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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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NO. 28495-6-III

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

State of Washington
Respondent

v.

Jose R. Veliz, Jr.
Appellant

APPEAL FROM FRANKLIN COUNTY SUPERIOR COURT

THE HONORABLE CARRIE RUNGE

=====
BRIEF OF APPELLANT
=====

**SALAZAR LAW OFFICE
Antonio Salazar
Attorney for Appellant**

**OFFICE AND POST OFFICE ADDRESS:
8917 Lake City Way N.E. #1
Seattle, Washington 98115
Telephone: (206) 624-6414**

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I. ASSIGNMENT OF ERROR

A. Assignment of Error.

1. The conviction for Custodial Interference in the First Degree must be reversed as it is not supported by evidence seen in the light most favorable to the State.

2. An Order for Protection, entered pursuant to RCW Chapter 26.50 cannot be the basis for a court ordered parenting plan, a necessary element in this instance, such that the conviction should be reverse.

3. The visitation schedule set forth in the Order of Protection, in this instance, cannot be enforced where the judge failed to check off he applicable visitation provisions.

4. The trial court committed reversible error in admitting evidence of another name used by the defendant, and by not engaging in the required balancing of interests on the record, and in failing to give a limiting instruction.

B. Issues Pertaining to Assignment of Error.

1. Whether the evidence in this case, viewed in light most favorable to the State, supports the conviction for Custodial Interference in the First Degree?

2. Whether, as a general rule, for purposes of the Crime of Custodial Interference in the First Degree, RCW 9A.40.060(2)(a), an Order for Protection, entered pursuant to RCW Chapter 26.50, can suffice to establish the necessary element of the existence of a "court ordered parenting plan"?

3. Whether the Rule of Lenity should be applied in this instance where the term "court ordered parenting plan" is subject to multiple reasonable interpretations?

4. Whether the visitation provisions of the Order for Protection can be enforced where the judge failed to check off those paragraphs but did check off on other parts of the order?

5. Whether the trial court committed reversible error by admitted evidence of the use of another name by the defendant and where it failed to conduct balancing of interests on the record, and failed to give a limiting instruction?

II. STATEMENT OF THE CASE

A. Statement of Proceedings

The defendant in this case, Jose R. Veliz, Jr. (hereinafter "Mr. Veliz") was charged by Information dated August 22, 2008, with the crime of Custodial Interference in the First Degree, in violation of RCW 9A.40.060(2)(a). (CP 56-57) It was alleged therein that during the time intervening between the 16th day of August, 2008, and August 17, 2008, then and there, being the parent of and with intent to deny access to Lorena DeVeliz, the other parent having the lawful right to time with N.V. pursuant to a court order parenting plan, did retain N.V., a child under the age of eighteen years of age, and intended to hold N.V. permanently or for a protracted period of time. (CP 56-57)

On August 18, 2009, the defendant filed a pretrial Knapstad motion to dismiss, alleging that the discovery could not support a verdict favorable to the State, because the state would be unable to establish the necessary element of a court ordered parenting plan. (CP 39-43) This motion was denied by the court. (RP 10-12) The court found that an order for protection could qualify as a court ordered parenting plan. (RP 11)

A jury trial was held, resulting in a guilty verdict on August 27, 2009. (CP 5)

After sentencing, a timely notice of appeal was filed.

B. Statement of Facts.

The testimony and evidence presented at trial was as follow:

Karla Carmac

Ms. Carmac stated that she was an attorney with the Northwest Justice Project, a legal aid office. (RP 25) She indicated that she consulted with Lorena Veliz, who presented her with a

protection order. (RP 25-26, Exhibit 1)¹ The protection order had been filled out by a Judge Swisher.

Over continuing objection, the witness testified that the order allowed visitation every weekend of Nicole Veliz, a child of Lorena Veliz and the defendant, Jose Veliz. (RP 27-29) She further testified that Mr. Veliz had visitation with Nicole from Saturday at 10:00 am until Sunday at 5 pm, every weekend. (RP 30) The order was dated May 5, 2008. (RP 30-31) The attorney was not present when Exhibit 1 was entered. (RP 37) She had not reviewed a transcript of the hearing of May 5, 2008. (RP 37)

The Order for Protection, Exhibit 1, was a mandatory form pursuant to RCW 26.50.060. (RP 37) The court starts with a blank which is then filled in by the parties, the attorneys or the judge and is then signed by the court. (RP 37-38) The form has boxes that can be checked off as may be applicable.

¹ Because of the importance of this exhibit to this appeal, it is attached hereto.

Exhibit 1, at page 2, had boxes number 1.-8., with the first 7 boxes being checked off, but box 8. was not checked off. On page 3 of the order, none of the boxes were checked off. (RP 39) On page 3 of the protection order, item number 15, which pertained to visitation, was not checked off. (RP 39)

Items 12, 13, 14 and 15 dealt with custody and visitation and none of those were checked off. (RP 40, Exhibit 1) The witness stated that Exhibit 1 was entered within the scope of RCW Chapter 26.50. (RP 40)

The witness further agreed that RCW Chapter 26.09 deals with dissolutions. (RP 41) She further agreed that Mr. Veliz initiated a dissolution action on May 14, 2009, 9. days after the entry of Exhibit 1. (RP 41) Because of Mr. Veliz initiating the dissolution action, that is why Lorena Veliz came to seek her legal advice. (RP 41)

Ms. Carmac filed a Notice of Appearance in the dissolution action in June, 2008. (RP 41) Exhibit 2, the Temporary Parenting Plan, was the

first written order made in the dissolution action. (RP 41)

Exhibit 2 was a Temporary Parenting Plan that was entered by Judge Yule on August 25, 2008. (RP 31) The witness stated that RCW Chapter 26.09 was very specific in terms of what the requirements were for temporary parenting plans and permanent parenting plans. (RP 42) In the Veliz matter a permanent parenting plan was entered in January, 2009. (RP 42)

Exhibits 1 and 2 were admitted without objection. (RP 36)

Lorena Veliz

Lorena Veliz stated that she and Mr. Veliz had a child together, Nicole Veliz, who was now 5 years old. (RP 45)

She stated that on May 5, 2008, she obtained a protection order and that Mr. Veliz was present. (RP 45)

Mr. Veliz would pick up Nicole and have her with him on Saturdays and Sundays. (RP 46)

On August 17th or 18, 2008, which was a weekend, Mr. Veliz picked up Nicole but did not bring her back. (RP 46) She stated that he was

supposed to bring her back on Sunday, August 18, 2008, at 5 p.m. (RP 46-47) She based this belief on her interpretation of the order of protection of May, 2008. (RP 54) She waited for one hour and then called the police. (RP 47)

She did not see Nicole again until approximately December 21, 2008. (RP 47) She met her at the airport in Pasco. (RP 47)

She indicated that she was together with Mr. Veliz for about seven years although they were only married for slightly over one year. (RP 53)

Michael Wright

Mr. Wright testified that he was a Pasco police officer and that on Monday, August 18, 2008, he had contact with Lorena Veliz regarding her daughter, Nicole. (RP 60-62)

Jose Veliz

The defendant/appellant, Jose Veliz, testified in his own defense. He stated that he was 49 years old and had lived in the Pasco area all of his life. (RP 71-72) He stated that Nicole Veliz was his daughter and that he had three other children that he saw all the time. (RP 72)

Mr. Veliz stated that he was previously married to Lorena Veliz and that they started being together since May, 2001. (RP 72)

He stated that he and Ms. Veliz separated on April 16, 2008. (RP 74) He was present in court when Exhibit 1 was entered on May 5, 2008. (RP 74-75) Exhibit 1 is a four page form with some of the information being filled out before the hearing. (RP 75) He stated that on page 3, item 15, regarding visitation, that this was filled out before the hearing, but that Judge Swisher, when he wrote on, and then signed the form, did not check off item number 15, regarding visitation. (RP 76) He and his wife and the judge then signed the form. (RP 76)

During the time period from the April 16, 2008, separation, until the May 5, 2008, hearing he continued to see Nicole regularly. After the May 5, 2008, hearing, he understood the order to prevent him from bothering his wife but he did not interpret it as a visitation order. (RP 77)

He filed for a dissolution of his marriage with Lorena Veliz 9 days after the May 5, 2008, hearing. (RP 77) He retained an attorney, Pat

Chvatal, for that purpose. (RP 78) He filed for dissolution and continued seeing his daughter, Nicole. (RP 78) He worked during the week and would see his daughter on weekends. (RP 78)

He had his daughter on the weekend of Saturday, August 17, 2008, and Sunday, August 18, 2008. (RP 78) As of that date, no temporary parenting plan had been entered pursuant to the dissolution proceedings. (RP 78) The first temporary parenting plan was entered on August 25, 2008. (RP 79, Exhibit 2)

Thus, he left with his daughter and they went to Los Angeles. (RP 79) He then decided to take Nicole to Mexico to see her grandparents. (RP 79) Mr. Veliz also wanted to meet his wife's family as he knew little about them and since he was going to get divorced, he thought that his daughter might be having more contact with his wife's family. (RP 79) Mr. Veliz had never met his wife's family. (RP 80)

Mr. Veliz had obtained the addresses of where his wife's family lived at in Colima and Guadalajara, Mexico. (RP 80) He and Nicole went to Colima, Mexico where he met his wife's

brother, Norberto, as well as some other brothers. (RP 80-81) He and Nicole met her grandparents. (RP 80) They then traveled to Guadalajara, Mexico and met two sisters of his wife. (RP 80) At each place, he introduced his daughter to her relatives. (RP 81)

He and his daughter also spent some time in Manzanillo, Mexico. (RP 81) When he went to Mexico, he did not know how long he would be there. (RP 81) They traveled by bus within Mexico. (RP 82)

When they were done visiting, they then took a bus to Tijuana, Mexico. (RP 82) On December 15, 2008, he and Nicole presented themselves at the point of entry into the United States at San Ysidro, California. (RP 83)

Prior to that date, he had found out that there was a court order for his arrest. (RP 90) He was arrested on his way back to return Nicole to her mother. (RP 91) He told the immigration authorities his name and told them that he thought that he had a warrant for his arrest. (RP 93) He gave the immigration officials his Washington state driver's license and social

security card under the name of Joe Veliz, as well as his birth certificate. (RP 100) He also provided his daughter's birth certificate. (RP 100)

Over objection, the State was allowed to present evidence that the appellant, at the time of his arrest, had additional identification with the name of Joel Rodriguez. (RP 97) This was an identification that a friend of his got for him to use in Mexico. (RP 97) Rodriguez was his mother's surname. (RP 97) Over defense objection, Exhibit 3, the identification in the name of Joel Rodriguez, was admitted. (RP 98)

Exhibit 1 (CP 35-38) where it indicated that he could not take his child out of the State, was not checked off by the court. Neither was the visitation schedule. (RP 99, Exhibit 1) He did not believe that he was prohibited from taking his daughter out of the State of Washington. (RP 99)

Mr. Veliz stated that it was never his intent to deny Nicole's mother from ever seeing Nicole again. (RP 83) It was never his intent to deny the mother access to Nicole for a protracted

period of time. (RP 83) He and Nicole had a very close relationship and he would always spend a lot of time with her. (RP 83) Previously, he had Nicole for four months all by himself when his wife went to Mexico. (RP 84)

III. ARGUMENT

- A. The conviction in this case must be reversed based on multiple legal reasons.
 - 1. The conviction must be reversed as the evidence, viewed in the light most favorable to the State, does not support a conviction beyond a reasonable doubt as Mr. Veliz was authorized to have visitation with his daughter during the time period charged.

Mr. Veliz was charged by information with violating RCW 9A.40.060(2)(a) as follows:

That...Jose Veliz...during the time intervening between the 16th day of August, 2008, and the 17th day of August, 2008, then and there, being the parent of and with intent to deny access from Lorena DeVeliz, the other parent having the lawful right to time with N.V. pursuant to a court ordered parenting plan, did retain N.V., a child under eighteen years of age, and intended to hold N.V. permanently or for a protracted period. (RP 56)

Because of how the information is worded, it means that the defendant had to have violated the statute by conduct occurring between the dates indicated, although the dates are consecutive to each other. A literal reading would require one to conclude that the time period was midnight of Saturday, August 17, which would be the start of Sunday, August 17, 2008. It is critical to this issue that the court keep in mind that the time period charged was a Saturday/Sunday weekend period.

The State, in prosecuting this case, based its position upon the Order of Protection, entered on May 5, 2008, as constituting the "court ordered parenting plan", which it maintained was violated, thus leading to the instant charge. The defense maintained that the Order of Protection was not a "court order parenting plan" for purposes of the statute at issue. However, even that document, consistent with the State witnesses, gave the defendant, Mr.

Veliz, the right to have visitation with his daughter that weekend and every weekend. The document, assuming that it was a court ordered parenting plan, and assuming that its visitation provisions, which were not checked off by the court, read as follows:

The respondent (Jose Veliz) will be allowed visitation as follows: Weekends Saturdays & Sundays or in accordance with a court ordered parenting plan. Sat & Sunday Sat from 10 AM to Sunday at 5 pm.

(CP 37)

The document itself indicates that it is not a court ordered parenting plan, as it references "or in accordance with a court ordered parenting plan". However, assuming that it is to be considered a "court ordered parenting plan" for purposes of the statute at issue, and assuming that its visitation provisions, although not checked off by the court, were enforceable, it nevertheless gave Mr. Veliz the right to visitation with his daughter, Nicole, during the

time period intervening between Saturday, August 16, 2008, and Sunday, August 17, 2008.

In that time period, all of the State witnesses testified, and assuming, *arguendo*, the State's position that the May, 2008, Order of Protection meets the statute's requirement of a "court ordered parenting plan", that Mr. Veliz was authorized to visit with his daughter, Nicole.

For instance, Karla Carmac, the mother's attorney, testified that Mr. Veliz, in her opinion, was authorized to visit with his daughter, Nicole, from Saturday, August 16, 2008, until Sunday, August 17, 2008, at 5 p.m. (RP 30) The mother, Lorena Veliz, testified similarly. (RP 46-47) Officer Wright testified that the following Monday was August 18, 2008. (RP 60-62)

Thus, the information charges Mr. Veliz with committing a crime for the time period during which all of the State's evidence shows that he was authorized to have his daughter, Nicole.

This same time period was set forth in the to convict instruction No. 7 (CP 16), which also set forth the same time period between the 16th of August, 2008, and the 17th of August, 2008. However, as indicated, all of the State's witnesses testified that Mr. Veliz was authorized to have his daughter and to visit with her on that weekend of August 16 and August 17, 2008. Thus, even assuming, *arguendo*, that the May, 2008, order of protection satisfied the statute's requirement of a predicate court ordered parenting plan, and assuming that the order of protection's visitation provisions were enforceable, even though not checked off by the court, the order authorized Mr. Veliz to have his daughter on that weekend for which he was charged in the Information, as per the testimony of the mother, the mother's attorney, and all of the police officers that testified.

On this basis, the conviction must be reversed as it is not supported by the evidence, seen in the light most favorable to the State.

It is incredulous that the information in this case was never amended to include a greater time frame than the weekend in which everyone agreed that Mr. Veliz had a right to have visitation with his daughter. The information could have been amended, for instance, to include the time frame up until December, 2008, when Mr. Veliz returned to the United States with his daughter, but it was never done. The state, fatally it is submitted, proceeded forward on a defective information which, in light of the State's own evidence, cannot support a conviction.

The standard of review, when the sufficiency of the evidence is challenged, is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime charged

beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); State v. Rempel, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990); State v. Israel, 113 Wn.App. 243, 54 P.3d 1218 (2002).

In this instance, in considering the information, which alleged that Mr. Veliz committed the crime between Saturday, August 16, 2008, and Sunday, August 17, 2008, and assuming that the Order of Protection can be "a court ordered parenting plan" for purposes of the predicate element, and considering that the document authorized Mr. Veliz to have visitation with his daughter during that time period, the conviction is not supported by the evidence as no rational trier of fact could have found the necessary elements of the crime charged beyond a reasonable doubt.²

² It is submitted that the jury clearly ignored the evidence, which dictated an acquittal, due, in part to the court's erroneous admission of evidence that Mr. Veliz used

2. An order for protection cannot constitute a necessary element for conviction for RCW 9A.40.060 (2) (a).

In order to violate the statute, as charged, the State had to establish, beyond a reasonable doubt, that the defendant parent, Mr. Veliz, denied the other parent, the mother, lawful time with the child pursuant to a court ordered parenting plan.

In this instance, the time period charged in the information is the time between August 16, 2008, and August 17, 2008. During that time period, there was no court ordered parenting plan. The first court ordered parenting plan was that entered on August 25, 2008 (Exhibit 2, CP 25-34) It was signed by the court, the attorney for Mr. Veliz and the attorney for Ms. Veliz, Karla Carmac. Prior to that time, there was no court ordered parenting plan and thus a necessary predicate element, i.e, a court order parenting

another name at some time that he was in Mexico. The jury's verdict was clearly not in

plan, was nonexistent during the time period charged in the information as it was not entered until one week after the end of the charging time period.

Thus, as a matter of law, this court, consistent with its obligations to properly interpret and enforce the law, should rule that, in this instance, the conviction must be set aside, vacated, for the nonexistence of a court ordered parenting plan during the time period charged. This was a necessary element in the statute and in the jury instructions presented to the jury. The absence of this element is fatal to the proper prosecution of this charge and Mr. Veliz' conviction must be set aside.

This issue was presented to the trial court, as indicated herein, in the form of a pretrial motion to dismiss, but the court reasoned that the May 5, 2008, Order of Protection, filed pursuant to the provisions of RCW Chapter 26.50,

accordance with the evidence.

sufficed to meet the statutory requirement of a "court ordered parenting plan", which plans are entered consistent with the requirements of RCW Chapter 26.09. It is submitted that this was a patently erroneous interpretation of a clear legal requirement of a predicate court ordered parenting plan, pursuant to the provisions of RCW Chapter 26.09. This trial error must be corrected by this appellate court which should rule, that, as a matter of law, an Order for Protection, entered pursuant to RCW Chapter 26.50, cannot suffice to meet the legal requirements of a "court ordered parenting plan", a predicate requirement to sustain a conviction pursuant to RCW 9A.40.060(2)(a).

The Order for Protection at issue is set forth in the Clerk's Papers at 35-38. It was not entered as part of a dissolution proceeding, and, as will be more fully discussed herein, was defective in that the provisions that addressed

visitation were not checked off by the court. (CP 37)

Even the order itself, at paragraph 15., page 3 of the Order for Protection, which was not checked off by the court, and upon which the State relied upon for this prosecution, the order itself indicates that it is not a court ordered parenting plan, as it states:

The respondent will be allowed visitation as follows: or in accordance with a court ordered parenting plan...

(CP 37)

The court is being requested herein to rule that, as a matter of law, an Order of Protection, and its provisions, entered pursuant to RCW Chapter 26.50, cannot form the predicate "court ordered parenting plan" for purposes of violating the statute at issue.

Karla Carmac, the attorney for Ms. Veliz, acknowledged in her testimony that in Washington state, the requirements of a court ordered parenting plan are very specific and are set

forth in a different statute, RCW Chapter 26.09. She also testified that in this instance the court ordered parenting plan was not entered until after the time period charged in the information. What could possibly be clearer? This court should reverse the patently improper ruling of the trial court in the pretrial motion to dismiss and the verdict of the jury which was not supported by any evidence in this record.

Chapter 26.09 addresses dissolution proceedings. RCW 26.09.194, which addresses filing a motion for, and obtaining a temporary parenting plan, sets forth a multitude of requirements that shall be accompanied by affidavit or declaration. Also, this same statute sets forth the requirements of a proper temporary parenting plan including:

- a schedule for the child's time with each parent when appropriate
- designation of a temporary residence for the child
- allocation of decision making authority
- provisions for temporary support of the child
- restraining orders, if application.

Other provisions of RCW Chapter 26.09 provide for the entry of a permanent parenting plan, which in this instance was not done until January, 2009.

In Washington state, the term "court ordered parenting plan" is not a nebulous concept. It is a term of great definition and the cases interpreting the court ordered parenting plan have recognized that specificity, such that there no legal support to argue that an Order of Protection can be considered to be a "court ordered parenting plan" for purposes of the necessary predicate element in this instance.

For instance, in Davisson v. Davisson, 131 Wn.App. 220, 126 P.3d 76 (2006), this court dealt at length on issues pertaining to the interpretation of a court ordered parenting plan entered pursuant to RCW Chapter 26.09, citing various provisions of RCW Chapter 26.09.

Similarly, in In re Custody of Halls, 126 Wn.App. 599, 109 P.3d 15 (2005), the court of

appeals therein reversed modification actions taken by the trial court, interpreting parenting plan modifications pursuant to RCW Chapter 26.09, and ruled that the trial court had failed to follow the procedures of RCW 26.09.260. This is another example to show that "court ordered parenting plans" is a highly specific court order and it is not to be confused with an Order of Protection entered pursuant to RCW Chapter 26.50.

In this instance, Mr. Veliz, to be found guilty, had to be found guilty of violating a court ordered parenting plan entered pursuant to the provisions of RCW Chapter 26.09. Since such a plan was not entered in this instance until August 25, 2008, until after the charging period, (CP 25-34) his conviction cannot stand.

Thus, during the time period charged in the information, there was no temporary or permanent parenting plan, within the scope of RCW Chapter 26.09.

Although, admittedly, the Mandatory form Order of Protection, entered in this instance pursuant to RCW 26.50.060, does have an area, at page 3, item #15, which addresses visitation, it is the appellant's position that such an Order of Protection, even if it had been properly filled out, does not rise to the "court ordered parenting plan" which is predicate element for violation of RCW 9A.40.060(2)(a).

Herein, the State relied upon the Order of Protection, Exhibit 1, which was entered on May 5, 2008 (Exhibit 1, CP 35-38), as the predicate "court ordered parenting plan" to support its charge against Mr. Veliz. The Order of Protection is not a court ordered parenting plan, as set forth in Chapter 26.09, and, as a matter of law, should be found not to constitute a court ordered parenting plan, such that the conviction of Mr. Veliz should be vacated.

RCW 26.50.060, which is the statutory basis for the Order of Protection, and which is noted

on the form itself, sets forth, at RCW

26.50.060(1) (d), as follows:

...parenting plans as specified in chapter 26.09 shall not be required under this chapter.

Thus, the statute under which the Order of Protection was issued itself draws a distinction between any order under its provisions and a court ordered parenting plan entered pursuant to the provisions of RCW Chapter 26.09. This is another reason why the conviction of Mr. Veliz should be vacated and the action dismissed.

Moreso, even though RCW 26.50.060 allows for the entry by the court of residential provisions with regard to minor children, it also makes a distinction between such action and parenting plans as specified in Chapter 26.09, which it states "shall not be required under this chapter."

In situations such as this, where the statute at issue does not define "court ordered parenting plan" and the issue is subject to

varying interpretations, the court should consider application of the "rule of lenity" as was recently done by the Washington Supreme Court in City of Seattle v. Winebrenner, 167 Wn.2d 451, 219 P.3d 686 (2009). Therein, the court concluded that RCW 46.61.5055 was subject to more than one reasonable interpretation and that therefore the statute was ambiguous. It then stated:

If, after applying rules of statutory construction, we conclude that a status is ambiguous "the rule of lenity requires us to interpret the statute in favor of the defendant absent legislative intent to the contrary." (citations omitted)

Similarly, herein, alternatively, one could argue that the statute, which is silent as to what is a court ordered parenting plan, is ambiguous as it is subject to more than one reasonable interpretation. Thus, application of the rule of lenity requires that the interpretation be in favor of the defendant in the absence of a legislative intent to the contrary.

There are no reported cases that counsel has found which address this specific issue in the context of the statute in question. Thus, it is submitted that this is an issue of first impression.

Mr. Veliz' conviction must be reversed on this basis as well.

3. In this instance, the improperly filled out Order of Protection cannot suffice to support a conviction.

Even assuming, *arguendo*, that an Order of Protection could suffice to constitute the necessary predicate element of a "court ordered parenting plan", in this instance, the court must reverse the conviction because the court that entered the Order of Protection, on May 5, 2008, failed to check off that section of the mandatory form which pertains to visitation.

Exhibit 1 in the trial court, the Order of Protection, (CP 35-38) is a four page form. As is common in these cases, and as was testified to by Mr. Veliz, who was present on May 5, 2008,

when the order was entered, some of the form was filled out prior to the hearing before Judge Swisher. No transcript was provided by the State as to the hearing of May 5, 2008, and Judge Swisher, who heard earlier proceedings in this matter and who Mr. Veliz requested recluse himself from this matter, which Judge Swisher refused, was not called as a witness. Thus, we are left with the four corners of this Order of Protection, as the ostensible basis to support the criminal conviction of Jose Veliz, as the State advanced, successfully before the trial court and before the jury, that this document was a "court ordered parenting plan".

The order contains what is clearly handwriting by different persons. Page one of the order (CP 35) identifies the parties and the three children of Lorena De Veliz, only one of which, Nicole, is the child of Mr. Veliz. Various boxes on page one are checked off, some with an "x" and some with a "/".

Page 2 of the Order of Protection (CP 36) has paragraphs or items numbered 1.-8. Each of the seven items which contain information on Page 2 of the Order for Protection have a "/", indicating that those provisions are being checked off as applicable.

By contrast, Page 3 of the Order of Protection (CP 37) has paragraphs or items numbered 9.-15. On Page 3, none of the items are checked off, either with an "x" or with a "/". This would indicate that the judge, who checked off and thus entered the restraining provisions on page 2, made no provisions on page 3 as to visitation, even though someone had at some point filled in visitation provisions at paragraph 15 of the Order for Protection. There are initials to the right of Paragraph 15. but one should not be left to wonder whose initials they are and what is the significance of having initials on the right side of paragraph 15., which was not checked off in any way, either with an "x" or

with a "/". The only proper interpretation of this mandatory form is that by failure to check off Paragraph 15., that the court made no provisions for visitation, thus there was no "court ordered parenting plan" that could have been violated by Mr. Veliz as of August 16, 2008, and August 17, 2008.

Page 4 of the Order for Protection (CP 38) again has various items checked off and it is signed by a Judge/Commissioner and by the mother and Mr. Veliz. Again, one has to assume that by checking off various sections or paragraphs of the form, that the Judge meant those sections or paragraphs to be enforceable. Similarly, in the absence of a check or mark, one must assume that the judge or commissioner meant that those sections or paragraphs were not meant to be applicable or enforceable. Again, one should not be left to wonder as to the provisions of an ostensible predicate order which was the sole

basis for the "court ordered parenting plan" for the felony conviction of Mr. Veliz.

Mr. Veliz should not be convicted of a felony when the supporting document for his conviction, the Order of Protection, is not an appropriate necessary predicate court ordered parenting plan and where, secondly, it makes no provision for visitation, thus there were no visitation provisions to violate. The fact that Mr. and Mrs. Veliz had established a certain visitation pattern is irrelevant as the statute, Custodial Interference, as charged, required the violation of an underlying court ordered parenting plan.

For this additional basis, the court should order the reversal of this conviction. It simply is not supported by the evidence.

4. The trial court committed reversible error in allowing, over objection, testimony as to another name used by the defendant.

In this case, at trial, there was no issue as to the identity of Mr. Jose Veliz, a lifelong

resident of the Pasco, Washington area. At no time did this defendant maintain that he was not the person named in the information. The information set forth an extremely discrete charging period, i.e, the time intervening between August 16, 2008, and August 17, 2008.

In this instance, Mr. Veliz testified in his defense. He testified, for instance, that he took his daughter to California, then to Mexico to meet his wife's relatives, and that when he was done with his visitation, he returned to the United States. Prior to his arrival at the border, he was informed that there was a warrant for his arrest. He also testified that on August 16, 2008 and August 17, 2008, there was no parenting plan then in effect. (RP 79)

On cross-examination, Mr. Veliz then testified that because he thought that there was an order for his arrest, that he presented himself to the border, told the authorities that he thought that there was a warrant for his

arrest, then presented his Washington state identification, his social security card, his birth certificate and that of his daughter, Nicole. (RP 93). The officers checked and determined that there was a warrant for him. (RP 93)

Mr. Veliz was then asked as follows:

Q: Did you use a different name when you came across the border, then?

A: I didn't use a different name to come across the border. I used Joe Veliz, Junior. (RP 94)

At that point, defense counsel called a bench conference outside the presence of the jury and moved that the court exclude any reference or testimony to an additional document that the defendant had with him when he was arrested, which document was in a different name. (RP 94-95) The defense moved to exclude any such testimony on the basis that it was irrelevant under Evidence Rule 401 and prejudicial under Evidence Rule 403. (RP 94-95)

The state countered as follows:

Your honor, the State's purpose is to show that this individual is not telling the truth and hasn't been telling the truth since he took the stand.

I think that this is relevant to the fact that he took flight with his daughter for four months and that he was using an alias when he was returning to the United States.

(RP 95)

The defense countered as follows:

Your Honor, he can't say he was using an alias if he doesn't have the witness. He has no proof of that...He was carrying identification in another name, but it doesn't say that he said that's my name... He presented a Washington state identification card, which is under Joe Veliz. That's what he presented at the border.

(RP 95)

The court ruled as follows:

I will overrule the objection. This is cross-examination. He can ask the questions of your client. The court finds that it is probative regarding your client's intent, as well as potential evidence of flight, so it is appropriate to ask your client that on the stand. I've overruled your objection... Goes to specific element of the crime that the State has to prove, so the court finds that it's relevant. Again, I would overrule your objection.

(RP 95-96)

Exhibit 3 was then introduced which contained a Washington state identification card under the name of Joe Veliz and also contained a Mexican identification document under the name of Joel Rodriguez. (RP 96-97) Mr. Veliz was then questioned at length as to his use of the other name and the use of the other identification document, which he stated that he used in Mexico as he was told that he should have some Mexican documents to travel within Mexico.

Exhibit 3 was admitted over defense objection. (RP 98)

It is submitted the trial court's ruling in this regard was erroneous, prejudicial, in violation of applicable law, and denied Mr. Veliz of his constitutional right to a fair trial.

First of all, this evidence was not relevant to any element of the crime charged. The court stated that it "goes to specific element of the crime that the State has to prove", yet the court failed to identify that element and failed to

conduct any analysis of relevancy versus any prejudicial effect, on the record, as required by applicable authority.

The elements of the crime are set forth in the to convict instruction. (CP 16)

This evidence was not relevant to the time period charged, that being the time period between August 16, 2008, and August 17, 2008.

This evidence was not relevant to the element of the other parent having the lawful right to time with the child pursuant to a court ordered parenting plan.

This evidence was not relevant to any element in the to convict instruction. (CP 16)

Even, if relevant, in such situations the court had clear obligations which it failed to meet. For instance, the defense argued, in making its objection, that the evidence was prejudicial and cited Evidence Rule 403.

In State v. Russell, __ Wn.App. (Division II, 2/9/2010, the court of appeals reversed a first

degree child rape conviction in ruling that the court abused its discretion in admitting ER 404(b) evidence without giving the jury a limiting instruction. In part, it stated as follows:

Russell argues that he was denied a fair trial by the trial court's admission of evidence of alleged sexual misconduct by Russell against CR before and after the acts in Washington for which he was charged. We agree...we review the trial court's decision to admit evidence under ER 404(b) for an abuse of discretion. State v. Foxhoven, 161 Wn.2d 168, 163 P.3d 786 (2007). Discretion is abused if it is exercise on untenable grounds or for untenable reasons...Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion.

(citations omitted)

ER 404(b) prohibits a court from admitting evidence of other crimes, wrongs, or acts... to prove the character of a person in order to show action in conformity therewith. This prohibition encompasses not only prior bad acts and unpopular behavior but any evidence offered to show the character of a person to prove the person acted in conformity with that character at the time of a crime. Foxhoven, 161 Wn.2d at 175... ER 404(b) is not designed to deprive the State of relevant evidence necessary to establish an essential element of its case, but rather to prevent the State from suggesting that a defendant is guilty

because he or she is a criminal-type person who would be likely to commit the crime charged. Foxhoven, 161 Wn.2d at 175... Before admitting ER 404(b) evidence, a trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect... This analysis must be conducted on the record... Moreover, if the evidence is admitted, a limiting instruction must be given to the jury... The trial court gave no such instruction here.

In this instance, the state stated, in arguing for the admissibility of what was clearly "bad character" evidence that it would show that the defendant, Mr. Veliz, was lying and that he had been lying since he took the stand. The State also argued that it was relevant to show flight and to show that he was using an alias when he was returning to the United States. (RP 95)

It is submitted, first of all, that the evidence was not relevant to any issue before the court, either in terms of the time frame charged, or any other element. Secondly, the evidence was

highly prejudicial and its admission, over continued objection, denied Mr. Veliz of a fair trial. In State v. Russell, *supra*, the court further stated as follows:

ER 401 defines relevant evidence as evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. State v. Stenson, 132 Wn.2d 668, 701-02, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Relevant evidence is admissible, ER 402, but may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403... A trial court has wide discretion in balancing the probative value of evidence against its potentially prejudicial impact...

Furthermore, the court noted the necessity, in such instances, of giving a limiting instruction, which was not done in this instance:

We review the trial court's balancing of probative value against prejudicial effect for abuse of discretion. State v. Sexsmith, 138 Wn.App. 497, 506, 157 P.3d 901 (2007), *review denied*, 163 Wn.2d 1014 (2008)...

In State v. Russell, even though the court felt that the trial court committed no error in its decision to admit the challenged evidence, it

stated that it committed reversible error by failing to give a limiting instruction.

we apply the Supreme Court's recent articulation of the ER 404(b) evidence admission requirements in Foxhoven, which states that where such evidence is admitted, a limiting instruction must be given to the jury. Foxhoven, 161 Wn.2d at 175...the cases for which this rule is derived place the burden of giving such an instruction on the trial court...the trial court should explain the purpose of the evidence and give a cautionary instruction to consider it for no other purpose. (citations omitted)...We hold that given the facts of this case the trial court abused its discretion in failing to give a limiting instruction...Accordingly, we reverse Russell's conviction...

In this instance, the trial court failed to adhere to its obligations to give Mr. Veliz a fair trial in numerous instances.

First, the court erred when it ruled that the challenged testimony was relevant, as it was not relevant to any issue on the sole charge before the jury. As the State argued, its intended purpose was to present Mr. Veliz as a "liar", which is classic 404(b) material where extreme care and caution must be exercised, which was not done in this instance.

Clearly, the challenged evidence was prejudicial, pursuant to Evidence Rule 403, and the court was required to engage in balancing of interests, on the record, including identifying any relevancy, how the evidence was relevant, identifying its potentially prejudicial impact, and then balancing the competing interests on the record. It failed to do any of these acts. The trial court failed to identify, in the first instance, how the evidence was relevant and it failed to consider, if relevant, if its probative value was outweighed by any prejudicial effect, which was patently clear as any juror will be mistrustful of a person who uses a name other than his own. The court totally failed to meet its obligations in this regard.

Also, even if the court made the proper decision to admit this evidence, which it did not, it is nevertheless fatal that it failed to give a limiting instruction as required by applicable authority. State v. Foxhoven, 161

Wn.2d 168, 163 P.3d 786 (2007); State v. Russell,
__Wn.App. (Division II, 2/9/2010). In the latter
case, even though the court felt that the court
did not err in admitting the evidence, it
nevertheless reversed the conviction for failure
to give the required limiting instruction,
placing such a burden on the trial court. This
should be done also in this instance, although
this court should rule that such evidence was not
relevant to any issue and should not have been
admitted.

The jury in this instance was led to believe
that perhaps Mr. Veliz appeared at the border and
stated that he was someone else. The only person
who could have stated that would have been the
officer at the border to whom Mr. Veliz presented
himself with his daughter. No such witness was
called. But the jury was left to wonder if
perhaps Mr. Veliz, by having an alias, could have
done that. This evidence was not relevant, was
highly prejudicial and should have been excluded.

Even if no error was made in the admission of such evidence, the failure of the trial court to give a limiting instruction requires a reversal of the conviction.

Also, it cannot be said that this was a case of the defendant opening the door. All of this was brought up in the course of cross examination.

For this additional reason, the conviction of Jose Veliz should be reversed.

IV. CONCLUSION

For the reasons set forth herein, and in the record on appeal, it is respectfully requested that the court of appeals reverse the conviction of Jose Veliz for Custodial Interference in the First Degree.

Dated this 31st day of March, 2010.



Antonio Salazar, WSBA #6273
Salazar Law Office
Attorney for appellant,
JOE VELIZ, JR.

18-54386

FILED
FRANKLIN CO CLERK

2009 MAY -5 P 3:34

MICHAEL J. KILLIAN

BY *[Signature]* DEPUTY

Court of Washington

for

Lorina Velasco De Veliz 9-19-77
Petitioner (First, Middle, Last Name) DOB

v. Jose DK Veliz 10-19-1960
Respondent (First, Middle, Last Name) DOB

Order for Protection

No. 08 2 50477-2

Court Address _____

Telephone Number: () _____

(Clerk's Action Required) (ORPRT)

Names of Minors: No Minors Involved

First	Middle	Last	Age
Arianna	Montano		10
Fidel	Montano		8
Nicole	Veliz		4

Respondent Identifiers

Sex	Race	Hair
M	Hispanic	Gray
Height	Weight	Eyes
5'9	220	Light Brown

Respondent's Distinguishing Features: _____

Caution: Access to weapons: yes no unknown

The Court Finds Based Upon the Court Record:

The court has jurisdiction over the parties, the minors, and the subject matter and respondent has been provided with reasonable notice and an opportunity to be heard. Notice of this hearing was served on the respondent by personal service service by mail pursuant to court order service by publication pursuant to court order other _____.

This order is issued in accordance with the Full Faith and Credit provisions of VAWA: 18 U.S.C. § 2265.

Respondent's relationship to the petitioner is:
 spouse or former spouse current or former dating relationship in-law parent or child
 parent of a common child stepparent or stepchild blood relation other than parent or child
 current or former cohabitant as intimate partner current or former cohabitant as roommate

Respondent committed domestic violence as defined in RCW 26.50.010 and represents a credible threat to the physical safety of petitioner; the court concludes as a matter of law the relief below shall be granted.

Court Order Summary:

- Respondent is restrained from committing acts of abuse as listed in restraint provision 1, on page 2.
- No-contact provisions apply as set forth on the following pages.
- Additional provisions are listed on the following pages.

The terms of this order shall be effective immediately and for one year from today's date, unless stated otherwise here (date):

MAY 5 ~~2009~~ 2009

Order for Protection (ORPRT) - Page 1 of 4
WPF DV-3.015 Mandatory (7/2007) - RCW 26.50.060

Attachment A

It is Ordered:

1. Respondent is **Restrained** from causing physical harm, bodily injury, assault, including sexual assault, and from molesting, harassing, threatening, or stalking petitioner the minors named in the table above these minors only:

(If the respondent's relationship to the petitioner is that of spouse or former spouse, parent of a common child, or former or current cohabitant as intimate partner, then effective immediately, and continuing as long as this protection order is in effect, the respondent may not possess a firearm or ammunition. 18 U.S.C. § 922(g)(8). A violation of this federal firearms law carries a maximum possible penalty of 10 years in prison and a \$250,000 fine. An exception exists for law enforcement officers and military personnel when carrying department/government-issued firearms. 18 U.S.C. § 925(a)(1).)

2. Respondent is **Restrained** from coming near and from having any contact whatsoever, in person or through others, by phone, mail, or any means, directly or indirectly, except for mailing or service of process of court documents by a 3rd party or contact by Respondent's lawyer(s) with petitioner the minors named in the table above these minors only:

If both parties are in the same location, respondent shall leave.

3. Respondent is **Excluded** from petitioner's residence workplace school; the day care or school of the minors named in the table above these minors only:

Other

Petitioner's address is confidential. Petitioner waives confidentiality of the address which is:

4. Petitioner shall have exclusive right to the residence that petitioner and respondent share. The respondent shall immediately **Vacate** the residence. The respondent may take respondent's personal clothing and tools of trade from the residence while a law enforcement officer is present.

This address is confidential. Petitioner waives confidentiality of this address which is:

5. Respondent is **Prohibited** from knowingly coming within, or knowingly remaining within 100ft (distance) of: petitioner's residence workplace school; the day care or school of the minors named in the table on page one these minors only:

Other:

6. Petitioner shall have possession of essential personal belongings, including the following:

Home #21 Campin LN, and all possessions in it and Vehical Toyota Camry 2007 and my furniter under further order of the Court.

7. Petitioner is granted use of the following vehicle:

Year, Make & Model Toyota Camry 2007

License No. VE1ZL*2280R

8. Other:

9. Respondent shall participate in treatment and counseling as follows:
 domestic violence perpetrator treatment program approved under RCW 26.50.150 or counseling at: _____
 parenting classes at: _____
 drug/alcohol treatment at: _____
 other: _____

RCS

10. Petitioner is granted judgment against respondent for ~~\$2,000.00~~ fees and costs ~~to be paid by~~ _____

RCS
to be paid by

11. Parties shall return to court on _____, at _____ .m. for review



12. Petitioner is **Granted** the temporary care, custody, and control of the minors named in the table above these minors only:

13. Respondent is **Restrained** from interfering with petitioner's physical or legal custody of the minors named in the table above these minors only:

14. Respondent is **Restrained** from removing from the state the minors named in the table above these minors only:

15. The respondent will be allowed visitations as follows: Weekends Saturdays & Sundays or in accordance with a Court approved parenting plan Sat + Sunday Sat from 10AM to Sunday at 5 pm.

RCS

Petitioner may request modification of visitation if respondent fails to comply with treatment or counseling as ordered by the court.

If the person with whom the child resides a majority of the time plans to relocate the child, that person must comply with the notice requirements of the Child Relocation Act. Persons entitled to time with the child under a court order may object to the proposed relocation. See RCW 26.09, RCW 26.10 or RCW 26.26 for more information.

Warnings to the Respondent: A violation of provisions 1 through 5 of this order with actual notice of its terms is a criminal offense under chapter 26.50 RCW and will subject you to arrest. If the violation of the protection order involves travel across a state line or the boundary of a tribal jurisdiction, or involves conduct within the special maritime and territorial jurisdiction of the United States, which includes tribal lands, you may be subject to criminal prosecution in federal court under 18 U.S.C. §§ 2261, 2261A, or 2262.

A violation of provisions 1 through 5 of this order is a gross misdemeanor unless one of the following conditions apply: Any assault that is a violation of this order and that does not amount to assault in the first degree or second-degree under RCW 9A.36.011 or 9A.36.021 is a class C felony. Any conduct in violation of this order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony. Also, a violation of this order is a class C felony if you have at least two previous convictions for violating a protection order issued under Titles 7, 10, 26 or 74 RCW.

If you are convicted of an offense of domestic violence, you will be forbidden for life from possessing a firearm or ammunition. 18 U.S.C. § 922(g)(9); RCW 9A1.040.

You Can Be Arrested Even if the Person or Persons Who Obtained the Order Invite or Allow You to Violate the Order's Prohibitions. You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order upon written application.

Pursuant to 18 U.S.C. § 2265, a court in any of the 50 states, the District of Columbia, Puerto Rico, any United States territory, and any tribal land within the United States shall accord full faith and credit to the order.

It is further ordered that the clerk of the court shall forward a copy of this order on or before the next judicial day to Pasco, Wa County Sheriff's Office Police Department **Where Petitioner Lives** which shall enter it in a computer-based criminal intelligence system available in this state used by law enforcement to list outstanding warrants.

Service

- The clerk of the court shall also forward a copy of this order on or before the next judicial day to Pasco, Wa County Sheriff's Office Police Department **Where Respondent Lives** which shall personally serve the respondent with a copy of this order and shall promptly complete and return to this court proof of service.
- Petitioner shall serve this order by mail publication.
- Petitioner shall make private arrangements for service of this order.
- Respondent appeared and was informed of the order by the court; further service is not required.

- Law enforcement shall assist petitioner in obtaining:
 - Possession of petitioner's residence personal belongings located at: the shared residence respondent's residence other: _____
 - Custody of the above-named minors, including taking physical custody for delivery to petitioner.
 - Possession of the vehicle designated in paragraph 7, above.
 - Other: _____
- Other: _____

This Order is in Effect Until the Expiration Date on Page One.

If the duration of this order exceeds one year, the court finds that an order of one year or less will be insufficient to prevent further acts of domestic violence.

Dated: MAY 5th 2008 at 3:22 pm .p.m.

Robert Fausch
Judge/Commissioner

Presented by:

I acknowledge receipt of a copy of this Order:

Lorena Ulaso
Petitioner

05.05.08
Date

[Signature]
Respondent 5/5/08
Date

A Law Enforcement Information Sheet (LEIS) must be completed.

Order for Protection (ORPRT) - Page 4 of 4
WPF DV-3.015 Mandatory (7/2007) - RCW 26.50.060

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ANTONIO SALAZAR, WSBA#6273
Attorney for Appellant