FILED
JUNE 9, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. JONATHAN JAMES TOTH, Appellant.	)	No. 36704-5-III UNPUBLISHED OPINION

LAWRENCE-BERREY, J. — Johnathan Toth appeals after a jury found him guilty of felony violation of a no contact order. We affirm.

FACTS

Jonathan Toth and Joenisha Nolan lived together until a fight between the two caused Toth to be arrested and detained in the county jail. Following his arrest and detention, a no contact order was entered that barred Toth from having contact with Nolan. The order expressly forbade him from "'contact[ing Nolan] directly, indirectly, in person, or through others by phone, mail, or electronic means except . . . by the defendant's lawyers.'" Report of Proceedings (RP) at 243.

Toth's cellmate was Christopher Tidwell. Toth executed a temporary limited power of attorney that gave Tidwell authority to obtain his truck from Nolan and his paycheck from his employer. Toth then handwrote two letters and gave them to Tidwell to deliver to Nolan.

Once Tidwell was released from jail, he mailed the two letters to Nolan. The letters, spanning 12 pages, mostly discussed the pending domestic violence assault charge, how Nolan had started the fight, and how much he loved her anyway. The tone of these letters is captured best by the last two paragraphs of the second letter:

> My heart is killing me and I can't take much more. We can totally fix this whole thing right now with neither of us in trouble. I can be home by Halloween!
>
> Momma-Joenisha Starr Toth—My Queen!! Baby I'm right here and still me and still so so in love with you. Don't destroy me us and our future with lies no more hun! Please baby just come back so we can fix this. I will wait in this cage for you crying like a bitch ok. Please come home!! I have a plan.

Ex. P-3 at 10.

Nolan informed law enforcement of these letters. The State charged Toth with felony violation of a no contact order, with a special allegation that the offense was committed against a family or a household member.

Prior to trial, Toth made a motion in limine to bar the State from referring to Nolan as a victim. The State disagreed, arguing it was important for the jury to understand Nolan's relationship with Toth with respect to the charges that led to the no contact order. The trial court allowed the use of the term "victim," but limited its use to only what was needed to allow the jury to understand this relationship. Toth then requested that he be allowed to testify that the underlying domestic violence assault charge had been dismissed, implying Nolan really was not a victim. The trial court denied his request and described the dismissal of the charge as irrelevant.

After the State presented its evidence, Toth moved to dismiss the case, arguing the evidence was insufficient to prove he committed the crimes charged. The trial court denied his motion. Toth then presented his case. Following this, he again moved to dismiss, again arguing insufficiency of the evidence. The trial court denied this motion, too.

While the jury was deliberating, it sent a few written questions to the trial court. One of these questions was, "[D]oes contact by the defendant's lawyer have to exclusively be court documents." Clerk's Papers (CP) at 140. The trial court declined to answer this question, believing any answer would be a comment on the evidence.

The jury found Toth guilty on the charge of felony violation of a no contact order, and answered "yes" on the special verdict that Toth and Nolan were members of the same household. CP at 137. As part of Toth's sentence, the trial court imposed a $200 criminal filing fee, but also found him indigent. Toth did not object to this fee being imposed.

Toth timely appealed.

ANALYSIS

DENIAL OF DIRECTED VERDICT

Toth argues the trial court erred by denying his motion to dismiss. Because his argument focuses on all the evidence, we construe his argument relating to his second motion to dismiss.

A trial court properly denies a criminal defendant's motion to dismiss if any reasonable jury, considering the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt. *State v. Athan*, 160 Wn.2d 354, 379, 158 P.3d 27 (2007). To prove a felony violation of a no contact order, the State must show: (1) there existed a no contact order applicable to the defendant, (2) the defendant knew the order existed, (3) the defendant knowingly violated a provision of the order, and (4) the defendant had twice been previously convicted for violating court orders.

RCW 10.99.050; RCW 26.50.110; *State v. Sisemore*, 114 Wn. App. 75, 77, 55 P.3d 1178 (2002).

Here, Toth's sufficiency challenge is limited to the third element—that he knowingly violated a provision of the no contact order. He argues his belief that he empowered Tidwell to act as his attorney causes his violation of the no contact order to not be knowing. We disagree.

Had Toth's comments in his letters to Nolan been limited to the scope of the power of attorney—obtaining his truck—his argument might be persuasive. But his comments related to the domestic violence assault case and were veiled attempts to dissuade Nolan from testifying against him. The no contact order explicitly forbade Toth from contacting Nolan through others by mail. Because Toth contacted Nolan through Tidwell by mail and because the purpose of the contact was outside the limited power of attorney, a reasonable jury could find that Toth knowingly violated the no contact order. We conclude the trial court did not err in denying Toth's motion for a directed verdict.

CRIMINAL FILING FEE

Toth contends the trial court erred by imposing a $200 criminal filing fee as part of his sentence while also finding he was indigent. While Toth did not object to this at trial, we nonetheless have discretion to review the unpreserved issue under RAP 2.5(a).

Various factors place us at equipoise whether to exercise our discretion. After considering these factors, we elect not to review this unpreserved error.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW (SAG)

SAG I: ADMITTANCE OF EVIDENCE IN VIOLATION OF ER 404

Toth contends the trial court abused its discretion in allowing statements to come in that violated ER 404(b), other crimes, wrongs, or acts. He argues that Officer Samuel Chimienti testified about Toth's underlying arrest, including that Nolan was a victim of domestic violence, that Toth had injured Nolan, and that Toth was incarcerated.

However, Toth did not object to these aspects of Officer Chimienti's testimony. In general, this court does not review issues raised for the first time on appeal. RAP 2.5(a).

Toth argues he preserved the issue because he testified. In support of his argument, he cites *State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013, 787 P.2d 906 (1989). There, the State had charged Brown with two counts of second degree theft. Prior to trial, the parties argued whether Brown's prior misdemeanor and felony theft convictions were admissible for impeachment purposes if Brown testified. The trial court ruled they were admissible. Brown chose not to testify and was convicted of one count of second degree theft. On appeal, Brown argued the trial court's evidentiary ruling was erroneous. Our Supreme Court held, in order to preserve alleged errors in admitting prior conviction

evidence for impeachment, a defendant must take the stand and testify. *Id.* at 540. And because Brown had not testified, he had failed to preserve the alleged error.

Brown does not stand for the proposition that unobjected to ER 404(b) evidence may be challenged on appeal if the defendant testifies. Rather, it stands for the proposition that a trial court's evidentiary ruling admitting prior convictions for impeachment may not be challenged on appeal if the defendant fails to testify.

We, therefore, decline to review Toth's first SAG issue.

SAG II: DENIAL OF RIGHT TO DEFEND ONESELF

Toth contends the trial court violated his constitutional right to a fair trial by allowing the State to refer to Nolan as a victim in reference to the no contact order, while preventing him from testifying that the charge that gave rise to the no contact order was dismissed.

We first note that Toth admitted he hit Nolan. In his second letter to Nolan, considered by the jury, Toth admitted he "fought" Nolan, and she "lost." Ex. P-3 at 6. Whether this made her a "victim" or not is hair splitting, and an occasional reference to her as a victim protected by the no contact order certainly was not prejudicial.

We next note the only factual issue presented to the jury was whether Toth knowingly violated the no contact order. Whether the underlying domestic violence

assault charge was dismissed did not tend to make his violation of the order any more or less knowing. We agree with the trial court that dismissal of that charge was irrelevant. There is no constitutional right to admit irrelevant evidence. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

SAG III: COURT DID NOT ANSWER JURY QUESTION

Toth contends the trial court abused its discretion when it did not answer the jury's question, "[D]oes contact by the defendant's lawyer have to exclusively be court documents." CP at 140. He argues the jury, by asking the question, already accepted that Tidwell had power of attorney and, thus, the jury might have found him not guilty had the trial court answered the jury's question.

When juries ask a question, it is within the discretion of the trial court to give the jury further instruction on the law. *State v. Sublett*, 176 Wn.2d 58, 82, 292 P.3d 715 (2012). Where there is no objection to the lack of further instruction, the defendant must show actual prejudice caused by a constitutional error. *Id.* at 82-83.

Toth does not assert any constitutional error, only an abuse of judicial discretion. This is insufficient.

SAG IV: MOTION TO STRIKE BRIEFS, SUBSTITUTE COUNSEL, AND START ANEW

Toth filed a motion with this court to strike the briefs, substitute appellate counsel, and start the appeal anew. He argues his counsel was ineffective and disloyal. Toth raises two bases in support of his motion.

First, Toth contends his appellate counsel only raised the issue of the motion to dismiss on appeal and that, in doing so, purposefully barred any other argument from being made. Toth rightly points out that a motion to dismiss is waived if the defense puts evidence on after the motion to dismiss is denied. *State v. Thomas*, 52 Wn.2d 255, 256, 324 P.2d 821 (1958). He goes on to argue that by appealing the denied motion to dismiss instead of the denied motion for a directed verdict, his appellate counsel raised an issue we cannot review. However, as explained at the outset of this opinion, we construed Toth's arguments as a challenge to the trial court's denial of his second motion—the motion for a directed verdict. For this reason, we reject his first basis for his motion on appeal.

Second, Toth contends his attorney purposefully chose to ignore an issue regarding the highlighted transcript of exhibit P-10. He contends the trial court allowed the jury to look over the highlighted transcript during deliberation, even though it contained redacted portions of the audio recording. Toth, in making this argument, shows nothing in the

record that indicates the jury had access to this highlighted transcript. The trial court did take the transcript for its personal use and returned it at the end of the trial, but there is nothing in the record that shows it was given to the jury for deliberation. This court cannot examine facts not in the appellate record. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). There is no factual basis for appellate counsel to raise this issue, and his failure to raise it does not establish disloyalty. For this reason, we reject Toth's second basis for his motion on appeal.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

WE CONCUR:

Siddoway, J.

Fearing, J.