Supreme Court No. 97952-9
(Court of Appeals No. 78316-5-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN VANWYCK,

Petitioner.

PETITION FOR REVIEW

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A. INTRODUCTION

Adrian VanWyck and his father, Thomas VanWyck, were very close. Several years ago, each suffered serious health crises that negatively impacted their relationship and led to the imposition of a no-contact order that neither Thomas nor Adrian wanted. In spite of the order, Thomas repeatedly invited Adrian over to his apartment for assistance with cooking, cleaning, and basic care. As a result, Adrian quickly accumulated seven violations of the order.

The facts of the instant case repeated this pattern: Thomas called Adrian in the midst of a health crisis, and Adrian dutifully went to Thomas' apartment to care for him. Following a bench trial, the trial court rejected the affirmative defense of necessity and found Adrian guilty of violating the no-contact order, despite a preponderance of the evidence that Adrian needed to violate the order in order to care for his father.

This Court should accept review in order to clarify that the defense of necessity applies to violations of no-contact orders.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Mr. VanWyck petitions this Court to review the opinion of the Court of Appeals in *State v. VanWyck*, No. 78316-5-I (filed Nov. 12, 2019) (unpublished), attached here as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

The defense of necessity applies when the pressure of circumstances causes an individual to take unlawful action to avoid a harm which social policy deems greater than the harm resulting from a violation of the law. Here, Adrian reasonably believed that violation of the no-contact order was necessary in order to care for his father Thomas and minimize the harm of a potential stroke. The preponderance of the evidence demonstrated Thomas both wanted and benefitted from Adrian's assistance in his time of medical need. Further, Adrian had no other alternatives, as his father was distrustful of doctors and hospitals and had no one else to rely on for help. Should this Court should accept review as a matter of substantial public interest in order to clarify that defendants charged with violating no-contact orders may raise the defense of necessity? *See* RAP 13.4(b)(4).

D. STATEMENT OF THE CASE

Petitioner Adrian VanWyck and his father, Thomas VanWyck,[1] had a very close relationship dating back to Adrian's childhood. RP 3/5/2018 at 36, 44–45. Together they took fishing trips, went camping in the San Juan Islands, participated in charity bike rides, and traveled to the

[1] For clarity, this brief identifies Adrian VanWyck and Thomas VanWyck by their first names.

Middle East and Europe. *See id.* at 44–45, 50. Although Thomas had other children, he was closest with Adrian. *Id.* at 36–37.

In 2014, Adrian was struck by a drunk driver while walking across the street. RP 3/5/2018 at 46. He suffered multiple broken bones and head injuries, was in a coma, and spent nearly a month in the hospital recovering. *Id.* at 46–47. Following the accident, Adrian experienced a significant change in personality, and began experiencing anxiety, paranoia, and irritability. *Id.* at 47. He became reclusive and suffered from seizures and problems with balance and vertigo. *Id.* at 47–48. While Adrian was in a coma, Thomas experienced the first of several strokes. *Id.* at 34–35, 47, 49. The strokes affected Thomas' memory and ability to work and care for himself. *See id.* at 34–36, 50. It also made him less patient. *Id.* at 35.

On January 1, 2015, Thomas called the police and reported that Adrian assaulted him. CP 104, 106, 108. Adrian had been living with Thomas for approximately one year. CP 104. According to Thomas, he and Adrian had a disagreement over money, and Adrian threw a bottle of pills at him and also hit him with a hat. CP 104, 106, 108. Thomas stated this did not hurt, but it "freaked [him] out." CP 106. This incident resulted in Adrian being convicted of fourth degree assault, CP 46, 49, as

well as the imposition of a five-year no-contact order prohibiting Adrian from coming with 150 feet of Thomas. *See* Supp. CP __ (Ex. 1).

Thomas did not want the no-contact order. *See* RP 3/5/18 at 38, 41. He and Adrian even made an unsuccessful attempt to lift the order. *See id.* at 38, 41, 59. Despite the no-contact order, Thomas repeatedly invited Adrian over to his apartment. *See* CP 111; RP 3/5/18 at 35, 53. Adrian would come over and take care of Thomas' housework, including cleaning, laundry, grocery shopping, and cooking. *Id.* at 36, 52. Adrian tried to convince Thomas to consider moving into a retirement community, but Thomas was resistant. RP 3/5/18 at 39, 50. At one point, Thomas' sister organized for a nurse to visit the apartment, but Thomas was unhappy with that arrangement, preferring Adrian as his caregiver. *Id.* at 39, 58, 90.

Adrian's and Thomas' medical issues changed the nature of their relationship, creating additional stress. *Id.* at 47–48. Consequently, they frequently got into disagreements. *Id.* at 32, 47. Sometimes Thomas would call the police and report that Adrian was at his apartment in violation of the no-contact order. CP 112. Other times, Thomas' sister would call and report Adrian in violation of the order. CP 115. At least

once Adrian was found in violation of the order after calling police himself. CP 111.

As a result, Adrian quickly racked up seven convictions for violating the no-contact order, including one felony conviction. CP 46. Prior to the imposition of the no-contact order in 2015, Adrian's adult criminal history consisted only of misdemeanors, the last of which occurred in 2006. *See id.*

In October 2017, Thomas called Adrian. RP 3/5/18 at 53. Thomas was "completely incoherent" over the phone. *Id.* Concerned for his father's health, Adrian went over to his father's apartment, where he found Thomas in bed. *Id.* Thomas had defecated on himself and had not eaten for several days. *Id.* Adrian stayed at his father's apartment for a few days to take care of him. *Id.*

Adrian helped Thomas to shower and eat and cleaned up the apartment. *Id.* at 54–55. After a few days of progress, Adrian started to ask who Thomas' doctor was. *Id.* at 54. When Thomas couldn't remember, Adrian started looking through Thomas' paperwork for the name of his doctor, which aggravated Thomas. *Id.* at 54, 57. They got into a disagreement, and Thomas called the police. *Id.*; CP 132–33. When police arrived and arrested Adrian, he informed them that he was only there because "my dad has been sick and I have been there helping

him out." CP 132. Adrian was charged with his eighth violation of the no-contact order. CP 137.

Adrian elected to have a bench trial. CP 128. At trial, the State presented testimony from the responding officers and Thomas VanWyck. RP 3/5/18 at 13–41. Thomas testified about his and Adrian's health issues, how Adrian had helped him when asked, and their close relationship. *Id.* at 34–39. He also testified that he and Adrian were trying to get the no-contact order lifted so they could live together. *Id.* at 41.

The defense called Adrian as its only witness. Adrian explained that he had only gone over to his father's house "[b]ecause I'm worried about my father's safety and his well being, his health, knowing his health conditions with the strokes, and knowing that there is pretty much no one else to take care of him." *Id.* at 58. He explained he didn't call an ambulance because Thomas seemed to be getting better with care and because Thomas "doesn't like doctors or hospitals or anything like that." *Id.* at 53–54. Adrian explained he spent several days taking care of his father and the apartment before Thomas got upset about Adrian looking

for the number for Thomas' doctor, resulting in Thomas' call to the police. *Id.* at 57.

At the close of trial, the court considered whether Adrian had a viable "necessity" defense, but found that there was insufficient evidence to support the defense. *Id.* at 68–70; CP 140. Accordingly, the court found Adrian guilty of violating a domestic no-contact order while on community custody. *Id.* at 70; CP 25, 140. The court imposed 60 months of detention. 4/4/18 at 93.

On appeal, Court of Appeals assumed, without deciding, that the defense of necessity was available but that Adrian did not prove all of the elements. Op. at 6–8 (attached as Appendix A). Specifically, the Court of Appeals held that Adrian remained at his father's apartment "after any emergency had resolved" and also that Adrian had other legal alternatives to violating the order, including calling 911 or Adult Protective Services. Op. at 7–8.

Adrian now petitions this Court for review.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Defendants charged with violating a no-contact order are entitled to present an affirmative defense of necessity.

The defense of necessity applies "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. Gallegos*, 73 Wn. App. 644, 650, 871 P.2d 621 (1994) (quoting *State v. Diana*, 24 Wn. App. 908, 913, 604 P.2d 1312 (1979), *overruled on other grounds by Seeley v. State*, 132 Wn.2d 776, 940 P.2d 604 (1997)). The "pressure" must come from physical forces of nature, not other human beings. *Id.* at 650–51. "Physical forces of nature" includes medical maladies. *State v. Kurtz*, 178 Wn.2d 466, 469, 309 P.3d 472 (2013).

The defense of necessity is "well recognized in the common law." *State v. Niemczyk*, 31 Wn. App. 803, 807, 644 P.2d 759 (1982). However, this Court has not directly addressed whether necessity is available as a defense to violation of a no-contact order, and recently declined to decide the issue in *State v. Yelovich* because the petitioner conceeded he did not raise the defense at trial. 191 Wn.2d 774, 780 n.1, 426 P.3d 723 (2018). The few Court of Appeals decisions addressing the issue are unpublished and have presumed the defense is available. *See, e.g., State v. Martin*, 2018 WL 3548420 at *2, 4 Wn. App. 1057 (Jul. 24, 2018) (unpublished) (recognizing generally that "[n]ecessity is a common law defense to a charged offense.")[2]

[2] Mr. VanWyck cites *Martin* as persuasive authority. *See* GR 14.1(a). There are other unpublished decisions addressing the necessity defense in this context, but they were

This Court has determined the defense of necessity is available in cases involving medical marijuana use as well as unlawful possession of a firearm. *See Kurtz*, 178 Wn.2d at 469; *State v. Jorgenson*, 179 Wn.2d 145, 158 n.5, 312 P.3d 960 (2013). This Court should accept review of this case in order to clarify as a matter of substantial public interest that this defense is also available to defendants charged with violating a no-contact order. *See* RAP 13.4(b)(4).

2. The preponderance of the evidence supported a necessity defense.

Affirmative defenses must be proven by a preponderance of the evidence. *See State v. Riker*, 123 Wn.2d 351, 366, 869 P.2d 43 (1994). On appellate review, this Court considers whether, considering the evidence in the light in the most favorable to the State, a rational trier of fact could have found that Adrian failed to prove the defense of necessity by a preponderance of the evidence. *See State v. Lively*, 130 Wn.2d 1, 17, 921 P.2d 1035 (1996).

In order to prove a necessity defense, the defendant must show by a preponderance of the evidence that "(1) he or she reasonably believed the commission of the crime was necessary to avoid or minimize a harm, (2) the harm sought to be avoided was greater than the harm resulting

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issued prior to March 1, 2013, and thus Mr. VanWyck is precluded from citing them. *See id.*

from a violation of the law, and (3) no legal alternative existed." *See Gallegos*, 73 Wn. App. at 651 (citing *Diana*, 24 Wn. App. at 916). Here, the preponderance of the evidence supported a necessity defense, and the trial court erred in concluding that Adrian did not meet his burden. *See* RP 3/5/18 at 69–70.

Concerning the first element, Adrian reasonably believed that violation of the no-contact order was necessary in order to minimize a harm. Adrian testified that his father had called him and was "completely incoherent." *Id.* at 53. Adrian further testified that he was concerned about his father's "safety and his well being, his health, knowing his health conditions with the strokes, and knowing that there is pretty much no one else to take care of him." *Id.* at 53, 58. Given Thomas' history of strokes and fragile physical state, it was not unreasonable for Adrian to believe that he needed to check on his father in person in order to care for him and minimize the harm of a potential stroke. *See id.* at 34–35, 50, 52; *Gallegos*, 73 Wn. App. at 651.

Second, the harm Adrian sought to avoid was greater than the harm resulting from the violation of the no-contact order. *See id.* Although the no-contact order was ostensibly put in place to protect Thomas, the record contains significant evidence that Thomas both wanted and benefited from Adrian's presence in his time of medical need. RP 3/5/18 at 35–36, 39,

53–54. In fact, Adrian testified that his father was getting better with his care, and that he had been able to get Thomas to eat, shower, and become mobile again. *Id.* at 54. Both Adrian and Thomas testified that Adrian cleaned up the apartment and took care of general chores. *Id.* at 36, 54–55. Although the Court of Appeals concluded that Adrian remained in the apartment long after any medical emergency had resolved, Op. at 7, the record indicates that Thomas required Adrien's assistance for several days, that he was getting better, and that Adrien was planning to leave the apartment shortly before he was apprehended by police. RP 3/5/18 at 53–54, 57.

Additionally, the only harm that arose out of the violation of the no-contact order was a minor dispute about Adrian searching through Thomas' paperwork to find the contact information for Thomas' doctor. *See id.* at 54, 57. The preponderance of the evidence demonstrates that Adrian was attempting to provide assistance to prevent his father's health from declining, a far greater harm than a minor spat over paperwork. *See Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 945, 913 P.2d 377 (1996) ("[S]ociety would rather have one commit a crime under duress than refuse compliance and risk the life of whoever is threatened.")

Finally, concerning the third element, Adrian had no other legal alternatives. *See Gallegos*, 73 Wn. App. at 651. Although the trial court

and the Court of Appeals both concluded that Adrian could have called 911 or Adult Protective Services, Adrian testified that his father was distrustful of doctors and hospitals and both Adrian and Thomas testified that Thomas had previously been unsuccessfully treated by an at-home nurse. RP 3/5/8 at 39, 53–54, 58, 69. Adrian further testified that when he tried to find the number to call Thomas' doctor, Thomas became agitated, stormed out of the apartment, and called the police. *Id.* at 57–58. There was a very real possibility that calling for medical care would have upset Thomas, thus further complicating his medical condition, or that Thomas would have rejected medical care altogether. *See id.* at 53 (Adrian testifying that "I knew [Thomas] would be angry if I did call [911], because he doesn't like doctors or hospitals or anything like that."). Additionally, Thomas and Adrian both testified that no other family members helped with Thomas' care. *See id.* at 37, 58.

The preponderance of the evidence supports all three factors of a necessity defense. *See Gallegos*, 73 Wn. App. at 651. Here, the "pressure of circumstances" led Adrian to violate the no-contact order in order to assist his ailing father and prevent his further decline, "a harm which social policy deems greater than the harm resulting from the violation of the law." *Id.* at 650.

F. CONCLUSION

Mr. VanWyck respectfully requests this Court accept review in order to clarify that the defense of necessity applies to violations of no-contact orders.

DATED this 5th day of December, 2019.

Respectfully submitted,

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APPENDIX A

FILED
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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ADRIAN LAWRENCE VANWYCK, Appellant.	No. 78316-5-I DIVISION ONE UNPUBLISHED OPINION FILED: November 12, 2019

LEACH, J. — Adrian VanWyck appeals the judgment and sentence imposed for his violation of a no-contact order and challenges three legal financial obligations (LFOs). He claims that the trial court abused its discretion when it rejected his necessity defense and his request for an exceptional sentence below the standard range.

VanWyck fails to show that no reasonable fact finder could find the evidence insufficient to establish a necessity defense. Because the trial court considered and rejected his request for a deviation from a standard range sentence and imposed a standard range sentence, he cannot appeal his sentence. So we affirm in part. Based on his indigency, VanWyck has established his right to relief from the challenged LFOs.

BACKGROUND

Adrian VanWyck is Thomas VanWyck's son.[1] Thomas has three other children, two live in Washington state and one lives in Arizona. In 2014, Adrian sustained head injuries and still suffers from them. That same year, Thomas had the first of several strokes. The strokes rendered Thomas physically fragile and unable to work.

According to Thomas, Adrian helped him "all the time" with car repairs, housecleaning, laundry, and cooking. He did not "feel an obligation to take care of Adrian" but worried that he would not have a place to stay if he did not stay at Thomas's apartment.

In January 2015, Thomas reported Adrian to the police after Adrian hit him on the head with a baseball cap and threw pills at him. He told the responding officers that he was "so scared of Adrian that he sleeps with a kitchen knife in his bedroom." The court convicted Adrian of fourth degree assault, domestic violence. It imposed several conditions, including an alcohol and drug assessment and a domestic violence assessment. It issued a postconviction no-contact order on April 8, 2015, that prohibited Adrian from coming within 150 feet of his father for five years from this date.

Between March 2015 and October 2016, Adrian was convicted of violating the no-contact order six times.[2] In January 2017, the State charged Adrian with

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[1] For the purposes of clarity, we refer to Adrian VanWyck as "Adrian" and Thomas VanWyck as "Thomas."

[2] Adrian stipulated to these convictions before the trial we are reviewing.

a felony violation of the no-contact order, domestic violence, based on evidence gathered after officers responded to three separate 911 calls made by Thomas's sister Rae Kordes and his neighbor Michael Hatch between the end of December 2016 and January 2017. Hatch called 911 after he checked on Thomas in his apartment because he had not left for work and discovered Adrian drinking beer in the kitchen while Thomas lay in bed "having vomited and urinated on himself." Kordes called twice in response to Adrian's presence at the home when she was caring for Thomas after he had left the hospital.

Adrian was convicted as charged. At sentencing on June 21, 2017, the State recommended a standard range sentence of 51 months, but the court imposed a first-time offender waiver with 90 days of jail time and 12 months of community custody. It ordered him to participate in a chemical dependency evaluation and "abide by all no-contact orders."

The following events led to the charges in this case. On November 2, 2017, Everett police responded to a 911 call from Thomas, who reported that Adrian was at his home and had an outstanding Department of Corrections warrant for his arrest. Officers contacted Thomas at his neighbor's. Thomas gave them access to his apartment, told them that Adrian was inside, and said that the interior doors should all be unlocked. Thomas told the police an incident had occurred that evening that caused him to ask Adrian to leave. Adrian refused. Thomas was afraid of Adrian.

Police found Adrian in Thomas's home behind a locked door and intoxicated. They arrested Adrian on the DOC warrant.[3]

Adrian elected to have his case tried to a judge. Adrian provided this explanation for his presence in his father's home. At the end of October 2017, Thomas called him, speaking incoherently. Adrian went to Thomas's home and found him in bed and extremely debilitated. Adrian stayed with Thomas for several days. During this time, he cared for his father and cleaned up the house. He said he had some knowledge of what to look for and observed his father "progressively getting better over the couple of days."

Adrian did not call an ambulance for Thomas "because of the restraining order" and because he "was waiting to see what would happen." He knew that if he called an ambulance, Thomas "would be angry" because "he doesn't like doctors or hospitals." After a couple of days, Thomas was more mobile and could communicate but still struggled to speak. Because of this, Adrian tried to obtain the phone number of Thomas's doctor. As he searched, his father "started getting aggravated" and "storm[ed] over to the neighbor[']s." Adrian agreed that Thomas called 911 because Adrian refused to leave after Thomas asked him to.

At trial, Adrian admitted that he knew a no-contact order prohibited him from any contact with Thomas. He said that despite this knowledge, he went to

[3] The warrant was in place because Adrian failed to comply with the Washington State Department of Corrections requirements.

his father's house because he was "worried about [his] father's safety and his well-being, his health, knowing his health conditions with the strokes, and knowing that there is pretty much no one else to take care of him." He claimed that "after I got that last phone call, then I knew something was really bad happening."

After the parties presented their cases, the court asked defense counsel what part of what they presented "rises to a defense." Defense counsel said, "[T]he Court heard the testimony. I'm leaving it up to the Court to decide. I understand where the Court is coming from."[4]

The court said,

> I think that [given] the factual scenario that was testified to by the defense, the closest doctrine that it gets to is necessity. I think the State is right about that.
>
> And in order to avail one's self on the defense of necessity, you have to establish by a preponderance of the evidence that you reasonably believed the commission of the crime was necessary to avoid or minimize the harm, that the harm sought to be avoided was greater than the harm that resulted in violation of the law, and that no legal alternative existed.
>
> In this case I am going to find as a matter of law that the defense of necessity was not met.

At sentencing, the defense asked for an exceptional sentence below the standard range based on what it identified as mitigating factors, emotional duress and Thomas's willing participation. The State disagree about both mitigating factors.

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[4] Earlier, the State characterized defense arguments as possibly "necessity or something akin to that."

After hearing from the parties, the court said that it did not find Adrian's story credible and that it considered him the primary problem. It also noted that the previous court's leniency had not changed Adrian's illegal conduct. It denied Adrian's request and imposed a standard sentence. It ordered him to pay legal financial obligations, including a $200 filing fee, a $100 DNA collection fee, and a $100 domestic violence penalty fee. It noted that the Washington State Patrol Crime Laboratory already had a DNA sample from Adrian.

ANALYSIS

Adrian raises three issues in this case. First, he claims that no reasonable judge could find that he did not prove the defense of necessity. Second, he asserts that the trial court did not consider his claim that a mitigating factor warranted a sentence below the standard range. Finally, he asks that certain LFOs imposed by the trial court be stricken because he is indigent. Only the last issue has merit.

Defense of Necessity

For purposes of this opinion, we assume, without deciding, that Adrian can raise and did raise necessity as a defense to violation of a court order.[5] To prove necessity, the defendant must establish, by a preponderance of the evidence, "that (1) he or she reasonably believed the commission of the crime was necessary to avoid or minimize a harm, (2) the harm sought to be avoided was

[5] The Washington Supreme Court has not addressed whether necessity is available as a defense to violation of a no-contact order. See State v. Yelovich, 191 Wn.2d 774, 780 n.1, 426 P.3d 723 (2018).

greater than the harm resulting from a violation of the law, and (3) no legal alternative existed."[6]

Defendants must prove affirmative defenses like necessity by a preponderance of the evidence.[7] When this court reviews a trial court's conclusion that the defendant failed to prove this defense, we ask "whether, considering the evidence in the light most favorable to the State, a rational trier of fact could have found that the defendant failed to prove the defense by a preponderance of the evidence."[8]

We begin our analysis by noting that Adrian's argument depends to a large degree upon this court accepting Adrian's testimony as true. But the trial court did not find him credible. This court defers to a trial court's decisions about credibility.

Even accepting Adrian's testimony as true, he did not provide evidence that requires a finding of necessity. Adrian stayed at his father's home for several days after any emergency had resolved. During this time he drank to the point of intoxication. This conduct does not rise to a legal necessity as a matter of law.

Adrian also did not establish the absence of reasonable, legal alternatives to his violation of the court order. As the trial court noted, if Thomas needed

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[6] State v. Gallegos, 73 Wn. App. 644, 651, 871 P.2d 621 (1994) (citing State v. Diana, 24 Wn. App. 908, 916, 604 P.2d 1312 (1979)).

[7] State v. Riker, 123 Wn.2d 351, 366, 869 P.2d 43 (1994).

[8] State v. Lively, 130 Wn.2d 1, 17, 921 P.2d 1035 (1996).

help, Adrian could have called 911 or Adult Protective Services and waited more than 150 feet from Thomas's home until help arrived. The record contains no credible evidence that these alternatives were not available in this case. Indeed, he admitted that he did not call a doctor or an ambulance at least in part "because of the restraining order."

Given these facts, Adrian fails to establish that no rational court could find that he did not establish the three prongs of the necessity defense. The trial court did not err.

Denial of Exceptional Sentence

Adrian contends that the trial court abused its discretion by failing to consider his request for an exceptional downward sentence because Thomas acted as a "willing participant." We conclude he cannot appeal his standard range sentence because the trial court did consider his request.

When a defendant has requested an exceptional sentence below the standard range, "review is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range."[9] "While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered."[10] Thus, "[t]he failure to consider an

[9] State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).
[10] State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

exceptional sentence is reversible error."[11] Similarly, we review a trial court's mistaken belief that it lacks the discretion to depart downward from the standard sentence.[12]

The trial court reviewed the sentencing memos and statements during the sentencing hearing, including the defense's assertion that the court should impose an exceptional downward sentence because Thomas was a willing participant. At sentencing, the trial court directed some observations to Adrian:

> [I]n looking at the material that's been presented by both sides and listening to what transpired at trial, I [wonder] if you knew that you were violating the no contact order, why didn't you just work around it.
>
> And you just said, you know, that you feel compelled to disobey the law.
>
> . . . .
>
> And I am not so sure I understand that kind of thinking, and I don't think it's correct. And what it does suggest to me is that it's not so much that you choose to disobey the law, it's just that you choose to do what you want.
>
> One thing that sort of stands out for me very powerful[ly], is Judge Fair gave you a first time offender waiver when she didn't really have to do that, and . . . that leniency just had no significance on you at all, whatsoever.
>
> And I don't have anything direct, with regard to this statement, but it seems to me that maybe your siblings don't see your dad because of you, that that's really the problem. There [are] a couple of things that I read which indicated that, that they don't approve of the relationship that you have or that you established with your dad and so they either don't intervene when you are around or they are afraid to intervene when you are around.

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[11] Grayson, 154 Wn.2d at 342.
[12] Grayson, 154 Wn.2d at 342.

The court did not find Adrian's story credible. It did not believe Adrian's claims that he was "in this tangled web," that he was "a victim," that it was not his fault, and that it was "just all these things are happening that sort of compel things to transpire a certain way" did not "wash."

It concluded by saying,

> People who take responsibility have a tendency to create order even in a bad situation, so that if there is a no contact order a responsible person can work with that and still create a situation where everything needs to get done. But for you, it's an excuse.
>
> So I am not going to bless that. I am not going to continue to keep continuing to grant you leniency so you can just keep doing this over and over and over again. I'm sorry to your dad that this is going to happen, that he feels that he needs you.
>
> But in this situation from sort of an objective outside observer, I think you are the problem. I don't think you are the solution. And that message needs to be delivered, because apparently a lenient sentence doesn't do it, because you got that already, and it didn't work.

The trial court was aware of its discretion to impose a sentence below the standard range. And it reviewed the materials submitted by the parties that included the memoranda discussing the defense theory that Thomas was a willing participant. The court made clear that it viewed Adrian's behavior solely to be the product of his own choices, indicating that it did not consider Thomas to be driving his son's violation of the no-contact order, as a willing participant or otherwise. Adrian has not established that the trial court refused to exercise its discretion.[13] He cannot appeal his standard range sentence.

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[13] Garcia-Martinez, 88 Wn. App. at 330.

Legal Financial Obligations

Finally, Adrian challenges the $200 filing fee, the $100 DNA fee, and the $100 domestic violence penalty because the legislature's 2018 modifications to LFO statutes apply to him. We agree.

In 2015, the Washington Supreme Court held that RCW 10.01.160(3) requires sentencing judges to "make an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs."[14] Later, in 2018, the legislature passed House Bill 1783 that amended statutes governing the imposition of discretionary LFOs. This law, effective June 7, 2018, amended former RCW 36.18.020(2)(h) (2015) to prohibit trial courts from imposing the $200 court filing fee on indigent defendants.[15] It also eliminated the mandatory $100 DNA collection fee where "the state has previously collected the offender's DNA as a result of a prior conviction."[16]

The legislature did not amend RCW 10.99.080(1) which states that a court "may impose a penalty assessment not to exceed one hundred dollars on an . . . offender convicted of a crime involving domestic violence." But it amended RCW 10.01.160(3) to prohibit sentencing courts from imposing discretionary costs on indigent defendants.[17] RCW 10.99.080 is discretionary and provides that when deciding whether to impose the penalty, "judges are

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[14] State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015).
[15] LAWS OF 2018, ch. 269, § 6(3).
[16] RCW 43.43.7541.
[17] LAWS OF 2018, ch. 269, § (6)(3).

encouraged to solicit input from the victim or representatives for the victim in assessing the ability of the convicted offender to pay the penalty, including information regarding current financial obligations, family circumstances, and ongoing restitution."[18]

Under State v. Ramirez,[19] these amendments apply to Adrian because his direct appeal was pending on June 7, 2018, the amendment's effective date.[20] He was indigent at the time of sentencing. And the judgment and sentence in this case states that the court did not require DNA testing because the Washington State Patrol Crime Laboratory already had a sample. Because of this, the State concedes that the $200 filing fee and the $100 DNA collection fee should be stricken.[21] We agree and remand for that purpose.

But the State does not concede that the domestic violence penalty should be stricken. It claims that the domestic violence penalty is not a "cost" and so RCW 10.01.160(3) does not apply. It asks this court to view costs as described in RCW 10.01.160(2): "expenses specifically incurred by the state in prosecuting the defendant or in administrating the deferred prosecution program . . . or pretrial supervision." We decline to take such a narrow view of the term "costs." Because the domestic violence penalty fee is discretionary and the 2018 amendment to RCW 10.01.160(3) prohibits sentencing courts from imposing

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[18] RCW 10.99.080(5).
[19] 191 Wn.2d 732, 747, 426 P.3d 714 (2018).
[20] Ramirez, 191 Wn.2d at 747.
[21] It also states that this court should order the lower court to strike the domestic violence penalty fee but, on the same page, asserts that this court should not order the lower court to strike the fee.

discretionary costs on indigent defendants, we remand for the superior court to strike the $100 domestic violence penalty.

CONCLUSION

We remand for the superior court to strike the criminal filing fee, the DNA collection fee, and the domestic violence penalty fee from the judgment and sentence. We otherwise affirm.

Leach, J.

WE CONCUR:

Smith, J.

Schindler, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 78316-5-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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