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Court of Appeals
Division II
State of Washington
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No. 50807-9-II

THE COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DONALD B. MARTIN JR.,

Appellant.

BRIEF OF RESPONDENT

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I. RESPONSE TO PETITIONER'S ASSIGNMENTS OF ERROR

1. There was trial court did not err when finding Donald Martin Jr. understood he was not to have contact with his estranged wife and their minor children.
2. Credibility determinations are for the finder of fact and the trial court reasonably concluded Martin's testimony was not credible.
3. Sufficient evidence supported the trial court's conclusion of law #5 regarding Martin's contact with A.M.
4. Sufficient evidence supported the trial court's conclusion of law #6 regarding Martin's contact with H.M.
5. Sufficient evidence supported the convictions.
6. Trial counsel was not ineffective.
7. The trial court's post-conviction requirement that Martin complete domestic violence perpetrator treatment was proper as was the domestic violence assessment.

II. RESPONSE TO PETITIONER'S ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. The defendant asserted necessity throughout the trial, and while it may not have been "formally" plead, the trial court, in finding the defendant not credible, rejected his assertion of necessity. Moreover, trial counsel's tactical decision addressing necessity was warranted as Donald Martin Jr. permitted Stefani Staats¹ to be with their children after Thurston County had charged her, and he produced for the trial court an order purporting to prohibit Staats from being around minors, yet he knew that order was replaced by an order authorizing her to be with their children. Thus, his

¹ Stefani Martin and Donald Martin Jr. had apparently separated at the time of this incident and by the time the matter proceeded to trial Mrs. Stefani Martin had obtained a divorce and returned to using her maiden name, Staats. She will, therefore, be called Staats. RP 74

assertion based upon a pre-trial release order, as the trial court found, sought to mislead authorities and belies his assertion of necessity.

2. Evidence produced at trial demonstrated Martin engaged in a long-term pattern of assaults of his former wife, including assaults that occurred in front of their children. As such, perpetrator treatment is an appropriate condition of probation.

III. STATEMENT OF THE CASE

Donald Martin Jr. was charged by amended information with first degree custodial interference and two counts of violating a no contact order following Martin's decision to withhold two children, H.R.M.² and A.V.M.³ from his then wife, Stefani Staats, despite a Superior Court Order making provision for the residential custody of the children. RP 24-26.⁴ CP 41, 45, Exhibits 2, 4. The order further prohibited Martin from having any contact with H.R.M. and A.V.M. Id.

Martin and Staats had a turbulent eight-year marriage and he frequently assaulted Staats, telling her that she deserved it. RP 32. Following a particularly brutal assault that occurred on July 28, 2016, Staats and Martin separated on August 10, 2016 when Staats called her father to take her to the ER for medical assessment. RP 28, 48, 210, 215. Staats was diagnosed with an orbital fracture as a result of

² DOB: 4/29/10

³ DOB: 12/9/11

⁴ RP is a continuous transcript of several hearings and referenced here as RP.

the July 28, 2016 assault. PR 28, 48. Martin was subsequently charged in Thurston County with Second Degree Assault, Domestic Violence; Harassment-Threats to Kill, Domestic Violence; and four counts of Fourth Degree Assault, Domestic Violence. Martin was represented by Erik Kupka, who was also trial counsel in this matter. RP 268-69.⁵ Martin frequently assaulted Staats and threatened to take the children – saying that Staats would never see their children again. RP 31, 35-39. Despite those threats, and as a result of the July 28, 2016 assault, Staats sought a domestic violence no contact on August 15, 2016, that was granted by the Pacific County Superior Court. PR 28, 48, Exhibit 2, 4. The order prohibited Martin from contacting Staats or their two minor children, and further made residential provision for the couple's minor children. Exhibit 2, 4.

On August 16, 2016, Pacific County Deputy Sheriff Jesse Eastham stopped Martin for speeding and arrested Martin for driving while his license was suspended. RP 81-84, 92. Deputy Eastham served Martin the protection order prohibiting Martin from having contact with Staats or their two minor children, H.R.M. and A.V.M.,

⁵ Thurston County Superior Court in Cause Number 16-1-01461-34. The felony matters involved Staats as the victim and the gross misdemeanor assaults involved the children. Ultimately Martin pleaded guilty to Second Degree Assault and received a 14-month prison sentence. RP 217, 268.

who were in the vehicle at the time of the traffic stop. RP 84, 104, Exhibit 2, 4. Deputy Eastham explained the orders, Exhibits 2 and 4, and informed Martin that they prohibited him from contact with Staats or their minor children. RP 86. The order also required Martin to give the children and the vehicle to Staats. RP 87. Martin called his mother, Kathleen Martin,⁶ to the scene of the traffic stop and they transferred items from Martin's vehicle into Kathleen's vehicle. Martin and his mother were observed by the Deputies reading through the protection orders and they confirmed an understanding that Martin could not have the children, including a request for Martin to give the children to the Deputy. RP 87-89. The Deputies did not have a *Writ of Habeas Corpus* authorizing them to forcible take the children and, as a result, the children were released to Kathleen Martin. RP 96-97, 106-07, 109, 119, 124. Martin left in his mother's vehicle with the two children in violation of the no contact order. RP 98-99, 124, 08-09, 176-77. Deputy Eastham's next involvement was three days later on August 19 at 2216 hours when Kathleen surrendered the children to law enforcement. RP 89-91, 315. The children were with Martin throughout this period of time contrary to the protection order. RP 124, 151-52, 158-59.

⁶ Using Kathleen Martin's first name to avoid confusion. No disrespect is intended.

Deputy Jon Ashley arrived to assist Deputy Eastham. Deputy Ashley informed Martin of the order prohibiting contact with the minor children and Martin said he would not allow the children to go with Staats. RP 105, 107, 120. Martin asserted there was a Thurston County order prohibiting Staats from being in contact with minors, including their children. RP 86, 105, 107, Exhibit 11. The order Martin was presented to the Deputies was among a handful of discovery items Martin claimed was from Staats' Thurston County case. RP 114, 174, 176, 185, Exhibit 11.

Martin asserted at trial that he necessarily withheld the children from Staats as a result of the May 4, 2016 Thurston County pre-trial release order which issued following Staats May 2, 2016 arrest for third degree child rape and molestation. RP 208, 211. To bolster his necessity defense, Martin asserted that: 1) he was not present in court on May 5, 2016 when the release conditions were amended to correctly reflect the trial court's May 4, 2016 oral ruling, 2) he did not discuss the amended release conditions with Staats following her trip to court on May 5, 2016 to seek amendment, and 3) they were they among the inch-and-a-half thick set of documents in the discovery for Staats' criminal case. RP 241-42, 250, 253, 297. The trial court did not find Martin credible, saying "I don't believe a

word your client says about that.” RP 320. The trial court found Martin “intentionally sought to mislead the police by presenting an order [Exhibit 11] he knew was not true.” RP 321. The trial court indicated Martin’s conduct was intentional wrongdoing. *Id.* Despite trial counsel asserting Martin was acting to protect his children from Staats, the court generously said Martin’s conduct was “irrational.” RP 322. The trial court found Martin intentionally violated the court’s order and did so with the intent to deny Staats the children. RP 332-33, 335.

The trial court’s findings were supported by the record. While Martin asserted at trial a necessity defense, he, inconsistently, testified that he did not intent to deprive Staats of having the minor children and that if the police came looking for the children he would have peacefully given the children to them. RP 261, 263-64, 277. Martin further asserted no law enforcement officer asked him to turn his children over to Staats. RP 250-51, 264. Deputy Ashley disagreed and specifically said he tried to convince Martin to turn the children over on August 16, 2016 while on the traffic stop. RP 301-02, 305-06. Martin never told either Deputy that he felt the children were in any danger from Staats nor did not request any law enforcement investigation of Staats. RP 86, 92-93, 95, 107-108, 122.

Martin did not take any steps to divest Staats of the children. RP 177, 247. In fact, Martin's anger was about Staats lying rather than about the Thurston County allegations and not about protecting the children for an alleged child molester. RP 169, 295-96. Martin first became aware of the allegations against Staats in April and Martin testified that he even asked investigating detectives to hold off on arresting her so that she could be present for his son's April 29th birthday celebration at Great Wolf Lodge. RP 235, 237-38. Martin testified that he did not have any concerns for the safety of his children. RP 238. Staats was charged in May and Martin received the discovery in Staats' criminal case during the end of July or the beginning of August. RP 169-70. Included in the "inch-and-a-half" of discovery was a pre-trial release order that Martin asserted he gave to Deputy Ashley at the August 16, 2016 traffic stop. RP 249. Martin asserted Exhibit 14, 15, the amended pretrial release order, was not among the discovery. RP 250. Yet, Martin contradicted himself indicated "it was the following day I had that next order [Exhibit 14]" which authorized Staats to have contact with her minor children. RP 252. Martin further contradicted himself, asserting the first time he had seen Exhibit 14, the order permitted Staats to be around her minor children, was in court at trial. RP 253-54. However, the record

established that Staats was permitted to be in contact with her children despite her Thurston County charge. Exhibit 15. Martin was with Staats on May 5, 2016 when the Thurston County Superior Court amended Staats' release conditions. CP 199-203, 205-06. Martin's further assertions that he was simply unaware of Staat's court matters is inconsistent with his testimony as Martin, in communication with the bondsman and Staats' attorney (who Martin said he retained), learned Staats was to be released and went to pick her up. RP 287, 288. Martin would later say that he was with the children and found her walking on May 4, 2016 in the morning. RP 288. Martin says Staats left the following morning to go to court to correct the order related to her children, yet Martin asserts when Staats returned she never showed him Exhibit 15, authorizing her to be with the children, and they never discussed it. RP 290. Moreover, following Staats arrest, she returned to her home and she, Martin, and the two minor children lived together through until August 10, 2017. RP 28, 48, 210, 215.

Martin's inconsistencies mounted because he was present on May 4, 2016 when the court set Staats release conditions, which specifically authorized Staats to have contact with her minor children. RP 211, 285. In error, the written order of the court reflected no

contact with minor children. RP 208-211, Exhibit 11. Staats was released on bond which Martin's mother posted. RP 286. While Martin asserted at trial he was not aware she could be around the children, his direct testimony indicated Staats' attorney successfully argued for her to be permitted to have contact with her minor children. RP 292. Further, the following day, May 5, 2016, Martin took Staats to Thurston County Superior Court to amend Exhibit 11, the written release condition order, to reflect to the court's oral ruling permitting contact with her minor children. *Id.* The superior court amended Staats' written order of release authorizing Staats to have contact with her biological, minor children which conformed to the court's oral ruling. CP 208-09, Exhibit 15. Martin was present in court when the order was amended. CP 208, 211.

Martin testified that he received two orders prohibiting his contact with his minor children and was aware as of August 16, 2016 he was prohibited from having contact with Staats and his two minor children. RP 256, 260, 262-63, 271-72, 275, 277, Exhibit 4. Martin knew he was prohibited from contacting his minor children and intentionally withheld them from Staats. RP 107, 332-33, 335. As a result Staats requested a *writ* and *warrant in aid of a writ* to secure her children, and Pacific County Sheriff's Deputies attempted for

several day to locate the minor children, including attempts at Kathleen's home and throughout Pacific and Thurston Counties. CP 111, 121, 221-226, Exhibits 7, 8. Pacific County Sheriff's also sought and received an arrest warrant for Martin for custodial interference (this action) and began to searching for the Martin children. PR 225. The manhunt included tracking Martin's phone, and attempting to locate Martin throughout Pacific and Thurston Counties. RP 226. Throughout this manhunt, Martin had the children and never sought law enforcements assistance. PR 229-31.

Martin was convicted of violating a no contact order and timely sought review.

Martin's statement of the case fails to effectively address Martin's knowledge of Staat's amended pre-trial release conditions and the timing thereof when he asserts the dates of the release conditions as "early May." Brief of Appellant at 4.⁷ The State's statement if the case more clearly outlines those dates.

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⁷ While it is not relevant on review it should be noted that Martin's statement of the case also reflects he was arrested for an outstanding warrant. That is in error. Martin was arrested following a speeding infraction because he was driving while suspended at the time he was contacted by law enforcement. RP 83.

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I. **ARGUMENT**

1. TRIAL COUNSEL WAS NOT INEFFECTIVE

Appellant asserts trial counsel was ineffective because he did not “plead and prove” necessity as a defense because necessity and general denial were presented by the defense to the trial court.⁸ It is evident from the record the trial court considered and rejected Martin’s assertion of necessity.

Martin’s asserted he “reasonably believed” Staats was prohibited from having contact with their minor children and, as a result, he knowingly violated a no contact order to protect his minor children from their mother.⁹ Martin’s claimed a Thurston County pre-trial release condition order issued on May 4, 2016 prohibited Staats from being around their minor children. However, Martin was in court when the Thurston County Judge orally ruled Staats was permitted to be around her children, but a scrivener’s error on the document incorrectly reflected no contact with any minor children. This order was amended the following day. Nevertheless, on August 16, 2016 when officers attempted to have Martin relinquish the children

⁸ Brief of Appellant at 9

⁹ Brief of Appellant at 11, 13

because he was now prohibited from having contact with Staats or the minor children he refused. He would later assert this was because of the May 4, 2016 order. Martin would further assert he was unaware Staats could have contact with her children and that he was unaware of the May 5, 2016 amended release condition order authorizing Staats to have contact with her minor children. The trial court soundly rejected Martin's claims and correctly found Martin intentionally violated a no contact order despite his claims he did so to protect the children from their mother.

A. Standard of Review

A claim of ineffective assistance of counsel requires a showing that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984). If one prong of the test fails, a reviewing court need not address the remaining prong. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). For the deficiency prong of ineffective assistance of counsel, a reviewing court gives great deference to trial counsel's performance and begins the analysis with a strong presumption that counsel was effective. *State v. West*, 185 Wn. App. 625, 638, 344 P.3d 1233 (2015). Deficient performance is

performance that fell below an objective standard of reasonableness based on consideration of all the circumstances. *State v. McFarland*, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). The appellant bears the burden to prove ineffective assistance of counsel. *McFarland*, 127 Wn.2d at 335.

Trial strategy and tactics cannot form the basis for a finding of deficient performance. *State v. Johnston*, 143 Wn. App. 1, 16, 177 P.3d 1127 (2007). The defendant must show in the record the absence of a legitimate strategic or tactical reason supporting the challenged conduct or omission by counsel and has the burden of showing a lack of a legitimate strategy. *McFarland*, 127 Wn.2d at 336.

For one to show ineffective assistance of counsel for failing to assert the defense of necessity, the defendant must first establish entitlement to the instruction or defense. *Johnston*, 143 Wn. App. at 21. Put another way, while the failure to request an instruction on a potential defense can constitute ineffective assistance of counsel, counsel's performance is not deficient if the defendant would not have received the proposed instruction. *State v. Flora*, 160 Wn.App. 549, 555, 249 P.3d 188 (2011).

Necessity is likened to self-defense and 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. Jeffrey*, 77 Wn. App. 222, 224–25, 889 P.2d 956 (1995); *United States v. Lemon*, 824 F.2d 763, 765 (9th Cir. 1987); *United States v. Harper*, 802 F.2d 115, 117 n.1 (5th Cir. 1986). The defense is not applicable where the compelling circumstances have been brought about by the accused or where a legal alternative is available to the accused. *State v. Gallegos*, 73 Wn.App. 644, 650, 871 P.2d 621 (1994), citing *State v. Diana*, 24 Wn.App. 908, 913–14, 604 P.2d 1312 (1979).

B. Martin was not entitled to a necessity defense and has failed to demonstrate his attorney's performance was deficient.

Necessity was not available to Martin. Here, Martin, in committing a second degree assault against Staats, a crime he admitted and was sentenced to 14 months in prison for committing, resulted in the very protection order he violated. This order placed the children with Staats and was brought about by Martin's actions, specifically committing a violent assault against Staats (and one of the minor children). Thus, necessity was not authorized.

Necessity was also not available because there was a legal alternative available to Martin. Martin asserted the children were in his possession between August 10 and 16, before a Pacific County Superior Court ordered custody to be with Staats. Martin said he went to the Thurston County family court and purchased divorce paperwork, a protection order, and paperwork for temporary protection and custody of the children. PR 247. However, he never completed the paperwork or sought court involvement. *Id.*

Finally, this matter was resolved at a bench trial. Because bench trials place judges in a unique position requiring them to sit as both arbiters of law and as finders of fact, we presume they considered only admissible evidence. *State v. Read*, 147 Wn.2d 238, 53 P.3d 26 (2002); *State v. Miles*, 77 Wn.2d 593, 464 P.2d 723 (1970). While this is a rebuttable presumption, the defendant here has failed to meet his burden of establishing the trial court did not consider his defense. In fact the contrary is clear from the record. The trial court found Martin's conduct "irrational" and the trial court did not "believe a word [Martin] says" regarding his knowledge of the amended pre-trial release conditions or any prohibition that Staats was not to have contact with the minor children. In fact the trial court found Martin "intentionally sought to mislead the police by presenting

an order he knew was not true,” and did so with the intent to deny Staats the children. RP 321, 332-33, 335. Since issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence is left to the fact finder pursuant to *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004), a reviewing court must appreciate the trial court considered Martin’s necessity claim and, in the strongest words possible, rejected he need to keep the children from their mother. It is evident from the record the trial court simply did not find Martin’s assertion persuasive. All evidence drawn from the trial court’s findings indicate Martin was not acting to protect his children, but instead to inflict further injury to Staats. Thus, while Martin’s attorney did not enter a formal defense of necessity, it is evident he argued the defense and the trial court considered and rejected the defense.

Appellant’s claim, unsupported in the record, that Martin was left in a rural area without means of transportation and after tendering the keys to the vehicle and “that he had no reasonable alternative other than to get into his mother’s car with his children”¹⁰ was rejected by the trial court. Further, these action Martin’s assertions belie the record. Martin left the vehicle which had been directed

¹⁰ Brief of Appellant at 13, 15

returned to Staats by a Superior Court Order, yet retained the key fob, rendering the vehicle inoperable. RP 110, 260-61, 275. Further, Martin was not stranded on the side of a rural highway, but was instead in the city of Raymond, Washington. RP 151.

Appellant further asserts deputies accepted the May 4 order as controlling.¹¹ To the contrary, each Deputy testified they felt the protection order requiring law enforcement to secure the minor children and deliver them to Staats did not provide authority to force Martin to surrender the minor children. RP 305. Instead they believed a *Writ and Warrant in Aid of Writ* was necessary. RP 96-97, 106-07, 109, 119, 124. Martin further asserts that “no one, and in particular the prosecutors...believed that an amended order was entered on May 5.”¹² Martin’s assertions fail and his trial counsel certainly realized this as well as their reports clearly document they believed a Writ necessary and never considered the Thurston County Order on Staats’ release. RP 303, 305.¹³ Further, Martin’s attorney in that

¹¹ Brief of Appellant at 14

¹² Brief of Appellant at 14.

¹³ Appellant incorrectly references Denise “Urlette” (which is actually Rowlett) as a Civil Deputy Prosecutor for the Pacific County Prosecutor’s Office. Brief of Appellant at 14. Ms. Rowlett is the Sheriff’s Civil Deputy and is not an attorney. However, she is responsible for writs and other civil matters which require a Sheriff’s Office response. Appellant also asserts, without citation to the record, that the “Pacific County prosecutor’s office . . . had near-instantaneous access to all pleadings and orders entered in Ms. Staats’ criminal case via the Odyssey Portal...”[sic]. While we currently have access to some documents, Odyssey was not available to the Prosecutor’s Office nor

matter (Erik Kupka) understood the issues because he represented Martin in Thurston County and in this matter.

C. Sufficient Evidence Supported The Conviction

Appellant complains the trial court erred finding Martin understood he was not have no contact with Staats or his minor children¹⁴ and that Martin knowingly violated a protection order prohibiting contact with A.M. and H.M..¹⁵ However, Martin's sufficiency of the evidence complaint is given only passing treatment and lacks reasoned argument and is therefore insufficient to merit judicial consideration. *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). Nevertheless the State will address the sufficiency below.

Martin assigns error to the trial court's finding of fact 10, finding of fact 22 (addressed elsewhere), and conclusions of law 5, 6, and 7 related to whether sufficient evidence support the convictions. Unchallenged findings are verities on appeal. *State v. Bonds*, 174 Wn.App. 553, 299 P.3d 663 (2013), RAP 10.3(g).

consulted. Moreover, such access would have shown that the May 4 order had been modified by the May 5 Amended Release Condition Order. RP 25, 253-54

¹⁴ Brief of Appellant at 1, Assignment of Error 1, trial court's finding of fact 10, CP 50

¹⁵ Brief of Appellant at 1, Assignments of Error 3, 4, 5; trial court's conclusions of law 4, 5, 6, 7, CP 52

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i. Standard of Review

Sufficient evidence supports the verdict if a rational person viewing the evidence in the light most favorable to the State could find each element proven beyond a reasonable doubt. *State v. Montgomery*, 163 Wn.2d 577, 586, 183 P.3d 267 (2008). An appellant claiming insufficiency of the evidence admits the truth of the State's evidence and all inferences reasonably drawn from it. *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable, and appellate courts defer to the trier of fact on conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d at 874–75. The credibility and veracity of witnesses are best determined by the fact finder. *In re Witt*, 96 Wn.2d 56, 633 P.2d 880 (1981). “Intent” to commit a criminal act means more than merely “knowledge” that a consequence will result. *State v. Caliguri*, 99 Wn.2d 501, 505, 664 P.2d 466 (1983). “Intent” exists only if a known or expected result is also the actor’s “objective or purpose.” *Caliguri*, 99 Wn.2d at 506 (citing RCW 9A.08.010(1)(a)). Where there is no direct evidence of the actor’s intended objective or purpose,

intent may be inferred from circumstantial evidence. *Id.* (citing *State v. Shelton*, 71 Wn.2d 838, 839, 431 P.2d 201 (1967)). Intent may be inferred from a defendant's conduct where it is plainly indicated as a matter of logical probability. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997) (citing *State v. Bright*, 129 Wn.2d 257, 270, 916 P.2d 922 (1996)). This includes inferring or permissively presuming that a defendant intends the natural and probable consequences of his or her acts. *Caliguri*, 99 Wn.2d at 506 (citing *State v. Caldwell*, 94 Wn.2d 614, 617–18, 618 P.2d 508 (1980)).

ii. Sufficient Evidence Supported the Convictions

Here, Martin was stopped and contacted by two Deputy Sheriff's Officers who serve him with a protection order and explain he is not to have contact with Staats or his two minor children and must surrender the vehicle and the children to law enforcement. RP 81-84, 86-87, 92, 104. Martin discussed the matter with his mother and they remove items from the vehicle so that the Sheriff's Deputies can transfer it to Staats. RP 87-89. However, Martin says he would not give the children to Staats. RP 105, 107, 120. The Deputies did not have a Writ of Habeas Corpus authorizing them to forcible take the children and, as a result, the children were released to Kathleen

Martin. RP 96-97, 106-07, 109, 119, 124. Martin gets into the vehicle with H.R.M. and A.V.M in violation of the order. RP 24-26, 98-99, 124, 08-09, 176-77, CP 41, 45, Exhibits 2, 4. Martin knowingly violated the contact order.

Admitting the truth of the State's evidence and all inferences reasonably drawn therefore, and viewing the evidence in the light most favorable to the State, as required, there is sufficient evidence to support the verdicts.

2. THE TRIAL COURT'S IMPOSITION OF DOMESTIC VIOLENCE TREATMENT AND A ONE HUNDRED DOLLAR ASSESSMENT WAS PROPER.

Appellant asserts there was "nothing in the record showing any relationship between domestic violence and the no contact order violation."¹⁶ The contrary is true. The prior domestic violence assault formed the basis for this protection order, which Martin violated. Martin fractured his wife's orbital socket in front of their children. He also assaulted one of his children. These assaults were charged and he subsequently pleaded guilty to second degree assault, domestic violence, and was ordered to serve a prison sentence. He violated this order, which stems for the earlier domestic violence assault. It is

¹⁶ Brief of Appellant at 18.

clear the trial court viewed this violation, appropriately, as a continuation of Martin's repeated domestic violence conduct. As such the condition of perpetrator treatment was directly related to the criminal conduct and a proper condition of probation.

Appellant further complains the trial court improperly assessed him one hundred dollars for a violation of a protection order.¹⁷

A. Standard of Review

Unlike a condition of sentence granted pursuant to the Sentencing Reform Act of 1981 (SRA), ch. 9.94A RCW, which is reviewed for an abuse of discretion regarding the imposition of crime-related prohibitions as authorized by the SRA and *de novo* as to whether the SRA grants authority to impose a certain condition, a review of a condition of a suspended sentence in superior court is reviewed for an abuse of discretion. *State v. Armendariz*, 160 Wn.2d 106, 156 P.3d 201 (2007).

B. The Domestic Violence Assessment Was Proper

Pursuant to RCW 9.95.210, a superior court may suspend a portion of the sentence and required, "as a condition of probation . .

¹⁷ Brief of Appellant at 18.

. the payment of the penalty assessment required by RCW 7.68.035” RCW 7.68.035(1)(a), provides in relevant part, the payment of five hundred dollars for each cause of action that includes one or more convictions of a gross misdemeanor, and, pursuant to RCW 10.99.080(1), the permissive imposition of a one hundred dollar assessment on adult offenders for a crime “involving” domestic violence. Domestic violence includes, but is not limited to, any of the following crimes when committed by one family or household member against another:

(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 onto 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...

RCW 10.99.020(5). Here, Martin committed a violation of the provisions of a protection order. CP 45. As such, the assessment was proper.

C. The Trial Court’s Order Requiring Domestic Violence Treatment Was Proper.

Martin asserts a trial court may only impose a sentence authorized by statute and appears to assert ordering domestic violence treatment exceeds the broad authority granted a superior

court. Martin is incorrect. RCW 9.95.210 grants superior court broad discretion to impose conditions upon its suspended sentence.

RCW 9.95.210 provides, in relevant part, the superior court may grant probation and suspend the imposition or the execution of the sentence and may direct that the suspension may continue upon such conditions and for such time as it shall designate. A person convicted of a crime has no right to probation, and the decision as to whether or not to grant probation is a matter addressed to the sound discretion of the sentencing court. *State v. Langford*, 12 Wn. App. 228, 529 P.2d 839 (1974)(a condition of probation term must be reasonable), citing *State v. Wills*, 68 Wn.2d 903, 416 P.2d 124 (1966). Trial courts have great discretion in imposing sentences within the statutory limits for misdemeanors and gross misdemeanors. This broad discretion is consistent with the tradition in American criminal jurisprudence affording wide latitude to sentencing judges on grounds that “the punishment should fit the offender and not merely the crime.” While the Sentencing Reform Act of 1981 (SRA) places substantial constraints on this historical discretion in felony sentencing, no similar legislation restricts the trial court's discretion in sentencing for misdemeanors or gross misdemeanors. *State v. Anderson*, 151 Wn.App. 396, 402, 212 P.3d

591 (2009) (internal quotation marks and footnote omitted) (quoting *State v. Herzog*, 112 Wn.2d 419, 423–24, 771 P.2d 739 (1989)).

3. THE COURT SHOULD GRANT COSTS TO THE PARTY THAT SUBSTANTIALLY PREVAILS ON REVIEW PURSUANT TO RAP 14.2

While the trial court may have found Martin indigent for this appeal, it appears the trial court did so without requiring Martin to provide any basis for the trial court’s decision as required by RCW 10.101.020. Because issues of indigency are a matter left to the sound discretion of the trial court, the State is unaware of any record (and none was produced upon appeal) which demonstrates the trial court has “a written record of the determination of indigency” and “an affidavit swearing under penalty of perjury that all income and assets reported are complete and accurate” as required by RCW 10.101.020(3) and (5). Thus, to the extent the state prevails on appeal, this Court should make a determination or, in the alternative, the matter should be remanded to the court to resolve this issue.

Further, past indigency does not render Martin unable to work in the future. There was no on-the-record individualized colloquy regarding Martin’s future ability to work. As such any award should be considered below on remand.

V. CONCLUSION

Donald Martin Jr. has a history of violent encounters with his former wife. Those encounters resulted in her seeking court intervention and the imposition of a domestic violence protection order. Martin was served the order and encouraged to surrender the children to law enforcement so they could return the children to her as directed by the Pacific County Superior Court. Martin elected to violate the order and take his children with him and then spent the next two days hiding from law enforcement officers who sought to return the children to their mother. Martin was convicted and granted probation. As a provision thereof, he was ordered to complete domestic violence treatment. The request was appropriate and lawful. Neither his conviction nor the treatment component should be disturbed on appeal.

RESPECTFULLY submitted this 27th day of December, 2017.



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