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No. 35567-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

JEREMY ALVAREZ,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. In violation of article I, § 9 and the Fifth Amendment, the trial court permitted the prosecution to elicit evidence of Mr. Alvarez’s prearrest silence.

Confronted by a police officer at his residence, the officer told Jeremy Alvarez that his step-sister, a 13-year-old girl, had accused him of sexually molesting her. Over Mr. Alvarez’s objection, the prosecutor was permitted to elicit the officer’s opinion that Mr. Alvarez did not appear surprised by the allegation. Because the admission of the officer’s testimony violated Mr. Alvarez’s right against self-incrimination under article I, § 9 of Washington Constitution and the Fifth Amendment to the United States Constitution, and deprived Mr. Alvarez of a fair trial, the conviction must be reversed. Br. of App. at 12-18.¹

a. The prosecution’s contention that it only elicited “demeanor” testimony is unsupported by legal argument and is contrary to precedent.

In response to Mr. Alvarez’s argument, the prosecution first argues that Mr. Alvarez lacks a “factual basis” for his claim because “[d]emeanor is not silence.” Br. of Resp’t at 7-8. The prosecution cites no authority in support of its position. Because the prosecution fails to cite authority, its

¹ The prosecution incorrectly asserts that Mr. Alvarez’s claim is made only under the Fifth Amendment. Br. of Resp’t at 9. Mr. Alvarez’s argument and related assignment of error cites to article I, § 9 of the Washington Constitution. Br. of App. at 1, 12.

argument should be rejected. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); State v. Leach, 113 Wn.2d 679, 699, 782 P.2d 552 (1989); RAP 10.3(a)(6).

In any event, the prosecution's argument is contrary to State v. Holmes, 122 Wn. App. 438, 93 P.3d 212 (2004). There, the prosecutor asked a detective, "Did you notice anything else about his demeanor when he was being placed under arrest?" The detective responded, "He didn't appear surprised." Holmes, 122 Wn. App. at 442. This Court rejected "the State's characterization of the detective's remarks as permissibly stating observations of Holmes' demeanor." Id. at 445. Rather, this Court held it was an impermissible comment on the defendant's silence. Id. at 216. The same is true in this case.

b. An explicit invocation of the right to silence is not required. And under the facts of this case, Mr. Alvarez had no opportunity to invoke his right to silence.

The prosecution contends that unless a person explicitly invokes their right against self-incrimination, the privilege does not apply. Br. of Resp't at 8-9. In support of this rule, the prosecution relies on Salinas v. Texas, 570 U.S. 178, 133 S. Ct. 2174, 186 L. Ed. 2d 376 (2013) (plurality opinion).

In Salinas, the United States Supreme Court rejected a defendant's

claim that his right against self-incrimination was violated because the prosecution had used his prearrest silence as substantive evidence of guilt. The decision, however, was fragmented. The plurality, consisting of three justices, reasoned that the defendant failed to expressly invoke his right to silence and that this was fatal to his claim. Id. at 183 (Alito J., plurality). Two other justices reasoned that even if the defendant had invoked his right against self-incrimination, this did not matter because the Fifth Amendment did not forbid a prosecutor from commenting on a defendant's silence. Id. at 191-93 (Thomas, J. concurring). Four justices dissented. Id. at 193 (Breyer, J., dissenting). The Court left unresolved the question on whether the Fifth Amendment provided a right to prearrest silence. Id. at 183; State v. Tsujimura, 140 Hawai'i 299, 311-12, 400 P.3d 500 (2017).²

Salinas is materially distinguishable on its facts and does not apply to this case. In Salinas, the defendant voluntarily submitted to an interview at a police station, but was silent in response to some questions during the interview. 570 U.S. at 182. The defendant therefore had the opportunity to expressly invoke his right to silence, but did not.

² Our Supreme Court has held that the privilege against self-incrimination includes a right to prearrest silence. State v. Easter, 130 Wn.2d 228, 241, 922 P.2d 1285 (1996).

In contrast, Mr. Alvarez did not volunteer for an interview or go to a police station to speak. Rather, Mr. Alvarez was confronted by a police officer at his residence and unilaterally advised by the officer of the allegation of sexual misconduct. RP 342-43. The officer testified that in response to his “advisement,” Mr. Alvarez “had no expression whatsoever on his face” and that he expressed “[n]o shock or anything like that.” RP 345. Unlike the defendant in Salinas, Mr. Alvarez did not volunteer for an interview and had no opportunity to expressly invoke his right to silence in response to the accusation.³ For this reason, Salinas does not apply. State v. Krancki, 355 Wis. 2d 503, 514, 851 N.W.2d 824 (Wis. Ct. App. 2014) (Salinas not applicable because the defendant “had no opportunity to affirmatively assert his Fifth Amendment right to remain silent in response” to police questioning); Tsujimura, 140 Hawai’i at 325 n.21 (no requirement that defendant invoke right to silence if there is no opportunity to do so). This Court should therefore apply Washington precedent to this case. See State v. Lovejoy, 89 A.3d 1066, 1074 (Me. 2014) (distinguishing Salinas and holding there was a violation of the

³ As the prosecutor and defense counsel below represented in their arguments to the court on the issue, it appears the officer read Mr. Alvarez his Miranda rights shortly after advising him of the allegations and that Mr. Alvarez subsequently invoked these rights. RP 343 (prosecutor represents: “I have specifically advised the law enforcement officer that we are not to speak of the Mirandized or invoking.”); RP 344 (defense counsel represents: “He had not been Mirandized yet but it was coming.”).

defendant's right against self-incrimination even though the defendant did not explicitly state he was exercising his right against self-incrimination).

The prosecution argues that Salinas overruled Washington law and that this Court is obligated to follow it. Br. of Resp't at 9-14. Although not cited by the prosecution, this Court has stated that Salinas overruled Easter and its companion case.⁴ State v. Magana, 197 Wn. App. 189, 194-95, 389 P.3d 654 (2016). The Court extracted from Salinas a rule that "absent an express invocation of the right to silence, the Fifth Amendment is not an obstacle to the State's introduction of a suspect's pre-arrest silence as evidence of guilt." Id. at 195.

With respect to the Magana court, Salinas did not overrule Washington law. The decision was a fractured plurality decision. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Marks v. United States, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977) (internal quotation omitted). As explained by Supreme Court of Kentucky, the "narrowest grounds" in Salinas is unclear:

⁴ State v. Lewis, 130 Wn.2d 700, 927 P.2d 235 (1996).

The “narrowest grounds” explaining the result in *Salinas* is not readily apparent: three justices agree that the Fifth Amendment was not violated because the defendant did not expressly invoke the right, while two say it was not violated because, under the particular facts of the case, the defendant did not have a Fifth Amendment right.

Trigg v. Commonwealth, 460 S.W.3d 322, 330 (Ky. 2015). Thus, the precedential value of Salinas is limited to its facts.

In addition to Salinas, the prosecution cites decisions from the federal circuit court of appeals and argues they are binding. Br. of Resp’t at 9-11. The prosecution is incorrect. While federal circuit appellate opinions may be persuasive, they are not binding on this Court. State v. Glasmann, 183 Wn.2d 117, 124, 349 P.3d 829 (2015); W.G. Clark Const. Co. v. Pac. Nw. Reg’l Council of Carpenters, 180 Wn.2d 54, 62, 322 P.3d 1207 (2014).

In sum, Salinas is inapplicable to this case and, as argued in the opening brief, Washington precedent compels the conclusion that Mr. Alvarez’s right against self-incrimination was violated.⁵ Br. of App. at 13-17.

⁵ Mr. Alvarez has filed a supplemental brief arguing that, in this context, article I, § 9 should be interpreted independently of the Fifth Amendment.

c. The prosecution has not met its heavy burden of proving the error harmless beyond a reasonable doubt.

Alternatively, the prosecution argues the error is harmless. Br. of Resp't at 16-17. The prosecution bears the burden of proving constitutional error harmless beyond a reasonable doubt. State v. DeLeon, 185 Wn.2d 478, 487, 374 P.3d 95 (2016). The prosecution must persuade this court to “find—beyond a reasonable doubt—that *any reasonable jury* would have reached the same result, despite the error.” Id. (internal quotation omitted).

The prosecution has not met its heavy burden. There was no other evidence comparable to the evidence of Mr. Alvarez's prearrest silence. The jury likely wondered why Mr. Alvarez did not act surprised when accused of sexual misconduct against a child. State v. Terry, 181 Wn. App. 880, 893, 328 P.3d 932 (2014). Although there were innocent explanations for the purported lack of surprise, the jury may have concluded this evidence showed guilt on the theory that an innocent person would appear surprised. Id.

In arguing that the error is harmless, the prosecution recounts the evidence from the trial in great detail. Br. of Resp't at 16-21. The prosecution, however, fails to acknowledge that its case largely came down to whether the jury found J credible. And, as outlined in the opening

brief, there were many reasons for the jury to not find J credible. Br. of App. at 17-18. Further, the record shows the jury did not find J to be entirely credible because the jury acquitted Mr. Alvarez of one of the two charges. RP 707. Given these circumstances, this Court is not in a position to find the error harmless. Holmes, 122 Wn. App. at 446-47. The prosecution has not proved beyond a reasonable doubt that, absent the constitutional error, *any reasonable jury* would have reached the same result. DeLeon, 185 Wn.2d at 488-89. This Court should reverse.

2. The court erred by admitting “expert” opinion testimony that the child’s statement to her was “consistent” with a prior statement given by the child to the police.

J spoke to the police about her allegations against Mr. Alvarez. J later spoke to Mari Murstig, a child forensic interviewer, about her allegations. Over Mr. Alvarez’s objection at trial, Mr. Murstig was allowed to testify that J’s statements to the police were “consistent” with what J told her. This was error because a jury is capable of determining if two statements are “consistent.” Br. of App. at 25-26. Opinion testimony by a witness (lay or expert) on the matter is unhelpful to the jury. Moreover, Ms. Murstig’s testimony improperly vouched for J’s credibility, which violated Mr. Alvarez’s constitutional right to a jury determination of the facts. Br. of App. at 26-28.

In opposing Mr. Alvarez’s argument, the prosecution claims this

case is controlled by State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). The prosecution is incorrect.

Kirkman involved different facts and did not address the issue in this case. As for the issue, Kirkman did not address (let alone hold), that an “expert” witness may give an opinion about whether a child’s statement to the police is “consistent” with what the child told her. Rather, Kirkman addressed when a defendant may properly claim for the first time on appeal that a witness’s testimony improperly vouched for the credibility of the complaining witness. Id. at 926-27. Because both the defendants in Kirkland failed to object to the challenged testimony, the issue concerned whether the manifest constitutional error exception to the rule of issue preservation applied. RAP 2.5(a)(3). The court held that, in the context of opinion testimony on the ultimate issue, manifest error requires an explicit or almost explicit statement by the witness on an ultimate issue of fact. Kirkman, 159 Wn.2d 936-37. Because the challenged testimony at issue in both cases did not contain such statements, the court held the errors were waived. Id. at 929, 938.

Unlike in Kirkman, Mr. Alvarez objected. And the challenge went to whether it was proper for Ms. Murstig to opine that J’s statement to her was consistent with what law enforcement said J told them. This was primarily a question concerning the application of the rules of

evidence. Br. of App. at 19-26. Mr. Alvarez argued the opinion testimony was improper under the rules of evidence. In contrast, Kirkman addressed whether opinion testimony improperly vouched for the credibility of a witness, which is a constitutional issue because vouching infringes on the right to a jury trial. Kirkman, 159 Wn.2d at 927.

The facts are also distinct. In Kirkman, Dr. Stirling testified that what the child *told him* concerning sexual abuse was “clear and consistent.” Kirkman, 159 Wn.2d at 923. He did not testify that the child’s account to him was “consistent” with what the child said to someone else. In this case, Ms. Murstig testified that what J told her was “consistent” with what she read in a police report. RP 363-64.

As argued, this was not proper opinion testimony (either lay or expert). Br. of App. at 25-26. Whether the story J told police was “consistent” with the story she told Ms. Murstig was an issue the jury was capable judging itself. Further, the testimony improperly vouched for J’s credibility and invaded the province of the jury. Br. of Resp’t at 26-28. This Court should reject the prosecution’s arguments and hold the trial court erred in overruling Mr. Alvarez’s objection and permitting the testimony.

The prosecution does not argue the error is harmless. Br. of Resp’t at 23. Because the error was prejudicial, this Court should reverse. Br. of

App. at 28-29.

3. The trial court commented on the evidence thrice. The prosecution has not affirmatively shown that no prejudice resulted to Mr. Alvarez.

Judicial comments on the evidence violate the Washington Constitution. Const. art. IV, § 16. Contrary to the State's suggestions, a claimed error concerning a judicial comment on the evidence may be raised for the first time on appeal as manifest constitutional error. State v. Levy, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006); RAP 2.5(a)(3).

In this case, the trial court commented on the evidence thrice. The trial court (1) instructed the jury on Mr. Alvarez's date of birth; (2) remarked to a juror who later sat on the jury that the court thought J was 12 or 13 years old; and (3) told the jury pool the date of J's birth. Br. of App. at 30-34.

The prosecution agrees that the jury instructions contain a caption on the cover page and that this caption lists Mr. Alvarez's birthdate below his name ("D.O.B.: 06/12/1990). CP 40; Br. of Resp't at 24. Although these were the "instructions of the court," CP 40, the prosecution claims this conveyed the prosecution's claim, not the opinion of the court. Br. of Resp't 24. Because these were the court's instructions, they conveyed the impression that Mr. Alvarez's birthdate was June 12, 1990. See State v.

Jackman, 156 Wn.2d 736, 744, 132 P.3d 136 (2006). Therefore, this was comment on the evidence.

Next, the prosecution does not dispute that the court told a potential juror, who later sat on the jury, that the charges concerned sex crimes against a child who was approximately 12 or 13 years old. The court expressed this in factual and personal terms, stating that the charged crimes were against “a minor who is, I think, 12, 13 years of age approximately.” RP 63. Contrary to the prosecution’s argument, this was improper. A proper explanation of the charges would have been that the charges concerned crimes against a minor, whom the prosecution alleged to have been 12 or 13 years old. See RCW 9A.44.076(1). Because the court’s comment suggested that the alleged victim was in fact 12 or 13 years old, this was a comment on the evidence. Levy, 156 Wn.2d at 721; Jackman, 156 Wn.2d at 744.

Finally, the prosecution also does not contest that when reading the charges to the jury, the court included language stating J’s birthdate. Br. of Resp’t at 28-29. There was no need for this. That the court subsequently qualified that the charging document and its contents were not “proof of matters charged” is not determinative. Under the circumstances, a jury would understand the court to be saying that J’s birthdate was established. See Jackman, 156 Wn.2d at 744; State v. Painter, 27 Wn. App. 708, 714,

620 P.2d 1001 (1980) (whether there is a comment on the evidence “depends upon the facts and circumstances of each case.”).

As argued, it is *conceivable* the jury *could* have reached a different results absent the judicial comments. Br. of App. at 34-35. The record does not affirmatively show that no prejudice to Mr. Alvarez resulted. Therefore the presumption of prejudice stands and reversal is required. Jackman, 156 Wn.2d at 745

To be sure, there was uncontroverted testimony about how old J and Mr. Alvarez were. But the same was true in Jackman, where the court commented on the evidence by including the alleged victims’ birthdates in the jury instructions. Id. Still, our Supreme Court held the prosecution had not proved the error did not prejudice the defendant. Id. The same is true in this case. The prosecution cites no authority to the contrary.

Because the trial court commented on the evidence and the prosecution has not proved no prejudice resulted to Mr. Alvarez, his conviction should be reversed.

4. Remand is necessary to correct several unlawful community custody conditions.

a. Challenges to community custody conditions may be raised for the first time on appeal.

Mr. Alvarez challenges several conditions of community custody imposed by the trial court at sentencing. Br. of App. at 36-48. As a

threshold matter, the prosecution invites this Court to not review any of Mr. Alvarez's challenges because he did not object to these conditions below. Br. of Resp't at 30-32. The prosecution ignores that it is well established "that illegal or erroneous sentences may be challenged for the first time on appeal." State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (internal quotation omitted) (reviewing community custody condition for first time on appeal); accord State v. Johnson, ___ Wn. App.2d ___, 421 P.3d 969, 971 (2018) (same). The prosecution cites no precedent in support of its position that this Court may decline to review Mr. Alvarez's challenges. Following precedent, this Court should review Mr. Alvarez's challenges.

b. The conditions should be modified to permit Mr. Alvarez contact with any future children he may have.

Whether a trial court had authority to impose a community custody conditions is reviewed de novo. State v. Coombes, 191 Wn. App. 241, 249, 361 P.3d 270 (2015).

The community custody conditions categorically forbid Mr. Alvarez from having contact with any child, period. CP 174-75. Should Mr. Alvarez have a child, this infringes on his fundamental liberty interest as a parent. Br. of App. at 39. Except in circumstances where the child is the victim, a sentencing court does not have authority to effectively

terminate a parent-child relationship through a community custody condition. Br. of App. at 39. The prosecution argues that should Mr. Alvarez have a child, he can file a motion seeking to change the terms of community custody. Br. of Resp't at 33. The prosecution provides no persuasive reason to not address the issue now. Accordingly, the Court should instruct that the trial court clarify the conditions do not apply to any children of Mr. Alvarez's.

c. The conditions involving children should be limited to children who are under the age of 16.

Setting aside the foregoing problem, the community custody conditions restricting contact with children should be amended to limit contact with children or minors who are under the age of 16. Br. of App. at 39-40.⁶

The various degrees of child rape and child molestation criminalize sexual acts against children under 16. See RCW 9A.44.073-.089. The legislature distinguished the term "child" from "minor" in these statutes, and used the term "minor" to describe those who were at least 16 and under 18. *Cf. id.* and RCW 9A.44.093-.096.

⁶ In the subheading, counsel mistakenly stated the conditions should be limited to minors 16 years or younger. Br. of App. at 39.

In this case, Mr. Alvarez was convicted of second degree rape of a child. He was not convicted of the broader sexual crimes involving minors who may be older than 15. See Br. of Resp't at 35. Given that the crime did not involve a minor who was 16 or 17 years old, it is unreasonable to forbid Mr. Alvarez from having contact with these people for life. Sixteen and seventeen year-olds have a significant amount of independence in society. They drive cars, have jobs, and attend college. When he rejoins society, Mr. Alvarez will likely have intermittent contact with these people. The Court should remand with instruction that the conditions involving children or minors be rewritten to apply only to children or minors under 16. Johnson, 421 P.3d at 973.

d. The conditions compelling Mr. Alvarez to speak are not reasonably related to the crime and violate the First Amendment.

The condition compelling Mr. Alvarez to disclose his “sexual criminal history/community custody/prohibitions” to future persons he forms a sexual relationship is not reasonably related to the circumstances of the offense, his risk of re-offense, or the safety of the community. RCW 9.94A.703(d); Br. of App. at 40; see United States v. Reeves, 591 F.3d 77, 81-82 (2d Cir. 2010) (condition that defendant notify sexual partners of his prior criminal history concerning his sex offenses was unreasonable). It also unconstitutionally compels Mr. Alvarez to speak in violation of the

First Amendment. Br. of App. at 41-42. Contrary to the prosecution's suggestion, there need not be a case precisely on point for this Court to hold that the condition violates the constitutional principle against compelled speech.

Relatedly, requiring Mr. Alvarez to advise his community corrections officer or treatment provider of current sexual relationships is unreasonable. Br. of App. at 40. It should also be stricken.

e. The challenge to the condition permitting a full search any electronic device is ripe and is unconstitutional.

Contrary to the prosecution's contention, the challenge to condition 6 is ripe because it authorizes complete searches of any electronic device Mr. Alvarez possesses. For this reason, Cates is distinguishable. State v. Cates, 183 Wn.2d 531, 535, 354 P.3d 832 (2015). The prosecution cites the dissent in Cates to argue that the condition in this case is the same. Br. of Resp't at 40-41. But the majority in Cates reasoned that the condition as written in that case did "not authorize any searches." Cates, 183 Wn.2d at 535. Here, the condition authorizes searches. Because the condition does not require any cause to search or a nexus between the property and any alleged probation violation, it is plainly unconstitutional. State v. Cornwell, 190 Wn.2d 296, 301-02, 306, 412 P.3d 1265 (2018).

f. The conditions related to controlled substances are not crime-related and are vague.

Concerning the condition forbidding Mr. Alvarez from unlawfully possessing controlled substances, this is not reasonably related to the offense. Contrary to the prosecution's arguments, Mr. Alvarez's personal history does not authorize the court to impose conditions that are unrelated to the crime. Br. of Resp't at 42-43. And the condition is vague because it is not clear if marijuana is included within the prohibition. Br. of App. at 45-46. The condition should be stricken.

g. The polygraph condition must be rewritten and Mr. Alvarez should not be ordered to pay for these polygraphs for the rest of his life.

The polygraph condition should be modified to state that it is limited to monitoring Mr. Alvarez's compliance with conditions of community custody. Br. of App. at 47-48; State v. Combs, 102 Wn. App. 949, 953, 10 P.3d 1101 (2000). The prosecution appears to agree that the condition should be limited, but argues remand is not necessary because it represents "prosecutors are currently working together on the local form and this provision will be noted." Br. of Resp't 45. This is not a persuasive reason to leave the condition in Mr. Alvarez's sentence unfixed. Moreover, the prosecution's assertions about what prosecutors are doing

regarding forms is outside the record, and is therefore improper. Nye v. Univ. of Washington, 163 Wn. App. 875, 885, 260 P.3d 1000 (2011).

As for making Mr. Alvarez pay for the polygraphs, the prosecution cites no statute specifically authorizing the court to impose this requirement on Mr. Alvarez. Br. of Resp't at 45. The pertinent statute on community custody indicates that supervision fees (like the fee for a polygraph to monitor compliance) are discretionary. RCW 9.94A.703(2)(d) ("*Unless waived by the court . . . the court shall order an offender to . . . [p]ay supervision fees as determined by the department.*") (emphasis added). For this reason, costs of community custody are discretionary legal financial obligations and are subject to an ability to pay inquiry. State v. Lundstrom, ___ Wn. App.2d ___, 429 P.3d 1116, 1121 n.3 (2018). The prosecution's contrary arguments should be rejected. Consistent with the trial court's waiver of all other discretionary legal financial obligations, this discretionary cost should be ordered stricken.

5. The Court should order the \$200 filing fee stricken.

After the filing of the Opening Brief, our Supreme Court held that the recent amendments concerning legal financial obligations apply to cases on appeal even though the amendments were not in effect when the legal financial obligation was imposed by the trial court. State v. Ramirez, ___ Wn.2d ___, 426 P.3d 714, 722 (2018). The change in the law forbids

imposing the filing fee against a person who is indigent. Id. Because the defendant in Ramirez was indigent, the Supreme Court ordered the filing fee stricken. Id. at 722-23. Following Ramirez, this Court should order the \$200 filing fee imposed against Mr. Alvarez stricken because he is also indigent. CP 143-46; RAP 12.2.

F. CONCLUSION

For the foregoing reasons, this Court should reverse the conviction and remand for a new trial. Alternatively, the Court should remand to remedy the flawed conditions of community custody and to strike the \$200 filing fee.⁷

⁷ Although not especially relevant to the legal issues, the prosecution makes several factual assertions that are not supported by its citations to the record. For example, the prosecution asserts that Mr. Alvarez was court-ordered to not contact his mother or grandmother. Br. of Resp't at 3 (citing RP 371-72, 394-95). The cited testimony at trial does not show this. Similarly, the prosecution theorizes that Mr. Alvarez "tricked" J into talking a walk with him. Br. of Resp't at 3. J testified, however, that the idea of going for a walk was her idea, not Mr. Alvarez's. RP 427. J also testified that she thought her mother heard them talking about going for a walk. RP 427, 543.

The prosecution highlights that Mr. Alvarez exercised his right to a speedy trial and that DNA testing had not been completed by the time the case was tried. Br. of Resp't at 6. The prosecution omits, however, that the trial court ruled this was an improper argument and forbade the prosecution from making it to the jury. RP 258-62, 300-303.

DATED this 19th day of December, 2018.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 35567-5-III
)	
JEREMY ALVAREZ,)	
)	
APPELLANT.)	

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