

72807-5

FILED
November 16, 2015
Court of Appeals
Division I
State of Washington

72807-5

NO. 72807-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ISRAEL SANCHEZ FABIAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE WILLIAM DOWNING

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS	3
C. <u>ARGUMENT</u>	6
1. THE OFFICER'S SINGLE USE OF THE WORD "VICTIM," AND THE COURT'S RESPONSE, WERE NOT ERROR	6
a. Additional Relevant Facts	7
b. The Witness' Single Utterance Of The Word "Victim" Was Not Opinion Testimony And Was Harmless	8
c. The Judge's Overruling Of Fabian's Objection Was Not A Comment On The Evidence	13
2. THE CASE SHOULD BE REMANDED FOR THE LIMITED PURPOSE OF CLARIFYING THE NO-CONTACT ORDER ONLY AS RELATED TO FABIAN'S BIOLOGICAL CHILDREN	15
a. Additional Relevant Facts	16
b. The Case Should Be Remanded For The Limited Purpose Of Amending The No-Contact Order Related To Fabian's Biological Children	17
D. <u>CONCLUSION</u>	21

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

In re Pers. Rest. of Pouncy, 144 Wn. App. 609,
184 P.3d 651 (2008), aff'd,
168 Wn.2d 382, 229 P.3d 678 (2010)..... 13, 14

In re Pers. Rest. of Rainey, 168 Wn.2d 367,
229 P.3d 686 (2010)..... 17, 18, 19, 20

State v. Adamo, 128 Wash. 419,
223 P. 9 (1924)..... 14

State v. Alger, 31 Wn. App. 244,
640 P.2d 44 (1982)..... 9, 10, 12

State v. Ancira, 107 Wn. App. 650,
27 P.3d 1246 (2001)..... 19, 20

State v. Berg, 147 Wn. App. 923,
198 P.3d 529 (2008)..... 18, 19

State v. Demery, 144 Wn.2d 753,
30 P.3d 1278 (2001)..... 9, 11

State v. Estill, 50 Wn.2d 245,
310 P.2d 885 (1957)..... 14

State v. Garrison, 71 Wn.2d 312,
427 P.2d 1012 (1967)..... 7

State v. Guloy, 104 Wn.2d 412,
705 P.2d 1182 (1985)..... 12

State v. Jasper, 158 Wn. App. 518,
245 P.3d 228 (2010), aff'd,
174 Wn.2d 96, 271 P.3d 876 (2012)..... 12

State v. Jenkins, 19 Wn.2d 181,
142 P.2d 263 (1943)..... 14

<u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	12
<u>State v. Lamar</u> , 180 Wn.2d 576, 327 P.3d 46 (2014).....	15
<u>State v. Letourneau</u> , 100 Wn. App. 424, 997 P.2d 436 (2000).....	19, 20
<u>State v. Mutch</u> , 171 Wn.2d 646, 254 P.3d 803 (2011).....	18
<u>State v. Rafay</u> , 168 Wn. App. 734, 285 P.3d 83 (2012).....	8, 9, 10
<u>State v. Surry</u> , 23 Wash. 655, 63 P. 557 (1900).....	14
<u>State v. Trombley</u> , 132 Wash. 514, 232 P. 326 (1925).....	7
<u>State v. Warren</u> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	17, 19

Constitutional Provisions

Washington State:

Const. art. IV, § 16	13, 14
----------------------------	--------

Statutes

Washington State:

RCW 9.94A.505	17
---------------------	----

Other Authorities

Sentencing Reform Act of 1981	17
-------------------------------------	----

A. ISSUES PRESENTED

1. In a criminal trial, the use of the word “victim” ordinarily conveys neither a statement of personal opinion nor an improper judicial comment on the evidence, and does not prejudice a defendant’s right to a fair trial. Moreover, a judge does not comment on the evidence by overruling an objection or stating reasons for a ruling. In Fabian’s trial for two counts of first-degree child rape — where his 8-year-old stepdaughter testified that Fabian had penetrated her, her mother witnessed one of the rapes, and Fabian’s semen and DNA were found inside the little girl’s body — a patrol officer used the word “victim” a single time to describe the girl being present in the family home, and the judge overruled Fabian’s objection. Was the officer’s use of the word “victim” permissible and harmless, and did the judge properly overrule the objection without commenting on the evidence?

2. A trial court has the discretion to impose crime-related prohibitions for a term of the maximum sentence of the crime, and may prohibit contact with the defendant’s own children if reasonably necessary to further a compelling interest in protecting them. In sentencing Fabian to an indeterminate sentence up to life, the trial court imposed a lifetime no-contact order protecting the victim, her

mother, and “other family members,” which includes Fabian’s two young biological children, who were playing mere inches from the victim as Fabian raped her. Should the case be remanded for the trial court to narrow the no-contact order only as it pertains to Fabian’s two biological children, and make findings on the reasonable necessity of the no-contact order and its duration as applied to those two children?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Israel Sanchez Fabian was charged by amended information with two counts of Rape of a Child in the First Degree – Domestic Violence, alleging that on or about March 28, 2014, and during a period of time between April 4, 2011 and March 27, 2014, in King County, Washington, he raped J.F., who was less than 12 years old at the time, was not married to the defendant, and was a family or household member. CP 9-10. A jury convicted Fabian as charged. CP 50-51. The court imposed a standard-range indeterminate sentence of 160 months to life. CP 95. Fabian timely appealed. CP 104.

2. SUBSTANTIVE FACTS

In March 2013, a shy, six-year-old girl named J.F., who liked drawing princesses and flowers, lived in a Bellevue, Washington, apartment with her mother, Maria, a half-brother, 5, a half-sister, 2, and Israel Sanchez Fabian, 29, the father of the other two children. 5RP 7-12.¹ Fabian² was not J.F.'s biological father but was the only father figure she had ever known. 5RP 10. The family shared the apartment with three other families. 5RP 11-12.

One evening, Maria³ prepared dinner and brought it to the family's bedroom. 5RP 44-45. When she opened the door, she saw Fabian sodomizing J.F. on the bedroom floor. 5RP 45. His erect penis was exposed, and "he was putting it in my little girl's, in the behind part." Id. Fabian had ejaculated on J.F., who was on a rug with her pants pulled down. 5RP 45-46. The two younger children were next to J.F. and Fabian. 5RP 46. The 5-year-old boy

¹ The verbatim report of proceedings is divided into 10 individually numbered volumes, referred to here as: 1RP (August 28, 2014); 2RP (October 23, 2014); 3RP (October 27, 2014); 4RP (October 28, 2014); 5RP (October 29, 2014); 6RP (October 30, 2014); 7RP (November 3, 2014); 8RP (November 4, 2014); 9RP (November 5, 2014); 10RP (December 5, 2014).

² Pretrial, the State and defense confirmed that Fabian's correct name is Israel Fabian-Sanchez. 2RP 51-52. The State is continuing to use the surname Fabian here to be consistent with the title of this case and avoid confusion, and means no disrespect.

³ The State is using Maria's first name for clarity and privacy, not disrespect.

was playing with a car and the 2-year-old girl was watching Fabian rape J.F. 5RP 46.

J.F. later recalled that as her little brother was playing next to her, Fabian had “putted his thing in my bottom,” and put it “in and out” of her “bottom and front,” and then licked her bottom. 4RP 117-18; 5RP 101.

Maria took J.F. to the bathroom and washed Fabian’s semen from the little girl’s body. 5RP 47. Fabian became angry, and threatened to leave the family to fend for itself. 5RP 48. He signed and dated a release to the title of his car and told Maria she could sell it and live off the money. 5RP 48; Ex. 8. Maria realized that she and her children could not survive financially if Fabian left. 5RP 49. But Maria made J.F. a promise: if it ever happened again, they would leave. 5RP 47-48.

The family soon moved to their own apartment in Bellevue, where the whole family shared the single bedroom. 5RP 16-17. The night of March 28, 2014, Maria was at work and J.F., now 7, and her brother and sister had fallen asleep on the living-room floor. 5RP 98. Fabian picked up J.F. and took her alone to the bedroom. 5RP 98. Fabian spat on his penis and then put it in and out of J.F.’s “bottom.” 4RP 110-14. When Fabian finished raping

the little girl, he went to pick up Maria from work. 4RP 114. It was the last of "many" times that Fabian did the same thing to J.F. 4RP 121.

The next morning, Maria noticed J.F. was in an armchair in the living room, holding herself between her legs and looking afraid. 5RP 30-31. Maria asked J.F. to tell her what was wrong, and reminded her of the promise she had made the previous year. 5RP 31. J.F. said that Fabian had threatened to hit her if she told, but Maria promised to protect her. 5RP 33. J.F. revealed what had happened the night before. 5RP 34.

Maria told J.F. to change out of her pajamas so they could leave the apartment, and Maria angrily telephoned Fabian. 5RP 34-36. Fabian appeared at the apartment within about a half hour, even though he had been at work in Seattle. 5RP 37-38. Fabian told J.F. that she had dreamed the whole thing, but J.F. said she had not. 5RP 38. Maria walked her children to a community center to find out how to get help, as Fabian pulled at her and urged her not to go. 5RP 39.

After calling a hotline number provided by someone at the community center, Maria took her children back home, and Fabian was gone. 5RP 40-41. About 2 p.m., Bellevue police patrol Officer

Robin Peacey was dispatched to J.F.'s home because someone with state Child Protective Services had reported the allegation of sexual assault. 4RP 15. Officer Peacey, with the help of a detective who speaks Spanish, interviewed a tearful Maria. Then the detective took Maria and the children to Seattle Children's hospital so J.F. could be examined. 4RP 52-53.

At the hospital, J.F. repeated what had happened to her, and a nurse took samples from J.F.'s body. 6RP 73-77. The Washington State Patrol Crime Lab later found Fabian's DNA from sperm cells on the sample taken from inside J.F.'s anus, as well as another location on the exterior of her genitals and on her underpants. 6RP 38-41. The lab also found saliva on samples from J.F.'s genitals, anus and underpants. 6RP 34.

C. ARGUMENT

1. THE OFFICER'S SINGLE USE OF THE WORD "VICTIM," AND THE COURT'S RESPONSE, WERE NOT ERROR.

Despite J.F.'s personal and vivid accounts of her stepfather raping her, her mother's testimony about witnessing one of the rapes, and evidence that Fabian's DNA was recovered from inside his 7-year-old stepdaughter's body, Fabian contends that his trial was unfair because a police patrol officer once uttered the word

“victim” in her testimony and the judge overruled Fabian’s objection. Fabian asserts that this word was an improper opinion on his guilt, and that the trial judge unconstitutionally commented on the evidence. To the contrary, this Court has long held that a single use of the word “victim” in a criminal trial — even when said by the judge — is not a statement of opinion and is harmless. And it is a century-old truism that overruling an objection is not commentary on the evidence. Fabian’s argument fails.

a. Additional Relevant Facts.

Pretrial, Fabian made a motion in limine to “prevent the State or its witnesses from referring to Mr. Fabian’s daughter as a ‘victim.’” CP 86-87. Fabian asserted in his written motion that the use of this word in any context would be an improper opinion of guilt.⁴ Id. In court, Fabian referred to his briefing and asked the trial court whether it had “a practice with respect to that issue.”

2RP 138. The court responded:

Yeah, I mean it’s the sort of thing that I think the prosecutor shouldn’t use that terminology in opening statement or at the

⁴ The cases Fabian cited in his motion in limine to support this assertion do not do so. He cited State v. Garrison, which held that it was improper for a publican to give an opinion “as to whether or not the appellant was one of the parties who participated in the burglary” of his tavern. 71 Wn.2d 312, 315, 427 P.2d 1012 (1967). And Fabian cited State v. Trombley, where it was error for a victim to give his opinion “that his place was burglarized.” 132 Wash. 514, 518, 232 P. 326 (1925).

outset in the case. If – if one of the witnesses suddenly blurts out that terminology, and it’s an understandable thing, it doesn’t produce a mistrial. But, yeah, police officers should be cautioned, but, again, if they -- if they mistakenly cross that line, it’s not the worst thing that’s ever happened. You know, objection will be lodged, the court would sustain it and instruct the jurors to disregard it.

2RP 138-39.

Officer Robin Peacey was the first prosecution witness. 4RP

12. She testified that she had been told by a dispatcher that she was responding to an allegation of sexual assault involving a child.

4RP 15. The prosecutor asked Peacey who was present at the apartment when she arrived, and how old the children were. 4RP

19. Peacey replied, “There was the youngest girl, I think she was two. The boy was probably around four, and then the victim, I believe, was seven.” 4RP 20.

Fabian objected. Id. The court responded, “The answer stands.”⁵ Id.

b. The Witness’ Single Utterance Of The Word “Victim” Was Not Opinion Testimony And Was Harmless.

Generally, no witness may offer testimony in the form of an opinion regarding the defendant’s guilt. State v. Rafay, 168 Wn.

⁵ The trial court used the phrase, “The answer stands” at least eight other times during the trial to overrule objections. See 4RP 20 (a different objection on the same page in the transcript); 4RP 22, 25, 40; 5RP 42, 50; 6RP 26; 8RP 96.

App. 734, 805, 285 P.3d 83 (2012). To determine whether a statement constitutes improper opinion testimony, a court considers the type of witness, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact. Id. at 805-06. But testimony that is based on inferences from the evidence, does not comment directly on the defendant's guilt, and is otherwise helpful to the jury, does not generally constitute an opinion on guilt. Id. at 806.

Trial courts are afforded broad discretion in deciding whether to admit evidence, including testimony. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). A trial court's decision to admit or deny evidence will be upheld unless the appellant can show abuse of discretion. Id. at 758. In this context, a trial court abuses its discretion only if no reasonable person would adopt the view espoused by the trial court. Id.

In the context of a criminal trial, even a *trial court's* use of the term "victim" has ordinarily been held not to convey to the jury the court's personal opinion of the case. State v. Alger, 31 Wn. App. 244, 249, 640 P.2d 44 (1982). And in the context of an entire trial, a single reference to "victim" is harmless beyond a reasonable doubt. Id.

In Alger, a statutory rape case, the trial court read the following stipulation to jury: “There has been a stipulation ... that [Alger] ... has never been married to the victim.” Id. at 248-49. This Court held that “the one reference to ‘the victim’ by the trial judge, did not, under the facts and circumstances of this case, prejudice the defendant’s right to a fair trial by constituting an impermissible comment on the evidence.” Id. at 249.

If one reference to a “victim” by the trial court itself is not improper, then one reference by a witness, even a police officer, cannot be improper. In Fabian’s case, Officer Peacey used the term simply to identify J.F. and distinguish her from her siblings, which was helpful and a fair inference from her involvement in the case, and was not in any way a “comment directly on the defendant’s guilt.” Rafay, 168 Wn. App. at 806. It was no different from the trial court’s use of the word in Alger to specify the alleged victim. It would require an enormous stretch of semantics to translate Officer Peacey’s use of the word “victim” here as, “I personally believe that the defendant is guilty of Rape of a Child in the First Degree – Domestic Violence.” It was not an opinion of guilt.

Still, in a vain search for abuse of discretion, Fabian complains that the trial court contradicted its earlier pretrial ruling by overruling Fabian's objection to Peacey's use of the word "victim." But the earlier ruling, which was really more of a guideline than an explicit prohibition, is irrelevant to the issue because the admission of testimony and evidence remained well within the trial court's broad discretion. See Demery, 144 Wn.2d 753, 758. The trial court was free to make a ruling on this specific testimony independent of its earlier generalized policy statement.

Fabian incorrectly alleges that the trial court had agreed with him that any use of the word "victim" by a witness is *per se* improper opinion testimony. The record does not show this. Instead, Fabian asked the judge for his general courtroom policy, and the judge stated that a *prosecutor* should not use the word in opening, but that when a witness blurts it out, it may be "understandable" and not grounds for a mistrial, and "it's not the worst thing that's ever happened." 2RP 138-39. The trial court never said anything about improper opinion testimony or prejudice. But even if it had, the trial court still had the discretion to overrule Fabian's objection to the specific use of the word. There was no error.

Fabian suggests that Peacey's use of the word "victim" here reached constitutional proportions. But even if improper, opinion testimony on guilt becomes an error of constitutional magnitude only if it is "an explicit or almost explicit witness statement on an ultimate issue of fact." State v. Kirkman, 159 Wn.2d 918, 936, 155 P.3d 125 (2007). Peacey's testimony was far from this standard.

Regardless, even a constitutional error may be so unimportant and insignificant in the setting of a particular case that the error is harmless beyond a reasonable doubt. State v. Jasper, 158 Wn. App. 518, 535-36, 245 P.3d 228 (2010), aff'd, 174 Wn.2d 96, 271 P.3d 876 (2012). A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that the other evidence is so overwhelming that any reasonable jury would have reached the same result in the absence of the error. State v. Guloy, 104 Wn.2d 412, 425-46, 705 P.2d 1182 (1985). And, as previously stated, a single reference to a "victim" in the context of a criminal trial is harmless beyond a reasonable doubt. Alger, 31 Wn. App. at 249.

In Fabian's trial, 8-year-old J.F. testified in person with intimate detail about the rapes. The jury saw J.F.'s video-recorded interview recounting the rapes. The jury heard J.F.'s consistent

statements to a hospital nurse and to her mother about the rapes. The jury heard Maria's testimony about personally witnessing Fabian rape her daughter. The jury heard about Fabian's tacit acknowledgments of his crimes by signing over his car after the first time he got caught, and by begging Maria not to report the second rape. And the jury learned that DNA evidence showed that Fabian's spermatozoa was inside his little 7-year-old stepdaughter's anal canal and on the outside of her genitals.

Fabian cannot credibly claim that beneath this mountain of evidence, the jury was tilted to convict him because a patrol officer once said the word "victim." There was no error, but even if there were, it was harmless beyond a reasonable doubt in the context of this trial. Fabian's argument is meritless.

c. The Judge's Overruling Of Fabian's Objection Was Not A Comment On The Evidence.

The Washington Constitution provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Const. art. IV, § 16. But a court does not comment on the evidence simply by overruling an objection or giving a reason for a ruling. See In re Pers. Rest. of Pouncy, 144

Wn. App. 609, 621-22, 184 P.3d 651 (2008), aff'd, 168 Wn.2d 382, 229 P.3d 678 (2010).

In fact, this is an axiom in Washington nearly as old as the state constitution. See State v. Estill, 50 Wn.2d 245, 248, 310 P.2d 885 (1957) (“We have repeatedly held that the court may state its reason in ruling upon an objection ... and, in any event, it is not a comment upon the evidence within the purview of the state constitution.”); State v. Jenkins, 19 Wn.2d 181, 190, 142 P.2d 263 (1943) (statements which are reasons for a ruling are not prejudicial); State v. Adamo, 128 Wash. 419, 424, 223 P. 9 (1924) (rulings and their reasons “cannot be considered a comment on the testimony within the prohibition of the Constitution”); State v. Surry, 23 Wash. 655, 660, 63 P. 557 (1900) (discussion of origins of Art. IV, § 16 concluding, “we do not think it was intended by this provision to prevent the judges from giving counsel the reasons for their rulings” or stating facts “upon which they base their conclusions”).

The judge in Fabian’s case was well within his discretion to overrule the objection to the officer’s use of the word “victim,” because it was not an opinion on guilt. When the judge said, “The answer stands,” he was merely overruling the objection in the same

manner that he did more than half a dozen other times during the trial. The judge's phrase was not even a reason for a ruling. It was just a ruling. The court did not endorse the testimony or comment on it.⁶ It did not err.

2. THE CASE SHOULD BE REMANDED FOR THE LIMITED PURPOSE OF CLARIFYING THE NO-CONTACT ORDER ONLY AS RELATED TO FABIAN'S BIOLOGICAL CHILDREN.

Fabian alleges that the imposition of a lifetime no-contact order protecting his two biological children violates his constitutional right to parent. To the contrary, the trial court in this case had the authority to further a compelling government interest in protecting Fabian's biological children, who were inches away from J.F. when their father raped her. However, the State agrees that the no-contact order, as written in Fabian's Judgment and Sentence, is overbroad, and that the trial court should have made findings on the record to support the necessity for and the duration of the no-contact order as to the biological children. Fabian's case should be remanded for the strictly limited purpose of amending the no-contact provision *only* as it affects Fabian's two biological

⁶ Moreover, the jury was instructed not to be concerned with the reasons for the judge's rulings, and to disregard any judicial comments that might have indicated a personal opinion. 9RP 9, 11; CP 57, 59. "Juries are presumed to follow instructions." State v. Lamar, 180 Wn.2d 576, 586, 327 P.3d 46 (2014).

children, with an opportunity for the court to make findings in support of the order. The lifetime no-contact orders pertaining to J.F. and her mother should not be disturbed because Fabian has not raised them here and they do not implicate constitutional rights.

a. Additional Relevant Facts.

At sentencing, the State sought lifetime no-contact orders protecting J.F. and her mother, but not the two younger children. CP 123; 10RP 7. J.F.'s mother, however, delivered a letter to the court in which she chronicled past abuses to her and her younger children, described her fear of Fabian taking the children away, and asked for a lifetime no-contact order protecting "me and my three kids." 10RP 13; CP 126-27. The record does not show that Fabian objected to any no-contact orders.⁷

Before imposing sentence, the court briefly discussed a desire that the "family will have the protection, the community will have the protection," from Fabian. 10RP 18. In imposing sentence, the court said:

Assuming Mr. Fabian-Sanchez is in the U.S., he will be subject to potentially up to lifetime supervision by the Department of Corrections, all the standard conditions would

⁷ In court, Fabian's attorney said she would "rest on my presentence materials," but those apparently are not on file with the Superior Court, and are not part of Fabian's designated clerk's papers.

apply during that time. In addition, the court would specifically include a prohibition on contact with [J.F. and Maria], and other family members, as well as other minors, without the approval of the community corrections officer.

10RP 18-19.

Paragraph 4.6 of the Judgement and Sentence specified that for the “maximum term of life,” Fabian shall have no contact with Maria, J.F.⁸, “and other family members.” CP 95.

- b. The Case Should Be Remanded For The Limited Purpose Of Amending The No-Contact Order Related To Fabian’s Biological Children.

The Sentencing Reform Act of 1981 authorizes trial courts to impose “crime-related prohibitions” as a condition of sentence, independent of the terms of community custody. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008); RCW 9.94A.505(9). The maximum operative length of these prohibitions is the statutory maximum for the crime, not the standard sentencing range for incarceration. In re Pers. Rest. of Rainey, 168 Wn.2d 367, 375, 229 P.3d 686 (2010).

A parent has a constitutionally protected right to raise children without State interference. State v. Berg, 147 Wn. App. 923, 942, 198 P.3d 529 (2008), disapproved of on other grounds by

⁸ J.F. was denoted on the Judgment and Sentence as “J.H.” with her date of birth. The State has used “J.F.” throughout this briefing because those are the initials used in the charging documents.

State v. Mutch, 171 Wn.2d 646, 254 P.3d 803 (2011). But in criminal cases, a sentencing court may impose limitations on this right when reasonably necessary to further the State's compelling interest in protecting children. Id. Such conditions must be "sensitively imposed" so that they are "reasonably necessary to accomplish the essential needs of the State and public order." In re Rainey, 168 Wn.2d at 374.

The extent to which a sentencing condition affects a constitutional right is a legal question subject to strict scrutiny. Id. "Nevertheless, because the imposition of crime-related prohibitions is necessarily fact-specific and based upon the sentencing judge's in-person appraisal of the trial and the offender, the appropriate standard of review remains abuse of discretion." Id. at 374-75. A court abuses its discretion if, when imposing a crime-related prohibition, it applies the wrong legal standard. Id. at 375.

A lifetime no-contact order pertaining to a biological child would not violate a defendant's right to parent so long as the trial court articulates a "reasonable necessity" for the duration of the no-contact order. See In re Rainey, 168 Wn.2d at 382 (where defendant kidnapped his child, total prohibition on contact was within the court's discretion, but remanded to articulate necessity

for lifetime duration). A trial court may also prohibit contact with biological children who were not themselves the victims of the crime but were in close proximity at the time. See Berg, 147 Wn. App. at 930, 942-43 (where defendant convicted of raping live-in girlfriend's daughter, court could restrict contact with defendant's biological daughter because she was living in the home at the time). A court may prohibit contact with the mother of a child sex victim even though the mother was not the victim herself. Warren, 165 Wn.2d at 34 (no violation of right to marriage).

Fabian cites State v. Letourneau and State v. Ancira to suggest that a criminal court's lifetime no-contact order with Fabian's children would be a *per se* violation of his parenting rights because it sidesteps dependency proceedings. Letourneau, 100 Wn. App. 424, 443, 997 P.2d 436 (2000); Ancira, 107 Wn. App. 650, 655, 27 P.3d 1246 (2001). But Berg specifically distinguished both those cases as inapposite where the children are directly connected to the crime of conviction.⁹ 147 Wn. App. at 943. And

⁹ In Letourneau, the victim was neither a family member nor living in the home, so there was no indication the defendant's own children were at risk. 100 Wn. App. at 441-42. In Ancira, the no-contact order as to the children was based on protecting them from witnessing the defendant abusing their mother, which was accomplished by prohibiting contact with the mother. 107 Wn. App. at 650, 655.

In re Rainey held that a lifetime order is not necessarily out of the question. 168 Wn.2d at 382.

Thus, the trial court here had the authority to impose a no-contact order protecting Fabian's young biological children, who live with Maria and J.F., and witnessed one of the rapes. However, the phrase in Fabian's Judgment and Sentence, "and other family members," is overbroad because it is not limited to J.F.'s siblings but could apply to anyone related to Fabian. While the trial court obviously believed in a necessity for imposing lifetime no-contact orders as to Fabian's biological children, it did not articulate its findings to support the order as to those children or its duration.

The case should be remanded to amend the portion of the Judgment and Sentence establishing the no-contact order as to Fabian's biological children. The trial court's discretion should be honored with an opportunity to remove the overbroad "other family members" language, specify the two biological children, and make findings on the record to support the reasonable necessity of the no-contact order and its duration as related to those two biological children. The lifetime prohibitions on contacting Maria, who is not

married to Fabian¹⁰, and J.F., who is not Fabian's biological child, should not be disturbed because Fabian has not raised them as issues here, and no constitutional rights are affected.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Fabian's convictions and remand the case for amendment of the no-contact provision of the Judgment and Sentence only as it pertains to Fabian's biological children.

DATED this 16TH day of November, 2015.

Respectfully submitted,

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¹⁰ Maria testified she is not married to Fabian. 5RP 8.

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Kevin A March, the attorney for the appellant, at MarchK@nwattorney.net, containing a copy of the BRIEF OF RESPONDENT in State v. Israel Sanchez Fabian, Cause No. 72807-5, 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.

Dated this 16th day of November, 2015.

U Brame

Name:

Done in Seattle, Washington