

55074-8

55074-8

78452-3

NO. 55074-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ISMAEL ARMENDARIZ,

Appellant.

FILED
JUL 11 2011
CLERK OF COURT
KING COUNTY
COURTHOUSE
315 3RD AVENUE
SEATTLE, WA 98104
PH: (206) 467-1000
FAX: (206) 467-1001
WWW.KINGCOUNTYWA.GOV

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE ROBERT ALSDORF

BRIEF OF RESPONDENT

NORM MALENG
King County Prosecuting Attorney

SCOTT F. LEIST
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	3
1. PROCEDURAL FACTS	3
2. SUBSTANTIVE FACTS	4
C. <u>ARGUMENT</u>	11
1. ARMENDARIZ WAS NOT ENTITLED TO A SELF-DEFENSE INSTRUCTION BECAUSE THERE WAS NO EVIDENCE THAT HE ACTUALLY FACED DEATH OR SERIOUS INJURY. ACCORDINGLY, HIS ATTORNEY'S DECISION NOT TO REQUEST A SELF-DEFENSE INSTRUCTION WAS APPROPRIATE AND DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL.....	11
2. STATEMENTS MADE BY ARMENDARIZ AT THE PRECINCT IN THE MINUTES FOLLOWING HIS ARREST WERE PROPERLY ADMITTED PURSUANT TO ER 404(B).....	17
3. THE SENTENCING COURT APPROPRIATELY ISSUED A NO-CONTACT ORDER WITH MS. TRUONG BECAUSE ARMENDARIZ'S VIOLATION OF THE EXISTING NO-CONTACT ORDER BETWEEN HIMSELF AND MS. TRUONG PRECIPITATED THE ASSAULT ON OFFICER CHITTENDEN	22

4.	ARMENDARIZ WAS PROPERLY ORDERED TO COMPLETE DOMESTIC VIOLENCE TREATMENT AS A CONDITION OF COMMUNITY CUSTODY FOR THE FELONY ASSAULT AND AS A CONDITION OF HIS PROBATION FOR THE MISDEMEANOR CRIME	27
a.	The Sentencing Court Properly Required Armendariz To Complete Domestic Violence Treatment For The Felony Crime As A Condition Of Community Custody.....	27
b.	Because Armendariz Must Also Complete Domestic Violence Treatment During His Misdemeanor Probation Period, Any Error In Requiring Treatment For The Felony Assault Is Harmless.....	30
D.	CONCLUSION	31

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Chapman v. California, 386 U.S. 18,
87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)..... 30

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 12, 13, 16

Washington State:

Hubbard v. Dep't of Labor and Indus., 140 Wn.2d 35,
992 P.2d 1002 (2000)..... 28

In re Jeffries, 110 Wn.2d 326,
752 P.2d 1338 (1988)..... 12

State v. Acosta, 123 Wn. App. 424,
98 P.3d 503 (2004)..... 18

State v. Adamo, 128 Wn. 419,
223 P. 9 (1924)..... 19

State v. Atsbeha, 142 Wn.2d 904,
16 P.3d 626 (2001)..... 17, 18

State v. Azpitarte, 140 Wn.2d 138,
995 P.2d 31 (2000)..... 28

State v. Brown, 132 Wn.2d 529,
940 P.2d 546 (1997)..... 18, 19, 21, 22

State v. Cadigan, 55 Wn. App. 30,
776 P.2d 727 (1989)..... 16

State v. Carleton, 82 Wn. App. 680,
919 P.2d 128 (1996)..... 19

<u>State v. Crockett</u> , 188 Wn. App. 853, 78 P.3d 658 (2003).....	23
<u>State v. Gonzales</u> , 90 Wn. App. 852, 954 P.2d 360 (1998).....	30
<u>State v. Jones</u> , 118 Wn. App. 199, 76 P.3d 258 (2003).....	29
<u>State v. King</u> , 24 Wn. App. 495, 601 P.2d 982 (1979).....	16, 17
<u>State v. Langford</u> , 67 Wn. App. 572, 837 P.2d 1037 (1992).....	27
<u>State v. Markle</u> , 118 Wn.2d 424, 823 P.2d 1101 (1992).....	21
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	13
<u>State v. Mierz</u> , 127 Wn. 2d 460, 901 P.2d 286 (1995).....	14
<u>State v. Powell</u> , 126 Wn.2d 244, 893 P.2d 615 (1995).....	21
<u>State v. Riles</u> , 135 Wn.2d 326, 957 P.2d 655 (1998).....	24, 26
<u>State v. Riley</u> , 121 Wn.2d 22, 846 P.2d 1365 (1993).....	24
<u>State v. Ross</u> , 71 Wn. App. 837, 863 P.2d 102 (1993).....	14
<u>State v. Thang</u> , 145 Wn.2d 630, 41 P.3d 1159 (2002).....	19
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	12, 13

<u>State v. Valentine</u> , 132 Wn.2d 1, 935 P.2d 1294 (1997).....	14
<u>State v. Walker</u> , 40 Wn. App. 658, 700 P.2d 1168 (1985).....	16
<u>State v. Westlund</u> , 13 Wn. App. 460, 536 P.2d 20 (1975).....	14
<u>Westerman v. Cary</u> , 125 Wn.2d 277, 892 P.2d 1067 (1994).....	24

Constitutional Provisions

Federal:

U.S. Const., amend. 6.....	12
----------------------------	----

Washington State:

Const., art. I, § 22.....	12
---------------------------	----

Statutes

Washington State:

RCW 10.99.020.....	27
RCW 9.94A.505	23, 27-29
RCW 9.94A.545	23
RCW 9.94A.602	23
RCW 9.94A.700	23, 26, 28, 29
RCW 9.94A.700 through .720	29

RCW 9.94A.715	23, 28
RCW 9A.36.031	21

Rules and Regulations

Washington State:

ER 403	19
ER 404	1, 17-19, 21

Other Authorities

WPIC 35.50.....	21
-----------------	----

A. ISSUES PRESENTED

1. A defendant charged with assaulting a law enforcement officer may argue self-defense and obtain a self-defense jury instruction only when evidence shows that the defendant was in actual danger of death or serious injury at the time of the assault. In this case, there was no evidence that the defendant was in any danger of injury or death during his arrest when he assaulted a Seattle Police officer. In fact, the defendant testified that he did not intentionally assault the officer and never resisted, claiming that he allowed himself to be arrested. Was the defendant accordingly entitled to a self-defense jury instruction or prejudiced by his attorney's failure to seek such an instruction?

2. Trial courts may admit evidence of other misconduct under ER 404(b) to prove motive, intent (if intent is an issue) or when those acts are part of the *res gestae* of the crime and will help portray a more complete picture of the event for the jury. The defendant made obscene threats to the police officer victim of his assault during the assault and echoed similar threats after his arrest minutes later to another officer. Were those statements properly admitted at trial as *res gestae* of the charged crime and

were they also admissible to show the defendant's motive and intent for the assault on the officer?

3. As a condition of sentence and in the interest of preventing crimes and preserving order, judges can prohibit offenders from having contact with crime victims as well as others connected with the offender's crime. This defendant violated an existing domestic violence no-contact order with his estranged girlfriend and, when police responded, assaulted one of the responding officers after kicking in the door to his girlfriend's house. Was there a sufficient connection between the offender, his girlfriend and his assault on the police officer to warrant the issuance of a no-contact order between the defendant and his former girlfriend?

4. Sentencing courts can require felony offenders to complete domestic violence treatment and can also require offenders on community custody to obtain treatment or counseling services related to the offense. This defendant was convicted of (i) assaulting a police officer (who responded to a domestic violence call triggered by the defendant's violation of a court order) and (ii) violation of that domestic violence court order. As a condition of sentence on each crime, the defendant was ordered to

complete domestic violence treatment. Was the domestic violence treatment ordered for the felony assault related to the defendant's crime? If not, is any error harmless given the fact that the defendant has to complete the same treatment during his misdemeanor probation?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

As a result of an incident on January 3, 2004, the defendant, Ismael Armendariz, was charged with one count of Assault in the Third Degree and one count of Domestic Violence Misdemeanor Violation of a Court Order. CP 1-2.

Armendariz initially disclosed two defenses – general denial and self-defense. RP 2. Following briefing by the State and argument that the facts of the case do not support a self-defense theory, Armendariz conceded that a defense of self-defense was likely inapplicable. RP 17-18. Although Judge Alsdorf allowed counsel for Armendariz to reserve the right to seek a self-defense instruction should the presented evidence warrant, defense counsel never sought such an instruction. RP 18, 30.

Following a jury trial before the Honorable Robert Alsdorf, Armendariz was convicted of both counts. CP 30, 54. Armendariz now appeals.

2. SUBSTANTIVE FACTS

On November 19, 2003, after the collapse of her long-term relationship with Armendariz, Diana Nonas-Truong obtained a No-Contact order from the Seattle Municipal Court against Armendariz. RP 41-42. That order prohibited any contact between Armendariz and Ms. Truong and barred Armendariz from coming within 500 feet of Ms. Truong's residence. RP 49-51. Armendariz received that order, signed it, read it and understood its restrictions. RP 50-52.

Despite the no-contact order and its explicit warning that even invited contact violates the order, Armendariz continued to have contact with Ms. Truong and her residence. RP 51. During the afternoon of January 3, 2004, Armendariz went to Ms. Truong's house, purportedly for a family gathering in honor of one of Ms. Truong's sons, but also so Ms. Truong and Armendariz could "figure out" the direction of their relationship. RP 105. That contact

ended in an argument and Ms. Truong and Armendariz agreed to go their separate ways. RP 109.

Armendariz returned to Ms. Truong's residence during the evening of January 3, 2004. RP 43, 100. Ms. Truong was not expecting company so when she heard "pounding" outside, Ms. Truong ignored it and took a shower. RP 93-94. When she again heard the pounding after her shower, Ms. Truong looked outside and saw several police officers in full uniform, including Seattle Police Officer Chittenden. RP 95, 151. The officers had responded to Ms. Truong's residence as a result of a 911 call reporting potential domestic violence. RP 142.

Enroute, responding officers heard about the existing no-contact order in place on January 3, 2004. RP 37-38. At least one of the officers, Officer Chittenden, knew something about the involved parties because he had responded to Ms. Truong's residence on one prior occasion where he arrested Armendariz. RP 58-59.

Ms. Truong answered the door and stated that she had not called 911. RP 97. Ms. Truong then spoke with officers and confirmed that a now-broken bedroom window was intact earlier in the day. RP 95-97. As other officers left to conduct an area check

for Armendariz, Officer Chittenden stepped inside to speak with Ms. Truong. RP 98-99, 142-43.

Officer Chittenden closed and locked Ms. Truong's door as he interviewed her, primarily to keep Armendariz out. RP 143. During that conversation, Officer Chittenden heard Armendariz yelling outside the front door, kicking on the front door as if someone was trying to gain entry and pounding on the living room windows. RP 144. Officer Chittenden and Ms. Truong heard Armendariz yelling various things, including "bitch," that he "was not going to go away," that he didn't care if the police were there and that he didn't care if he went to jail. RP 98-99, 144.

Because Officer Chittenden was by himself and believed (based on what he had seen and heard) that Armendariz might be combative, Officer Chittenden asked for a "fast backup" via radio, essentially asking any officers in the area to respond as quickly as possible. RP 114, 145. In response, Officers Polhemus, Milstead and Inouye began to head to Ms. Truong's residence. RP 33, 114, 123.

As Officer Chittenden waited for backup officers to arrive, he heard the yelling and pounding begin to move away from the front door area, leading the officer to conclude that Armendariz might

leave. RP 145. Because Officer Chittenden did not want Armendariz to get away, the officer opened the front door and prepared to go outside and arrest Armendariz. RP 146.

Officer Chittenden never made it outside. RP 146. As soon as the front door was unlocked, Armendariz forcefully kicked it open, causing the door to strike Officer Chittenden in the left side of the head. RP 146-47. Officer Chittenden then saw Armendariz standing in the threshold of the doorway. RP 148. After identifying himself by yelling "police," Officer Chittenden grabbed Armendariz to arrest him. RP 148.

Armendariz resisted Officer Chittenden and engaged in a lengthy wrestling match on the floor. RP 149. As soon as that struggle began, Officer Chittenden began telling Armendariz to "relax" and "stop fighting." RP 153. Armendariz grabbed at Officer Chittenden's waistband and tried to get on top of the officer, apparently attempting to overpower Officer Chittenden. RP 149. During that struggle, Armendariz grabbed Officer Chittenden's holstered gun, leading Officer Chittenden to conclude that Armendariz might be trying to disarm him. RP 150. Armendariz was in a position of advantage on top of Officer Chittenden and the officer was "losing" the fight by virtue of his inability to bring

Armendariz under control. RP 151-52. As a result, Officer Chittenden broadcast a “help the officer” call over radio, a call reserved for times when an officer is in “mortal danger.” RP 123, 150.

When he heard Officer Chittenden ask for help over the radio, Armendariz stated, “yeah, you better call for help bitch.” RP 154. Officer Chittenden concluded that Armendariz was desperate and that Armendariz would continue to fight and attempt to overpower him. RP 155. Officer Chittenden tried to wrap his legs around Armendariz to bring him under control and, when that failed, Officer Chittenden punched Armendariz. RP 101, 156-57. During the struggle, Ms. Truong saw Armendariz punch Officer Chittenden. RP 101. After he broadcast his “help the officer” call, Officer Chittenden continued his unsuccessful attempts to bring Armendariz under control and arrest him. RP 151.

Officer Polhemus was the first to arrive at the “help the officer” call, within about a minute of broadcast. RP 62, 152. When Officer Polhemus entered Ms. Truong’s residence, he saw Officer Chittenden on the ground in the corner of the living room on his back with Armendariz on top of him. RP 102, 117. Officer Polhemus (who was also in full uniform) began to give Armendariz

loud, repeated verbal commands to put his hands behind his back and tried to grab Armendariz's hand but Armendariz was "extremely resistive" and never complied with the verbal commands. RP 118-19.

Officers Milstead and Inouye arrived soon thereafter. RP 34, 124. As Officers Chittenden and Polhemus continued to struggle with Armendariz in attempts to get his hands behind his back for handcuffing, Officer Inouye also began to yell commands at Armendariz to put his hands behind his back. RP 36, 119. Officer Milstead drew his "Taser" but, because of the circumstances of the struggle and the close quarters, he did not deploy that weapon. RP 128. Eventually, Officers Chittenden and Polhemus were able to flip Armendariz over, bring him under control and handcuff him. RP 119, 130.

After he was handcuffed and arrested, Armendariz was transported to the Seattle Police North Precinct by Officer Milstead. RP 130. While Armendariz was in the holding cell area in the company of Officer Milstead, Armendariz said "Come on bitch, take these handcuffs off and we can go at it." RP 131-32. Both Armendariz and Officer Chittenden received medical treatment for the injuries suffered in the struggle. RP 135.

Armendariz told a somewhat different version of the events when he testified at trial. Although Armendariz did not dispute his unauthorized presence at Ms. Truong's residence on the evening of January 3, 2004, and explained that he carefully read and understood the court order that barred him from the residence, Armendariz said he came because Ms. Truong invited him there. RP 42, 50-51. While Armendariz agreed that he was knocking loudly on Ms. Truong's door and yelling her name, he said that he never used profanity. RP 56. Armendariz also claimed that he had no idea the police were at Ms. Truong's residence and only realized he was in a fight with a police officer (a police officer that he incidentally knew from prior arrests) after he was grabbed and thrown to the floor. RP 58-59. Finally, Armendariz stated that, because of his "respect for the law," he would have immediately complied with any requests to put his hands behind his back. RP 57. According to Armendariz, he never resisted (he was only "not helping" the officers as they attempted to restrain him) and the incident resolved itself when he "allowed" himself to be brought under control, turned around and handcuffed. RP 59-61.

The jury convicted Armendariz as charged. CP 30, 54. At a September 24, 2004 sentencing, Judge Alsdorf imposed a 3-month

sentence (followed by 12 months on community custody) for the Assault in the Third Degree and a concurrent 5-month sentence (followed by 12 months of probation) for the Domestic Violence Misdemeanor Violation of a Court Order.¹ RP 87-88, 90, CP 31-37, 38-40. Judge Alsdorf also imposed a 5-year no-contact order with Ms. Truong and Domestic Violence Batterer's Treatment for Armendariz although Judge Alsdorf encouraged Ms. Truong to petition the court for early termination of the no-contact order if Armendariz successfully completed his treatment. RP 89, CP 31-37, 38-40.

C. ARGUMENT

- 1. ARMENDARIZ WAS NOT ENTITLED TO A SELF-DEFENSE INSTRUCTION BECAUSE THERE WAS NO EVIDENCE THAT HE ACTUALLY FACED DEATH OR SERIOUS INJURY. ACCORDINGLY, HIS ATTORNEY'S DECISION NOT TO REQUEST A SELF-DEFENSE INSTRUCTION WAS APPROPRIATE AND DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL.**

Armendariz argues that his attorney's failure to seek a self-defense jury instruction violated his constitutional right to

¹ The sentence for Count II, Domestic Violence Misdemeanor Violation of a Court Order, is a suspended sentence which could result in an additional term of incarceration for Armendariz if he violates the conditions of that sentence, which include compliance with the no-contact order and treatment.

effective assistance of counsel. Given the evidence presented in the case, Armendariz was not entitled to such an instruction and thus was not prejudiced by his counsel's failure to request it. Accordingly, Armendariz's claim of ineffective assistance of counsel fails.

The provisions of both the Washington State and federal constitutions guarantee that criminal defendants have the right to representation by counsel. U.S. Const., amend. 6; Const., art. I, § 22. Federal and state courts have long held that the right to counsel is, in essence, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987).

The threshold for evaluating effective assistance of counsel is whether counsel's conduct "so undermined the functioning of the adversarial process" that the result cannot be relied on as fair. Strickland, 466 U.S. at 686. A defendant alleging ineffective assistance must show (i) that counsel's performance was deficient, and (ii) that such deficiency prejudiced the defendant. In re Jeffries, 110 Wn.2d 326, 331, 752 P.2d 1338 (1988), (citing Strickland, 466 U.S. at 686). In order to prove an ineffective

assistance claim, the defendant must prove both elements of the Strickland test. Thomas, 109 Wn.2d at 225-26.

The first prong of the Strickland test requires a criminal defendant alleging ineffective assistance of counsel to show that counsel's representation "fell below an objective standard of reasonableness based on consideration of all the circumstances." Thomas, 109 Wn.2d at 226. This is a high burden because any court scrutinizing the performance of counsel will indulge in a "strong" presumption of reasonableness. Strickland, 466 U.S. at 688-89. Essentially, a defendant alleging ineffective assistance must demonstrate the absence of legitimate strategic or tactical reasons underlying counsel's decisions. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

In order to satisfy the second prong of the Strickland test, a defendant must prove that there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. Thomas, 109 Wn.2d at 226. A reasonable probability is one that is sufficient to undermine confidence in the outcome of the proceeding. Strickland, 466 U.S. at 694.

Here, Armendariz claims that his counsel erred in failing to request a self-defense jury instruction and that such error prejudiced him to the point where faith in the result is undermined. Armendariz ignores longstanding applicable precedent concerning jury instructions and self-defense in assault cases involving law enforcement victims.

It is well established that arrestees may not assault law enforcement officers during arrest and later claim “self-defense” unless the arrestee was actually about to be killed or seriously injured. State v. Ross, 71 Wn. App. 837, 842, 863 P.2d 102 (1993). This prohibition applies even if the arrest is later determined to be unlawful (State v. Valentine, 132 Wn.2d 1, 21, 935 P.2d 1294 (1997)) and even if the arrestee reasonably but mistakenly believed he was about to be seriously injured by officers (State v. Westlund, 13 Wn. App. 460, 466, 536 P.2d 20 (1975)). This rule promotes orderly and safe law enforcement by encouraging aggrieved citizens to test the actions of law enforcement in a court of law rather than by the law “of the street.” State v. Mierz, 127 Wn. 2d 460, 475, 901 P.2d 286 (1995).

In this case, there is no evidence in the record suggesting that Armendariz was actually in danger of death or serious injury at

the hands of Officer Chittenden or anyone else. Officers Chittenden, Inouye, Polhemus and Milstead all testified that their struggles with Armendariz came during their attempts to physically restrain and arrest him. RP 35-36, 117-18, 130, 145-46, 157-58. Those attempts involved a “bear hug” by Officer Chittenden (RP 117-18), some punches by Officer Chittenden after Armendariz grabbed Officer Chittenden’s firearm (RP 157-58), and attempts to physically grab Armendariz’s arm and place it behind his back (RP 130). These actions resulted in, at most, minor injuries to Armendariz that were successfully and completely treated that evening before he was booked into jail. RP 135.

In his testimony, Armendariz initially claimed that he thought his life was in danger (RP 44), but later explained that he never struck Officer Chittenden and didn’t intend to hurt him (RP 46). In fact, despite his stated belief that his life was in danger, Armendariz testified that he had not even resisted officers that night, instead claiming that he “allowed himself” to be brought under control and arrested. RP 59-60.

Given the dearth of evidence in the record that Armendariz was actually in danger of injury or death, defense counsel’s decision not to seek a self-defense jury instruction was appropriate.

Lawyers are not required to seek and parties are not entitled to receive jury instructions that are not supported by evidence. State v. Cadigan, 55 Wn. App. 30, 38, 776 P.2d 727 (1989); State v. King, 24 Wn. App. 495, 501, 601 P.2d 982 (1979). While Armendariz reserved the right to seek a self-defense instruction if warranted by the facts, counsel understandably never sought that instruction given the evidence admitted at trial. Counsel's decision was also likely based on avoiding the presentation of inconsistent defenses (self-defense opposed to general denial), a legitimate strategic decision. Instead, defense counsel opted to pursue a general denial defense, arguing that Armendariz did not intentionally assault Officer Chittenden. RP 78-80.

Because there was no credible evidence suggesting that Armendariz was actually in danger of death or serious injury, he was not entitled to a self-defense instruction. See State v. Walker, 40 Wn. App. 658, 662, 700 P.2d 1168 (1985). Accordingly, Armendariz cannot satisfy either of the required elements of the Strickland test. Armendariz cannot show that the conduct of his attorney (pursuing only legally available defenses supported by the evidence and pursuing a defense consistent with his client's general denial) was deficient or inconsistent with legitimate trial

strategy. Similarly, Armendariz cannot show any prejudice caused by counsel's decision not to seek a self-defense instruction because there was insufficient evidence to support the inclusion of such an instruction. King, 24 Wn. App. at 501.

2. STATEMENTS MADE BY ARMENDARIZ AT THE PRECINCT IN THE MINUTES FOLLOWING HIS ARREST WERE PROPERLY ADMITTED PURSUANT TO ER 404(b).

Armendariz claims that Judge Alsdorf erroneously admitted a statement Armendariz made to officers 20 or 30 minutes after his assault on Officer Chittenden and his arrest. Because the statement was made a short time after the assault on Officer Chittenden and was offered as *res gestae* evidence as well as evidence showing Armendariz's intent and state of mind, the statement was properly admitted.

The decision to admit evidence is within the sound discretion of the trial court and such decision may be reversed only upon a finding of abuse of discretion. State v. Atsbeha, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001). A court abuses its discretion only

when it acts in a manner inconsistent with that of any reasonable person. See Atsbeha, 142 Wn.2d at 913-14.

Although evidence of other misconduct is inadmissible to prove propensity or criminal character, such evidence may be admissible to prove motive, intent, knowledge and absence of mistake or accident. ER 404(b). Evidence of other misconduct is also admissible under the *res gestae* exception to ER 404(b) when the misconduct helps outline the context and the sequence of events surrounding the crime so the jury has a “complete picture” of the incident. State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997). Finally, evidence of other misconduct may also be admitted to show the defendant’s state of mind at the time of the offense. State v. Acosta, 123 Wn. App. 424, 434, 98 P.3d 503 (2004).

Before admitting other misconduct evidence, the trial court should (i) find by a preponderance of the evidence that the crime occurred, (ii) identify the purpose behind introducing the evidence, (iii) determine whether the evidence is relevant to prove an element of the charged crime and (iv) weigh the probative value of the

evidence against its prejudicial effect. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).²

Many Washington cases discuss the ER 404(b) admission of post-crime misconduct and statements. For example, State v. Brown affirmed the *res gestae* admission of subsequent sex attacks by a defendant on a different victim because the evidence of subsequent misconduct “provided the jury with a more complete picture of events surrounding the crimes committed against [the victim here].” Brown, 132 Wn.2d at 573. Similarly, the trial court in State v. Adamo properly admitted the statement “Ha, I kill you too” made by a defendant to another party after a shooting because that statement “closely followed” the shooting and “tended to show the frame of mind of the defendant at the time of the shooting, and was also part of the *res gestae*.” State v. Adamo, 128 Wn. 419, 424, 223 P. 9 (1924).

² Although Armendariz does not argue that Judge Alsdorf failed to do the required ER 403 balancing on the record, a court’s failure to do so constitutes harmless error if a reviewing court (i) determines from the record that the trial court would have admitted the evidence following a balancing and (ii) concludes in considering the untainted evidence that the outcome of the trial would have been the same absent the contested evidence. State v. Carleton, 82 Wn. App. 680, 686-87, 919 P.2d 128 (1996). The record contains argument from the State concerning the probative nature and potential prejudice of Armendariz’s statements to Officer Milstead (RP 137), and this Court can accordingly conclude that the trial court adopted that argument. Carleton, 82 Wn. App. at 685.

In this case, Judge Alsdorf admitted two statements by Armendariz. The first, "Yeah, you better call for help bitch," occurred during Armendariz's assault on Officer Chittenden and was admitted without objection. RP 154. The second, "Come on bitch, take these handcuffs off and we can go at it" occurred 20 or 30 minutes after the assault when Armendariz was under arrest and at the precinct in the company of Officer Milstead. RP 132. Counsel for Armendariz objected to the admission of the statement made to Officer Milstead on relevance grounds, claiming that the statement was "not probative of [Armendariz's] state of mind." RP 130, 137. Judge Alsdorf overruled the relevance objection, finding that the statement to Officer Milstead was "close in time" to the charged assault and thus admissible *res gestae* evidence. RP 137-38.

That decision was correct. The statements Armendariz made during the assault and shortly thereafter were properly admissible *res gestae* evidence Armendariz's state of mind at the time of the assault. The statements were nearly identical and illustrated for the jury a "more complete picture of events" surrounding the assault, particularly in light of Armendariz's testimony that he did not and never would have assaulted Officer

Chittenden because of his “respect for the law.” Brown, 132 Wn.2d at 571; RP 58.

Even if the trial court erred in admitting the statement to Officer Milstead as *res gestae* evidence, the reviewing court can consider other proper bases on which the decision could be sustained. State v. Markle, 118 Wn.2d 424, 438, 823 P.2d 1101 (1992). Because intent was an issue in this case (given the requisite mental state for Assault in the Third Degree³ and the defense advanced by Armendariz) Judge Alsdorf could properly have admitted the statement to show Armendariz’s intent at the time of the assault. State v. Powell, 126 Wn.2d 244, 261-62, 893 P.2d 615 (1995). In addition, the court could have admitted the statement as motive evidence because the statement demonstrated an impulse, desire or other moving power that caused Armendariz to act to assault Officer Chittenden. Powell, 126 Wn.2d at 259.

In any event, the trial court properly admitted evidence about Armendariz’s statement to Officer Milstead. That statement was admissible under ER 404(b) as part of the *res gestae* of the

³ Armendariz was charged with Assault in the Third Degree under RCW 9A.36.031(g). CP 1. Although that subsection does not require proof of intent, the general definition of assault does require intent. WPIC 35.50.

recently completed assault and to demonstrate Armendariz's intent and motive. The decision to admit that evidence was clearly within the broad discretion provided to the trial court, was based on reasonable grounds and thus should not be disturbed. Brown, 132 Wn.2d at 572.

3. THE SENTENCING COURT APPROPRIATELY ISSUED A NO-CONTACT ORDER WITH MS. TRUONG BECAUSE ARMENDARIZ'S VIOLATION OF THE EXISTING NO-CONTACT ORDER BETWEEN HIMSELF AND MS. TRUONG PRECIPITATED THE ASSAULT ON OFFICER CHITTENDEN.

Armendariz claims that the sentencing court lacked statutory authority to impose a five-year no-contact order between himself and Ms. Truong. Given the statutory discretion granted to sentencing judges to impose conditions of sentence and supervision and the facts of this case, Armendariz's argument is meritless.

Defendants convicted of “crimes against persons,” like Assault in the Third Degree, are subject to a mandatory community custody term of up to 18 months.⁴ RCW 9.94A.505(2)(a)(I), RCW 9.94A.700(1), RCW 9.94A.602. In addition to the many mandatory community custody conditions enumerated in RCW 9.94A, Washington law authorizes sentencing judges to impose additional discretionary conditions. RCW 9.94A.545, 9.94A.700(4), 9.94A.715(1). A sentencing judge can, as a condition of sentence, bar an offender from having contact with the crime victim, “any other” specified individuals and any specific “class” of individuals. RCW 9.94A.545, 9.94A.700(5), 9.94A.715(2)(a), 9.94A.720(1)(c).⁵ A reviewing court measures sentence conditions by an abuse of discretion standard. State v. Crockett, 188 Wn. App. 853, 856, 78 P.3d 658 (2003).

⁴ Because Armendariz was subject to a standard range sentence of less than one year, his maximum community custody term was 12 months. RCW 9.94A.545.

⁵ While the cross references are somewhat complex, RCW 9.94A.545 mandates that offenders sentenced to a community custody term are subject to the conditions listed in RCW 9.94A.715 and RCW 9.94A.720 (which authorize no-contact orders with “other specified individuals”). RCW 9.94A.715 also mandates that any community custody term shall include the conditions outlined in RCW 9.94A.700(4) and (5), which include no-contact orders with victims. RCW 9.94A.700.

The State has a compelling interest in preventing future crimes. Westerman v. Cary, 125 Wn.2d 277, 293, 892 P.2d 1067 (1994). In serving that interest, sentencing courts may impose no-contact orders. State v. Riley, 121 Wn.2d 22, 38, 846 P.2d 1365 (1993). Despite this authority, sentencing courts have some limitations on their authority to impose overbroad or unreasonable no-contact orders. One case addressing those limitations, State v. Riles, held that a no-contact order that barred a sex offender who victimized an adult female from having contact with any “minor-age children” was unreasonable. State v. Riles, 135 Wn.2d 326, 349-50, 957 P.2d 655 (1998). In that case, the court found that there was no “reasonable relationship” between the crime and the no-contact order to justify such a broad restriction. Riles, 135 Wn.2d at 349. Although the Supreme Court did not find an “express requirement” that sentence conditions be crime-related, that court did state that the language of the statute required that the parties protected by the no-contact order have “some relationship to the crime.” Id. at 349-50.

In this case, the court barred Armendariz from any contact with Ms. Truong for five years following his convictions for Assault

in the Third Degree and Domestic Violence Misdemeanor Violation of a Court Order. CP 34, 39.

Armendariz argues that Judge Alsdorf lacked statutory authority to prohibit contact between himself and Ms. Truong because Ms. Truong was not the victim of the felony assault. This argument ignores the fact that Ms. Truong was the victim in Count II, the violation of the existing domestic violence court order. CP 2. In fact, it was the existence of that order and Armendariz's violation of it on January 3, 2004 that triggered the police response. RP 142. Armendariz's violation of the no-contact order led Officer Chittenden to arrest him and it was during that arrest that the assault occurred. RP 146-48. Of particular note is the fact that the victim of the assault was the officer who initially arrested Armendariz for domestic violence in November 2003, the incident that caused the issuance of the no-contact order. RP 49. Given those facts, it stretches the bounds of credibility to suggest that there is no connection between Ms. Truong, the prior domestic violence incidents involving Armendariz and Ms. Truong, the no-contact order on January 3, 2004 and the assault committed by Armendariz on that day.

Judge Alsdorf recognized this obvious connection. During sentencing, Judge Alsdorf addressed Armendariz, stating that, “you need to understand that the no-contact orders are to be comply [sic] with.” RP 87. Later during the sentencing hearing, when he was considering the length of the no-contact order, Judge Alsdorf stated, “given the offense here ... the State is asking for 5 years ... I will impose the 5 year no-contact order because I do want to make sure that its clear that this is very serious.” RP 88-89.

This is not a case like Riles where the broad no-contact order imposed by the court bore no relationship to the defendant’s crime. As clearly illustrated by the facts of the case and as outlined by Judge Alsdorf, Armendariz’s prior violent relationship with Ms. Truong, the existence of the no-contact order and Armendariz’s violation of that order on November 3, 2004 and subsequent assault were all directly related to the court’s decision to impose a 5-year no-contact order. That decision does not constitute an abuse of discretion and must stand.⁶

⁶ Furthermore, RCW 9.94A authorizes sentencing courts to impose a no-contact order for the victim, a specified class of individuals and “any other specified individuals.” RCW 9.94A.700(5). Even if Ms. Truong is not a victim, as Armendariz claims, the sentencing court still has statutory authority to impose a no-contact order for her as an “other specified individual.”

4. ARMENDARIZ WAS PROPERLY ORDERED TO COMPLETE DOMESTIC VIOLENCE TREATMENT AS A CONDITION OF COMMUNITY CUSTODY FOR THE FELONY ASSAULT AND AS A CONDITION OF HIS PROBATION FOR THE MISDEMEANOR CRIME.

a. The Sentencing Court Properly Required Armendariz To Complete Domestic Violence Treatment For The Felony Crime As A Condition Of Community Custody.

Armendariz claims that the sentencing court lacked statutory authority to require Armendariz to complete domestic violence treatment as a condition of community custody for the felony assault. Given the authority granted sentencing courts within the Sentencing Reform Act to require participation in “crime-related” treatment, this claim fails.

When sentencing a “domestic violence” offender, the sentencing court may order participation in a domestic violence perpetrator program. RCW 9.94A.505(11). Crimes of “domestic violence” include Assault in the Third Degree (when the perpetrator and victim are household or family members) and violation of an existing no-contact order.⁷ RCW 10.99.020(1), (3)(c) and (3)(r).

⁷ In this case, Armendariz’s violation of the no-contact order was a misdemeanor, meaning the provisions of the SRA would not apply to the sentence for that offense. State v. Langford, 67 Wn. App. 572, 587, 837 P.2d 1037 (1992).

In addition, when sentencing any offender who is subject to community placement or custody, the sentencing court may impose additional conditions during the term of supervision, including participation in “crime-related treatment or counseling services” (RCW 9.94A.700(5)(b)) or “rehabilitative programs ... reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community” (RCW 9.94A.715(2)(a)).

Armendariz argues that because there is a specific mention of domestic violence treatment within RCW 9.94A.505(11) and no specific mention within RCW 9.94A.700 or .715, that creates an ambiguity or inconsistency that works in his favor. But this argument ignores the plain language and obvious application of the statute.

When interpreting a statute, the reviewing court strives to effect the intent of the legislature and reads each provision of the statute in an attempt to understand the statute “as a whole.” Hubbard v. Dep’t of Labor and Indus., 140 Wn.2d 35, 43, 992 P.2d 1002 (2000). Unless there is an ambiguity, the meaning of the statute comes from its plain language. State v. Azpitarte, 140 Wn.2d 138, 140-41, 995 P.2d 31 (2000). When construing different

provisions of the SRA, they are not read to contradict each other but are instead “harmonized” if reasonably possible. State v. Jones, 118 Wn. App. 199, 208, 76 P.3d 258 (2003).

RCW 9.94A.505 and RCW 9.94A.700 through .720, by their very terms, address completely different issues. RCW 9.94A.505 is the overriding sentencing statute within the SRA and begins, “When a person is convicted of a felony, the court shall impose punishment as provided in this chapter.” RCW 9.94A.505(1). RCW 9.94A.505 then directs the reader to other provisions of the SRA that address specific crimes, types of sentences and post-incarceration supervision that may or may not apply given the facts of the case. RCW 9.94A.505. On the other hand, RCW 9.94A.700 through .720 govern specific requirements and prohibitions imposed during community custody or placement. Because these statutes address different issues, they are neither ambiguous nor contradictory.

In this case, Judge Alsdorf properly required Armendariz to complete domestic violence treatment as a condition of his felony conviction. The facts of the case clearly illustrate that the entire incident, including the assault, was caused by Armendariz’s violation of the existing no-contact order issued due to prior

domestic violence allegations. Given those circumstances, the requirement that Armendariz receive domestic violence treatment during supervision was reasonably related to the circumstances of the offense, the offender's risk of reoffending, and the safety of the community.

b. Because Armendariz Must Also Complete Domestic Violence Treatment During His Misdemeanor Probation Period, Any Error In Requiring Treatment For The Felony Assault Is Harmless.

A “harmless error” is one that is trivial, formal or merely academic and which “in no way affects the outcome of the case.” State v. Gonzales, 90 Wn. App. 852, 855, 954 P.2d 360 (1998). The harmless error doctrine was developed to eliminate technical arguments that needlessly waste judicial resources. Id. (citing Chapman v. California, 386 U.S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)).

Contrary to the assertions within Armendariz’s brief, he was required by Judge Alsdorf to complete domestic violence treatment as a condition of his misdemeanor probation as well as during his

felony community custody period.⁸ CP 7, 37; Brief of Appellant at 25. The misdemeanor Judgment and Sentence orders a 12-month probation term for count II and contains a requirement that “the defendant shall enter into, make reasonable progress and successfully complete a state certified domestic violence treatment program.” CP 39. The probation term ordered for the misdemeanor is of identical length as the community custody period imposed. CP 39; RP 89-90.

Given the fact that Armendariz must complete domestic violence treatment by the terms of the misdemeanor Judgment and Sentence, it matters not whether Judge Alsdorf erroneously required Armendariz to complete the same treatment as a condition of his felony sentence. Accordingly, any error is harmless and does not warrant reversal.

D. CONCLUSION

For the reasons stated above, this Court should find that Armendariz received effective assistance of counsel and find that Armendariz’s post-arrest statement to Officer Milstead was properly

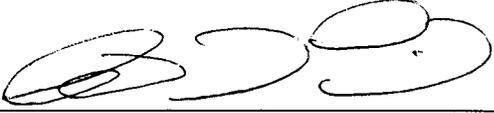
⁸ Armendariz does not challenge the authority of Judge Alsdorf to impose domestic violence treatment as a result of the misdemeanor domestic violence conviction.

admitted, and affirm his convictions. In addition, this Court should affirm the imposition of the no-contact order and the domestic violence treatment requirement as conditions of the felony sentence that were warranted given the facts of the case.

DATED this 10 day of September, 2005.

Respectfully submitted,

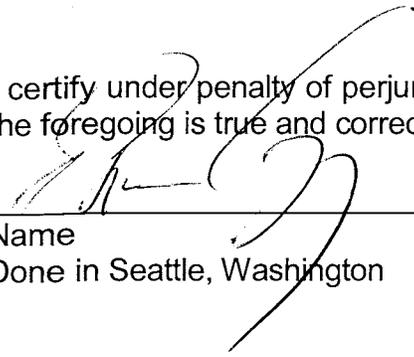
NORM MALENG
King County Prosecuting Attorney

By: 
SCOTT F. LEIST, WSBA #29940
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Elaine Winters, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. ISMAEL ARMENDARIZ, Cause No. 55074-8-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

9-6-05

Date

RECEIVED
SEP 14 2005
