Chittenden, which is a felony offense, and a misdemeanor violation of a court order for disobeying the no-contact order.

The State moved to prohibit Armendariz from claiming self-defense, arguing that the facts did not support such a defense. Armendariz's attorney characterized his defense as general denial and noted that he did not anticipate submitting a self-defense instruction. But he requested that the court allow Armendariz to revisit the issue in the event the trial evidence supported self-

defense. The court granted the State's motion, but reserved Armendariz's right to request a self-defense instruction if evidence was admitted at trial supporting a different set of facts.

During trial, Armendariz objected to the admission of a statement he made to Officer Brett Milstead, after Officer Milstead placed him in a holding cell. Officer Milstead testified that Armendariz said: "Come on, bitch. Take these handcuffs off and we can go at it." The court allowed the statement into evidence under the *res gestae* exception to ER 404(b).

A jury found Armendariz guilty as charged. For third degree assault, the court sentenced Armendariz to three months in jail followed by 12 months community custody. It also issued an order prohibiting Armendariz from having contact with Nonas-Truong for five years. The court required Armendariz to attend a domestic violence treatment program as part of his community custody conditions. For violating a court order, the court sentenced Armendariz to a 12-month suspended sentence on the condition that he serve five months in jail, have no contact with Nonas-Truong, and complete a domestic violence treatment program. The sentences ran concurrently.

Armendariz appeals the judgment and sentence.

## II.

Armendariz first argues that his constitutional right to effective assistance of counsel was contravened because his attorney did not propose a self-defense instruction for the third degree assault charge. The proper standard for attorney

performance is that of "reasonably effective assistance."<sup>1</sup> Courts have elaborated a two-part test in determining whether a defendant is deprived of his constitutional right to counsel due to ineffectiveness. First, the defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."<sup>2</sup> Second, the defendant must prove that the substandard assistance resulted in prejudice. Armendariz must rebut a strong presumption of competent representation in order to prove ineffective assistance of counsel.<sup>3</sup> An attorney's legitimate trial tactics or strategy cannot serve as a basis for a claim by the defendant that he did not receive adequate assistance.<sup>4</sup>

Armendariz's attorney pursued a general denial defense. During trial, Armendariz testified that he did not resist arrest or strike Officer Chittenden. His attorney's decision to not argue self-defense was likely strategic. If Armendariz had claimed that he used force because he believed that he was in actual danger of serious injury, his general denial theory would have been refuted by his own testimony. Further, neither Armendariz's testimony nor any other evidence supported a self-defense instruction. Armendariz's attorney provided effective assistance.

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<sup>1</sup> Strickland v. Washington, 466 U.S. 668, 683, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

<sup>2</sup> Strickland, 466 U.S. at 687; State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991); State v. Jeffries, 105 Wn.2d 398, 417-18, 717 P.2d 722 (1986); State v. Wilson, 117 Wn. App. 1, 15-16, 75 P.3d 573, rev. denied, 150 Wn.2d 1016 (2003).

<sup>3</sup> Lord, 117 Wn.2d at 883; Wilson, 117 Wn. App. at 16.

<sup>4</sup> Lord, 117 Wn.2d at 883.

Armendariz next argues that the trial court committed reversible error by permitting Officer Milstead to testify about the statement Armendariz made while in the holding cell. The court allowed the statement into evidence under the res gestae exception to ER 404(b). Whether to admit evidence under this exception is a matter within the sound discretion of the trial court.<sup>5</sup> The court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons.<sup>6</sup>

Under ER 404(b), evidence of misconduct other than the act for which the defendant is charged is not admissible to show that the defendant is a criminal type.<sup>7</sup> However, evidence of other misconduct may be admitted for other reasons, such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.<sup>8</sup>

Courts have also recognized the res gestae or same transaction exception to the rule. "Under this exception, evidence of other crimes or misconduct is admissible to complete the story of the crime by establishing the immediate time and place of its occurrence."<sup>9</sup> Where the defendant's subsequent misconduct constitutes "a 'link in the chain' of an unbroken sequence of events surrounding the charged offense," evidence of that offense is admissible.<sup>10</sup> "Each act must be

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<sup>5</sup> State v. Fish, 99 Wn. App. 86, 94, 992 P.2d 505 (1999).

<sup>6</sup> State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997).

<sup>7</sup> ER 404(b); Brown, 132 Wn.2d at 570.

<sup>8</sup> ER 404(b); Brown, 132 Wn.2d at 570.

<sup>9</sup> Brown, 132 Wn.2d at 571.

<sup>10</sup> Brown, 132 Wn.2d at 571.

'a piece in the mosaic necessarily admitted in order that a complete picture be depicted for the jury.'" <sup>11</sup>

To admit evidence under an exception to ER 404(b), the trial court must: (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify on the record the purposes for which it admits the evidence; (3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value of the evidence against its prejudicial affect. <sup>12</sup>

The court may have abused its discretion by admitting Armendariz's postarrest statement under the res gestae exception to ER 404(b). Armendariz's statement to Officer Milstead did not constitute a "piece in the mosaic" that was necessary to complete the picture of what occurred between Armendariz and Officer Chittenden. He made the statement after his arrest, 20 to 30 minutes after the incident with Officer Chittenden. Additionally, the court did not state on the record the relevancy of the statement or weigh its probative value against the prejudicial affect.

Regardless, any error in admitting Armendariz's statement was harmless. An erroneous admission of ER 404(b) evidence requires reversal only if the error, within reasonable probability, materially affected the outcome of the trial. <sup>13</sup> "The

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<sup>11</sup> Fish, 99 Wn. App. at 94 (quoting State v. Powell, 126 Wn.2d 244, 263, 893 P.2d 615 (1995)).

<sup>12</sup> State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

<sup>13</sup> State v. Everybodytalksabout, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002); State v. Carleton, 82 Wn. App. 680, 686, 919 P.2d 128 (1996).

error is harmless if the evidence is of minor significance compared to the overall evidence as a whole.”<sup>14</sup>

Armendariz’s statement was insignificant compared to the overall evidence. Four police officers testified that Armendariz fought with Officer Chittenden on the floor while resisting arrest, despite their verbal commands to stop resisting and to put his hands behind his back. Officer Chittenden testified that, when he called for backup, Armendariz stated, “[y]eah, you better call for help, bitch.” Additionally, Nonas-Truong testified that Armendariz and Officer Chittenden wrestled on the floor while hitting and punching each other. In light of this overwhelming evidence, any error in admitting Armendariz’s postarrest statement was harmless.

Armendariz also challenges his sentence. As part of his sentence for third degree assault, the court issued a no-contact order, prohibiting him from having contact with Nonas-Truong for five years. Armendariz argues that the court exceeded its statutory authority because the court was only authorized to prohibit him from having contact with “the victim of the crime or a specified class of individuals”<sup>15</sup> as a condition of his community custody.<sup>16</sup> But, under RCW 9.94A.700(5)(e), the court may also order the offender to comply with any “crime-

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<sup>14</sup> Everybodytalksabout, 145 Wn.2d at 469.

<sup>15</sup> RCW 9.94A.700(5)(b).

<sup>16</sup> Citing RCW 9.94A.720(1)(c), the State argues that the court is also authorized to prohibit the defendant from having contact with “any other specified individuals.” But this provision does not provide the court with sentencing authority. Rather, it pertains to the Department of Correction’s supervision of offenders on community placement or custody, and authorizes the Department to impose conditions on supervision.

related prohibition” as a condition of community custody.<sup>17</sup> A “crime-related prohibition” is “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.”<sup>18</sup>

Although Nonas-Truong was not the victim of the assault, Armendariz’s tumultuous relationship with Nonas-Truong is what led to the assault of Officer Chittenden. Officer Chittenden responded to a 911 call reporting potential domestic violence at Nonas-Truong’s residence, and Armendariz assaulted Officer Chittenden while resisting arrest on violation of a previous court order preventing him from having contact with Nonas-Truong. Thus, the order was directly related to the circumstances surrounding the crime, and authorized as a condition of community custody.<sup>19</sup>

Finally, Armendariz argues that the sentencing court lacked authority to order him to participate in domestic violence treatment as a condition of his community custody for assaulting a police officer. However, RCW 9.94A.715(2)(a) authorizes the court, as a condition of community custody, to “order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the

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<sup>17</sup> Under RCW 9.94A.545, the court may impose a term of community custody for a crime against a person under RCW 9.94A.411, subject to conditions and sanctions as authorized in RCW 9.94A.715. Assault in the third degree is a crime against a person under RCW 9.94A.411. RCW 9.94A.715(2)(a) authorizes the court to impose conditions on community custody as provided for in RCW 9.94A.700(5).

<sup>18</sup> RCW 9.94A.030(12).

<sup>19</sup> We note that Armendariz’s term of community custody is 12 months, whereas the no-contact order was issued for five years. But neither party has identified this as an issue.

offender's risk of reoffending, or the safety of the community."<sup>20</sup> "Rehabilitative treatment" is not defined, but treatment for domestic violence is certainly included within its meaning, and the ordered treatment is reasonably related to the crime. Officer Chittenden responded to a 911 call reporting potential domestic violence at Nonas-Truong's residence, Armendariz was there in violation of a no-contact order, and he assaulted Officer Chittenden while resisting arrest on violation of the court order. Because the assault occurred in connection with the officer's response to a domestic violence incident, the court did not err by ordering Armendariz to participate in a domestic violence treatment program.

AFFIRMED.

FOR THE COURT:

Baker, J

Cox, CJ

Edington, J

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<sup>20</sup> RCW 9.94A.715(2)(a).