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Court of Appeals
Division III
State of Washington

NO. 36060-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

ABDUL SWEIDAN,

Appellant.

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

The Honorable Joseph Burrowes, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated the appellant's constitutional rights to confront witnesses by allowing a witness to testify remotely via video conference.

2. The appellant was denied a fair trial when his daughter's opinion he was guilty was admitted into evidence in violation of his right to a jury trial.

3. The trial court erred in imposing an exceptional sentence based on factors not found by the jury.

4. The trial court erred in entering a 28-year ban on all contact with the appellant's children, violating the fundamental right to parent one's minor children, as well as the constitutional right of association with one's adult children.

5. The trial court erred in imposing the \$200 criminal filing fee despite the appellant's indigence

6. The trial court erred in imposing the discretionary \$100 domestic violence (DV) penalty assessment despite the appellant's indigence.

Issues Pertaining to Assignments of Error

1. Did the trial court violate the appellant's constitutional rights to confront witnesses under the state and federal constitutions by allowing a crucial State's witness to testify remotely via video conference?

2. Washington law strictly forbids opinions on guilt. Must appellant's conviction be reversed where the appellant's daughter's opinion that her father was guilty of assaulting her mother was admitted into evidence?

3. Did the trial court err in imposing an exceptional sentence based on factors not found by the jury?

4. Does the trial court's 28-year ban on any form of contact with the appellant's children violate the fundamental right to parent one's minor children, as well as the constitutional right of association with one's adult children?

5. Under State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018), should the \$200 criminal filing fee be stricken?

6. Similarly, should the DV penalty assessment be stricken?

B. STATEMENT OF THE CASE¹

1. Objection to video conference testimony

Syrian refugee Dania Alhafeth was stabbed several times in her Kennewick residence on August 30, 2017. 4RP 668, 679-80; 5RP 858. Although the wounds were numerous and severe, she survived. 4RP 724-27; 5RP 850, 852, 858-64, 882-83, 893. Alhafeth said Sweidan, her husband, was responsible. 6RP 1145. The day of the stabbing, both spouses received treatment at a local hospital. E.g. 5RP 824.

Before Sweidan's trial, the State moved to admit the testimony of medical interpreter Maisa Haddad via Skype, an internet-based video conferencing computer application. 1RP 49-52; Supp. CP ____ (sub no. 48, Motion and Affidavit to Permit Video Conference Testimony). She provided Arabic-to-English interpretation services for Sweidan at the hospital where he was treated for cuts to his hands the same day Alhafeth was stabbed. 1RP 56. Haddad claimed that when hospital staff stepped out of the room, Sweidan complained about and cursed his wife. 1RP 56. The State argued Haddad would provide important evidence as to

¹ This brief refers to the verbatim reports chronologically according to the first date appearing in each volume. Thus, the brief refers to the volumes as follows: 1RP – 2/21, 4/2, and 4/3/18; 2RP – 4/3/18; 3RP – 4/3 and 4/4/18; 4RP – 4/4 and 4/5/18; 5RP – 4/5 and 4/6/18; 6RP – 4/6, 4/11, and 4/12/18, 7RP – 4/9 and 4/10/18; 8RP – 4/10/18; 9RP – 4/12 and 4/13/18; and 10RP – 5/14/18. Most, but not all, volumes are consecutively paginated.

Sweidan's state of mind and motive for stabbing Alhafeth. 1RP 56-57. Haddad lived in Michigan and needed to "keep an eye on" her sick mother. 1RP 52. The mother had cancer. In addition, the mother had recently undergone heart surgery. 1RP 52.

Sweidan objected. He argued the state had failed to show the witness was truly unavailable and that any video testimony would violate Sweidan's right to confront witnesses under the state and federal constitutions. CP 45-49; 1RP 53-56.

The court ruled that the video conference testimony would be permitted. 1RP 57-60. The court found it had discretion to allow remote testimony under ER 611,² CR 34(a)(1),³ and State v. Cayetano-Jaimes, 190 Wn. App. 286, 359 P.3d 919 (2015).⁴ While face-to-face confrontation was preferred, it was not an absolute right. 1RP 59. The

² Under ER 611(a), a trial court "shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

³ Under CR 34(a)(1), a civil rule, "[i]n all trials the testimony of witnesses shall be taken orally in open court, unless otherwise directed by the court or provided by rule or statute. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location."

⁴ In Cayetano-Jaimes, Division One of this court held that a defendant's right to present a defense was violated when the trial court categorically excluded telephonic testimony. 190 Wn. App. at 291-92. The right of an accused person to confront witnesses was not at issue. Id.

court was “satisfied” that Skype (an Internet video conferencing platform) was an “effective” way for a witness to testify. 1RP 59.

The court’s complete ruling follows:

[B]ased on my review of the evidence that may be provided by this witness, and balancing the issues of the confrontation clause and the right of parties to cross-examine the witness in court, the court is satisfied with the reasonable and available means that Skype or closed circuit TV testimony is an effective way for this witness to testify. Therefore, the court will grant the State’s motion to allow this witness to testify via Skype or video testimony.

1RP 59.

2. Trial testimony

Sweidan, his wife Alhafeth, and their five children fled the war in Syria, finding temporary residence in Jordan. Then, in 2016, the family—including all but one of the couple’s children—moved to the United States as refugees. 3RP 598-99; 4RP 606-09. By August of 2017, the family lived in an apartment on South Olympia Street in Kennewick. 4RP 608.

Of the children who made the move to the United States, A.S., the oldest, was 17 years old as of August 2017. K.S., the youngest, was two years old. 4RP 606.

A.S. testified her parents had fought in the past, but conflict increased once they arrived in the U.S. 4RP 613. Alhafeth and Sweidan mostly argued about money. 4RP 613, 615. Sweidan occasionally pushed

or pinched Alhafeth. 4RP 617. On occasion, Sweidan also threatened Alhafeth with more serious harm, but A.S. did not believe the threats. 4RP 632-33, 635.

The day before A.S.'s mother was stabbed, the family showed up at the fast-food restaurant where A.S. worked and ate dinner together. 4RP 620-21, 660. Alhafeth and Sweidan seemed to be arguing about something, but A.S. did not know what had caused the conflict. 4RP 620-21. Eventually, everyone but Sweidan and one of A.S.'s siblings went to Walmart to buy school supplies. 4RP 622. When A.S. got home, however, Sweidan appeared to be in a good mood. 6RP 622-23. A.S. did not notice anything else unusual that day. 4RP 624.

When A.S. woke up the next morning, Sweidan had gone to work. A.S.'s younger siblings left for school before A.S. Then A.S. went to school, leaving mother Alhafeth and brother K.S. at home. 4RP 624-26.

That afternoon, A.S.'s school notified her something bad had happened. 4RP 627. Arriving at her residence, A.S. saw police, neighbors, and an Arabic-speaking school district liaison outside. 4RP 628. A neighbor had called 9-1-1 after the injured Alhafeth telephoned him for help. See 4RP 669 and 6RP 1076 (police officers' testimony).

A detective interviewed A.S. later that day. He asked about conflict in the home. 4RP 628. A.S. told him that family conflict was

minimal.⁵ 4RP 631-32. But, at trial, A.S. testified that was not true. 4RP 632. When A.S. later spoke with a different detective, she told him “my family, they were having an argument or arguments, and I said that I think that . . . was him who did that, I mean my dad.” 4RP 632. Defense counsel did not object. 4RP 632.

Alhafeth testified. Alhafeth and Sweidan, both from Homs, Syria, married in the mid-1990s. 6RP 1119. The marriage was quarrelsome, in part because Sweidan’s mother interfered frequently. 6RP 1119-20, 1147. Alhafeth contemplated divorce, but Sweidan threatened to kill her when the subject came up. 6RP 1121-22. The marriage improved after Alhafeth inherited money from her father. 6RP 1121.

After the Syrian war began, the family moved to Damascus, Syria, then to Jordan, where the family spent time in refugee camps. 6RP 1122. Alhafeth found work in Jordan. 6RP 1123-24. But Sweidan was not working and demanded the money Alhafeth earned. 6RP 1124. Sweidan hit Alhafeth on occasion. 6RP 1123.

Sweidan wanted to leave Jordan for the United States. Alhafeth did not want to leave Jordan because it would mean leaving her eldest

⁵ According to the detective, A.S. downplayed conflicts between her parents, although Sweidan tended to ask Alhafeth questions to the point that Alhafeth became annoyed. 4RP 659-60, 663.

daughter, who had married and settled in Jordan. 6RP 1125. Ultimately, Sweidan convinced Alhafeth to come to the U.S. 6RP 1125.

But the couple's problems did not abate upon arrival in the U.S. 6RP 1127. The two quarreled about Sweidan's failure to find work, although he eventually got a job at the Tyson Foods plant. 6RP 1127. Alhafeth also found work as a caregiver a few months before the incident. But she sent the money she earned to family members in the Middle East, including her brother's war widow and children. 6RP 1129-30. Sweidan resented this. 6RP 1130.

The night before the incident, Sweidan and Alhafeth argued. 6RP 1133. The next morning, Sweidan went to work as normal and Alhafeth stayed home with K.S. 6RP 1134-35. Sweidan returned home unexpectedly while Alhafeth was on the phone with her daughter; he sat down across from her while she took another call. 6RP 1137-40.

Sweidan asked Alhafeth if they were going to make up. 6RP 1140. When Alhafeth declined, Sweidan left the room and returned with a knife. 6RP 1140-41. Sweidan complained that Alhafeth gave money to others but not to him. 6RP 1141.

Alhafeth was surprised when Sweidan began stabbing her. 6RP 1141, 1155. K.S. yelled "momma, momma." 6RP 1142. Sweidan pushed the child away and eventually took him out of the room. 6RP 1142.

A wounded Alhafeth tried to stand but fell to the floor. 6RP 1142-43. Sweidan left the room, but after changing his clothes, he returned. 6RP 1143. He stabbed Alhafeth again, this time in the thigh, before leaving the residence. 6RP 1144.

Alhafeth was initially unable to move but she revived when she heard K.S. calling for her. 6RP 1144. She was able to reach her phone, which had fallen on the floor. She called her neighbor, who called the police. 6RP 1144-45, 1159.

After finding Alhafeth on the living room floor, police heard K.S. trying to get out of a locked bedroom. 6RP 1070-72, 1105. A state crime laboratory scientist extracted DNA from stains on K.S.'s shirt. Testing revealed a mix of DNA consistent with both Sweidan's and Alhafeth's genetic profiles. 8RP 210-11. K.S. was not injured. See 6RP 1106.

Sweidan disputed Alhafeth's account of their relationship and of the incident. In Syria, Sweidan was a generous husband. 9RP 1208-10, 1217. However, the family had to leave Syria, in part because Alhafeth's brothers became involved with anti-government groups. 9RP 1210. The building where the family resided was severely damaged after the brothers and other members of the resistance shot at a government hospital across the street. 9RP 1211-14, 1240.

Sweidan found work in Jordan. 9RP 1219. However, problems arose—Sweidan discovered Alhafeth was having a relationship with another man. Sweidan threatened to tell Alhafeth's family. Faced with exposure, Alhafeth threatened to kill herself by stabbing herself with scissors. 9RP 1220. Sweidan eventually forgave Alhafeth for the sake of his children. 9RP 1221.

To pursue economic opportunity—and because, according to Sweidan, Jordanians do not like Syrians—Sweidan applied for permission to emigrate to the U.S. 9RP 1227.

His application was initially denied. But it was approved after he expressed his sympathy for Israel. 9RP 1223-24. Sweidan recounted meeting a Jewish man who gave him a gold chain and star, as well as a card with the Israeli flag on it. Sweidan kept the items. 9RP 1224. The Jewish man thought Sweidan was likely of Jewish descent based on Sweidan's appearance. 9RP 1224.

Sweidan eventually found work in the U.S. Although Sweidan made enough money to support his family, 9RP 1232-36, 1241-42, Alhafeth earned even more money cooking for others. 9RP 1244-46. But she refused to share her earnings with Sweidan and instead sent money to her mother, who funneled the money to anti-government groups in Syria.

9RP 1245. Alhafeth's cooking operation created an insect infestation.
9RP 1245.

Sweidan asked Alhafeth to stop cooking for others. About two and a half months before the incident, an argument turned violent; Alhafeth spit on and scratched Sweidan. 9RP 1245.

The night before Alhafeth was wounded, Sweidan and Alhafeth again quarreled about Alhafeth's side job. 9RP 1248. In addition, Sweidan had learned that Alhafeth was again in contact with the man in Jordan. 9RP 1249.

Sweidan left for work on August 30 as usual. But he left work early in part because he had a dental appointment. 9RP 1250. Before the appointment he stopped at home to bathe and take a quick nap; he had slept poorly the night before. 9RP 1252.

Sweidan found Alhafeth at home. She confronted Sweidan, calling him a traitor. 9RP 1253. Sweidan thought Alhafeth must have found a story he had written about meeting the Jewish man. 9RP 1253.

Indeed, Alhafeth threatened to tell everyone she knew that Sweidan was a Jew and a traitor. 9RP 1254. Sweidan retorted that he would tell Alhafeth's family about her illicit relationship. 9RP 1254-55.

Meanwhile, K.S. wandered out of the bedroom. 9RP 1256. Alhafeth returned K.S. to his room and locked the door. 9RP 1256.

Flustered by Alhafeth's behavior, Sweidan went to the bathroom to brush his teeth. But Alhafeth called to him from the kitchen. When Sweidan went to investigate, Alhafeth surprised him by brandishing a large knife. 9RP 1257.

Sweidan tried to wrest the knife from Alhafeth, but she slashed at his fingers. 9RP 1257. She began stabbing herself in the chest and neck. 9RP 1258. When Sweidan asked Alhafeth why she would do such a thing, Alhafeth retorted that she was making sure Sweidan would go to jail for a long time. 9RP 1258, 1261-62.

Desperate to find the items the Jewish man had given him, Sweidan searched several rooms. 9RP 1258. Sweidan feared that he could be danger if Alhafeth's family learned he harbored pro-Israel sentiments. 9RP 1263. However, his fingers were gushing blood, so he put on rubber gloves to control the bleeding.⁶ 9RP 1259. He also changed his clothes; he had been wearing pajamas. 9RP 1258.

Sweidan ultimately fled the apartment. Once outside, he remembered K.S. was still locked in a bedroom. He attempted to re-enter the residence, but Alhafeth had positioned herself at the door, and she engaged the lock every time he tried to unlock it. 9RP 1260.

⁶ Alhafeth kept gloves in the kitchen to use when making a spicy pepper-based dish. 9RP 1312.

Sweidan drove to the hospital. According to testifying medical providers, Sweidan was treated for cuts on three fingers. 5RP 814; 7RP 7-9, 13. Upon learning there was another Arabic-speaking patient at the hospital who had suffered stab wounds, a nurse became suspicious and contacted the police.⁷ 5RP 824-25. Police arrested Sweidan. 5RP 828.

As discussed above, medical interpreter Maisa Haddad testified via Internet from Michigan. Haddad interpreted for an Arabic-speaking patient at Trios hospital in Kennewick on August 30, 2107. 4RP 754; see also 4RP 772 and 5RP 833 (nurses' testimony regarding interpretation system). The man had cut his fingers. 4RP 759. The man told a treating physician the injury had occurred while he was cutting meat. 4RP 759. When medical staff left the room, Haddad remained silent and did not ask any questions, as was her practice. 4RP 761-63. But the man volunteered to Haddad that his wife had been giving him a "hard time. 4RP 762. According to Haddad, the man also "cursed" his wife, saying things like, "may God not bless her." 4RP 767.

In closing argument, the State relied on Haddad's testimony to argued that Sweidan was guilty of murder and assault. 9RP 1344-45.

⁷ The nurse noticed that, although Sweidan was wearing clean clothes, he had blood spatter on his feet. 5RP 815, 835.

3. Charges, verdict, and sentence

The State charged Sweidan with attempted second degree murder – domestic violence⁸ (count 1) and first degree assault – domestic violence⁹ (count 2). The State also alleged that the crime was committed in the presence of K.S, making the charged crime an aggravated domestic violence offense.¹⁰ In addition, the State alleged that the crime was committed with a deadly weapon other than a firearm.¹¹ CP 1-2, 34-36.

A jury convicted Sweidan as charged. CP 112-19. The court ultimately dismissed count 2, assault, because it violated the prohibition on double jeopardy. CP 131-33.

Sweidan argued for a 189-month sentence, within the standard range.¹² CP 127. He argued that, considering that K.S. was very young at the time, it was unlikely he would remember the incident. CP 129-30.

The court sentenced Sweidan to an exceptional sentence upward of 336 months. CP 151-54 (written findings and conclusions in support of exceptional sentence); 10RP 31-36. The court's findings in support of

⁸ RCW 9A.32.050(1)(a); RCW 10.99.020

⁹ RCW 9A.36.011(1)(a); RCW 10.99.020.

¹⁰ RCW 9.94A.535(3)(h).

¹¹ RCW 9.94A.533(4).

¹² Based on Sweidan's offender score of zero, the standard range, including the 24-month deadly weapon enhancement, was 116.25 to 189 months. CP 135.

exceptional sentence are addressed in detail in the argument section below.

The Stated sought a 50-year ban on all contact between Sweidan and four of his children, who were 19, 17, almost 13, and almost 3 years old at the time of sentencing. The State argued that the prohibition on contact was necessary to prevent harm, as the children had likely witnessed domestic violence aside from the charged incident. 10RP 35. With little comment, the court entered no-contact orders prohibiting Sweidan from contacting each of his children for 28 years, until 2046. CP 140; 10RP 35; Supp. CP ____ (sub no. 115, Post-Conviction No Contact Order). In 2046, Sweidan will be in his 70s, and his oldest children in their 40s.

The Court also ordered that Sweidan pay \$900 in legal financial obligations (LFOs) including a \$200 criminal filing fee¹³ and a \$100 “DV penalty assessment.” CP 137, 145.

Sweidan timely appeals. CP 146-47.

C. ARGUMENT

1. HADDAD’S INTERNET TESTIMONY VIOLATED SWEIDAN’S CONFRONTATION RIGHTS AND REQUIRES REVERSAL.

Admission of Maisa Haddad’s testimony via internet video conference violated Sweidan’s right to confront witnesses. Because the

¹³ RCW 36.18.020(2)(h).

State cannot demonstrate that the error was harmless beyond a reasonable doubt, reversal is required.

- a. An accused person has the constitutional right to confront witnesses; face-to-face confrontation is strongly preferred.

An accused person has both state and federal constitutional rights to confront witnesses. Article I, section 22 guarantees an accused “shall have the right . . . to meet the witnesses against him face to face[.]” Likewise, the Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”

The trial court erred when it allowed Haddad to testify by internet video conference. Haddad’s testimony violated Sweidan’s confrontation rights under the state and federal constitutions. Reversal is required.

- b. Haddad’s testimony violated Sweidan’s confrontation rights under the *Craig* test.

This Court reviews constitutional questions, including claims under the confrontation clause, de novo. State v. Koslowski, 166 Wn.2d 409, 417, 209 P.3d 479 (2009). Haddad’s testimony via two-way internet video conference violated Sweidan’s right to confront witnesses. While the appropriate test, set forth in Maryland v. Craig, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990), has been adopted in Washington, no

Washington court has applied the test in this context. Thus, consideration of decisions from the appellate federal courts is instructive. Under such cases, the trial court violated Sweidan’s right to confront witnesses.

- i. *Washington has adopted the Craig test, but never applied it in this context.*

“The confrontation clauses of the state and federal constitutions guarantee the right of an accused to confront witnesses against him or her ‘face to face.’” State v. Foster, 135 Wn.2d 441, 466, 957 P.2d 712 (1998) (plurality opinion). Live testimony is preferred because face-to-face confrontation enhances the accuracy of fact finding. State v. Rohrich, 132 Wn.2d 472, 479, 939 P.2d 697 (1997); accord Coy v. Iowa, 487 U.S. 1012, 1019, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988). Indeed, witnesses are often judged by the “manner in which they enter the courtroom, their willingness to make eye contact with trial participants, and their ability to control nervous gestures as they deliver their testimony.” James W. Kraus, Virtual Testimony and Its Impact on the Confrontation Clause, 34 CHAMP 26, 29 (May 2010).

This “preferred right of physical presence” may be dispensed with only if (1) excusing the physical presence of the particular witness is necessary to further an important public policy and (2) the reliability of the

testimony is otherwise assured. Foster, 135 Wn.2d at 466 (plurality opinion, citing Maryland v. Craig, 497 U.S. at 850).

Before addressing the Foster case, it is necessary to examine the origins of the test it applied.

In Coy, which preceded Craig, the United States Supreme Court held that the placement of a screen between a defendant and two child witnesses, which allowed the “witnesses to avoid viewing [the defendant] as they gave their testimony,” constituted an “obvious . . . violation of the defendant’s right to a face-to-face encounter.” Coy, 487 U.S. at 1020. In reaching that conclusion, the Supreme Court highlighted “the profound effect upon a witness of standing in the presence of the person the witness accuses,” explaining that a physically-confronted “witness ‘may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts.’” Id. at 1019-20 (quoting Zechariah Chafee, The Blessings of Liberty 35 (1956)). The “right to face-to-face confrontation” thus serves to “ensure the integrity of the fact-finding process.” Coy, 487 U.S. at 1020 (citation omitted).

Accordingly, the Supreme Court held that the Confrontation Clause’s “irreducible literal meaning” guarantees “a right to meet face to face all those who appear and give evidence at trial.” Id. at 1021 (emphasis omitted) (quoting California v. Green, 399 U.S. 149, 175, 90 S.

Ct. 1930, 26 L. Ed. 2d 489 (1970) (Harlan, J., concurring)). Nevertheless, the court acknowledged that “face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.” Coy, 487 U.S. at 1020.

The court “le[ft] for another day” the question whether there were exceptions to the right to face-to-face confrontation, observing that any exception “would surely be allowed only when necessary to further an important public policy.” Id. at 1021.

Two years later, the Supreme Court squarely addressed that issue. There, the court upheld a Maryland statute permitting child victims of abuse to testify from outside the courtroom by one-way closed-circuit television. Craig, 497 U.S. at 840-41. This procedure could be invoked only if the trial judge found “that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.” Id. at 840-41 (citation omitted). The prosecutor and defense counsel could examine and cross-examine the child witness in a separate room. Id. at 841. The defendant and jury could see the testifying child witness on a monitor in the courtroom, but the witness could not see the defendant. Id. at 841-42.

The court declared that, while “the Confrontation Clause reflects a preference for face-to-face confrontation,” defendants do not have an “absolute right to a face-to-face meeting with witnesses against them at trial.” *Id.* at 844, 849 (quoting Ohio v. Roberts, 448 U.S. 56, 63, 100 S. Ct. 2531, 65 L. Ed.2d 597 (1980)). But the court cautioned that “the face-to-face confrontation requirement” should not “easily be dispensed with.” Craig, 497 U.S. at 850.

Thus, the court set forth the test quoted in our state Supreme Court’s Foster decision, that “a defendant’s right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where” (1) the “denial of such confrontation is necessary to further an important public policy,” and (2) “the reliability of the testimony is otherwise assured.” Craig, 497 U.S. at 840-41.

Using this two-part test, the United States Supreme Court turned to Maryland’s video testimony procedure. The court first concluded that the procedure adequately ensured the “reliability and adversariness” of the testimony, as it “preserve[d] all of the other elements of the confrontation right”—the child witness had to be competent to testify under oath, the defendant could conduct live cross-examination, and everyone in the courtroom could observe the witness’s demeanor. *Id.* at 851.

The court further concluded that “a State’s interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant’s right to face his or her accusers in court.” Id. at 853. But such cases would require a “case-specific finding” that the procedure is “necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant” when “such trauma would impair the child’s ability to communicate.” Id. at 857-58. The court explained that the trial court would need to find that the witness would be traumatized by the defendant’s presence in the courtroom, not from the courtroom generally, and that the trauma would rise to a level that is “more than de minimis.” Id. at 856.

In Foster, ostensibly relying on Craig, five state Supreme Court justices concluded that use of closed-circuit testimony under former RCW 9A.44.150 (1990)¹⁴ did not violate the state or federal confrontation clauses. See Foster, 135 Wn.2d at 470 (four-justice plurality); id. at 481 (Alexander, J., concurring in part and dissenting in part, and stating that

¹⁴ Former RCW 9A.44.150 provided that for certain types of crimes, where certain criteria are satisfied, and certain findings made, “the court may order that a child under the age of ten may testify in a room outside the presence of the defendant and the jury while one-way closed-circuit television equipment simultaneously projects the child’s testimony into another room so the defendant and the jury can watch and hear the child testify[.]”

independent state constitutional analysis applied, but that statutory procedure satisfied the state constitution as well).

Neither the state Supreme Court nor the federal Supreme Court have applied the Craig test to two-way video conferencing technology. See Wrotten v. New York, 560 U.S. 959, 960, 130 S. Ct. 2520, 177 L. Ed. 2d 316 (2010) (Sotomayor, J., respecting denial of certiorari) (noting some differences between one- and two-way video and stating that the Supreme Court has not yet decided the appropriate standard to govern two-way testimony).¹⁵ Nonetheless, the broad consensus of state and federal courts is that it does apply. See State v. Rogerson, 855 N.W.2d 495, 501-03 (Iowa 2014) (collecting cases).

Craig and Foster supply the appropriate framework, but those cases are distinguishable from the present case. First, unlike in the present case

¹⁵ The United States Supreme Court rejected a proposed change to Federal Rule of Criminal Procedure 26, however, that would have permitted unavailable witnesses to testify via two-way video. Order of the Supreme Court, 207 F.R.D. 89, 91 (2002). In an accompanying statement, Justice Scalia wrote, “I share the majority’s view that the Judicial Conference’s proposed Fed. Rule Crim. Proc. 26(b) is of dubious validity under the Confrontation Clause of the Sixth Amendment to the United States Constitution. . . .” Id. at 93 (statement of Scalia, J.). He added,

we made clear in Craig, a purpose of the Confrontation Clause is ordinarily to compel accusers to make their accusations in the defendant's presence—which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant's image. Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones.

case, the method for allowing child testimony via one-way, closed-circuit television is specifically authorized by state statute. See State v. Myers, 133 Wn.2d 26, 32, 941 P.2d 1102 (1997) (statutes are presumed constitutional, and the party challenging them has the burden of proving otherwise). Relatedly, the public policy concern—avoiding child witnesses’ trauma caused by testifying in the physical presence of the accuser¹⁶—is does not apply in this case.

This case involves remote testimony by an adult witness, for which there is no statutory provision or court rule, and for which the legislature has made no analogous public policy determination.

¹⁶ Under Laws of 1990, ch. 150, § 1, the legislature’s statement regarding RCW 9A.44.150,

The legislature declares that protection of child witnesses in sexual assault and physical abuse cases is a substantial and compelling interest of the state. Sexual and physical abuse cases are some of the most difficult cases to prosecute, in part because frequently no witnesses exist except the child victim. When abuse is prosecuted, a child victim may suffer serious emotional and mental trauma from exposure to the abuser or from testifying in open court. In rare cases, the child is so traumatized that the child is unable to testify at trial and is unavailable as a witness or the child's ability to communicate in front of the jury or defendant is so reduced that the truth-seeking function of trial is impaired. In other rare cases, the child is able to proceed to trial but suffers long-lasting trauma as a result of testifying in court or in front of the defendant. The creation of procedural devices designed to enhance the truth-seeking process and to shield child victims from the trauma of exposure to the abuser and the courtroom is a compelling state interest

Because Washington courts have not addressed such an issue, consideration of federal case law is instructive. Cf. Davis v. Microsoft Corp., 109 Wn. App. 884, 891, 37 P.3d 333 (2002) (“because the issue . . . is a matter of first impression in Washington, we look to federal case law for guidance.”), aff’d, 149 Wn.2d 521, 70 P.3d 126 (2003).

Relying on the test set forth Craig, federal appellate courts, have by and large, disapproved of such testimony under similar circumstances. This court should reach the same conclusion here.

- ii. *As federal appellate case law demonstrates, the trial court did not find the first Craig factor was satisfied, not could it have.*

The trial court did not find the first Craig factor was satisfied, nor could it have. As stated, federal cases are instructive.

For example, the Eleventh Circuit Court of Appeals addressed the first Craig factor in United States v. Yates, 438 F.3d 1307 (11th Cir. 2006). There, Yates and Pusztai were charged with mail fraud, conspiracy to commit money laundering and defraud the United States, and various prescription-drug-related offenses. Before trial, the government requested the admission of testimony from two “essential witnesses” living in Australia by means of a live, two-way video conference. The government noted, “Although both witnesses are willing to testify at trial via video

teleconference, they are unwilling to travel to the United States.” Id. at 1309-10.

Defense counsel did not dispute the witness’s refusal to travel to the U.S., but counsel objected nonetheless, arguing the testimony would violate Yates’s and Pusztai’s Sixth Amendment confrontation rights because it would deny them face-to-face confrontation. The federal district court granted the motion, finding the confrontation rights would not be violated because the two-way video conference would allow Yates and Pusztai to see the witnesses, and vice versa, during the testimony. The court also found that the government asserted an “important public policy of providing the fact-finder with crucial evidence,” and that “the Government also has an interest in expeditiously and justly resolving the case.” Yates, 438 F.3d at 1310.

Because the courtroom was not outfitted with video equipment, the trial was temporarily moved to the U.S. Attorney’s office for the video conference. At trial, defense counsel again objected on Sixth Amendment grounds. Before questioning, the witnesses were sworn in by the district court and acknowledged their testimony was under oath and subject to penalty for perjury. Despite minor technical difficulties, everyone could see the testifying witnesses on a television monitor, and the witnesses

could see the conference room. Defense counsel cross-examined both witnesses. Yates and Puztai were found guilty on all counts. Id. at 1310.

The Eleventh Circuit reversed, finding the video conference testimony violated the defendants' confrontation rights. Id. at 1319. The court recognized the right to a physical face-to-face meeting is not absolute and may be compromised under limited circumstances. But, the court concluded, the case presented "no necessity of the type Craig contemplates." Yates, 438 F.3d at 1312, 1316.

Employing Craig's test for admissibility, the court held the government's need for video conferencing to expeditiously present its case was not a public policy important enough to outweigh the right to confront accusers face-to-face. Yates, 438 F.3d at 1313, 1316. The court stated:

If we were to approve introduction of testimony in this manner, on this record, every prosecutor wishing to present testimony from a witness overseas would argue that providing crucial prosecution evidence and resolving the case expeditiously are important public policies that support the admission of testimony by two-way video conference.

Id. at 1316.

The court also rejected the government's assertion that two-way video conferencing testimony is more protective of confrontation rights than admitting unavailable witness testimony via deposition. The court recognized Federal Rule of Criminal Procedure 15 was carefully designed

to protect defendants' rights to physical face-to-face confrontation by ensuring their opportunity to be present at depositions. The court also noted the Supreme Court had rejected a proposed revision to Federal Rule of Criminal Procedure 26¹⁷ which would have allowed testimony by two-way video conference. Yates, 438 F.3d at 1314-15 (citing 207 F.R.D. 89). The court summarized its reasoning, stating, "[t]he simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation." Yates, 438 F.3d at 1315.

Significantly, the court rejected the government's reliance on United States v. Gigante, 166 F.3d 75 (8th Cir. 1999), cert. denied, 528 U.S. 1114 (2000). Yates, 438 F.3d at 1313. Gigante was charged with several crimes associated with his alleged involvement with the New York mafia. Gigante, 166 F.3d at 78-79. At trial, a former mafia associate "in the final stages of inoperable, fatal, cancer" was permitted to testify for the government via two-way closed-circuit television from an undisclosed location where he was receiving medical care. Id. at 79-80.

Refusing to apply the Craig factors, the Gigante court nonetheless concluded the testimony did not violate the Sixth Amendment because the

¹⁷ Federal Rule of Criminal Procedure 26, also discussed in footnote 15, supra, states, "In every trial the testimony of witnesses must be taken in open court, unless otherwise provided by a statute or by rules adopted under 28 U.S.C. §§2072-2077."

closed-circuit television procedure preserved all the characteristics of in-court testimony. Gigante, 166 F.3d at 80-81.

The Yates court observed that the Gigante court should have applied the Craig factors, which likely would have been satisfied because the witness was participating in the federal witness protection program at an undisclosed location, had inoperable, fatal cancer, and was unable to travel due to medical problems. Yates, 438 F.3d at 1313.

Finding that denial of Yates and Pusztai's Sixth Amendment confrontation rights was not necessary to further an important public policy, the Yates court found it unnecessary to address whether the second part of the test, whether the testimony was sufficiently reliable. Id. at 1318.

More recently, the Ninth Circuit reached a similar result. The court recognized that before a defendant's right to "physical, face-to-face confrontation at trial" may be compromised using a remote video procedure, a court must make a "case-specific finding" that the Craig factors are satisfied. United States v. Carter, 907 F.3d 1199, 1208 (9th Cir. 2018).

Carter was charged with and convicted of prostitution-related crimes involving minors. During Carter's trial, one of the complaining witnesses, J.C., testified against him from Minnesota by two-way video;

she was the seven months pregnant and unable to travel. The Ninth Circuit found the trial court violated Carter's right to confront witnesses. Id. at 1202.

As the Carter court observed, the United States Supreme Court has not decided whether Craig's standard applies in the case two-way video testimony from a remote location. The Ninth Circuit also noted that it had not previously analyzed the issue outside the context of 18 U.S.C. § 3509. That statute, enacted in direct response to Craig, permits child witnesses to testify by two-way video. Carter, 907 F.3d at 1206.

Nonetheless, the court stated, “[w]e now make clear that a defendant’s right to physically confront an adverse witness (whether child or adult) cannot be compromised by permitting the witness to testify by video (whether one-way or two-way) unless Craig’s standard is satisfied.” Carter, 907 F.3d at 1206. “[T]hat standard is a stringent one; the use of a remote video procedure must be reserved for rare cases in which it is ‘necessary.’” Id. (citing Craig, 497 U.S. at 850).

Craig’s necessity requirement was not satisfied at Carter’s trial. “Although the district court concluded that J.C. was ‘unavailable to travel to be physically present’ at trial, all agree that J.C.’s inability to travel was due to her pregnancy—a temporary disability.” Carter, 907 F.3d at 1208. Further, “there were alternatives available to preserve Carter’s right to

physical face-to-face confrontation, meaning that denying him that right was not necessary.” Id.

As the Carter court noted, moreover, several states had adopted the Craig standard in the context of two-way video conferencing. Id. at 1207-08 (citing Rogerson, 855 N.W.2d at 502-03). These cases indicated a consensus that that “Craig [provides] the standard for assessing the constitutionality of two-way video testimony.” Carter, 907 F.3d at 1208 (quoting Rogerson, 855 N.W.2d at 502).¹⁸

In Rogerson, for example, the court held that “before permitting a witness to testify via two-way videoconference,” the trial court must make a case-specific determination as to the Craig factors. Rogerson, 855 N.W.2d at 505. Applying that test to two categories of witnesses the state wished to testify remotely, the court rejected the state’s arguments,

[T]he State represented at the hearing on its motion that the witnesses . . . resided a significant distance from Iowa and had suffered serious injuries. The State did not present evidence that the witnesses were beyond the court’s subpoena power or that they were unable to travel because of their injuries. Under Craig and the other precedents discussed above, this is insufficient. The State has not shown that the witnesses cannot appear in person or even that personal appearance would cause severe stress.

Rogerson, 855 N.W.2d at 507.

¹⁸ As Carter and Rogerson note, Gigante, discussed above, appears to be one of the few outliers. Carter, 907 F.3d at 1208 n. 4; Rogerson, 855 N.W.2d at 503.

The court further rejected the state's argument that lab employees should be permitted to testify remotely. "[C]onvenience and cost-saving are not sufficient reasons to deny constitutional rights." Id. at 507.¹⁹

As to the first Craig factor, the rationale of the foregoing cases applies in Sweidan's case.

As in Yates, the State did not establish, and the trial court did not find, that denial of Sweidan's right to face-to-face confrontation was essential to further an important public policy interest. More than expeditiousness and convenience are required. Yates, 438 F.3d at 1313, 1316; see also Rogerson, 855 N.W.2d at 505. And, as in Carter, the State did not establish, and the court did not find, true necessity based on a permanent inability to testify; moreover, the court did not explore alternatives to remote testimony. Carter, 907 F.3d at 1208. For example, while, according to a letter submitted by Haddad, Haddad's mother suffered from a long-term illness, the surgery-related infirmity may have abated with time. Supp. CP ____ (sub no. 48, supra). In any event, the court did not make any related finding. 1RP 59.

Instead, the trial invoked only ER 611 (general courtroom management), CR 34(a)(1) (a civil rule unconcerned with the

¹⁹ Moreover, the court did not even seriously entertain the state's argument that such witnesses were subject to a different test because they were not truly "accusatory" witnesses. Rogerson, 855 N.W.2d at 507.

Confrontation Clause), and Cayetano-Jaimes, 190 Wn. App. 286 (a case not addressing the right to confront witnesses). 1RP 59. Then, the court simply noted that while face-to-face confrontation was preferred, it is not an absolute right. 1RP 59. The court stated it was “satisfied” that Skype was an “effective” way for a witness to testify. 1RP 59.

Based on the foregoing cases, the court’s findings were inadequate. The first Craig factor was not satisfied in this case.

- iii. *As federal appellate law demonstrates, the trial court did not find the second Craig factor was satisfied, not could it have.*

The challenged testimony also fails the second Craig factor, reliability. The trial court did not find that factor was satisfied, nor could it have.

Though Yates declined to address whether testimony via two-way video conference was sufficiently reliable, the Eighth Circuit has concluded testimony via similar two-way closed-circuit television²⁰ is not. United States v. Bordeaux, 400 F.3d 548 (8th Cir. 2005). There, the district court permitted the complaining child witness to testify via two-way closed-circuit television after finding her fear of Bordeaux rendered her unable to testify in open court. Id. at 552.

²⁰ See Bordeaux, 400 F.3d at 552 (“A two-way closed-circuit system allows those in the courtroom to watch the witness on television and also allows the witness to see the defendant on television.”).

On appeal, Bordeaux argued the two-way closed-circuit testimony violated his right to confront witnesses. The federal appellate court agreed, noting such a system does not ensure the reliability of face-to-face confrontation because they “do not provide the same truth-inducing effect.” Id. at 554. The court noted:

[A] defendant watching a witness through a monitor will not have the same truth-inducing effect as an unmediated gaze across the courtroom. We are not alone in noting that something may be lost when a two-way closed-circuit television is employed, for even the Gigante court admitted that there may be “intangible elements” of confrontation that are “reduced or eliminated by remote testimony.”

Bordeaux, 400 F.3d at 554.

More recently, the Carter court reached a similar conclusion:

Our conclusion follows directly from the “core” of the Confrontation Clause guarantee—providing the accused an “opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact.” Green, 399 U.S. at 156-57[.] Not only does physical confrontation at trial serve as a symbol of fairness, but it also promotes reliability, for “[i]t is always more difficult to tell a lie about a person ‘to his face’ than ‘behind his back.’” Coy, 487 U.S. at 1019[.] Compelling “adverse witnesses at trial to testify in the accused’s presence” thus “enhances the accuracy of factfinding” at trial. Craig, 497 U.S. at 846-47[.]. So too does “compelling [witnesses] to stand face to face with the jury” as they tell their side of the story. Green, 399 U.S. at 158 (quoting Mattox v. United States, 156 U.S. 237, 242, 15 S. Ct. 337, 39 L. Ed. 409 (1895)).

Carter, 907 F.3d at 1206-07.

But, according to Carter, these important components of confrontation are lost when the witness does not testify in court. This is true regardless of the witness's age or ability to see the defendant on a screen from a distant location. Id. at 1207. "Any procedure that allows an adverse witness to testify remotely necessarily diminishes 'the profound [truth-inducing] effect upon a witness of standing in the presence of the person the witness accuses.'" Id. (citing Coy, 487 U.S. at 1020); see also Rogerson, 855 N.W.2d at 504 ("we do not believe two-way videoconferencing is constitutionally equivalent to the face-to-face confrontation envisioned by the Sixth Amendment").

As in Bordeaux and Carter, the reliability of Haddad's testimony cannot be assured because remoted video conferencing lacks the same "truth-inducing effect" of live testimony. Here, the court made no such finding and did not even reference the appropriate test. 1RP 59.

For all these reasons, admission of Haddad's testimony violated Sweidan's face-to-face right of confrontation.

iv. *Cases the State previously relied on are distinguishable.*

The State's memorandum in support of remote video conference testimony cited several cases in support of its position that such testimony

should be permitted. Supp. CP ____ (sub no. 48, supra). The State's purported persuasive authority does not stand up to scrutiny.

First, two of the federal cases simply uphold state court decisions in federal habeas proceedings, thus applying a different legal standard than the one to be employed in the present case. See Horn v. Quarterman, 508 F.3d 306, 318, 322 (5th Cir. 2007); Harrell v. Butterworth, 251 F.3d 926, 930 (11th Cir. 2001). Second, the cases by and large involve witnesses who were themselves incapacitated or gravely ill. That was not the situation here. See State v. Sewell, 595 N.W.2d 207, 210 (Minn. Ct. App. 1999) (witness himself would risk paralysis if he traveled); Stevens v. State, 234 S.W.3d 748, 781 (Tex. App. 2007) (witness's own heart disease made travel impossible); Horn, 508 F.3d at 313 (witness himself terminally ill with liver cancer). Finally, in one of the cases, defense counsel and the prosecutor traveled *to* the witness. Again, that is not what happened here. Horn, 508 F.3d at 313. The cases are, therefore, distinguishable and should be rejected as persuasive authority.

- c. The State cannot demonstrate that the error was harmless beyond a reasonable doubt.

As shown, admission of the testimony violated the constitution. It was also prejudicial.

Confrontation clause violations are subject to constitutional harmless error analysis. Koslowski, 166 Wn.2d at 431. Prejudice is presumed, and the state bears the burden of proving harmlessness. State v. W.R., Jr., 181 Wn.2d 757, 770, 336 P.3d 1134 (2014). An error is prejudicial unless the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. Koslowski, 166 Wn.2d at 431.

Relevant factors include “the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony . . . on material points, the extent of cross-examination otherwise permitted, and . . . the overall strength of the prosecution’s case.” State v. Saunders, 132 Wn. App. 592, 604, 132 P.3d 743 (2006) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 686-87, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)), review denied, 159 Wn.2d 1017 (2007).

The State cannot show the violation of Sweidan’s confrontation rights was harmless beyond a reasonable doubt. The testimony was not cumulative of other testimony. Moreover, the State explicitly relied on Haddad’s testimony to argue that Sweidan was guilty. 9RP 1344. In addition, the State relied on Haddad’s testimony to argue that Alhafeth’s testimony was credible, arguing that Sweidan’s statements to Haddad

cursing his wife were similar to statements Sweidan allegedly made to Alhafeth when stabbing her. 9RP 1344-45.

Considering that Haddad's testimony was unique, prejudicial, and was relied on by the State to enhance primary witness Alhafeth's credibility, the violation of Sweidan's confrontation rights was not harmless beyond a reasonable doubt. Saunders, 132 Wn. App. at 604. Reversal is required.

2. SWEIDAN'S DAUGHTER'S OPINION ON GUILT
INVADED THE PROVINCE OF THE JURY AND
DENIED SWEIDAN A FAIR TRIAL.

At trial, downplaying her original statement that there were few problems in the home, A.S. testified she told a detective that she believed her father was the person who had harmed her mother. 4RP 632. Sweidan's daughter's opinion on his guilt invaded the province of the jury and denied Sweidan a fair trial.

The role of the jury is "inviolable" under the Washington Constitution. CONST. art I, §§ 21, 22. The right to have factual questions decided by the jury is crucial to the jury trial right. U.S. CONST. amend. VI; CONST. art. I, §§ 21, 22; Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989). "To the jury is consigned under the constitution 'the ultimate power to weigh the evidence and determine the facts.'" State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008)

(quoting James v. Robeck, 79 Wn.2d 864, 869, 490 P.2d 878 (1971)). Washington courts likewise recognize that it is exclusively “the function of the jury to assess the credibility of a witness and the reasonableness of the witness’s responses.” State v. Demery, 144 Wn.2d 753, 762, 30 P.3d 1278 (2001) (plurality opinion).

ER 701 permits opinion testimony by a lay witness only when it is (1) rationally based on the perception of the witness, (2) helpful to the jury, and (3) not based on scientific or specialized knowledge. Therefore, no witness “may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.” State v. Black, 109 Wn.2d 336, 348, 754 P.2d 12 (1987). Nor may a witness “give an opinion on another witness’[s] credibility” or the “veracity of the defendant.” State v. Carlson, 80 Wn. App. 116, 123, 906 P.2d 999 (1995). Opinion testimony is therefore “clearly inappropriate” in a criminal trial when it contains “expressions of personal belief[s] to the guilt of the defendant, the intent of the accused, or the veracity of witnesses.” Montgomery, 163 Wn.2d at 591.

Although there was no objection in this case, an explicit or nearly explicit opinion on credibility or guilt is manifest constitutional error that may be raised for the first time on appeal. Montgomery, 163 Wn.2d at 595.

State v. Johnson, 152 Wn. App. 924, 219 P.3d 958 (2009), is instructive. There, the court reversed Johnson's child molestation conviction based on improper opinion testimony. Id. at 934. Rather than a daughter's opinion, Johnson analogously involved out-of-court statements by Johnson's wife indicating she believed the complainant's allegations. Id. at 931. The complainant (T.W.), her mother, and her stepfather all related an incident during which Johnson's wife confronted T.W. about the accusations and demanded T.W. prove they were true. Id. at 931-32. When T.W. recounted details of Johnson's intimate anatomy and sexual habits, Johnson's wife burst into tears, acknowledged it must be true, and—hours later—attempted suicide. Id. at 932-33.

The Johnson court held it was manifest constitutional error to admit Johnson's wife's opinion and reversed despite the lack of objection below. Id. at 934. The court reasoned that the wife's testimony shed "little or no light on any witness's credibility or on evidence properly before the jury and really only tells us what [Johnson's wife] believed." Id. at 933. The court further noted "the jury should not have heard collateral testimony that Johnson's wife believed T.W.'s allegations." Id. at 934. The testimony "served no purpose except to prejudice the jury," thereby denying Johnson a fair trial. Id.

As in Johnson, A.S.'s statement to the detective, which she repeated on the stand, clearly suggested she believed Sweidan was responsible for her mother's injuries. But A.S.'s opinion as to Sweidan's guilt was "clearly inappropriate" and served no purpose except to prejudice Sweidan. Montgomery, 163 Wn.2d at 591; see also State v. Jerrels, 83 Wn. App. 503, 508, 925 P.2d 209 (1996) ("A mother's opinion as to her children's veracity could not easily be disregarded even if the jury had been instructed to do so.").

An error of constitutional magnitude is presumed prejudicial, and the State bears the burden of proving the error was harmless beyond a reasonable doubt. W.R., 181 Wn. 2d at 770. An error is harmless only if this court cannot reasonably doubt that the jury would have arrived at the same verdict in its absence. State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010).

The State cannot meet this burden. Credibility played a crucial role in this case. Sweidan testified and denied culpability, while offering jurors an alternative explanation for Alhafeth's injuries. A.S. was not present and was not qualified to declare her father responsible for her mother's injuries. But a daughter's opinion that her father had harmed her mother, while inadmissible under the constitution, must have carried great

weight with jurors. Jerrels, 83 Wn. App. at 508. Reversal is, therefore, required.

3. THE TRIAL COURT ERRED IN IMPOSING AN EXCEPTIONAL SENTENCE BASED ON FACTORS NOT FOUND BY THE JURY.

The trial court erred in imposing an exceptional sentence of 336 months based on factors not found by the jury.²¹ CP 138, 151-54.

This court reviews de novo whether the reasons provided by the trial court provide legal basis from departure from the standard range. State v. Law, 154 Wn.2d 85, 94, 110 P.3d 717 (2005). The Sixth Amendment guarantees criminal defendants a right to trial by jury: As the Supreme Court has stated, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.” Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The “statutory maximum” referenced in Apprendi “is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” Blakely v. Washington, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (emphasis omitted).

²¹ As indicated above, Sweidan argued for a 189-month sentence, within the standard range. CP 127.

Under the Sentencing Reform Act of 1981 (SRA), found at chapter 9.94A RCW, a sentencing court may impose an exceptional sentence “if it finds . . . that there are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535. However, consistent with the Sixth Amendment requirements established in Blakely and Apprendi, the legislature has provided, “The facts supporting aggravating circumstances [for exceptional sentences] shall be proved to a jury beyond a reasonable doubt If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.” RCW 9.94A.537(3); see also RCW 9.94A.535 (“Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.”); State v. Hagar, 158 Wn.2d 369, 374, 144 P.3d 298 (2006) (“[E]xceptional sentences violate Blakely when they are based on facts not stipulated to by the defendant or found by a jury beyond a reasonable doubt.”).

There was only one aggravating circumstance that could constitutionally support an exceptional sentence here: The jury found beyond a reasonable doubt that the offense was an aggravated domestic violence offense based on commission within a minor child’s sight and sound. RCW 9.94A.535(3)(h)(ii); CP 119 (verdict); see also CP 98

(related instruction). The jury was not asked to find, nor did it find, beyond a reasonable doubt, any other aggravating fact or circumstance.

Nonetheless, the trial court engaged in its own fact-finding during sentencing, recounting several aspects of the trial testimony in addition to the jury's finding. 10RP 33 (second full paragraph). The court's written findings list several components of the trial testimony. While some focus on the presence of K.S. during the crime, several do not. See CP 152-53 (Findings 4, 5, 12, 13, 14, 15). The court's single written conclusion of law further confuses the issue, stating

Based on the above findings of fact, the jury's finding of guilt on [second degree attempted murder] with a Domestic Violence Allegation, an Aggravated Circumstance Allegation of Aggravated Domestic Violence, a Deadly Weapon Enhancement, the evidence presented at the hearing,^[22] and testimony at trial, the Court concludes that there are substantial and compelling reasons justifying an exceptional sentence of 147 months for a total sentence of 336 months.

CP 153-54.

Because the court appears to have relied on factors beyond the jury's finding on the aggravating factor, the trial court violated Sweidan's Sixth Amendment right to a jury trial, as well as the SRA. Therefore, Sweidan asks that the exceptional sentence be vacated and that the case be

²² The court did not take evidence at the sentencing hearing; rather, it heard argument from the parties. 10RP 4-21.

remanded for resentencing without consideration of factors that were neither stipulated to nor proved to the jury beyond a reasonable doubt.

4. THE TRIAL COURT ERRED IN ENTERING A 28-YEAR TOTAL BAN ON CONTACT WITH FOUR OF SWEIDAN'S CHILDREN.

The State sought a 50-year prohibition on any form of contact between Sweidan and his children, who were ages 19, 17, almost 13, and almost 3 at the time of trial. 10RP 8, 35. The trial court, stating only that it believed 50 years was too long, entered a 28-year ban on all forms of contact with Sweidan's children. 10RP 35. Other than to tie the ban to the length of the sentence, the court did not indicate why a 28-year ban on all contact was necessary. Based on the constitutional rights involved, the case should be remanded for the entry of an appropriately tailored order.

Sentencing errors may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). A sentencing court "may impose and enforce crime-related prohibitions" under the SRA. RCW 9.94A.505(9);²³ State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). Under State v. Armendariz, 160 Wn.2d 106, 118-20, 156

²³ 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.

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.

But 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). In Rainey, for example, even where Rainey had been convicted of harassing his wife and kidnapping his child, the court struck a lifetime no-contact order with the child and remanded for the court to impose a more appropriately tailored order. Rainey, 168 Wn.2d at 382.

The State may argue that the right to parent disappears upon a child's majority. But even though two of Sweidan's children are no longer minors, parents and children share a constitutional interest in each other's companionship and affection. Moore v. Burdman, 84 Wn.2d 408, 411, 526 P.2d 893 (1974); Smith v. City of Fontana, 818 F.2d 1411, 1418-19 (9th Cir. 1987), overruled on other grounds, Hodgers-Durgin v. de la Vina, 199 F.3d 1037 (9th Cir. 1999). The right to the preservation of family integrity encompasses the reciprocal rights of both parent and children. Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977). Familial bonds do not simply evaporate once a child turns 18 years old.

“[C]hoices to enter into and maintain certain familial human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty.” Roberts v. U.S. Jaycees, 468 U.S. 609, 617-18, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984). “This right to familial association is grounded in the Fourteenth Amendment’s Due Process Clause.” Lowery v. County of Riley, 522 F.3d 1086, 1092 (10th Cir. 2008). The freedom of intimate association protects associational choice as well as biological connection. Trujillo v. Bd. of County Comm’rs, 768 F.2d 1186, 1188 (10th Cir. 1985).

Based on these principles, parents have a due process liberty interest in the companionship and society of their adult children as well. See Rentz v. Spokane County, 438 F. Supp.2d 1252, 1265 (E.D. Wash. 2006) (“the Ninth Circuit has consistently recognized that its precedent recognizes a Fourteenth Amendment liberty interest of parents in the companionship and society of their adult children”); Smith, 818 F.2d at 1419 (recognizing companionship and nurturing interests of parent and child in maintaining familial bond are reciprocal and there is no reason to accord less constitutional value to child-parent relationship than to parent-child relationship; holding due process right to familial companionship

and society extended to protect an adult child from unwarranted state interference into relationship with parents).

Sweidan and each of his children have a fundamental right to one another's companionship and society even after the children become adults. The 28-year ban on contact—which, given Sweidan's age may well become a lifetime ban on contact—cannot be justified under the appropriate test. Moreover, the order unduly interferes with the freedom of both parent and child to preserve a familial relationship. This court should remand for an appropriately tailored order.²⁴

5. THE CRIMINAL FILING FEE MUST BE STRICKEN FROM SWEIDAN'S JUDGMENT AND SENTENCE.

Last year, in Ramirez, the state 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 also applies prospectively to cases pending on appeal. Ramirez, 191 Wn.2d at 739, 746-50. Under Ramirez, the criminal filing fee should be stricken from Sweidan'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

²⁴ For example, the order could permit contact if initiated by the child. As the order stands, Sweidan would be prohibited from contact any of his children even if they decided at some point in the future that they wished to resume contact.

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, the Ramirez Court struck the fee due to indigency. Ramirez, 191 Wn.2d at 749-50.

The court found Sweidan indigent and imposed a 336-month prison sentence. CP 135, 150. Although Sweidan was previously employed, he has clearly lost his job. Further, the trial court imposed significant restitution, which may not be waived. CP 136. Thus, the record indicates Sweidan is indigent under RCW 10.101.010(3).

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. Ramirez, 191 Wn.2d at

749. Accordingly, the criminal filing fee should be stricken from Sweidan's judgment and sentence.

6. LIKEWISE, THE DV ASSESSMENT MUST BE STRICKEN FROM THE JUDGMENT AND SENTENCE.

The DV penalty assessment should likewise be stricken. Although not explicitly addressed by Ramirez, the controlling statute, RCW 10.99.080(1), provides that

All superior courts . . . *may* impose a penalty of one hundred dollars, plus an additional fifteen dollars on any person convicted of a crime involving domestic violence; in no case *shall* a penalty assessment exceed one hundred fifteen dollars on any person convicted of a crime involving domestic violence. The assessment *shall* be in addition to, and *shall* not supersede, any other penalty, restitution, fines, or costs provided by law.

(Emphasis added.)

“This [use of ‘may’ and ‘shall’ in a statute] indicates that the Legislature intended the two words to have different meanings: ‘may’ being directory while ‘shall’ being mandatory. State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994) (quoting State v. Bartholomew, 104 Wn.2d 844, 848, 710 P.2d 196 (1985)) (modification of quote by Krall).

RCW 10.99.080(1) states a court “may” impose a DV penalty assessment and therefore constitutes a discretionary LFO. Id. 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. Laws of 2018, ch. 269, § 6(3). Because the DV penalty assessment is a discretionary LFO, and because Sweidan is indigent, under Ramirez it too should be stricken.

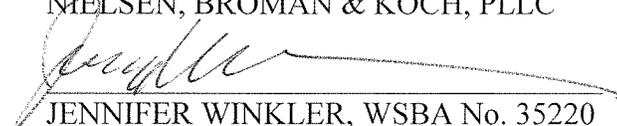
D. CONCLUSION

The trial court violated Sweidan's right to confront witnesses by allowing an important witness to testify remotely by video. Because the error was not harmless beyond a reasonable doubt, reversal is required. Sweidan was also denied a fair trial when his daughter's opinion on guilt was admitted, invading the province of the jury. Further, remand is required because the trial court erred in imposing an exceptional sentence based on factors not found by the jury and in entering a 28-year total ban on contact with Sweidan's children without providing a rationale for the scope and length of the no-contact order. Finally, the criminal filing fee and DV assessment should be stricken based on Sweidan's indigence.

DATED this 29th day of March, 2019.

Respectfully submitted,

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