Supreme Court No. _____
COA No. 39112-4-I

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSE SANCHEZ,

Appellant.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Jose Sanchez, appellant below and petitioner here, petitions this Court for review of the Court of Appeal's decision dated June 6, 2024, which the Court ordered partially published and amended on August 20, 2024. (App. A, B.).

B. ISSUES PRESENTED

1. The State bears the burden of proving every element of a charged crime beyond a reasonable doubt. If the jury instructions include unnecessary elements of the crime, the State must prove those, too. Here, the State added dates to each of the charges pending against Mr. Sanchez. Under the law of the case, the dates became essential elements that the State was required to prove beyond a reasonable doubt. The Court of Appeals correctly decided that the State failed

to prove the dates for eight misdemeanor charges, but the evidence was also insufficient regarding the dates of the four remaining charges. Should this Court grant review to harmonize and dismiss these remaining counts?

2. A prosecutor commits misconduct when they elicit testimony and make comments designed to arouse the passions and prejudices or to inflame the emotions of the jury. Here, the prosecutor persisted, after a sustained objection, in questioning designed to turn domestic violence stereotypes into evidence. This and other inadmissible evidence purposefully elicited by the prosecutor served to insinuate that Mr. Sanchez was a manipulative, abusive liar. Should this Court grant review to correct the prosecutor's improper questioning and commentary, which prejudiced Mr. Sanchez?

3. The Washington Constitution venerates the open administration of justice. Const. art. I, § 10. This preference for candor and transparency requires that redactions, even of names, must follow constitutional requirements and Court Rule, including a hearing and written findings. The Court of Appeals, without request, hearing, written findings, or local rule, chose to redact the name of the alleged victim from its decision. This unreasoned decision violates precedent of this Court, Court Rules of general applicability, and the Washington Constitution. Should this Court grant review to correct this error?

C. STATEMENT OF THE CASE

Convictions and Court of Appeals Decision

After a jury trial, Mr. Sanchez was found guilty of two counts of tampering with a witness and ten counts of violation of a court order. CP 79-81. The jury also

found that the alleged victim, Brittany Thomas, and Mr. Sanchez were members of the same family or household. CP 82. These convictions were based on phone calls and video calls that Mr. Sanchez made to Ms. Thomas using systems provided by the Okanogan County jail. VRP 176.

The Court of Appeals held that the State failed to produce sufficient evidence of the date of eight charges of violation of a court order and vacated Mr. Sanchez's convictions for those charges. Slip. op. at 1-2. The Court of Appeals let stand two convictions for tampering with a witness, domestic violence, allegedly committed on August 23, 2021, and August 29, 2021, and two charges for violation of a court order, domestic violence, also from the same dates. *Id*.

Missing evidence of dates for tampering charges and Counts 5 and 7 of the court order violation charges.

In its closing argument, the State played excerpts from Exhibits 7 and 11 as proof of the tampering charges, but it never specified which exhibit it believed supported which charge. VRP 385-88.

Exhibit 7, an audio call, was not introduced to the jury with an identifying date. VRP 224. The alleged victim, Brittany Thomas, did not identify a date that she received the call. VRP 237. The prosecutor never asked its law enforcement witness, Detective Eugene Davis, to identify any exhibits, including Exhibit 7, with a date. VRP 194-201.

The contents of Exhibit 7 include the voice identified as Mr. Sanchez's stating that he's looking at 5 years or potentially 10 years to life, stating that Ms.

Thomas could help him out by writing or saying "BS," and also mentioning his lawyer. VRP 226-33.

Exhibit 11 was also not introduced to the jury with an identifying date. VRP 244. Ms. Thomas did not identify a date that she received the video call. VRP 252. Detective Davis also did not identify Exhibit 11 with a date. *See* VRP 194-201.

The contents of Exhibit 11 do not include a discussion of how much time Mr. Sanchez is facing or any reference to Mr. Sanchez's lawyer, and Mr. Sanchez does not ask Ms. Thomas to change her story. VRP 244-52. Mr. Sanchez talks about their children, he says that he is having his family try to help Ms. Thomas, and he tells Ms. Thomas that she is going to hurt their children. *Id*. Ms. Thomas says that she is not going to lie and say something never happened, but she was thinking about dropping the charges. VRP 249.

The only information in the record about dates comes from Detective Davis's testimony. Detective Davis said that he listened to calls that Mr. Sanchez was alleged to have made in late August and early September of 2021. VRP 194. Phone calls from the jail were made through a system called Pay Tel and video visits from the jail were made through a system called HomeWAV. VRP 188-89.

Detective Davis stated that he only listened to one Pay Tel call from the date of September 23, 2021. VRP 197. None of the charges included a date of September 23, 2021. CP 38-47.

Detective Davis later testified that he listened to one Pay Tel call made between August 19 and September 2, and he listened to between seven and nine HomeWAV video calls from that same time span. VRP 198-99. That time span included the dates of the

charges. CP 38-47. The prosecutor never asked Detective Davis if the HomeWAV or Pay Tel calls it introduced as exhibits were the same as the one or ones he listened to. *See* VRP 178-210.

The number of Pay Tel calls and HomeWAV calls introduced by the prosecutor at trial did not match the numbers that Detective Davis said that he reviewed. The State introduced five Pay Tel calls in exhibits 4, 5, 6, 7 and 8. VRP 218, 221-22, 225, 238-39, and 240-41.

Detective Davis never testified to listening to a Pay Tel or other call from August 23, 2021. *See* VRP 178-210. The prosecutor only mentioned the date of August 23 once, and there was no responsive answer adopting the date.[1] VRP 199. Specifically, the prosecutor said:

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[1] The Court of Appeals misunderstood Detective Davis's testimony here, claiming: "Finally, when the prosecutor asked Detective Davis if the Pay Tel call was from

Q. Now in the one Pay Tel call that you listened to from 8/23 and the HomeWAV call – do you recall the date of – that the HomeWAV call was made that you listened to?

A. I believe the HomeWAV was on the 29th of August.

Q. Okay. So thinking about those two calls and about common characteristics of people who – who are – or who experience domestic violence, did you hear anything in those calls that troubled you?

A. Yes.

Q. Okay. What was that?

A. Mr. Sanchez was talking to Ms. Thomas and was basically telling her that he was looking at a substantial amount of time for – like five to life and five to ten for cases that he was being held for And he was putting – wanting her to change her story and contact his attorney and try to make it go away from whatever – from whatever the no contact charge was on.

August 23, Detective Davis did not correct her." Slip op. at 4. The prosecutor never asked Detective Davis if the Pay Tel call was from August 23. VRP 199.

VRP 199-200.[2] Detective Davis never specified that the call contents he described above were from a call or a video from either August 23 or August 29.

D. ARGUMENT

1. The State presented insufficient evidence for all of Mr. Sanchez's charges, not just eight of the court order violations.

The Court of Appeals correctly recognized that the State failed to present sufficient evidence to support elements of eight of the court order violations, but it erroneously relied on a statement of the prosecutor, not testimony of a witness, to establish sufficient evidence for the remaining counts.

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[2] The Court of Appeals summarized this part of the testimony as follows: "Detective Davis was then asked about the contents of the Pay Tel call made on August 23 and the HomeWAV call made on August 29." Slip op. at 4. However, the questions about the contents of the HomeWAV call and Pay Tel call do not reference dates. VRP 199-200.

The State bears the burden at trial of proving every element of an offense against a defendant beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, §§ 3, 22; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The State also bears the burden of proving "otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' [jury] instruction." *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). When such a situation occurs, the instructions become the "law of the case." *Id.* at 101. Longstanding in Washington's jurisprudence, the 'law of the case' doctrine exists to provide adequate incentive for trial counsel to review all jury instructions for their propriety, and it is codified in the criminal rules. *Id*. at 105; CrR 6.15(c).

Where the charging period is included in the jury instructions without objection, the charging period becomes the law of the case and requires proof beyond a reasonable doubt. *State v. Jensen*, 125 Wn. App. 319, 326, 104 P.3d 717 (2005). On appeal, the defendant may assign error to any such added elements, including for sufficiency of the evidence. *Hickman*, 135 Wn.2d at 102.

Here, the State included specific dates in the information for each of the charges against Mr. Sanchez. CP 38-47. At trial, the prosecutor also included the dates of the charges in each of the 'to convict' jury instructions. CP 59-60, 65-74. The Court of Appeals agreed that, by doing so, the State assumed the burden of proving each of the dates of the charged offenses beyond a reasonable doubt. Slip op. at 9-10. The Court of Appeals correctly analyzed the facts

produced for eight out of twelve of the charges against Mr. Sanchez, ruling that insufficient evidence supported the dates of those charges. *Id*. at 10.

However, the Court of Appeals incorrectly analyzed the import of a statement of the prosecutor and misunderstood other important details of the testimony to find evidentiary support for the remaining four counts.

a. The Court of Appeals wrongfully included part of a prosecutor's question, which was abandoned mid-question, never acknowledged by the witness's answer, and never re-asked, as 'evidence.'

When a defendant challenges the sufficiency of the evidence, he admits the truth of the State's evidence on that charge. *State v. Clark*, 190 Wn. App. 736, 755, 361 P.3d 168 (2015). This does not include unreasonable inferences from the evidence, however. *State v. Vasquez*, 178 Wn.2d 1, 7, 309 P.3d 318 (2013)

(holding that inferring intent from possession alone is an unreasonable inference).

Not everything said during trial is "evidence." As the Court of Appeals correctly observed, "the prosecutor's statements are not evidence." Slip op. at 11. Indeed, the jury was instructed that "the lawyer's statements are not evidence." CP 52. In criminal trials, the jury is commonly instructed that:

> [t]he defendant is to be tried only on the evidence which is before the jury, and not on suspicions that may have been excited by questions of counsel, answers to which were not permitted, or answers given by witnesses which have been stricken and which you have been instructed to disregard.

State v. Nelson, 72 Wn.2d 269, 284, 432 P.2d 857 (1967).

A proposition so basic that local authority is difficult to find, a question of an attorney is not evidence unless the witness adopts the facts set forth

in the question. *Bartlett v. Mut. Pharm. Co.*, 759 F. Supp. 2d 171, 208 (D.N.H. 2010) (" . . . this court expressly instructed the jury that "[q]uestions . . . by lawyers are not evidence, unless the witness adopts the facts set forth in the question. . . ."); *see also United States v. Jackson*, 578 F. Supp. 3d 240, 250 (D.N.H. 2022) ("Agent Cook then adopted the factual premise of the prosecutor's question by answering "I did." The jury could thus draw inferences from both the question and the answer.").

Here, the Court of Appeals relied on part of a prosecutor's question, which was abandoned and not acknowledged or adopted, as evidence that a Pay Tel call was made on August 23, 2021. Slip op. at 12 (". . . there was circumstantial evidence that Sanchez made phone calls on August 23 and August 29."). The only statement regarding a call on August 23 was this

abandoned question of the prosecutor to Detective Davis:

> Q. Now in the one Pay Tel call that you listened to from 8/23 and the HomeWAV call – do you recall the date of – that the HomeWAV call was made that you listened to?
>
> A. I believe the HomeWAV was on the 29th of August.

VRP 199-200.

Detective Davis's answer in no way acknowledged the facts assumed by the initial, abandoned part of the prosecutor's question – that Detective Davis listened to a Pay Tel call from August 23. He was silent as to those facts. The Court of Appeals correctly interpreted a witness's silence to the prosecutor's statements in another part of its opinion (Slip op. at 11), but, by crediting the abandoned question here, it failed to uniformly apply this basic principle of evidence.

This is not a case where an answer to a compound question is "yes," and the sufficiency of the evidence standard requires the Court to assume that the "yes" applied to both parts of the compound question. This is a case where the prosecutor started to ask a question about August 23 but abandoned that part of the question and asked a different one. Only the different question was answered. The facts assumed in the first question were never re-asked or contained in any other answer from the witness.

Although the prosecutor continued to ask the detective about the "two calls," this references one Pay Tel and one HomeWAV call. VRP 199-200. Detective Davis said that he only listened to one Pay Tel call. VRP 199. Thus, the date of the alleged Pay Tel call was not a necessary detail in order for Detective Davis to answer the State's further questions. He could answer

questions about contents of the singular Pay Tel call he listened to without acknowledging or specifying the call by date. For all of these reasons, there was insufficient evidence of either date of the tampering charges or the two remaining court order violation charges.

b. The Court of Appeals mis-cited the facts

The Court of Appeals claimed that the contents of Exhibit 8 matched a description of call contents given by Detective Davis. This is incorrect.

Exhibit 8 was a call where only eight lines of dialogue are recorded. VRP 242. It contains Mr. Sanchez and Ms. Thomas asking what is going on, and a child stating "I'm beating the shit out of her." VRP 242.

This does not match the description of the call Detective Davis listened to, which included Mr. Sanchez telling Ms. Davis that he was looking at doing

a lot of time, and asking her to change her story and contact his attorney. VRP 200.

In closing, the prosecutor cited from Exhibit 11 as evidence of one of the tampering charges (VRP 386-87), so perhaps the Court of Appeals meant to cite that Exhibit. However, the contents of the HomeWAV video call in Exhibit 11 do not match the content description that Detective Davis provided. *See* VRP 244-52. Detective Davis never offers another summary of a communication between Ms. Thomas and Mr. Sanchez which would match the contents in Exhibit 11. *See* VRP 178-210. There was no other testimony to link Exhibit 11 to any date.

Although some of the contents of Exhibit 7 overlap Detective Davis's cursory summary, there is otherwise no evidence to establish what date Exhibit 7 was made. *See* VRP 224-37. Exhibit 7 was a Pay Tel

call, not a video call, so it could not have been the HomeWAV call that Detective Davis listened to from August 29. VRP 225. Detective Davis said that the Pay Tel call he listened to was recorded between August 19 and September 2, which is not sufficient to determine whether the call was the basis of counts 1 and 5 or 2 and 7. VRP 199; CP 38-47. Also, the fact that Detective Davis listened to a HomeWAV call from August 29 does not preclude that there was also a Pay Tel call from that date as well. Thus, there was also insufficient evidence of the date of either Exhibit 7, Exhibit 11, or any other exhibit to meet the date elements of all of the offenses charged against Mr. Sanchez.

The proper remedy where the State does not present sufficient evidence of all elements of the crime, including added elements, is reversal and dismissal. *Hickman*, 135 Wn.2d at 103. The State did not present

sufficient evidence of the dates of the charged offenses. Reversal and dismissal is required.

2. The Court of Appeals incorrectly ruled that prosecutorial misconduct committed through improper questioning cannot be raised as a misconduct error, conflicting with other precedent

An error at trial may be both misconduct and an evidentiary error. The reviewing court cannot refuse to address the error because the appellant asked the court to review the error under one standard and not another, but that is what the Court of Appeals did here. Mr. Sanchez raised a claim of prosecutorial misconduct based on the prosecutor's questioning of witnesses, and the Court of Appeals declined to reach the issue, stating that it was instead an evidentiary error. Slip op. at 14. This holding conflicts with several published cases holding that a prosecutor's questioning can constitute misconduct.

Prosecutorial misconduct is forbidden because it violates a defendant's right to a fair trial. U.S. Const. amends. VI, XIV; Const. art. I, § 22. "Justice can be secured only when a conviction is based on specific evidence in an individual case and not on rhetoric. . . we do not convict by appeal to a popular cause . . ." *State v. Loughbom*, 196 Wn.2d 64, 69-70, 470 P.3d 499 (2020).

A prosecutor undermines a person's right to a fair trial when they elicit testimony and make comments designed "to arouse passion and prejudice and to inflame the jurors' emotions." *State v. Ramos*, 164 Wn. App. 327, 339, 263 P.3d 1268 (2011) (internal quotations omitted). In this case, the prosecutor did this by insinuating that Mr. Sanchez was a liar and manipulator whose victim was finally so "fed up" with his violence that she deigned to prosecute him.

A prosecutor can commit misconduct through questioning, not just argument. It is misconduct for an attorney to "repeatedly ask[] knowingly objectionable questions." *Andren v. Dake*, 14 Wn. App. 2d 296, 318, 472 P.3d 1013 (2020). A question which knowingly includes inadmissible facts, in a deliberate effort to influence the jury's perception of a key witness, is prosecutorial misconduct. *State v. Copeland*, 130 Wn. 2d 244, 285, 922 P.2d 1304 (1996).

It is misconduct for a prosecutor to repeatedly ask questions requiring evidentiary objections from the defense. *State v. Alexander*, 64 Wn. App. 147, 154–55, 822 P.2d 1250 (1992). This is because "[t]he pattern of repeatedly asking the same question has the effect of telling the jury the answer to it even when all of defense counsel's objections are sustained." *Id.* Additionally, requiring the defense to repeatedly object

to the prosecutor's improper questions is problematic because, even if the objections are sustained, they "leave the jury with the impression that the objecting party is hiding something important." *Andren*, 14 Wn. App. 2d at 318.

For misconduct to which an accused objects, reversal is appropriate if the conduct was both improper and prejudicial in the context of the entire trial. *Loughbom*, 196 Wn.2d at 70. Where no objection is made, reversal is proper where the misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *Id.* If a substantial likelihood exists that the prosecutor's comments affected the verdict, this Court must reverse. *Id*.

Here, the prosecutor asked the Detective to testify to domestic violence stereotypes in an effort to

prejudice Mr. Sanchez by denigrating his character. She began by asking Detective Davis: ". . . based on your training and experience, what are some of the common characteristics of people who commit domestic violence crimes?" VRP 180. The defense's objection to relevancy was sustained. VRP 180-81. The prosecutor then asked a similar question: "What are some of the common characteristics of people who suffer from domestic violence?" VRP 181. The defense's objection to relevancy to this question was overruled. VRP 181. Detective Davis then answered that victims who are "fed up with the violence" will prosecute their case. VRP 181-82.

Since the alleged victim, Ms. Thomas, testified in this case, this testimony impermissibly bolstered her testimony by suggesting that she was the victim of violence and was fed up by it and that was why she

chose to testify against Mr. Sanchez. The same insinuation also served to prejudice Mr. Sanchez by implying that he is a violent abuser who drove Ms. Thomas to be "fed up with the violence" and prosecute.

Later, the prosecutor asks the Detective if "there is ever emotional or mental manipulation towards victims of domestic violence" by their abusers. VRP 183. Detective Davis agreed. *Id.* The prosecutor then tied the issuance of the court order prohibiting Mr. Sanchez from contacting Ms. Thomas as a means of protecting her from this kind of mental and emotional manipulation. *Id.*

This questioning impermissibly suggested to the jury that Ms. Thomas and Mr. Sanchez have a history of violence so severe that the court issued this order to protect Ms. Thomas.

Additionally, the questions directly implied that Mr. Sanchez used mental or emotional manipulation against Ms. Thomas. This is impermissible character evidence. ER 404. A person who uses mental or emotional manipulation cannot be trusted, so this impermissible questioning also destroyed Mr. Sanchez's credibility. Since this is a case where Mr. Sanchez testified in his defense, and his defense rested in large part on his credibility, these questions had a substantial likelihood of affecting the verdict. VRP 283-301.

Overall, these impermissible questions invoked the more pervasive issue of domestic violence generally. *See Ramos*, 164 Wn. App. at 338 (prosecutor may not urge jury to convict in order to protect the community, deter future law-breaking, or other reasons unrelated to the charged crime (internal

quotations omitted)). The Court should grant review because the prosecutor asked impermissible questions to elicit unduly prejudicial evidence that irreparably tainted the jury and denied Mr. Sanchez a fair trial.

3. The Court of Appeals redacted its decision in violation of the Court Rules, the Constitution, and precedent from this Court

The Court of Appeals' unconsidered decision to redact Ms. Thomas's name from its opinion was not briefed or requested and did not follow statutory and constitutional requirements for redaction. Its decision fails to follow clear precedent from this Court.

When confronted with a request to redact or seal, the court must analyze the request under both the Court Rules and the constitution. *State v. Dreewes*, 192 Wn.2d 812, 827, 432 P.3d 795 (2019). General Rule 15 creates a uniform procedure for sealing or redacting court records, which includes court opinions. GR 15(a);

GR 31(c)(4). Under this rule, a court may redact or seal if it makes written findings that redaction is "justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record." GR 15(c)(2). The proponent of the redactions must make some showing of the need for redactions. *State v. C.R.H.*, 107 Wn. App. 591, 596, 27 P.3d 660 (2001).

Although Division Three of the Court of Appeals has local general orders requiring redactions of names in some cases, those rules only apply to children and to sexual assault victims. *In re the Matter of Victim Initials* (2023); *In re the Use of Initials or Pseudonyms for Child Victims or Child Witnesses* (2012). Ms. Thomas is neither.

There was no proponent of redactions in this case before the Court of Appeals issued its opinion. The

State never briefed the issue, nor did Mr. Sanchez or even Ms. Thomas. Amici asked the Court to refer to Ms. Thomas by initials, but it did so cursorily and without citation to GR 15. Mot. Publish 13-14. Amici did not even style the request as a "redaction" or base it on a request from Ms. Thomas *See id.*

Without a proponent or a proper request, no hearing was held on this matter to determine the extent of any privacy or safety concerns. Without proponent or hearing, the Court's decision to redact Ms. Thomas's name from the court's Opinion violated this uniform General Rule.

It also violated constitutional requirements. The Washington Constitution guarantees that "[j]ustice in all cases shall be administered openly . . . ." Const. art I, § 10. Open administration of the courts is "of utmost importance" and "a vital part of our constitution and

our history." *Dreilling v. Jain*, 151 Wn.2d 900, 903-04, 93 P.3d 861 (2004). "Secrecy fosters mistrust." *Id.* at 903. So court proceedings "must be conducted openly to foster the public's understanding and trust in our judicial system and to give judges the check of public scrutiny." *Id.* This preference for candor even extends to prevent the redaction of names from a meritless lawsuit. *Hundtofte v. Encarnacion*, 181 Wn.2d 1, 9, 330 P.3d 168 (2014).

Sometimes, however, privacy interests and other rights conflict with the constitution's guarantee of open courts. In those situations, the Supreme Court created a five-part test to assess whether the requested court closure or redaction is permissible. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982). This is often referred to as the *Ishikawa* test, named after the case where it was first articulated. The first step of the

test requires the proponent of the closure to make some showing of the need for the closure. *Id.* at 37.

There is no need to articulate the rest of the four steps of the *Ishikawa* test because the Court cannot get past step one. There was no proponent of the redactions in this case. There was no showing of a need for the redactions. Not even Amici articulated an interest specific to Ms. Thomas. The redactions were thus neither carefully considered nor specifically justified, and they violated the Washington Constitution.

The Supreme Court has admonished that "[t]he proper functioning of the adversary system depends on both parties having an opportunity to be heard when the court makes decisions related to a case." *State v. Parvin*, 184 Wn.2d 741, 763, 364 P.3d 94 (2015). The reason for this is to prevent errors. *Id.* Unfortunately,

this case provides an example of the wisdom of this principle. Without the benefit of argument or hearing, the Court of Appeals violated the General Rules and the Washington Constitution. This Court should reverse this decision of the Court of Appeals.

E. CONCLUSION

For the reasons stated, Mr. Sanchez asks this Court to reverse his convictions and dismiss the charges. Otherwise, Mr. Sanchez asks this Court to grant the other relief requested.

Counsel certifies this brief contains approximately 4,626 words and complies with RAP 18.17.

DATED this 18th day of September, 2024.

Respectfully submitted,

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APPENDIX A

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CASE # 391124
State of Washington v. Jose Agustin Sanchez
OKANOGAN COUNTY SUPERIOR COURT No. 2110019724

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Tristen L. Worthen
Clerk/Administrator

TLW:ko
Attach.
c: **Email** Hon. Robert Grim
c: Jose Agustin Sanchez, c/o Wash. Appellate Project, 1511 3rd Ave, Ste 610, Seattle, WA 98101

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

STATE OF WASHINGTON, Respondent, v. JOSE AGUSTIN SANCHEZ, Appellant.	))))))))))	No. 39112-4-III UNPUBLISHED OPINION

STAAB, J. — Jose Sanchez appeals his ten convictions for violating a domestic violence no-contact order and two convictions for witness tampering. The State alleged that Sanchez made numerous calls from jail to a person protected by a pretrial no-contact order during an approximate two-week period. Sanchez raises five issues on appeal: (1) sufficiency of the evidence to support the convictions, (2) prosecutorial misconduct, (3) whether the crime of witness tampering can be designated as a crime of domestic violence, (4) whether the State's witness provided an improper opinion of guilt, and (5) whether certain fees and assessments should be struck. The State cross-appeals the trial court's exceptional sentence.

We agree with Sanchez that the evidence was insufficient to support eight of the convictions for violating a no-contact order. The to-convict jury instructions required the

State to prove that each offense occurred on or about a specific date. While the State admitted ten jail calls, the State failed to introduce any evidence of the dates when eight of the calls were made. Otherwise, we affirm the remaining two counts of violating a no-contact order and two counts of witness tampering. We decline to address the sentencing issues because we remand for resentencing.

BACKGROUND

Procedural history

On May 10, 2021, after Sanchez was charged with domestic violence assault, the superior court imposed a pretrial domestic violence no-contact order protecting the alleged victim, B.T. The State subsequently charged Sanchez with eleven misdemeanor charges of violating a domestic violence no-contact order and two counts of witness tampering. The information alleged that on or about eight specific dates, Sanchez contacted the protected person while the no-contact order was in effect. Prior to trial, the State moved to amend the information to add domestic violence designations to the two counts of witness tampering and to remove one count of violating a domestic violence no-contact order. Sanchez objected, arguing the designation did not apply to charges for witness tampering. The judge overruled the objection and allowed the amendment.

Trial

Detective Eugene Davis, who works for the Okanogan County Sheriff's Department, was called as a fact witness at trial. Detective Davis provided brief

testimony relating to his experience as an officer as well as his experience with domestic violence cases. He explained that he had made roughly 80 to 100 domestic violence arrests and had over 200 total investigations. The State asked Detective Davis to describe common characteristics of people who commit domestic violence crimes based on his training and experience. Defense counsel's relevance objection was sustained. The State rephrased the question, asking Detective Davis to describe common characteristics of people who suffer from domestic violence. After the objection for relevancy was overruled, Detective Davis explained that victims are often "non-responsive, not willing to help [ ] law enforcement," and often experiencing the "worst thing in their life at [the] time" they call for help. Rep. of Proc. (RP) at 181-82.

Detective Davis then testified that a no-contact order was issued on May 10, 2021, prohibiting Sanchez from contacting B.T. Detective Davis testified that he listened to Pay Tel and HomeWAV[1] calls from the jail that were made in late August and early September 2021. While initially indicating that he could not recall the number of calls he listened to, Detective Davis eventually testified that he listened to "around" ten calls, including one Pay Tel call and nine HomeWAV calls. He identified Sanchez as the person who placed these calls.

[1] Pay Tel Communications is the main telephone system for inmates. HomeWAV, LLC, is a video visitation system similar to Skype. Both types of calls are recorded and tracked.

The State asked Detective Davis "how did each of those calls violate the Domestic Violence No Contact Order you talked about?" RP at 199. Defense counsel objected, stating that the question called for a "legal conclusion." RP at 199. The court sustained the objection, requesting the State to either rephrase the question or ask another. The State then asked, "[h]ow did those calls violate the terms of the Domestic Violence No Contact Order that you read to us?" RP at 199. Defense counsel did not object, and Detective Davis went on to answer that Sanchez "had direct contact with [B.T.] by phone and by the video chat system." RP at 199.

At one point, Detective Davis indicated that there was one Pay Tel call he listened to from September 23. Later, he clarified that there was one Pay Tel call from Sanchez to the protected party sometime between August 19 and September 2. Finally, when the prosecutor asked Detective Davis if the Pay Tel call was from August 23, Detective Davis did not correct her.

Detective Davis was then asked about the contents of the Pay Tel call made on August 23 and the HomeWAV call made on August 29. He indicated that during these calls Sanchez was telling B.T. that he (Sanchez) was looking at substantial time if convicted and trying to convince her to change her story and contact his attorney. Otherwise, Detective Davis did not describe any of the other calls. Nor did the State play any of the recorded calls for Detective Davis, or ask him if the calls contained in the State's exhibits were the same calls he identified as made by Sanchez to B.T.

The State then called B.T. as a witness. The State informed her that it was "going to ask [ ] a few questions about [her] relationship with Mr. Sanchez prior to the time that [the] alleged crimes occurred . . . [to] allow the jury to get a sense of [her] emotional and financial state at the time that [the] alleged incidents occurred." RP at 213. She explained that she and Sanchez had a ten-year relationship and three kids together. Additionally, B.T. provided background on when they met, when they moved in together, and brief information about their children.

The State then played ten recorded calls, five Pay Tel calls and five HomeWAV calls. B.T. identified the people in each call as herself and Sanchez. The prosecutor identified some of the exhibits by a date, but never asked B.T. when the calls were made or even to confirm the date of the calls.

The State introduced Exhibit 7, described as a Pay Tel call, and played the recorded call in its entirety. Similar to the other exhibits, B.T. identified the voices as herself and Sanchez. B.T. did not indicate when the call was made. However, Sanchez is heard telling B.T. that he is looking at "life or ten years." RP at 231. He then tells her: "On that one thing, you could write something to them guys and help me out on that shit somehow, fucking say something, fucking BS whatever. They're going to try to hold me here on that shit." RP at 231. Later, he tells B.T.,

> I don't know—from nobody—just on the regs—just on there right now, it's in me. The only way to get it gone is by fucking—is to say that—you

> know, it's just going to hurt you now (indiscernible). (Indiscernible) I mean, 20 sitting there or life to 20.

RP at 231. As the conversation winds down, B.T. asks, "what's this for," to which Sanchez replies,

> It's my lawyer, in case you think about doing that. The sooner the better. If not, they're going to fucking exonerate it or whatever and I'm going to stay here for fucking—until whatever. It would be nice to get out and see my kids and take care of some business and stuff. It's 509—is that good?

RP at 233.

The State introduced Exhibit 8, a HomeWAV video call and played the recording for the jury. The exhibit was not identified by date and B.T. was not asked when the call occurred.

The State introduced Exhibit 11, another HomeWAV video call and played the entire video. During this call, Sanchez and B.T. discussed the fires in Twisp. At some point, the following conversation occurs:

> MR. SANCHEZ: And did you ever reach out to that one guy?
>
> MS. THOMAS: No.
>
> MR. SANCHEZ: You ever get him?
>
> MS. THOMAS: I don't know.
>
> MR. SANCHEZ: You don't know? What's that mean?
>
> MS. THOMAS: Yeah, I'm undecided.
>
> MR. SANCHEZ: You're looking to do better right here?

> MS. THOMAS: No. I'm not—I'm not going to lie about it and like no, I made it all up; it never happened. Like I don't know—I was thinking about dropping the charges, but fucking—

RP at 249.

Sanchez testified on his own behalf. He admitted signing the no-contact order but claimed that he did not have sufficient time to read and understand it during the hearing. He also admitted making each of the calls included in the ten exhibits. He did not testify as to when those calls were made. He did testify that he did not realize the no-contact order prevented him from calling B.T. from jail and thought it only prevented physical contact. Moreover, he did not believe he was violating the no-contact order because the jail approved the calls.

Conclusion of trial

The jury was provided standard instructions. The court instructed that the "lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law." Additionally, it informed the jury that the evidence presented may be either direct or circumstantial and the law does not distinguish between direct and circumstantial evidence in weight or value in finding the facts of the case. The to-convict jury instructions required the State to prove that each of the 12 counts occurred on or about a specific date. The jury convicted Sanchez on all twelve counts and this appeal followed.

ANALYSIS

Sanchez raises several issues on appeal. Because he challenges the sufficiency of evidence used to support all twelve convictions, we must address this issue first.

1. SUFFICIENCY OF THE EVIDENCE

Sanchez argues the State failed to prove that the alleged crimes occurred on or about the dates alleged in each jury instruction. He contends that when these dates were added to the to-convict jury instructions, the dates became elements that the State was required to prove. While he acknowledges that there was evidence of ten calls made from Sanchez to B.T., he contends there was no evidence of when those calls were made. The State responds that Detective Davis testified Sanchez made about ten calls from jail between August 21 and September 2, and this was sufficient to prove the on or about dates listed in the to-convict jury instructions.

We conclude that the evidence is sufficient to support four charges from two dates. The charges of violating a no-contact order and witness tampering for counts 1 and 5 (both alleging the crimes occurred on or about August 23, 2021) and counts 2 and 7 (both alleging the crimes occurred on or about August 29, 2021). As to the remaining charges, the State failed to introduce sufficient evidence to show that these charges occurred on or about the dates alleged in the information and the corresponding to-convict jury instructions.

"The State has the burden of proving the elements of a crime beyond a reasonable doubt." *State v. Clark*, 190 Wn. App. 736, 755, 361 P.3d 168 (2015). When a defendant challenges the sufficiency of the evidence against him, this court views "the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* A challenge to the sufficiency of the evidence "admits the truth of the State's evidence." *Id.* When challenging sufficiency of the evidence, "circumstantial evidence and direct evidence carry equal weight." *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). The proper remedy where the State does not present sufficient evidence of all the elements of the crime, including added elements, is to reverse the conviction and dismiss with prejudice. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

Generally, the date of an offense is not an essential element of the crime. *See State v. Brooks*, 195 Wn.2d 91, 98, 455 P.3d 1151 (2020). For crimes in which the exact date is not an essential element, the State is required to prove only that the crime was committed before the expiration of the statute of limitations. *State v. Stribling*, 164 Wn. App. 867, 879, 267 P.3d 403 (2011). However, when dates are added to a to-convict jury instruction, they become essential elements under the law of the case doctrine and the State must then prove the additional element. *Hickman*, 135 Wn.2d at 102-03. Even as added elements, however, the State need only prove that the crimes occurred around the

time of the alleged date. *See State v. Polk*, 187 Wn. App. 380, 395, 348 P.3d 1255 (2015).

With respect to counts 3, 4, 6, 8, 9, 10, 11, and 12, alleging misdemeanor violation of a domestic violence no-contact order, the State failed to produce evidence that Sanchez violated the no-contact order on or about the dates alleged. Here, the amended information identified each count as occurring on or about a specific date between August 21 and September 2, 2021, and these dates were included in the to-convict jury instructions. At trial, the State introduced evidence that a pre-trial no-contact order was issued on May 10, 2021. The State also introduced ten exhibits of recorded calls between Sanchez and B.T. While the calls were made when Sanchez was in jail, there was no evidence of the dates when Sanchez was actually in jail. The recorded calls did not contain a date reference, and neither Sanchez nor B.T. testified as to when the calls were made.

Detective Davis testified that he listened to or watched ten calls from Sanchez to Davis made between August 19 and September 2. However, other than the calls made on August 23 and August 29, he did not testify as to the content of any of the calls. Nor was he ever asked if any of the ten recorded calls admitted as exhibits were the same calls that he listened to and that took place between August 21 and September 2.

The State asserts that the evidence is nonetheless sufficient for several reasons. First, the State contends that the prosecutor introduced several of the exhibits by

reference to a date, and B.T. did not disagree. Br. of Resp't at 11-12. For example, the prosecutor introduced Exhibit 6 by stating, "[o]kay. [B.T.], I'm going to play the start of a Pay Tel call that was made on August 21st of 2021," and then proceeded to play the recording. RP at 217. But B.T. was never asked to confirm the date. And, as the jury was properly instructed, the prosecutor's statements are not evidence.

The State also argues that Detective Davis' testimony was sufficient as circumstantial evidence that all of the recorded calls occurred in late August and early September. The State notes that Detective Davis testified there were ten calls in this time period and the State introduced evidence of ten calls. The State reasons that circumstantial evidence suggests that the ten calls Detective Davis testified about were the same calls contained in the exhibits. We disagree. Detective Davis testified that he listened to one Pay Tel call and nine HomeWAV calls. The State's ten exhibits included five Pay Tel calls and five HomeWAV calls. Given this disparity, the fact that Detective Davis may have listened to ten calls does not mean he listened to the same ten calls that formed the basis for the ten charges.

While we find the evidence insufficient to support convictions on counts 3, 4, 6, 8, 9, 10, 11, and 12, we find the evidence otherwise sufficient with respect to counts 1, 2, 5, and 7. Counts 1 and 5 charged witness tampering and violation of a no-contact order on or about August 23, and counts 2 and 7 charged the same crimes occurring on or about August 29.

For these counts, there was circumstantial evidence that Sanchez made phone calls on August 23 and August 29. Detective Davis described the contents of two calls, one Pay Tel call on August 23 and one HomeWAV call on August 29. The State played Exhibit 7, a Pay Tel call from August 23, and Exhibit 8, a HomeWAV call from August 29. The content of these calls matched the descriptions given by Detective Davis. B.T. identified the persons on the calls as herself and Sanchez.

2. IMPROPER OPINION OF GUILT

Sanchez contends that the State violated his constitutional right to a fair trial when the State asked Detective Davis, "[h]ow did those calls violate the terms of the Domestic Violence No Contact Order that you read to us?" and Detective Davis answered that Sanchez "had direct contact with [B.T.] by phone and by the video chat system." RP at 199. The State responds that Sanchez waived the challenge by failing to object.

Standard of review and error preservation

We agree with the State that Sanchez did not preserve this issue at trial. The State asked the same question twice. The first time it asked the question, the court sustained Sanchez's objection. The State immediately asked an almost identical question and Sanchez failed to object.

In Washington, an "'appellate court may refuse to review any claim of error [that] was not raised in the trial court.'" *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009) (quoting RAP 2.5(a)). This rule comes from the principle that defense counsel is

obligated to seek a remedy as errors occur or shortly thereafter. *Id.* at 98. Requiring preservation through objections "serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials." *State v. Lazcano*, 188 Wn. App. 338, 356, 354 P.3d 233 (2015).

Sanchez argues his first objection was sufficient to preserve the issue and cites to *State v. Barrow*, 60 Wn. App. 869, 876-77, 809 P.2d 209 (1991). We find this case distinguishable. In *Barrow*, defense counsel objected to specific comments made in the initial argument and rebuttal arguments, and the court held that it would examine whether there was a substantial likelihood that "those comments" affected the jury's verdict. *Id.* at 877. Here, when the State asked the first question, the court sustained Sanchez's objection before Detective Davis could answer. Unlike *Barrow*, the testimony that Sanchez challenges on appeal was admitted without objection.

Sanchez frames the issue as one in which the trial court erred in allowing the witness to provide an improper opinion of guilt. But it is not the trial court's job to raise the objection. Rather, defense counsel's failure to object to the second question denied the court an opportunity to rule on the alleged error.

We conclude that Sanchez waived the issue by failing to object to the prosecutor's second question. Sanchez does not argue or provide analysis on alternative grounds for review and so we decline to address this issue. *See* RAP 2.5(a).

3. PROSECUTORIAL MISCONDUCT

Sanchez argues that the State committed prosecutorial misconduct by introducing evidence that appealed to the passions and prejudices of the jury. Specifically, he argues that Detective Davis provided irrelevant and prejudicial testimony about his background in investigating domestic violence and the "characteristics" of people who suffer from domestic violence. In addition, B.T. testified about her emotional and financial state at the time of the alleged crimes.

We disagree that these questions and answers amount to prosecutorial misconduct. Instead, these are evidentiary objections subject to review under an abuse of discretion standard. Since Sanchez does not assign error the trial court's evidentiary ruling we do not decide whether the trial court abused its discretion by allowing the State to introduce the evidence.

To demonstrate non race-based prosecutorial misconduct, the defendant has the burden of establishing: (1) the State acted improperly, and (2) the State's improper act prejudiced the defendant.[2] *State v. Ramos*, 164 Wn. App. 327, 333, 263 P.3d 1268 (2011). Not all evidentiary errors amount to prosecutorial misconduct. Instead, "prosecutorial misconduct is a term of art referring to prejudicial errors committed by the prosecuting attorney that deny the defendant a fair trial." *State v. Fisher*, 165 Wn.2d 727,

[2] Race-based prosecutorial misconduct is reviewed under a stricter standard. *State v. Bagby*, 200 Wn.2d 777, 802-03, 522 P.3d 982 (2023).

756 n.8, 202 P.3d 937 (2009). Examples of misconduct include arguments that misstate the law or shift the burden of proof to the defendant. *State v. Emery*, 174 Wn.2d 741, 759-60, 278 P.3d 653 (2012). It is also improper for a prosecutor to argue facts not in evidence. *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003). In *Ramos*, the court found that it was prosecutorial misconduct to ask a witness if another witness is lying; but it is not misconduct to ask if another witness is mistaken. 164 Wn. App. at 334.

Here, Sanchez contends that eliciting testimony from Detective Davis about his experience investigating domestic violence and the characteristics of domestic violence victims was irrelevant because Detective Davis was not being called as an expert witness. Even if this is true, Sanchez does not meet his burden of demonstrating that the irrelevant evidence rose to the level of denying Sanchez a fair trial. The evidence was not inherently prejudicial. Indeed, had Detective Davis testified as an expert witness, his experience would undoubtedly be relevant and admissible. *See State v. Case*, 13 Wn. App. 2d 657, 678, 466 P.3d 799 (2020).

Sanchez next claims the prosecutor's questions to B.T. about her history and relationship with Sanchez amounted to misconduct. Sanchez argues this signaled to the jury her emotional and financial state were relevant to the jury's consideration and further implied she was vulnerable to Sanchez's "emotional and mental manipulation." Because Sanchez did not object to these questions, he waived his challenge to this testimony

unless he can demonstrate the act was flagrant and ill-intentioned. Sanchez makes no attempt to do so on appeal. Regardless, we note that B.T.'s state of mind was relevant. to the witness tampering charges.

We reject Sanchez's claim that the testimony elicited by the prosecutor touched on Sanchez's right to a fair trial and amounted to misconduct.

4. DOMESTIC VIOLENCE DESIGNATION ON CONVICTIONS FOR WITNESS TAMPERING

Sanchez contends that RCW 10.99.020(4) does not include witness tampering as a domestic violence offense and therefore the trial court erred in designating the two witness tampering convictions as crimes of domestic violence. The State responds that RCW 10.99.020(4) is a non-exhaustive list of offenses to which a designation may be applied and witness tampering is similar to other crimes specifically listed. We agree with the State and find no error.

Our review of this issue requires us to interpret the statute. Construction of a statute is a question of law reviewed de novo. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). When interpreting a statute, a court's "fundamental objective is to ascertain and give effect to the legislature's intent." *Lenander v. Dep't of Ret. Sys*., 186 Wn.2d 393, 405, 377 P.3d 199 (2016). Where the language of a statute is clear, the legislature's intent will be derived from the plain language of the statute. *Engel*, 166 Wn.2d at 578. In order to determine a statute's plain meaning, courts should examine the "statute in which the provision at issue is found, as well as related statutes or other

provisions of the same act in which the provision is found." *Dep't of Ecology v. Campbell & Gwinn*, LLC., 146 Wn.2d 1, 10, 43 P.3d 4 (2002). However, if after this inquiry the plain meaning is susceptible to more than one reasonable meaning, "the statute is ambiguous and it is appropriate to resort to aids to construction, including legislative history." *Id.* at 12.

The domestic violence act allows certain crimes committed against an intimate partner to receive a domestic violence designation. *See* RCW 10.99.020(4)(b). To determine what crimes are eligible for a domestic violence designation, we first look to the domestic violence statute. The relevant portion reads: "'Domestic violence' *includes but is not limited to* any of the following crimes when committed either by (a) one family or household member against another family or household member, or (b) one intimate partner against another intimate partner." *State v. Abdi-Issa*, 199 Wn.2d 163, 170, 504 P.3d 223 (2022). The list of crimes in RCW 10.99.020(4)(b) is nonexclusive. *Id*. at 171.

Nonetheless, Sanchez contends that witness tampering should not be designated as a crime of domestic violence because it is not a crime against a person or property. In *Abdi-Issa*, the court held that although animal cruelty was not an enumerated crime, it was sufficiently similar to the enumerated crimes that designating it as a crime of domestic violence was not error in light of the particular allegations in that case. *Id*. at 171-72.

In this case, the witness tampering allegations were similar to the enumerated crimes of coercion and interference with the reporting of domestic violence. *See* RCW 10.99.020(4)(b)(vii), (xxiii). Interference with the reporting of domestic violence requires proof that the defendant prevented or attempted to prevent the victim of domestic violence from calling 911, obtaining medical assistance, or reporting to law enforcement. RCW 9A.36.150. Likewise, coercion requires proof of the use of a threat to compel or induce another to engage in conduct which that person has "a legal right to abstain from, or to abstain from conduct which he or she has a legal right to engage in." RCW 9A.36.070. Here, the State alleged that Sanchez was attempting to convince B.T. to retract her allegations that Sanchez had previously committed acts of domestic violence against her. Under these circumstances, the court did not error in designating the witness tampering charges as crimes of domestic violence.

Sanchez asserts that the legislature intentionally excluded witness tampering from the list of enumerated offenses. Appellant's Amd. Br. at 30. He cites no authority for this contention and the statute does not support the negative inference.

Citing the general definition of a crime victim, Sanchez also argues that B.T. cannot be a victim of witness tampering because she did not sustain any emotional, psychological, or financial injury to her person or property as a result of Sanchez's attempts to get her to retract her allegations of assault. Appellant's Amd. Br. at 31 (quoting RCW 9.94A.030(54)). A similar argument was rejected in *Abdi-Issa*, where the

court noted that the Sentencing Reform Act of 1981, ch. 9.94A RCW, also defined a "victim of domestic violence" as:

> an intimate partner or household member who has been subjected to the infliction of physical harm or sexual and psychological abuse by an intimate partner or household member as part of a pattern of assaultive, coercive, and controlling behaviors directed at achieving compliance from or control over that intimate partner or household member. Domestic violence includes, but is not limited to, the offenses listed in RCW 10.99.020 and ****26.50.010 committed by an intimate partner or household member against a victim who is an intimate partner or household member.

RCW 9.94A.030(55).

Here, Sanchez was attempting to convince B.T. to comply with his request that she retract her earlier report of assault on B.T. Whether a defendant attempts to keep a domestic violence victim from initially reporting the crime or attempts to convince the victim to retract their allegations after the fact, the conduct could constitute psychological abuse as part of a pattern of coercive and controlling behavior of the victim of domestic violence.

5. SENTENCING ISSUES

Sanchez challenges certain legal financial obligations imposed at sentencing. The State also cross-appealed the trial court's exceptional sentence. Since we reverse several convictions and remand for further proceedings including resentencing, we decline to address these issues at this time.

6. STATEMENT OF ADDITIONAL GROUNDS (SAG)

Sanchez raises six claims in his statement of additional grounds. We deny his first and second claim, conclude that three claims of his claims are based on evidence outside the record on appeal and decline to review the final claim.

SAG No. 1: Recordings allowed in the jury room

Sanchez states the court allowed recordings to go back into the jury room in their entirety. Decisions on evidentiary issues are "within the sound discretion of the trial court" and will not be disturbed on appeal absent abuse of discretion. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). A judge may take audiotape or videotape recorded exhibits into deliberations to review them if "the exhibits are found to bear directly on the charge and are not unduly prejudicial." *State v. Frazier*, 99 Wn.2d 180, 189, 661 P.2d 126 (1983); *State v. Gregory*, 158 Wn.2d 759, 847-48, 147 P.3d 1201 (2006) (applying same principles provided for audiotapes to videotapes).

At trial, the court explained that all exhibits admitted into evidence, including audio recordings and videos would be provided in the jury room for further review. RP at 356. Defense counsel did not object to this. *See* RP at 356-57. In addition, the calls related directly to the several no-contact order violations and witness tampering charges and Sanchez fails to articulate any prejudice from allowing the jury to review them in the jury room. This argument fails.

SAG No. 2: Recordings played in open court

Next, Sanchez states that defense asked for the jury to hear all recordings in open court. The nature of Sanchez's objection on this issue is unclear and we decline to address this claim.

SAG No. 3: Shackles during proceedings

Sanchez claims that he was held in shackles the entirety of the case except for the trial. The record is devoid of any indication Sanchez was in shackles other than at sentencing. *See* RP at 438. The only evidence of shackling was at the sentencing hearing where defense asked if Sanchez could "be unshackled so that he can jot down notes if he thinks they're relevant for sentencing purposes." RP at 438. The State did not object, and the court allowed the shackles to be removed. RP at 438. If Sanchez was shackled during trial, this evidence is not in the record. Since this issue raises facts outside the record, it is more properly considered in a personal restraint petition and we decline to address it on direct appeal. *See* RAP 16.4.

SAG No. 4: Mention of B.T.'s finances

Sanchez next contends that there is a breach of agreement because defense was asked at recess not to mention B.T.'s finances and the prosecutor did so, making her a victim in court. The record on appeal does not contain discussions of an agreement. Otherwise, the only mention of finances was during the State's direct examination of B.T., which we address above. To the extent this claim relies on evidence outside the

record, it should be raised in a personal restraint petition and we decline to address it on direct review. RAP 16.4.

SAG No. 5: Ineffective assistance of counsel

Sanchez argues ineffective assistance of counsel because his current counsel failed to call "former legal [counsel] to see about any letters looking to contact [B.T.] or other [witnesses]." It appears he claims a prior attorney sent a letter to his post office box while he was in jail and his mother mentioned he was trying to contact witnesses. We decline to address this issue because it depends on evidence outside the record on direct review and can be raised in a personal restraint petition. RAP 16.4.

SAG No. 6: Jail staff monitoring HomeWAV calls

Finally, Sanchez argues that jail staff was required to make sure any person on HomeWAV does not have a no-contact order. Therefore, he claims that by allowing B.T. to be on his HomeWAV, it helped or influenced by allowing him to violate the no-contact order. Because we reverse Sanchez's convictions for violating the no-contact order, he can raise this argument on retrial.

7. CONCLUSION

We conclude that the evidence is insufficient to support the charges of violating a no-contact order in counts 3, 4, 6, 8, 9, 10, 11, and 12. We therefore reverse these convictions with instructions for the court to dismiss the charges with prejudice.

Otherwise, we find no error and affirm the remaining convictions. We remand for resentencing in light of our decision.

Reversed and remanded.

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.

APPENDIX B

Tristen L. Worthen
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August 20, 2024

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CASE # 391124
State of Washington v. Jose Agustin Sanchez
OKANOGAN COUNTY SUPERIOR COURT No. 2110019724

Dear Counsel:

Enclosed is your copy of this Court's Order Granting Motion to Publish Court's Opinion in Part of June 6, 2024, which was filed today.

Sincerely,

Tristen L. Worthen
Clerk/Administrator

TLW:ko
Enc.

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FILED
AUGUST 20, 2024
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOSE AGUSTIN SANCHEZ, Appellant.	)))))))))	No. 39112-4-III ORDER GRANTING THIRD PARTY MOTION TO PUBLISH OPINION IN PART

THE COURT has considered Evangeline Stratton, Family Violence Appellate Project's third party motion to publish opinion and is of the opinion the motion should be granted. Therefore,

IT IS ORDERED, the motion to publish is granted. The opinion filed by the court on June 6, 2024 shall be modified on page 1 to designate it is an opinion published in part.

On pages 6 and 7, the references to Ms. Thomas in the block quote shall be changed to B.T.

On page 19 the following language shall be inserted before section 5. Sentencing Issues:

> A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports

and that the remainder, having no precedential value, shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

And on page 23 by deletion of the following language:

A majority of the panel has determined that 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.

PANEL: Judges Staab, Lawrence-Berrey, Cooney

FOR THE COURT:

Robert Lawrence-Berrey
Chief Judge

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 – Division Three** under **Case No. 39112-4-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 or residence address as listed on ACORDS:

☒ respondent Okanogan County Prosecutor's Office
[clevine@co.okanogan.wa.us]

☐ petitioner

☒ respondent Jennifer Joseph, DPA
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MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: September 18, 2024

WASHINGTON APPELLATE PROJECT

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