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Court of Appeals
Division III
State of Washington
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36737-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY MESSNER, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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?fa=forms.contribute&formID=18](http://www.courts.wa.gov/forms/?fa=forms.contribute&formID=18) 6

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available at [http://www.courts.wa.gov/forms/?fa=forms.
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I. APPELLANT’S ASSIGNMENT OF ERROR

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

II. ISSUE PRESENTED

Does the special allegation/special verdict portion of the judgment and sentence reflect that “domestic violence” was pled and proven and is the language upon which defendant relies for his claim that the court entered a “domestic violence” finding included in the *other current convictions* and *criminal history* sections of the judgment and sentence?

III. STATEMENT OF THE CASE

The defendant was charged with three counts of first degree child rape and one count of first degree child molestation. CP 1-2. The information did not allege the crimes were committed against a family or household member. CP 1-2.

The case was tried to a jury in October 2018, but the Court declared a mistrial because the jury was deadlocked. CP 3-4. The matter was retried in February 2019. None of the instructions, verdict forms, or special verdict forms asked for the jury to make a finding that the crimes were committed against a family or household member, and the jury did not make such a finding. CP 5-36.

The court entered the judgment and sentence on April 10, 2019, a nunc pro tunc order which corrected a scrivener's error in an earlier judgment and sentence entered April 4, 2019. CP 43. Defendant alleges that the corrected judgment and sentence contains a scrivener's error designating his offenses as "domestic violence." The defendant misreads the judgment; no such designation is present; therefore, there is no scrivener's error to strike.

IV. ARGUMENT

THE DEFENDANT MISREADS THE JUDGMENT AND SENTENCE; THERE IS NO SCRIVENER'S ERROR DESIGNATING HIS OFFENSES AS DOMESTIC VIOLENCE, AND THEREFORE, NOTHING FOR THE TRIAL COURT TO STRIKE.

The State does not disagree with the law cited by the defendant. The State must plead and prove an allegation that the parties are members of the same family or household in order for the domestic violence designation to apply. *See* RCW 9.94A.525(21). Under RCW 9.94A.525(21), in the circumstance where *prior* adult convictions involving domestic violence were pled and proved and where the current conviction is one of domestic violence, which has been pleaded, a sentencing court is required to add two points, rather than one point, to the current offender score for each qualifying current conviction.

Notwithstanding the State’s agreement on the applicable law, the State disagrees with the defendant’s reading of the judgment and sentence. The defendant claims that the judgment and sentence reflects a domestic violence designation for his current offenses of child rape and child molestation, although the designation was neither pled nor proven, citing to CP 46. *See* Br. at 3-5 (noting three times the offending language could be found at CP 46). The provisions at issue are reproduced below:

Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

	<i>Crime</i>	<i>Cause Number</i>	<i>Court (county & state)</i>
1.			
2.			

*DV: Domestic Violence was pled and proved.
 Additional current convictions listed under different cause numbers used in calculating the offender score are attached in Appendix 2.1b.

2.2 Criminal History: (RCW 9.94A.525):

<i>Crime</i>	<i>Date of Crime</i>	<i>Crime Type</i>	<i>Adult or Juv</i>	<i>Place of Conviction</i>	<i>Sent. Date</i>
NO PRIOR FELONIES					

*DV: Domestic Violence was pled and proved.

CP 46.

Ostensibly, the defendant believes the two notations stating: “*DV: Domestic Violence was pled and proved” are scrivener’s errors which incorrectly designate his current convictions for child rape and molestation as having been committed against a family or household member. To the contrary, these notations are merely explanatory phrases indicating that *if*

the judgment contained “other current conviction” or “criminal history” data with a “DV” designation,¹ the court made a finding that domestic violence was pled and proven in those *other* cases, potentially triggering the double-point provision of RCW 9.94A.525(21). These notations *do not* convert the defendant’s current convictions for child rape and molestation into domestic violence related offenses.

Had the court or the parties wished to record a domestic violence designation for the defendant’s current convictions, those notations would have been made on the second page of the judgment, CP 44:

Count No.: III	<u>RAPE OF A CHILD IN THE FIRST DEGREE</u> RCW <u>9A.44.073(1)-F (#67350)</u> Date of Crime <u>between August 20, 2013 and April 13, 2016</u> Incident No. <u>2016-00130482</u>
Count No.: IV	<u>CHILD MOLESTATION IN THE FIRST DEGREE</u> RCW <u>9A.44.083(1)-F (#67400)</u> Date of Crime <u>between August 20, 2013 and April 13, 2016</u> Incident No. <u>2016-00130482</u>
Class: FA (Felony-A), FB (Felony-B), FC (Felony-C)	
to the Information	
<input type="checkbox"/> Additional current offenses are attached in Appendix 2.1a.	
<input checked="" type="checkbox"/> The defendant is a sex offender subject to indeterminate sentencing under RCW 9.94A.507 .	
The jury returned a special verdict or the court made a special finding with regard to the following:	
GV	<input type="checkbox"/> For the crime(s) charged in Count _____, domestic violence – intimate partner as defined in RCW 9A.36.041(4) was pled and proved.
GV	<input type="checkbox"/> For the crime(s) charged in Count _____, domestic violence (other) pled and proved. RCW 10.99.020.
<input type="checkbox"/>	The defendant used a firearm in the commission of the offense in Count(s) _____.
	<small>RCW 9 94A 825 9 94A 533</small>

¹ The defendant had no “other current convictions” or prior convictions. He was scored as a “9+” based solely on points afforded by his convictions for the four crimes of which he was convicted in this case.

As can be seen, a box *was* checked to indicate the defendant was subject to indeterminate sentencing as a sex offender. CP 44. The lines immediately following that provision state: “The jury returned a special verdict or the court made a special finding with regard to the following.” CP 44. Following this phrase are a multitude of enhancements and aggravators; the first two include the boxes where the court would note that domestic violence was pled and proven in the instant case; in the defendant’s judgment and sentence, those boxes remain unchecked.² CP 44. Had a domestic violence designation been pled and proven, one (or potentially both) of those boxes would have been checked. Because the boxes were not checked, neither the parties nor the court designated the defendant’s crimes as domestic violence offenses.

² Preceding the two domestic violence special verdict designations are the letters “GV.” This notation is included in the uniform judgment and sentence template required by CrR 7.2(d) available on the Washington Courts’ website. *See, e.g.*, WPF CR 84.0400 (Felony Judgment and Sentence – Prison) available at <http://www.courts.wa.gov/forms/?fa=forms.contribute&formID=18> (last accessed 3/16/2020). According to the Washington Courts’ website pertaining to plea and sentencing codes, “GV” is simply a designation meaning Domestic Violence was pled and proved. *See* JIS Link Codes, Washington Courts, Plea and Sentencing Codes, available at <http://www.courts.wa.gov/jislink/public/codes/CLJ/findjudg.htm> (last accessed 3/10/2020). This court-code for data entry purposes does not change the fact that the applicable domestic violence boxes remain unchecked in the defendant’s judgment and sentence.

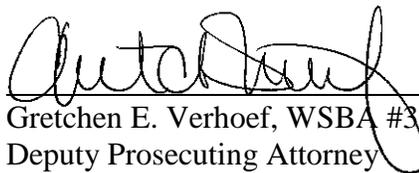
The State disagrees that there is any scrivener's error present in the defendant's judgment and sentence. However, if this Court were to find that the inapplicable notations found at CP 46 are confusing (despite the fact that they are merely stock language included in the uniform judgment and sentence required by court rule, *see* fn.2) this Court could order them stricken without resentencing.³ *See State v. Ramos*, 171 Wn.2d 46, 246 P.3d 811 (2011).

V. CONCLUSION

The State respectfully requests that the Court affirm the defendant's judgment and sentence. No scrivener's error exists and the defendant's current convictions are not designated having been committed against a family or household member.

Dated this 19 day of March, 2020.

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³ Those notations are also included in the templates accessible on the Washington Court's website, <http://www.courts.wa.gov/forms/?fa=forms.contribute&formID=18> (last accessed 3/16/2020).

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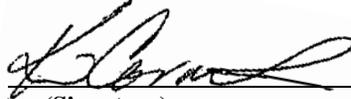
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on March 19, 2020, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Lisa Tabbut
ltabbutlaw@gmail.com

3/19/2020
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

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