

NO. 62708-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GIOVANNI BAZAN,

Appellant.

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STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE PALMER ROBINSON

**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Did the trial court abuse its discretion in denying the defendant's motion for a mistrial, a motion based on the defendant's assertion that a trial irregularity had occurred?

2. The State concedes that the order prohibiting the defendant from contacting his minor children was issued improperly.

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The defendant was charged in count I with second-degree assault by strangulation, and in count II with felony harassment. CP 49-50. Both charges carried the aggravating factor that the crimes were domestic violence offenses committed within the sight or sound of the victim's or the offender's minor child. CP 49-50.

The defendant was tried by jury, the Honorable Judge Palmer Robinson presiding. As to count I, the jury found the defendant guilty of the lesser included offense of fourth-degree assault, with a finding that the offense was a domestic violence offense that occurred within the sight or sound of the victim's minor child. CP 87-88, 92-93. As to count II, the jury found the defendant

guilty as charged of felony harassment, with a finding that the offense was a domestic violence offense, but that the offense did not occur within the sight or sound of the victim's minor child. CP 89-91.

On count I, for the charge of fourth-degree assault--a gross misdemeanor, the court sentenced the defendant to a twelve-month suspended sentence. CP 115-17. On count II, for the charge of felony harassment, the court sentenced the defendant to a standard range sentence of six months. CP 95-101.

## **2. SUBSTANTIVE FACTS**

Teresa Koler and the defendant, Giovanni Bazan, have two children in common, a four-year-old son, MBK, and a two-year-old daughter, GBK. 8RP<sup>1</sup> 75. Teresa and the defendant had an eight-year relationship marked with incidents of domestic violence. 8RP 75. At the time of this incident, Teresa was living with MBK and GBK in a townhouse in Shoreline. 8RP 78.

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<sup>1</sup> The verbatim report of proceedings is cited as follows: 1RP--10/17/08; 2RP--10/20/08; 3RP--10/21/08; 4RP--10/22/08; 5RP--10/23/08; 6RP--10/27/08; 7RP--10/28/08; 8RP 10/29/08; 9RP--10/30/08; 10RP--11/3/08; 11RP--11/4/08; and 12RP--11/18/08.

On June 1, 2008, the defendant was at Teresa's residence when they got into an argument. 8RP 79. Teresa, wanting the defendant to leave, ran to a neighbor's house and pretended to call the police. 8RP 79. Teresa's ploy worked as the defendant did leave her residence. 8RP 80.

At approximately six o'clock the next morning, the defendant arrived back at the home and climbed in bed with Teresa and the two children. 8RP 80. Later that morning, after the children and Teresa had gotten up, Teresa returned upstairs to the bedroom to retrieve the children's drink cups. 8RP 80. While still in the bedroom, Teresa asked the defendant to leave. 8RP 80. The next thing Teresa remembered was that she was lying on the bed with the defendant on top of her. 8RP 81.

Teresa testified the defendant was angry because he thought she had called the police the day prior. 8RP 81. She remembered the defendant punching her with a closed fist in the ribs, biting her nose, and wrapping his hands around her neck. 8RP 81-84. The assault stopped when MBK entered the room and tried to get the defendant to stop. 8RP 81. Later, using a ruse

about changing the children's diapers, Teresa was able to run to a neighbor's house and call the police. RP 81.

Additional facts are included in the sections they belong.

**C. ARGUMENT**

**1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION FOR A MISTRIAL.**

The defendant contends that the trial court abused its discretion in denying his motion for a mistrial based on his claim that during trial, a security officer rushed forward to protect Teresa from the defendant. This claim should be denied. First, the defendant's assertion of what actually occurred is not supported by the evidence. Second, the trial court did not abuse its discretion when it found that what did occur, was not prejudicial requiring a mistrial.

**a. The Defense Claim.**

Teresa Koler began her testimony on the morning of October 29, 2008. 8RP 13, 71. Before completion of her direct examination, the court broke for lunch. 8RP 89. When court resumed, the parties discussed some legal issues not relevant

here, prior to the jury entering the courtroom. 8RP 90. Later that day, the jury was excused again and the parties discussed some more legal issues. 8RP 127-40. At the conclusion of Teresa's testimony, the court adjourned for the day. The defendant did not raise any motions regarding any acts that had occurred during the course of Teresa's testimony. 8RP 204.

The next morning, October 30, 2008, before the jury was brought in, the defendant raised multiple issues about Teresa's testimony, but again, he mentioned nothing of the issue related to this appeal. 9RP 4-7. When trial resumed, multiple witnesses were called and examined. 9RP 10-72. Then, after the afternoon recess, the defendant brought a motion for a mistrial based on a number of claims. 9RP 81-86. The defendant claimed his trial was not fair because the court had allowed the prosecutor to admit some hearsay statements, the court had allowed the prosecutor to ask some leading questions, and because the jurors may have seen one of the State's witnesses--a police officer--talking to the bailiff. 9RP 81-86. The court denied the motion. 9RP 88.

The next court day, November 3, 2008, the defendant moved yet again for a mistrial. 10RP 9. Defense counsel stated that "cumulatively we don't feel that Mr. Bazan has received a fair

trial." 10RP 9. Counsel raised a litany of issues. Counsel claimed it wasn't fair for the court to object during the defense opening statement, that counsel was not allowed to admit evidence of prior incidents involving Teresa Koler, that counsel was not allowed to ask more questions about a prior incident involving Teresa that was admitted, that the jury may have seen a State's witness talking to the bailiff, and that the jury may have seen a courtroom security officer approach counsel table. 10RP 9-15.

In regards to the later claim, defense counsel stated that six days prior, when Teresa Koler was testifying, "we took a break, or we stopped for lunch. . .She was getting off the stand, and I believe headed towards the door. And the officer in the back of the courtroom. . .came rushing back behind me, behind Ms. Gibbs [co-counsel] and stood about two or three feet away from Mr. Bazan." 10RP 15. Counsel added that "in and of itself [the officer coming forward] may not be a reason for a mistrial, but given all the other reasons I think that's incredibly important." 10RP 15.

In denying the defendant's motion, the court stated "one of the few new things is the idea that the officer from court detail rushed behind Mr. Bazan at one of the breaks. My understanding

-- I did not witness that. I am -- the description that was given to me was not that he rushed but that he approached, and the bailiff interceded and that you also said something to him. I'm denying the motion." 10RP 16-17. Defense counsel did not contradict the court's assertion and presented no testimony, affidavit or any other evidence supporting the defense claim.

**b. The Trial Court Properly Denied The Defendant's Motion For A Mistrial.**

A trial court's denial of a motion for a mistrial is reviewed for an abuse of discretion. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). An abuse of discretion is shown when the reviewing court is satisfied that "no reasonable judge would have reached the same conclusion." Hopson, 113 Wn.2d at 284 (citing Sofia v. Fibreboard Corp., 112 Wn.2d 636, 667, 771 P.2d 711 (1989)).

In considering whether trial irregularities warrant a new trial, the court will consider, among other things, (1) the seriousness of the irregularity; (2) whether the statement was cumulative of evidence properly admitted; and (3) whether the irregularity could

be cured by an instruction. State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172, 837 P.2d 599 (1992). A trial court has wide discretion in curing trial irregularities. Post, 118 Wn.2d at 620.

On appeal, the defendant claims the trial court erred in not declaring a mistrial when "a courtroom security officer rushed to physically interpose himself between Bazan and Koler in the presence of the jury." Def. br. at 9. He asserts that "he was singled out by a security guard and visibly treated as though he was dangerous." Def. br. at 13-14. He claims that the situation herein is akin to cases wherein defendants are left shackled during the course of trial. However, it is only by gross hyperbole that the defendant can argue such a position.

The defendant claims that "[l]ike Clark<sup>2</sup> and Finch,<sup>3</sup> Bazan was restrained." Def. br. at 13. In both Clark and Finch, the defendants were forced to appear and sit during trial while shackled. Here, Bazan was never restrained during trial. Nor is there evidence Bazan was "impliedly restricted" as the defendant claims on appeal. Def. br. at 10. And there is absolutely no evidence that the security officer got between Teresa and the

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<sup>2</sup> State v. Clark, 143 Wn.2d 731, 24 P.3d 1006 (2001).

<sup>3</sup> State v. Finch, 137 Wn.2d 792, 975 P.2d 967 (1999).

defendant. Rather, the only factual assertion below was that the security officer came up behind the two defense attorneys and the defendant. There was no allegation the officer was armed, took out handcuffs, uttered any commands or warning, attempted to protect Teresa, got in-between the defendant and Teresa, touched the defendant or took any other concerning action whatsoever. The only defense assertion even disputed was the defense claim that the officer was "rushing" up behind counsel. When the court interjected and said that the information the court had was that the officer merely approached behind counsel, defense counsel remained mute. It is defense counsel's obligation to perfect the record if they disputed the court's understanding of the event. See State v. Rienks, 46 Wn. App. 537, 544, 731 P.2d 1116 (1987) (The party seeking review has the burden of perfecting the record so that the court has before it all of the evidence relevant to the issue); State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994) (findings, including oral findings, which are unchallenged, are deemed verities on appeal).

It is also evident that defense counsel did not believe her own allegation was serious enough to warrant a mistrial. First, counsel waited until virtually every single one of the State's witnesses had

testified before raising the motion for a mistrial. See State v. French, 100 Wn. App. 380, 387, 4 P.3d 857 (2000) (a delay in making a motion for a mistrial "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial"). Second, even at trial, counsel told the court that the event was not in itself sufficient to grant a mistrial. 10RP 15.

The trial court is in the best position to evaluate any prejudice. State v. Luvene, 127 Wn.2d 690, 701, 903 P.2d 690 (1995). With the facts known to the Court here, the defendant cannot show that the trial court abused its discretion in denying his motion for a mistrial. While reasonable minds might differ, that is not the standard the defendant must meet. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). To prevail on appeal, the defendant must prove that no reasonable person would have taken the position adopted by the trial court. State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982).

**2. THE ORDER PROHIBITING THE DEFENDANT FROM HAVING ANY CONTACT WITH HIS CHILDREN IS IMPROPER.**

In the sentencing documents, there are three places where the court addresses the permissible contact between the defendant, Teresa Koler, and their minor children MBK and GBK. In the felony harassment judgment and sentence (CP 95-101), the defendant is prohibited from contacting Teresa Koler, MBK and GBK for five years. CP 98, section 4.6. In the misdemeanor assault judgment and sentence (CP 115-17), the defendant is prohibited from contacting Teresa Koler. CP 116, section 8. And pursuant to RCW 10.99.050, the court entered a separate order prohibiting contact, prohibiting the defendant from contacting Teresa Koler, MBK or GBK until November 18, 2013. CP 114. The State concedes that the court improperly prohibited the defendant from contacting his minor children.

RCW 9.94A.505(8) provides the sentencing court with the authority to issue no contact provisions for certain felony offenses.<sup>4</sup> In pertinent part the statute provides that "[a]s a part of any [felony] sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter." RCW 9.94A.505(8). As pertinent here "crime related prohibition" means "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(13).

Determining whether a relationship exists between the crime and a no contact provision is generally left to the discretion of the sentencing judge. State v. Berg, 147 Wn. App. 923, 942, 198 P.3d 529 (2008). However, careful review of sentencing conditions is required where those conditions interfere with a fundamental constitutional right. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d

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<sup>4</sup> Contrary to what one might expect, and what may have been an oversight by the Legislature, felony harassment--threatening to kill another person--is not defined as a crime against a person, or a crime of violence. See RCW 9.94A.411(2); RCW 9.94A.030. Not meeting these definitions, and not being a prison range sentence, there is no community placement, community custody or community supervision for the crime of felony harassment. See RCW 9.94A.545; RCW 9.94A.700; RCW 9.94A.715. Thus, the provisions governing supervision of felony offenders, that may provide other authority for a no contact provision, are not applicable here.

940 (2008). Conditions that interfere with a fundamental right must be reasonably necessary to accomplish the essential needs of the State and public order. Id. Conditions that interfere with fundamental rights must be sensitively imposed, with "no reasonable alternative way to achieve the State's interest." Id. Washington courts "have been reluctant to uphold no-contact orders with classes of persons different from the victim of the crime." Id. at 33. Parents have a fundamental liberty interest in the care, custody, and control of their children. State v. Ancira, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001).

Here, while the children were in the house during the commission of the act of felony harassment, they were not present in the room and were unaware the act had occurred. See CP 91. At sentencing, the prosecutor indicated it was asking for a no-contact provision with the children because Child Protective Services (CPS) was asking for it. 12RP 9. No other explanation was given. The sentencing court was aware that a dependency action was pending, wanted any order in the criminal case to be consistent with any order arising from the dependency court, but in what the court indicated was "an excess of caution," ordered the

defendant to have no contact with his minor children on the felony count. 12RP 12.

While the court certainly had reason to be concerned, and the court's actions prudent, the State concedes that the inclusion of the defendant's minor children in the felony no-contact sentencing condition was unlawful. State v. Ancira, supra, is directly on point.

Ancira has a long history of physically abusing his wife. He was convicted of felony violation of a no-contact order when he had his wife exit their car and he drove away with their child. The court ordered that Ancira have no contact with his child for five years as a condition of sentence. This Court noted that "[t]here can be no doubt that witnessing domestic violence is harmful to children," but that there was no evidence that prohibiting contact with the children was "reasonably necessary" to achieve this goal. Ancira, 107 Wn. App. 650, 653. Preventing contact with Ancira's wife, this Court held, sufficiently protected the children from the identified harm--witnessing domestic violence--and was all that could be imposed without violating the defendant's fundamental right to parent. Id.

Here, the record does not support the imposition of the no-contact provision with the children. The children were not witnesses to the harassment, nor were they aware that it

happened. Further, the only evidence presented to the court concerning the defendant's relationship with his children is that he was a "great dad" who loved his children. 8RP 76, 12RP 9. The court never made the required findings that prohibiting the defendant from having contact with his children "related" to the circumstances of the crime, that the children were endangered, and that the no-contact provision was reasonably necessary to protect the children.

In addition, RCW 10.99.050 does not grant the sentencing court the power to prohibit contact greater than the power that exists under RCW 9.94A.505(8). Rather, RCW 10.99.050(1) merely provides that "[w]hen a defendant is found guilty of a crime and a condition of the sentence restricts the defendant's ability to have contact with the victim, such condition shall be recorded and a written certified copy of that order shall be provided to the victim." Thus, the power of the sentencing court to issue no-contact provisions emanates from RCW 9.94A.505, that itself defines "victim" to mean "any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged." RCW 9.94A.030(53). No

finding was made here that the defendant's minor children were harmed.<sup>5</sup>

**D. CONCLUSION**

For the reasons cited above this Court should affirm the defendant's conviction, and remand for entry of an order striking the defendant's minor children from the felony judgment and sentence prohibiting the defendant from having contact with his minor children, and striking the defendant's minor children from the RCW 10.99 order prohibiting the defendant from having contact with his minor children.

DATED this 10 day of June, 2009.

Respectfully submitted,

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<sup>5</sup> There can be little question that the court could have prohibited the defendant from having contact with MBK as a condition of the fourth degree assault conviction, as MBK entered the room during the assault, MBK witnessed the assault, and the assault stopped because of MBK's actions. 8RP 81. However, this was not done.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jonathan Palmer, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. BAZAN, Cause No. 62708-2-1, in the Court of Appeals, Division I, for the State of Washington.

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

  
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Name  
Done in Seattle, Washington

06/10/2009  
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