NO. 32086-3-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

JESSE LEE CASTILLO,

Defendant/Appellant.

APPELLANT'S BRIEF

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ASSIGNMENT OF ERROR

1. The trial court incorrectly determined that the State pled and proved that the offense was a domestic violence offense.

ISSUES RELATING TO ASSIGNMENT OF ERROR

1. Did the State present sufficient evidence that domestic violence was pled and proved in order to include that finding in the Judgment and Sentence? (CP 15)

2. If the State failed to plead and prove domestic violence, must the domestic violence assessment be removed from the Judgment and Sentence?

STATEMENT OF CASE

An Information was filed on September 24, 2013 charging Jesse Lee Castillo with violation of a no-contact order. A domestic violence tag was appended to the charge. (CP 4)

Mr. Castillo pled guilty as charged. An agreed mitigated sentence was imposed. Mr. Castillo reserved the right to challenge the domestic violence tag and did so. (CP 8; RP 2, ll. 12-16; RP 9, l. 24 to RP 10, l. 20)

The trial court determined that the State pled and proved domestic violence under paragraph 2.2 of the Judgment and Sentence.

Mr. Castillo filed his Notice of Appeal on November 22, 2013. (CP 25)

SUMMARY OF ARGUMENT

The State failed to plead and prove that domestic violence occurred, as that term is statutorily defined in various statutes.

The failure to plead and prove domestic violence requires that any finding contained in the Judgment and Sentence be removed. It also requires that the domestic violence assessment be stricken from the Judgment and Sentence.

ARGUMENT

I. RCW 9.94A.030

LAWS OF 2010, Ch. 274, Sec. 101 provides, in part:

> The legislature intends to improve the lives of persons who suffer from the adverse effects of domestic violence and to require reasonable, coordinated measures to prevent domestic violence from occurring. The legislature intends to give law enforcement and

> the courts better tools to **identify violent perpetrators of domestic violence** and hold them accountable. ...

(Emphasis supplied.)

Chapter 274 amended RCW 9.94A.525. The amendment is contained in RCW 9.94A.525(21) which states:

> If the present conviction is for a felony domestic violence offense **where domestic violence as defined in RCW 9.94A.030 was pled and proven,** count priors as in subsections (7) through (20) of this section; however, count points as follows:
>
> (a) Count two points for each adult prior conviction where domestic violence as defined in RCW 9.94A.030 was pled and proven after August 1, 2011 ....;
>
> (b) Count one point for each second and subsequent juvenile conviction where domestic violence as defined in RCW 9.94A.030 was pled and proven after August 1, 2011 ....; and
>
> (c) Count one point for each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030, was pled and proven after August 1, 2011.

Each subsection of RCW 9.94A.525(21) requires the State to plead and prove that domestic violence occurred as defined in RCW 9.94A.030.

RCW 9.94A.030(20) states: "'Domestic violence' has the same meaning as defined in RCW 10.99.020 and 26.50.010."

It appears that the Legislature, by referencing two (2) statutes intended to try and cover multiple bases for a finding of domestic violence.

RCW 10.99.020(5) states, in part:

> "Domestic violence" includes but is not limited to any of the following crimes ...:
>
> ...
>
> (r) Violation of the provisions of a restraining order, no-contact order, or protection order **restraining or enjoining the person** or restraining the person from going on to the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location.

(Emphasis supplied.)

RCW 26.50.010(1) provides:

> "Domestic violence" means: (a) **Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault**, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

(Emphasis supplied.)

Under the facts and circumstances of Mr. Castillo's case, RCW 26.50.010(1) has no application.

If RCW 26.50.010 has no application, then the language of RCW 9.94A.030(20) precludes a finding of domestic violence. Since RCW 9.94A.030(20) is drafted using the word "and," both provisions must be met in order to establish that domestic violence occurred.

"Context is particularly important when harmonizing two statutes where one references the other. The referred statute must be read in context of the referring statute." *Rivas v. Overlake Hospital Medical Center,* 164 Wn.2d 261, 267, 189 P.3d 753 (2008).

RCW 9.94A.030(20) references two (2) statutes. Those two (2) statutes must be read together within the framework of RCW 9.94A.030(20).

As noted in *Tracfone Wireless, Inc. v. Department of Revenue,* 170 Wn.2d 273, 284, 242 P.3d 810 (2010):

> "'Terms referred to, and only those terms, must be treated as if they were incorporated into the referring act' or statute." *Int'l Exp. Corp. v. Clallam County,* 36 Wn. App. 56, 57-58, 671 P.2d 806 (1983) (citing *Knowles v. Holly,* 82 Wn.2d 694, 513 P.2d 18 (1973))
> ....

Where

> [t]he statute contains an "and", not an "or" ... [w]e thus read the "and" as simply being an "and." The Legislature would have used the word "or" if it had intended to convey a disjunctive meaning.

Ski Acres, Inc. v. Kittitas County, 118 Wn.2d 852, 856, 827 P.2d 1000 (1992).

Mr. Castillo contends, that the rules of statutory construction establish that his position, concerning the definition of "domestic violence," is the reasonable interpretation of the statute. Interpretation of a statute is a question of law.

> We review *de novo* questions of law, which include statutory construction to determine legislative intent. When faced with an unambiguous statute, we derive the legislature's intent from the statute's plain language alone.

Plemmons v. Pierce County, 134 Wn. App. 449, 456, 140 P.3d 601 (2006).

RCW 9.94A.030(20) is an unambiguous statute. Legislative intent is apparent from the provisions of LAWS OF 2010, Ch. 274, Sec. 101. The enactment specifies the intent to "identify violent perpetrators of domestic violence."

The legislative intent to go after the violent perpetrators is expressed by the inclusion of the referenced statutes in the conjunctive within RCW 9.94A.030(20).

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> ... well-settled principle of statutory construction is that "each word of a statute is to be accorded meaning." *State ex rel. Schillberg v. Barnett,* 79 Wn.2d 578, 584, 488 P.2d 255 (1971). "'[T]he drafters of legislation ... are presumed to have used no superfluous words and we must accord meaning, if possible, to every word in a statute.'" *In re Recall of Pearsall-Stipek,* 141 Wn.2d 756, 767, 10 P.3d 1034 (2000) quoting *Greenwood v. Dep't. of Motor Vehicles,* 13 Wn. App. 624, 628, 536 P.2d 644 (1975)). "[W]e may not delete language from an unambiguous statute: '"Statutes must be interpreted and construed so that all of the language used is given effect, with no portion rendered meaningless or superfluous."'" *State v. J.P.,* 149 Wn.2d 440, 450, 69 P.3d 318 (2003) (quoting *Davis v. Dep't. of Licensing,* 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (quoting *Whatcom County v. City of Bellingham,* 128 Wn.2d 537, 546, 909 P.2d 1303 (1996))).

State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005).

As previously pointed out, RCW 9.94A.525(21) requires that the State plead and prove domestic violence. The Information contains the following language: "Furthermore, you committed this crime against a family or household member. (RCW 10.99.020)"

The State pled domestic violence. It did not prove domestic violence. In order to prove domestic violence the State was required to not only establish a violation of a no-contact order, but also that the violation caused either physical harm or fear of immediate physical harm. The State failed to do so.

Mr. Castillo, in his guilty plea, stated:

> On August 14, 2013 I called Helen Miller from the Yakima County Jail, trying to maintain my life in the community. I knew that there was a restraining order and that I had twice been convicted of violating no contact provisions of no-contact orders.

(CP 11)

Mr. Castillo's statement clearly establishes that no violence was involved with the charged offense.

The guilty plea statement further deleted any reference to a domestic violence offense. Thus, Mr. Castillo preserved his right to challenge the inclusion of a domestic violence tag at the time of sentencing.

Even if the Court were to determine that RCW 9.94A.030(20) is ambiguous, Mr. Castillo is still entitled to have the rule of lenity applied.

> When a statute is ambiguous ... we will resort to principles of statutory construction, legislative history, and relevant case law to assist in interpretation. "'[A] statute is ambiguous if it can reasonably be interpreted in more than one way.'" When interpreting a

> statute, we "must ascertain and give effect to the Legislature's intent," and we will avoid absurd results.

Plemmons v. Pierce County, supra, quoting *Yousoufian v. Office of King County Executive,* 152 Wn.2d 421, 98 P.3d 463 (2004) and *Shoreline Cmty. Coll. Dist. No. 7 v. Employment Sec. Dep't.,* 120 Wn.2d 394, 405, 842 P.2d 938 (1992).

Mr. Castillo continues to insist that there is no ambiguity in the statute. The State did not prove the occurrence of domestic violence.

It should also be remembered that "penal statutes are strictly construed so that only conduct which is clearly within the statutory terms is subject to punitive sanctions." *State v. Johnson,* 119 Wn.2d 167, 172, 829 P.2d 1082 (1992).

II. DOMESTIC VIOLENCE ASSESSMENT

"A court commits reversible error when it exceeds its sentencing authority under the SRA." *State v. Winborne,* 167 Wn. App. 320, 330, 273 P.3d 454 (2012).

Mr. Castillo contends that the sentencing court exceeded its statutory authority when it imposed the DV assessment.

If the State failed to plead and prove that domestic violence occurred, then no DV assessment can be imposed.

CONCLUSION

Mr. Castillo is entitled to have the finding that domestic violence was pled and proven removed from his Judgment and Sentence. The State failed to prove the occurrence of domestic violence under the facts and circumstances of his case.

Mr. Castillo is entitled to have the DV assessment removed from his Judgment and Sentence.

Mr. Castillo respectfully requests that his arguments be granted and that the trial court be directed to correct/modify/change the Judgment and Sentence as it now exists.

DATED this 1st day of February, 2014.

Respectfully submitted,

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COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, Respondent, v. JESSE LEE CASTILLO, Defendant, Appellant.	)	YAKIMA COUNTY NO. 13 1 01354 7 **CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this 1st day of February, 2014, I caused a true and correct copy of the *APPELLANT'S BRIEF* to be served on:

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