MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Russell G. Finnegan,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 12, 2023

Court of Appeals Case No. 23A-CR-639

Appeal from the Pulaski Superior Court

The Honorable Kim E. Hall, Special Judge

Trial Court Cause No. 66D01-1912-CM-275

Memorandum Decision by Judge Tavitas
Judges Pyle and Foley concur.

Tavitas, Judge.

Case Summary

[1] Russell Finnegan was convicted of invasion of privacy after violating a no-contact order. Finnegan appeals and argues: (1) the no-contact order was unenforceable; (2) the trial court violated his constitutional rights to compulsory process by refusing to issue a subpoena for witness testimony; and (3) the trial court abused its discretion by refusing to instruct the jury on the defense of necessity. We find Finnegan's arguments without merit and, accordingly, affirm.

Issues

[2] Finnegan raises three issues, which we reorder and restate as:

I. Whether the no-contact order was enforceable.

II. Whether the trial court violated Finnegan's constitutional rights to compulsory process by refusing to issue a subpoena for witness testimony.

III. Whether the trial court abused its discretion by refusing to instruct the jury on the defense of necessity.

Facts

[3] This case stems from events described in Finnegan's related appeal, *Finnegan v. State*, No. 22A-CR-1879 (Ind. Ct. App. Feb. 23, 2023), *trans. denied*. To summarize, in 2018, Finnegan was renting property on land owned by Gerald Kruger in Francesville ("the Property"), and Kruger hired Scott Thompson to perform farming work near the rented property. *Id*. at 2. Finnegan believed

that Thompson "trespass[ed]" on the Property when performing the work, and on October 18, 2019, Finnegan armed himself with two loaded firearms and handcuffs and attempted to place both Thompson and Kruger under a "citizen's arrest." *Id*. at 2-3. Based on these events, the State charged Finnegan with criminal confinement and intimidation in Cause No. 66C01-1910-F3-14 ("Cause No. F3-14").[1]

[4] On October 21, 2019, the trial court held Finnegan's initial hearing in Cause No. F3-14, and the trial court explained that it was issuing two no-contact orders that prohibited Finnegan from having any contact with Kruger, Thompson, or "with [the Property]." Ex. Vol. I p. 43. Finnegan asked how he could recover his belongings from the Property, and the prosecutor and the trial court explained that Finnegan could "have a third party retrieve his belongings," contact the prosecutor's office, or "go through [an] attorney." *Id*. at 44-45. The trial court provided Finnegan with the phone number for the prosecutor's office. Finnegan indicated that he "[u]nderstood" the trial court's instructions. *Id*. at 45.

[5] The next day, Finnegan was served with copies of the no-contact orders, which were issued pursuant to Indiana Code Section 35-33-8-3.2. Both orders provided that Finnegan "shall not visit" the Property. *Id*. at 4-5, 8-9. Finnegan was released on bond, and he worked with his attorney, Jay T. Hirschauer, to

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[1] At trial, Finnegan was convicted of criminal confinement, a Level 3 felony, and intimidation, a Level 5 felony, and we upheld Finnegan's convictions on appeal. *Finnegan*, Case No. 22A-CR-1879, slip op. at 1.

renew his lease at the Property. In November 2019, however, Kruger died in an unrelated car accident, and after Kruger's death, Finnegan was unable to renew the lease and "get . . . back in the house." Tr. Vol. II p. 142.

[6] In the week before December 25, 2019, Finnegan learned that a truck belonging to his neighbor, Mark Cervenka[2], was "stolen out of [Cervenka's] driveway in broad daylight." *Id*. at 143. On December 25, 2019, Finnegan went to the Property to recover his belongings.

[7] Sometime that day, Pulaski County Sheriff's Office Detective Frederick Rogers was dispatched to the Property after an individual reported that Finnegan was at the Property. Detective Rogers knocked on the door, and Finnegan answered. Finnegan "advised [Detective Rogers that] he was aware that he was not supposed to be" at the Property, and Finnegan "indicated that he knew about the no-contact orders." *Id*. at 113. Detective Rogers helped Finnegan remove his belongings from the home before placing him under arrest.

[8] The State charged Finnegan with two counts of invasion of privacy, a Class A misdemeanor. Count I alleged that Finnegan violated the no-contact order regarding Kruger, and Count II alleged that Finnegan violated the no-contact order regarding Thompson.

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[2] In the record, Cervenka's name is also spelled "Sevecka," which the court reporter noted was the "phonetic" spelling. Tr. Vol. II p. 96. We will use the "Cervenka" spelling.

[9] Before trial, the trial court determined that Finnegan was an "abusive pro se litigant" and placed restrictions on Finnegan's pro se filings.[3] *Id*. at 54. Finnegan filed a subpoena to require Cervenka to testify at trial; however, the trial court struck the subpoena based on Finnegan's noncompliance with the abusive pro se litigant order.

[10] The trial court held a jury trial on February 7, 2023. Finnegan renewed his request to subpoena Cervenka, and the trial court inquired regarding Cervenka's "first[-]hand knowledge . . . ." Tr. Vol. II p. 97. Finnegan answered that Cervenka would testify regarding the theft of Cervenka's truck and explained that "having this knowledge is the reason [Finnegan] went back to [the Property]" to obtain his belongings. *Id*. Finnegan admitted that Cervenka did not know the reason that Finnegan went to the Property. The trial court denied Finnegan's request to subpoena Cervenka.

[11] The State then presented its case in chief, during which the State elicited Detective Rogers's testimony regarding Finnegan's knowledge of the no-contact orders and presence at the Property. The trial court admitted the no-contact orders into evidence.

[12] Finnegan testified in his own defense. Finnegan admitted that he knew the no-contact orders prohibited him from visiting the Property, and he admitted that

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[3] This Court has provided a glimpse of Finnegan's abusive behavior in Finnegan's related appeals. *See e.g.*, *Finnegan*, Case No. 22A-CR-1879, slip op. at 4 n.2, 5; *Finnegan v. State*, 201 N.E.3d 1186, 1189-90, 1196 (Ind. Ct. App. 2023), *trans. denied*.

he went to the Property on December 25, 2019, nonetheless. Finnegan explained that, after he learned that Cervenka's truck was stolen, he went to the Property to recover his belongings. On cross-examination, Finnegan admitted that contacting the prosecutor's office or having a family member collect his belongings "[p]robably" would have been "a better course of action . . . ." *Id*. at 147.

[13] After the close of evidence, Finnegan requested a final jury instruction on the defense of necessity. The trial court determined that no emergency existed and that Finnegan had alternative means to secure his belongings in lieu of violating the no-contact orders. Accordingly, the trial court declined to issue the instruction.

[14] In his closing argument, Finnegan admitted, "I'm probably guilty of these charges. . . . I simply disobeyed an order from the Judge." *Id*. at 163. After eighteen minutes of deliberation, the jury found Finnegan guilty on both counts. The trial court entered judgment of conviction on Count I and dismissed Count II due to double-jeopardy concerns. The trial court then sentenced Finnegan to 365 days in the Pulaski County Jail, all suspended to probation. Finnegan now appeals.

Discussion and Decision

I. The no-contact order was enforceable

[15] Finnegan first argues that the no-contact order regarding Kruger is unenforceable, and thus, his conviction cannot stand.[4] We are not persuaded.

[16] Finnegan was convicted of invasion of privacy, a Class A misdemeanor, under Indiana Code Section 35-46-1-15.1(a)(11). That section provides, in relevant part, that "[a] person who knowingly or intentionally violates . . . an order issued under IC 35-33-8-3.2 . . . commits invasion of privacy, a Class A misdemeanor."

[17] The trial court issued the no-contact order here pursuant to Indiana Code Section 35-33-8-3.2, which governs the conditions a trial court may impose on a defendant who is admitted to bail "to assure the defendant's appearance at any stage of the legal proceedings, or, upon a showing of clear and convincing evidence that the defendant poses a risk of physical danger to another person or the community, to assure the public's physical safety." Ind. Code § 35-33-8-3.2(a). Subsection (a)(3) of the statute permits a trial court to "[i]mpose reasonable restrictions on the activities, movements, associations, and residence of the defendant during the period of release."

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[4] Finnegan does not argue that the State presented insufficient evidence that he violated the no-contact order. Indeed, Finnegan admitted that he knew of the no-contact order and willingly violated it.

[18] Finnegan contends that, when Kruger died, "[t]he no contact order became void . . . ." Appellant's Br. p. 11. He relies on *Mosely v. State*, 171 N.E.3d 1031 (Ind. Ct. App. 2021). In that case, Mosely pleaded guilty to corrupt business influence for running a fraud scheme, and the trial court ordered Mosely to have no contact with the victim as a condition of his probation. *Id*. at 1032-33. The trial court issued the no-contact order pursuant to Indiana Code Section 35-38-2-2.3(a)(18), which provides that a trial court may "order the probationer to '[r]efrain from any direct or indirect contact with an individual.'" *Id*. at 1034 (citing Ind. Code § 35-38-2-2.3(a)(18)).

[19] Unbeknownst to the parties and the trial court, however, the victim died before the trial court issued the no-contact order. *Id*. at 1032. While in prison, Mosely wrote to the victim's address; the State alleged that Mosely violated the conditions of his probation by attempting to commit invasion of privacy; and the trial court terminated Mosely's probation. *Id*. at 1033. On appeal, a panel of this Court held that the trial court "lacked the authority" to issue the no-contact order in the first place because, "given [the victim's] earlier death, the order was void at the outset." *Id*. at 1034.

[20] We find *Mosely* distinguishable. First, the no contact order issued here not only prohibited Finnegan from having contact with Kruger, but also prohibited him from visiting the Property.

[21] Moreover, Finnegan fails to persuade us that the no-contact order was void based on Kruger's death. "The distinction between a void and voidable

judgment normally 'is no mere semantic quibble.'" *Mosely*, 171 N.E.3d at 1034 (quoting *Stidham v. Whelchel*, 698 N.E.2d 1152, 1154 (Ind. 1998)). Whereas a void judgment is "one that, from its inception, is a complete nullity and without legal effect," a voidable judgment "is not a nullity . . . [u]ntil superseded, reversed, or vacated . . . ." *State v. Oney*, 993 N.E.2d 157, 165 (Ind. 2013) (quotation omitted). "[A]s a general proposition, [a] voidable judgment or order may be attacked only through a direct appeal, whereas a void judgment is subject to direct or collateral attack at any time." *Id*. (quotation omitted).

[22] Here, unlike in *Mosely*, Kruger did not die until after the no-contact order was issued, so the order could not be void for that reason, as Finnegan contends. Further, Finnegan makes no argument that the no-contact order was voidable, and we, thus, do not decide that issue. *See* Ind. App. R. 46(A)(8)(a) (requiring that each argument be supported by "cogent reasoning" and "citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on"). Accordingly, the no contact order was enforceable.

II. The trial court did not violate Finnegan's constitutional rights to compulsory process by refusing to subpoena Cervenka

[23] Finnegan next argues that the trial court violated Finnegan's constitutional rights to compulsory process by refusing to issue a subpoena requiring Cervenka to testify at trial. We are not persuaded.

[24] "'Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the

Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.'" *Kubsch v. State*, 784 N.E.2d 905, 923-24 (Ind. 2003) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 2146 (1986)) (internal citations omitted). As the United States Supreme Court has observed:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Id. at 924 (quoting *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 1923 (1967)). "[T]he right of a criminal defendant to compulsory process for obtaining witnesses in his behalf is guaranteed by both the federal and Indiana constitutions." *Ferguson v. State*, 670 N.E.2d 371, 375 (Ind. Ct. App. 1996) (citing U.S. Const. amend. VI; Ind. Const. art. 1 § 13[5]), *trans. denied*.

[25] A criminal defendant, however, "does not enjoy an absolute right to subpoena anyone or anything for any purpose." *Klagiss v. State*, 585 N.E.2d 674, 681 (Ind. Ct. App. 1992). When a defendant alleges that the right to compulsory

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[5] Article 1, Section 13 of the Indiana Constitution provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall have the right . . . to have compulsory process for obtaining witnesses in his favor."

process has been unconstitutionally limited, we make two inquiries: (1) whether the trial court "arbitrarily denied" the defendant's right to call the witness; and (2) "whether the witness was competent, and his testimony was relevant and material." *Ferguson*, 670 N.E.2d at 375 (citing *Washington*, 388 U.S. at 23).

[26] Regarding the second prong, "[t]he defendant must indicate how the witness' testimony would have been both material and favorable to his defense." *Id*. (citing *Davis v. State,* 529 N.E.2d 112, 115 (Ind. Ct. App. 1988)). Our courts have explained:

> [T]he omission [of the testimony] must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

Id. (citing *Davis*, 529 N.E.2d at 115); *accord United States v. Valenzuela-Bernal*, 458 U.S. 858, 868, 102 S. Ct. 3440, 3447 (1982)).

[27] Here, Cervenka's testimony was neither relevant, competent, nor material. Cervenka's personal knowledge was limited to the theft of his own truck; he lacked any personal knowledge regarding Finnegan's actions or motivations for visiting the Property. Cervenka, accordingly, would not have been competent to testify regarding the disputed facts at trial. *See Kubsch*, 784 N.E.2d at 926 (observing that evidence sought to effectuate defendant's constitutional right to present a defense "must comply with applicable evidentiary rules"); *Klagiss*, 585

N.E.2d at 681-682 (subpoenaed videotape was not material and favorable to the defense when "no one with personal knowledge of the making of the tape or the accuracy of its contents would be available either to verify its accuracy or to be subject to cross-examination by the state").

[28] Additionally, Finnegan himself testified that Cervenka's truck was stolen, and Cervenka's testimony would have been merely cumulative of that evidence. Finnegan also admitted that he knew about the no-contact orders and willingly violated them. Cervenka's testimony, thus, would cast no doubt on the fact that Finnegan knowingly violated the no-contact order. *See Paschall v. State*, 717 N.E.2d 1273, 1276-77 (Ind. Ct. App. 1999) (prosecutor's testimony was not material and favorable to the defense when the evidence "foreclosed any reasonable doubt" that defendant committed the offense).

[29] Moreover, the trial court did not act arbitrarily by refusing to issue the subpoena. Finnegan argues that "[t]he court's reasoning was based upon evidence that was not in the record, and seemed, instead, drawn from the court's own suppositions." Appellant's Br. p. 16. The record does not support Finnegan's argument. Rather, the trial court inquired regarding whether Cervenka would be competent to testify regarding any disputed fact and determined that he would not. The trial court's determination was not arbitrary. *See Klagiss*, 585 N.E.2d at 681 (trial court's determination was not arbitrary when it permitted defendant to make an offer of proof regarding the subpoenaed evidence and "took reasonable steps to determine whether the

motion to quash should be granted"). Accordingly, Finnegan's constitutional rights to compulsory process were not violated.[6]

III. The trial court did not abuse its discretion by refusing to instruct the jury on the defense of necessity

[30] Lastly, Finnegan argues that the trial court abused its discretion by refusing to instruct the jury on the defense of necessity. Again, we are not persuaded.

[31] We review a trial court's refusal to give a requested jury instruction for an abuse of discretion. *Hernandez v. State*, 45 N.E.3d 373, 376 (Ind. 2015). We consider: "'(1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other instructions which are given.'" *Id.* (quoting *Guyton v. State*, 771 N.E.2d 1141, 1144 (Ind. 2002)). "A trial court may refuse a jury instruction only when '[n]one of the facts' in the record would support the legal theory offered in the instruction." *Humphrey v. Tuck*, 151 N.E.3d 1203, 1207 (Ind. 2020) (quoting *Sims v. Huntington*, 393 N.E.2d 135, 139 (1979)).

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[6] Finnegan also argues that the trial court did not give a "sua sponte" instruction on Indiana Pattern Jury Instruction No. 13.2500, which instructs, "You should judge the testimony of the Defendant as you would the testimony of any other witness" and that "[t]he combination of no instruction to jurors as to how Finnegan's testimony should be considered and the court's refusal to issue a subpoena for [Cervenka] . . . operated to deprive Finnegan of his constitutional rights . . . ." Appellant's Br. p. 16. Finnegan, however, admits that he did not request this jury instruction, and thus he must demonstrate that the trial court's failure to issue the instruction sua sponte constitutes fundamental error. *See, e.g.*, *Dimmitt v. State*, 25 N.E.3d 203, 208 (Ind. Ct. App. 2015), *trans. denied.* Finnegan does not argue that fundamental error occurred, and accordingly, his argument is waived.

[32] The defense of necessity applies when:

> (1) the act charged as criminal was the result of an emergency and was done to prevent a significant harm; (2) there was no adequate alternative to the commission of the act; (3) the harm caused by the act was not disproportionate to the harm avoided; (4) the Defendant had a good-faith belief that his/her act was necessary to prevent greater harm; (5) the Defendant's belief was objectively reasonable under all the circumstances of the case; and (6) the Defendant did not substantially contribute to the creation of the emergency.

Hernandez, 45 N.E.3d at 376-77.

[33] Here, the evidence does not support an instruction on the defense of necessity. No emergency existed. Finnegan had been released on bond for several weeks before he went to the Property, and the theft of Cervenka's truck occurred approximately one week beforehand. Moreover, Finnegan had ample alternatives to secure his belongings in lieu of violating the no-contact order. Finnegan could have contacted the prosecutor's office, asked a friend or family member for assistance, or sought assistance from a legal professional. He simply did not do so. Accordingly, the trial court did not abuse its discretion by refusing to instruct the jury on the defense of necessity.

Conclusion

[34] The no-contact order was enforceable, Finnegan's constitutional rights to compulsory process were not violated, and the trial court did not abuse its

discretion by refusing to instruct the jury on the defense of necessity. Accordingly, we affirm.

[35] Affirmed.

Pyle, J., and Foley, J., concur.