Supreme Court No. _____
COA No. 39437-9-III

THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

BRANDON YOUNG,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Under RAP 13.4, petitioner Brandon Young asks for review of the June 13, 2023 opinion of the Court of Appeals. (attached as Appendix).

B. ISSUE PRESENTED FOR REVIEW

1. The prosecution may not charge a person for violating an order after the order has been vacated, expired, or otherwise rendered inapplicable, even if the alleged violation occurred while the order was in effect. Because the no-contact order had expired and was inapplicable at trial, the State failed to prove beyond a reasonable doubt that Mr. Young violated a no-contact order in existence and applicable to him. Should this Court accept review under RAP 13.4(b)(2) because this opinion conflicts with a published decision of the Court of Appeals?

2. A sentencing court has discretion to impose a mental health sentencing alternative (MHSA) if the defendant meets the statutory criteria and the court determines the sentencing alternative is appropriate. Here, the sentencing court acknowledged that Mr. Young would have met the statutory criteria for a MHSA with his diagnosis of bipolar disorder. Yet the court refused to impose the alternative because it concluded Mr. Young's extensive history of bipolar disorder was not "current," and also separately found that the PTSD and ADHD diagnoses did not "rise to the level" of being a serious enough mental condition to warrant an alternative sentence. The Court of Appeals affirmed the trial court's rejection of Mr. Young's request for a MHSA on the basis that he did not show he was "currently" suffering from or diagnosed with bipolar disorder, depression, or anxiety. The Court of

Appeals also held that though Mr. Young provided evidence that he was diagnosed with PTSD and ADHD, those diagnoses did not "rise to the level" of being a serious mental illness. Additionally, it held the sentencing court rightly denied Mr. Young's request for a MHSA, because he did not show a sufficient nexus between the serious mental health diagnosis and the guilty verdict. By denying the sentencing alternative on several impermissible bases, did the court misinterpret and misapply the statute? Is review warranted because the Court of Appeals' opinion misinterprets the trial court's sentencing authority? RAP 13.4(b)(1),(2).

C. STATEMENT OF THE CASE

Brandon Young struggles with bipolar disorder, anxiety disorder, post-traumatic stress disorder (PTSD), and depression, which he manages with

prescription medication. 12/14/22 RP 183, 190, 195, 200. Mr. Young and Brandy Adams were in a committed relationship that lasted over seven years and gave them two girls. 12/14/22 RP 192.

1. Mr. Young alleges prosecutorial misconduct and the trial court dismisses the assault and harassment charges with prejudice and vacates the pretrial no-contact order.

In a prior case, the prosecution charged Mr. Young with assaulting and harassing Ms. Adams. 8/10/22 RP 11. When Mr. Young was in pre-trial detention awaiting trial on those pending charges, the trial court imposed a pre-trial no-contact order prohibiting him from contacting Ms. Adams. 10/18/22 RP 132.

On February 28, 2022, the court vacated the no-contact order and dismissed the assault and harassment charges with prejudice after Mr. Young moved for a dismissal and a mistrial alleging

prosecutorial misconduct. 10/18/22 RP 12. The trial court dismissed the charges with prejudice, vacated and recalled the pre-trial no-contact order. *Id*.

2. A week after the trial court rendered the pretrial order inapplicable the State charges Mr. Young for violating it.

On March 2, 2022, after the trial court the pre-trial no-contact order was rendered inapplicable and the case dismissed, the State filed an information alleging Mr. Young made several phone calls to Ms. Adams from jail. CP 6. The State charged Mr. Young with five counts of tampering with a witness, six counts of violating a no-contact order based on the same phone calls, and for a separate conversation he had with his father. CP 1-3.

3. The court denies the motion to dismiss all counts of violation of a court order despite the defense pointing out the law required dismissal because the underlying no-contact order was inapplicable and no longer existed.

Just before trial, the defense moved to dismiss all the counts of violating a no-contact order on the basis the State could not prosecute Mr. Young for violating a no-contact order after the pretrial no-contact order expired—after the trial court rendered it inapplicable. 10/18/22 RP 8-14. The trial court denied the motion to dismiss.

Following a jury trial, Mr. Young was convicted on all counts. 10/20/22 RP 3-7.

4. The trial court denies Mr. Young's request for a mental health sentencing alternative.

Mr. Young requested the sentencing court to impose the mental health treatment alternative instead of imprisoning him. *Id*. at 192-3. Since he was

14 years old, Mr. Young has managed symptoms of his chronic incurable bipolar disorder with medication. 12/14/22 RP 195. He also struggles with depression and PTSD. 12/14/22 RP 195.

Mr. Young presented two psychological reports as evidence he had several mental illnesses. 12/14/22 RP 190. He also testified he has been hospitalized several times for panic and anxiety attacks. *Id.* at 191. Mr. Young explained that during his pretrial incarceration the symptoms of his mental illnesses worsened because the State put him in solitary confinement for 54 days, 22 hours a day. *Id.* at 193.

When the Court specifically asked Mr. Young what medications he has been taking, he provided a list of medications for managing his bipolar disorder, some for his depression, others for his anxiety disorder, and others for insomnia. *Id.* at 194-95; CP 83.

Specifically, Mr. Young explained since he was 14 years old, he has been taking Lithium to manage the symptoms of his bipolar disorder. *Id*. at 195.

Troy Todd a licensed mental health professional visited Mr. Young at the Spokane jail. CP 79-88. Mr. Todd opined other mental health professionals often misdiagnose bipolar disorder when a patient has PTSD. CP 80. He believed all symptoms of bipolar disorder, anxiety disorder, and depression that Mr. Young exhibited could be explained by his PTSD. *Id*. at 199-200; CP 79-80.

The court rejected Mr. Young's request for the MHSA primarily on the basis that PTSD was not a serious enough mental health condition to qualify for the sentencing alternative. 12/14/22 RP 200-02. And although the court credited Mr. Young's "extensive history" of receiving treatment for bipolar disorder,

depression, or anxiety disorder, it believed those diagnoses were not "in effect" at the time of sentencing. *Id*. at 199-200. The trial court rejected Mr. Young's testimony detailing his extensive struggles with treating bipolar disorder, depression, and anxiety disorder because the most recent mental health professional who interviewed him for a few minutes in jail opined he would only diagnose Mr. Young with PTSD and ADHD, as he believed all the symptoms Mr. Young exhibited—which other professional diagnosed as bipolar disorder—were "best explained" by a diagnosis of PTSD. *Id*; CP 79-82.

The trial court hedged: "I'm not saying that [bipolar disorder diagnosis] is not in Mr. Young's history, but what I have is a diagnosis of PTSD, and PTSD can be serious; I don't minimize that." 12/14/22 RP 200. But ultimately, the trial court held: "I don't

find that his mental health [viz. the PTSD and ADHD diagnoses] rises to the level of being a serious mental illness," and further there was not a "sufficient connection" between PTSD and the guilty verdicts in this case. *Id.*

The trial court also held that the community would not benefit from mental health services because Mr. Young in the past had "ample opportunity over the course of many years to engage in treatment." *Id.* at 201-02. Notwithstanding, the trial court acknowledged that Mr. Young previously qualified for the mental health sentencing alternative, and acknowledged that Mr. Young had been successful in Idaho when he received mental health, and substance abuse treatment, and vocational rehabilitation. *Id.* at 201-02. The trial court discredited his testimony that he was willing to participate in the sentencing alternative and

speculated that Mr. Young's true intent was not to receive treatment but to receive the "side benefit to the mental health sentencing alternative:" a substantially less period of incarceration. *Id*. at 202-03.

The court imposed 60-month concurrent sentences for each violation of a no-contact order and 60-months concurrent sentence for the tampering convictions. CP 240-41. The court ran the convictions for violating no-contact orders and for tampering consecutively after finding an exceptional sentence based on the free crimes aggravator, contending some offenses were unpunished. 12/14/22 RP 204-05. CP 240-41. The court imposed 364 days in jail for attempted violation of a no-contact order concurrent to other sentences. CP 240-41. The total sentence the court imposed was ten years. 12/14/22 RP 204-05.

The sentencing court also imposed $500 in victim penalty assessment even though Mr. Young objected based on his indigent status. CP 243-44; 12/14/22 RP 188.

Mr. Young seeks review of the Court of Appeals' opinion affirming the trial court. RAP 13.4.

D. ARGUMENT

1. The Court should accept review because the State did not prove the existence of an applicable no-contact order at trial.

The State charged Mr. Young with violating a pretrial no-contact order. 10/18/22 RP 132. Because the underlying no-contact order had *expired* at trial, the State could not prove beyond a reasonable doubt that Mr. Young violated a no-contact order that existed and was applicable to him. 10/18/22 RP 12;CP 6; See App. 7. This Court must vacate all five no-contact order convictions. 10/18/22 RP 12;CP 6.

a. When a no-contact order is vacated or otherwise rendered inapplicable there remains no underlying basis for prosecuting a violation of a no-contact order.

The State may charge a person for violating an order when the order is valid and in effect. *City of Tacoma v. Cornell*, 116 Wn. App. 165, 170–71, 64 P.3d 674, 676 (2003). But the State may not charge a person for violating a pretrial no-contact order after the order expired, has been vacated, or rendered inapplicable, even if the alleged violation occurred while the order was in effect. *Id.*

In *Cornell*, the superior court issued a temporary order of protection order (TRO) against Cornell for his former girlfriend. *Id.* at 166–67. Two days later she filed a police report alleging that Cornell had violated the TRO. *Id.* Two weeks later, the court entered a permanent restraining order. *Id.* Cornell sought revision and dismissal of the order and the superior

court vacated both the temporary and permanent orders. *Id*. at 167. The City did not appeal the order vacating the temporary and permanent protection orders. *Id*.

Eleven days after the superior court vacated the temporary and permanent orders, the City charged Cornell with violating the TRO. *Id*. Cornell moved to dismiss the charge in municipal court. *Id*. The municipal court denied the motion, and Cornell sought superior court review. *Id*. at 167.

At the superior court hearing, Cornell argued that because the protection order had been vacated and was thus inapplicable and the charge must be dismissed. *Id*. The City argued that because the violation occurred while the protection order was still in effect, it could file a criminal charge even after the protection order was vacated. *Id*.

The superior court disagreed with the City and determined that once a valid order is vacated, there remains no underlying basis for prosecution, reversed the municipal court, and dismissed the City's charge with prejudice. *Id.* This Court granted the City's motion for discretionary review. *Id.* at 168. The City maintained before this Court that it may proceed with a criminal prosecution on a violation of an order that was valid and unchallenged at the time of arrest.

This Court reduced the question to whether the City may prosecute a violation of a TRO that was valid at the time of arrest but was invalid at the time of prosecution. *Id.* at 169. It agreed with Cornell and dismissed the charges with prejudice:

> In summary, we agree with the trial court's rationale: the City had no underlying basis to charge *Cornell*. The City may charge a person for violating an order during the time the order is valid and in effect. But the City may not charge a person for violating

> an order after the order has been vacated, even if the alleged violation occurred while the order was in effect.

Cornell, 116 Wn. App. at 170.

Similarly, in *State v. Anaya,* the Court of Appeals considered whether "violation of a no-contact order that was entered at arraignment in a domestic violence case [could] serve as a basis for criminal prosecution after the dismissal of that case[.]" *State v. Ananya*, 95 Wn. App. 751, 752-53, 976 P.2d 1251 (1999). Looking closely at the statutory provisions, the *Anaya* court determined that "the language . . . indicated that the order [was] dependent on the criminal charge." *Id.* at 757, 976 P.2d 1251. Concluding that "[t]he Legislature had not criminalized the violation of such an order after dismissal of the underlying charge," the *Anaya* court "h[e]ld that the no-contact order entered at arraignment against Anaya *expired* upon the dismissal

of the underlying domestic violence charge." *Id*. at 760, 976 P.2d 1251 (emphasis added).

b. Once the trial court vacates, recalls, or renders inapplicable the pretrial no-contact order, Mr. Young could not be prosecuted for violating it.

Here, the March 2, 2021 information charged Mr. Young with five counts of violating the pretrial no-contact order in the underlying cause No. 21-1-000-32. CP 2-3. The charging document specified that the five charges stemmed from the violation of a pretrial no-contact that had been vacated, or expired on February 28, 2021.

The Information charged Mr. Young with violating a pretrial contact order after it had expired and was inapplicable. *Cornell*, 116 Wn. App. at 170 (*citing In re the Matter of the Estate of Couch*, 45 Wn. App. 631, 634, 726 P.2d 1007 (1986) ("judgment which has been vacated is of no force or effect and the rights

of the parties are left as though no such judgment had ever been entered"). Thus, similar to *Cornell*, Mr. Young was charged with violating an inapplicable order after it had expired.

In *State v. Miller*, the Supreme Court held, "[t]he trial judge should not permit an invalid, vague, or otherwise inapplicable no-contact order to be admitted into evidence." *State v. Miller*, 156 Wn.2d 23, 24, 123 P.3d 827 (2005). Washington courts preclude criminal prosecutions for violations of invalid, inapplicable, or expired protection orders. Thus, where the issuing court has vacated or recalled the underlying order, the expired or inapplicable order cannot serve as a predicate for a criminal prosecution.

c. Without a valid no-contact order, there was insufficient evidence to convict Mr. Young for violating a no-contact order.

The state must prove all the elements of a charged crime beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068 25 L. Ed. 2d 368 (1970).

The first element of each jury instruction told the jury to convict Mr. Young of the crime of violation of a no-contact order, the state had to prove there was a valid, applicable, unexpired no-contact order in place when it charged him with violating it. *See* CP 59-63 (Instructions No. 22-26); RCW 10.99.040. The State could not prove beyond a reasonable doubt that an applicable no-contact order exists because it brought charges after the vacature.

Mr. Young moved to dismiss on the grounds that the pre-conviction no-contact order did not exist as it

had expired on February 28, 2021. When the charges were brought on March 2, the State could not prosecute him for violating an expired order. The trial court denied Mr. Young's motion to dismiss. This Court of Appeals affirmed the denial. This Court should accept review because the Court of Appeals and the trial court's reading of *Cornell* is strained.

2. The Court of Appeals, like the sentencing court, misinterprets and applies an incorrect standard in denying Mr. Young's request for the mental health sentencing alternative.

The trial court erred in rejecting Mr. Young's request for MHSA on the impermissible basis that PTSD was not a serious enough mental health condition, and on the mistaken basis that Mr. Young was required to prove a "sufficient connection" between the mental illness and the guilty verdicts in this case. 12/14/22 RP 200-02. The court also erroneously held

that the community would not benefit from the sentencing alternative. *Id.*

The Court of Appeals is factually mistaken that Mr. Young did not present evidence he was currently suffering from any serious mental health conditions. App. 14. The record belies this contention that Mr. Young did not produce evidence that he was currently suffering from or diagnosed with bipolar disorder, depression, or anxiety. In fact, Mr. Young testified that he was diagnosed with multiple serious mental illnesses—bipolar disorder, anxiety disorder, depression, and PTSD. 12/14/22 RP 190-95. Mr. Young's undisputed testimony was that he suffered several serious mental illnesses:

> I'm bipolar too, you know, that's a major mental health disorder. It's in both of those evaluations. And you know, obviously, having post-traumatic stress disorder and impulsivity issues and stuff like that.

12/14/22 RP 190.

The trial court elicited from Mr. Young that he took "Mirtazapine", a prescription medication, to manage the symptoms for his anxiety—in fact he was taking it even while he was in jail. *Id*. at 194. The court elicited from Mr. Young that he had been taking Prozac and Remeron, for his depression, and "lithium" for his bipolar disorder. *Id*. at 194-95.

The Court of Appeals held there was nothing improper with a sentencing court can concluding that PTSD does not "rise to the level" of being a serious mental illness as this was not an "outright" refusal to recognize PTSD as a serious mental illness. App. 14. It is also mistaken that a sentencing court can require a defendant to prove a "sufficient connection" between his serious mental illness and the guilty verdict to show he qualifies for the sentencing alternative. *Id*.

The Court of Appeals is incorrect on both the law and the facts.

While no defendant is entitled to receive a sentencing alternative, every defendant is entitled to ask the trial court to consider such a sentence and to have the court actually consider it. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). A trial court errs in refusing to impose a sentencing alternative if it does so under the mistaken belief that it did not have the discretion to impose it. *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017).

A trial court has discretion to impose a sentencing alternative if it determines the defendant is otherwise eligible for it. *State v. Mohamed*, 187 Wn. App. 630, 638, 350 P.3d 671 (2015) (addressing parenting sentencing alternative and drug offender sentencing alternative). The court may not deny a

sentencing alternative for improper reasons. *State v. Sims*, 171 Wn.2d 436, 445, 256 P.3d 285 (2011). The court abuses its discretion in denying a sentencing alternative if its decision was reached by misinterpreting the statute or applying an incorrect legal standard. *State v. Adamy*, 151 Wn. App. 583, 587, 213 P.3d 627 (2009).

A defendant meets the statutory criteria for the mental health sentencing alternative if: (1) the defendant is convicted of a felony that is not a serious violent offense or a sex offense; (2) the defendant is diagnosed with a serious mental illness recognized by the diagnostic manual in use by mental health professionals at the time of sentencing; (3) the defendant and the community would benefit from supervision and treatment, as determined by the judge;

and (4) the defendant is willing to participate in the sentencing alternative. RCW 9.94A.695(1).

If the court determines the defendant is eligible for a mental health sentencing alternative and decides the alternative is appropriate, the court waives imposition of a sentence within the standard range and imposes a term of community custody of up to 36 months. RCW 9.94A.695(4). The court must impose certain mandatory conditions of community custody, including the specific treatment conditions set forth in the statute, and has discretion to impose "any additional conditions recommended by any of the written reports regarding the defendant." RCW 9.94A.695(7)(a), (b). If the defendant violates the terms of community custody or fails to make satisfactory progress in treatment, the court may revoke the sentencing alternative and impose a term of total or

partial confinement within the standard range, or impose other sanctions. RCW 9.94A.695(10)(a), (b), (11)(c).

Mr. Young has managed the symptoms of his incurable bipolar disorder since he was 14 years old by taking lithium. 12/14/22 RP 195. The trial court did not disbelieve Mr. Young had a "history" of receiving treatment for bipolar disorder, depression, or anxiety disorder. *Id.* at 199-200. The sentencing court mistakenly believed those diagnoses were not "in effect" at the time of sentencing because the most recent mental health professional who visited Mr. Young for a few minutes in jail opined he believed that while other professional could diagnose him with bipolar disorder, anxiety disorder, and depression, he believed those symptoms could be explained by his PTSD. *Id.* at 199-200. Neither the Court of Appeals

nor the trial court had any legal basis to hold that Mr. Young did not suffer from bipolar disorder, anxiety disorder, and depression, or that somehow his mental health diagnoses were not current.

Morever, both courts erred in finding PTSD did not "rise to the level" of being a serious mental illness condition to qualify for the mental health sentencing alternative. App. 14. In 2013, the American Psychiatric Association revised the PTSD diagnostic criteria in the 5th edition of its DSM-5. It included PTSD in a new category in DSM-5, Trauma-and Stressor-Related Disorders. All conditions included in this classification require exposure to a traumatic or stressful event as a diagnostic criterion.[1] The trial

[1] American Psychiatric Association Diagnostic and statistical manual of mental disorders. 5th ed. Arlington, VA: American Psychiatric Association; 2013, pp 271-72;

court misinterpreted the statutory factors in holding that Mr. Young had not met the statutory criteria for the mental health sentencing alternative. RP 359; RCW 9.94A.695(1).

Even if *arguendo*, the trial court could not consider the evidence of extensive past struggles with bipolar disorder, anxiety disorder, and depression, the statute required the trial court to consider PTSD as mental health diagnosis because it is clearly in the DSM-V. PTSD is a serious mental illness and it is recognized by DSM-V, which was the latest diagnostic manual in use by mental health professionals at the time of sentencing. The trial court erred in holding PTSD did not "rise to the level" of being a serious

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https://www.ncbi.nlm.nih.gov/books/NBK207191/box/part1_ch3.box16/

mental health condition to qualify for the sentencing alternative.

Mr. Young testified he needed treatment and would benefit from it, and the community would clearly benefit from supervision and treatment as it would save the cost of incarcerating Mr. Young. Mr. Young testified he was willing to participate in the sentencing alternative and follow the requirements of the recommended treatment program, the trial court had no proper basis to believe otherwise. The State presented evidence that when Mr. Young was successful when he received the sentencing alternative in the past.

The Court of Appeals gives its imprimatur to the trial court to decide that certain mental health disorders are not serious enough to deserve the mental health sentencing alternative. The Court of Appeal

mistakenly holds that a defendant must prove a "sufficient connection" between his serious mental illness and the guilty verdict to show he qualifies for the sentencing alternative. The Court of Appeals, like the trial court, turns a blind-eye to the evidence in the record that Mr. Young has been suffering from incurable bipolar disorder since he was a teenager. This Court should accept review to instruct lower courts not to deny the MHSA based on improper, untenable reasons.

E. CONCLUSION

The Court of Appeals manufactured a false premise to affirm and distinguish this Court's precedent. The opinion also misconstrues the facts and the law in affirming the sentencing court's denial of the Mental Health Sentencing Alternative. This Court should accept review either to dismiss the charge with

prejudice or to instruct lower courts not to deny the MHSA on improper, untenable bases. RAP 13.4(b)(1),(2)(4).

This brief complies with RAP 18.7 and contains 4,551 words.

DATED this 8th day of July 2024.

Respectfully submitted,

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APPENDICES

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

STATE OF WASHINGTON, Respondent, v. BRANDON EDWARD YOUNG, Appellant.	))))))))))	No. 39437-9-III UNPUBLISHED OPINION

STAAB, J. — Brandon Young was originally charged with domestic violence crimes after B.A. called 911 twice to report that Young was on his way over to her apartment after threatening her on the phone. The court imposed a pretrial no-contact order. While these charges were pending, Young called B.A. numerous times from jail. After the original charges were dismissed, the State filed new charges against Young for witness tampering and violating the pretrial no-contact order. A jury found Young guilty of five counts of witness tampering, five counts of violating a domestic violence no-contact order, and one count of attempted no-contact order violation.

Young appeals raising several issues. First, he challenges the sufficiency of evidence to support his convictions for violating a no-contact order, claiming that the State failed to prove the order was valid on the day the new charges were filed. Second,

he argues the trial court erred in admitting hearsay statements when it allowed the State to play B.A.'s two 911 calls from the original incident. Third, he claims the court erred by denying his request for a mental health sentencing alternative (MHSA). Finally, he claims the court should strike his victim penalty assessment (VPA).

We find no error and affirm Young's convictions and sentence. We remand with instructions to strike the VPA.

BACKGROUND

Arrest for Assault Domestic Violence

On December 6, 2021, B.A. and her neighbor called 911 to make a report about B.A.'s boyfriend, Brandon Young. They explained that Young had threatened B.A. the night before and then texted B.A. moments earlier and indicated he was on his way over to her home. B.A. told the 911 dispatcher they had broken up that morning and Young told her that all his stuff was at her house and that it did not matter what she said, he was on his way to get it. She explained that she was at her neighbor's apartment because she did not feel safe to go home because Young threatened to beat down her door and kick it in. Around that same time, she received another text from Young that he was "coming up now." Ex. P-3 at 05:19-05:20. The 911 dispatcher told them both to stay safe, and the call ended.

About 15 minutes later, B.A. and her neighbor called 911 a second time. In this call, B.A. explained she was calling back because Young was beating on her door and

said that he was going to crawl through her roommate's window. She said she was still at her neighbor's apartment, but that Young said her window was unlocked and to "keep fucking ignoring me bitch." Ex. P-3 at 00:38-00:45. She could hear Young outside but did not want to open the door because she was scared. She heard a window open and believed that Young had entered her apartment. Following this incident, Young was arrested and charged with fourth degree assault-domestic violence and harassment-domestic violence. Two days later, the court imposed a pretrial domestic violence no-contact order on Young, listing B.A. as the protected person.

Detective Tyler Smith investigated and discovered that after the no-contact order was issued, Young had called B.A. over 200 times from jail. Detective Smith called the number Young was contacting from jail and confirmed it was B.A., recognizing her voice from the 911 calls. In addition to this phone number, B.A. provided another number to Detective Smith that revealed several other jail calls from Young.

On February 28, 2022, the court dismissed Young's original charges with prejudice and presumably recalled the no-contact order.

Charges for Witness Tampering and Violation of a No-Contact Order.

In early March, the State charged Young with five counts of tampering with a witness, five counts of violating a no-contact order, and one count of attempted violation of a no-contact order. These alleged violations all occurred between December 13, 2021 and February 10, 2022, before the assault-domestic violence and harassment-domestic

violence charges were dismissed and the no-contact order was recalled. The new charges stemmed from the many phone calls from Young to B.A. while he was in jail.

At trial, the State sought to introduce the two 911 calls from the original charges. Young objected, arguing the 911 calls violated his right to confrontation and were inadmissible hearsay. After listening to the recordings, the trial court overruled Young's objection relating to the confrontation clause, concluding that the calls were nontestimonial. Additionally, it overruled his hearsay objection and found both 911 calls qualified as excited utterances. As to the first call, the court found there was some excitement, clear stress, and although there were some threats that occurred the night before, the passage of time did not make it less stressful. The trial court found that what tipped the scale here was that the declarants received information that "Young was coming over and there was a statement that [B.A.] didn't feel safe," indicating some current excitement related to the anticipation of Young coming over in that very moment. However, the court made clear that if the statements were strictly based on the threats from the night before, this would not have qualified as an excited utterance.

As to the second call, the court found B.A. appeared calm during her statement. However, although she appeared calm, she did admit she was scared. The court explained that B.A. observed Young go into her home, and indicated fear by describing that he was beating down her door and trying to crawl through her window. Although the

court found this was a closer call because of her tone, it found she continued to express fear as a result of the event that was occurring.

Sentencing

The jury found Young guilty on all counts. At sentencing, Young requested an MHSA, asserting that he had been previously diagnosed with bipolar disorder, PTSD,[1] antisocial personality disorder, and substance abuse disorder. In denying his request, the court found that Young failed to meet his burden of showing he currently suffered from a serious mental illness. While acknowledging that Young may have a history with bipolar disorder, his most recent diagnosis was only for PTSD and ADHD,[2] not bipolar disorder. Additionally, based on the evidence presented at trial and Young's current mental health condition, the court found that Young did not demonstrate a sufficient connection between his mental health conditions and the guilty verdicts in this matter.

Finally, the court did not find Young or the community would benefit from an MHSA. It noted that Young had ample opportunity over the course of "many years" to engage in treatment and classes. For example, when Young was in Idaho, "he was offered mental health treatment, substance abuse treatment, and vocational rehabilitation," all of which provided opportunities for Young to engage in rehabilitation.

[1] Posttraumatic stress disorder.

[2] Attention-deficit/hyperactivity disorder.

Rep. of Proc. (RP) (Dec. 14, 2022) at 201. Based on the record before it, the court did not find Young's true intent was to receive treatment. It explained the advantage of an MHSA is a substantially shorter period of incarceration, often a driving factor for individuals. The court found it especially disturbing that there was a no-contact order in place, Young intentionally violated it on numerous occasions, and he chose to tamper with the witnesses. The court concluded that a sentencing alternative was not appropriate and did not align with the intent of the Sentencing Reform Act of 1981 (SRA), ch. 9.94A RCW, which is to "promote respect for the law." RP (Dec. 14, 2022) at 204.

Young now appeals.

ANALYSIS

1. SUFFICIENCY OF THE EVIDENCE AND VALIDITY OF THE NO-CONTACT ORDER

Young argues that the evidence was insufficient to support the convictions for violating the no-contact order. He contends that the State failed to prove that Young violated a valid no-contact order because prior to the time he was charged, the trial court had invalidated the no-contact order. We disagree. The evidence suggests that the no-contact order was simply recalled when the underlying charges were dismissed, not declared invalid. Young's argument fails to recognize the legal distinction between an order that has been declared invalid and an order that has been recalled. Additionally, we note that the validity of the no-contact order is not an essential element of the crime of

violating a no-contact order and the State was not required to prove that the underlying order was valid.

The "validity of [a] no-contact order is not an element of the crime" of violating a no-contact order. *State v. Miller*, 156 Wn.2d 23, 31, 123 P.3d 827 (2005). Instead, to convict Young of violating a no-contact order, the jury had to find beyond a reasonable doubt that (1) there existed a no-contact order applicable to Young, (2) Young knew of the existence of the order, (3) that on or about the date of the violation Young knowingly violated the order, and (4) Young had previously been convicted for violating the provisions of a court order twice. Clerk's Papers (CP) at 59-63. Here, the jury was instructed that it had to find "[t]hat on or about [date] there *existed* a no-contact order applicable to the defendant." CP at 59-63 (emphasis added).[3]

Nevertheless, Young maintains that the State cannot charge a person with "violating a pretrial no contact order after the order has been vacated, even if the alleged violation occurred while the order was in effect." Appellant's Br. at 17. In support of this position, Young cites *City of Tacoma v. Cornell*, 116 Wn. App. 165, 169, 64 P.3d 674 (2003). In *Cornell*, the defendant was arrested for violating a temporary no-contact order. Several weeks later, a superior court judge vacated the temporary and permanent

[3] Contrary to Young's assertion in his brief, the jury was not instructed that it had to find a *valid* no-contact order. Appellant's Br. at 23; CP at 59-63.

orders after finding that the petition and supporting documents failed to meet statutory requirements. After the orders were vacated, the City charged the defendant with violating the temporary no-contact order. The *Cornell* court held that the City was precluded from charging "a person for violating an order after the order has been vacated, even if the alleged violation occurred while the order was in effect." *Id*. at 170.

Young maintains that the no-contact order in this case was similarly "vacated." There is nothing in the record to support this assertion. Young did not designate the order that terminated the no-contact order as part of the record on appeal. *See* RAP 9.6(a); *In re Marriage of Haugh*, 58 Wn. App. 1, 6, 790 P.2d 1266 (1990) (noting that an "appellant has the burden of perfecting the record so that the court has before it all the evidence relevant to the issue[s]" on appeal). Contrary to Young's assertion that the pretrial no-contact order was vacated, the State maintains that the no-contact order was simply recalled when the underlying charges were dismissed.

The evidence presented at trial was sufficient to support the convictions for violating a no-contact order.

2. ADMISSION OF 911 CALLS AS EXCITED UTTERANCES

Young argues the trial court abused its discretion by admitting two 911 calls made by B.A. at his trial for violating the no-contact order. He contends that the calls were hearsay and the trial court erred by admitting them as excited utterances. Young asserts that the first call did not qualify as an excited utterance because it was based on threats

that were made the night prior and in the second call B.A. was calm and safe in her neighbor's home.

This court reviews evidentiary decisions, including a trial court's application of the excited utterance exception to the hearsay rule for abuse of discretion. *State v. Rodriquez*, 187 Wn. App. 922, 939, 352 P.3d 200 (2015). "Abuse of discretion occurs when the trial court's ruling is manifestly unreasonable or based on untenable grounds or reasons." *Id.*

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial . . . offered in evidence to prove the truth of the matter asserted." ER 801(c). Generally, hearsay statements are inadmissible. ER 802. However, hearsay statements may be admissible if an exception applies. *See* ER 803.

An excited utterance is an exception to hearsay. ER 803(a)(2). An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." ER 803(a)(2). "A statement qualifies as an excited utterance if (1) a startling event occurred, (2) the declarant made the statement while under the stress or excitement of the event, and (3) the statement relates to the event." *State v. Magers*, 164 Wn.2d 174, 187-88, 189 P.3d 126 (2008). The first and second elements may be determined from "circumstantial evidence, such as the declarant's behavior, appearance, and condition, . . . and the

circumstances under which the statement is made." *State v. Young*, 160 Wn.2d 799, 809-10, 161 P.3d 967 (2007).

Based on the evidence presented, the trial court did not abuse its discretion in finding that the calls were admissible under the excited utterance hearsay exception. As a threshold matter, both statements are considered hearsay because they are statements made by B.A. outside the current trial to prove the truth of each statement. ER 801(c). Therefore, to be admissible a hearsay exception must apply.

As to the first call, the evidence supports the court's finding that B.A.'s 911 call related to the startling event of learning that Young was on his way over to her apartment and threatened to harm her or her property. Similarly, the evidence supports the court's finding that B.A. called 911 the second time as Young was at her apartment, beating on her door and crawling through her window. While the court found this was a closer call because of B.A.'s tone, she continued to express fear as a result of the event that was occurring. These findings support the court's conclusion that the second 911 call qualified as an excited utterance.

Young argues that the threats B.A. was concerned with were made the night before. The trial court disagreed and this decision was within its discretion given the evidence. In addition, the argument that B.A. appeared calm during the second call does not defeat application of the exception. The purpose of this exception is to make sure the declarant is "still under the influence of the event so as to preclude any chance of

fabrication, intervening influences, or the exercise of choice or judgment." *State v. Bryant*, 65 Wn. App. 428, 433, 828 P.2d 1121 (1992). Here, the statements made were directly to the 911 operator as the event was occurring, and importantly, there is no requirement under the rule that a person maintain a certain tone of voice for it to apply. *See* ER 803(2).

Finally, Young makes fleeting arguments that the 911 calls allowed the jury to hear B.A.'s unsworn, uncrossed testimony about Young's prior bad acts, which were only introduced to show propensity. Young did not assign error to the trial court's conclusion that the United States Constitution confrontation clause was not implicated because the 911 calls were nontestimonial, nor did he raise ER 404(b) at trial or develop this argument on appeal. We therefore decline to address these undeveloped arguments. *See State v. Stubbs*, 144 Wn. App. 644, 652, 184 P.3d 660 (2008) ("Passing treatment of an issue or lack of reasoned argument is insufficient to allow for our meaningful review."), *rev'd on other grounds*, 170 Wn.2d 117, 240 P.3d 143 (2010).

3. MENTAL HEALTH SENTENCING ALTERNATIVE

Young argues that the sentencing court failed to meaningfully consider his request for an MHSA, rejected his request based on a misinterpretation of the law, and articulated an improper basis in finding he was not a good candidate. We disagree.

Generally, a sentence within the standard sentencing range may not be appealed. RCW 9.94A.585(1). While no defendant is entitled to challenge a sentence within the

standard range, "this rule does not preclude a defendant from challenging on appeal the underlying legal determinations by which the sentencing court reaches its decision." *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). "[W]here a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider the sentence . . . is effectively a failure to exercise discretion and is subject to reversal." *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

When a trial court is called on to make a discretionary sentencing decision, the court "must meaningfully consider the request in accordance with the applicable law." *McFarland*, 189 Wn.2d at 56. A sentencing court errs when "it refuses categorically to impose an exceptional sentence below the standard range under any circumstance[ ]." *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). Additionally, a court errs when it operates under a "mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which he may have been eligible." *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 333, 166 P.3d 677 (2007).

Under RCW 9.94A.695(1), a defendant is eligible for an MHSA if:

> (a) The defendant is convicted of a felony that is not a serious violent offense or sex offense;
>
> (b) The defendant is diagnosed with a serious mental illness recognized by the diagnostic manual in use by mental health professionals at the time of sentencing;
>
> (c) The defendant and the community would benefit from supervision and treatment, as determined by the judge; and

(d) The defendant is willing to participate in the sentencing alterative.

The decision of whether to grant an MHSA request is within the sentencing court's discretion:

> After consideration of all available information and determining whether the defendant is eligible, the court shall consider whether the defendant and the community will benefit from the use of this sentencing alternative. The court shall consider the victim's opinion whether the defendant should receive a sentence under this section. If the sentencing court determines that a sentence under this section is appropriate, the court shall waive imposition of the sentence within the standard range.

RCW 9.94A.695(4).

Young argues that the trial court's failure to impose an MHSA sentence was an abuse of discretion for several reasons. First, he asserts that the court had no basis to find that Young did not suffer from bipolar disorder, anxiety disorder, and depression. "Serious mental illness" under the statute is defined as "a mental, behavioral, or emotional disorder resulting in a serious functional impairment, which substantially interferes with or limits one or more major life activities." RCW 9.94A.695(12)(a). To determine whether a defendant has a serious mental illness, the court may rely on information including reports completed pursuant to chapter 71.05 RCW[4] and chapter

[4] Behavioral Health Disorders— formally Mental Illness.

10.77 RCW,[5] or other mental health professionals as defined in RCW 71.05.020, or other information and records that relate to mental health services. RCW 9.94A.695(2).

Here, Young failed to produce evidence that he was currently suffering from or diagnosed with bipolar disorder, depression, or anxiety disorder. Instead, the diagnosis provided to the court was for PTSD and ADHD. RP (Dec. 14, 2022) at 200. Given this evidence, the court did not abuse its discretion in finding that Young was not currently diagnosed with a serious mental illness.

Young also contends that the court found that PTSD was not a qualifying condition for an MHSA. This argument mischaracterizes the trial court's finding. The court did not make a categorical conclusion that PTSD was not a serious mental illness. Instead, the court found, based on the evidence from trial and his current mental health condition, that Young's mental health did not *rise to the level* of being a serious mental illness or that there was a sufficient connection between that and the guilty verdicts in this matter. While the outright refusal to recognize bipolar disorder as a serious mental illness would be a failure to exercise discretion, subject to reversal, that is not what occurred here. Therefore, Young's argument fails.

Finally, even if the court did find Young was eligible, the court properly exercised its discretion in determining that the community would not benefit from Young entering a

[5] Criminally Insane–Procedures.

sentencing alternative and that Young himself would not be willing to participate in it. The court considered Young's history of treatment opportunities and his actions in this case and concluded that Young's request for a sentencing alternative was not based on an interest in receiving treatment. The court was within its discretion to find the sentencing alternative was not appropriate or aligned with the intent of the SRA, which is to "promote respect for the law." RP (Dec. 14, 2022) at 204.

4. VPA ASSESSMENT

Next, Young challenges the imposition of the VPA fee as part of his sentence because he is indigent. Young is correct that this fee should be struck from his judgment and sentence. Under former RCW 7.68.035(1)(a), a judge was required to impose the $500 penalty assessment for one or more felony or gross misdemeanor convictions. However, earlier last year, legislation amended this statute. *See* LAWS OF 2023, ch. 449, § 1(4). This amendment had an effective date of July 1, 2023, and included a provision instructing a court not to impose the penalty assessment if the court found the defendant indigent at the time of sentencing as defined in RCW 10.01.160(3).

Here, the amendment applies to Young because the trial court found him indigent and because his case was pending on direct appeal when the changes became effective. *See State v. Ellis*, 27 Wn. App. 2d 1, 530 P.3d 1048 (2023). Therefore, we agree this fee should be struck from his judgment and sentence.

5. STATEMENT OF ADDITIONAL GROUNDS (SAG)

Young raises additional claims in his SAG and we address them in turn.

Vindictive Prosecution

Young argues that, in the instant case, the trial court vacated the no-contact order and dismissed his assault and harassment charges. The phone calls Young made to B.A. stemmed from those charges. In this regard, he argues the new charges rise to the level of vindictiveness because the State is intentionally filing more serious charges in retaliation for his lawful exercise of procedural rights.

CrR 8.3(b) states that on motion of court, "the court, in the furtherance of justice, . . . may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." We review a trial court's CrR 8.3(b) ruling for abuse of discretion. *State v. Myers*, 27 Wn. App. 2d 798, 804, 533 P.3d 451 (2023).

Young's argument fails for several reasons. First, Young did not file a motion per the court rule. Second, the word "may" indicates the court has discretion to act under CrR 8.3(b). Third, it is unclear, but it appears from Young's argument he either believes the trial court should have dismissed his charges under CrR 8.3(b) or that this court should. Our review of the issue is limited to whether the trial court abused its discretion. Here, we cannot find that the court abused discretion it was never asked to exercise.

Speedy Trial

Young claims the State failed to prosecute his charges within the speedy trial period. He contends that since the witness tampering charges were related to the original assault charge, the speedy trial time for both cases is the same. Young argues that CrR 3.3 does not directly address the question when the speedy trial clock starts to run if the State files a new charge or charges against a defendant already "held to answer" for another crime.

Under CrR 3.3(h), "[a] charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice."

Young was arrested and charged with assault-domestic violence and harassment-domestic violence on December 8, 2021, under superior court number 21-1-03000-32. Two days later, the court issued a pretrial no-contact order. On February 28, 2022, the court dismissed the assault and harassment charges on the State's motion. The following month, on March 2, 2022, the State charged Young with five counts of witness tampering, five counts of violating a no-contact order, and one count of attempted no-contact order violation, under superior court number 22-1-00500-32.

Young's argument fails because the acts of assault and harassment were a separate cause number based on different charges not before us on appeal. *See* Notice of Appeal. The speedy trial period for these charges is separate from the speedy trial period for the subsequent charges filed under a different cause number and based on subsequent

conduct. Young fails to demonstrate that the speedy trial period on these charges expired before his trial.

We affirm Young's conviction and sentence but remand with instructions for the court to strike the VPA from Young's judgment and sentence.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Staab, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Cooney, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 39437-9-III**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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