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Division II
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NO. 50807-9-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DONALD MARTIN JR.,

Appellant.

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

The Honorable Douglas Goelz, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding that the appellant Don Martin, Jr. “under[stood] that he was to have not contact with Stefani [Staats] or either of the minor children[.]” (Finding of Fact (FF) 10); Clerk’s Papers (CP) 50.¹

2. The trial court erred in finding that the appellant’s testimony was not credible. (FF 22); CP 51.

3. The trial court erred in entering Conclusion of Law 5 regarding contact with A.M. CP 52.

4. The trial court erred in entering Conclusion of Law 6 regarding contact with H.M. CP 52.

5. The trial court erred in convicting the appellant of violation of no contact order as alleged in Counts 4 and 5. (Conclusions of Law 6 and 7.) CP 53.

6. Trial counsel was ineffective for failing to plead and argue a necessity defense when his defense theory to the charged offenses of violation of a no contact order in Counts 4 and 5 was necessity due to his belief that Ms. Staats was prohibited from having contact with minors in her conditions of release, issued in her then-pending prosecution for multiple counts of rape of a child and child molestation in Thurston County Superior Court.

7. The trial court erred in ordering appellant to complete domestic violence perpetrator treatment prior to being able to have contact with his

children and by ordering him to pay a \$100.00 domestic violence assessment.
CP 55.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the appellant's defense was he necessarily had contact with his children after being served with an order requiring him to place the children with their mother Stefani Staats due to his belief, based on a court order provided to him by Ms. Staats' criminal defense counsel regarding a then-pending prosecution for rape of a child and child molestation filed against Ms. Staats in Thurston County Superior Court, that she was prohibited from having contact with minors as part of her conditions of release, was trial counsel ineffective for failing to plead and argue an affirmative defense based on the common law defense necessity? Assignments of Error 1, 2, 3, 4, 5, and 6.

2. The appellant was convicted of two counts of violation of a no contact order regarding his children, A.M. and H.M. The sentencing court imposed conditions requiring the appellant to complete domestic violence perpetrator treatment before being able to have contact with his children. CP 55. Where there is no evidence that the appellant abused his children or that they were harmed in any way while in his care and custody, is the requirement of DV perpetrator treatment reasonably related to the circumstances of the violation of the no-contact order, particularly where the State did not allege domestic violence in its charging document? Assignment of Error 7.

C. STATEMENT OF THE CASE

¹Findings of Fact and Conclusions of Law are contained at CP 48-53.

Donald Martin and Stefani Staats were married for eight years and had two children, A.M.² and H.M.³ 1Report of Proceedings⁴ (RP) at 25. Ms. Staats was charged with rape of a child and child molestation in Thurston County in May, 2016, and they separated on August 10, 2016. 1RP at 27, 57. On that date Ms. Staats left Thurston County and moved to her father's apartment in South Bend, Pacific County, Washington. 1RP at 27-29. Ms. Staats subsequently obtained a temporary protection order prohibiting Mr. Martin from having contact with her and their children and granting residential placement of the children with her and an amended temporary order prohibiting Mr. Martin from having contact with their children. 1RP at 27, 30. Exhibit 2 and 4.

Ms. Staats was charged with rape of a child and child molestation in Thurston County Superior Court in May, 2016. 1RP at 57. Exhibit 11. Ms. Staats was charged with allegedly having sex with a minor patient while she was employed as a nurse at Providence St. Peters Hospital in Lacey, Washington. 1RP at 60. The case was set for trial in July, 2017, approximately two months after the bench trial in May, 2017. 1RP at 57.

Following her arrest on the charges, Ms. Staats was released in early May, 2016, on conditions which included a prohibition against having contact with any minor. 1RP at 55. Ex. 11. Ms. Staats testified that the order was

²DOB: 12/9/11

³DOB: 4/29/10

⁴The record of proceedings consists of the following transcribed hearings: May 12, 2017; 1RP - May 16, 2017 (bench trial, morning session); 2RP - May 16, 2017 (bench trial,

amended to permit her to be around her own children. 1RP at 71. She testified that Mr. Martin was aware of the criminal charges filed against her and her conditions of release in May 2016. 1RP at 63, 65-66.

Pacific County Deputy Sheriff Jesse Eastham stopped a red Cadillac driven by Mr. Martin for speeding on August 16, 2016, in Raymond, Pacific County, Washington. 1RP at 83. Mr. Martin's children A.M. and H.M. were in the car at the time of the stop. 1RP at 88. Mr. Martin had an outstanding warrant for driving while suspended in the third degree. The deputy placed him under arrest, put him in the back of his patrol vehicle, and then served him with the temporary protection and amended temporary order obtained by Stefani Staats, which required that the children be placed in her custody. 1RP at 85, 105. Exhibits 2, 4. The orders also provided that Mr. Martin was required to surrender the Cadillac to Ms. Staats. 1RP at 84. Mr. Martin explained to the deputy that he had a Thurston County order that prohibited Ms. Staats from having contact with the children. 1RP at 86. After checking with the jail, Deputy Eastham was advised that the jail would not accept Mr. Martin for suspended license in the third degree and the deputy removed Mr. Martin's handcuffs. 1RP at 87. Mr. Martin then went to the Cadillac and obtained an order that stated that Ms. Staats could not have contact with minors. 1RP at 87, 93-94. Deputy Eastham identified the document entered as Exhibit 11 as the order that Mr. Martin showed him during the traffic stop. 1RP at 95.

afternoon session; and May 26, 2017 (sentencing).

Mr. Martin's mother, Kathy Martin, arrived at the scene. 1RP at 87. Mr. Martin agreed that he would release the Cadillac to Ms. Staats and he removed his personal possessions from that car and put them in his mother's vehicle. 1RP at 87. Mr. Martin and his mother also studied the protection orders served on him for five to ten minutes. 1RP at 89.

Pacific County Deputy Sheriff John Ashley arrived and requested that Mr. Martin relinquish custody of the children to the deputies while Kathy Martin continued to read the orders. 1RP at 88. Deputy Ashley testified that Mr. Martin said that he would not let the children go to Ms. Staats and that the reason was that she faced criminal charges in Thurston County and that she was not allowed to be around minors. 1RP at 105, 107-08. After contacting the Pacific County civil deputy prosecutor and the elected prosecutor by phone and discussing the protection orders and Ms. Staats' Thurston County conditions of release, the deputies released the children to Kathy Martin, who put them in her car. 1RP at 96, 108. Mr. Martin also got in her car, and they drove to Olympia. 1RP at 96-97, 106.

Deputy Eastham was subsequently advised on August 19, 2016 by police dispatch that Kathy Martin had the children and wanted to place them with the police. 1RP at 90. The deputy met Kathy Martin in South Bend, received A.M. and H.M. from her, and the children were subsequently placed with Stefani Staats. 1RP at 91.

Mr. Martin was charged by second amended information filed May 12, 2017, in Pacific County Superior Court with custodial interference (Counts 1

and 2), violation of a no contact order protecting Stefani Martin⁵ (Count 3), and violation of no contact order regarding alleged contact by Mr. Martin with A.M. and H.M, contrary to RCW 26.50.110(1) (Counts 4 and 5). Clerk's Papers (CP) 41-44.

Mr. Martin waived his right to jury trial and the case was heard on May 16, 2017, by the Honorable Douglas Goelz. 1RP at 10-191, 2RP at 195-337.

Following Deputy Ashley's testimony, the court inquired regarding the amended conditions of release order permitting Ms. Staats to have contact with A.M. and H.M. referenced by Ms. Staats during her testimony. 1RP at 126. Defense counsel stated that neither he nor his client had been presented with an order amending the conditions of her pretrial release, despite her testimony that such an order existed. 1RP at 126. When court resumed the following day, the State introduced an order amending the conditions her of release dated May 5, 2016, allowing contact with her children. 2RP at 196-97.

Ex. 15. Ms. Staats testified that she first provided the document to the prosecution on May 16, 2017, the second day of trial. 2RP at 197. Ms. Staats testified that she and Mr. Martin went to the Thurston County Superior Court on May 5, 2016 in order to obtain the order amending her conditions to permit contact with her children. 2RP at 200. She testified that the May 4th order

⁵At trial, the former Ms. Martin testified that she was previously married to Mr. Martin and that her name is now Stefani Staats. 1RP at 24-25. Mr. Martin, on the other hand, testified that he was not aware if he was divorced from Ms. Staat, saying he was "not informed" of a dissolution. 2RP at 234.

was amended to correct the omission of language permitting contact with her children. 2RP at 210-11.

Mr. Martin testified that he learned that Ms. Staats was charged with multiple sex offenses in April, 2016, from a detective who contacted him regarding investigation of alleged crimes 2RP at 237-38. Mr. Martin was not initially concerned that his wife was charged with the offenses because she denied that she committed the alleged crimes. 2RP at 238-40. Mr. Martin was present in court on May 4, 2016 when the court ordered that she have no contact with minors as part of her conditions of release. 2RP at 241. He stated that contrary to her testimony, he did not transport her to court after her release on May 5th to modify the conditions of release. 2RP at 242. He testified that he received a copy of the discovery in her case on August 10 from her defense counsel, which included the May 4 order establishing conditions of release entered as Exhibit 11. 2RP at 242-43. After receiving the discovery on August 10, he stated that he became concerned about the safety of A.M. and H.M. while in Ms. Staats' care. 2RP at 244. At the time, they were both staying at a hotel near the Thurston County Courthouse, and after reading the discovery Mr. Martin told her that he was taking the children to his mother's house in Raymond. 2RP at 245. He stated that when he was stopped by Deputy Eastham in Raymond, he had copies of the discovery from Ms. Staats' case with him. 2RP at 248. He stated that he did not think that the May 5 amended order (Ex. 14) was included in the discovery he received on August 10 and that he had not seen the amended order prior to the trial on

May 16, 2017. 2RP at 250-53.

During his opening statement, Mr. Martin's counsel, in so many words, explained his defense would be a necessity. Counsel stated

Mr. Martin acted in what he reasonably believed his good faith way, he could not return his children, his own children to the mother of his children, to his wife because there was a court order that prevented her from having contact with these children.

1RP at 21.

During closing arguments, defense counsel argued that "he did what he felt was right to protect his children." 2RP at 322.

The court found Mr. Martin guilty of misdemeanor violation of the protection order regarding A.M. and H.M., as charged in Counts 4 and 5. 2RP at 333. The court acquitted him of Counts 1, 2 and 3. 2RP at 333. The court did not initially rule regarding the lesser included charges of second degree custodial interference in Counts 1 and 2. 2RP at 333. At sentencing, the court declined the State's request to reopen the trial and declined to make a finding of guilt regarding the lesser included charges, noting that it had precluded defense counsel from arguing by ruling before counsel presented closing argument and the court was therefore not going to find Mr. Martin guilty of the lesser included offenses. 2RP at 345.

The court imposed 364 days for each count to be served concurrently, with 180 days suspended. 2RP at 357. The court also ordered that Mr. Martin have no contact with his children until he receives court permission and that

he attend an intensive parenting class and complete a domestic violence perpetrator class. 2RP at 357-58.

The court imposed legal financial obligations including \$500.00 crime victim assessment, \$100.00 domestic violence assessment, and \$200.00 court costs. RP (5/26/17) at 358; CP 55.

Timely notice of appeal was filed June 16, 2017. CP 57. This appeal follows.

D. ARGUMENT

1. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PLEAD AND ARGUE THE AFFIRMATIVE DEFENSE OF NECESSITY

Mr. Martin's defense theory was he refused to give the children to law enforcement to place with Ms. Staats, and left with the children in his mother's car, because he believed that a court order entered May 4, 2016, prohibited her from having contact with the children. 1RP at 253. In other words, Mr. Martin presented a necessity defense, as made clear by counsel's opening statement and closing argument. 2RP at 322. Counsel nevertheless declared before trial that the defense would be general denial. 1RP at 19. The court was therefore unable to consider Mr. Martin's defense. Trial counsel was ineffective for failing to plead and argue a defense based on necessity.

a. Mr. Martin had the right to effective assistance of counsel.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States

Constitution and Article I, Section 22 of the Washington State Constitution. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. *Strickland*, 466 U.S. at 687; *Thomas*, 109 Wn.2d at 225-26. To establish the first prong of the *Strickland* test, the defendant must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." *Thomas*, 109 Wn.2d at 229-30. To establish the second prong, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove that he received ineffective assistance of counsel. *Thomas*, 109 Wn.2d at 226. Rather, only a reasonable probability of such prejudice is required. *Strickland*, 466 U.S. at 693; *Thomas*, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 226.

A lawyer's strategic choices made after thorough investigation of the law and the facts rarely constitute deficient performance. *Strickland*, 466 U.S. at 690. In reviewing the first prong of the Strickland test, the appellate

courts presume that defense counsel was not deficient, but this presumption is rebutted if there is no possible tactical explanation for counsel's performance. *Strickland*, 466 U.S. at 689-90; *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The appellate court will find prejudice under the second prong if the defendant demonstrates "counsel's errors were so serious as to deprive the defendant of a fair trial." *Strickland*, 466 U.S. at 687.

b. Counsel's failure to assert a necessity defense constituted deficient performance.

Mr. Martin's defense at trial regarding Counts 4 and 5 is that he believed that conditions of release for Ms. Staats entered in her Thurston County child rape and molestation case prohibited her from having contact with minors, including her own children. Ex. 11.

While Mr. Martin testified regarding his reason for not giving A.M. and H.M. to the deputies and leaving the scene with his children, and where counsel elicited testimony that despite being served with the temporary no contact orders, he was not placed under arrest and in fact was allowed to leave with his children, his attorney did not put this testimony in a recognized, available legal defense for the court by offering a necessity defense.

A criminal defendant has a constitutional right to present a defense. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d

503 (2006). “Necessity” is a common law defense. *State v Jeffrey*, 77 Wn. App. 222, 226, 889 P.2d 956 (1995). The defense of necessity is available to a defendant when ‘the physical forces of nature or the pressure of circumstances cause the accused to take unlawful action to avoid a harm which social policy deems greater than the harm resulting from a violation of the law.’ *State v. Parker*, 127 Wn.App. 352, 354, 110 P.3d 1152 (2005). (quoting *State v. Gallegos*, 73 Wn.App. 644, 650, 871 P.2d 621 (1994)). Necessity is a common law defense that excuses otherwise criminal conduct when it is necessary to avoid a greater harm. *Gallegos*, 73 Wn.App. at 650-51; *Shaun P. Martin, The Radical Necessity Defense*, 73 U. Cin. L. Rev. 1527 (2005).

The necessity defense essentially permits an accused to admit the elements of an offense but avoid punishment if her illegal acts were designed to obtain a greater good. A driver may exceed the speed limit to rush an injured person to the hospital. An onlooker is permitted to destroy a home to prevent a fire from spreading. A prisoner may leave a burning jail. A captain may enter an embargoed port in a storm.

Martin, *The Radical Necessity Defense*, 73 U. Cin. L. Rev. at 1727-28.

In order to be entitled to a necessity instruction, a defendant must show that (1) he believed it necessary to commit a crime in order to avoid or minimize harm; (2) the harm the defendant sought to avoid was greater than

the harm resulting from the violation of the law; and (3) no legal alternative existed. *Jeffrey*, 77 Wn.App. at 225. Washington's common law defense of necessity is included in the pattern jury instructions. 11A Washington Practice: Washington Pattern Jury Instructions Criminal, 18.02. The pattern instruction reads:

Necessity is a defense to the charge of (fill inappropriate offense) if

- (1) the defense reasonably believed the commission of the crime was necessary to avoid or minimize a harm; and
- (2) the harm sought to be avoided was greater than the harm resulting from a violation of the law;
- (3) the threatened harm was not brought about by the defendant; and
- (4) no reasonably [equally effective] legal alternative existed.

This defense must be established by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

WPIC 18.02.

Mr. Martin's case fits the requirements for a necessity defense. Mr. Martin reasonably believed that Ms. Staats was prohibited from having contact with minors, based on the May 4 order that he received from Ms. Staats' criminal defense attorney on August 10. Mr. Martin testified that he was not present in court when Ms. Staats' conditions of release were modified on May 5; he picked her up when she was leaving the courthouse.

2RP at 241, 286-87 . He testified that the amended order was not contained in the discovery in her case that he received on August 10. 2RP at 241, 253.

Even more compellingly, contrary to Finding of Fact 10, the deputies accepted, after consultation with Pacific County prosecutors, the conclusion that the May 4 order was controlling and declined to arrest Mr. Martin for violation of the protection order when he got into his mother's car and left with the children, who were released to Mr. Martin's mother. The deputies' decision to permit Mr. Martin to leave with the children was done after consulting with prosecutors during the roadside investigation on August 16.

After speaking with Pacific County civil deputy prosecuting attorney and apparently the elected prosecutor—who tried the case—both deputies permitted Mr. Martin to leave with his children and he was not placed under arrest. The deputies contacted the Pacific County prosecutor's office, who presumably had near-instantaneous access to all pleadings and orders entered in Ms. Staats' criminal case via the Odyssey Portal, the court records platform used by Thurston County Superior Court.⁶

Mr. Martin's position is understandable; no one, and in particular the prosecutors called by the deputies while serving Mr. Martin the no contact orders on the roadside, believed that an amended order was entered on May 5.

⁶<http://www.courts.wa.gov/index.cfm?fa=home.sub&org=sccms&page=OdysseyPortalRegister>

In addition, Mr. Martin did not cause his wife's legal problems resulting in her arrest and subsequent release on conditions.

Finally, Mr. Martin had no reasonable alternative. The "rescinded" arrest and service of protection orders took following a traffic stop of a car driven by Mr. Martin. In accordance with the orders served on him, he surrendered the Cadillac to the deputies, leaving him on the side of the road in a rural town without transportation. Mr. Martin was left no other means of transportation after tendering the Cadillac keys to the deputies and therefore had no reasonable alternative other than to get into his mother's car with his children. Moreover, the deputies gave every indication that he was lawfully authorized to be in his mother's car with his children; he was not arrested and allowed to leave the scene without further incident.

c. Mr. Martin's trial attorney was prejudicially ineffective by failing to argue defense of necessity

Defense counsel must, "at a minimum, conduct a reasonable investigation" in order to make informed decisions about how to best represent his client. *In re Personal Restraint of Davis*, 152 Wn.2d 647, 721, 101 P.3d 1 (2004) (emphasis omitted) (quoting *In re Personal Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001)). "This includes investigating all reasonable lines of defense." *Davis*, 152 Wn.2d at 721 (citing

Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986)). Mr. Martin readily admitted he was served with the temporary no contact orders but was unable to comply because of his belief—which was apparently shared by the deputies and Pacific County prosecutors—that Ms. Staats could not have contact with minors. Had counsel presented an affirmative necessity defense, the court could have concluded by a preponderance of the evidence that Mr. Martin’s actions fit that defense because (1) Mr. Martin was under a good faith belief—which was tacitly acknowledged by the Pacific County prosecuting attorney—that the May 4, Thurston County order prevented the children from being placed with Ms. Staats, (2) it would have been a greater legal harm if the children were placed with her, (3) Mr. Martin did not create this legally bewildering situation; that it was entirely the result of Ms. Staats’ criminal actions, and (4) no reasonable alternatives existed.

The judge did not have the opportunity to determine if Mr. Martin’s decision to not give the children to the deputies was excused by necessity because the trial court was not provided with a formal argument on that affirmative defense. Although defense counsel argued Mr. Martin’s actions were made in “good faith,” and therefore excusable, counsel’s failure to proffer a necessity defense gave him no legal basis to argue his client should

therefore be found not guilty of Counts 4 and 5.

d. Mr. Martin's convictions must be reversed.

Mr. Martin did not receive a fair trial because his attorney did not plead or present a necessity defense; an affirmative defense recognized by Washington law and which would have been considered by the court if argued. Therefore, this Court should reverse his convictions and remand for a new trial. *Thomas*, 109 Wn.2d at 229, 232.

2. THE TRIAL COURT ERRED BY ORDERING MR. MARTIN TO COMPLETE DOMESTIC VIOLENCE TREATMENT BECAUSE IT WAS NOT REASONABLY RELATED TO THE CIRCUMSTANCES OF THE OFFENSE

A trial court may impose only a sentence authorized by statute. *State v. Barnett*, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). An unauthorized sentence is void. *State v. Paulson*, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). Whether a trial court exceeded its statutory authority is an issue of law reviewed de novo. *State v. Murray*, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003). Erroneous sentences may be challenged for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

Mr. Martin was convicted of misdemeanor offenses and therefore was not sentenced under the Sentencing Reform Act. The trial court ordered Mr. Martin to complete domestic violence perpetrator treatment, pay a \$100

domestic violence assessment, and obtain permission from the court before being able to have contact with H.M. and A.M. without connecting these requirements to Mr. Martin's convictions for violation of a protection order. 2RP at 357-58; CP 51.

There is nothing in the record showing any relationship between domestic violence and the no contact violation. The testimony involving domestic violence involved Ms. Staats only, and even if factual, had no bearing on the two offenses for which he was convicted. The evidence presented at trial is that Mr. Martin had sole custody of the children from August 10 until they were transferred to law enforcement on or August 19, 2016, and by all accounts the children were well cared for while in his custody.

The crimes at issue were not charged as a domestic violence crime and there is no relationship connecting Mr. Martin's alleged crimes to domestic violence. Therefore the court exceeded its authority by imposing domestic violence perpetrator treatment and a \$100.00 domestic violence assessment. CP 55. The condition requiring such treatment and corresponding LFO should be stricken from the judgment and sentence. To fail to do so is error. See, e.g. this Court's unpublished opinion in *State v. Rudolph*, No. 49126-5-II, 2017 WL 5593789, at *1 (Wash. Ct. App. November 21, 2017) (trial court

erred abused its discretion by ordering that Rudolph obtain a domestic violence evaluation as a condition of his community custody here there are no facts that the crime involved domestic violence).⁷

3. **THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.**

If Mr. Martin does not substantially prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. At sentencing, the court imposed fees, including \$500.00 victim assessment and \$100.00 domestic violence assessment. CP 55. The trial court found him indigent for purposes of this appeal.

CP 60. There has been no order finding Mr. Martin's financial condition has improved or is likely to improve. Under RAP 15.2(f), "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent."

This Court has discretion to deny the State's request for appellate costs. Under RCW 10.73.160(1), appellate courts "may require an adult offender convicted of an offense to pay appellate costs." "[T]he word 'may' has a permissive or discretionary meaning." *State v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). The commissioner or clerk "will" award costs to the State if the State is the substantially prevailing party on review, "unless the appellate court

⁷Unpublished opinion cited pursuant to GR. 14.1(a) ("unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.")

directs otherwise in its decision terminating review.” RAP 14.2. Thus, this Court has discretion to direct that costs not be awarded to the State. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016). Our Supreme Court has rejected the concept that discretion should be exercised only in “compelling circumstances.” *State v. Nolan*, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In *Sinclair*, the Court concluded, “it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant’s brief. *Sinclair*, 192 Wn. App. at 390. Moreover, ability to pay is an important factor that may be considered. *Id.* at 392-94. Based on Mr. Martin’s indigence, this Court should exercise its discretion and deny any requests for costs in the event the state is the substantially prevailing party.

E. CONCLUSION

For the foregoing reasons, Mr. Martin respectfully requests this Court reverse and remand the convictions. In the alterative, this Court should strike the challenged condition of the Judgment and Sentence requiring completion of domestic violence treatment and corresponding \$100.00 domestic violence assessment.

DATED: December 4, 2017.

Respectfully submitted,
THE TILLER LAW FIRM



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CERTIFICATE OF SERVICE

The undersigned certifies that on December 4, 2017, that this Appellant's Corrected Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a copy was emailed to Mark D. McClain, Pacific County Prosecutor's Office and copies were mailed by U.S. mail, postage prepaid, to the following Appellate:

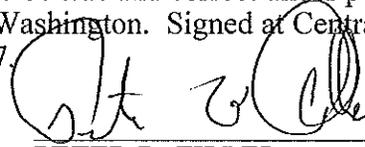
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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on December 4, 2017.



PETER B. TILLER

THE TILLER LAW FIRM

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