

COA NO. 67495-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MORRIS

Appellant.

67495-1-I
10/11/18
10:18 AM
COURT CLERK
STATE OF WASHINGTON

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

The Honorable Ronald L. Castleberry, Judge

REPLY BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

Page

A. ARGUMENT IN REPLY**Error! Bookmark not defined.**

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MORRIS CAUSED GREAT BODILY HARM OR THAT HE ACTED RECKLESSLY AS TO THAT RESULT.. 1

 a. The Evidence Is Insufficient To Show Great Bodily Harm..... 1

 b. The Evidence Is Insufficient To Show Morris Acted Recklessly As To The Result..... 3

 c. The Remedy Is Not Remand For Entry Of A Conviction On Second Degree Child Assault..... 4

2. THE COURT ERRED IN ORDERING PSYCHOLOGICAL EVALUATION AND TREATMENT AS A CONDITION OF COMMUNITY CUSTODY. 7

3. THE COURT VIOLATED MORRIS'S FUNDAMENTAL RIGHT TO PARENT HIS CHILDREN WHEN IT IMPOSED A SENTENCING CONDITION THAT UNJUSTIFIABLY RESTRICTED CONTACT WITH HIS CHILDREN... 9

 a. The Court's Prohibition On Contact With A.M. Is Unconstitutional In Scope and Duration..... 9

 b. The Court's Prohibition On Contact With T.M. Is Unconstitutional In Scope and Duration..... 14

B. CONCLUSION..... 16

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Berger v. Sonneland,
144 Wn.2d 91, 26 P.3d 257 (2001)..... 1

Grant v. Smith,
24 Wn.2d 839, 167 P.2d 123 (1946)..... 9

In re Detention of Campbell,
139 Wn.2d 341, 986 P.2d 771 (1999)..... 15

In re Pers. Restraint of Heidari,
159 Wn. App. 601, 248 P.3d 550 (2011),
aff'd, 174 Wn.2d 288, 274 P.3d 366 (2012)..... 4

In re Pers. Restraint of Heidari,
174 Wn.2d 288, 274 P.3d 366 (2012)..... 5

In re Pers. Restraint of Rainey,
168 Wn.2d 367, 229 P.3d 686 (2010)..... 11

Moore v. Burdman,
84 Wn.2d 408, 526 P.2d 893 (1974)..... 12

State v. Berg,
147 Wn. App. 923, 198 P.3d 529 (2008),
abrogated on other grounds,
State v. Mutch, 171 Wn.2d 646, 254 P.3d 803 (2011) 14, 15

State v. Corbett,
158 Wn. App. 576, 242 P.3d 52 (2010)..... 14

State v. Hundley,
126 Wn.2d 418, 895 P.2d 403 (1995)..... 2, 3

State v. Jones,
93 Wn. App. 14, 968 P.2d 2 (1998)..... 9

TABLE OF AUTHORITIES (CONT'D)

	Page
 <u>WASHINGTON CASES</u> (CONT'D)	
<u>State v. Riles</u> , 135 Wn.2d 326, 957 P.2d 655 (1998).....	14
 <u>FEDERAL CASES</u>	
<u>Duchesne v. Sugarman</u> , 566 F.2d 817 (2d Cir. 1977)	12
<u>In re Winship</u> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....	2
<u>Lowery v. County of Riley</u> , 522 F.3d 1086 (10th Cir. 2008).	13
<u>Rentz v. Spokane County</u> , 438 F. Supp.2d 1252 (E.D. Wash. 2006).	13
<u>Roberts v. U.S. Jaycees</u> , 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984).....	12
<u>Smith v. City of Fontana</u> , 818 F.2d 1411 (9th Cir. 1987), <u>overruled on other grounds</u> , <u>Hodgers-Durgin v. de la Vina</u> , 199 F.3d 1037 (9th Cir. 1999).....	12, 13
<u>Strandberg v. City of Helena</u> , 791 F.2d 744 (9th Cir.1986)	13
<u>Trujillo v. Bd. of County Comm'rs</u> , 768 F.2d 1186 (10th Cir. 1985)	13
<u>United States v. Daugherty</u> , 269 U.S. 360, 46 S. Ct. 156, 70 L. Ed. 309 (1926).....	9

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>STATUTE, CONSTITUTION AND OTHER</u>	
Chapter 9.94B RCW	7
Former RCW 9.94A.505(9)	8
Laws of 2008, chapter 231 § 6.....	8
Laws of 2008, ch. 231, § 55(1)	8
Laws of 2008, ch. 231, § 55(2)	7, 8
RAP 12.2.....	5
RCW 9A.04.110(4)(b)	6
RCW 9A.04.110(4)(c)	1, 2
RCW 9A.36.021(1)(a)	5
RCW 9A.36.130(1)(a)	5
RCW 9.94B.010(1)	7
RCW 9.94B.080.....	7, 8
Sentencing Reform Act.....	7
U.S. Const. amend. XIV	13

A. ARGUMENT IN REPLY

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MORRIS CAUSED GREAT BODILY HARM OR THAT HE ACTED RECKLESSLY AS TO THAT RESULT.

a. The Evidence Is Insufficient To Show Great Bodily Harm.

The State claims the evidence is sufficient to show "great bodily harm:" because Dr. Feldman testified S.M. would be an "impaired member of society." Brief of Respondent (BOR) at 9-10. The State does not adequately account for the requirement that the impairment or loss of a bodily organ be "significant." RCW 9A.04.110(4)(c).

When an essential element in the case is best established by an opinion that is beyond the expertise of a layperson, expert testimony is required. Berger v. Sonneland, 144 Wn.2d 91, 110, 26 P.3d 257 (2001). Dr. Feldman testified he was "very worried that she was likely to sustain some permanent brain damage" at the time of discharge from the hospital. 7RP 18-19. His subsequent review showed A.M. had progressed. 7RP 20. He opined "she's going to be a much more functional member of society that I thought she might have been but will still be an impaired member of society." 7RP 20.

Dr. Feldman did not testify such impairment would be significant. Dr. Feldman did not testify that A.M. suffered a significant impairment of

her brain. The record does not establish a bodily injury that "causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(c).

"Great bodily harm" also includes "bodily injury which creates a probability of death." RCW 9A.04.110(4)(c). Although the State did not rely on the "probability of death" argument below, it now argues that the evidence is sufficient show "great bodily harm" in this manner. Specifically, the State argues A.M. "could have died" absent medical intervention. BOR at 10.

In deciding sufficiency of evidence claims, "could" is not the relevant standard. State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). Evidence in the record does not show a "probability" that A.M.'s injury would result in her death. The record is silent on probability. The State's argument in the brief does not contain any citations to the record that show a probability that A.M. would have died from her injury. BOR at 9-10. The fact that medical personnel treated her breathing lapses does not show a probability that she would have died absent that treatment. "[T]he reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.'" Hundley, 126 Wn.2d at 421-22 (quoting In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). "No

reasonable trier of fact could reach subjective certitude on the fact at issue here." Hundley, 126 Wn.2d at 422.

b. The Evidence Is Insufficient To Show Morris Acted Recklessly As To The Result.

The State argues Morris knew how to appropriately handle an infant as young as A.M. by pointing to his CPR training. BOR at 14. Morris knew based on his CPR training that shaking a child when she stops breathing is not part of the CPR protocol. 4RP 653-54. But that testimony does not show Morris knew of a substantial risk that great bodily harm may occur from such an action and that he disregarded that level of risk. His CPR training did not address that issue. 4RP 647-48, 651-54.

The State contends the evidence shows Morris used a significant amount of force in shaking A.M. BOR at 15. But it was not the shaking alone that caused the injury. Dr. Feldman was clear that, in his opinion, A.M.'s injury was the result of an acceleration/deceleration force involving impact on either a hard or soft surface. 7RP 6-8, 39-40. There was no physical evidence of impact on a hard surface, leaving impact on a soft surface such as a couch as the required mechanism to produce the injury at issue here. 7RP 7-8. The State presented no evidence that an ordinary parent such as Morris who did not possess the training and experience of

someone like Dr. Feldman would know of a substantial risk that great bodily harm may occur from shaking an infant in combination with impact on a soft surface.

The State further relies on Morris's words and actions after the injury took place as evidence of recklessness. BOR at 15-16. The State's argument is illogical. The State needed to prove *at the time of the injury* that Morris knew of and disregarded a substantial risk that great bodily harm may occur. Whether Morris attempted to initially conceal his shaking of A.M. after he took her to the hospital or later downplayed the amount of force used says nothing of what Morris knew at the time of the injury. Rather such evidence, looked at in the light most favorable to the State, only shows Morris knew he was potentially in trouble with the law and was attempting to portray himself in a good light after it was apparent A.M. had suffered an injury.

c. The Remedy Is Not Remand For Entry Of A Conviction On Second Degree Child Assault.

The State asserts this Court should remand to resentence Morris for second degree child assault in the event this Court finds insufficient evidence to support the first degree child assault conviction. BOR at 16-19 (citing In re Pers. Restraint of Heidari, 159 Wn. App. 601, 607, 248 P.3d 550 (2011), aff'd, 174 Wn.2d 288, 274 P.3d 366 (2012)).

function of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.04.110(4)(b); CP 74 (Instruction 14).

The State argues the jury, in finding Morris guilty of first degree child assault, necessarily decided that A.M. suffered at least a temporary but substantial impairment of the function of a body part or organ. BOR at 18. There is sufficient evidence to show the requisite level of harm for second degree child assault.

The evidence, however, remains insufficient to show recklessness as to that result. The State failed to prove beyond a reasonable doubt that Morris knew of and disregarded a substantial risk that substantial bodily harm would occur from the combined action of shaking an infant and causing the infant to impact a soft surface. The reasons why the evidence is insufficient to show recklessness regarding great bodily harm for the first degree child assault conviction are the same reasons why the evidence is insufficient to show recklessness regarding substantial bodily harm for a second degree child assault conviction. See section A.1.b., supra and Brief Of Appellant at 25-29.

2. THE COURT ERRED IN ORDERING
PSYCHOLOGICAL EVALUATION AND TREATMENT
AS A CONDITION OF COMMUNITY CUSTODY.

The State contends the statutory requirements for imposing mental evaluation and treatment as a condition of community custody under RCW 9.94B.080 only apply to crimes committed before July 1, 2000. BOR at 19. In other words, it is the State's position that there is no longer a statutory provision in the Sentencing Reform Act that addresses the mental evaluation and treatment as a community custody condition for crimes committed since July 1, 2000.

That argument fails. Laws of 2008, ch. 231, § 55(2) specifies "Sections 6 through 58 of this act also apply to all sentences imposed or reimposed on or after August 1, 2009, for crimes committed prior to the effective date of this section, to the extent that such application is constitutionally permissible." RCW 9.94B.080 is section 53. The effective date of the section is August 1, 2009. Morris's offense was committed on May 29, 2009 and sentence imposed on July 1, 2011. CP 31. RCW 9.94B.080 clearly applies to Morris.

The State points to RCW 9.94B.010(1), which provides "This chapter codifies sentencing provisions that may be applicable to sentences for crimes committed prior to July 1, 2000." BOR at 19-20. Nothing in that language compels a conclusion that chapter 9.94B RCW applies

exclusively to crimes committed before July 1, 2000. Laws of 2008, chapter 231, § 55(1) and (2) definitively show the legislature intended RCW 9.94B.080 to apply to crimes committed prior to the effective date of RCW 9.94B.080 and to crimes committed after the effective date.

Moreover, the statement of intent for Laws of 2008, chapter 231 provides that apart from an exception not relevant here, "the legislature does not intend to make, and no provision of sections 7 through 58 of this act may be construed as making, a substantive change to the supervision provisions of the sentencing reform act." Laws of 2008, chapter 231 § 6. Making the mental health evaluation and treatment provision of community custody inapplicable to crimes committed after July 1, 2000 would undeniably constitute a substantive change in the law. The State's argument cannot be reconciled with the legislature's clear expression of intent. RCW 9.94B.080 was formerly codified at RCW 9.94A.505(9). The mental health evaluation and treatment provision has changed location. The substantive requirements of that provision have not changed.

The State contends the trial court, in using the term "psychological evaluation," may have actually meant to impose parenting classes and counseling to confront issues of power and control, which were recommended by the State at sentencing. BOR at 20-21; 4RP 851. The

State therefore asks for remand to the trial court to clarify the condition requiring "psychological evaluation." BOR at 21.

Morris does not object to the State's proposed remedy. A sentence must be "definite and certain." State v. Jones, 93 Wn. App. 14, 17, 968 P.2d 2 (1998) (citing Grant v. Smith, 24 Wn.2d 839, 840, 167 P.2d 123 (1946)). Consistent with this mandate, "[s]entences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them." United States v. Daugherty, 269 U.S. 360, 363, 46 S. Ct. 156, 70 L. Ed. 309 (1926). Remand for clarification of the court's intent is appropriate.

3. THE COURT VIOLATED MORRIS'S FUNDAMENTAL RIGHT TO PARENT HIS CHILDREN WHEN IT IMPOSED A SENTENCING CONDITION THAT UNJUSTIFIABLY RESTRICTED CONTACT WITH HIS CHILDREN.

a. The Court's Prohibition On Contact With A.M. Is Unconstitutional In Scope and Duration.

The State asserts the lifetime ban on all contact between Morris and his daughter A.M. is necessary because Dr. Feldman stated A.M. would be impaired throughout her life. BOR at 24. From this, the State contends the no contact order is necessary because A.M. will always be vulnerable. BOR at 24.

But Dr. Feldman spoke of impairment in terms of developmental delays in motor and language function. 7RP 20. Dr. Feldman also acknowledged A.M.'s condition had improved from his earlier assessment. 7RP 20. The State has not shown a lifetime ban on all contact is necessary to protect a child with motor and language delays. The inability of A.M. to become a fully functional member of society does not equate to being so vulnerable that severance of all contact between daughter and father is necessary.

In any event, the trial court did not say, and State on appeal cannot explain, why the absolute ban on even supervised contact is reasonably necessary to protect A.M. from harm. If Morris's communications were supervised, either during in-person contact or through other communication means, then there would be no reasonable risk that such contact would harm A.M. because the supervisor would be there to prevent a problem. The absolute ban on contact is not narrowly tailored as possible to achieve the State's interests.

The State attempts to justify the absolute ban on all contact, supervised or otherwise, on the ground that Morris sent a nasty letter to his wife. BOR at 24-25. But again, supervised contact would ameliorate any concern that Morris would mentally or emotionally abuse A.M. in communicating with her as a child.

That being said, there is no evidence in this record that Morris is predisposed to mentally or emotionally abusing A.M. He sent a mean letter to his adult wife in the midst of the criminal proceedings against him. This was an isolated action. It cannot fairly be relied upon to justify no contact with his child, either now or as she continues to grow older and into adulthood. There is no evidence showing Morris attempted to use A.M. to inflict emotional distress on her mother or vice versa.

In contrast, the Supreme Court in Rainey upheld the scope (but not the duration) of a total ban on contact where the father had a record of continually inflicting measurable emotional damage on his daughter and attempting to leverage the child to inflict emotional distress on the mother. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 379-80, 229 P.3d 686 (2010). That dynamic is missing in Morris's case.

The State also claims the lifetime length of the no contact order is constitutionally permissible because a parent's fundamental right to parent ceases when a child reaches the age of majority. BOR at 26-27. Yet the Supreme Court in Rainey specifically rejected a no contact order between parent and child that did not adequately justify the *lifetime* duration of the order. Rainey, 168 Wn.2d at 374. In so doing, the Court analyzed the duration of the order under the constitutional standard for when fundamental rights are restricted. Id. The State's suggestion that a non-

constitutional standard should be used assess the justification for a no contact order between parent and child once the child reaches 18 cannot be reconciled with the Supreme Court's analytical approach in Rainey.

The State presents an unduly narrow conception of what the parent-child relationship entails. While the custodial interest of parents may no longer exist once a child reaches the age of majority, due process continues to protect the familial relationship.

Parents and children share a constitutional interest in each other's companionship and affection. Moore v. Burdman, 84 Wn.2d 408, 411, 526 P.2d 893 (1974); Smith v. City of Fontana, 818 F.2d 1411, 1418-19 (9th Cir. 1987), overruled on other grounds, Hodgers-Durgin v. de la Vina, 199 F.3d 1037 (9th Cir. 1999). The right to the preservation of family integrity encompasses the reciprocal rights of both parent and children. Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977). Familial bonds do not simply evaporate once a child turns 18 years old.

"[C]hoices to enter into and maintain certain familial human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty." Roberts v. U.S. Jaycees, 468 U.S. 609, 617-18, 104 S. Ct. 3244,

82 L. Ed. 2d 462 (1984). "This right to familial association is grounded in the Fourteenth Amendment's Due Process Clause." Lowery v. County of Riley, 522 F.3d 1086, 1092 (10th Cir. 2008). The freedom of intimate association protects associational choice as well as biological connection. Trujillo v. Bd. of County Comm'rs, 768 F.2d 1186, 1188 (10th Cir. 1985).

Based on these principles, parents have a due process liberty interest in the companionship and society of their adult children. See Rentz v. Spokane County, 438 F. Supp.2d 1252, 1265 (E.D. Wash. 2006) ("the Ninth Circuit has consistently recognized that its precedent recognizes a Fourteenth Amendment liberty interest of parents in the companionship and society of their adult children"); Smith, 818 F.2d at 1419 (recognizing companionship and nurturing interests of parent and child in maintaining familial bond are reciprocal and there is no reason to accord less constitutional value to child-parent relationship than to parent-child relationship; holding due process right to familial companionship and society extended to protect an adult child from unwarranted state interference into relationship with parents) (citing Strandberg v. City of Helena, 791 F.2d 744, 748 (9th Cir. 1986) (in section 1983 claim, parents' interest in directing the upbringing of their son was not implicated because son was twenty-two years old and no longer a minor; but parents were

able to "claim a violation of their fourteenth amendment due process rights in the companionship and society of the decedent.").

Morris and A.M. each have a fundamental right to one another's companionship and society even after A.M. becomes an adult. The lifetime ban on contact cannot be justified under the standard for assessing restrictions on fundamental rights.

It is also worth noting the no contact order subjects Morris to criminal punishment even if A.M., as an adult, chooses to contact Morris on her own accord. CP 29. The order unduly interferes with the freedom of both parent and child to preserve a familial relationship.

b. The Court's Prohibition On Contact With T.M. Is Unconstitutional In Scope and Duration.

There is nothing in the record to show Morris harmed T.M. in any way, shape or form. In arguing the no contact order involving Morris's other child is constitutionally sound, the State relies on State v. Riles, 135 Wn.2d 326, 347, 957 P.2d 655 (1998). BOR at 28. That reliance is misplaced. Riles did not involve restrictions on contact with a biological child challenged under the due process clause. Riles, 135 Wn.2d at 346-47.

The State also relies on State v. Berg, 147 Wn. App. 923, 198 P.3d 529 (2008), abrogated on other grounds, State v. Mutch, 171 Wn.2d 646,

254 P.3d 803 (2011) and State v. Corbett, 158 Wn. App. 576, 242 P.3d 52 (2010). Those cases involved a parent who committed multiple acts of sexual abuse against a child in his care. Berg, 147 Wn. App. at 928-30, 943-44; Corbett, 158 Wn. App. at 583-86, 599-600. The record showed a parental predilection for inflicting continued sexual abuse on children over a period of time.

In contrast, Morris was involved in a one-time physical assault against A.M. There is nothing in the record to show Morris has a predilection for physically abusing children in this manner or that he grooms children for that kind of abuse. Cf. In re Detention of Campbell, 139 Wn.2d 341, 356, 986 P.2d 771 (1999) (describing sex offenders as having modus operandi of grooming potential victims); Berg, 147 Wn. App. at 944 (prohibiting Berg from having any unsupervised contact with child prevented him from again exploiting a child's trust and putting her at the same risk of sexual harm).

The State's attempt to justify restriction on contact with T.M. on the basis of a single letter that Morris sent to his wife fails for the same reason that argument fails in relation to A.M. There is no evidence in this record that Morris is predisposed to mentally or emotionally abusing children with whom he has contact. His communication with his wife,

another adult, cannot fairly be said to show an attendant risk of harm to his child. The perceived risk is nothing more than speculation.

Finally, the State has no response to Morris's argument that the restriction on contact with T.M. is not narrowly tailored because no parenting plan exception was made applicable to contact with T.M., whereas such an exception was made for A.M. That does not make sense.

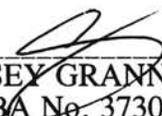
B. CONCLUSION

For the reasons stated above and in the opening brief, this Court should reverse the conviction and challenged sentencing conditions related to psychological evaluation and no contact orders.

DATED this 4th day of September 2012.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON)

Respondent,)

vs.)

MICHAEL MORRIS,)

Appellant.)

COA NO. 67495-1-1

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 4TH DAY OF SEPTEMBER, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201
- [X] MICHAEL MORRIS
DOC NO. 352838
CLALAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 4TH DAY OF SEPTEMBER, 2012.

x Patrick Mayovsky

2012 SEP -4 11:14:19
STATE OF WASHINGTON
COURT OF APPEALS DIVISION ONE