No. 30738-7-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

SEBASTIAN CORTES AGUILAR,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CHELAN COUNTY

BRIEF OF APPELLANT

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I. APPELLANT'S ASSIGNMENT OF ERROR

1. The trial court deprived Mr. Cortes Aguilar of due process of law when it entered a conviction for first degree murder despite a lack of proof beyond a reasonable doubt of premeditation.

2. The trial court violated the defendant's Article 1, Section 22 right to know the nature and cause of the accusation against him by allowing the State, after resting, to amend the Information to a previously uncharged manner of committing assault.

3. Even if the State should have been permitted to amend, the trial court further deprived Mr. Cortes Aguilar of due process of law when it entered a conviction for second degree assault despite lack of evidence of specific intent to cause bodily harm or create an apprehension of bodily harm against the named victim.

4. The trial court erred by entering No Contact Orders prohibiting the Defendant from having any contact with either of his children for ten years.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The State bears the burden, under the Fourteenth Amendment, of proving every essential element of the offense

beyond a reasonable doubt. As charged, premeditation was an essential element of first degree murder and required the State to prove the defendant affirmatively decided to cause the victim's death after some period of deliberation. Where the State presented no evidence of reflection or planning on the part of the Defendant, did the State produce substantial evidence of premeditation sufficient to prove it beyond a reasonable doubt?

2. After resting its case in chief, the State is permitted to amend only to a lesser included offense, not an alternate means of the offense. Where the State charged the specific intent crime of assault in the first degree against a specific victim and rested its case, should the State have been permitted to amend to an alternate means of committing the entirely different offense of second degree assault simply because it was of a lesser seriousness level?

3. The State bears the burden under the Fourteenth Amendment of proving every essential element of the offense beyond a reasonable doubt. As charged in the Second Amended Information, the specific intent to cause bodily harm or to create an apprehension of bodily harm was a necessary element of second degree assault. Where the State produced no evidence of intent to

injure or create apprehension of injury against the named victim, was it error to convict the Defendant?

4. Parenting is a fundamental constitutional right and State interference with such rights is subject to strict scrutiny. Crime-related prohibitions affecting fundamental rights must be narrowly drawn and sensitively imposed so that they are reasonably necessary to accomplish the essential needs of the State and public order. Did the trial court err by failing to apply the reasonably necessary standard in ordering the Defendant to have no contact with either of his children for ten years?

III. STATEMENT OF THE CASE

On August 21st, 2011 at approximately 5:00 p.m. Spanish-speaking Wenatchee Police Officer Keith Kellog, along with Detective Edgar Reinfeld, interviewed Appellant Sebastian Cortes Aguilar regarding the death of his wife, Ortencia Arroyo Alejandre, earlier that day. RP 4-9, 221-226. Mr. Cortes allowed Officer Kellog to audio tape the interview and was cooperative throughout the entire, long process. RP 10, 221-226, 228-229.

During the interview, Mr. Cortes told Detective Kellog that Ms. Alejandre was holding a knife to peel a cucumber and when he voiced his suspicions about her talking to another man on the

phone, she became upset and struck out at him with the knife, cutting him on the hand. RP 226-227. Mr. Cortes told Officer Kellog that Ms. Alejandre threatened to kill him, so he grabbed the knife and attacked her to prevent being harmed or killed. RP 227. Mr. Cortes told Officer Kellog that he never intended to kill Ms. Alejandre. RP 227. He told Officer Kellog that he remembered his daughter getting in the middle, but did not remember cutting her during that process and that it must have been an accident repeatedly saying how "it all happened so fast or really quickly, very quickly". RP 227-228. Mr. Cortes repeatedly stated that Ms. Alejandre got angry and that it was rapid and she snapped. RP 234. Officer Kellog discussed that with Mr. Cortes multiple times to make sure there was no confusion. RP 234.

Mr. Cortes' words were not the only evidence to support his version of events, Officer Kellog saw cuts to Mr. Cortes' hand and shoulder, pointing them out to Detective Reinfeld and photographing them. RP 235. Mr. Cortes told Officer Kellog that what he did was bad and that he was "not thinking, not thinking." RP 238. Mr. Cortes repeatedly indicated that he only intended to injure Ms. Alejandre. RP 240.

Another eyewitness to testify regarding the events in question was Jovani Cortes, the young son of Mr. Cortes and Ms. Alejandre. RP 319. Jovani testified that he was in the kitchen and heard a bottle break so he went into the living room. RP 321. He saw his sister trying to protect their mother so Jovani went to the front door to call for help. RP 322. He saw his father get a knife, so he went to call 911, heard screaming and that is when his father started to stab his mom. RP 322. Jovani testified that he did not see his dad go get a knife, but that he had it in his hand. RP 322.

Janeli Cortes, the 13-year-old daughter of Mr. Cortes and Ms. Alejandre was the final eyewitness to testify. RP 328. She testified that her parents were arguing loud enough that she heard them over the television in the other room. RP 328. When she heard a bottle crack, she turned off the television and ran into the living room to see her father assaulting her mother with his hands and a belt. RP 329. She testified that her father ran into the kitchen and immediately returned with a knife. RP 329-330. Janeli testified that she got in between her mother and father and that her father "started, like, throwing the knife, like, trying to punch her" while Janeli tried to stop him. RP 330. In the fray, Janeli testified that both she and her mother were cut, but that she did not realize

she had been cut at that time. RP 330-331. Janeli testified that Mr. Cortes was swinging the knife at her mother but that he never swung the knife at her. RP 335. She testified that her father was not aiming the knife at her. RP 335. Janeli testified that her father then ran away and that she ran to get help. RP 331-332.

Detective Weatherman was assigned this case, did a diagram of the apartment and characterized it as small. RP 337-340. In fact, every law enforcement officer to testify regarding the size of the apartment described it as being small. RP 132, 133, 161, 176.

At the close of the State's case in chief, the Defense moved to dismiss Count II for lack of evidence that Mr. Cortes' intended to assault Janeli Cortes and further argued that because the State had chosen to allege intent to assault Janeli Cortes rather than intent to assault Ortencia Arroyo Alejandre, the State should not be permitted to argue transferred intent or amend the Information to conform with the proof. RP 343-347. At that time, the Court seemed to agree. RP 350-352. In the afternoon session, however, there was significant discussion of transferred intent and the State was permitted to amend count II from assault in the first degree alleging intent to commit serious bodily harm against Janeli Cortes

to assault in the second degree alleging that Mr. Cortes, "with intent to commit a felony, did then and there unlawfully, feloniously ~~and intentionally~~ assault(ed) Janeli Cortes Alejandre . . .". (alterations in original). RP 364-365. CP 30-31. The Defense maintained the objection and the next day preserved it with an exception to allowing the case to go to the jury framed as an assault against Janeli Cortes. RP 378.

On March 9, 2012, the jury found Mr. Cortes guilty of counts I and II in the Second Amended Information and found that he was armed with a deadly weapon and that he was a member of the family or household of both victims. CP 94-98.

IV. ARGUMENT

1. THE STATE DID NOT OFFER SUFFICIENT EVIDENCE OF PREMEDITATION TO CONVICT MR. CORTES OF FIRST DEGREE MURDER

a. The State was required to prove the elements of the offense beyond a reasonable doubt. In a criminal prosecution, the Fourteenth Amendment Due Process Clause requires the State to prove each essential element of the crime charged beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re*

Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Evidence is only sufficient if, when viewed in the light most favorable to the prosecution, a rational trier of fact cold have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

To convict Mr. Cortes of first degree murder, the State was required to prove that he acted "with premeditated intent to cause the death of another person . . ." RCW 9A.32.030(1)(a). Premeditation distinguishes first and second degree murder. *State v. Brooks*, 97 Wn.2d 873, 651 P.2d 217 (1982).

b. The State did not prove beyond a reasonable doubt that Mr. Cortes acted with premeditation. Premeditation must involve "more than a moment in point of time," but a mere opportunity to deliberate is not sufficient to support a finding of premeditation. RCW 9A.32.020(1); *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245, *cert denied*, 518 U.S. 1026 (1995). Instead, premeditation is "the deliberate formation of and reflection upon the intent to take a human life" and involves "the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." *Pirtle*, 127 Wn.2d at 644

(quoting *State v. Gentry*, 125 Wn.2d 570, 597-98, 888 P.2d 1105, *cert denied*, 516 U.S. 843 (1995)); *State v. Ortiz*, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992).

Premeditation may be proved by circumstantial evidence where the inferences drawn by the jury are reasonable and the evidence supporting the jury's finding is substantial. *Pirtle*, 127 W.2d at 643; *Gentry*, 125 Wn.2d at 597. However, the Supreme Court has said

> Having the opportunity to deliberate is not evidence the defendant did deliberate, which is necessary for a finding of premeditation. Otherwise, any form of killing which took more than a moment could result in a finding of premeditation, without some additional evidence showing reflection.

State v. Bingham, 105 Wn.2d 820, 826, 719 P.2d 109 (1986).

An impulsive or spontaneous act at is not premeditated. *State v. Luoma*, 88 Wn.2d 28, 34, 558 P.2d 756 (1977). While evidence of a spontaneous act may establish intent, another element of murder, it does not establish premeditation for purposes of first degree. State v. Bolen, 142 Wash. 653, 666, 254 P. 445 (1927). The State did not prove that Mr. Cortes premeditated the intent to kill his wife. At best, it can be said that arming himself with the knife is evidence of the intent to kill her even though he told

Officer Kellog that he did not. There was quite simply no evidence of premeditation whatsoever.

In *Pirtle*, the Supreme Court discussed four characteristics which "are particularly relevant to establish premeditation: motive, procurement of a weapon, stealth, and the method of killing." *Pirtle*, 127 Wn.2d at 644.

In the instant case, there was no evidence admitted at trial that related whatsoever to motive. There was some explanation that perhaps Mr. Cortes and Ms. Alejandre were arguing or fighting, but that alone is hardly a motive to kill. In fact, quite to the contrary, the testimony from Janeli Cortes was that her father had come to the house "to have a barbecue with us and so he came and – well, we were going to start and then it went all wrong." RP 328. This is a couple that had a long term love relationship and two children that were right there. At sentencing, Mr. Cortes repeatedly professed his love for his children, any premeditation would certainly have sought to commit such a heinous crime away from the children.

Although there is evidence that Mr. Cortes "ran" to the kitchen of a very small apartment in order to procure a weapon, there is also evidence that Ms. Alejandre had already procured it and cut Mr. Cortes with it twice before he ever had it. Either way,

the method and timing of the procurement in this case goes to intent which element must also be proven. The timing, at best, can be said to have given Mr. Cortes the mere opportunity to deliberate as the Court described in *Bingham*, supra, 105 Wn.2d 820 at 826. Evidence of opportunity to deliberate is not evidence of the deliberation necessary to show premeditation. On the facts of this case, there simply is no evidence of deliberation and the evidence we do have points, at most, to intent.

Finally, there was not only no evidence of stealth or planning, but ample evidence to the contrary. Rather than planning ahead, Mr. Cortes grabbed either the weapon he had already been stabbed with or the only one in the apartment. Similarly, he used the opposite of stealth by engaging in a loud fight in a small suburban apartment with broken bottles and screaming running out the door and fleeing immediately thereafter. RP 309-312.

A conviction of first degree murder requires the State to provide substantial evidence of premeditation and prove, beyond a reasonable doubt, the premeditated intent to commit the act causing death. Here, there simply was none and the jury's decision can only have been based on the understandable emotion that must have flown from watching these poor children testify regarding

the senseless and spontaneous loss of their mother at the hands of their father.

c. On the facts of this case, the Court must reverse Mr. Cortes' conviction for first degree murder but may either remand for resentencing on the lesser included offense of second degree murder, remand for a new trial or take any other action deemed just. The absence of proof beyond a reasonable doubt of an element requires a dismissal of the conviction and charge. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980). In *Green*, the Supreme Court wrote that in order for a case to be remanded for resentencing on a lesser included offense, the jury must have been instructed on that offense and the jury must have necessarily found each element of that lesser included offense. *Green*, 94 Wn.2d at 234-35. In State v. Gilbert, the Court of Appeals for Division I called that dicta and declined to follow it. *State v. Gilbert*, 68 Wn.App. 379, 842 P.2d 1029 (1993). But the Supreme Court recently abrogated *Gilbert's* ruling in *In re Heidari*, 174 Wn.2d 288, 274 P.3d 366 (2012) and upheld its ruling in *Green*.

"[T]he appellate court may reverse, affirm or modify the decision being reviewed and take any other action as the merits of

the case and the interests of justice may require." RAP 12.2. In the case at bar, Appellant submits that the interests of justice support simply vacating the conviction for failure of proof. As argued below, the State chose to charge first degree murder and first degree assault when the facts supported only charges of second degree murder and second degree assault on transferred intent. Mr. Cortes has been through a trial, jeopardy has attached, he has been convicted on insufficient evidence and we now know that the evidence was insufficient as a matter of law. Even though the jury was instructed on the lesser included offense of second degree murder, it was also instructed on first degree manslaughter and based on the clear error, it cannot easily be said what essential elements they found and which they would have unanimously agreed upon. The burden of this failure belongs to the State and it is therefore simply unjust to give them another bite at the apple.

2. IT WAS ERROR TO PERMIT THE STATE TO AMEND TO AN ALTERNATIVE THEORY OF ASSAULT AT THE CLOSE OF ITS CASE IN CHIEF EVEN THOUGH IT AMENDED TO A LOWER SERIOUSNESS LEVEL OF ASSAULT, BUT EVEN IF THIS AMENDMENT WAS PROPER, THE STATE FAILED TO

PROVE THE ESSENTIAL ELEMENT OF INTENT AS REQUIRED IN THE SECOND AMENDED INFORMATION AS DRAFTED

By way of overview, what happened here is that the State had Mr. Cortes charged all along with first degree assault for the cut to Janeli Cortes' arm by alleging that he intended to inflict great bodily harm upon her and thereby intentionally assaulted her. After the State rested, the Defense moved to dismiss count II against Janeli Cortes offering as his stronger argument that there was no evidence of Mr. Cortes' intent to assault his daughter, only his wife who he was not accused of assaulting in count II. The State responded by saying that is what they meant, that he intended to assault his wife and that intent then transferred to Janeli, who was cut in the fray. Ultimately the Court was persuaded to permit the amendment, but the State then *again* failed to properly charge Mr. Cortes with the intent to assault his wife and again charged him with the intent to assault his daughter in a different manner than he was originally accused of assaulting her. Had the State amended at that time to allege that Mr. Cortes was in the process of committing a felony assault on his wife and accidentally caused injury to his daughter, the intent would have properly transferred, but they did not. Mr. Cortes' conviction on count II must now be

vacated for two reasons. First, because the State amended the information to charge a different crime after resting its case in chief. Second, because it failed to prove an essential element of the amended charge, to wit: the intent to assault Janeli Cortes.

Article 1, Secton 22 of the Washington State Constitution enumerates the Rights of the Accused in a criminal prosecution and provides for the accused to know the nature and cause of the accusation against him.

Two weeks before the Defense argued the point to the trial court, this Court held that, "After the State rests its case-in-chief, it cannot amend the information to charge a different or greater crime, or add an essential element of the crime. *State v. Kirwin*, 166 Wn.App. 659, 271 P.3d 310 (Div. III, 2012)(citing *State v. Vangerpen*, 125 Wn.2d 782, 789-91, 888 P.2d 1177 (1995)). In *Kirwin*, the State charged one of the three alternative ways to commit the crime of custodial interference under RCW 9A.40.060 but proved another. Despite the fact that the to-convict instruction properly described the crimes that were proven, they did not describe the crime that was charged in the information. *Kirwin*, 166 Wn.App. at 663-64.

In the case of Mr. Cortes, the error in the proceedings were worse and the State failed repeatedly to cure the mistake. Here, the wrong victim was alleged throughout the State's prosecution. Had the State alleged an assault on Ms. Alejandre, it is difficult to see how the doctrine of transferred intent would not apply. See, for example, *State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994) (holding that once the intent to assault the intended victim is established, it is transferred to any unintended victim); *State v. Clinton*, 25 Wn.App. 400, 606 P.2d 1240 (1980) (citing the great weight of common law authority upholding the transferring of intent of the defendant to harm one individual to an unintended victim); *State v. Elmi*, 138 Wn.App. 306, 156 P.3d 281 (2007) (holding that once intent against the victim is proven, that intent can be transferred to the unintended victims regardless of the defendant's knowledge of their presence). The State cited to and argued the law of transferred intent from both *Wilson* and *Elmi*, but nevertheless continued to identify the wrong victim.

One need look no further than the form of the Second Amended Information itself to see the confusion which was taking place at the trial court level. RP 365, CP 78. On the Second Amended Information, the Court crossed out an essential element

of the crime charged; that of intent to assault Janeli Cortes. It is clear from a comparison of the full reading of the Second Amended Information during Mr. Cortes' arraignment at RP 365 and the grammatically incorrect and improperly altered charging document itself that nobody knew what was going on. But the State enjoys the choice of how to plead their case along with the burden of proving what they chose to plead. Mr. Cortes is indigent, RP 177-178, and doesn't even speak English. He cannot be held to account for the State's mistake.

Because the State sought to change the victim and allege transferred intent, they were seeking to fundamentally change the charge against Mr. Cortes. This issue was thereafter rendered moot, however, because the State failed to make the necessary change and instead alleged an entirely different crime of felony second degree assault against a victim there was no evidence Mr. Cortes intended to assault.

Unlike the facts in *Kirwin*, the State here presented insufficient evidence of the offense described in the Second Amended Information and the to-convict instruction: an intentional assault against Janeli Cortes. CP 31, 78. The jury in *Kirwin* heard substantial evidence of the crime described in the to-convict

instruction if not the crime described in the charging document. *Kirwin* at 670. The jury here heard only substantial evidence of an uncharged crime not described in the jury instructions, but nevertheless arising out of the same set of facts that Mr. Cortes was tried and unlawfully convicted of. In such a scenario, double jeopardy bars retrial. *Kirwin* at 670 (citing *State v. Wright*, 131 Wn.App. 474, 478, 127 P.3d 742 (2006), *affirmed*, 165 Wn.2d 783, 203 P.3d 1027 (2009).

On the facts in *Wright*, the defendants' convictions were set aside because they were convicted of a "nonexistent crime" which the Court held to be trial error, not insufficient evidence. *Wright*, 131 Wn.2d 783 at 793-94. Here, on the other hand, Mr. Cortes was charged with the very real crimes of first and second degree assault. The trial court dismissed the count of first degree assault for lack of evidence of assault against Janeli Cortes and then failed to recognize that the State did not change the alleged victim such that the concept of transferred intent could have applied. But it was still the State's choice, not the trial court's, to re-allege the different means of committing the lesser offense of felony second degree assault against Janeli Cortes. Now, there being no evidence that Mr. Cores intended to assault Janeli Cortes, this Court must vacate

the conviction for lack of evidence which is deemed an acquittal terminating jeopardy according to the holding in *Wright*.

3. THE DEFENDANT HAS A FUNDAMENTAL RIGHT TO PARENT HIS CHILDREN AND THE COURT IMPROPERLY ENTERED ORDERS PROHIBITING HIM FROM CONTACTING EITHER OF THEM

a. Jovani Cortes was not a listed victim while Janeli Cortes was an improper victim and the Court failed to analyze the reasonable necessity of preventing Mr. Cortes from exercising his fundamental right to parent them requiring remand for such an evaluation. Upon conviction of a crime, the Sentencing Reform Act of 1981 authorizes the trial court to impose crime-related prohibitions such as the entry of a No Contact Order. *In re Rainey*, 168 Wn.2d 367, 229 P.3d 686 (2010) (citing *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008); RCW 9.94A.505(8). Entry of crime-related prohibitions are reviewed for an abuse of discretion. *State v. Ancira*, 107 Wn.App. 650, 27 P.3d 1246 (Div. I, 2001). A court abuses its discretion if it applies the wrong legal standard when imposing a crime-related prohibition. *In re Rainey*, 168 Wn.2d 367, 229 P.3d 686 (2010); *State v. Lord*, 161 Wn. 2d 276, 284, 165 P.3d 1251 (2007). A court will more carefully

review conditions that interfere with a fundamental constitutional right such as the right to the care, custody and companionship of one's children. *Id.* at 374. "Such conditions must be 'sensitively imposed' so that they are 'reasonably necessary to accomplish the essential needs of the State and public order.'" *Id.* (citations in original). The imposition of crime-related prohibitions is fact-specific based upon the sentencing court's evaluation of the offender and facts at trial. *Id.*

Here, the trial court engaged in absolutely no evaluation of the Defendant's fundamental right and no analysis of the State's compelling interests. RP (Sentencing Hearing March 27, 2012) at 42-44. The trial court was given no authority on this point but the Defense did object on that basis. RP (Sentencing Hearing March 27, 2012) at 42-44. By failing to apply any legal standard, much less the very careful and nuanced analysis required by *Rainey*, *Warren*, *Ancira*, etc. the trial court abused its discretion in entering both No Contact Orders.

In point of fact, such a remand itself is improper. It is Appellant's position that the State failed to prove an essential factual element of both charges: premeditation necessary to convict in count I and intent to assault Janeli Cortes as necessary to

convict as charged on count II. Because these are failures of proof requiring vacation and dismissal which has the effect of a acquittal and termination of jeopardy as discussed above, further proceedings violate double jeopardy and the trial court should properly lose jurisdiction over Mr. Cortes entirely.

V. CONCLUSION

Based upon the foregoing, Appellant respectfully requests this court vacate both convictions for a failure of proof and dismiss this action.

Respectfully submitted this 16th day of August, 2012.

David R. Partovi, WSBA #30611
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington the on the 16th day of August, 2012, I mailed a true and correct copy of the foregoing Appellant's Brief by depositing the same in the United States mail, postage prepaid, addressed as follows:

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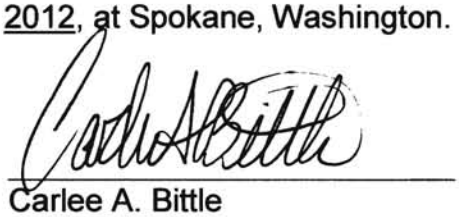
SIGNED this 16th day of August, 2012, at Spokane, Washington.



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