

FILED
Court of Appeals
Division III
State of Washington
3/4/2020 11:55 AM

NO. 36737-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY MESSNER,

Appellant.

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

The Honorable Annette S. Plese, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred in finding that domestic violence was pled and proven at trial.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The state did not plead the charges Mr. Messner faced, all offenses against his daughter E.B., as domestic violence. The state did not ask the jury to return a factual finding the offenses were domestic violence. Yet, in the judgment and sentence, the court twice notes that domestic violence was pled and proved. Must the “pled and proved” language be stricken from the judgment and sentence as scrivener’s errors?

C. STATEMENT OF THE CASE

The state charged Anthony Messner with three counts of rape of a child in the first degree and one count of child molestation in the first degree. Clerk’s Papers (“CP”) 1-2. In each instance, the named victim is E.B., Messner’s daughter born on February 20, 2007. RP3¹ 1219; CP 1-2.

¹There are four volumes of verbatim report of proceedings consecutively number 1-4. The verbatim report is referenced herein by the volume number and specific page. Ex. “RP3 1219” refers to Volume 3 at page 1219.

The Information, filed on November 9, 2016, is the only charging document in the case. CP 1-2. The Information does not allege the four charges are domestic violence offenses. CP 1-2.

A jury heard Mr. Messner's first trial in October 2018. RP1-2. After the jury could not reach a verdict, the court declared a mistrial. RP2 866; CP 4.

Mr. Messner's second trial commenced on January 28, 2019. RP2 872. The second trial is the trial at issue on this appeal.

At the second trial, the court did not ask the jury to make a finding as to whether any of the current offenses qualify as domestic violence. CP 29-36. Neither the state nor Mr. Messner asked the court to instruct the jury to return a verdict addressing the applicability of domestic violence. RP4 1753-60, 1842-43.

The jury returned verdicts finding Mr. Messner guilty as charged in the Information. RP4 1842-43; CP 29-32.

The court sentenced Mr. Messner on April 4, 2019. RP4 1850-65.

On April 10, 2019, the court entered an order voiding the prior judgment and sentence. CP 42; RP4 1874-78. The court entered a judgment and sentence "nunc pro tunc to 4/4/2019." CP 43-59. The

replacement judgment and sentence again noted that domestic violence was pled and proved. CP 46.

Subsequently, the court voided its judgment and sentence entered on April 4 in favor of the judgment and sentence entered on April 10. RP4 1874-78; CP 42-62.

Mr. Messner filed a timely notice of appeal. CP 38-39. Counsel on appeal has made a thorough review of the appellate record.

D. ARGUMENT

Issue: Because the state did not plead and prove the charges as domestic violence, it is error to note to the contrary in the judgment and sentence.

The state did not charge Mr. Messner's offenses as domestic violence. CP 1-2. The court did not instruct the jury to decide if Mr. Messner's offense were domestic violence. CP 5-28. As domestic violence was neither pled nor proven to the jury, the court erred in including the "pled and proved language" in the judgment and sentence.

The "pled and proved" language in the judgment and sentence are scrivener's errors. Scrivener's errors are clerical errors resulting from mistake or inadvertence, especially in writing or copying something on the record. *In re Personal Restraint of Mayer*, 128 Wn. App. 694, 701, 117 P.3d 353 (2005). A scrivener's error is one that, when amended, would correctly

convey the intention of the trial court, as expressed in the record at trial. *State v. Priest*, 100 Wn. App. 451, 456, 997 P.2d 452 (2000); *see also Presidential Apartment Assocs. v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996).

A crime qualifies as domestic violence if the crime is committed by “one family or household member against another.” RCW 10.99.020(5). The definition of “family or household member” is both specific and limited. Family or household member means

spouses, former spouses, persons who have a child in common regardless of whether they have been married or have lived together at any time, adult persons related by blood or marriage, adult persons who are presently residing together or who have resided together or who have resided together in the past and who have or have had a dating relationship, persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship, and persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.

RCW 10.99.020(3). E.B. is Mr. Messner’s biological child. RP Vol 3 1222.

Technically each of the four offenses qualify as domestic violence. But, contrary to the judgment and sentence, the charges were not pled and proved as domestic violence. CP 46. The information does not plead domestic violence. CP 1-2. The jury did not return a special verdict finding the crimes qualify as domestic violence. CP 29-36. The jury did not return

a factual finding of domestic violence because they were not asked to make the finding.

CrR 7.8(a) provides that clerical errors in judgments, orders, or other parts of the record may be corrected by the court at any time on its own initiative or the motion of any party. *State v. Makekau*, 194 Wn. App. 407, 421, 378 P.3d 577 (2016).

It is a scrivener's error on Mr. Messner's judgment and sentence to reflect that domestic violence was pled and proven. CP 46.

Mr. Messner's case should be remanded to strike the domestic violence language from the judgment and sentence.

E. CONCLUSION

Mr. Messner's case should be remanded to correct the judgment and sentence.

Respectfully submitted March 4, 2020.



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Attorney for Anthony Messner

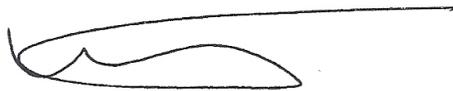
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I filed the Brief of Appellant to (1) Spokane County Prosecutor's Office, at SCPAAppeals@spokanecounty.org; (2) the Court of Appeals, Division III; and (3) I mailed it to Anthony Messner/DOC# 413928 Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed March 4, 2020, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Anthony Messner, Appellant

LAW OFFICE OF LISA E TABBUT

March 04, 2020 - 11:55 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
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Appellate Court Case Title: State of Washington v. Anthony Michael Messner
Superior Court Case Number: 16-1-04346-2

The following documents have been uploaded:

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