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Court of Appeals
Division II
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No. 53130-5-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

GARY D. ARVIDSON, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Amber Finlay, Judge

No. 18-1-00168-4

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENTS OF ISSUES
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The jury is sole judge of the persuasiveness of the evidence and there is substantial evidence in the record to support the jury's verdict; therefore, Arvidson's challenge to the sufficiency of the evidence must fail as matter of law.
2. Although the trial court failed to make an explicit finding regarding Arvidson's mental health condition, there is substantial evidence in the record from which the trial court could in its discretion find that Arvidson suffers from a mental health condition that contributed to his offense. Therefore, this case should be remanded for the trial court to exercise its discretion and make the finding it deems appropriate.
3. Because Arvidson is indigent, the trial court erred by imposing interest accrual and community custody supervision fees.

B. FACTS AND STATEMENT OF THE CASE

For the purposes of the issues raised in this appeal, the State accepts Arvidson's statement of facts, except where additional or contrary facts are offered below in relation to the State's individual arguments in response to Arvidson's assignments of error. RAP 10.3(b).

C. ARGUMENT

1. The jury is sole judge of the persuasiveness of the evidence and there is substantial evidence in the record to support the jury's verdict; therefore, Arvidson's challenge to the sufficiency of the evidence must fail as matter of law.

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This case proceeded to a jury trial based on an information that charged Arvidson with one count of custodial assault in violation of RCW 9A.36.100(1). CP 72-73. At trial, the judge instructed the jury that “[a] person commits the crime of custodial assault when he or she intentionally assaults a full or part-time staff member while that staff member is performing his or her official duties at the time of the assault, at a local detention facility.” CP 101 (Jury Instruction No. 6). The trial court’s *to-convict* jury instruction correctly enumerated these elements. CP 104 (Jury Instruction No. 9). On appeal, Arvidson challenges the sufficiency of the evidence only in regards to the element of intent. Br. of Appellant at 11.

Sufficiency of the evidence is a question of constitutional law that is reviewed de novo on appeal. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Substantial evidence means evidence in the record of a sufficient quantity to persuade a fair-minded, rational person of the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, any rational

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trier of fact may find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The reviewing court defers to the trier of fact on issues of conflicting testimony, the credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

The jury in the instant case heard testimony from a Mason County Jail correctional officer who testified that Arvidson, an inmate at the jail, struck the officer in the face when the officer was attempting to escort Arvidson from his cell to the showers. RP 127-29. The jury also saw a video recording of the assault. RP 127-29; Trial Ex. 1. The officer testified:

I remember him kind of smiling and looking at me, then he grabbed his – he used his right hand to grab my right arm and applied a lot of pressure. And at that point I figured it wasn't going to work for him going to take a shower, so I decided to perform like an escort hold and help him back into his cell, and by that point he used his left hand struck my face on my right side....

RP 127-28.

The State contends that this evidence is sufficient to affirm the jury's verdict. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

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2. Although the trial court failed to make an explicit finding regarding Arvidson's mental health condition, there is substantial evidence in the record from which the trial court could in its discretion find that Arvidson suffers from a mental health condition that contributed to his offense. Therefore, this case should be remanded for the trial court to exercise its discretion and make the finding it deems appropriate.

As permitted by RCW 9.94A.650, the trial court sentenced Arvidson to a first-time offender waiver sentence. CP 122. The court imposed 45 days confinement and 12 months of community custody. CP 124-25. Two of many of the community conditions required that Arvidson obtain a mental health evaluation and that he successfully participate in and complete the recommended treatment. CP 133, 134; RP 166-67. The record suggests that Arvidson has a mental health condition and that it contributed to his offense. RP 1-5, 7, 14, 16-17, 19, 23, 31. However, a search of the record does not reveal any citation where the court made an explicit finding that Arvidson has a mental health condition that contributed to his offense.

RCW 9.94A.702(2) specifies that because the trial court sentenced Arvidson to less than one year of incarceration as a first-time offender, it could "impose community custody as provided by RCW 9.94A.650." Under RCW 9.94A.640(3), the trial court had authority to "impose up to

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six months of community custody unless treatment is ordered, in which case the period of community custody may include up to the period of treatment, but shall not exceed one year.” However, RCW 9.94A.650 does not expressly authorize the trial court to impose a mental health evaluation or mental health treatment. Nor does the statute expressly empower the court to impose any other community custody conditions, except that at subsection (4), it allows that “[a]s a condition of community custody, in addition to any conditions authorized in RCW 9.94A.703, the court may order the offender to pay all court-ordered legal financial obligations and/or perform community restitution work.” Thus, it appears that with the exception the specified LFOs and community restitution, the trial court’s authority to impose community custody conditions is limited to those conditions expressly authorized by RCW 9.94A.703.

RCW 9.94A.703(3)(c) authorizes the sentencing court to impose “crime-related treatment or counseling services” as a condition of community custody. In the instant case, there is evidence that Arvidson has a mental illness and that it contributed to his offense. RP 1-5, 7, 14, 16-17, 19, 23, 31. However, a trial court may order an offender to submit to a mental health examination and to complete recommend treatment only if the court first complies with certain statutory procedures. *State v.*

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Brooks, 142 Wn. App. 842, 851, 176 P.3d 549 (2008). Pursuant to RCW 9.94B.080, the court must find that the defendant is a mentally ill person as defined in RCW 71.24.025. *Brooks* at 851. Additionally, the court must find that the mental health condition contributed to the offense. *Id.* The trial court “may” base its findings on a presentence report, but after a 2015 amendment to RCW 9.94B.080 the sentencing court is no longer required to base its findings on a presentence report.

Here, although there is evidence to support a finding that Arvidson has a mental illness and that the mental illness contributed to his offense, the trial court did not make an express finding. When the record does not support the imposition of mental health treatment, the condition should be struck. *State v. Brooks*, 142 Wn. App. 842, 851-52, 176 P.3d 549 (2008). However, where there is evidence in the record to support the imposition of mental health treatment but the court has failed to make the necessary, the reviewing court may remand the case to the trial court for the trial court to make any necessary finding supported the record. *See, e.g., State v. Shelton*, 194 Wn. App. 660, 676, 378 P.3d 230 (2016); *see also, State v. Montgomery*, No. 78078-6-I (Wash. Ct. App. Sep. 23, 2019) (unpublished) (2019 Wash. App. LEXIS 2453; 2019 WL 4635135).

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The State contends that the appropriate remedy for the trial court's failure to make the necessary finding in the instant case is to remand the case to the trial court for the trial court to enter the finding it deems appropriate based on the existing record.

3. Because Arvidson is indigent, the trial court erred by imposing interest accrual and community custody supervision fees.

The only legal financial obligation imposed by the trial court in this case was the \$500 victim penalty assessment required by RCW 7.68.035. CP 126.

- a) The \$500 victim penalty assessment.

The \$500 victim penalty assessment required by RCW 7.68.035 is a mandatory fee that is unaffected by recent amendments to LFO statutes under HB 1783. *State v. Catling*, 193 Wn.2d 252, 438 P.3d 1174 (2019). Specifically, RCW 9.94A.760 mandates that indigency of the defendant "is not grounds for failing to impose... the crime victim penalty assessment under RCW 7.68.035." Therefore, irrespective of Arvidson's claim of indigency in the instant case, the trial court did not err by imposing the \$500 crime victim penalty assessment.

b) Accruing Interest.

Boilerplate language in Arvidson's judgment and sentence states that the LFOs imposed by the court "shall bear interest from the date of the judgment until paid in full[.]" CP 127. However, RCW 10.82.090(1) provides that "[a]s of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations." Subsection (2) of the statute then states that the court must waive all interest that accrued prior to June 7, 2018. Therefore, the State concedes that the boilerplate language imposing interest should be struck from the judgment and sentence.

c) Community custody fee.

As a condition of community placement, the trial court ordered Arvidson to "pay a community placement fee as determined by the Department of Corrections[.]" CP 133. RCW 9.94A.703(2)(d) authorizes the trial court to impose "supervision fees as determined by the department[.]" However, RCW 9.94A.703(2) identifies these fees as discretionary and authorizes the trial court to waive them. RCW 10.01.160(3) prohibits the imposition of discretionary costs against indigent defendants.

The recent case of *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n. 3, 429 P.3d 1116 (2018), *review denied*, 193 Wn.2d 1007 (2019), supports

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Arvidson's contention that the supervision fees should be waived in the instant case. Accordingly, the State concedes that upon remand this condition should be struck from the judgment and sentence.

D. CONCLUSION

The jury is sole judge of the credibility of witnesses and the persuasiveness of the evidence. Sufficient substantial evidence supports the jury's verdict in this case and the verdict, therefore, should be sustained on appeal.

Substantial evidence exists in the record from which the trial court judge could have made an express finding that Arvidson suffers from a mental health condition that contributed to his crime. However, the trial court failed to make an express finding before ordering Arvidson to undergo a mental health examination and to complete mental health treatment as a condition of sentencing. The State contends that the correct remedy on these facts is to remand to the trial court for the court to exercise its discretion and to enter whatever express finding that it deems appropriate based on facts in the record.

Finally, although there is no direct evidence that Arvidson receives public benefits, the record supports a finding that he was indigent at the time of sentencing. Therefore, the State concedes that language in the

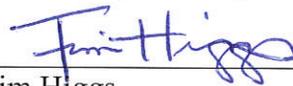
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judgement and sentence that orders the accrual of interest on unpaid LFOs,
as well as the imposition of a community custody fee, should be struck
from the judgment and sentence upon remand.

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