

96691-5

FILED

No. 34786-9-III

DEC 31 2018

WASHINGTON STATE COURT OF APPEALS
DIVISION III

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
by _____

THE STATE OF WASHINGTON

v.

CARLOS HERNANDEZ., PETITIONER

PETITION FOR DISCRETIONARY REVIEW

Julie A. Anderson WSBA#15214
Attorney for Appellant Carlos Hernandez
636 Valley Mall Pkwy Suite 200-A
East Wenatchee, Washington 98802
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A. IDENTITY OF THE PETITIONER:

Carlos Hernandez II (hereinafter Hernandez) is the Petitioner.

B. CITATION TO THE COURT OF APPEALS DECISION:

Hernandez seeks review of the decision of the Court of Appeals Division III, filed on December 6, 2018, affirming Hernandez's convictions.

C. ISSUES PRESENTED FOR REVIEW:

1: Did the Court of Appeals Div. III (hereinafter referred to as the Court of Appeals) err in affirming the trial court's decision terminating the cross examination of A.G. as a contempt sanction in violation of CrR 7.21 and in violation of Hernandez's constitutional right to confrontation?

2: Did the Court of Appeals err in denying Hernandez's motion to dismiss, where Hernandez was not provided counsel at public expense during a critical stage in the proceeding?

3: Did the Court of Appeals err in affirming the trial court's decision which failed to ensure that the Defendant was provided

the co-defendant's written or recorded statements pursuant to CrR7.7(A)(1)(ii)?

4. Did the Court of Appeals err in affirming the trial court's decision denying pro Defendant Hernandez reasonable access to research materials?

5. Did the Court of Appeals err in affirming the trial court's decision where the Defendant's right to a fair trial was compromised by the court not fully investigating Hernandez's allegations that Grant County Deputy Kissler had intimidated the Defendant's witness, Paul Holland, who was an inmate trustee?

D. STATEMENT OF THE CASE:

1. Procedural History

Carlos Hernandez, hereinafter "Hernandez" was charged by Grant County's Fifth Amended Information with the following crimes:

1. Rape of a child in the third degree (RCW 9A.44.079);
2. Child molestation in the third degree (RCW 9A.44.089);
3. Unlawful possession of a firearm in the first degree(RCW 9.41.040(1)(a); **(9 counts)**;
4. Possession of an Unlawful Firearm (RCW 9.41.190(1));

5. Possessing a stolen firearm (RCW 9A.56.310(6) and 9A.20.021(1)(b));
6. Distribution of controlled substance to a person under age 18 (RCW 69.50.406(1)).
7. Special Allegation Sexual Motivation (indicating that if the crime of distribution of a controlled substance was committed with sexual motivation, and if the Defendant had previously been convicted on two separate occasions of a “most serious offense,” then a conviction would result in the mandatory sentence of life imprisonment without the possibility of parole.
8. Tampering with a witness (RCW 9A.72.120). **CP 539-545.**

Hernandez was convicted on all charges, except witness tampering. **CP 670-687.** He was sentenced to life imprisonment without the possibility of parole on the third strike offense, Count #15. **See CP 818-839.** He timely filed a Notice of Appeal to the Court of Appeals, Div. 3.

2. General Facts:

Hernandez girlfriend, Jessica Cobb, who was also the mother of his child, was also charged with sex offenses arising out of same incidents with Hernandez and minor alleged victim A.G. **RP 743; 859-861.**

On August 1, 2016, two days before trial, Hernandez moved the court to allow Ms. Anderson to substitute in for public defender Michael Morgan. The court agreed that she could substitute in as counsel, but the court denied her request for a three month continuance, primarily on the grounds that the case had been continued many times, and because of the concern that another continuance would traumatize the minor alleged victim, A.G. **RP 393-431.** Ms. Anderson did not substitute in as counsel.

On the first day of trial Hernandez asked to represent himself. **RP 3-48.** The court granted his motion and appointed public defender Morgan to stay on as standby counsel. **RP 48-49. (transcript from August 3, 2016.)**

3. Right To Confrontation Of Witnesses Facts:

The following facts occur in Trial Volume VII: The defendant, Carlos Hernandez II, became agitated on one of last days of trial and went on a tirade in the courtroom. Grant County Deputy Prosecuting Attorney Wilmore, hereinafter “Wilmore,” had made a motion to terminate the cross examination by Hernandez of A. G., the alleged victim on the grounds that some of his questions were not relevant, and that the court, under Rule 611, had discretion to control the scope of cross-examination and the use of legal questions. **RP 1225, lines 1-8.**

At that time, the court did not terminate Mr. Hernandez's cross examination, but cautioned Mr. Hernandez that if he continued, quote on the lines of questions that—aren't relevant or haven't (as stated) been asked already, the court can conclude questioning." **RP 1225, lines 23-25.**

Mr. Hernandez was upset, indicating, " Okay. Before Ms. Cobb did what she did—[apparently referring to Jessica Cobb taking a plea deal and testifying against Mr. Hernandez] I think her doing that switched everything around, so I don't see no reason I should be able to go back to these statements and then other ones." Hernandez explained,

I'm trying to prove they set me up.
They—they discussed this in the home. And
without being able to go back to
[Detective] Wallace's stuff. They deceived
me, man. I don't know why the court is so
damn fucking ignorant and they don't want
to fucking listen.

Hernandez's tirade continued, the courtroom deputies apparently descended on Mr. Hernandez. **RP 1227, lines 2-21.**

Wilmore made a motion for the court to hold Hernandez in contempt. **RP 1227, lines 2-21.** Hernandez began screaming about the courtroom officer having a gun out on his hand. **RP 1227 at lines 9-12.** Later Mr. Hernandez explained that had felt something in his hand from

one of the deputies' belts, and that he was concerned that the last thing he needed was "a firearm going off and somebody getting hit and that's on me too...." **RP 1220**, lines 14-16.

The alleged victim A.G. said that she wanted out [of the courtroom] and the prosecutor said to take her out. **RP 1228**, lines 10-25.

Hernandez continued to swear and the court said, "Mr. Hernandez, that's enough." The court then called a recess. **RP 1229**, lines 23-25. Judge Antosz found Hernandez in contempt of court and gave Hernandez an opportunity to respond. **RP 1230** lines 7-25; **RP 1231**, lines 1-25; **RP 1232**, lines 1-2.

The court found that Hernandez was in contempt for his outburst sentenced him to 15 days of confinement, and if it continued 30 days, **RP 1232**, lines 1-12 and indicated that there could be greater sanctions such as shackling or bounding. **RP 1232**, lines 13-20. The court also signed a written order regarding the contempt, which is attached as **Appendix A** to this brief.

Wilmore put on the record that Hernandez started screaming and that he had to be escorted out by four deputies. Wilmore put on the record that A.G. was discombobulated. She ran for the jail door because she

didn't know where she was. **RP 1236**, lines 7-14. Wilmore asked to terminate the examination of A. G. **RP 1245**, lines 1-5.

The court asked Hernandez to speak to Morgan and come up with a list of questions to ask A.G. to present to the judge to see if he would have permission to ask the specific questions. Hernandez indicated that he wanted to ask A.G. the following questions:

1. Did I interact with your mother after my sexual encounter at my residence?
2. Why didn't you call the police after you first got home?
3. How long did you wait to have the police called after the incident?
4. Did I interact with you at Mando's after the sexual counter in your presence?
5. Do you know if your mom was high between the 13th and the 17th?
6. Do you know how your mother got those drugs?
7. Where did she get the drugs?

RP 1255, lines 17-25; **RP 1256**, lines 6-16.

The trial judge wanted a report on how the victim was affected because of Hernandez's outburst. **RP 1258**, lines 13-17. After the judge received the report, he found that A.G. was "legitimately under stress of the event," and that the "outburst was intimidating." **RP 1260**, lines 17-22. The court said that she was "legitimately frightened" **RP 1260**, lines

17-22. Deputy Prosecutor Wilmore argued that A.G. was “in no position to testify.” *Id.* at lines 23-25. Wilmore said that A.G. was frightened because Hernandez had access to a weapon and Hernandez had been yelling at the deputies to “get your mace and gun out of my hands.” **RP 1261**, lines 16-23. Wilmore argued that Hernandez caused her unavailability so he has waived his right to question her. **RP 1262**, lines 16-21.

Wilmore also reported that “[A.G] is refusing to testify.” **RP 1263**, lines 14-19. Wilmore also stated that A.G. was “unable to testify.” **RP 1264**, lines 1-7. Hernandez told the court that Wilmore had just said “I just seen her. She’s calmed down. She’s cool.” **RP 1265**, lines 20-22. Hernandez also said, “She just don’t want to testify.” **RP 1265**, lines 23-25. The court ruled that Hernandez had already inquired of her, and that her “unavailability” as a witness was brought about by Mr. Hernandez’s behavior. **RP 1272**, lines 14-18. The court concluded, “*So her testimony will not proceed further.*” **RP 1272**, lines 14-18. (Emphasis added.)

Hernandez stated that he wanted to note that the reason A.G. left the day before was because of a family emergency, nothing to do with his outburst or anything.” **RP 1274**.

In the written order of contempt attached hereto as **APPENDIX A**, signed on August 16, 2016, the court made the following Findings of Fact:

a. Shouting and vulgar language in courtroom. The defendant did not cease when directed by the court 9:12-9:16 am.

The court thereafter made the following conclusions of law:

2.1: Defendant Hernandez committed a contempt of Court within the Courtroom and in the presence of the undersigned Judge.

2.2 Sanctions are necessary to preserve order in the Court and to protect the authority and dignity of the Court.

The trial court then checked box 3.3 as follows:

3.3 A punitive sanction:

shall be imposed as follows: 15 Days of confinement

The trial court did not mention that part of the contempt sanction was, *in fact*, also the termination of the cross examination of the alleged victim, A.G. Id. at 1274.

4. Failure to Provide Counsel at Critical Stage Facts

The following facts were contained in the declaration of Michael Morgan, signed May 31st, 2016 in support of the Defendant's Motion to

Dismiss related to the fact that Carlos Hernandez was unrepresented from October 19, 2015 until December 1, 2015:

Hernandez was incarcerated on October 19, 2015 when his retained attorney, John Crowley, withdrew as Hernandez's retained attorney. CP 210. See also RP 86 (from transcript October 26, 2015). Hernandez had been previously determined to be indigent and eligible for an attorney at public expense. CP 210.

On October 26, 2015, the defendant appeared in court without an attorney. On November 17, 2015, the defendant appeared without an attorney. On November 17, 2015, the defendant appeared in court without an attorney. CP 210.

On December 1, 2015, the defendant appeared in court with an appointed attorney, Michael Morgan. CP 210. See also RP 100 (transcript from December 1, 2015.)

On April 1, 2016, Judge Knodell denied the defense motion for Mr. Crowley to show cause why his withdrawal as counsel should be authorized. Judge Knodell cited with approval CR 59 for the proposition that the defendant had 10 days from the time of Mr. Crowley's withdrawal as counsel to file a motion for reconsideration of that decision. CP 210.

On May 25, 2016, Judge Knodell denied the defense motion to reconsider his April 1, 2016 decision. Written findings had not yet been entered. CP 210.

5. Nondisclosure of Jessica Cobb Statements Facts

The following facts appear in Vol. III of the Report of Proceedings: Defendant Hernandez made a motion to dismiss under CrR 8.3 and CrR 4.7(1) (ii) on the grounds that the State had not provided Jessica Cobb's written statements of Jessica Cobb's "free talk." RP 856-858. The trial court denied the motion on the grounds that Hernandez had had an opportunity to interview the witness. RP 858.

6. Failure to Grant Pro Se Defendant Access to Research Materials Facts

The following facts appear in volume 3 of the report of proceedings: Hernandez told the court, "If I'm going to be treated like an attorney, shouldn't I have access to telephone so I can be contacting people nonstop through this? I'm stuck in a cell 23 hours a day. I get nothing. Nothing. I'm making my own Post-it notes. I don't have access to the law library all day, to do the legal law kiosk. I-- I got nothing." RP 816.

Hernandez also told the court that he had one hour a day to clean his cell, shower, and make calls. RP 816. Hernandez said that he assaulted someone in jail and he had been put in isolation since. Carlos also complained that he didn't have a laptop or disk player. RP 823.

7. **Hernandez Right to a Fair Trial Was Precluded by Deputy Kissler Facts**

After Hernandez's conviction, he filed a Motion for a New Trial based on a number of errors including the issue about Deputy Kissler's Misconduct. RP 843-852. Hernandez filed a Declaration on October 7, 2016, explaining the issue as follows:

During one of the breaks during trial, I was being held in a holding cell. I heard one of my subpoenaed witnesses, who was an inmate trustee, Paul Holland, talking to Brian Kissler, who is a Grant County Sheriff's deputy who works at the Grant County jail. Earlier that day, the deputies were playing the telephone call tapes between me and Jessica on the loudspeaker in the jail. I heard Deputy Kissler say to Paul Holland, "Carlos Hernandez is a piece of shit. I can't believe you're going to testify for him. If he knew that Jessica was touching that girl, and didn't say nothing about it, then he is just as guilty as she is."

I raised this issue on the record with the court when I got back into court that day, telling the court that the officers, like the jurors, are instructed not to talk about the case. Officer Kissler broke those rules. I noticed that when Paul Holland came up to the courtroom to testify the next day, he was no longer wearing the trustee color, orange; rather he was wearing a green jumpsuit. Before he went up on the stand I asked him if he had been "tanked," which

means that he had had his trustee privileges taken away. He said yes.

When it was time for Paul Holland to testify for me, he asked the judge if he could talk to someone because he didn't want to get in any more trouble. After Paul Holland had a chance to talk to an attorney, he told the court that he was taking the Fifth Amendment.

Later I saw that he had gotten his trustee status back, even though there's a rule that once inmate loses his trustee status, an inmate is not a lot to get that status back again.

Paul Holland stated that he will testify that he was intimidated from testifying by Officer Kissler. He [Paul Holland] was going to testify about A.G.'s drug usage and that she lied about her age. If I get a new trial he will testify for me. Brian Kissler prejudiced my right to a fair trial.

Declaration of Carlos Hernandez in Support of Motions for...A
New Trial. **CP 858-859**.

Here, Hernandez had also brought this issue to the attention of the trial court during the trial when Paul Holland refused to testify after he had been stripped of his inmate trustee status.

Deputy Kissler gave his side of the story beginning at **RP 1215**, over Hernandez's objections. Kissler stated that he had told Holland that if Hernandez didn't notify law enforcement. He is just as guilty as [A.G.'s] mom is. Kissler did not mention anything about stripping Holland of his trustee status. **RP 1215**. The court did not order any relief related to Hernandez's allegation that Deputy Kissler had intimidated

Holland into taking the 5th Amendment by stripping him of his trustee status. The Court did not ask Hernandez his side of the story. Id.

E. ARGUMENT

The Washington State Supreme Court should grant discretionary review of Issue No. 1 because limiting Hernandez's cross examination of the alleged victim was contrary to the 6th amendment to the United States Constitution and to article 1, SS 22 of the Washington State Constitution which protect a Defendant's right to confront witnesses against him. See e.g. State v. Hudlow, 99 Wn. 2d 1, 15, 659 P. 2d 514 (1983), citing Davis v. Alaska; , People v. Kahn, 80 Mich.App. 605, 612; 264 N.W.2d 360 (1978).; People v. Redmond, 112 Mich.App. 246, 255, 315 N.W.2d 909 (1982). Issue No. 1 also establishes that the Court of Appeals Div. III decision conflicts with the Washington State Supreme Court's decision in State v. Hudlow, Id. Therefore this issue falls under RAP 13.4 (b) (1) (conflict with a Washington State Supreme Court Case) and RAP 13.4 (b)(3) (a significant question of law under the Constitution of the State of Washington State or of the United States is involved).

[I]t is clear that any attempt to limit meaningful cross-examination, whether it be by legislative act, judicial pronouncement or court ruling upon the admissibility of evidence, court rule, or the common law, must be justified by a compelling state interest. Where a statute or court ruling is challenged on grounds that it unduly restricts the Sixth Amendment right to confrontation, the state's interest

in the rule must be balanced against the fundamental requirements of the constitution.

Hudlow, 99 Wn.2d at 15. (Emphasis added.) The trial court did not make a finding that limiting Hernandez's cross examination of the alleged victim was supported by a "compelling state interest."

The Court should accept discretionary review of Issue No. 2, where Hernandez was not appointed a public defender after his retained attorney, John Crowley, withdrew. Hernandez had no attorney from October 19, 2015 through December 1, 2015, during which he attended three court hearings without an attorney.

Under both the Washington State Constitution and the United States Constitution, a criminal defendant is entitled to assistance of counsel at critical stages in the litigation. U.S. Const. amend VI, Wash. Const. art. 1, SS 22, State v. Everybody talks about, 161 Wn.2d 702, 708, 166 P.2d 693 (2007); State v. Heddrick, 166 Wn. 2d 898, 910, 215 P. 2d at 201 (2009).

Critical stages are those "step[s] of a criminal proceeding such as arraignment, that held significant consequences for the accused." Bell v. Cone, 535, U.S. 685, 696 (2002); In re Det. of Kistenmacher, 163 Wn. 2d 166, 186 n.11 (2008). A critical stage is one "in which a defendant's

rights maybe lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected. State v. Agtuca, 12 Wn App. 412, 404, 529 P.2d 1159 (1974).

In this case, the failure of Grant County to ensure that Hernandez was appointed counsel after Crowley withdrew was a critical stage in the proceeding. On April 1, 2016, Judge Knodell denied the defense motion for Mr. Crowley to show cause why his withdrawal as counsel should be authorized. Judge Knodell cited with approval CR 59 for the proposition that the defendant had 10 days from the time of Mr. Crowley's withdrawal as counsel to file and objection to the court's order allowing the withdrawal ex parte. **CP 210**. On May 25, 2016, Judge Knodell denied the defense motion to reconsider his April 1, 2016 decision. Written findings had not yet been entered. CP 210. Because Grant County had not appointed counsel within 10 days of the order allowing Crowley's withdrawal ex parte, Hernandez did not have an opportunity to have appointed counsel assist him in contesting that decision. Hernandez had not waived his right to counsel after Crowley's withdrawal.

"Lawyers are not fungible, and often the most important decision a defendant makes in shaping his defense is the selection of an attorney." United States v. Gonzalez-Lopez, 399 F. 3d 924, 928 (8th Cir. 2005) aff'd,

548 U.S. 140 (2006). *A complete denial of counsel at a critical stage of the proceedings is presumptively prejudicial and calls for an automatic reversal.* United States v. Cronin, 66 U.S. 648, 658-59, n.25, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). The presumption that counsel's assistance is essential requires a conclusion that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Chronic, 466 U.S. at 659. The failure of the Defendant to have appointed counsel within ten days of the court allowing Crowley to withdraw ex parte deprived Hernandez of counsel to assist him in making a motion to disallow Crowley to withdraw as his counsel. Crowley was Hernandez's counsel of his choosing.

Therefore, this case should be accepted for discretionary review because this issue falls under RAP 13.4(b) (3) because it is a significant question of law under both U.S. Const. amend. VI, and the Wash. Const. art. 1, SS 22.

Discretionary review should also be granted as to issue no. 2, pertaining to the Court of Appeals affirming the trial court's decision wherein Hernandez was not provided with a copy of the co-Defendant's written or recorded statement pursuant to CrR 7.7(A)(1) (ii), because this issue implicates the Washington State Constitution art. 1, section 14 and 22, as well as the 8th and Fourteenth amendments to the United States

Constitutions which guarantee a defendant's right to a fair trial. See State v. Davis, 141 Wn. 2d 798, 10 P. 3d 977 (2000).

Under CrR 4.7(a) (1)(ii), a defendant is entitled to a copy of "any written or recorded statements and the substance of any oral statements made by the defendant, or the codefendant if the trial is to be a joint one." The sanctions for not complying with the CrR 4.7 rules for discovery are set forth in CrR 4.7(h)(7) as follows:

(7) Sanctions.

(i) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.

(ii) Willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

Given the fact that the co-defendant turned state's evidence during their trial, this discovery was crucial to the Hernandez's 's ability to thoroughly cross examine the co-defendant, and the withholding of her

statement is a constitutional violation of his right to a fair trial as well as a violation of CrR 4.7(a)(1) (ii).

Discretionary Review should also be granted as to issue no. 4 pertaining to the Court of Appeals affirming the trial court's decision denying Hernandez research materials needed to properly represent himself in the trial RAP 13.4(b) (3). This issue also is a constitutional issue under Washington State Constitution art. 1, section 14 and 22, as well as the Eighth and Fourteenth amendments to the United States Constitution, which guarantee a defendant's right to a fair trial. See State v. Davis, 141 Wn. 2d 798, 10 P. 3d 977 (2000). A pro se defendant must be afforded reasonable access to research materials. State v. Silva, 107 Wn. App. 605, 616, 27 P. 3d 663 (Div. 1 2001). In Silva, the court reviewed the factors set forth in State v. Gunwall, 106 Wn. 2d 54, 720 P. 2d 808 (1986) and determined that the Washington Constitution provides rights independent from the United States Constitution. See also CrR 8.3(b).

Finally, the Court should accept review of issue No. 5, pertaining to Hernandez's claims that Deputy Kissler intimidated witness Paul Holland, which denied Hernandez a fair trial. The court took testimony from Holland on this issue without hearing from Hernandez about the incident. This issue falls under RAP 13.4(b) (3) as it implicates

Hernandez's right to a fair trial under Washington State Constitution art. 1, section 14 and 22, as well as the 8th and Fourteenth amendments to the United States Constitution.

F. CONCLUSION

The Court should grant discretionary review of the Court of Appeals Division III decision based on considerations for accepting review in RAP 13.4 (1) and (3).

Respectfully submitted this 28th day of December, 2018

LAW OFFICES OF JULIE A. ANDERSON

A handwritten signature in cursive script, reading "Julie A. Anderson", is written over a solid horizontal line.

Julie A. Anderson, WSBA#15214

Appendix A

FILED

AUG 17 2016

KIMBERLY A. ALLEN
GRANT COUNTY CLERK

Superior Court of Washington
County of Grant

State of Washington

PLAINTIFF(S),

vs.

Carlos Hernandez

DEFENDANT(S).

No. 15-1-00031-7

ORDER OF CONTEMPT

The above-entitled matter was before the undersigned Judge on this day for the following purpose:

Criminal Trial

The following named parties and attorneys were present:

Morgan Wilmore, McBee, Defendant Pro Se

The Court makes the following **FINDINGS OF FACT**:

- 1.1 The undersigned certifies that he/she saw or heard the following described facts, which occurred within the Courtroom of the undersigned on this date:

1.2 Shouting and using vulgar language
in courtroom. The defendant did not
cease when directed by the court. 9:12-
9:16am

1.3 Defendant Hernandez was thereupon advised that his or her conduct constituted contempt of Court and that he or she was entitled to speak in mitigation of the contempt before the Court decided whether to punish him or her for the contempt.

1.4 Defendant Hernandez chose to speak not to speak, in mitigation of the contempt. The substance of his or her statement was as follows:

On the Record at 9:30am

The Court makes the following **CONCLUSIONS OF LAW**:

2.1 Defendant Hernandez committed a contempt of Court within the Courtroom and in the presence of the undersigned Judge.

2.2 Sanctions are necessary to preserve order in the Court and to protect the authority and dignity of the Court.

2.3 The Court is authorized to summarily impose either a remedial or punitive sanction pursuant to RCW 7.21.050. The Court may impose for each separate contempt of Court a punitive sanction of a fine of not more than \$500 or imprisonment in the county jail for not more than 30 days, or both, or a remedial sanction as set forth in RCW 7.21.030(2). A forfeiture imposed as a remedial sanction may not exceed more than \$500 for each day the contempt continues.

Based on the foregoing **FINDINGS OF FACT** and **CONCLUSIONS OF LAW**:

IT IS ORDERED:

3.1 Defendant Hernandez is in contempt of Court.

3.2 A remedial sanction:

does not apply.


shall be imposed as follow: _____

3.3 A punitive sanction:

does not apply.

shall be imposed as follows: 15 Days of confinement

DATED: 8-16


JUDGE OF THE SUPERIOR COURT

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WASHINGTON STATE COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON,
Plaintiff,

v.

Carlos Hernandez II
Defendant.

Appellate Court No. 34786-9- III

PROOF OF SERVICE BY MAIL

TO: THE CLERK OF THE ABOVE ENTITLED COURT
AND TO: KEVIN J. MCCRAE, DEPUTY PROSECUTING ATTORNEY

The undersigned, being first sworn on oath, deposes and says: I am a resident of the State of Washington, over the age of eighteen years. On the 28th day of December, 2018, and I sent to the Court of Appeals Div. 3 and Kevin J. McCrae the following documents:

- Petition for Discretionary Review
- Proof of Service by mail.

in the above-entitled action to the following:

Court of Appeals, Div. 3
500 N. Cedar Street
Spokane, WA 99201-1905

Grant County Prosecutor's Office
Deputy Prosecuting Attorney
RE: Kevin J. McCrae

Law Office Julie A. Anderson

409 N. Mission St.

Wenatchee, WA 98801

(509) 663-0635 (509) 662-9328 FAX

1 35 C Street NW
2 Ephrata, WA 98823
3
4

5 **I declare under the penalty of perjury under the laws of the State of Washington that the**
6 **foregoing is true and correct.**
7

8 **Date this 27th day of June, 2018 in Wenatchee, Washington**
9

10
11 
12 _____

13 Eric Rossman
14 Assistant to Julie A. Anderson
15

Law Office Julie A. Anderson

409 N. Mission St.

Wenatchee, WA 98801

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Renee S. Townsley
Clerk/Administrator

(509) 456-3082
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*The Court of Appeals
of the
State of Washington
Division III*

500 N Cedar ST
Spokane, WA 99201-1905

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December 6, 2018

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E-mail

Garth Louis Dano
Kevin James McCrae
Grant County Prosecutor's Office
PO Box 37
35 C St NW
Ephrata, WA 98823-1685

CASE # 347869
State of Washington v. Carlos Hernandez, II
GRANT COUNTY SUPERIOR COURT No. 151000317

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b), 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact that the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. RAP 12.4(b). Please file the motion electronically through the court's e-filing portal or if in paper format, only the original need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of the opinion (may also be filed by electronically or if in paper format, only the original need be filed). RAP 13.4(a). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates each is due. RAP 18.5(c).

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:btb

Attachment

c: **E-mail** Honorable John M. Antosz

c: **E-mail** Carlos Hernandez, II (DOC #741820 - Washington State Penitentiary)

DO NOT CITE. SEE GR 14.1(a).

Court of Appeals Division III
State of Washington

Opinion Information Sheet

Docket Number: 34786-9

Title of Case: State of Washington v. Carlos Hernandez, II

File Date: 12/06/2018

SOURCE OF APPEAL

Appeal from Grant Superior Court

Docket No: 15-1-00031-7

Judgment or order under review

Date filed: 09/28/2016

Judge signing: Honorable John Michael Antosz

JUDGES

Authored by Rebecca Pennell

Concurring: George Fearing

Laurel Siddoway

COUNSEL OF RECORD

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Kevin James McCrae

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Ephrata, WA, 98823-1685

OPINION FACT SHEET

Case Name: State of Washington v. Carlos Hernandez, II
Case Number: 34786-9-III

1. TRIAL COURT INFORMATION:

A. SUPERIOR COURT: Grant County
Judgment/Order being reviewed: Felony Judgment and Sentence
Judge Signing: John M. Antosz
Date Filed: September 28, 2016

2. COURT OF APPEALS INFORMATION:

- | | |
|--|---|
| <input checked="" type="checkbox"/> Affirmed | <input type="checkbox"/> Other |
| <input type="checkbox"/> Affirmed as Modified | <input type="checkbox"/> Reversed and Dismissed |
| <input type="checkbox"/> Affirmed in Part/Remanded** | <input type="checkbox"/> Remanded ** |
| <input type="checkbox"/> Affirmed/Rev'd-in part & Remanded | <input type="checkbox"/> Reversed |
| <input type="checkbox"/> Affirmed/Vacated in part | <input type="checkbox"/> Reversed In Part |
| <input type="checkbox"/> Affirmed In Part/Rev'd in Part | <input type="checkbox"/> Remanded with Instructions** |
| <input type="checkbox"/> Denied (PRP, Motions, Petitions) | <input type="checkbox"/> Reversed and Remanded ** |
| <input type="checkbox"/> Dismissed (PRP) | <input type="checkbox"/> Rev'd, Vacated and Remanded ** |
| <input type="checkbox"/> Granted/Denied in Part | <input type="checkbox"/> Vacated and Remanded ** |
| <input type="checkbox"/> Granted (PRP, Motions, Petitions) | |

* These categories are established by the Supreme Court
 ** If remanded, is jurisdiction being retained by the Courts of Appeals? YES
 NO

3. SUPERIOR COURT INFORMATION:

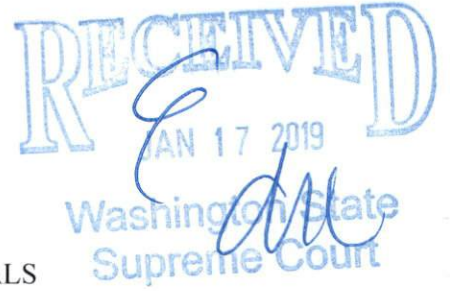
(IF THIS IS A CRIMINAL CASE, CHECK ONE)

Is further action required by the superior court?

- YES NO



 Authoring Judge's Initials



No. 34786-9-III

WASHINGTON STATE COURT OF APPEALS

DIVISION III

THE STATE OF WASHINGTON

v.

CARLOS HERNANDEZ., PETITIONER

PETITION FOR DISCRETIONARY REVIEW

APPENDIX B

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Appendix B

FILED
DECEMBER 6, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,)	No. 34786-9-III
)	
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
CARLOS HERNANDEZ, II,)	
)	
Appellant.)	

PENNELL, A.C.J. — Carlos Hernandez challenges his convictions for third degree rape of a child, third degree child molestation, firearm-related charges, and distribution of a controlled substance to a minor with sexual motivation. We affirm.

FACTS

In early January 2015, 14-year-old A.G.¹ visited the home of family friends Carlos Hernandez and Jessica Cobb under the auspices of a request to babysit. While at the home, A.G. was provided methamphetamine by Mr. Hernandez. A.G. also engaged in sexual activities with Mr. Hernandez and Ms. Cobb, including sexual intercourse with Mr. Hernandez.

Later that day, A.G. reported the incident to her mother and then the police. A search of Mr. Hernandez's residence and vehicle uncovered several firearms. Mr. Hernandez was eventually charged with third degree rape of a child, third degree child molestation, 12 firearm-related charges, distribution of a controlled substance to a minor with sexual motivation, and witness intimidation.

Mr. Hernandez was initially represented by appointed counsel. Two months later, Mr. Hernandez hired a private attorney, John Crowley, to represent him. A few months after that, the State joined and consolidated Mr. Hernandez's case with that of his codefendant, Ms. Cobb.

¹ To protect the privacy interests of A.G., a minor, we identify her only through the use of initials. General Order of Division III, *In Re the Use of Initials or Pseudonyms for Child Victims or Child Witnesses* (Wash. Ct. App. June 18, 2012), http://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=2012_001&div=III.

Approximately seven months after appearing for Mr. Hernandez, Mr. Crowley moved ex parte and in camera to withdraw from representation. The motion was supported by a sealed declaration that has not been made a part of the record on appeal. The court granted Mr. Crowley's motion, and Mr. Hernandez attempted to hire another private attorney, Julie Anderson, to replace Mr. Crowley. Mr. Hernandez was unable to hire Ms. Anderson, so the court eventually reappointed Mr. Hernandez's original public defender to represent him.

Almost three months after reappointment of Mr. Hernandez's original counsel, Mr. Hernandez brought a motion to reconsider the court's order allowing Mr. Crowley's withdrawal. The trial court denied this motion on the merits and because it was untimely.

On the morning of trial, Mr. Hernandez asked to represent himself. After engaging Mr. Hernandez in a colloquy regarding his rights, the court granted Mr. Hernandez's request and appointed his public defender as standby counsel.

A.G. was the first witness to testify for the State. After Mr. Hernandez finished cross-examining A.G., he reserved the right to recall her as a witness in his case-in-chief. Mr. Hernandez identified specific areas of questioning that he claimed justified recalling A.G. as a witness. A few days into trial, Ms. Cobb and the State reached a plea agreement, and Ms. Cobb testified as a State witness.

At the beginning of the tenth day of trial, Mr. Hernandez notified the trial court of a recent issue that had developed in his case. Mr. Hernandez stated he thought he overheard a corrections officer, Brian Kisler, improperly discussing his case with defense witness Paul Holland, who was incarcerated. The State presented testimony from Officer Kisler, outside the presence of the jury, describing what had occurred. According to Officer Kisler, he had merely encouraged Mr. Holland to be truthful. When Mr. Holland was called as a defense witness, he asserted his right to silence under the Fifth Amendment to the United States Constitution and did not testify.

Also on the tenth day of trial, Mr. Hernandez called A.G. back to the stand as a witness during his case-in-chief. After Mr. Hernandez began questioning A.G., she asked to take a break, then left the courthouse due to a family emergency. The court noted that Mr. Hernandez was allowed to call A.G. back as a witness when she returned.

Mr. Hernandez continued questioning A.G. the following day. After the court sustained several objections to Mr. Hernandez's questions, the State moved to terminate A.G.'s examination under ER 611. The court ruled Mr. Hernandez would be allowed to continue questioning, but Mr. Hernandez was warned that A.G.'s examination would be terminated if Mr. Hernandez continued questioning A.G. on matters that were irrelevant or repetitive.

Subsequent to the court's warning, Mr. Hernandez engaged in a verbal outburst. Courtroom security became involved, and Mr. Hernandez was found in contempt. The court imposed 15 days' imprisonment as Mr. Hernandez's contempt sanction. The court warned Mr. Hernandez that if his behavior continued, a more significant sanction would be ordered.

After Mr. Hernandez's outburst, A.G.'s mental state deteriorated and she refused to testify. The State again moved to terminate A.G.'s testimony under ER 611. The trial court did not grant the State's motion immediately. Instead, Mr. Hernandez was provided the opportunity to proffer a list of questions that he still wished to pose to A.G. After reviewing Mr. Hernandez's list, the court determined the questions identified by Mr. Hernandez were either cumulative or irrelevant. The court then excused A.G. from further testimony.

At the end of trial, the jury found Mr. Hernandez guilty of all the charges except witness tampering. The court sentenced Mr. Hernandez as a persistent offender to life without the possibility of early release. Mr. Hernandez timely filed his notice of appeal.

After Mr. Hernandez filed his notice of appeal, he filed a motion for new trial in the trial court. In a declaration accompanying the motion, Mr. Hernandez accused Officer Kisler of improperly discussing the case with Mr. Holland and intimidating him into

refusing to testify.¹ Mr. Hernandez's appellate counsel noted the motion for hearing, but the hearing was subsequently struck. The trial court record indicates Mr. Hernandez's motion was never renoted or heard by the trial court.

ANALYSIS

Termination of Mr. Hernandez's direct examination of A.G.

Mr. Hernandez argues that the trial court's termination of his examination of A.G. was (1) a contempt sanction in violation of chapter 7.21 RCW and (2) a violation of his right to confrontation.²

Mr. Hernandez's arguments are predicated on a mischaracterization of the record. The trial court did not exclude A.G.'s testimony as part of its contempt sanction. The contempt sanction only involved 15 days' confinement. At the time the sanction was imposed, A.G. had not been excused from testifying. The court's eventual decision to terminate Mr. Hernandez's examination of A.G. was a separate ruling altogether.

The trial court's decision to terminate A.G.'s examination did not infringe on Mr. Hernandez's right of confrontation. Mr. Hernandez was able to fully question A.G. on cross-examination during the State's case-in-chief. The court then provided further accommodation and allowed Mr. Hernandez to call A.G. as a direct witness in his case-

² U.S. CONST. amend. VI; WASH. CONST. art. I, § 22.

in-chief. By the time A.G. was excused from further testimony, Mr. Hernandez had exhausted the areas of questioning that had prompted the trial court to allow him to call A.G. as a defense witness. The trial court had a duty to protect A.G. from “harassment or undue embarrassment.” ER 611(a). The court properly exercised this duty by terminating Mr. Hernandez’s questioning of A.G.

Mr. Hernandez’s right to counsel

Mr. Hernandez contends the trial court deprived him of the right to counsel during a critical stage in the proceedings within the period after Mr. Crowley withdrew. Even though Mr. Hernandez had advised the court that he was attempting to retain private counsel, Mr. Hernandez now claims the court should have immediately provided appointed counsel upon granting Mr. Crowley’s motion to withdraw. Mr. Hernandez argues that because he did not have counsel immediately after Mr. Crowley’s withdrawal, his attorney was unable to file a timely motion for reconsideration of the court order permitting withdrawal.

Regardless of whether the trial court should have provided counsel on an earlier date, Mr. Hernandez has failed to show that the period subsequent to Mr. Crowley’s withdrawal was a critical stage in his proceedings. Mr. Hernandez was able to file a motion for reconsideration of the court’s withdrawal order after he received appointed

counsel. The trial court considered Mr. Hernandez's motion and denied it not only because it was tardy (the motion was filed several months after the appearance of appointed counsel), but also on the merits. Mr. Hernandez has failed to show that his motion for reconsideration would have met a different fate had it been filed during the time that he was without counsel. Because Mr. Hernandez has not demonstrated that he lost any rights or defenses as a result of the delayed appointment of counsel, he is not entitled to relief. *See State v. Heddrick*, 166 Wn.2d 898, 910, 215 P.3d 201 (2009).

Provision of Ms. Cobb's recorded statements via CrR 4.7

Mr. Hernandez argues he was denied a fair trial because he was not provided Ms. Cobb's written or recorded statements pursuant to CrR 4.7(a)(1)(i) and (ii). In doing so, he argues the trial court erred when it denied his motion to dismiss under CrR 4.7(h)(7). We review a trial court's ruling on Mr. Hernandez's request for a discovery sanction for abuse of discretion. *State v. Woods*, 143 Wn.2d 561, 582, 23 P.3d 1046 (2001).

CrR 4.7(a)(1)(i) requires the State to provide written or recorded statements of a prosecution witness as well as the substance of any oral statements. The State complied with this rule. Mr. Hernandez was provided a copy of the recording of Ms. Cobb's interview. The interview recording gave Mr. Hernandez a summary of Ms. Cobb's

anticipated testimony. Nothing further was required.³

Despite the compliance with CrR 4.7(a)(1)(i), Mr. Hernandez also appears to claim the State violated CrR 4.7(a)(1)(ii) because it did not provide him a summary of Ms. Cobb's interview. CrR 4.7(a)(1)(ii) pertains to statements made by the defendant or a codefendant. It requires the State to disclose the substance of any oral statements made by a codefendant, regardless of whether the statement was recorded. At the time Ms. Cobb engaged in the interview, she was still a codefendant. She had not yet been designated as a State witness. Thus, Mr. Hernandez suggests the State violated the terms of the rule by failing to disclose the substance of Ms. Cobb's interview during the time that she remained a codefendant.

The trial court appropriately declined to issue a sanction for the State's purported violation of CrR 4.7(a)(1)(ii). The State had nearly concluded its case-in-chief by the time Ms. Cobb decided to cooperate. In disclosing Ms. Cobb's recorded interview, the State provided Mr. Hernandez the substance of Ms. Cobb's oral interview. This was done prior to Ms. Cobb's trial testimony or any reference to her statements during the

³ To the extent Mr. Hernandez claims he was unable to listen to the recording of Ms. Cobb's interview due to the limitations placed on him in custody, that issue is resolved by Mr. Hernandez's claim that he was denied access to resources to prepare/present his defense.

interview. The State had a due process obligation to provide Mr. Hernandez with any inconsistencies in Ms. Cobb's statements. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *State v. Mullen*, 171 Wn.2d 881, 894, 259 P.3d 158 (2011). However, the State represented that Ms. Cobb's statements were consistent. Thus, there was nothing to disclose. Given these circumstances, and the fact that Mr. Hernandez was afforded an opportunity to interview Ms. Cobb, the State adequately complied with its discovery obligations.

Mr. Hernandez's access to resources to prepare/present his defense

Mr. Hernandez contends he was denied a fair trial because the trial court failed to ensure that he had reasonable access to research materials and time so that he could adequately prepare his defense. The appellate record is insufficient to assess the merits of Mr. Hernandez's claim. As such, his complaint is more properly brought through a personal restraint petition. Relief on direct appeal is unwarranted. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Witness intimidation

Mr. Hernandez argues he was deprived of his right to a fair trial when corrections officer Brian Kisler purportedly intimidated defense witness Paul Holland. Again, the

record lacks sufficient facts to review Mr. Hernandez's claim. The appropriate forum for this claim is a personal restraint petition, not a direct appeal. *Id.*

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW (SAG)

Mr. Hernandez raises several arguments in his SAG (claims two, three, four and five) that are repetitive of arguments adequately raised by counsel both in this appeal and a companion case, *State v. Hernandez*, No. 34816-4-III. Those contentions do not merit separate review.

Mr. Hernandez's first SAG argument appears merely to clarify terminology used by A.G. regarding marijuana. While Mr. Hernandez's point may have been relevant to A.G.'s credibility at trial, it is not a ground for relief on appeal.

Mr. Hernandez's sixth SAG argument deals with the interruption in A.G.'s testimony during his case-in-chief when A.G. purportedly left for a family emergency. The trial court resolved this issue by granting Mr. Hernandez leave to call A.G. back as a witness. Given this circumstance, Mr. Hernandez has not established any type of error.

Mr. Hernandez's sixth and seventh SAG arguments pertain to a recorded pretrial interview of A.G. by defense counsel and a defense investigator. The record before us indicates both defense counsel and counsel for the State worked to provide Mr. Hernandez the substance of A.G.'s interview by transcribing the recording. The

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court also allowed Mr. Hernandez to call A.G. as a defense witness in order to address issues discovered through the defense interview. Mr. Hernandez has not demonstrated that he was deprived of a fair trial based on issues surrounding A.G.'s pretrial interview.

CONCLUSION

The judgment and sentence is affirmed.

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

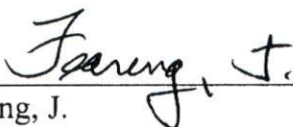


Pennell, A.C.J.

WE CONCUR:



Siddoway, J.



Fearing, J.