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No. 36060-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

ABDUL RAHMAN SWEIDAN,

Appellant

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

NO. 17-1-01004-2

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The trial court did not violate the defendant's right to confront witnesses by allowing a witness who resides in Michigan and who was unable to travel to Washington to testify via video conference.
- B. The defendant's daughter's statement that she told a detective, "I think that was him who did that," was not objected to and is not grounds for reversal.
- C. The trial court properly imposed an exceptional sentence above the standard range based on the jury's verdict finding that the crime was an aggravated domestic violence crime.
- D. The trial court did not abuse its discretion in ordering a No-Contact Order for the defendant's children for 28 years, which is the same amount of confinement time.
- E. The defendant is correct that the \$200 filing fee should be stricken.
- F. The defendant is also correct that the \$100 domestic violence assessment should be stricken.

II. STATEMENT OF FACTS

- A. **The marriage between the defendant and Dania Alhafeth is marred by him beating her and threatening to kill her if she divorced him.**

Dania Alhafeth and the defendant are natives of Syria and were married in 1995. RP¹ at 1118-19. Dania² stated that he would beat her severely and that he did not permit her to see her extended family. RP at 1120. It was not a happy marriage and she asked for a divorce more than 20 times. RP at 1150. However, he would threaten to kill her or her siblings if she talked about divorce. RP at 1122.

The family, including their children, Aya, Mohammad, and Karam, moved to the United States on May 26, 2016. RP at 608-09. Aya, the oldest child with them, confirmed that her father continued to assault her mother and witnessed maybe two assaults. RP at 617. Aya also confirmed her father made threats to her mother: "I will kill you rather than divorcing you." RP at 635.

The defendant also became angry when Dania told him that she was sending money to the wife of her brother who died in the Syrian war. RP at 1130-31. The night before the offense, August 29, 2017, the defendant followed his wife to Aya's job at McDonalds. RP at 609, 1132. He grabbed Dania's hand and she told him that since they always fight, there was no reason to make peace. RP at 1132-33. Aya tried to intervene,

¹ Unless otherwise indicated, "RP" refers to the verbatim report of proceedings for the motion hearing and jury trial, transcribed by court reporter Cheryl Pelletier, numbered volumes I through VII, and dated February 21, 2018 and April 2-13, 2018.

² To avoid confusion, the State will use the first names of the family members. No disrespect is intended.

telling her father, “If you are not happy with my mom, then divorce her.”

RP at 618, 1134.

B. The next day the defendant stabs Dania 23 times, some of which were in the presence of their two-year-old son, Karam, leaving her for dead.

The defendant came home early from work the next day, August 30, 2017. RP at 1137. Karam, then two-years-old, was with Dania. RP at 606, 1135. The defendant said, “[A]re we going to make up?” RP at 1140. Dania told him that she did not see the benefit of making up because they were always disagreeing. *Id.* In response, the defendant went into the kitchen, got a knife, and began stabbing her. RP at 1140-41.

The defendant was saying to Dania, “Die, die. May God not bring you back.” RP at 1142. Karam was still in the same room and he was yelling, “Momma, Momma,” and trying to push the defendant away. *Id.* The defendant picked up Karam and locked him in a back bedroom. RP at 682, 1142.

Dania heard the defendant changing clothes. RP at 1144. He came back to Dania, saw that she was still breathing, and said, “You haven’t died yet?” *Id.* He then stabbed her in the thigh in a manner which Dania described as a “strong hit.” *Id.* He left the apartment and locked the door. RP at 672, 1144. Dania was able to call a neighbor and asked him to call the police. RP at 1145.

Dania could hear Karam, still locked in a back bedroom, crying and screaming, “Momma.” RP at 1144. When the police arrived, she managed to say, “Son” to Sgt. Littrell, which he interpreted as her alerting the police that a child was in locked in the apartment. RP at 682.

ER Dr. Brandon Thomas counted 23 penetrating stab wounds. RP at 858. The stabs wounds included two on her face, multiple wounds on the right side of her back, wounds on the anterior and posterior abdomen, on her left side flank, and in her upper groin. *Id.* There were two penetrating wounds to Dania’s liver and three lacerations to her liver. RP at 864, 882.

Dr. Thomas was concerned about a penetrating lung injury which could be fatal. RP at 853-55. A wound had penetrated her chest cavity and caused bleeding. RP at 864. Her breathing was like a wet rattle sound. RP at 853. She needed a breathing tube. RP at 879. Dr. Thomas classified her condition as critical, meaning she could die at any time. RP at 850.

Dr. Thomas noted that there was no way Dania could have inflicted the wounds to her back. RP at 861. He also noted Dania had defensive wounds between her thumb and second finger. *Id.*

C. The police take Dania to Trios Hospital in Kennewick, WA where the defendant had earlier checked himself in for wounds to his hands.

The defendant drove himself to Trios Hospital in Kennewick, WA and arrived at 1:37 P.M. RP 04/09/2018 at 6. He was first contacted by medical staff at 1:49 P.M. RP 04/09/2018 at 7. He had wounds on the second, third, and fourth fingers of his right hand. *Id.*

The police were dispatched to Dania and the defendant's apartment at 1:42 P.M. on August 30, 2017 and she was also taken to Trios. RP at 695, 702.

A nurse, Debbie Logan, noted the coincidences: an Arabic speaking woman coming into the emergency room for stab wounds just after an Arabic speaking man came to the emergency room with large cuts on his hand. RP at 823-24. The nurse also noted the man had changed his clothes, which was out of the ordinary for people who are injured. RP at 815. He also had a large amount of blood spatter on his feet. *Id.*; RP at 823.

D. The forensic evidence reveals that Dania's blood is on the defendant's shirt and calf, a mixture of their blood is on Karam's shirt, knives are found in the sink, and blood is throughout the apartment.

Here is a list of items seized with test results if applicable. All the below citations to the record are from volume 1 or 2 of the trial on April 9 and April 10, 2018.

- The defendant's shirt. RP 04/09/2018 at 194. It was positive for blood and the front of the shirt had Dania's blood, with the odds of a random match at 1 in 10 nonillion. *Id.* at 197-98.
- There were two knives in the kitchen sink. *Id.* at 117. The two knives had blood on them. *Id.* at 118-19. Blood which had been diluted was in the sink. *Id.* at 118, 131.
- Rubber gloves were under the sink and they had blood on them which was still wet. *Id.* at 122, 164. The blood on the gloves and the DNA matched the defendant's with odds of a random match at 1 in 2.1 nonillion. *Id.* at 205-06.
- Karam's shirt had blood, with the blood on the bottom of the shirt matching the defendant to 1 in 2.1 nonillion odds of a random match, and the blood on the hood of his shirt being 2.4 undecillion times more likely a mixture of the defendant's blood and Dania's than that of two random individuals. *Id.* at 30, 210.
- Blood was found on the defendant's right calf and Dania was found to be the major contributor with the odds of a random match at 1 in 10 nonillion. *Id.* at 210-11.
- Blood was found in Dania and the defendant's apartment on the entryway, in the doorway, on a coffee table, on a brown

couch, on pillows on the couch, on a telephone, on a TV stand, in the bathtub, on the floor and counter in the kitchen, and on a beige couch in the living room. *Id.* at 86, 92-95, 101-03, 130-31. There was blood on the living room wall, which matched Dania with the odds of a random match at 1 in 10 nonillion. *Id.* at 203. There was blood on a light switch on a west bathroom wall, which matched the defendant, with the odds of a random match at 1 in 2.1 nonillion. *Id.* at 203-04.

- Blood was also found in the defendant's vehicle, which he drove to the hospital, on the exterior driver door, on a white plastic bag, which contained a purple towel with bloodstains, on the passenger side of the center control panel, and on a Marlboro brand cigarette box. *Id.* at 26.

E. The defendant's testimony: Dania stabbed herself in an effort to frame him.

The defendant stated that he and Dania argued the day before the stabbing, saying that he found evidence Dania was rekindling a romance with another who was in Jordan. RP at 1248-49. On August 30, 2017 she had found various items relating to Israel or Judaism, including a story he had written about a Jewish person he knew in Syria, in Amma, and two in

Morocco. RP at 1253. She also found, he stated, an ID card that had an Israeli flag on it and the Israeli symbol. *Id.*

She picked up a knife and started stabbing herself, first in the chest, then her neck. RP at 1257-58. She said, "I am going to create a big problem for you. You will never get out of jails." RP at 1258. She stabbed herself because, he claimed, "She discovered that I am a Jew." RP at 1262.

He later testified that

[S]he was saying that she was going to create problems for me because . . . I know her secrets, because I know that siblings are from the al-Nusra front and I know that her brother, Hossen Alhafeth, he used to work with bin Ladin. And so Hossen used to provide funds to her mother and then her mother would send those funds to the al-Nusra front.

So that's what she was afraid of, that this is all going to be discovered and that her brother is going to send somebody to do a kill because this was discovered now that I am a Jew. And that Hossan is not going to believe her because she had basically known all this and that, in essence, she is a liar because she kept all this hidden.

RP at 1263.

Although he told his treating doctor that he cut his fingers accidentally while cutting meat, he testified that Dania slashed his fingers. RP at 759, 1257. He did not attempt to explain how Dania was able to stab herself in the back.

F. Facts relating to issues raised on appeal by the defendant:

1. Facts relating to issue of daughter's opinion of the defendant's guilt.

Aya Sweidan, age 19, was the first witness before the jury. RP at 599. When first questioned by the police, she stated she did not suspect her father. RP at 655. She stated that her parents did not argue the night before the stabbing or in the recent past, and that there was no reason her father would be angry with her mother. RP at 659.

However, when she testified, she stated that she was in shock from what happened and her statement that there were no problems between her parents was not truthful. RP at 631-32. She later spoke to another detective. RP at 632. The prosecutor asked:

Q: Do you remember what you told that detective?

A: I said that---well, I don't know exactly because it just depended on what questions he asked, so just depended on what questions were asked. I remember that I said that my family, they were having an argument or arguments, and I said that I think that, I think that was him who did that, I mean my dad.

Id.

There was no objection to this statement, possibly because the defendant asked her about other statements she made to the detective. RP at 638. There was no further mention of this comment in closing arguments. RP at 1328-52, 1370-73.

2. Facts relating to video testimony of medical interpreter.

The medical interpreter, Maisa Haddad, lives in Michigan and is the sole in-home caregiver for her mother who is suffering from esophageal cancer and heart disease. CP 166. Fawaz M. Hasso, M.D. stated that he is treating Ms. Haddad's mother and she needs continuous medical care. CP 167. Dr. Hasso stated that Ms. Haddad was unable to travel. *Id.* The Court allowed Ms. Haddad to testify via video conference. RP at 57-59.

Ms. Haddad's testimony covered a total of 14 pages of transcript, including five pages on her qualifications and her manner of interpreting via video conference, and two pages of interpretation between the doctor and the defendant. RP at 753-767. At some point, the medical staff left the room and the defendant started talking directly to Ms. Haddad. RP at 761. He stated that his wife was giving him a hard time and he cursed at her at some points. RP at 761-63.

The prosecutor's closing argument, including rebuttal, covered a total of 27 pages. Of this, only five paragraphs referred to the defendant cursing Dania. RP at 1344-45.

In his direct testimony, the defendant said something very similar: He and Dania were arguing over money, he spat in her face, and she scratched him. RP at 1245. He said he spun the curse on her and told her, "You are cursed in this life and the hereafter." RP at 1246.

3. Facts related to exceptional sentence:

The Information charged that the crime was an aggravated domestic violence offense because it was committed within the sight or sound of the parties' minor child, Karam. CP 2. The jury found this aggravating factor beyond a reasonable doubt. CP 118.

At sentencing, the trial court had to decide whether to impose an exceptional sentence, and if so, what the specific sentence should be. RP 05/14/2018 at 32. The trial court entered Findings of Fact and Conclusions of Law Re: Sentencing, which closely followed the oral ruling. See CP 151-54, attached as Appendix A. RP 05/14/2018 at 33-35.

The defendant characterizes the trial court as adopting factual findings not justified by the jury verdict. However, Finding 16 clearly states the basis for the exceptional sentence: "The Court finds that based on the conduct being within the sight and sound of the child that a standard range sentence is not sufficient punishment and not in the best interest of justice." Finding 17 is that "There are substantial and compelling reasons justifying an exceptional sentence." Finding 18 states the sentence. App. A.

The other Findings concern the background of the case and relate to how the Court determined the precise sentence. Findings 1-3 recount the charges and the standard range. Findings 4-9 repeat testimony at trial

which formed the basis for the jury's verdict on the exceptional sentence that the Attempted Murder occurred within the sight and sound of the parties' minor child. Findings 10 and 11 state the recommendations of the prosecutor and defendant. Findings 12-16 state what factors the Court considered to arrive at a total sentence of 336 months, including the seriousness level of the crime, the defendant's criminal history and the testimony of the victim (Finding 12), the impact on the victim's family (Finding 13), the level of violence demonstrated by the number of stab wounds (Finding 14), that there were no mitigating factors and that the defendant had no remorse (Finding 15), that the facts showed the crime was committed within the sight and sound of Karam and the amount of trauma he may experience given his youth (Finding 16).

4. Facts relating to issue on No-Contact Order with the defendant's children.

The record shows trial court fully considered the appropriateness of a No-Contact Order barring the defendant from contacting his children. As argued in section D below, the standard on review should be abuse of discretion rather than de novo based on this record.

The prosecution recommended a 50 year No-Contact Order with Dania along with their children. The prosecutor cited *State v. Ancira*, 107 Wn. App. 650, 27 P.3d 1246 (2001) for the proposition that the court must

find a no-contact order between a parent and a child is reasonably necessary to prevent harm to the children. The prosecutor explained that contact by the defendant would cause them emotional distress and harm. RP 05/14/2018 at 8.

In response the defense attorney stated,

I also would object to the . . . 50-year no-contact order . . . I haven't heard any . . . real State interest that would . . . outweigh the father's right to parent their children if the children desire. And, that, we don't know, but a 50-year NCO is, essentially, a lifetime order at this point. I think that the Court should consider whether . . . it's appropriate to . . . change over time or whether these uninvolved children should have a part in their father's life if they want it. Again, we don't—we don't know. And then, also, whether the Court would allow any less restrictive alternatives, which I think . . . again . . . could be desired. I don't know. So . . . that would be my request.

RP 05/14/2018 at 16-17.

The Court stated that the case was disturbing and had an impact on the family. RP 05/14/2018 at 31. The Court agreed with the defense attorney and imposed a No-Contact Order of 28 years. RP 05/14/2018 at 35.

III. ISSUES

- A. Was there any error in allowing the medical interpreter to testify via Skype and if so, was the error harmless?

1. What is the standard on review for considering confrontation of witness challenges?
 2. Is the *Craig* test met by these facts?
 - a. Was it necessary to allow Ms. Haddad to testify via Skype to further an important public policy?
 - b. Was the reliability of her testimony otherwise assured?
 3. Can the defendant's citations to *United States v. Carter* and *United States v. Yates* be distinguished, and is it accurate for the defendant to claim, "Washington has . . . never applied [the *Craig* test] in this context"?
 4. In any event, can we conclude beyond a reasonable doubt based on the forensic evidence, the testimony of the surviving victim, and the problems with the defendant's testimony, the defendant would have been convicted without Ms. Haddad's testimony?
- B. Is Aya's statement, for which there was no objection, that she believed it was her father "who did that" sufficient to reverse the conviction?

1. What is the standard of on review for considering the argument, since there was no objection at trial to the testimony?
 2. Was the testimony a manifest error?
 3. If the defendant's argument is considered and if Aya's statement was improper, was it a harmless error, when considering the forensic evidence, the victim's testimony, the observations of the police and EMTs, and the defendant's own testimony?
- C. Did the trial court impose an exceptional sentence based on the jury's verdict finding that the Attempted Murder was an aggravated domestic violence offense and was the sentence clearly excessive?
1. What are the standards for review of a challenge to an exceptional sentence?
 2. Did the trial court base the exceptional sentence on an appropriate aggravating factor—the commission of the crime within the sight and sound of a minor child—and did the trial court properly use its discretion to impose a sentence of 336 months?

- D. Did the trial court abuse its discretion in imposing a No-Contact Order against the defendant contacting his children for the same length of time (28 years) as his sentence?
1. What is the standard for review for a challenge to a No-Contact Order between a parent and a child?
 2. Did the trial court abuse its discretion in imposing a No-Contact Order for the time the defendant was incarcerated and having it terminate shortly after his release?

IV. ARGUMENT

- A. **There was no error in allowing the medical interpreter to testify via Skype.**
1. **The standard on review for considering confrontation of witness challenges.**

Maryland v. Craig, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990) stated that courts have “never insisted on an actual face-to-face encounter at trial in *every* instance in which testimony is admitted against a defendant.” *Id.* at 847. “The Confrontation Clause reflects a *preference* for face-to-face confrontation at trial, a preference that ‘must occasionally give way to considerations of public policy and the necessities of the case.’” *Id.* at 849 (citations omitted). Under *Craig*, a face-to-face confrontation may be dispensed with only where it is 1) necessary to

further an important public policy, and 2) where the reliability of the testimony is otherwise assured. *Id.* at 850.

Generally, the trial court's decision on constitutional issues are reviewed de novo. *State v. Cayetano-Jaimes*, 190 Wn. App. 286, 295, 359 P.3d 919 (2015). However, on the first prong of the test, the trial court's determination of whether it was necessary to allow the confrontation via video conference is reviewed for abuse of discretion. As the *Craig* court stated,

So long as a trial court makes such a case-specific finding of necessity, the Confrontation Clause does not prohibit a State from using a one-way closed circuit television procedure for the receipt of testimony by a child witness in a child abuse case. Because the Court of Appeals held that the trial court had not made the requisite finding of necessity under its interpretation of "the high threshold required by [citation] . . . we cannot be certain whether the Court of Appeals would reach the same conclusion in light of the legal standard we establish today.

497 U.S. at 860 (citation omitted).

See also *United States v. Gigante*, 166 F.3d 75, 80, (2nd Cir. 1999), "Judge Weinstein held in a published opinion that . . . the witness could not appear in court. Although Gigante attacks this determination, we review this factual finding for clear error."

2. The *Craig* test has been met.

- a. It was necessary to allow Ms. Haddad, who was the caretaker for her mother in**

Michigan and could not travel to Washington, to testify via Skype.

Where a witness is unable to travel because of health concerns which will not abate, cases have consistently held that it is appropriate to allow video conference testimony. If it is inconvenient for a witness to travel, courts have held that the first prong of the *Craig* test has not been met. But, where a witness is unable to travel due to health concerns which will not abate, cases have consistently held that it is appropriate to allow video conference testimony.

For example, *Horn v. Quarterman*, 508 F.3d 306, 313 (5th Cir. 2007) held that the state court correctly applied federal law when it permitted a terminally ill witness, whose doctor advised against travel, to testify via a two-way closed-circuit television. “Protection of seriously ill witnesses may give rise to the type of necessity required under *Craig* to permit testimony by way of closed-circuit television.” *Id.* at 320.

United States v. Benson, 79 F. App’x 813, 820-21 (6th Cir. 2003) held that a defendant’s confrontation right was not violated by the district court’s decision to permit an 85-year-old witness to testify via video conference from another state when the witness was too ill to travel.

Harrell v. Butterworth, 251 F.3d 926, 931 (11th Cir. 2001) upheld the trial court’s conclusion to excuse in-person confrontation. The court

noted there was an important public policy to excuse in-person confrontation when the witness lived beyond the subpoena power of the court, that it was in the state's interest to expeditiously and justly resolve criminal matters, that one of the witnesses was in poor health and could not travel from Argentina to the United States, and that the witnesses were absolutely essential to the prosecution's case.

State v. Sewell, 595 N.W.2d 207, 211-13 (Minn. Ct. App. 1999) held that television testimony was allowed for a witness who had undergone surgery and his physician signed an affidavit, which the court confirmed, that the witness would risk paralysis if he travelled to Minnesota.

Stevens v. State, 234 S.W.3d 748, 781-83 (Tex. App.— Fort Worth 2007, no pet.) held that testimony from a 75-year-old witness suffering from medical problems could testify by closed-circuit television without a violation of the confrontation clause. The witness's health situation was tenuous and documented by his treating cardiologist.

Bush v. State, 2008 WY 144, 193 P.3d 203 (Wyo. 2008) also noted that where a witness is unable to travel because of health reasons, there is a public policy of preventing further harm to an already serious medical condition. In such a case, it is necessary for the witness to testify via video conference.

The trial court's ruling on the need for Ms. Haddad to testify via Skype is consistent with these decisions. The trial court had a letter from Fawaz M. Hasso, MD certifying that Ms. Haddad's mother was suffering from esophageal cancer and heart disease and needed continuous medical care. For that reason, Dr. Hasso stated, Ms. Haddad needed to provide continuous medical care, preventing her from traveling. CP 167. The public had an interest in an expeditious trial, in providing the jury with all relevant information so the trial could be justly resolved, and in allowing adult children to provide continuous care for their parents.

The first prong of the *Craig* test was satisfied; there is no reason to believe the trial court abused its discretion on this issue.

b. The reliability of Ms. Haddad's testimony was assured because she had no interest in the case and was not asked to identify the defendant.

Once the unavailability of a witness and the necessity of his testimony have been demonstrated, the focus of the confrontation clause analysis shifts to the reliability of the testimony. *Sewell*, 595 N.W.2d at 213. The reliability of the testimony of an unavailable witness is ascertained for purposes of a confrontation clause analysis by examining four factors: 1) whether the testimony was given under oath; 2) whether there existed the opportunity for cross-examination; 3) whether the fact-

finder has the ability to observe demeanor evidence; and 4) whether there exists an increased risk that the witness will wrongfully implicate an innocent defendant when testifying out of his presence. *Id.*

All of the above factors are satisfied. Ms. Haddad testified under oath, she was cross-examined, the jury had the ability to observe her demeanor, and she was not asked to identify the defendant. The second prong of the *Craig* test was also satisfied.

3. The defendant's citations to *United States v. Carter* and *United States v. Yates* can be distinguished and it is not accurate for the defendant to claim, "Washington has . . . never applied (the *Craig* test) in this context." Br. of Appellant at 17.

a. *Carter* and *Yates* are not on point.

The defendant cites two cases, *United States v. Carter*, 907 F.3d 1199 (9th Cir. 2018) and *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006) in support of his argument that the *Craig* test was not met. As discussed below, those cases can be distinguished.

In *Carter*, it appears that neither prong of the *Craig* test was satisfied. In that case, the defendant was charged with 14 counts of trafficking and prostituting seven minor girls. One of the victims was now an adult, was seven months pregnant, and could not then travel.

Concerning the first prong of the *Craig* test, the court noted that the prosecution could have continued the trial until the victim was able to travel. The prosecution could have also severed this victim's count from the others and went forward with six victims and tried the counts on the victim in question later. *Carter*, 907 F.3d at 1208.

The second prong of the *Craig* test, whether the victim's testimony was reliable, was also a big problem. The victim, testifying via video conference, was asked to identify the defendant. She said, "Um, is that him right there next to—I can't really see that well on you guy's thing, but I believe that's him next to these two gentlemen right there. I can't really see that well." *Id.* at 1203. As stated, Ms. Haddad was not asked to identify the defendant and in fact her direct testimony was not challenged; her cross-examination was short and covered only two pages of transcript. RP at 766-67.

Yates can be distinguished on two grounds. First, the court criticized the trial court for accepting the prosecution's statement that the witnesses were unwilling to travel from Australia to the United States for trial and for not holding a hearing on the subject. The *Yates* court stated the trial court

held no hearing to consider evidence of the necessity for the video conference testimony. Rather, the trial court allowed the two-way video testimony based only on the

Government's assertions in its motion that the Australian witnesses were unwilling to travel to the United States for trial and the Government's posited 'important public polic[ies] of providing the fact-finder with crucial evidence, expeditiously and justly resolving the case' and "ensuring that foreign witnesses can so testify."

Yates, 438 F.3d at 1315-16. The *Yates* court further stated the trial court "made no case-specific findings of fact that would support a conclusion that this case is different from any other criminal prosecution in which the Government would find it convenient to present testimony by two-way video conference." *Id.* at 1316.

In contrast, the trial court had a letter from Ms. Haddad and a statement from a doctor supporting the fact that she could not travel because she was the full-time caretaker for her mother. The Court had briefing on this from both parties and held a hearing. RP at 50-60. Contrast this with *Yates* in which the court held no hearing and there was nothing other than the prosecutor's statement that the witnesses could not attend the trial.

The second reason *Yates* can be distinguished is based on the difference between Fed. R. Crim. P. 15(c) and CrR 4.6 on depositions. The *Yates* court held that it was error to allow the Australian witnesses to testify via teleconference because the trial court could have ordered their

deposition which the defendant could have attended under Fed. R. Crim.

P. 15(c). *Yates*, 438 F.3d at 1314. Fed. R. Crim. P. 15(c) provides:

Defendant's Presence . . . [T]he officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant a) waives in writing the right to be present; or b) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion. (Emphasis added.)

There is no similar provision in CrR 4.6 requiring the custodian, in this case the Benton County Sheriff who operates the jail, to produce the defendant for a deposition in another State. The defendant did not suggest deposing Ms. Haddad probably because there was no practical way for him to be released from the Benton County jail, transported to Michigan, attend a deposition in Ms. Haddad's locale, and then be transported back to the Benton County jail.

b. Comment on the defendant's claim that "Washington has . . . never applied (the *Craig* test) in this context". Br. of Appellant at 17.

The accuracy of this statement depends on the qualifier "in this context," but several cases in Washington have allowed a witness to testify via video. *State v. Cayetano-Jaimes*, 190 Wn. App. 286, 359 P.3d 919 (2015) held that the victim's mother, who had been deported to Mexico and could not legally return to the United States, should have been

allowed to testify via telephone. *State v. Foster*, 135 Wn.2d 441, 957 P.2d 712 (1998) allowed a child victim of sexual or physical abuse to testify via closed-circuit television.

4. In any event, beyond a reasonable doubt the defendant would have been convicted without Ms. Haddad's testimony.

The forensic evidence is damning. The victim's blood was on the defendant's shirt. RP 04/09/2018 at 197-98. The victim's testimony was damning. Dania described an unprovoked and repeated knife attack on her, with the defendant wondering why she was still alive and stabbing her again. RP at 1141-44. The medical evidence was damning. Dania was stabbed 23 times in multiple areas. RP at 858. The defendant's testimony was not credible. Dania, according to Dr. Thomas, could not have stabbed herself in the back where some of the knife wounds were located. RP at 861. And, to claim that Dania stabbed herself that many times because she wanted to frame him defies common sense.

There were two relevant facts produced in Ms. Haddad's testimony. She testified that the defendant claimed he cut his hand while at work. RP at 759. The defendant contradicted this at trial, saying that he cut himself when he tried to take a knife from Dania. RP at 1257. He did not even attempt to explain away the contradiction between his testimony and Ms. Haddad's testimony.

She also said the defendant said “his wife was giving him a hard time. And he was just cursing her at some points. That’s what I recall.” RP at 762-63. The defendant admitted as much when he testified saying, “I spin the curse on her telling her you are cursed in this life and hereafter.” RP at 1245-46.

In closing argument, the prosecutor referred to Ms. Haddad’s testimony for about one page, from RP at 1344, line 13, to RP at 1345, line 10. The prosecutor did not mention the contradiction between the defendant’s statement to Ms. Haddad that he cut his fingers while at work and the defendant’s testimony that he cut his fingers in a struggle with his wife.

The defendant admitted bizarre problems in his marriage: “[S]he discovered that I am a Jew,” and Dania’s brother “used to work with bin Ladin.” RP at 1262-63. He also admitted they had a physical confrontation about two and a half months before the stabbing. RP at 1245. Given his admission of these things, it is difficult to see how the interpreter’s testimony that he cursed his wife added much. That is especially true in light of the overwhelming evidence of the defendant’s guilt.

B. Aya’s statement that she believed it was her father “who did that”, to which there was no objection, was not a manifest error under RAP 2.5 (a) and was harmless because the evidence of the defendant’s guilt was overwhelming.

1. Standard for reviewing challenges to testimony when there is no objection to it at trial.

To raise an error for the first time on appeal, the appellant must demonstrate the error is truly of constitutional dimension and the error is manifest. RAP 2.5 (a)(3). Manifest, within the meaning of the rule, requires a showing of actual prejudice. To demonstrate actual prejudice, there must be a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial. The focus of the actual prejudice is on whether the error is so obvious that it warrants appellate review. *State v. Mohamed*, 187 Wn. App. 630, 648-49, 350 P.3d 671 (2015). A manifest error requires a nearly explicit statement by the witness that the witness believed the accusing victim. *Id.* at 650.

2. Aya's statement that she believed it was her father "who did that" to her mother was not a manifest error under this standard.

The defendant is correct that the right to a jury determination of guilt is a constitutional right. But, the defendant cannot establish that Aya's comment was a manifest error, as described in the section above. The following factors have been cited to determine if the error was manifest:

- Was the comment fleeting? *Id.* at 651. In *Mohamed*, a police officer testified that the confidential informant in a drug case was

“very honest.” The court held: Not a manifest error. “The comment was fleeting and was about the informant’s honesty in general.” *Id.* In this case, Aya’s comment took two lines of one page of a transcript which totaled over 1,300 pages. There were no comments about this statement in closing arguments.

- Was the jury properly instructed that they “are the sole judges of the credibility of witnesses?” *State v. Montgomery*, 163 Wn.2d 577, 596, 183 P.3d 267 (2008). The same instruction was given herein. CP 77-78.
- Was the opinion evidence from a police officer who has an “aura of reliability?” *Id.* at 594. Obviously, Aya was not a police officer. She also had a clear bias in favor of her mother and against her father, which the jury was instructed they could consider. CP 78.
- Was the opinion evidence a crucial part of the State’s case? *State v. Barr*, 123 Wn. App. 373, 381, 98 P.3d 518 (2004). In *Barr*, a police officer was allowed to testify without objection that during the interrogation the defendant showed signs of deception, that the defendant was afraid of going to prison for the crime, that there were big flags that the defendant was deceptive, and that he was not genuine. *Id.* at 379-80. Here, Aya’s comment was not important. The case was based on the forensic evidence, the

surviving witness's testimony, the history of domestic violence, and the defendant's anger with his wife. The prosecutor never mentioned Aya's comment in closing argument.

The defendant has cited two cases in support of the proposition that this Court should consider Aya's comment although there was no objection. One case is *Montgomery*. The holding in *Montgomery* was that the opinion evidence was not a manifest error. 163 Wn.2d at 596. The case was reversed because the trial court incorrectly gave a missing witness instruction. *Id.* at 601.

The other case the defendant cites is *State v. Johnson*, 152 Wn. App. 924, 219 P.3d 958 (2009). *Johnson* involved a charge of second-degree child molestation in which the victim was a neighbor. The victim described a mole on the defendant's penis and an unusual way he masturbated.

In response, the defendant's wife, Stacy Johnson, testified there was no mole on the defendant's penis, and that the defendant was never alone with the victim. *Id.* at 932. In rebuttal, the State called the victim and her parents who said that Ms. Johnson ended the confrontation believing the victim.

The *Johnson* court reversed on two grounds: first, the rebuttal witnesses clearly gave Ms. Johnson's opinion on her husband's guilt and,

second, this testimony was collateral and was highly prejudicial— “clearly more prejudicial than probative under ER 403.” *Id.* at 934.

Johnson is distinguishable from this case. The issue of whether the defendant’s wife believed the accusations was not a fleeting part of that case. Four witnesses, Ms. Johnson, the victim, and the victim’s parents testified about the issue. The *Johnson* jury was incorrectly instructed that the various versions of Ms. Johnson’s reaction were only admitted to assist the jury in determining credibility. But, a witness cannot be impeached on collateral matters. *Id.* at 933. Finally, the reversal was not just based on opinion evidence on the defendant’s guilt. The reversal was also based on the highly prejudicial nature of testimony that the defendant’s spouse did not believe him.

Johnson is not applicable because the problem there was that opinion evidence, and highly prejudicial opinion evidence at that, was introduced in the guise of rebuttal impeachment testimony. The testimony was on a collateral matter and should not have been admitted whether or not it contained Ms. Johnson’s opinion about her husband’s guilt.

The defendant has the burden of proving that the error was manifest which means that he suffered actual prejudice. *Mohamad*, 187 Wn. App. at 648-49. If the court determines the claim raises a manifest constitutional error, a harmless error analysis may still apply. *State v.*

Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). The defendant has conflated these two issues by arguing that the State cannot prove the error was harmless beyond a reasonable doubt. Br. of Appellant at 40.

Concerning the issue of whether the error is manifest, the defendant has the burden of proof.

On that issue, the defendant has failed to prove any actual prejudice. Aya's statement was fleeting and covered two lines of one page out of about 925 pages of recorded testimony over eight days. The jurors could easily have discounted Aya's comment because they understand that she had no special forensic knowledge or insight into the police investigation. The jurors were instructed that they were the sole judges of credibility.

Aya's comment was not a manifest error.

3. In any event, the error was harmless.

On this point, the defendant is correct in stating the burden of proof: a constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. If there is overwhelming untainted evidence, the error is harmless. *State v. Thach*, 126 Wn. App. 297, 313, 106 P.3d 782 (2005). Obviously, this standard is much different than the standard for determining if an error is manifest.

In this case, the State's evidence without Aya's comment meets the overwhelming untainted evidence test. The State's evidence included a history of domestic violence by the defendant against his wife/victim, Dania. RP at 617. Dania told her husband that their marriage was broken, and he responded by getting a knife and repeatedly stabbing her. RP at 1140-41. Dania said their young son tried to intervene and the defendant carried him into a bedroom and locked the door. RP at 1142. Dania described how the defendant thought she was dead and then gave her one more, hard stab to the thigh. RP at 1144.

The first responders, doctors, and forensic investigators supported her statements. Blood was throughout the residence. RP 04/09/2018 at 86-122. Knives were in the kitchen sink where they may have been washed off. RP at 1028-29; RP 04/09/2018 at 130-31. Their minor son was locked in a back bedroom. RP at 682. Dania's blood was on the defendant's shirt. RP 04/09/2018 at 198. The defendant's blood was on the minor child's shirt. RP 04/09/2018 at 210.

The State did not cross-examine the defendant probably because his testimony served as its own cross-examination. He testified that Dania stabbed herself, although a doctor said her back wounds could not be self-inflicted and that she had defensive wounds. RP at 861, 1257-58. He alternated between saying that she stabbed herself because she discovered

he secretly had converted to Judaism, or to frame him out of revenge. RP at 1258, 1262. He contradicted his statement to his doctor that he cut his fingers on his job as a meat cutter. RP at 759. He contradicted the first responders and Dania's doctors by claiming that she was able to prevent him from re-entering the apartment. RP at 1260.

This is overwhelming evidence that is untainted by Aya's single comment.

One other fact needs to be considered: The defendant did not object to Aya's comment about what she told a detective probably because he wanted to question her about her statements to the police. In her direct testimony, Aya stated that she told the police that there were not a lot of problems in the family. RP at 631. In cross-examination, she was asked whether she told Detective Runge that there was no reason for her father to be upset with her mother, and that her parents had a loving relationship. RP at 638.

Detective Runge testified that Aya stated that she had no idea her father was a suspect, that she said her parents did not argue the night before or any night in the recent past, and that if something was wrong her mother would have told her. RP at 655, 659, 661.

In an effort to get in front of these statements, the State asked Aya in direct examination if she told the truth to the police. She answered that

her comment that there were not a lot of problems in the family was not the truth. RP at 631-32. The State then asked her what else she told the police. RP at 632. That is when she stated, “I remember that I said that my family, they were having an argument or arguments, and I said that I think that, I think that was him who did that, I mean my dad.” *Id.*

It is likely that the defense attorneys purposefully did not object to Aya’s statement about what she told the police because they thought the subject would be helpful. And, perhaps it was. Aya’s original comments about her parents’ happy marriage were virtually the only helpful evidence produced for the defendant throughout the entire trial. But, whether or not the defense attorneys objected, there was overwhelming evidence of the defendant’s guilt without Aya’s comment about what she told the police.

C. The trial court properly imposed an exceptional sentence based on an aggravating factor: the presence of the parties’ minor child during the attempted murder.

1. The standard for reviewing exceptional sentences:

RCW 9.94A.537 (6) provides:

If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court may sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the maximum allowed under RCW 9A.20.021, for the underlying conviction if it finds, considering the purposes of this chapter that the facts found are

substantial and compelling reasons justifying an exceptional sentence.

A challenge to an exceptional sentence is a) whether the reasons given by the sentencing judge are supported by evidence for which the standard of review is clearly erroneous standard, b) whether the reasons justify a sentence outside the standard range, for which the standard of review is de novo, and c) whether the sentence was clearly excessive, for which the standard of review is abuse of discretion. *State v. Kolesnik*, 146 Wn. App. 790, 802-03, 192 P.3d 937 (2008).

A sentencing court may exercise its discretion to set the precise length of the exceptional sentence appropriate on a determination of substantial and compelling reasons supported by the jury's finding of an aggravating factor. *Id.* at 805. A sentence is clearly excessive if it "shocks the conscience." *State v. Knutz*, 161 Wn. App. 395, 411, 253 P.3d 437 (2011).

2. **The exceptional sentence was proper: It was based on a jury verdict, the trial court found that there were substantial and compelling reasons to impose an exceptional sentence, and the sentence imposed was not clearly excessive.**

State v. Perry, 6 Wn. App. 2d 544, 431 P.3d 543 (2018) provides a good contrast with this case. In *Perry*, the defendant was convicted of a Felony Hit and Run. The victim suffered multiple injuries and the jury

found an aggravating factor that the injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense.

The trial court entered Findings of Fact stating, among other things:

3. The victim . . . may very likely have died had his brother not been walking along the road with him, which is a substantial and compelling reason to impose an exceptional sentence.

. . .

5. The failure to stop and render aid in this case does not have any excuse in the view of the jury and in the view of this Court, which is a substantial and compelling reason to impose an exceptional sentence.

6. The unwillingness to stop and see if anybody had in fact been hurt gives rise to two very unflattering implications: it shows extreme recklessness or carelessness and the other shows a level of consciousness of guilt and fleeing to avoid other potential different or magnifying legal problems. These are substantial and compelling reasons to impose an exceptional sentence.

Id. at 550.

The *Perry* court concluded that the trial court erred when it made findings of fact beyond those made by the jury to support the exceptional sentence. *Id.* at 557. Here, the trial court imposed an exceptional sentence solely on the basis of the aggravating factor.

At the heart of the court's Findings and Conclusions is Finding No. 16:

The Court considered the facts presented at trial detailing the act being committed within the sight and sound of the young child and the impact it would make on this child for purposes of sentencing the defendant outside of the standard range. The Court considered the amount of trauma the child witnessed at such a young age which the Court found may have long lasting effects. The Court finds that based on the conduct being within the sight and sound of the child that a standard range sentence is not sufficient punishment and not in the best interest of justice.

App. A.

The other Findings provide the evidence supporting the Aggravating Factor. For example:

Finding No. 4 states:

The facts presented at trial included evidence that the defendant came home early from work. His wife, Dania Alhafeth, was present with their two-year-old child. The defendant and Ms. Alhafeth had a brief conversation and the defendant grabbed a knife from the kitchen and began stabbing Ms. Alhafeth numerous times.

Id.

This only supports the upcoming Finding in Finding No. 16 that there is sufficient reason for an exceptional sentence because the crime was in front of the child.

Finding No. 5 states: “At trial Ms. Alhafeth testified that the defendant, while stabbing her, said, ‘Die, Die and may God never bring you back.’” *Id.* This is referring to actions in the sight or sound of the minor child.

Finding No. 6 states: “At trial Ms. Alhafeth testified that while the defendant was stabbing her, their two-year-old child was attempting to get to her and was crying. Ms. Alhafeth testified the defendant pushed their child back while he continued stabbing her.” *Id.* Again, this relates directly to evidence supporting the jury’s verdict that the Attempted Murder occurred within the sight and sound of the minor child.

Finding No. 7 states, “Ms. Alhafeth testified that the defendant then locked their child in his bedroom. The defendant stabbed Ms. Alhafeth again and eventually left her in the living room and the child in the bedroom.” *Id.* This relates only to evidence that the child was within the sound of the crime.

Finding No. 8 states, “Ms. Alhafeth testified that after the defendant left, she could hear her two-year-old child yelling, ‘Mama, Mama’ as he was locked in the bedroom.” *Id.* This Finding supports the ultimate Finding 16, that because the crime was committed within the sight and sound of the child, an exceptional sentence is warranted.

Finding No. 9 states,

Kennewick Police Officers who responded to the scene testified that as they arrived and discovered Ms. Alhafeth lying in blood on the living room floor that they also heard a child crying in the bedroom and kicking the door to get out. They testified they were able to unlock the door and found a young boy in the bedroom crying with blood on his shirt.

Id. Likewise, this Finding supports the ultimate Finding that an exceptional sentence was justified because the crime was committed within the sight and sound of the child.

Finding No. 13 states, “The Court considered the testimony of the victim and the impact to her and her family based on the horrific and brutal attack.” *Id.* Finding No. 14 states, “The Court considered the number of stab wounds upon the victim, 23 to 30, and found this demonstrates the level of violence initiated during the attack by the defendant.” *Id.* The impact on the victim’s family and the level of violence directly impact the trauma to the child, but these Findings explain why the sentencing court imposed a 28-year sentence. Unlike in *Perry*, the sentencing court is not saying these are grounds for an exceptional sentence.

As a whole, the Findings specifically state that the court imposed an exceptional sentence only because the jury found the aggravating factor and, as the court explained in Findings 4-9, there was evidence to support that verdict. The trial court’s Findings and Conclusions explain why it imposed an exceptional sentence and why it imposed the specific 28- year sentence. *Id.*

RCW 9.94A.535 requires that “[w]henver a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for

its decision in written findings of fact and conclusions of law.” This requires the trial court to explain why it is imposing an exceptional sentence and why it arrived at the precise sentence.

With all due respect to the defendant, his argument conflates these two tasks. The trial court explicitly stated it was imposing an exceptional sentence based on the jury’s verdict finding an aggravating factor. In setting forth the precise sentence, the court cited other factors, including the defendant’s lack of remorse, the harm to the entire family of the victim, and the viciousness of the attack. It is incorrect to state that the trial court imposed an exceptional sentence based on these facts. These factors were only considered by the sentencing judge to determine the precise sentence.

A trial court has all but “unbridled discretion” in setting the length of an exceptional sentence and a reviewing court has “near plenary discretion to *affirm* the length of an exceptional sentence” *State v. Burkins*, 94 Wn. App. 677, 701, 973 P.2d 15 (1999). The jury found that the crime was an aggravated domestic violence offense, the trial court found that an exceptional sentence was justified, and properly used its discretion to impose a sentence which was not clearly excessive.

D. The trial court did not abuse its discretion in imposing a No-Contact Order which was equivalent to the length of the defendant’s prison sentence.

1. Standard on Review for abuse of discretion.

In re Rainey, 168 Wn.2d 367, 374-75, 229 P.3d 686 (2010) set the standard on review for challenges to the length of a no-contact order prohibiting a parent from contacting a child.

We generally review sentencing conditions for abuse of discretion. But we 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. Such conditions must be "sensitively imposed" so that they are "reasonably necessary to accomplish the essential needs of the State and public order." The extent to which a sentencing condition affects a constitutional right is a legal question subject to strict scrutiny. Nevertheless, because the imposition of crime-related prohibitions is necessarily fact-specific and based upon the sentencing judge's in-person appraisal of the trial and the offender, the appropriate standard of review remains abuse of discretion.

Id. (internal citations omitted.)

2. The trial court did not abuse its discretion by imposing a No-Contact Order (NCO) for 28 years, the same length of confinement, which as a practical matter will only require the defendant not to mail his children during his incarceration and a short time thereafter.

The trial court linked the length of the NCO to the length of his sentence, 28 years or 336 months. The defendant will be released before the NCO expires because he had credit for time served from August 30, 2017 to May 14, 2018 for pre-sentence detention, and because he may receive earned good time credit. But relatively shortly after his release, the

NCO will terminate, and the defendant will not be restricted from contacting his children, whether in person or by some less restrictive alternative such as mail, social media, or supervised visits.

None of the children have expressed any desire to contact their father. Likewise, their father, the defendant, expressed no desire during allocution to contact his children. RP 05/14/2018 at 22-31. Obviously, the children cannot be forced to visit the defendant or accept his phone calls while he is incarcerated.

Therefore, as a practical matter the only thing the trial court prevented was the defendant sending mail to his children during his incarceration and a short period of time thereafter. For the reasons stated below, that restriction was not an abuse of discretion.

The State has a compelling interest in protecting children from witnessing domestic violence. *State v. Ancira*, 107 Wn. App. 650, 654, 27 P.3d 1246 (2001). The State also has the responsibility to intervene to protect a child when parental actions or decisions seriously conflict with the physical or mental health of the child. *In re Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980).

In this case, the evidence is that the defendant began stabbing his wife in front of their two-year-old son, Karam. Karam tried to intervene and the defendant locked him in a bedroom. The defendant left his wife

for dead in the apartment with Karam still locked in a bedroom. Karam literally had his parents' blood on his shirt. RP 04/09/2018 at 209-10.

Further, Aya's testimony was that she witnessed the defendant threatening to kill her mother and assaulting her. RP at 612, 617. The defendant indirectly said she was lying, "[E]verything that was said is completely incorrect and it is lies and it is unjust." RP 05/14/2018 at 22.

The defendant has cited no case which struck down a No-Contact Order while the defendant is incarcerated. Most reported cases do not link the length of the No-Contact Order with the length of incarceration. For example, in *Ancira*, 107 Wn. App., the defendant pleaded guilty to a Felony Violation of a Domestic Violence Order of Protection based on two prior convictions and was prohibited from contact of any kind with his children for five years, the maximum allowable for the crime. The *Ancira* Court did not hold that a No-Contact Order was inappropriate. *Id.* at 655. Rather, that court held the extreme prohibition for the full five years was not justified. *Id.* at 654. In *State v. Torres*, 198 Wn. App. 685, 393 P.3d 894 (2017), the trial court sentenced the defendant to six months incarceration but provided for a 5-year NCO prohibiting all contact with his son. The *Torres* court remanded, telling the trial court to consider whether an NCO is presently necessary and to consider less restrictive alternatives. *Id.* at 690. In *Rainey*, the defendant was sentenced to 68

months, but the NCO with his three-year-old daughter was for life. *In re Rainey*, 168 Wn.2d 367, 229 P.3d 686 (2010)

State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008) is helpful.

The defendant was found guilty of two sex offenses against his step-daughters. His wife, Lisa, the mother of the victims, testified against him at trial. The trial court imposed a lifetime NCO prohibiting the defendant from contacting Lisa. *Id.* at 32-33. The court in *Warren* upheld the NCO, noting that Lisa testified against him although he attempted to induce her not to cooperate with the prosecution, she is the mother of the victims, and there was no indication she objected to the NCO. *Id.* at 34.

The Department of Corrections (DOC) also has a policy to restrict or deny contact between an offender and “an individual or class of individuals that has been victimized by the offender. DOC 450.050. The Court in *In re Arseneau*, 98 Wn. App. 368, 989 P.2d 1197 (1999), upheld this policy against a First Amendment and Due Process objection, to prevent the defendant, in prison for incest against his step-daughter, from sending letters to his niece. The court found the government had an interest in protecting the class of persons involved in the crime and to promote the defendant’s rehabilitation. *Id.* at 377.

The defendant went to prison adamantly stating he was framed and that everyone who testified was a liar. RP 05/14/2018 at 22, 24, 26. For his

own rehabilitation, the defendant needs to accept the overwhelming evidence of his guilt and stop saying that the witnesses, including his daughter, were liars. Whether or not DOC has a policy about letter writing, it makes sense for the defendant's rehabilitation and the children's mental well-being that he not be allowed to contact them during his incarceration and for a short period of time after he is released.

Finally, the defendant both in this Court and at trial has not clearly articulated what he is requesting. At trial, the defense attorney suggested that the requested 50-year NCO be reduced. "I also would object to the . . . 50-year no-contact order . . . a 50-year NCO is, essentially, a lifetime order at this point," and requested some less restrictive alternative, "[W]hether the Court would allow any less restrictive alternatives, which I think . . . again . . . could be desired". RP 05/14/2018 at 16-17. On appeal, the only concrete suggestion is that the NCO permit contact if initiated by the child. Br. of Appellant at 48 n.24.

In large part the trial court accepted the defendant's request to reduce the length of the NCO. The trial court's linking the length of the NCO with the length of the incarceration was appropriate and was not an abuse of discretion.

V. CONCLUSION

The defendant had a fair trial. The defendant has two minor criticisms of the trial. The medical interpreter was allowed to testify via Skype. The trial court had a doctor's letter confirming that the interpreter needed to care full time for her ailing mother in Michigan. The interpreter added that the defendant cursed his wife, which he confirmed on his own direct testimony. The other criticism is a comment by the defendant's daughter expressing her opinion that he caused her mother's injuries. That testimony was improper, but the defendant did not object and should not be allowed to raise it on appeal. The comment was never mentioned again by either counsel and had no effect on the verdict.

The exceptional sentence was based on the jury verdict finding an aggravating factor—the defendant's minor child was present while he was stabbing his wife. The defendant is confusing the basis for the exceptional sentence with the court's reasoning for the exact sentence.

Finally, the defendant argues that the No-Contact Order with his children is too long. To the contrary, the trial court matched the length of the No-Contact Order with the length of incarceration. Once the defendant is released from custody, he will in short order have unrestricted contact with his children.

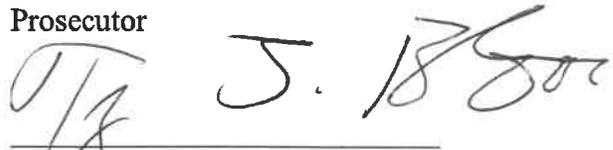
The defendant is correct about the legal financial obligations.

Otherwise, the conviction and sentence should be affirmed.

RESPECTFULLY SUBMITTED on July 2, 2019.

ANDY MILLER

Prosecutor

Handwritten signature of Terry J. Bloor in black ink, consisting of a stylized 'TJ' followed by 'J. Bloor'.

Terry J. Bloor, Deputy

Prosecuting Attorney

Bar No. 9044

OFC ID NO. 91004

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Jennifer Winkler
Nielsen, Broman & Koch, PLLC
1908 E Madison Street
Seattle, WA 98122

E-mail service by agreement
was made to the following
parties:
sloanej@nwattorney.net

Signed at Kennewick, Washington on July 2, 2019.


Demetra Murphy
Appellate Secretary

Appendix A

**Clerk's Papers 151-154 – Findings of Fact and Conclusions of Law Re:
Sentencing**

MA

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF BENTON

STATE OF WASHINGTON,	Plaintiff,
vs.	
ABDUL RAHMAN SWEIDAN, DOB: 03/1/1971	Defendant.

NO. 17-1-01004-2
FINDINGS OF FACT AND
CONCLUSIONS OF LAW RE:
SENTENCING
Appendix 2.4

THIS MATTER, having come duly and regularly before the Court for Sentencing on May 14, 2018, the defendant being personally present and represented by MICHAEL VANDERSYS and ERIC SCOTT, attorneys for defendant, and the State of Washington being represented by BRIAN V. HULTGRENN and EMILY K. SULLIVAN, Deputy Prosecuting Attorneys for Benton County, the Court having reviewed the case record to date and having presided over the jury trial, NOW, THEREFORE, makes the following:

FINDINGS OF FACT

1. On April 13, 2018, a jury found the defendant guilty of Attempted Murder in the Second Degree and Assault in the First Degree. Each count had a Domestic Violence Allegation, an Aggravating Circumstance Allegation of Aggravated Domestic Violence and a Deadly Weapon Enhancement. The jury found the defendant guilty of each of these allegations.
2. On May 14, 2018, the defendant was sentenced by Judge Burrowes for the charge of Attempted Murder in the Second Degree with a Domestic Violence Allegation, an Aggravating Circumstance Allegation of Aggravated Domestic Violence and a Deadly Weapon Enhancement.
3. The defendant did not have any relevant criminal history for the Court to consider when calculating his offender score. The standard range for

1 Attempted Murder in the Second Degree with a zero offender score is 92.25 –
2 165 months. The deadly weapon enhancement is an additional 24 months.
3 The total standard range including the enhancement is 116.25 – 189 months.
4 The maximum term sentence the defendant could receive is Life.

- 5 4. The facts presented at trial included evidence that the defendant came home
6 early from work. His wife, Dania Alhafeth, was present with their two-year-old
7 child. The defendant and Ms. Alhafeth had a brief conversation and the
8 defendant grabbed a knife from the kitchen and began stabbing Ms. Alhafeth
9 numerous times.
- 10 5. At trial Ms. Alhafeth testified that the defendant, while stabbing her, said, “Die,
11 Die and may God never bring you back.”
- 12 6. At trial Ms. Alhafeth testified that while the defendant was stabbing her, their
13 two-year-old child was attempting to get to her and was crying. Ms. Alhafeth
14 testified the defendant pushed their child back while he continued stabbing her.
- 15 7. Ms. Alhafeth testified that the defendant then locked their child in his bedroom.
16 The defendant stabbed Ms. Alhafeth again and eventually left her in the living
17 room and the child in the bedroom.
- 18 8. Ms. Alhafeth testified that after the defendant left, she could hear her two-year-
19 old child yelling, “Mama, Mama” as he was locked in the bedroom.
- 20 9. Kennewick Police Officers who responded to the scene testified that as they
21 arrived and discovered Ms. Alhafeth lying in blood on the living room floor that
22 they also heard a child crying in the bedroom and kicking the door to get out.
23 They testified they were able to unlock the door and found a young boy in the
24 bedroom crying with blood on his shirt.
- 25 10. The State asked that the Court sentence the defendant to 336 months. The
State explained to the Court that the additional 147 months was because the
act occurred within sight and sound of the young child.
11. Defense Counsel argued for 165 months.
12. The Court considered what punishment is proportionate to the criminal acts and
the criminal history of the defendant for purposes of sentencing within the

1 standard range. The Court also considered the seriousness level of the crime
2 and the testimony of the victim.

3 13. The Court considered the testimony of the victim and the impact to her and her
4 family based on the horrific and brutal attack.

5 14. The Court considered the number of stab wounds upon the victim, 23 to 30,
6 and found this demonstrates the level of violence initiated during the attack by
7 the defendant.

8 15. The Court found that there were no mitigating factors the defendant presented.
9 The Court also found the defendant did not show remorse or take any
10 responsibility for the attack.

11 16. The Court considered the facts presented at trial detailing the act being
12 committed within the sight and sound of the young child and the impact it would
13 make on this child for purposes of sentencing the defendant outside of the
14 standard range. The Court considered the amount of trauma the child
15 witnessed at such a young age which the Court found may have long lasting
16 effects. The Court finds that based on the conduct being within the sight and
17 sound of the child that a standard range sentence is not sufficient punishment
18 and not in the best interest of justice.

19 17. There are substantial and compelling reasons justifying an exceptional
20 sentence.

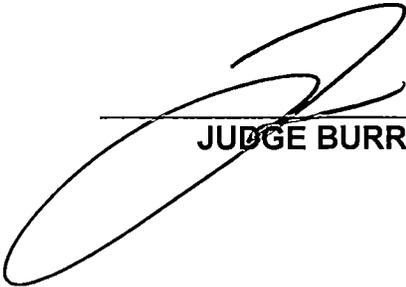
21 18. The Court sentenced the defendant to 165 months on the Attempted Murder in
22 the Second Degree charge with an additional 147 months for the Aggravating
23 Circumstance Allegation of Aggravated Domestic Violence. The Court also
24 sentenced the defendant to 24 months for the Deadly Weapon Enhancement.
25 The total sentence was 336 months. The defendant was also sentenced to 36
months of Community Custody once released from custody.

CONCLUSIONS OF LAW

1. Based on the above findings of fact, the jury's finding of guilt on Attempted Murder in the Second Degree with a Domestic Violence Allegation, an

1 Aggravated Circumstance Allegation of Aggravated Domestic Violence, a
2 Deadly Weapon Enhancement, the evidence presented at the hearing, and
3 testimony at trial, the Court concludes that there are substantial and
4 compelling reasons justifying an exceptional sentence of 147 months for a total
5 sentence of 336 months.

6 SIGNED this 22 day of JUNE, 2018.

7
8 
9
10 **JUDGE BURROWES**

11 Presented by:

11 Approved to Form:

12 
13 **BRIAN V. HULTGRENN, # 34277**
14 Prosecuting Attorney
15 OFC ID #91004

12 
13 **MICHAEL VANDERSYS, # 45186**
14 Defense Counsel

15 
16 **EMILY K. SULLIVAN, # 41061**
17 Prosecuting Attorney
18 OFC ID #91004

15 
16 **ERIC SCOTT, # 48913**
17 Defense Counsel

BENTON COUNTY PROSECUTOR'S OFFICE

July 02, 2019 - 4:04 PM

Transmittal Information

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Appellate Court Case Title: State of Washington v. Abdul Rahman Sweidan
Superior Court Case Number: 17-1-01004-2

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