

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY SEAN COLEMAN,

Appellant.

No. 27254-1-III

Division Three

UNPUBLISHED OPINION

Schultheis, C.J. — Timothy Coleman argues that cumulative error deprived him of a fair trial on a charge of unlawful imprisonment. He contends that trial counsel was ineffective for failing to object to prior bad acts evidence and the prosecutor’s use of the term “domestic violence.” He also contends the trial court erred in admitting testimony from a domestic violence expert and in imposing a domestic violence fine. Finally, Mr. Coleman contends that the information was constitutionally deficient. We affirm.

FACTS

Mr. Coleman and Chrystle Richards met in the spring of 2007 at Alcoholics Anonymous while Mr. Coleman was on work release. The two would occasionally go

out together when Mr. Coleman was permitted to leave work release for social outings. In early June 2007, Mr. Coleman was released from confinement and he and Ms. Richards began to spend more time together. The relationship quickly soured. On June 5 or 6, Mr. Coleman saw Ms. Richards in a park with some friends. He sent Ms. Richards a text message, asking, ““Could I see you?”” Report of Proceedings (RP) at 44-45. A friend in the group asked Mr. Coleman to join them but he drove away. Shortly thereafter, Ms. Richards decided to end the relationship.

On June 10, the couple began arguing in a park. Ms. Richards wanted to leave but Mr. Coleman wanted to continue the conversation. She left in her car and Mr. Coleman followed her in his truck. He sped past her and tried to get her to pull over to talk. Ms. Richards ended up in Mr. Coleman’s lane and their cars collided. No one was injured and Ms. Richards received a traffic citation for the unsafe lane change. Later that day, Mr. Coleman apologized and offered to pay for the ticket. At some point that day, Ms. Richards told Mr. Coleman that she wanted to end their relationship.

Mr. Coleman called Ms. Richards the next day and offered her the use of his truck. She borrowed the truck and returned it that evening. They briefly spoke inside Mr. Coleman’s apartment. When Ms. Richards was ready to leave, Mr. Coleman wanted to continue talking and refused to give her a ride home. Ms. Richards told him she would walk home and started to leave.

Mr. Coleman became angry, grabbed Ms. Richards' cell phone, and refused to give it back. She walked out the door and then returned because she realized Mr. Coleman also had the keys to her apartment. When it became clear that Mr. Coleman was not going to return Ms. Richards' phone or keys, she turned to leave again. At the door, Mr. Coleman grabbed Ms. Richards by the hair, threw her down, and ripped off her shirt, telling her, "You're not going anywhere." RP at 50. The couple struggled for three to four minutes. Ms. Richards fought back but Mr. Coleman hit her in the head and managed to hold her down.

Ms. Richards was eventually able to get outside Mr. Coleman's apartment but she returned for her phone. When Ms. Richards was back inside the apartment, Mr. Coleman began to hit and kick her. Ms. Richards was able to get outside and screamed for someone to call 911. A bystander called police and officers arrived within five minutes. Ms. Richards obtained a no-contact order against Mr. Coleman that day.

The next day, June 12, Ms. Richards began receiving hang-up calls she suspected were from Mr. Coleman. She called him back and he admitted to making the calls and apologized for the events of the previous day. On June 13, Mr. Coleman showed up at Ms. Richards' apartment. She allowed Mr. Coleman inside her apartment to talk. During their conversation, he promised to give her a car if she agreed to spend a day with him before he turned himself in. Ms. Richards agreed to drive him to a motel in Vantage.

Upon arrival in Vantage, Mr. Coleman got a motel room and Ms. Richards agreed to have dinner with him at a restaurant across from the motel. After dinner, they returned to the motel room and began drinking. Ms. Richards decided she wanted to leave, resulting in more arguing and another physical struggle.

The State charged Mr. Coleman with unlawful imprisonment based on the events of June 11. Before trial, the State moved to admit evidence of the events that occurred before and after June 11. Defense counsel did not object, noting, “They more or less have to come in so that the jury has a total picture of their relationship.” RP at 4. The trial court admitted the evidence.

Defense counsel moved to exclude the State’s proposed domestic violence expert, Erin Gailey, from testifying about the impact of domestic violence on a victim. The court granted the defense motion, subject to review as the facts of the case developed.

During opening statement, the prosecuting attorney stated:

For a lot of people the term “domestic violence” is just a buzz word. For a lot of people it’s a term that doesn’t hit home to them because they’ve never experienced it. But when it does happen to you, it’s anything but simply a word. For Chrystle Richards domestic violence was very real. She lived with it from January 2007 all the way up through June of that year.

RP at 15-16.

Ms. Richards testified to the events described above. The court then revisited the issue of Ms. Gailey’s proposed testimony. The State argued that Ms. Gailey should be

allowed to explain the dynamics of domestic violence to help the jury understand Ms. Richards' seemingly inconsistent behavior. Defense counsel argued that a domestic violence analysis was irrelevant because the parties had never lived together and their relationship was exceedingly brief. The court questioned the relevance of the proposed testimony, noting the absence of a history of domestic violence in the relationship.

However, after thinking about the issue overnight, the court changed its mind, ruling that Ms. Gailey would be allowed to testify "about the victims of domestic violence making seemingly counterintuitive decisions." RP at 92. The judge reasoned, "I do think there's a legitimate misunderstanding in the general public about why, you know, why didn't she leave . . . And because that question was asked on cross examination I think it's fair for the state maybe to bring that in generally." RP at 93.

Ms. Gailey then testified that domestic violence victims stay in violent relationships for any number of reasons, including the potential danger of leaving. She explained that perpetrators of domestic violence use violence or the threat of violence and isolation to control their partner and that such abuse "becomes very debilitating." RP at 105. Ms. Gailey did not give an opinion about the specific dynamics of Mr. Coleman's and Ms. Richards' relationship.

Mr. Coleman did not testify. The jury found Mr. Coleman guilty of unlawful imprisonment. The court imposed a midrange standard range sentence of 50 months, a

domestic violence no-contact order, and a \$100 domestic violence fine.

ANALYSIS

Ineffective Assistance of Counsel

The first issue is whether Mr. Coleman was denied his right to a fair trial based on ineffective assistance of counsel. Mr. Coleman contends that he was prejudiced by defense counsel's stipulation to prior bad acts evidence and failure to object to the prosecuting attorney's use of the term "domestic violence" during trial.

To prevail on an ineffective assistance claim, a defendant must show that defense counsel's performance was deficient and this deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). A defendant must make both showings to prevail on an ineffective assistance claim. *Thomas*, 109 Wn.2d at 226. We begin with a strong presumption that counsel's conduct fell within the range of reasonable professional assistance. *Id.* To establish prejudice, the defendant must show that there is a reasonable probability that the trial's outcome would have differed absent counsel's deficient performance. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Mr. Coleman argues that trial counsel should have objected to the State's motion to admit evidence of events that occurred before and after June 11 because these events

were irrelevant to the charge of unlawful imprisonment and inadmissible under ER 404(b).¹ He contends this evidence was prejudicial, tainting him as a “‘criminal type’” and therefore likely to commit the charged crime. Br. of Appellant at 15.

We note that matters of trial strategy cannot constitute ineffective assistance of counsel. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). The decision of when or whether to object is a classic example of trial strategy. Only in egregious circumstances on testimony central to the State’s case, will counsel’s failure to object constitute incompetence justifying reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Further, counsel’s actions pertaining to the defendant’s theory of the case do not constitute ineffective assistance. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

Here, the record indicates that defense counsel’s decision to allow events prior and subsequent to June 11 into evidence was deliberate trial strategy. Before trial, counsel stated that such evidence was necessary to give the jury a complete picture of the relationship. Further, the evidence of the events at issue supported the defense theory of the case—that Ms. Richards’ behavior was inconsistent with someone who has allegedly

¹ “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b).

been held against her will.

Additionally, it is apparent from the record that by eliciting details about events in the park the day before the incident, defense counsel hoped to show that Ms. Richards bore some responsibility for the couple's volatile relationship. For example, during opening statement, defense counsel pointed out that the day before the incident in question, police issued Ms. Richards a traffic citation after she crossed into Mr. Coleman's lane of traffic during an argument.

Defense counsel's strategy is evident in his closing argument:

If you were in [Ms. Richards'] shoes and your liberty had been restrained and your life had been threatened, once you had gotten out of the apartment, would you go back for a cell phone? . . .

If you went to the trouble to get a no-contact order and you truly believed that somebody was going to kill you . . ., would you let him into your apartment the next day? . . . Would you go on a trip to Vantage with him? Would you drink with him? Would you have dinner with [him]? Would you check into a motel with [him]? According to her, she did all this. She had ample opportunities to leave, and she didn't.

RP at 123-24.

We conclude that defense counsel's decision to stipulate to the admissibility of the evidence in question was a valid tactical choice. This strategy may have been unsuccessful but it does not show ineffective assistance of counsel as the law defines it.

Next, Mr. Coleman contends that defense counsel was ineffective for failing to object to the use of the term "domestic violence" during trial. He contends that the jurors

were left to speculate what the term meant and “could have concluded that Mr. Coleman was guilty because Ms. Richards was a victim of domestic violence.” Br. of Appellant at 18. The State responds that Mr. Coleman’s conduct constituted domestic violence as defined by chapter 10.99 RCW, which encompasses people who have dated. It also points out that the term has entered the common vernacular.

The domestic violence statute lists unlawful imprisonment as a potential domestic violence crime. RCW 10.99.020(5)(q). The statute also states that unlawful imprisonment is a domestic violence crime if committed by a family or household member against another. RCW 10.99.020(3). The definition of “family or household members” includes persons who have dated. *Id.*

In view of the statutory definition, defense counsel was not deficient for failing to object to the prosecutor’s characterization of the offense as one of domestic violence. Because the crime at issue is listed in the statute as a potential domestic violence offense and the parties dated, albeit briefly, the prosecutor’s use of the term “domestic violence” was not improper.

In any event, even if defense counsel was deficient for failing to object to the State’s use of the term “domestic violence,” Mr. Coleman cannot establish that the outcome of the trial would have been different absent counsel’s deficient performance. First, the jury was instructed that the remarks of counsel were not evidence.

Further, overwhelming evidence supports the conviction. A person is guilty of unlawful imprisonment if “he knowingly restrains another person.” RCW 9A.40.040(1). To restrain someone is to “restrict a person’s movements without consent and without legal authority in a manner which interferes substantially with [her] liberty.” RCW 9A.40.010(1). A substantial interference is a “real” or “material” interference with the liberty of another as contrasted with a petty annoyance or imaginary conflict. *State v. Robinson*, 20 Wn. App. 882, 884, 582 P.2d 580 (1978), *aff’d*, 92 Wn.2d 357, 597 P.2d 892 (1979).

Here, Mr. Coleman impaired Ms. Richards’ ability to leave his apartment by pulling her hair, throwing her down, hitting her in the head, ripping off her shirt, and holding her down for three to four minutes. Ms. Richards’ ripped shirt was later found stashed in a boot in Mr. Coleman’s apartment. When a police officer arrived on the scene, Ms. Richards was screaming and had scratches on her body. In view of this strong evidence of guilt, we reject Mr. Coleman’s argument that the “aura of domestic violence” prejudiced his case. Br. of Appellant at 19.

Expert Testimony

Next, Mr. Coleman argues that the trial court erred in admitting Ms. Gailey’s testimony concerning the dynamics of domestic violence relationships. We review a trial court’s decision to exclude or admit evidence and testimony at trial under an abuse of

discretion standard. *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004). A trial court abuses its discretion when it bases its decision on untenable grounds. *State v. Partee*, 141 Wn. App. 355, 361, 170 P.3d 60 (2007).

Mr. Coleman argues that Ms. Gailey's testimony pertaining to the dynamics of domestic violence relationships is irrelevant to whether Mr. Coleman committed the crime of unlawful imprisonment. The State responds that Ms. Gailey's testimony was helpful to the jury because it explained Ms. Richards' seemingly inconsistent behavior and provided the jury with some basic information with which to evaluate her credibility.

In Washington, expert testimony pertaining to domestic violence is allowed to explain the seemingly inconsistent behavior of victims of domestic violence. *See, e.g., State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988) (admitting expert testimony as to battered women syndrome to help the jury understand why the victim failed to leave the relationship or report the acts of violence); *State v. Grant*, 83 Wn. App. 98, 109, 920 P.2d 609 (1996) (noting that expert testimony pertaining to domestic violence is admissible to explain why a victim minimized the violence and allowed the defendant to see her despite a no-contact order).

In *Ciskie*, the victim and the defendant dated for almost two years. During that time, the defendant repeatedly assaulted the victim physically and sexually. When the victim indicated she wished to end the relationship, the defendant increased the assaults

against her. The *Ciskie* court allowed an expert to testify about battered women syndrome to explain why the victim had stayed in the relationship and failed to report the acts of violence to the police. *Ciskie*, 110 Wn.2d at 280.

In contrast to *Ciskie*, the relationship between the parties here was exceedingly brief. Mr. Coleman and Ms. Richards did not spend any significant time together until Mr. Coleman's release from confinement in early June 2007. The incident at issue occurred on June 11. There is no evidence of domestic violence in the relationship from the date of Mr. Coleman's release and the incident at issue. At most, the record discloses that on June 5 or June 6, Mr. Coleman expressed some jealousy when he saw Ms. Richards in a park with friends and that he followed Ms. Richards in his truck after an argument.

Given the parties' abbreviated relationship and the lack of a domestic violence history, there was no tenable basis to admit Ms. Gailey's testimony. The trial court admitted the testimony to explain why Ms. Richards did not leave Mr. Coleman after the incident at issue. But without any evidence of a domestic violence history, Ms. Gailey's testimony that perpetrators of domestic violence isolate, control, and debilitate their victims, was irrelevant to any issue before the jury.

Despite this error, the overwhelming untainted evidence, detailed above, supports Mr. Coleman's conviction. Accordingly, any error is harmless.

Information

Next, Mr. Coleman contends that the information was defective because it failed to include a domestic violence allegation. He complains that the absence of such an allegation prevented him from adequately preparing a defense and that he was prejudiced by the court's imposition of a domestic violence no-contact order at sentencing.

“The Sixth Amendment to the United States Constitution and article I, section 22 (amend. 10) of the Washington Constitution require that a charging document include all essential elements of a crime, statutory and nonstatutory, so as to inform the defendant of the charges against him and allow him to prepare a defense.” *State v. Phillips*, 98 Wn. App. 936, 939, 991 P.2d 1195 (2000). “Every material element of the charge, along with all essential supporting facts, must be put forth with clarity.” *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). Additionally, Washington law requires prosecutors to set forth their intent to seek enhanced penalties for the underlying crime in the information. *State v. Crawford*, 159 Wn.2d 86, 94, 147 P.3d 1288 (2006).

The time at which the defendant challenges the charging document controls the standard of review. Where, as here, the challenge is made after the verdict, the language is construed liberally in favor of validity. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). Under the liberal standard of review, we apply a two-prong test: (1) do the necessary elements appear in any form, in the information, and if so, (2) can the

defendant show actual prejudice from the inartful language. *Id.* at 104.

Domestic violence is not an element of unlawful imprisonment. The domestic violence act, chapter 10.99 RCW, “created no new crimes but rather emphasized the need to enforce existing criminal statutes in an evenhanded manner to protect the victim.” *Roy v. City of Everett*, 118 Wn.2d 352, 358, 823 P.2d 1084 (1992). Further, designation of a crime as a domestic violence crime “does not itself alter the elements of the underlying offense; rather, it signals the court that the law is to be equitably and vigorously enforced.” *State v. O.P.*, 103 Wn. App. 889, 892, 13 P.3d 1111 (2000).

Here, the State charged and convicted Mr. Coleman of unlawful imprisonment. The information stated all the elements of the crime. The State did not seek an exceptional sentence based on domestic violence and the court did not use domestic violence as an aggravating factor for an exceptional sentence.

Nevertheless, Mr. Coleman argues that the court’s imposition of a domestic violence no-contact order constitutes an increased punishment requiring a special domestic violence allegation in the information. His argument is not persuasive.

RCW 10.99.050 provides for enforcement of no-contact orders that are entered as a condition of a defendant’s sentence. Division One of this court has held that such domestic violence no-contact orders are not punitive; rather, the procedures authorized by RCW 10.99.050 are regulatory and designed to protect third parties. *State v. Felix*, 125

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Wn. App. 575, 579-80, 105 P.3d 427 (2005). The *Felix* court noted that “RCW 10.99.050 does not authorize no-contact orders that might not otherwise be imposed; it specifies only additional enforcement measures for no-contact orders that may already be issued as a sentencing condition.” *Id.* at 580.

We conclude that the information is constitutionally sufficient. It contained the necessary elements of unlawful imprisonment. And the trial court had the discretion to impose a no-contact order even without a domestic violence allegation or finding.

Domestic Violence Fine

Mr. Coleman argues that the trial court lacked statutory authority to impose a domestic violence fine in the absence of a finding that the crime of unlawful imprisonment involved domestic violence under RCW 10.99.080(1). Mr. Coleman claims that because he was not convicted of a crime involving domestic violence, imposition of the fine was erroneous.

The State argues that Mr. Coleman may not challenge the fine for the first time on appeal. However, “In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.” *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). A trial court may impose a sentence only as authorized by statute. *In re Pers. Restraint of Tobin*, 165 Wn.2d 172, 196 P.3d 670 (2008). Here, Mr. Coleman argues that his sentence is contrary to RCW 10.99.080.

Accordingly, his challenge to his sentence may be raised for the first time on appeal.

RCW 10.99.080 authorizes superior courts to “impose a penalty assessment not to exceed one hundred dollars on any person convicted of a crime involving domestic violence.” Because the parties dated and the crime at issue is listed in the domestic violence statute as a potential domestic violence offense, the crime is one of domestic violence. RCW 10.99.020(3)-(5). Accordingly, imposition of the domestic violence fine was proper.

Cumulative Error

Finally, Mr. Coleman contends that cumulative trial court error warrants reversal of his conviction. We apply the cumulative error doctrine “when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.” *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Here, we do not find an accumulation of errors that denied Mr. Coleman a fair trial.

Affirmed.

A majority of the panel has determined that 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.

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WE CONCUR:

Sweeney, J.

Korsmo, J.