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NO. 52054-1-II

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

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STATE OF WASHINGTON, Respondent

v.

JUAN GABRIEL FREGOSO URIBE, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-02454-6

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BRIEF OF RESPONDENT

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## **RESPONSE TO ASSIGNMENTS OF ERROR**

- I. The Trial Court Did Not Infringe upon Fregoso Uribe's Right to Testify.**
- II. The Trial Court Properly Limited the Scope of Fregoso Uribe's Cross Examination of State's Witnesses.**
- III. The Trial Court Properly Prohibited Contact with All Minors as a Condition of Fregoso Uribe's Sentence.**
- IV. The State agrees the Filing Fee and the Jury Demand Fee Should be Stricken.**

## **STATEMENT OF THE CASE**

Juan Gabriel Fregoso Uribe (hereafter 'Fregoso Uribe') was charged with five counts, including rape of a child in the first degree, three counts of child molestation in the first degree, and indecent liberties with force for incidents of sexual abuse involving his niece, A.O.S. CP 11-13. At the time of trial, A.O.S. was nine years old. RP 512. Her birthday was on February 25, 2009. RP 691. The incidents were charged as having occurred between February 25, 2013 and March 1, 2017. CP 11-13. After a jury trial, Fregoso Uribe was found guilty as charged. CP 63-72. In addition, the jury found that for each count the crime was part of an ongoing pattern of sexual abuse of the same victim under the age of 18 years manifested by multiple incidents over a prolonged period of time and that Fregoso Uribe violated a position of trust or confidence to

facilitate the commission of the crime, and that for count 5, indecent liberties with force, the victim was under the age of 15. CP 64, 66, 68, 70, 72. The trial court sentenced Fregoso Uribe to a high end sentence on Count 1 of 318 months in prison, and to certain conditions, including no contact with minors. CP 110. Fregoso Uribe was found to be indigent; and at a sentencing hearing prior to *Ramirez*, the trial court also imposed a \$200 filing fee and a \$250 jury demand fee. CP 98.

The testimony at trial was as follows: Eugenia<sup>1</sup> is A.O.S.'s mother. RP 690. Eugenia is married to A.O.S.'s father, Mauricio. RP 690-93. Eugenia works as a medical assistant and Mauricio works construction. RP 693. They both work full time. RP 693. A.O.S. was four years old, in 2013, when her mother, Eugenia, started working as a full time medical assistant. RP 693-94. Mauricio's sister, Patty, watched the children, including A.O.S., while Mauricio and Eugenia worked. RP 517, 694. Patty was married to Fregoso Uribe, whom A.O.S. identified at trial. RP 518, 701-02. Sometimes while A.O.S. was at their house, Aunt Patty would go to the store and she would spend time with Fregoso Uribe. RP 518, 701. A.O.S. didn't like it when Fregoso Uribe would touch her in her private during that time. RP 519. Fregoso Uribe would touch her private with his

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<sup>1</sup> To protect the victim's identity, the individuals related to her are referred to by their first names only so that her identity may not be determined from the State's briefing. The State intends no disrespect.

private. RP 520. By the word private on her body, A.O.S. means “vagina,” and the other word for private on Fregoso Uribe’s body is the word “nuts.” RP 521. The boy’s private part is the same part they use to go pee from and Fregoso Uribe would put it in her private. RP 521. Fregoso Uribe also used his hand to touch her on her vagina, both on the inside and on the outside; he also touched her on her bottom. RP 522. A.O.S. described Fregoso Uribe’s private as being red with blue lines, and that sometimes he would grab her hand and force her to touch it for white things to come out. RP 523. A.O.S. would try to pull her hand away as Fregoso Uribe grabbed her by her wrist, but she was unable to get her hand away. RP 524. A.O.S. described the touching as occurring in four different rooms in their residence. RP 522-23. A.O.S. also described times that occurred in the bedroom when she would lie down on the bed, sometimes on her back, sometimes on her stomach, and Fregoso Uribe would lie down and put his private in her private. RP 529. It felt weird and made A.O.S. sad. RP 529-30. On other occasions Fregoso Uribe would have her lie down on her stomach and he put his private inside her bottom, and that felt horrible. RP 530.

One day, A.O.S.’s grandmother gave her some clothes to try on, but mentioned something smelled weird; A.O.S. had issues with an odor emanating from her vagina. RP 533. A.O.S. then told her about what was

happening with Fregoso Uribe. RP 533. She felt brave for telling her grandmother. RP 533.

Ramona is A.O.S.'s grandmother. Her son, Mauricio is A.O.S.'s father. RP 553-54. She is also the mother of Fregoso Uribe's wife, Patty. RP 553-54. Ramona Olvera is married to Santiago. RP 555. Just prior to A.O.S.'s eighth birthday, Ramona gave A.O.S. some shorts as a little birthday present. RP 558. Ramona told A.O.S. to try them on, but A.O.S. wanted to take a bath first. RP 559-60. A.O.S. felt uncomfortable and told her grandmother that it was just that Fregoso Uribe had put cream on her and she smelled bad. RP 560. Ramona asked A.O.S. why Fregoso Uribe was putting cream on her and A.O.S. said that he touches her. RP 560. A.O.S. seemed scared and worried, and she seemed like she wanted someone to listen to her. RP 561. A.O.S. told Ramona that she was always being touched and that she would ask him why he didn't touch Aunt Patty and he responded that her "little Frog" was warmer than Patty's. RP 561. During this conversation, Ramona wasn't asking A.O.S. any questions, she just let A.O.S. talk. RP 562. A.O.S. told her that when Fregoso Uribe "did it from behind" that it would hurt for days. RP 562. A.O.S. told her grandmother that Fregoso Uribe would use his penis to touch her vagina and make her put her hand on his penis. RP 563.

In March 2017, about ten days to two weeks after A.O.S. disclosed to her grandmother, Ramona had A.O.S. and her parents, Mauricio and Eugenia, come over to her house to tell them what A.O.S. had told her. RP 571, 709. A.O.S. was afraid, she was talking and crying. RP 571. But A.O.S. was able to tell her parents what Fregoso Uribe had done to her. RP 571. Eugenia remembers A.O.S. telling them about a cream that Fregoso Uribe would use on her thighs and that he would do something to her behind; she mentioned that Fregoso Uribe asked her to put his penis inside her mouth and to kiss him, and that he used to play with his finger on her “froggy,” A.O.S.’s word for vagina. RP 711. A.O.S. described that Fregoso Uribe would discipline her, or at least tell her parents that he would need to discipline her, but would actually use those opportunities to molest or rape her, and that when he was teaching her how to swim at the river he was touching her vagina under the water. RP 719.

After A.O.S. told her parents what had happened, her parents took her to the hospital to be checked out. RP 713-14. Eugenia had previously noted that A.O.S. had had urinary tract infections, starting at about age 5, and she had a bad odor coming from her vagina that went away after she received medication after her last contact with Fregoso Uribe. RP 715-16.

Dr. Jennifer Lanning is an emergency room physician at Legacy Salmon Creek. RP 767. Dr. Lanning treated A.O.S. at the hospital on

March 4, 2017. RP 775. A.O.S. came in with her parents. RP 776. Her parents were tearful and upset and concerned that A.O.S. had been sexually abused. RP 777. Dr. Lanning completed a physical exam and noted some vaginal redness to A.O.S. RP 782-87. Dr. Lanning prescribed antibiotics for potential sexually transmitted infections, but did not confirm whether A.O.S. had any such infection. RP 779.

In addition, A.O.S. was seen by a child abuse specialist. Dr. Kimberly Copeland is a child abuse pediatrician and medical director for the Child Abuse Assessment Team at Legacy Health System in Vancouver, Washington. RP 594. Dr. Copeland evaluated A.O.S. and recorded the conversation between the two of them; the conversation included the medical history and mental health screening. RP 600-04; EX. 3A. This recording was played to the jury. RP 625-51. During this conversation, A.O.S. told Dr. Copeland that Fregoso Uribe had touched her, put his privates in her vagina and in her bottom. RP 624-27.

During the physical examination, Dr. Copeland noted strips of dark pigmentation on both sides of A.O.S.'s inner thighs and milder, but similar hyper-pigmentation of the outer labia. RP 617. These markings were unusual. RP 618. Hyper-pigmentation in children is usually caused by chronic rashes to an area causing the area to be irritated. RP 618. The markings could have been associated with irritation due to sexual assault.

RP 618. A.O.S. also had vaginal discharge. RP 618. Vaginal discharge can be caused by a number of things, including sexually transmitted infections or irritation. Dr. Copeland also was aware of A.O.S.'s reported urinary tract infections which can happen with both adults and children experiencing sexual contact as they're caused by bacteria being introduced into the urethra. RP 620.

Fregoso Uribe's wife testified that she never saw anything suspicious between A.O.S. and Fregoso Uribe. RP 908-09. She also indicated that she never saw the two of them alone together. RP 909-10. However, Patricia admitted that she did not focus on observing Fregoso Uribe as she was not suspicious of him. RP 929-31.

After a colloquy with the trial court, included in section one of the Argument below, Fregoso Uribe decided not to testify in his own defense. RP 947.

## **ARGUMENT**

### **I. The Trial Court Did Not Infringe upon Fregoso Uribe's Right to Testify.**

Fregoso Uribe claims the trial court misadvised him regarding his right to testify by telling him that he would have to answer all questions asked of him when Fregoso Uribe asked if he could pick and choose which questions to answer when the prosecutor cross-examined him.

Fregoso Uribe claims this improperly denied him of his right to testify. The trial court properly answered Fregoso Uribe's questions, making it clear that Fregoso Uribe could not pick and choose which questions he could answer based on the ones he liked and disliked. Fregoso Uribe clearly understood the right to testify and chose not to testify because he did not want to be subject to a tough cross-examination on the serious crimes he perpetrated against A.O.S. His constitutional rights were not violated.

A defendant has the right to testify under the Fourteenth Amendment's due process clause, in the compulsory process clause of the Sixth Amendment, and as a necessary corollary to the Fifth Amendment's privilege against self-incrimination. *Rock v. Arkansas*, 483 U.S. 44, 51-52, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987). The Washington Constitution also explicitly protects a defendant's right to testify. *State v. Robinson*, 138 Wn.2d 753, 758, 982 P.2d 590 (1999). A defendant may waive this right and such waiver must be made knowingly, voluntarily, and intelligently, but the trial court does not need to obtain an on-the-record waiver by the defendant. *Id.* at 758-59. A trial court, however, has no obligation to inform a defendant of his or her constitutional right to testify. *State v. Thomas*, 128 Wn.2d 553, 559, 910 P.2d 475 (1996). Ordinarily a trial judge does not advise a defendant at all about his or her right to testify at

trial, leaving that advisement to the defendant's attorney. *See Thomas*, 128 Wn.2d at 560 (discussing that it may be ill-advised for a judge to intrude into the attorney-client relationship to discuss a defendant's right to testify). However in this case, both Fregoso Uribe and his attorney asked the trial judge questions about Fregoso Uribe's proposed testimony and it appears Fregoso Uribe was not trusting his attorney's advice and/or did not believe his attorney about what was the best course of action. Therefore the interjections by the trial court were invited by Fregoso Uribe, and there is no credible evidence to show that the trial court's colloquy with the defendant infringed on his right to testify. The following exchange occurred on this subject after an approximately 20 minute break during which Fregoso Uribe and his attorney spoke about whether Fregoso Uribe would testify:

DEFENSE COUNSEL: So – so Your Honor I've had a discussion with my client – same discussion we've had at the jail several times. My client is – my client believes certain thing should – he should be allowed to do on the stand. And I have advised him that those are not going to be allowed to be – go on or be said on the stand. Either the Prosecution is going to object or we – you're just not going to allow it. My concern at this point is – is that – again I don't know how – he's made some statements to me that are concerning – that he's going to have to talk about Mexico. And while I've advised him that that's not a good idea at all and I'm vehemently opposed to that there's still some concern in my mind that he may intentionally try to do it. A lot of this is he – he – he's very unhappy with how

this trial has progressed and what people have testified to. He feels there is literally hundreds and hundreds and hundreds of inconsistencies having been said by everybody. There's – he's indicated that he feels there might be a conspiracy of friendship between the Prosecutor and the cop and the doctor – that they're friends since they hang out together. And I – just – there's stuff of that nature. So he does want to testify but I'm – I'm advising the court that I have some great concerns about it at this point.

JUDGE: We can deal with it. Do you want me to deal with it?

DEFENSE COUNSEL: Yeah, Okay.

FREGOSO URIBE: Well I'm asked to understand if she don't ask me nothing about Mexico I will try to avoid enough. Honest it's my (inaudible) to –to get why you try this cases. I understand that you're – what you doing is taking everything off – leaving only this case I will understand. But what I was –

JUDGE: I'm not sure I followed –

DEFENSE COUNSEL: He – he believes that the Mexico thing is important to his case – very important and that – that's something he should be allowed to talk about. And by taking that away or by prohibiting it that he's not allowed to tell his entire case or his entire story. I have advised him that it's a highly prejudicial thing –

JUDGE: - well as an offer of proof let's do that.

DEFENSE COUNSEL: - okay.

JUDGE: As an offer of proof what about Mexico is relevant to this case?

FREGOSO URIBE: - well as my first time in these problems I never be in this situation. I haven't any – I will have any enough time to talk to my lawyer in the past. He

only comes to see me five times. He never – I can – I cannot call him. I –

JUDGE: Can – can you stay on the question first?

FREGOSO URIBE: - yes.

JUDGE: What about Mexico is relevant to this case?

FREGOSO URIBE: I feel- well I'm not – I – I'm not – I don't want to say I feel. I'm – I'm sure they hiding something.

JUDGE: Who is they? Mexico?

FREGOSO URIBE: Ramona – Ramona especially. Eugenia –

JUDGE: See you're doing that again. My question isn't very confusing. Do you need the translation?

FREGOSO URIBE: Okay. Let's try that please.

JUDGE: Okay. What about Mexico is relevant to this case?

FREGOSO URIBE: Fine.

INTERPRETER: If I felt – if I had – had felt at the moment that they kicked me out that my life was not at risk or my family at risk I would have never left.

JUDGE: Okay. I don't think that's problematic.

FREGOSO URIBE: And in –

JUDGE: The question that I posed to you was are you going to testify about Mexico – you running to Mexico?

FREGOSO URIBE: Well that's why I asked my lawyer. He suggest me – don't do it. So I'm smart enough to don't bring that kind of stuff into this.

JUDGE: Okay.

FREGOSO URIBE: So if she don't ask me anything about Mexico I – I'll have – I don't – why I have to answer, you know?

JUDGE: I've – I've already instructed her that she is not allowed to raise the issue of you fleeing to Mexico. If you'll recall she wanted to have that evidence presented to the jury as an inference of a consciousness of guilt – that you fled to Mexico because you believed yourself guilty. I did not let her do that in her case-in-chief. I did say that if you – if the defense opens the door to that topic then I would let her go through that door that the defense opens. So if you want to talk about fleeing to Mexico it's going to open the door to the Prosecutor asking you all kinds of questions and then making the inference for the jury. That's what I believe your attorney was probably trying to tell you but –

FREGOSO URIBE: Okay. Understood.

JUDGE: - okay. Because I don't think it's relevant that you went to Mexico or you went to Idaho or you went to South Carolina. I don't think that's relevant –

FREGOSO URIBE: Yeah. I –

JUDGE: - because –

FREGOSO URIBE:- I have no experience with that and I respect you.

JUDGE: - okay.

FREGOSO URIBE:You – you points.

JUDGE: So what else is a concern for you?

FREGOSO URIBE: Well if – if I was asking to use the video and also the audio because even with the high profiles that these people is presenting I feel like the evidence – the real evidence of my innocence is in the video and in the audio.

DEFENSE COUNSEL: Wha-what he's saying your honor is – is that he feels that with the – all these experts that came in and testified that they're very important people. And that he wants to be able to refute each and every point that they said on – in – in their – in the CDs and – and on the audios. That they said this – they didn't say this. He wants to go down each and every question. So I said hundreds and hundreds of things that he wants to challenge.

JUDGE: It – it's – that door has been closed on that cross exam tactic of those witnesses. Those witnesses were on the stand here for you to cross examine everything that was in those audios and the videos. Kim Holland was here this morning. That was your opportunity to cross examine her about that information.

DEFENSE COUNSEL: What he's saying is he wants to be able to talk about those –

JUDGE: He had the chance to talk about those –

DEFENSE COUNSEL: - no. He –

JUDGE: - in cross examination.

DEFENSE COUNSEL: - he wants to do it on the stand. He wants to do it on the stand now. He wants to say yeah she said this – but this is really bad. No she said this but she didn't do that – she should have done this. He wants to be able to say that.

JUDGE: Okay. You can't challenge the witness without the witness being able to – to be confronted by that challenge. You are sure able to testify about what you know. You cannot testify about what somebody else has told you.

That's hearsay. You can testify about what you know personally.

FREGOSO URIBE: Okay.

JUDGE: But there are Rules of Evidence that we all have to follow

FREGOSO URIBE: Yes, sir.

JUDGE: - those rules –

FREGOSO URIBE: And I want to go –

JUDGE: - those Rules –

FREGOSO URIBE: - I want to go with the Rules.

JUDGE: - those Rules apply to the Prosecutor as well as the defense.

FREGOSO URIBE: But – but –

JUDGE: Neither one of you have a different rule book.

FREGOSO URIBE: - no.

JUDGE: And – and my job is to sit up here and make sure they follow the rules and you follow the rules.

FREGOSO URIBE: That's (inaudible).

JUDGE: And I will do that –

FREGOSO URIBE: Yes, sir.

JUDGE: - and so if there is something that's either narrative- that's going to be the challenge here – and – and I don't know when the Prosecutor is going to want to object. But if they object then I have to make a ruling consistent with this Evidence Rules.

FREGOSO URIBE: Understood.

JUDGE: And your attorney will be available to ask you questions – that’s how it will start. You’ll be sworn in and he’ll 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 URIBE: Correct.

JUDGE: Okay.

FREGOSO URIBE: Can I avoid to answer the questions?

JUDGE: 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 her. Those are the Rules. That’s the Evidence Rules.

JUDGE: 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 – sorry – then – I apologize. Then you have to answer questions that the Prosecutor asks you.

FREGOSO URIBE: Okay. Okay.

JUDGE: And – and I just want to reiterate that you do not have to testify. If you do not testify I’ll give the jury an instruction that they’re not to use the fact that you didn’t testify against you. The burden is still on the Prosecutor – and the State – to prove you guilty of these charges. You have no burden to prove your innocence.

FREGOSO URIBE: Very well.

JUDGE: Okay.

FREGOSO URIBE: So – I'm not going to testify.

JUDGE: You choose not to testify?

FREGOSO URIBE: Not testify.

JUDGE: Okay. Any other witnesses?

DEFENSE COUNSEL: No, Your Honor.

RP 940-47.

Directly before Fregoso Uribe's ultimate question, whether he could avoid answering the prosecutor's questions on cross examination, the judge explained to Fregoso Uribe that his job was to ensure that the parties followed the rules of evidence. RP 946. It was clear from the context of the entire colloquy and from the entire trial that Fregoso Uribe had sat through thus far that both parties were able to move to keep certain evidence out, to prevent the other side from asking certain questions, and could object to certain questions being asked. Fregoso Uribe's attorney routinely objected throughout the trial and Fregoso Uribe observed this. Fregoso Uribe sought the judge's input on this issue and invited the discussion that ensued. It was Fregoso Uribe that very clearly stated his ultimate goal was to be able to discuss what he wanted to discuss on his

direct testimony without having to avail himself of cross examination questions that he did not like from the prosecutor. The judge quite appropriately and correctly informed Fregoso Uribe that this was not how things worked and that if he took the stand he had to answer the prosecutor's questions. It was clear from the context of the entire colloquy that all the questions from both his own attorney and the prosecutor would be subject to the rules of evidence, to objections, and to the pretrial motions the judge had already ruled upon. There was no infringement upon Fregoso Uribe's right to testify and the trial court did not err. Fregoso Uribe's claim to such should be denied.

**II. The Trial Court Properly Limited the Scope of Fregoso Uribe's Cross Examination of State's Witnesses.**

Fregoso Uribe alleges the trial court erred in failing to allow him to admit evidence that he believed was relevant to show the bias of multiple state witnesses. Fregoso Uribe believed three individuals had conspired against him to cause the instant allegations to occur. RP 460. Fregoso Uribe therefore attempted to admit evidence that each of these three individuals disliked him for some specious reason, unrelated to the instant case both in subject matter and in time in which the situation occurred. The trial court properly excluded the irrelevant evidence.

A defendant has the right, under the Confrontation Clause, to cross-examine witnesses against him. *State v. Johnson*, 90 Wn.App. 54, 69, 950 P.2d 981 (1998). However, this right is not without limit; the scope of extent of such cross examination is within the sound discretion of the trial court. ER 607, 611(b); *State v. Roberts*, 25 Wn.App. 830, 834, 611 P.2d 1297 (1980) (citing *State v. Robbins*, 35 Wn.2d 389, 213 P.2d 310 (1950), *State v. Wills*, 3 Wn.App. 643, 476 P.2d 711 (1970), and 5 R. Meisenholder, Washington Practice ss 264, 265, 299 (1965)). A defendant has no constitutional right to have irrelevant evidence admitted. *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983); *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct., 646, 98 L.Ed.2d 798 (1988). “A trial court may, in its discretion, reject cross-examination where the circumstances only remotely tend to show bias or prejudice of the witness, where the evidence is vague, or where the evidence is merely argumentative or speculative.” *Id.* (citing *State v. Jones*, 67 Wn.2d 506, 512, 408 P.2d 247 (1965) and *State v. Knapp*, 14 Wn.App. 101, 540 P.2d 898 (1975)). A trial court should preclude cross-examination of a witness on subjects that are remote, vague, speculative, or argumentative. *Jones*, 67 Wn.2d at 512. If a trial court denies a defendant the ability to cross-examine an essential state witness on relevant matters that show bias, this will likely violate the Sixth Amendment Right to Confrontation. *Id.* (citing *Davis v. Alaska*, 415 U.S.

308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)). This Court will not disturb a trial court's rulings on the admissibility of evidence absent an abuse of its discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A trial court abuses its discretion if its exercise of discretion is manifestly unreasonable or based upon untenable grounds or made for untenable reasons. *Id.*

This Court reviews the right of confrontation based on a claim of improper limitation of cross-examination of a state's witness for an abuse of discretion. *State v. Blair*, 3 Wn.App.2d 343, 350, 415 P.3d 1232 (2018) (citing *State v. Lee*, 188 Wn.2d 473, 486, 396 P.3d 316 (2017)). When reviewing a trial court's decision for an abuse of discretion, it is important that an appellate court not replace the trial court's discretion with its own; even when the reviewing court would not have made the same decision as the trial court, it is not reversible error unless the trial court abused its discretion. *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013); *State v. Lile*, 188 Wn.2d 766, 782, 398 P.3d 1052 (2017).

One example of a trial court properly limiting a defendant's ability to cross-examine the witnesses against him to expose bias is in *State v. Kilgore*, 107 Wn.App. 160, 26 P.3d 308 (2001), *aff'd*, 147 Wn.2d 288, 53 P.3d 974 (2002). In *Kilgore*, four children claimed the defendant had raped and molested them. *Kilgore*, 107 Wn.App. at 186. The children's

grandmother testified as a witness called by the State at trial. *Id.* at 186.

The defendant wanted to cross-examine the grandmother on the subject of her prior DUI conviction, arguing it was relevant because after she received the DUI conviction, the defendant refused to allow the children to ride in a vehicle with her again. *Id.* This tension, the defendant argued, caused the grandmother to prompt the children to accuse, falsely, the defendant of molesting and raping them. *Id.* The defendant claimed the grandmother was the “instigator of all the allegations.” *Id.* at 172-73. In finding the evidence not admissible, the Court noted that it was the children who accused the defendant of rape and molestation, and the defendant pointed to no evidence that suggested the grandmother asked or convinced the children to lie about the defendant. *Id.* at 186. In fact, the defendant “merely cites facts that show [the grandmother] had contact with her two sons, [two of the victims], and the mothers of [the other two victims]. He fails to provide a link or ‘train of facts’ that suggest that the animosity engendered by his refusal to allow [the grandmother] to drive his children caused the four children to accuse him of molesting and raping them.” *Id.* at 186-87. Therefore, the Court found, the trial court properly limited the scope of cross-examination by declining to allow the defendant to question the grandmother about her prior DUI. *Id.* at 187. In addition, the Court in *Kilgore* found that the grandmother was not the

accuser and the case did not rise and fall on whether the jury believed her testimony. *Id.* at 187. Therefore, the language in *State v. Roberts*, 25 Wn.App. 830, 611 P.2d 1297 (1980) did not apply. *Id.*

In another case, the defendant sought to expose the bias of his ex-wife by introducing evidence of the financial details of their protracted and rancorous divorce proceeding. *State v. Fisher*, 165 Wn.2d 727, 751-52, 202 P.3d 937 (2009). The trial court, however, properly prohibited the defendant from cross-examining his ex-wife on this subject because her alleged financial motivation to lie about the defendant was speculative. *Id.*

As in *Kilgore* and *Fisher*, the trial court here properly precluded the defendant's cross-examination of the witnesses on their potential bias because it was far too speculative and thus irrelevant.

Fregoso Uribe asked the trial court to allow him to present evidence that he felt showed that three individuals had "conspired against him to cause this to happen." RP 460. He claimed that three or four years prior he had grabbed the foot of Eugenia, the victim's mother and that then Eugenia complained about the way he touched her, believing he was trying to sexually molest her because he touched her foot. RP 461. Fregoso Uribe also wanted to be able to somehow introduce evidence, though it is unclear how because the witness would deny it on cross-examination (as she did during the 9A.44 hearing outside the presence of

the jury) and he made no offer of proof through another witness, that the victim's grandmother, Ramona, had a child out of wedlock and that the defendant knew this secret. RP 462. The defendant speculated that Ramona begrudged the defendant knowing this secret and chose to fabricate his molestation against her granddaughter so as to prevent him from divulging her secret love child. RP 462-63.

With regards to the incident with Eugenia, the incident with the foot grab occurred four years prior to trial and is not temporally relevant to the incident or the disclosure, nor was it relevant to her bias at the time of trial. Furthermore, Fregoso Uribe pointed to no link between this incident and a drive to accuse Fregoso Uribe of molesting the victim; Fregoso Uribe provided no link to this prior incident and a potential motive to fabricate molestation. The same is true to the supposed incident with Ramona. Initially, Fregoso Uribe could not prove that Ramona had a child out of wedlock, that she cheated on her spouse and that this was a secret that she confided in Fregoso Uribe. Ramona denied such incident during her testimony in the pretrial hearing, and Fregoso Uribe himself did not testify. It is clear from the context of the explanation of this secret that only Ramona and Fregoso Uribe knew about it, therefore, no other witness could have possibly offered the evidence. Accordingly, the only way to get this evidence through any witness would have been through Fregoso

Uribe who chose not to testify. Fregoso Uribe had no legitimate basis to ask this question of Ramona as she denied the incident occurred.

Furthermore, all of Ramona's children were adults, so this prior "bad act" of hers was quite temporally distant from the time of the abuse at issue at trial, and the potential relevance to Ramona's potential bias at trial is extremely speculative and makes absolutely no sense. It was clearly completely irrelevant and the trial court properly excluded the evidence.

And while the trial court usually allows defendants more leeway when cross-examining the accusing witnesses in sexual assault cases, Eugenia and Ramona are not the accusers here, A.O.S. is the accuser, she is the lone victim. Eugenia and Ramona are at best first disclosure witnesses. The theory upholding the additional leeway given to defendants to show bias against accusing witnesses does not apply here to non-accusers. Additionally, a trial court only abuses its discretion if it makes a decision no other judge would make given the situation and the law. With clearly irrelevant evidence attempting to be presented by a defense attorney who clearly also believed it to be irrelevant, the trial court made the appropriate call as the evidence was not temporally related and there was no link between the prior incidents and a motive to fabricate molestation. The trial court did not abuse its discretion and the charges should be affirmed.

Even if the trial court erred, such error was harmless beyond a reasonable doubt. *See State v. Spencer*, 111 Wn.App. 401, 408, 45 P.3d 209 (2002) (discussing that error in admission of bias evidence is subject to the constitutional harmless error test). Even if the jury had some reason to believe that Fregoso Uribe weirdly touched Eugenia on her foot four or more years earlier, that likely would have only been used as character evidence against *him* making him look even more sexually deviant, and the jury likely would have dismissed the idea that Ramona used a 20 or more year old secret as a motive to convince her granddaughter to convincingly make up a story about prolonged sexual abuse, rape and anal rape. In addition, it is clear that A.O.S. did not make up her urinary tract infections, her vaginal odor, her red marks near her labia, and her vaginal discharge. The jury also got to hear from A.O.S. first hand, a year or more after the alleged coerced allegation of abuse was forced out of her by her grandmother and mother. Her claims were consistent. The jury also heard what she told the forensic interviewer and the doctor, and heard her innocent explanations and child-like descriptions of things (like calling semen “cream”), something one is unlikely to see in allegations of abuse wherein adults coached a child on what to say. Even if the evidence had come in about the supposed bias that Eugenia and Ramona had against Fregoso Uribe, it is clear that any jury would still have convicted Fregoso

Uribe beyond a reasonable doubt of all charges. He was clearly guilty and the slight, very irrelevant evidence of bias he claims he should have been allowed to admit would not have changed the outcome of his case.

### **III. The Trial Court Properly Prohibited Contact with All Minors as a Condition of Fregoso Uribe's Sentence.**

Fregoso Uribe argues the trial court improperly prohibited contact between Fregoso Uribe and his biological children when it prohibited contact with all minors. However, protection of children is a valid state interest when Fregoso Uribe molested a child in his care and the trial court properly entered no contact with all minors as a crime-related prohibition. The trial court should be affirmed.

As part of any term of community custody, the court may impose and enforce crime-related prohibitions. RCW 9.94A.505(9); RCW 9.94A.703(3)(f). A crime-related community custody condition prohibits conduct that “directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). “Directly related” includes conditions that are reasonably related to the crime. *State v. Irwin*, 191 Wn.App. 644, 364 P.3d 830 (2015). However, when a sentencing condition interferes with a fundamental constitutional right, like the right to parent, more careful review of those sentencing conditions is required. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008); *In re Pers.*

*Restraint of Rainey*, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). Thus, sentencing conditions burdening the right to care, custody and companionship of one’s children “must be ‘sensitively imposed’ so that they are ‘reasonably necessary to accomplish the essential needs of the State and public order.’” *Rainey*, 168 Wn.2d at 374 (quoting *Warren*, 165 Wn.2d at 32). But “[p]arental rights are not absolute and may be subject to reasonable regulation.” *City of Sumner v. Walsh*, 148 Wn.2d 490, 526, 61 P.3d 1111 (2003) (citing *Nunez v. City of San Diego*, 114 F.3d 935, 952 (9th Cir. 1997)).

The crimes that Fregoso Uribe was convicted of, rape of a child and child molestation, are crimes that inherently involve children as victims. Therefore conditions of Fregoso Uribe’s sentence that seek to limit his access to children are therefore crime-related. *See State v. Miller*, 198 Wn.App. 1008 (2017) (finding in a case involving crimes of rape of a child and child molestation that conditions that sought to limit access to children were crime-related).<sup>2</sup> This Court reviews the imposition of crime-related prohibitions for an abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). An abuse of discretion occurs when a decision is manifestly unreasonable or the discretion was exercised on

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<sup>2</sup> GR 14.1 allows citation to unpublished opinions of the Court of Appeals issued on or after March 1, 2013. This opinion is not binding on this Court and may be given as much precedential value as this Court chooses.

untenable grounds or for untenable reasons. *State v. Ancira*, 107 Wn.App. 650, 653, 27 P.3d 1246 (2001).

It was reasonable for the trial court to prohibit Fregoso Uribe from having contact with any minors, including his biological children, because he is a danger to children, preying on children in his care. He took care of A.O.S., he was her godfather, acted in loco parentis as her baby-sitter, and even was allowed to discipline her. A lot of tasks that he also likely does for his own biological children. In *State v. Berg*, 147 Wn.App. 923, 198 P.3d 529 (2008), the defendant was convicted of rape of a child and child molestation after he sexually molested a child who lived with him, but who was not his biological child. *Berg*, 147 Wn.App. at 927-31. On appeal, the defendant challenged the reasonableness of the order prohibiting contact with all female minors, which included his own biological daughter. The Court of Appeals upheld the no contact provision finding that Berg acted as her parent when the abuse occurred and that by allowing his own daughter to be alone with him would be putting her in the same situation and putting her at the same risk the victim was put in and at when she was sexually abused by the defendant. *Id.* at 942-43. The trial court's order restricting contact was reasonably necessary to protect his biological daughter. *Id.*

The situation in this case is somewhat similar. While A.O.S. did not live with Fregoso Uribe, she often spent the vast majority of her waking hours over at his house, in his presence, with him and his children. He had a position of authority over A.O.S., like a parent. He was able to discipline her, like a parent. He had rules for her, like a parent. He provided for her, like a parent. He did act in loco parentis of A.O.S. So like the defendant in *Berg, supra*, while Fregoso Uribe did not abuse his own biological child in abusing A.O.S., he abused someone who was like his child and therefore all children who could find themselves in his care or in his presence are at risk, including his own biological children. Thus the trial court did not err in prohibiting Fregoso Uribe from having contact with all minors as his class of victims includes minors under his care, like his own minor biological children would be. The trial court's imposition of this condition should be affirmed.

**IV. The State agrees the Filing Fee and the Jury Demand Fee Should be Stricken.**

Fregoso Uribe asks this Court to strike the jury demand fee and criminal filing fee which were imposed at sentencing pursuant to *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). The State agrees that under *Ramirez*, the changes brought by HB 1783 apply prospectively and apply to Fregoso Uribe's case. Accordingly, the criminal filing fee and the

jury demand fee should be stricken from Fregoso Uribe's judgment and sentence.

*State v. Ramirez, supra*, held that amendments made in 2018 to Washington's legal financial obligation system apply prospectively to cases on direct review. *Ramirez*, 191 Wn.2d at 749-50. Fregoso Uribe's case is on direct review. Thus the 2018 amendments to the legal financial obligation statutes apply to Fregoso Uribe's case. The 2018 amendments prohibit imposition of a \$200 criminal filing fee on defendants who are indigent at the time of sentencing as defined by RCW 10.101.010(3)(a)-(c). RCW 36.18.020(2)(h). Fregoso Uribe was found to be indigent at the time of sentencing by the trial court. CP 98. Accordingly, the criminal filing fee should be stricken from the judgment.

In addition, the amendments to the legal financial obligation statutes made in 2018 affected the jury demand fee. The jury demand fee statute is also qualified by the statement that the court shall not order a defendant to pay costs if the court finds the person to be indigent at the time of sentencing. RCW 10.46.190. The holding in *Ramirez* also applies to this statute and therefore as Fregoso Uribe was found to be indigent at the time of sentencing and his appeal is pending direct review, the jury demand fee should be stricken from his judgment.

Based on *Ramirez*, the trial court's finding that Fregoso Uribe was indigent at the time of sentencing, and the status of Fregoso Uribe's case being on direct review, Fregoso Uribe is entitled to have both the criminal filing fee and the jury demand fee stricken from the judgment and sentence. The matter should be remanded with direction to the trial court to strike the two fees from the judgment.

#### CONCLUSION

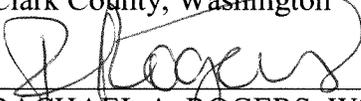
The trial court should be affirmed in all respects.

DATED this 19<sup>th</sup> day of April, 2019.

Respectfully submitted:

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