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NO. 52054-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

JUAN G. FREGOSO URIBE,

Appellant.

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

The Honorable Daniel Stahnke, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court misadvised the appellant regarding his right to testify at trial, in violation of the appellant's state and federal rights to testify in his defense.

2. The trial court violated the appellant's right to confrontation and usurped the role of the jury when it prohibited cross-examination as to bias based on an improper weighing of evidence tending to show bias.

3. The trial court violated the appellant's fundamental right to parent by entering a temporary but total ban on contact between the appellant and his four minor children.

4. The trial court erred in imposing the jury demand and criminal filing fees in light of the appellant's indigence.

Issues Pertaining to Assignments of Error

1. In a colloquy regarding the appellant's decision to testify, the trial court informed the appellant that once he waived his right to silence, he would have to answer any question posed by the prosecutor. This misadvisement regarding the parameters of appellant's right to testify—exacerbated by defense counsel's accompanying comments—effectively deprived the appellant of his constitutional right to testify.

Where, based on this error, prejudice is presumed, should each of the appellant's convictions be reversed?

2. The trial court prohibited cross-examination of key witnesses as to their bias based on an improper evaluation of the credibility of the assertions, i.e., whether the witnesses were, in fact, biased. In doing so, did the trial court usurp the role of the jury and violate the appellant's constitutional right to confront the witnesses against him?

3. Even children of sex offenders may benefit from parental support and involvement, albeit in carefully circumscribed form. And because any limitation on contact must be appropriately tailored, some inquiry to discern the appropriate level of contact is required.

Did the trial court's entry of a temporary but total ban on contact with the appellant's four children—absent any specific inquiry or findings—violate the appellant's fundamental right to parent?

4. Based on the state Supreme Court's recent decision in State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018), should the criminal filing and jury demand fees be stricken from the judgment and sentence?

B. STATEMENT OF THE CASE

1. Charges, verdicts, and sentence

The State charged appellant Juan Gabriel Fregoso Uribe (Fregoso) with five counts relating to A.O.S.: first degree rape of a child¹ (count 1);

¹ RCW 9A.44.073

first degree child molestation² (counts 2-4), and indecent liberties by forcible compulsion³ (court 5). The State alleged that each offense occurred between February 25, 2013 and March 1, 2017. CP 11-13 (Amended Information). A.O.S., born in 2009 and pseudonymously referred to in this brief as “Andrea,” is Fregoso’s niece by marriage. RP 555.

As to each charge, the State also alleged two aggravators under RCW 9.94A.535(3) (aggravating circumstances to be considered by a jury). CP 11-13. And, as to count 5, the State alleged that “Andrea” was under 15 at the time of commission. Such an allegation, if found by a jury, would result in a mandatory minimum of 25 years of incarceration. RCW 9.94A.837; RCW 9.94A.507(3)(c)(ii).

The jury entered guilty verdicts on each charge and answered “yes” to each special verdict allegation. CP 63-72. The court sentenced Fregoso to 318 months to life in prison, reflecting the high end of the standard range on count 1.⁴ CP 99; RCW 9.94A.507. The court also imposed lifetime community custody. CP 100.

² RCW 9A.44.083.

³ RCW 9A.44.100(1)(a).

⁴ The court also sentenced Fregoso concurrently to an exceptional sentence of 318 months to life in prison on count 5 based on the jury’s findings, as well as lesser concurrent terms on counts 2-4. CP 98-99.

As a condition of community custody, the court ordered that Fregoso complete a sexual deviancy evaluation and comply with recommended treatment. CP 111 (condition 8). The court also ordered that Fregoso have no “contact with minors without prior approval of the [Department of Corrections (DOC)] *and* Fregoso’s sexual deviancy treatment provider.” CP 110 (condition 4) (emphasis added). By operation of RCW 9.94A.707(2), this condition takes effect upon entry of the judgment and sentence.

Despite a lengthy sentence and a finding that Fregoso was indigent,⁵ the trial court also ordered that Fregoso pay \$1,050 in legal financial obligations, including a \$200 criminal filing fee and a \$250 jury demand fee. CP 101. The judgment and sentence contains a checked box with boilerplate language stating Fregoso will be able to pay his obligations in the future. CP 98. But, at the sentencing hearing, there was no discussion regarding Fregoso’s ability to pay. RP 1078-81.

Fregoso appeals his convictions and sentence. CP 117.

⁵ CP 118-24 (declaration of indigency and order of indigency).

2. Testimony of prosecution witnesses

Starting in 2013 Fregoso's wife, Patricia, who is Andrea's paternal aunt, provided child care for Andrea while Andrea's parents worked. RP 694-95.⁶

Patricia provided care at Patricia and Fregoso's residence. RP 695. They lived in the downstairs of a house. Patricia's sister, another paternal aunt of Andrea, lived upstairs. RP 899.

Andrea's paternal grandmother Ramona—Fregoso's mother-in-law—also lived in the area. RP 556. Around the time of Andrea's eighth birthday in 2017, Ramona was spending time with Andrea and Andrea's younger brother. RP 558, 573. Ramona asked Andrea to try on shorts that she had purchased for Andrea's birthday. RP 558. But Andrea was self-conscious about her body's odor and wanted to take a bath first. RP 560. Andrea explained to Ramona that she smelled bad because Fregoso put "cream" on her. RP 560. Andrea also said Fregoso touched her vaginal area, had Andrea touch his penis, and, causing pain, used his penis to have contact with Andrea from behind. RP 562-63.

⁶ Cf. RP 897-99 (Patricia's testimony acknowledging that she provided child care for a portion of that period but clarifying that she did not provide child care between March of 2015 and July of 2016).

Ramona initially kept the information to herself. She eventually told her priest, although she did not reveal any details to him. Then she told her husband, who confronted Fregoso about the allegations. RP 564-65, 574-75. Ramona finally told Andrea's father and mother about two weeks after the initial conversation. RP 571, 709. That evening, Andrea's parents took her to the hospital. RP 355, 713.

Andrea's mother Eugenia testified that Andrea was initially reluctant to talk about what she had told her grandmother. RP 710. But Andrea mentioned several incidents involving Fregoso during the ride to the hospital. At trial, Eugenia relayed these incidents to the jury. RP 711-12. Over time Andrea provided, unprompted, details regarding other incidents with Fregoso. Eugenia also relayed these incidents. RP 717-21.

At the hospital, Andrea was seen by an emergency room physician, Dr. Jennifer Lanning. RP 653, 767. Lanning, who testified at trial, noted some vaginal redness but no discharge or odor. RP 782, 787. Lanning prescribed antibiotics for sexually transmitted infections just in case. But no one testified Andrea, in fact, suffered from such an infection. E.g. RP 663-65, 779.

Andrea was examined by a child abuse pediatrician, Dr. Kimberly Copeland, about two weeks later. RP 594, 674. Unlike Dr. Lanning, Copeland noted vaginal discharge, which was somewhat unusual in a child

of Andrea's age. Andrea may have been suffering from a bacterial infection or irritation of her vaginal area. RP 618-19. The condition was no longer present at a follow-up appointment a few weeks later. RP 623, 663.

Eugenia also reported to Dr. Copeland that Andrea had had bladder infections in the past. RP 618. Copeland acknowledged bladder infections can have several causes. RP 619.

During an audio-recorded interview with Dr. Copeland, Andrea repeated the allegations she had made to grandmother Ramona. Ex. 3A (redacted recording, admitted at trial). Andrea said Fregoso used his penis to contact her front and back "private" areas. In addition, Andrea reported Fregoso held her wrist and forced her to touch his penis. RP 613-16; see also Ex 3A at approx. 0:59-1:30 and 2:50-3:30.

Andrea did not provide specific dates but said the contact often occurred when she got home from school. Ex. 3A at approx. 23:18-23:50. Andrea said the first incident occurred in first grade; whereas the last incident occurred around her birthday. Andrea seemed somewhat confused about the date of her birthday, indicating it had occurred in July. Ex. 3A at approx. 24:15-24:50. Andrea provided estimates of the number of times each type of contact occurred. Ex. 3A at approx. 24:58-25:40.

Andrea testified at trial and repeated the allegations. RP 520-32. On cross-examination, Andrea acknowledged that 11 people lived at Fregoso and Patricia's home during the time her aunt babysat her. RP 535-36. When the contact occurred, however, her aunt Patricia was at the store or in another room. RP 551-52.

3. Defense theory and court's refusal to permit inquiry into bias

Before certain key prosecution witnesses testified, defense counsel notified the court that Fregoso wished to present a theory that grandmother Ramona and mother Eugenia were angry at Fregoso and had, moreover, conspired against Fregoso to fabricate the allegations. RP 460.⁷

As for mother Eugenia, she was angry because Fregoso had, in the past, touched her body in a way that Eugenia perceived to be sexual and, therefore, offensive. RP 461. As for grandmother Ramona, she had revealed to Fregoso that she had given birth to a child out of wedlock several years earlier. RP 462.

Defense counsel argued he should be permitted into inquire into each of the incidents to show the women were biased against Fregoso. RP

⁷ Fregoso also wished to argue that another family member, Carlos, also wished him ill. Carlos reportedly had animus against Fregoso because Carlos had excluded Fregoso from a real estate purchase and wanted Fregoso and his family off the property. RP 463. Carlos, however, did not testify, nor was he alleged to have overheard any disclosure.

465-67. For example, counsel wished to ask Ramona if she harbored animus toward Fregoso because she had improvidently divulged her secret to him and feared disclosure. RP 467-68.

The State argued against such inquiry, claiming Fregoso wished to impeach the witnesses with extrinsic evidence of their conduct, which was prohibited under the evidence rules. RP 469. Fregoso's attorney initially acknowledged that impeachment by extrinsic evidence was prohibited.⁸ But counsel later clarified that he wished to impeach based on *bias*. RP 467.

The court ultimately excluded the evidence, appearing to disbelieve the claims of bias. First, the court noted, Eugenia had left her children with Fregoso and his wife for years after the offensive touching. RP 469. Second, forcing Fregoso into a position in which he was compelled to reveal

⁸ Under ER 608(b)

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness[']s credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness[']s character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Ramona's secret was a poor method of suppressing such a secret.⁹ RP 470. Having heard the witnesses testify pretrial, the court did not believe they harbored any animosity toward Fregoso. RP 474.

4. Misadvisement regarding Fregoso's right to testify

After the State rested its case, Fregoso informed the court he wished to testify, but not until the next day. RP 935. The court told Fregoso he must testify that day. RP 935-36. But the court permitted Fregoso 25 minutes to talk with his attorney. RP 936-37.

Back on the record, Fregoso's attorney informed the court that Fregoso wished to testify about going to Mexico after learning of the allegations; however, this was information that the trial court had excluded on a defense motion.¹⁰ RP 941-42. Fregoso also wished to point out inconsistencies in Andrea's recorded interviews,¹¹ which had been admitted, and played for the jury, under the child hearsay statute. RP 943-44.

⁹ At a child hearsay hearing pretrial, Ramona denied divulging such a secret to Fregoso. RP 38. However, Fregoso's attorney indicated her demeanor suggested calculation regarding how to respond rather than surprise or shock at the allegation. RP 471.

¹⁰ Fregoso wished to testify family members' threats caused him to leave the area. E.g. RP 942.

¹¹ In addition to the Dr. Copeland interview, an interview with a child interview specialist was played for jurors. RP 835; Ex. 1.

The court explained that Fregoso would not be permitted to testify about his opinion about other witnesses' testimony. The parties, including Fregoso, needed to follow the rules of evidence in presenting their cases. RP 946.

The trial court continued:

[The court:] . . . You'll be sworn in and [your attorney will] ask you questions. Then when he's done asking questions then the Prosecutor is going to start asking you questions. And you're going to have to answer the Prosecutor's questions as directly as possible.

[Fregoso:] Correct.

[The court:] Okay.

[Fregoso:] Can I avoid to answer questions?

[The court]: You can claim the Fifth Amendment Right but not as a blanket statement. *You have to answer all questions presented to you by the Prosecutor. By electing to take the stand you are in effect agreeing to testify to all questions.*

[Defense counsel:] *You can't answer some and not others. You have to answer all. Or don't take the stand at all.* Once you take the stand you have to answer all questions – from me or from [the prosecutor]. Those are the Rules. That's the Evidence Rules.

[The court:] Prior to you being sworn in and sitting in that chair you have a Fifth Amendment Right not to testify or to say anything.

But once you elect to waive your Fifth Amendment Rights [t]hen you have to answer questions that the Prosecutor asks you.

[Fregoso:] Okay. Okay.

RP 946-47 (emphasis added).

The court then reminded Fregoso that he was not required to testify and that the jury would be instructed not to use his failure to testify against him. RP 947.

5. Defense case

Fregoso did not testify. RP 947. But Fregoso's wife Patricia did. RP 896. Patricia never saw anything suspicious between Andrea and Fregoso. RP 908-09. She never saw Andrea and Fregoso alone together. RP 909-10.

On cross-examination, however, Patricia was forced to acknowledge she did not focus on observing her husband because she was not suspicious of him. RP 929-31.

C. ARGUMENT

1. THE TRIAL COURT MISADVISED FREGOSO REGARDING THE RIGHT TO TESTIFY, IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS. REVERSAL IS REQUIRED.

The trial court informed Fregoso that once he waived his right to testify, he would have to answer any question the prosecutor asked. Defense counsel perpetuated this erroneous statement by agreeing with the trial court. This misadvisement regarding Fregoso's right to testify—which

was compounded by, although not invited by, defense counsel—effectively deprived Fregoso of his constitutional right to testify. Based on the violation of this fundamental right, reversal is required.

a. Origins of the right to testify and standard of review

The United States Supreme Court has recognized that criminal defendants have the right to testify on their own behalf. Rock v. Arkansas, 483 U.S. 44, 51-52, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). This right is implicitly grounded in the Fifth, Sixth, and Fourteenth Amendments. Id. at 52-53.

In Washington, however, a criminal defendant’s right to testify is *explicitly* protected by our state constitution. CONST. art. I, § 22 (“In criminal prosecutions the accused shall have the right . . . to testify in his own behalf.”);¹² State v. Robinson, 138 Wn.2d 753, 758, 982 P.2d 590 (1999).

¹² Article 1, section 22 provides in relevant part that

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases[.]

Given this express guarantee, the state constitutional right to testify is more protective than the federal constitution's implicit right to testify. State v. Martin, 171 Wn.2d 521, 533, 252 P.3d 872 (2011); State v. Wallin, 166 Wn. App. 364, 370-71, 269 P.3d 1072 (2012).

Deprivation of the right to testify is manifest constitutional error, reviewable for the first time on appeal under RAP 2.5(a)(3). See State v. Kalebaugh, 183 Wn.2d 578, 584-85, 355 P.3d 253 (2015) (holding erroneous reasonable doubt instruction was manifest constitutional error because it implicated a constitutional right and had practical and identifiable consequences at trial).

Denial of the right to testify is reviewed de novo. See State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010) (“We review a claim of a denial of Sixth Amendment rights de novo.”); United States v. Pino-Noriega, 189 F.3d 1089, 1094 (9th Cir. 1999) (“[A] defendant’s claim that he was deprived of his Sixth Amendment right to testify is reviewed de novo.”).

- b. The trial court misadvised Fregoso regarding his right to testify, effectively depriving him of his right to testify.

The trial court misadvised Fregoso regarding his right to testify, effectively depriving him of his right to testify under the state and federal constitutions.

The right to testify is fundamental, “and cannot be abrogated by defense counsel or by the court.” Robinson, 138 Wn.2d at 758. The United States Supreme Court has stated: “Even more fundamental to a personal defense than the right of self-representation . . . is an accused’s right to present his own version of events in his own words.” Rock, 483 U.S. at 52. The defendant alone has the authority to decide whether to testify or not. Robinson, 138 Wn.2d at 758.

In order to be effective, the waiver of a fundamental right must be “an intentional relinquishment or abandonment of a known right or privilege.” State v. Thomas, 128 Wn.2d 553, 558, 910 P.2d 475 (1996) (quoting Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)). Thus, waiver of the right to testify “must be made knowingly, voluntarily, and intelligently.” Thomas, 128 Wn.2d at 558; accord Robinson, 138 Wn.2d at 758. If the decision not to testify is made against the defendant’s will, “it is axiomatic that the defendant has not made a knowing, voluntary, and intelligent waiver of his right to testify.” Id. at 763.

At trial, an accused must choose between exercising his fundamental right to testify and his fundamental right to remain silent under the Fifth Amendment. A waiver of either right need not be on the record, but it must be knowing. Thomas, 128 Wn.2d at 559.

“‘[W]hen an accused voluntarily takes the stand he waives his constitutional rights [against self-incrimination] as to all matters concerning which cross-examination is otherwise normally proper.’” State v. Hart, 180 Wn. App. 297, 304, 320 P.3d 1109 (2014) (quoting State v. Robideau, 70 Wn.2d 994, 1001, 425 P.2d 880 (1967) (internal quotations omitted)).

But “such waiver extends ‘only to cross-examination which . . . is limited to the scope of the defendant’s direct testimony.’” Hart, 180 Wn. App. at 304 (quoting State v. Epefanio, 156 Wn. App. 378, 388, 234 P.3d 253 (2010)). For example, in Hart, this Court held that the lower court infringed upon the defendant’s constitutional right against self-incrimination when it allowed the State to cross-examine him about the facts underlying a charge that he did not testify to on direct examination. Hart, 180 Wn. App. at 304-05.

In the present case, the trial court informed Fregoso that he would be required to answer every question put to him by the prosecutor. This was patently incorrect. The prosecutor’s questions would be limited to the scope of direct examination, as well as the other strictures of the rules of evidence. Instead, Fregoso—clearly unsophisticated in his knowledge of legal procedure—was told that the rules of evidence put any and all questions on the table. Accordingly, the trial court’s misadvisement violated Fregoso’s right to testify by mispresenting the consequences of exercising that right.

Several cases, while not factually identical, are instructive. As a preliminary matter, the state Supreme Court has, in general terms, warned against the type of colloquy that occurred in this case. The Court discouraged trial courts from inquiring into a defendant's decision to testify because it might "appear to encourage the defendant to invoke or waive his Fifth Amendment rights." Matter of Pers. Restraint of Lord, 123 Wn.2d 296, 317, 868 P.2d 835, decision clarified sub nom. In re Pers. Restraint Petition of Lord, 123 Wn.2d 737, 870 P.2d 964 (1994).

And in Thomas, that Court held the federal constitution does not require trial courts to inform defendants of the right to testify. 128 Wn.2d at 559. Nor must the trial court obtain an on-the-record waiver of the right. Id. Rather, the court "may assume a knowing waiver of the right from the defendant's conduct," such as not taking the stand. Id.

But where the record supports that waiver was not, in fact, *knowing*, the inquiry is different. At issue in Rock was an Arkansas court rule that prohibited a defendant's hypnotically refreshed testimony. 483 U.S. at 56. The United States Supreme Court held application of the rule "had a significant adverse effect on the petitioner's ability to testify," because it effectively prevented her from describing any events that occurred the day of the charged conduct. Id. at 57. This "arbitrary restriction" impermissibly infringed the right to testify, necessitating reversal. Id. at 61-62.

Washington courts have reached similar conclusions. In State v. Hill, the trial court ruled Hill could be cross-examined about two prior convictions if he took the stand. 83 Wn.2d 558, 560-61, 520 P.2d 618 (1974). Hill elected not to testify given the prejudicial nature of the prior convictions. Id. at 562-63. However, the convictions had previously been dismissed, making them inadmissible. Id. at 561. The state Supreme Court recognized Hill's fundamental right "to give his version of events if he wished." Id. at 565. The Court therefore held the trial court's erroneous ruling "prejudicially deprived [Hill] of a free and voluntary choice in the matter and literally compelled him to remain silent." Id.

And in In re Detention of Haga, 87 Wn. App. 937, 943 P.2d 395 (1997), overruled on other grounds by Robinson, 138 Wn.2d at 768, Haga wished to testify on his own behalf. Id. at 940. Defense counsel expressed doubts about Haga's competency and his ability to testify truthfully. Id. The trial court refused to allow Haga to take the stand. Id.

In doing so, the trial court "deprived [Haga] of his constitutional right to testify." Id. The Court of Appeals held: "when 'a defendant insists that he wants to testify, he cannot be deprived of that opportunity.'" Id. (quoting People v. Robles, 2 Cal.3d 205, 214-15, 85 Cal. Rptr. 166, 466 P.2d 710 (1970)).

As demonstrated, the trial court may not interfere with the right to testify, whether by direct prohibition, or by misadvisement regarding the conditions of taking the stand. Here, the trial court misadvised Fregoso regarding his right to testify by suggesting that he would have to answer any question the prosecutor asked, or not testify at all. Although Fregoso's initial proposed testimony was not consistent with the rules of evidence, the trial court went too far by applying legally impermissible conditions to his testimony. This undue interference violated Fregoso's right to testify.

c. Defense counsel exacerbated but did not "invite" the error.

Defense counsel's comments made the situation worse by parroting the trial court's erroneous statements. But this Court should reject any claim that counsel invited the error.

Invited error "must be the result of an affirmative, knowing, and voluntary act," rather than simple acquiescence. State v. Mercado, 181 Wn. App. 624, 630, 326 P.3d 154 (2014). Put another way, counsel must have "materially contribute[d]" to the error "by engaging in some type of affirmative action through which he knowingly and voluntarily sets up the error." State v. Hockaday, 144 Wn. App. 918, 924 n. 5, 184 P.3d 1273 (2008). Defense counsel did not set up the error in this case. Instead, defense counsel merely parroted the court's own statements. RP 946-47.

Moreover, as discussed, the right to testify “cannot be abrogated by defense counsel or by the court.” Robinson, 138 Wn.2d at 758. In Haga, the trial court indicated it would “go along” with defense counsel’s decision not to call his client as a witness. Haga, 87 Wn. App. at 940. To a greater extent than in the present case, defense counsel was the driving force behind the trial court’s deprivation of Haga’s right to testify. Id. Reversal was nonetheless required. Id.

This Court should reject any argument the error was invited. At most, defense counsel acquiesced in the trial court’s own erroneous admonishment.

- d. The trial court’s denial of the right to testify was per se prejudicial, requiring reversal. But reversal is also required under a harmless-beyond-a-reasonable-doubt standard.

The only remaining question is the appropriate remedy when a trial court deprives a defendant of his right to testify. Washington courts have not reached a definitive answer. Considering the more protective state constitutional right to testify, however, this Court should find the error was per se prejudicial. But even under a constitutional harmless error analysis, reversal is required.

In Robinson, the Court held that remand for an evidentiary hearing was necessary to determine whether Robinson knowingly and voluntarily

waived his right to testify. 138 Wn.2d at 770. Robinson had alleged “specific facts” suggesting his attorney prevented him from testifying, even though Robinson remained silent at trial. Id. at 759-61. The Robinson Court rejected the argument that prejudice should be presumed in cases where defense counsel prevents his or her client from taking the stand.¹³ 138 Wn.2d at 768.

The Court acknowledged, however, that in Hill, it reversed without evaluation of whether Hill was actually prejudiced by the trial court’s denial of his right to testify—Hill made no offer of proof about the contents of his proposed testimony. Robinson, 138 Wn.2d at 767. The Court then made the following distinction:

Hill is distinguishable because it involved wrongful actions by a court that resulted in a deprivation of the defendant’s right to testify. In contrast to the defendant in Hill, Robinson’s right to testify was abridged, not by the court, but by actions of his defense counsel.

Robinson, 138 Wn.2d at 767-68. The Robinson Court ultimately “decline[d] to address the question of a remedy for defendants whose right to testify is abridged by the court.” Id. at 768.

¹³ The Robinson Court rejected the Haga Court’s conclusion that an error affecting a defendant’s right to testify is per se prejudicial because it found the cases the Court relied upon to be inapplicable. Robinson, 138 Wn.2d at 768.

Hill and Robinson, when read together, suggest that a trial court's denial of the defendant's right to testify is per se prejudicial.

Such a conclusion is appropriate given the more protective state constitutional right to testify. As stated, unlike the federal constitution, from which the right to testify is merely inferential, the state constitution explicitly provides a defendant has a right to testify. Robinson, 138 Wn.2d at 758. Thus, the Supreme Court has found the state constitution to be more protective of the right. See Martin, 171 Wn.2d at 529-33 (analyzing six factors under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), and concluding that claim of abridgement of the right to testify should be analyzed separately under the state constitution).

This Court should recognize a more protective state constitutional right under the circumstances in this case as well. In analyzing whether independent state constitutional analysis is required, the relevant factors are “(1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.” Gunwall, 106 Wn.2d at 58.

As in Martin, Gunwall factors 1, 2, and 3 support independent analysis. The constitutional provision at issue is the same. Thus, the analysis here will be identical to the analysis in that case. Martin, 171 Wn.2d at 529-31.

As for the fifth factor, it always weighs in favor of independent analysis. Id. at 533 n. 6; Gunwall, 106 Wn.2d at 62.

The sixth factor, whether the provision touches on matters of local concern, is often tied to the fourth factor. Id. at 67.

Thus, the only remaining issue of substance is the fourth factor, “preexisting state law.” Id. at 58. As discussed above, prior cases addressing the right to testify differ in their prejudice analysis. But, as noted in Martin, the state constitution recognized the right to testify long before the right was recognized under federal law. Martin, 171 Wn.2d at 532-33. Moreover, state statute has long protected the right to of the accused testify: RCW 10.52.040 provides in part that “any person accused of any crime in this state . . . may, in the examination or trial of the cause, offer himself, or herself, as a witness[.]” Thus, the fourth factor weighs in favor of independent state constitutional analysis.

In summary, considering each Gunwall factor, this Court should recognize a more protective state constitutional right and, correspondingly, follow the more protective remedy. In Wallin, 166 Wn. App. at 377, for example, a post-Martin case, the Court of Appeals held that under article I, section 22, the State cannot suggest a defendant has tailored his testimony based on nothing more than his presence at trial. The Court reversed

Wallin's conviction even without engaging in any harmless error analysis.

Id.

Even if this Court does not apply a per se prejudice standard, however, the constitutional harmless error standard applies. State v. Clark, 143 Wn.2d 731, 775, 24 P.3d 1006 (2001) (recognizing that when a constitutional right of the defendant has been violated, the State must prove the error was harmless beyond a reasonable doubt); see also Hart, 180 Wn. App. at 305 (so holding).

The State cannot show that interference with Fregoso's right to testify was harmless beyond a reasonable doubt, because the content of Fregoso's testimony is unknown.

Further, without Fregoso's testimony, his defense was incomplete. The State effectively impeached Fregoso's wife's testimony—his only witness—by demonstrating she would not have been able to observe her husband at all times during the charging period. RP 929-31. Cf. Hill, 83 Wn.2d at 564 (“Certainly, the involuntary loss of the right [to testify] can be prejudicial to an accused person's cause, for, in many instances, it constitutes the only evidence available to him.”).

This Court should find the trial court impermissibly deprived Fregoso of his right to testify, and that such action by the trial court is per se prejudicial, requiring reversal. Hill, 83 Wn.2d at 565-66. However, the

result is the same under a constitutional harmless error analysis, because the State cannot prove Fregoso's defense was not harmed by the trial court's interference. Under either standard, reversal is required.

2. THE TRIAL COURT VIOLATED FREGOSO'S RIGHT TO CONFRONT WITNESSES AND USURPED THE ROLE OF THE JURY WHEN IT PROHIBITED CROSS-EXAMINATION AS TO BIAS BASED ON AN IMPROPER EVALUATION OF CREDIBILITY. REVERSAL IS REQUIRED FOR THIS REASON AS WELL.

Fregoso wished to impeach two key witnesses, Andrea's mother and grandmother, regarding their bias against him. But the trial court refused to allow such impeachment. Considered carefully, the court's oral ruling indicates it refused to permit such cross-examination because it did not believe the witnesses were biased. The trial court's improper credibility determination usurped the jury's role and violated Fregoso's right to confront the witnesses against him.

Because this error constituted a violation of Fregoso's right to confront witnesses, and because the error was not harmless beyond a reasonable doubt, reversal is required for this reason, as well.

a. Applicable law and standard of review

An accused person has a constitutional right under the Sixth Amendment of the United States Constitution¹⁴ to impeach a prosecution witness with evidence of bias. Davis v. Alaska, 415 U.S. 308, 315-18, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); State v. Spencer, 111 Wn. App. 401, 408, 45 P.3d 209 (2002). “Bias”

is a term used in the “common law of evidence” to describe the relationship between the party and the witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness[’s] like, dislike, or fear of a party, or by the witness[’s] self-interest.

United States v. Abel, 469 U.S. 45, 52, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984). Proof of bias is evidence is deemed relevant because the jury, as finder of fact and arbiter of credibility, has historically been entitled to assess all evidence that “might bear on the accuracy and the truth of a witness[’s] testimony.” Id.

¹⁴ The Sixth Amendment provides that

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

This Court reviews de novo claimed violations of the Sixth Amendment confrontation clause. State v. Kirkpatrick, 160 Wn.2d 873, 881, 161 P.3d 990 (2007); State v. Chambers, 134 Wn. App. 853, 858, 142 P.3d 668 (2006). This Court also reviews de novo claims that a trial court's ruling misapplied the law. State v. Henderson, ___ Wn.2d ___, 430 P.3d 637, 638 (2018). Misapplication of the law also constitutes an abuse of discretion. State v. Johnson, 180 Wn. App. 92, 100, 320 P.3d 197 (2014).

“It is fundamental that a defendant charged with the commission of a crime should be given great latitude in the cross-examination of prosecuting witnesses to show motive or credibility.” State v. Wilder, 4 Wn. App. 850, 854, 486 P.2d 319 (1971).

An error excluding bias evidence is presumed prejudicial, but it is subject to a harmless error analysis. Spencer, 111 Wn. App. at 408. Reversal is required unless the State can prove beyond a reasonable doubt that the unconstitutional act did not prejudice the defendant and that he would have been convicted even if there had been no error. State v. Fitzsimmons, 93 Wn.2d 436, 452, 610 P.2d 893 (1980), overruled on other grounds by City of Spokane v. Kruger, 116 Wn.2d 135, 803 P.2d 305 (1991); State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998).

- b. Because the court used an improper legal standard in excluding the bias evidence, the court erred.

The trial court applied an incorrect legal standard in excluding the bias evidence.

As stated, Fregoso wished cross-examine Andrea's mother, his sister-in-law, about the fact that she was biased against him because he had offended her. He also wished to cross-examine Andrea's grandmother, his mother-in-law, about her animus toward him, because he knew a sensitive secret and she feared he would reveal it. RP 461-68.

As a preliminary matter, the State argued—erroneously—that the evidence was inadmissible because it involved an attempt to introduce extrinsic evidence regarding credibility, prohibited under ER 608(b). As will be demonstrated, the State's argument was incorrect, and thus this Court should reject any similar argument on appeal.

Even though evidence that establishes the bias of a witness impeaches the witness, such evidence is not considered impeachment on a collateral matter. State v. Jones, 25 Wn. App. 746, 751, 610 P.2d 934 (1980). And, in any event, such evidence is admissible notwithstanding its collateral aspects. Id. (citing State v. Constantine, 48 Wash. 218, 93 P. 317 (1908)). In Jones, this Court held the trial court should have allowed the

defendant to establish bias by demonstrating that the State's witness made a prior statement that he denied making. Jones, 25 Wn. App. at 751.

As shown, because the proposed cross-examination in this case dealt with bias, the State was incorrect—ER 608(b) did not apply.

But, rather than excluding the evidence on ER 608(b) grounds, as the State urged, the trial court appears to have excluded the proposed line of inquiry on other grounds. As for Andrea's mother, the court did not believe she could be biased based on her actions after the offensive touching. RP 469. As for the grandmother, the court did not believe she could be biased, because the court deemed a fabricated allegation against Fregoso a poor way to keep a secret. RP 470. Although the court mentioned "relevance," the record shows that that was not the court's real inquiry. RP 470. Immediately preceding the court's relevance comment, it stated, "The rationale doesn't make sense at all. To keep her secret quiet she exposes him as a child molester?" RP 470.

Thus, rather than finding the proposed lines of questioning irrelevant, the court weighed the evidence. In other words, the court appears to have determined the witnesses were not, in fact, biased. This was, inherently, a credibility determination. As will be shown, the court's decision to prohibit such cross-examination on that ground was erroneous as a matter of law.

The trial court decides preliminary questions of fact, including the admissibility of evidence, under ER 104(a). State v. Karpenski, 94 Wn. App. 80, 102, 971 P.2d 553 (1999), abrogated on other grounds by State v. C.J., 148 Wn.2d 672, 63 P.3d 765 (2003). The proper inquiry is “whether the evidence is sufficient to support a finding of the needed fact.” Id.

Under a sufficiency test, the trial court “must take the information in the light most favorable to the proponent, accepting that . . . which favors the proponent.” Condon Bros., Inc. v. Simpson Timber Co., 92 Wn. App. 275, 286, 966 P.2d 355 (1998). In contrast, “[i]t is the function and province of the jury to weigh the evidence, to determine the credibility of the witnesses, and to decide the disputed questions of fact.” State v. Snider, 70 Wn.2d 326, 327, 422 P.2d 816 (1967).

Here, the trial court usurped the jury’s role by weighing the credibility of the allegations of bias. RP 469-70. Because the court applied an improper legal standard to prohibit such cross-examination, the court erred. Fregoso should have been permitted to impeach the mother and grandmother by questioning them about their bias.

- c. Erroneous exclusion of the bias evidence was not harmless beyond a reasonable doubt.

An error excluding bias evidence is presumed prejudicial, although it is subject to a harmless error analysis. Spencer, 111 Wn. App. at 408.

In determining whether a constitutional error limiting the cross-examination of a witness for potential bias was harmless beyond a reasonable doubt, this Court considers several factors, which include

the importance of the witness[’s] testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and . . . the overall strength of the prosecution’s case.

Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

These factors weigh in Fregoso’s favor, and against the State. First, it was vital that Fregoso be permitted to impeach the mother and grandmother based on their bias, that is, their dislike of him and their own self-interest. See Abel, 469 U.S. at 52 (defining bias). These two witnesses were crucial to the State’s case—the initial disclosures were made to these two women. The women provided critical evidence regarding the format, content, and spontaneity of the initial disclosures. RP 558-63, 711-14, 716-21. Although Andrea testified at trial, even the State recognized Andrea’s demeanor at trial was difficult and stilted. RP 1043-44 (closing argument acknowledging the limitations of her testimony). The jury, therefore, was likely to rely heavily on the mother and grandmother’s testimony in evaluating Andrea’s credibility, both at the trial and in the interviews.

The proffered evidence was not cumulative of other evidence. Similarly, Fregoso's cross-examination otherwise lacked cogency. Counsel challenged the grandmother based on delay in relaying the disclosure;¹⁵ he challenged the mother, Eugenia, based on her jealousy of Fregoso and Patricia because they spent more time with Andrea.¹⁶ Neither avenue of attack was particularly effective. In contrast, targeted cross-examination regarding bias was likely to have been productive for the defense.

In summary, the State's case rested heavily on the women's testimony, and the defense was hampered by its inability to effectively cross examine them about their ill feelings toward Fregoso. The State, therefore, cannot establish that the exclusion of bias evidence was harmless beyond a reasonable doubt.

3. THE TRIAL COURT ERRED IN ENTERING A TEMPORARY BUT TOTAL BAN ON CONTACT BETWEEN FREGOSO AND HIS CHILDREN.

The trial court erred in entering a temporary but total ban on contact between Fregoso and his four minor children.¹⁷ The parties did not discuss, and there is no indication the trial court specifically considered, Fregoso's

¹⁵ RP 574-78.

¹⁶ RP 732.

¹⁷ See, e.g. CP 89 (at the time of sentencing, Fregoso had four children between the ages of two and nine).

relationship with his biological children in imposing the ban. The case should be remanded for entry of an appropriately tailored order, specific to Fregoso's biological children.

Sentencing errors may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

RCW 9.94A.703 lists conditions of community custody, some mandatory, some waivable, and some discretionary. As a condition of community custody, a sentencing court may order an offender to “[r]efrain from direct or indirect contact with the victim of the crime or a specified class of individuals.” RCW 9.94A.703(3)(b).

Moreover, a sentencing court “may impose and enforce crime-related prohibitions” under the Sentencing Reform Act of 1981. RCW 9.94A.505 (9);¹⁸ State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). Under State v. Armendariz, 160 Wn.2d 106, 118-20, 156 P.3d 201 (2007), crime-related prohibitions may extend up to the statutory maximum for the crime and are not limited to the standard sentencing range for incarceration.

¹⁸ Under RCW 9.94A.505(9)

As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter. “Crime-related prohibitions” may include a prohibition on the use or possession of alcohol or controlled substances if the court finds that any chemical dependency or substance abuse contributed to the offense.

Meanwhile, parents have a fundamental liberty interest in the “care, custody, and management” of their children. Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). Although the imposition of crime-related prohibitions is generally reviewed for abuse of discretion, courts “more carefully review conditions that interfere with a fundamental constitutional right such as the fundamental right to the care, custody, and companionship of one’s children.” In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010) (citation omitted). “Such conditions must be ‘sensitively imposed’ so that they are ‘reasonably necessary to accomplish the essential needs of the State and public order.’” Id. (quoting Warren, 165 Wn.2d at 34).

Any state interference with the fundamental right to parent is subject to strict scrutiny. Warren, 165 Wn.2d at 34. Sentencing “conditions that interfere with fundamental rights must be sensitively imposed” with “no reasonable alternative way to achieve the State’s interest.” Id. at 32, 35. Thus, sentencing courts must consider whether a condition, such as a no-contact order, is reasonably necessary in scope and duration to prevent harm to children. Rainey, 168 Wn.2d at 377-82. Less restrictive alternatives, such as indirect contact or supervised visitation may not be prohibited unless there is a compelling State interest in barring all contact. Warren,

165 Wn.2d at 32; State v. Ancira, 107 Wn. App. 650, 655, 27 P.3d 1246 (2001).

Here, the trial court entered a community custody condition prohibiting Fregoso from having contact with all minors without prior approval of the DOC *and* Fregoso's sexual deviancy provider. CP 110 (condition 4). Under the Sentencing Reform Act, this condition will take effect immediately. RCW 9.94A.707.¹⁹

But sexual deviancy treatment is tied to a post-incarceration community custody condition. See CP 111 (condition 8, clearly referring to sexual deviancy treatment in the community rather than prison). While incarcerated, however, Fregoso will not have such a provider. Thus, no one can approve any form of contact, even limited contact. Thus, while incarcerated, Fregoso may have no contact whatsoever with his own children.

The State has a compelling interest in protecting children from harm. But the State did not meet its burden to demonstrate how prohibiting all contact between Fregoso and his children—whether it be via highly monitored prison visits, or telephone calls, or letters—was reasonably

¹⁹ RCW 9.94A.707(2) provides that “[w]hen an offender is sentenced to community custody, the offender is subject to the conditions of community custody as of the date of sentencing, unless otherwise ordered by the court.”

necessary to effectuate that interest. The court made no related finding. The matter was not even discussed. RP 1076-81.

But because the no-contact order pertaining to Fregoso's children implicates Fregoso's fundamental right to parent, the State was required to show, and the trial court was required to find, that no less restrictive alternative would prevent harm to these children. See Rainey, 168 Wn.2d at 381-82. Again, there was no such inquiry and the court made no such finding.

Even children of sex offenders may benefit from parental support and involvement, in whatever carefully circumscribed form. There is no indication that the trial court tailored the condition in any way to consider the parent-child relationship. Because the temporary, but complete, ban on Fregoso's contact with his children violates his fundamental right to parent, this Court should remand for entry of an appropriately tailored order.

4. THE JURY DEMAND AND CRIMINAL FILING FEES
MUST BE STRICKEN FROM FREGOSO'S JUDGMENT
AND SENTENCE.

Recently, in Ramirez, the Washington Supreme Court discussed and applied Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783), which became effective June 7, 2018 and applies prospectively to cases pending on appeal. Ramirez, 191 Wn.2d at 739, 746-

50. Under Ramirez, the jury demand fee and criminal filing fee should be stricken from Fregoso's judgment and sentence.

HB 1783 amended "the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing as defined in RCW 10.101.010(3)(a) through (c)." Ramirez, 191 Wn.2d at 746 (citing LAWS OF 2018, ch. 269, § 6(3)); see also RCW 10.64.015 ("The court shall not order a defendant to pay costs, as described in RCW 10.01.160, if the court finds that the person at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).").

HB 1783 "also amends the criminal filing fee statute, former RCW 36.18.020(2)(h), to prohibit charging the \$200 criminal filing fee to defendants who are indigent at the time of sentencing. LAWS OF 2018, ch. 269, § 17." Ramirez, 191 Wn.2d at 748. Thus, HB 1783 establishes that the \$200 criminal filing fee is no longer mandatory if the defendant is indigent. Accordingly, Ramirez struck the fee due to indigency. Ramirez, 191 Wn.2d at 749-50.

Although not explicitly addressed by Ramirez, the jury fee statute, RCW 10.46.190, was also amended by HB 1783. LAWS OF 2018, ch. 269, § 9. RCW 10.46.190 now reads, "Every person convicted of a crime or held of bail to keep the peace may be liable to all the costs of the proceedings

against him or her, including, when tried by a jury . . . a jury fee as provided for in civil actions for which judgment shall be rendered.” LAWS OF 2018, ch. 269, § 9. RCW 10.46.190 was also amended to include the proviso that the “court shall not order a defendant to pay costs, as described in RCW 10.01.160, if the court finds that the person at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).” LAWS OF 2018, ch. 269, § 9. Thus, applying Ramirez’s reasoning to the jury fee statute, it is clear that RCW 10.46.190 is a discretionary obligation that may not be imposed on an indigent defendant. Cf. Ramirez, 191 Wn.2d at 749-50.

In Fregoso’s judgment and sentence, both the criminal filing fee and the jury fee were imposed, although the court appears to have struck \$2,250.00 in fees for Fregoso’s court-appointed trial attorney. CP 101. Yet, according to Fregoso’s motion for order of indigency, he has no income or assets. CP 118-19. Thus, the record indicates Fregoso is indigent under RCW 10.101.010(3).

And, while the trial court checked a box corresponding to boilerplate language indicating Fregoso would be able to pay costs in the future, RP 98, such a finding is patently inadequate under Ramirez. Ramirez, 191 Wn.2d at 742 (“We explained that ‘the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry.’”) (quoting State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680

(2015)). The trial court engaged in no individualized inquiry at sentencing. RP 1078-81.

Because HB 1783 applies prospectively to his case, and because HB 1783 “conclusively establishes that courts do not have discretion” to impose certain fees against those who are indigent, the sentencing court lacked authority to impose the criminal filing fee and jury fee. Ramirez, 191 Wn.2d at 749. Accordingly, the criminal filing fee and jury fee should be stricken from Fregoso’s judgment and sentence.

D. CONCLUSION

The trial court misadvised Fregoso regarding his right to testify, in violation of his state and federal rights to testify at trial. The trial court also violated Fregoso’s right confront witnesses and usurped the role of the jury when it prohibited cross-examination as to bias based on an improper weighing of the evidence. For both reasons, reversal is required on all counts.

Moreover, this Court should remand so that the trial court may appropriately tailor a condition relating to Fregoso's contact with his children. Finally, the trial court erred in imposing the jury demand and criminal filing fees despite Fregoso's indigency. This Court should order the fees stricken.

DATED this 21st day of December, 2018.

Respectfully submitted,

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