

FILED

OCT 13 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

27360-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ELIAS SALGADO, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. THE COURT VIOLATED MR. SALGADO'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT BY PERMITTING THE PROSECUTOR TO PRESENT ARGUMENT SHIFTING THE BURDEN OF PROOF.

A prosecuting attorney commits misconduct by making a closing argument that shifts the burden of proof. *United States v. Perlaza*, 439 F.3d 1149, 1171 (9th cir. 2006). Such misconduct affects a constitutional right and requires reversal of the conviction unless the error is harmless. *State v. Moreno*, 132 Wn. 2d 663, 672, 132 P.3d 1137 (2006); *see also Perlaza*, at 1171.

Under the evidence in this case, the prosecutor's argument urging the jury to hold Mr. Salgado accountable tended to shift the State's burden of proving every element of the alleged rape offenses, instead focusing the jury's attention on whether Mr. Salgado's generally abusive conduct made him unworthy of acquittal.

The court violated Mr. Salgado's right to due process under the Fourteenth Amendment to the United States Constitution by denying defense counsel's motion to exclude such argumentation.

2. THE COURT VIOLATED MR. SALGADO'S FIRST AMENDMENT RIGHTS BY IMPOSING RESTRICTIONS ON HIS CONTACT WITH HIS CHILDREN, WHO WERE NOT VICTIMS OF THE CHARGED CRIMES, FOR WHICH NO COMPELLING STATE INTEREST PROVIDED JUSTIFICATION.

The State argues that the restrictions on Mr. Salgado's contact with his biological children is consistent with the recent decision in *In re Rainey*, 168 Wn.2d 367, 229 P.3d 686 (2010). But *Rainey* addressed limitations on the petitioner's contact with victims of the crimes of which he had been convicted. Mr. Salgado was not charged with any crime involving his biological children. Thus, these restrictions were sentencing conditions based on alleged facts that were implicit in the jury's verdict and violated the principles announced in *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and *State v. Armendariz*, 160 Wn. 2d 106, 156 P.3d 201 (2007). *In re Rainey*, 168 Wn. 2d at 376; *see also State v. Ancira*, 107 Wn. App. 650, 27 P.3d 1246 (2001). The court exceeded its authority in imposing restrictions on Mr. Salgado's contact with his biological children and these restrictions must be vacated.

Any restrictions on a convicted defendant's right to contact with family members must be justified by a compelling interest of the State. Here, the court did not identify any such compelling interest with respect

to Mr. Salgado's biological children. Even if the testimony as to physical and emotional abuse of family members in general could provide some justification for entering some protective order relating to his children, nothing in the record justifies prohibiting non-physical contact such as writing and telephonic communication, nor does the record justify a lifetime prohibition, with limited opportunity for contact under the supervision of a community custody officer.

The restrictions on contact should be stricken. Alternatively, the matter should be remanded to the trial court to evaluate the proposed restrictions in light of the *Rainey* requirement that the court identify a compelling necessity for imposing any restrictions, and limit those restrictions to what is reasonably necessary to serve that compelling State interest.

The State has argued that the Judgment and Sentence does not impose any restriction on Mr. Salgado's contact with his children until they reach the age of majority. The court's oral comments suggest otherwise. (RP 8/14/2008 87) This matter should be remanded to the trial court for a correction of the judgment and sentence to eliminate this apparent ambiguity.

E. CONCLUSION

Mr. Salgado received a maximum sentence of life in prison for rape because of overwhelming evidence that he physically and emotionally abused his wife and her daughter. The decisions of the trial court limiting his ability to present a defense, and permitting the prosecutor to present an emotionally appealing argument that tended to shift the burden of proof to Mr. Salgado, deprived Mr. Salgado of a fair trial on the rape charges.

Similarly, the court imposed unjustified restrictions on Mr. Salgado's right to have contact with his children based on the testimony relating to physical and emotional abuse of the alleged victim and her mother. These restrictions should be vacated.

Dated this 13th day of October, 2010.

GEMBERLING & DOORIS, P.S.


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Attorney for Appellant

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 27360-1-III
)	
vs.)	CERTIFICATE
)	OF MAILING
ELIAS SALGADO,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on October 13, 2010, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

David Trefry
TrefryLaw@WeGoWireless.com

I certify under penalty of perjury under the laws of the State of Washington that on October 13, 2010, I mailed a copy of Appellant's Brief in this matter to:

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P O Box 2049
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Signed at Spokane, Washington on October 13, 2010.



Robert Canwell
Legal Assistant