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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

Sup Ct. No. 89358-6
COA No. 30738-7-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SEBASTIAN CORTES AGUILAR,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

PETITION FOR REVIEW

DAVID R. PARTOVI
Attorney for Petitioner

PARTOVI LAW, P.S.
900 N. Maple, Lower Level
Spokane, Washington 98101
(509) 270-2141
Fax (509) 326-6102

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I. IDENTITY OF PETITIONER

Petitioner, Sebastian Cortes Aguilar, was the defendant in the Superior Court, and the appellant in the Court of Appeals

II. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals decision filed August 20, 2013, which affirmed the lower court's decision in favor of the State of Washington. A copy of the court's opinion is attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

- (1) Was the amended charging document in this case deficient as a matter of law?
- (2) Did the trial court make findings in support of the No Contact Orders and, if so, were they constitutionally sufficient?

IV. STATEMENT OF THE CASE

On August 21st, 2011 at approximately 5:00 p.m. Spanish-speaking Wenatchee Police Officer Keith Kellog, along with Detective Edgar Reinfeld, interviewed Appellant Sebastian Cortes Aguilar regarding the death of his wife, Ortencia Arroyo Alejandre, earlier that day. RP 4-9, 221-226. Mr. Cortes allowed Officer Kellog

to audio tape the interview and was cooperative throughout the entire, long process. RP 10, 221-226, 228-229.

During the interview, Mr. Cortes told Detective Kellog that Ms. Alejandre was holding a knife to peel a cucumber and when he voiced his suspicions about her talking to another man on the phone, she became upset and struck out at him with the knife, cutting him on the hand. RP 226-227. Mr. Cortes told Officer Kellog that Ms. Alejandre threatened to kill him, so he grabbed the knife and attacked her to prevent being harmed or killed. RP 227. Mr. Cortes told Officer Kellog that he never intended to kill Ms. Alejandre. RP 227. He told Officer Kellog that he remembered his daughter getting in the middle, but did not remember cutting her during that process and that it must have been an accident repeatedly saying how "it all happened so fast or really quickly, very quickly". RP 227-228. Mr. Cortes repeatedly stated that Ms. Alejandre got angry and that it was rapid and she snapped. RP 234. Officer Kellog discussed that with Mr. Cortes multiple times to make sure there was no confusion. RP 234.

Mr. Cortes' words were not the only evidence to support his version of events, Officer Kellog saw cuts to Mr. Cortes' hand and shoulder, pointing them out to Detective Reinfeld and photographing them. RP 235. Mr. Cortes told Officer Kellog that what he did was

bad and that he was “not thinking, not thinking.” RP 238. Mr. Cortes repeatedly indicated that he only intended to injure Ms. Alejandre. RP 240.

Another eyewitness to testify regarding the events in question was Jovani Cortes, the young son of Mr. Cortes and Ms. Alejandre. RP 319. Jovani testified that he was in the kitchen and heard a bottle break so he went into the living room. RP 321. He saw his sister trying to protect their mother so Jovani went to the front door to call for help. RP 322. He saw his father get a knife, so he went to call 911, heard screaming and that is when his father started to stab his mom. RP 322. Jovani testified that he did not see his dad go get a knife, but that he had it in his hand. RP 322.

Janeli Cortes, the 13-year-old daughter of Mr. Cortes and Ms. Alejandre was the final eyewitness to testify. RP 328. She testified that her parents were arguing loud enough that she heard them over the television in the other room. RP 328. When she heard a bottle crack, she turned off the television and ran into the living room to see her father assaulting her mother with his hands and a belt. RP 329. She testified that her father ran into the kitchen and immediately returned with a knife. RP 329-330. Janeli testified that she got in between her mother and father and that her father “started, like,

throwing the knife, like, trying to punch her” while Janeli tried to stop him. RP 330. In the fray, Janeli testified that both she and her mother were cut, but that she did not realize she had been cut at that time. RP 330-331. Janeli testified that Mr. Cortes was swinging the knife at her mother but that he never swung the knife at her. RP 335. She testified that her father was not aiming the knife at her. RP 335. Janeli testified that her father then ran away and that she ran to get help. RP 331-332.

Detective Weatherman was assigned this case, did a diagram of the apartment and characterized it as small. RP 337-340. In fact, every law enforcement officer to testify regarding the size of the apartment described it as being small. RP 132, 133, 161, 176.

At the close of the State’s case in chief, the Defense moved to dismiss Count II for lack of evidence that Mr. Cortes’ intended to assault Janeli Cortes and further argued that because the State had chosen to allege intent to assault Janeli Cortes rather than intent to assault Ortencia Arroyo Alejandre, the State should not be permitted to argue transferred intent or amend the Information to conform with the proof. RP 343-347. At that time, the Court seemed to agree. RP 350-352. In the afternoon session, however, there was significant discussion of transferred intent and the State was permitted to

amend count II from assault in the first degree alleging intent to commit serious bodily harm against Janeli Cortes to assault in the second degree alleging that Mr. Cortes, “with intent to commit a felony, did then and there unlawfully, feloniously ~~and intentionally~~ assault(ed) Janeli Cortes Alejandre . . .”. (alterations in original). RP 364-365. CP 30-31. The Defense maintained the objection and the next day preserved it with an exception to allowing the case to go to the jury framed as an assault against Janeli Cortes. RP 378.

On March 9, 2012, the jury found Mr. Cortes guilty of counts I and II in the Second Amended Information and found that he was armed with a deadly weapon and that he was a member of the family or household of both victims. CP 94-98.

V. ARGUMENT

Review should be granted in this case on the basis of RAP 13.4(b)(3) because both of the issues presented for review involve significant questions of Constitutional law as discussed below.

1. The Amended Assault Two Charging Document

The Court of Appeals characterized this sufficiency of evidence challenge to the second degree assault conviction as attacking the transferred intent of Mr. Cortes. It is not the transferred intent that is insufficient; it is the charging document itself.

Specifically, the wrong victim – Janeli Cortes – is listed in the charging document and a necessary element of assault – intent – was simply crossed out by the judge in permitting the amendment. This is a Constitutional error as there is no evidence that Mr. Cortes assaulted Janeli Cortes, the incorrectly-listed victim, and one cannot be guilty of assault without having the specific intent to assault. The Court of Appeals’ reasoning would work if the Amended Information listed Ortencia Arroyo Alejandre as the *intended* victim of the charged assault. It did not and Mr. Cortes’ defense thus focused on the lack of intent to assault the listed victim.

The Court of Appeals wrote, “Mr. Cortes maintains that the doctrine of transferred intent was not included in the information and, therefore, cannot be used to transfer Mr. Cortes’ intent to harm the victim, Ms. Arroyo Alejandre, to his daughter.” *State v. Aguilar*, 2013 WL 4426275 at 12 (Div. III, 2013) but Mr. Cortes was not accused of assaulting Ms. Arroyo Alejandre. He was accused of assaulting Janeli Cortes and there was no evidence that he had the required intent to do so.

Only once the intent to assault the *intended victim* is established, may it transfer to any unintended victim. *State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994). The Court of Appeals

dealt with only the second half of this law: that once it became clear Mr. Cortes intended to assault Ms. Arroyo Alejandre, his intent could thereafter transfer to Janeli Cortes. Had Mr. Cortes been accused of assaulting Ms. Arroyo Alejandre, this would be correct. But Mr. Cortes was never accused of assaulting Ms. Arroyo Alejandre. Instead, he was accused of assaulting Janeli Cortes, albeit mistakenly, and because there was no evidence of his intent to assault Janeli Cortes, his conviction was entered without sufficient evidence.

Nor is the wrong victim the only flaw in the charging document. By crossing out the intent element, the charging document became fundamentally flawed even if it was not when it alleged the wrong victim.

This is not a situation where the defendant is arguing that the required element of "intent" was missing from the charging document as was the case in *State v. Davis*, 119 Wash.2d 657 (1992) (holding the charging document's use of the word assault implicated the common law requirement of intent). Instead, in this case the trial court judge actively crossed out the intent element. In *Davis*, the required common law element of intent was presumed inferred from the inclusion of the word assault in the charging document. *State v.*

Davis, 119 Wash.2d 657, 662 (1992). In the case of Mr. Cortes, however, the common law element of intent was specifically stricken from the charging document. One cannot logically thereafter infer the re-inclusion of this element by use of the word "assault."

In *Davis*, the information was "more liberally construed in favor of validity" because *Davis* did not challenge the information until the appeal. *Davis*, at 661. Mr. Cortes' counsel did challenge the amendment and the language contained therein and the entire basis of his defense against the charge was lack of intent which amounts to the prejudice further required under *Davis*. *Id.* at 663-4.

In summary, the State and Federal Constitutions require that all essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him." *State v. Kjorsvik*, 117 Wash.2d 93, 97 (1991). The *mens rea* of intent is implied from common law with the word assault. *State v. Davis*, 119 Wash.2d 657, 662 (1992). But when a prosecutor chooses to name the wrong victim and a judicial officer actively strikes the essential element of intent, it can no longer be said that an accused has been informed of the nature of the cause and accusation against him. When it prejudices his defense, the conviction cannot stand.

2. The No Contact Orders

Immediately prior to imposing a sentence in excess of thirty years, the Trial Court referenced a number of the more heinous facts of this case. RP (Sentencing Hearing March 27, 2012) at 42-44. The entry of two condition of sentence no contact orders preventing Mr. Cortes from seeing his own children, on the other hand, was done without so much as an acknowledgement of the very serious Constitutional Rights upon which those orders infringe.

Upon conviction of a crime, the Sentencing Reform Act of 1981 authorizes the trial court to impose crime-related prohibitions such as the entry of a No Contact Order. *In re Rainey*, 168 Wn.2d 367, 229 P.3d 686 (2010) (citing *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008); RCW 9.94A.505(8)). Entry of crime-related prohibitions are reviewed for an abuse of discretion. *State v. Ancira*, 107 Wn. App. 650, 27 P.3d 1246 (Div. I, 2001). A court abuses its discretion if it applies the wrong legal standard when imposing a crime-related prohibition. *In re Rainey*, 168 Wn.2d 367, 229 P.3d 686 (2010); *State v. Lord*, 161 Wn. 2d 276, 284, 165 P.3d 1251 (2007). A court will more carefully review conditions that interfere with a fundamental constitutional right such as the right to the care, custody and companionship of one's children. *Id.* at 374. "Such

conditions must be 'sensitively imposed' so that they are 'reasonably necessary to accomplish the essential needs of the State and public order.'" *Id.* (citations in original). The imposition of crime-related prohibitions is fact-specific based upon the sentencing court's evaluation of the offender and facts at trial. *Id.*

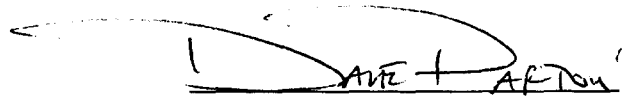
Mr. Cortes submits that there was no analysis whatsoever on this point. It is true that the Court of Appeals discussed the factors pertinent to the imposition of sentence, but surely something which can be described as meeting the legal standard described above must first acknowledge that standard and the important rights being infringed. The Trial Court simply stated as a matter of course that it was going to impose no contact orders against both children and questioned only the duration. Then, the Court chose the statutory maximum of Second Degree Assault without the slightest nod to what basis there might be in support thereof.

By failing to apply any legal standard, much less the strict scrutiny analysis required by *Rainey*, *Warren*, *Ancira*, etc. the trial court abused its discretion in entering both no contact orders. This Court should grant review simply because the Court of Appeals decision conflicts with these cases.

VI. CONCLUSION

Petitioner asks this Court to grant review, reverse the Court of Appeals, dismiss the assault in the second degree conviction against Janeli Cortes and remand for findings regarding the imposition of no contact orders.

Respectfully submitted this 19th day of September, 2013.


David R. Partovi, WSBA #30611
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington the on the 19th day of September, 2013, I mailed a true and correct copy of the foregoing Appellant's Brief by depositing the same in the United States mail, postage prepaid, addressed as follows:

Douglas J. Shae
Chelan County Prosecuting Attorney
P.O. Box 2596
Wenatchee, WA 98807-2596

SIGNED this 19th day of September, 2013, at Spokane, Washington.


David R. Partovi

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

STATE OF WASHINGTON,)	No. 30738-7-III
)	
Respondent,)	
)	
v.)	PUBLISHED OPINION
)	
SEBASTIAN CORTES AGUILAR,)	
)	
Appellant.)	

KULIK, J. — After confronting his wife about her telephone conversation with another man, Sebastian Cortes Aguilar¹ stabbed and killed his wife. Mr. Cortes also cut his daughter as she attempted to block her father from attacking her mother. A jury found Mr. Cortes guilty of first degree murder of his wife and second degree assault of his daughter. Mr. Cortes appeals. He contends that the evidence was not sufficient to establish the premeditation element of first degree murder. He also contends that the evidence was not sufficient to establish that he intentionally assaulted his daughter. Finally, Mr. Cortes challenges the condition of community custody that prohibits him

¹ Sebastian Cortes Aguilar signed his judgment and sentence as “Sebastian Cortes.”

from contacting his children for 10 years. We conclude that Mr. Cortes's challenges are without merit and affirm the trial court in all respects.

FACTS

In August 2011, Mr. Cortes and his wife, Ortencia Arroyo Alejandre, argued in their Chelan County home. Mr. Cortes stabbed Ms. Arroyo Alejandre at least five times. She died at the home from her injuries. The couple's 13-year-old daughter was also cut during the argument. Wenatchee police arrested Mr. Cortes and charged him with first degree murder of Ms. Arroyo Alejandre and first degree assault—domestic violence, of their daughter.

At trial, Officer Keith Kellogg testified that he interviewed Mr. Cortes regarding the death of Ms. Arroyo Alejandre. Mr. Cortes told Officer Kellogg that Ms. Arroyo Alejandre was holding a knife to peel a cucumber when Mr. Cortes voiced his suspicions about her talking to a man on the telephone. Ms. Arroyo Alejandre became upset and struck out at Mr. Cortes with the knife, cutting him on the hand. Mr. Cortes told Officer Kellogg that Ms. Arroyo Alejandre threatened to kill him, so he grabbed the knife and attacked her to prevent being harmed or killed. Mr. Cortes stated that he intended to stab Ms. Arroyo Alejandre in the throat, but did not think that he would kill her if he stabbed her in that area. Mr. Cortes said that he acted out because of Ms. Arroyo Alejandre's

words and actions. Officer Kellogg testified that he saw cuts to Mr. Cortes's hand and shoulder, which according to Mr. Cortes, came from Ms. Arroyo Alejandre.

During the interview, Mr. Cortes also said that he remembered his daughter getting in the middle of the argument, but did not remember cutting her during that process and that it must have been an accident. He said everything happened really quickly.

The daughter witnessed the violent argument between her parents. She testified that she was listening to the television and could hear her parents arguing in another room. When she heard a bottle crack, she turned off the television and ran into the living room. She witnessed her father punching her mother and beating her mother with a belt. Her father ran into the kitchen, and the daughter attempted to pick up her mother and take her away from the house. The daughter testified that she knew her father was going to get a knife because she had observed him do it before.

The daughter said her father caught up with them and pulled them into a corner. The daughter positioned herself in front of her mother. Her father then "started, like, throwing the knife, like, trying to punch her and I was trying to hit him so he would stop." Report of Proceedings (RP) at 330. The daughter saw her father hit her mother with the knife. When the daughter turned around, she saw her mother covered in blood. The

daughter's arm was cut during the attack, although she did not realize it at the time. She did not believe that her father was aiming the knife at her.

The couple's son also witnessed the argument and testified at trial. He stated that he was in the kitchen when he heard the bottle crack. He went into the living room and saw his sister trying to protect his mother. He also saw his father pulling his mother's hair. When Mr. Cortes went to get a knife, the son called 911. He heard his mother screaming. When he saw his mother next, she was bleeding from the neck and unconscious.

A neighbor testified that he saw a man, covered in blood, come out of the residence and drive away from the scene in a hurry. He also saw a girl come out and yell, "'Daddy, don't leave.'" RP at 313.

The children's godfather, Jorge Torres Cortes, testified that Mr. Cortes called him and asked to hide in his garage. Mr. Torres asked what happened, and Mr. Cortes responded that he killed his wife.

Officer Jared Reinfeld was the first officer to arrive at the scene. He testified that the daughter came out of the basement of the home, screaming and soaked in blood. Officer Reinfeld followed the daughter as she ran back inside. The daughter was holding

her mother in her lap, screaming that her mother was dead. When Officer Reinfeld asked the daughter who did it, she responded that her dad killed her mom.

Emergency medical technician, Aaron Jacobs, testified that he was dispatched to the scene. When he entered the apartment, he saw the daughter clinging to her mother and crying hysterically. He also noticed that both Ms. Arroyo Alejandre and the daughter were completely covered in blood, as well as the walls where they were located. Mr. Jacobs and his team initiated basic life support but were unable to resuscitate Ms. Arroyo Alejandre. Ms. Arroyo Alejandre was pronounced dead at the scene.

Dr. Jonathan Kim, an emergency medicine physician, testified that on the date of the incident, he treated a stab wound on a 13-year-old girl. He stated that she was tearful and emotional when he observed her. She made a statement that her father had become drunk and slit her mother's throat because he thought her mother had been cheating on him. She said she was trying to hold her mother and, at some point in the process, she was cut. Dr. Kim testified that the girl's wound was deep and serious. He believed that the wound was caused by a knife.

Forensic pathologist, Dr. Gina Fino, performed the autopsy of Ms. Arroyo Alejandre. She testified that multiple sharp force injuries were present on Ms. Arroyo Alejandre's body. The first wound that Dr. Fino described was a penetrating stab wound

to the anterior of the neck, caused by a knife. This wound continued under the collarbone and appeared to end in the right anterior upper lung lobe, making a visible cut mark in the lung. The wound was about six inches deep.

The second wound was a two-inch curved penetrating stab wound to the upper right chest. The wound was six inches deep, punctured the right lung, and left tool marks on the rib. Dr. Fino also testified to three other upper body stab wounds, ranging from three to six inches deep. One of the stab wounds that punctured Ms. Arroyo Alejandre's lung caused blood to accumulate in her chest cavity.

Dr. Fino testified to other superficial sharp force injuries on Ms. Arroyo Alejandre's upper chest area. She also testified to an injury to Ms. Arroyo Alejandre's forehead that went completely through her skin and made a mark on her skull. Dr. Fino found defensive wounds on Ms. Arroyo Alejandre's hand and arms. She associated these wounds with Ms. Arroyo Alejandre using parts of her body to block an injury.

Dr. Fino concluded her testimony by saying that the mechanism of death was bleeding from the stab wounds. She also recognized damage to the lungs. Her conclusion was that Ms. Arroyo Alejandre died from multiple stab wounds to the neck and chest.

The State rested. Mr. Cortes moved to dismiss the first degree assault charge. He argued that the information alleged an intentional assault against his daughter, but the evidence did not indicate that Mr. Cortes intended to assault his daughter. Mr. Cortes also argued that his assault of Ms. Arroyo Alejandre was the intended crime, and that intent could not be transferred to his daughter because the information did not contain transferred intent language. The trial court agreed with Mr. Cortes's argument. However, instead of ordering dismissal, the court allowed the State to amend the charge to second degree assault for the injury to the daughter. The information alleged that Mr. Cortes, "with intent to commit a felony, did then and there unlawfully, feloniously, and intentionally assaulted [the daughter]." Clerk's Papers (CP) at 31. The amendment was made without objection.

A jury found Mr. Cortes guilty of first degree murder—domestic violence, and second degree assault—domestic violence. The jury also found by special verdict that Mr. Cortes was armed with a deadly weapon in commission of the crime and that Mr. Cortes and Ms. Arroyo Alejandre were members of the same household. The trial court sentenced Mr. Cortes to 371 months of confinement, which included a 24-month weapon enhancement to the first degree murder conviction. The court also ordered a 10-year no contact order for the children.

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Mr. Cortes appeals. He contends that the evidence does not establish all of the elements of first degree murder. He also contends that the trial court erred by allowing the State to amend the information, and that the evidence does not support the second degree assault conviction against his daughter. Last, he challenges the imposition of the 10-year no contact order between Mr. Cortes and his children.

ANALYSIS

Sufficient Evidence of Premeditation. Mr. Cortes contends that his first degree murder conviction should be reversed because the State failed to prove the premeditated intent element of the crime.

The standard of review for a sufficiency of the evidence challenge in a criminal case is ““whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”” *State v. Bingham*, 105 Wn.2d 820, 823, 719 P.2d 109 (1986) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). A defendant challenging sufficiency of the evidence “admits the truth of the State’s evidence and all inferences that can reasonably be drawn from that evidence.” *State v. Gentry*, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995).

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In a criminal prosecution, the Fourteenth Amendment's due process clause requires the State to prove each essential element of the crime charged beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

To convict of first degree murder, the State is required to prove that Mr. Cortes caused the death of the victim, that he intended to cause the death, and that he acted with premeditated intent. *State v. Ortiz*, 119 Wn.2d 294, 313, 831 P.2d 1060 (1992).

Premeditation distinguishes first and second degree murder. *State v. Brooks*, 97 Wn.2d 873, 876, 651 P.2d 217 (1982). "Premeditation" involves a deliberate formation of and reflection upon the intent to take a human life and includes the mental process of thinking beforehand, deliberation, reflection, and weighing or reasoning for a period of time, however short. *Gentry*, 125 Wn.2d at 597-98 (quoting *State v. Robtoy*, 98 Wn.2d 30, 43, 653 P.2d 284 (1982)); *State v. Ollens*, 107 Wn.2d 848, 850, 733 P.2d 984 (1987)). Factors relevant to establish premeditation include motive, procurement of a weapon, stealth, and method of killing. *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245 (1995).

Both direct and circumstantial evidence can be used to establish premeditation. *Bingham*, 105 Wn.2d at 823-24. "Circumstantial evidence can be used where the inferences drawn by the jury are reasonable and the evidence supporting the jury's verdict

is substantial.” *Id.* at 824. A wide range of proven facts will support an inference of premeditation. *State v. Finch*, 137 Wn.2d 792, 831, 975 P.2d 967 (1999).

In *Ortiz*, the court found sufficient evidence of premeditation where the killing was committed with a knife that was procured on the premises, but obtained from another room. *Ortiz*, 119 Wn.2d at 312-13. The murder occurred in a bedroom, and not the kitchen where the knife was found. *Id.* at 313. Additionally, the victim had multiple wounds, was struck in the face with something other than the knife, and the defensive wounds found on the victim provided evidence of a prolonged struggle. *Id.* at 312-13.

Here, sufficient evidence of premeditation can be inferred from the facts. The evidence establishes that Mr. Cortes had a motive to kill his wife—her possible involvement with another man. Mr. Cortes said during a police interview that he was suspicious about Ms. Arroyo Alejandro’s telephone conversation with another man, and Dr. Kim testified that the daughter said the attack occurred because her father thought her mother had been cheating on him.

Also, Mr. Cortes had time to reflect on his actions before killing Ms. Arroyo Alejandro. He began the attack on his wife by hitting her. Then, similar to *Ortiz*, Mr. Cortes instituted his plan to kill his wife by leaving the living room to procure a weapon, a knife, from the kitchen. He returned to the living room with the knife and stopped her

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from leaving. Mr. Cortes continued the attack on his wife with the knife, stabbing her multiple times. The evidence indicates his use of stealth, as Mr. Cortes stabbed his wife even though his 13-year-old daughter attempted to block the attack by standing between Mr. Cortes and his wife.

Last, Mr. Cortes's lengthy and excessive attack provides evidence of premeditation. Mr. Cortes inflicted five deep wounds and other defensive wounds, indicating a violent, prolonged struggle. Three of the wounds punctured Ms. Arroyo Alejandro's lung, a vital organ. He intended to stab her in the throat, although he claims that he did not expect the stabbing to kill her. After the attack, Mr. Cortes had the presence of mind to leave his home where the attack took place and to ask for help in hiding from law enforcement.

The facts in this case are sufficient for a rational jury to have found beyond a reasonable doubt that Mr. Cortes considered his actions for the requisite time before killing Ms. Arroyo Alejandro. The evidence is sufficient to support jury's verdict that Mr. Cortes's murder of his wife was premeditated.

Amended Information. Mr. Cortes contends that the trial court erred by allowing the State to amend the information after it closed its case in chief.

The State cannot amend the information to charge a different or greater crime or add an essential element of a crime once it rests its case in chief. *State v. Kirwin*, 166 Wn. App. 659, 673, 271 P.3d 310 (2012). However, the State may amend the information after it rests its case in chief if the amendment is to a lesser degree of the same crime or a lesser included offense. *State v. Pelkey*, 109 Wn.2d 484, 491, 745 P.2d 854 (1987).

For the crime of assault, lower degrees of assault are considered lesser degree offenses of all higher degrees of assault. *State v. Foster*, 91 Wn.2d 466, 471-72, 589 P.2d 789 (1979). And the jury can be instructed on lesser included offenses even without an amendment to the information. Because second degree assault is a lesser degree of first degree assault, the amendment was not improper.

Sufficient Evidence of Second Degree Assault. Mr. Cortes contends that the State failed to establish the intent element for second degree assault, specifically that Mr. Cortes intended to assault his daughter. Mr. Cortes maintains that the doctrine of transferred intent was not included in the information and, therefore, cannot be used to transfer Mr. Cortes's intent to harm the victim, Ms. Arroyo Alejandre, to his daughter.

The second degree assault elements relevant here are (1) an assault and (2) intent to commit a felony. RCW 9A.36.021(1)(e). Washington recognizes three definitions of assault: “(1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an

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unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is incapable of inflicting that harm.”” *State v. Aumick*, 126 Wn.2d 422, 426 n.12, 894 P.2d 1325 (1995) (quoting *State v. Walden*, 67 Wn. App. 891, 893-94, 841 P.2d 81 (1992)).

Under the doctrine of transferred intent, once the intent to inflict harm on one victim is established, the mens rea transfers to any other victim who is actually assaulted. *State v. Clinton*, 25 Wn. App. 400, 403, 606 P.2d 1240 (1980). “Moreover, transferred intent is applicable to second degree assault charges involving an accidental or unintended victim.” *State v. Wilson*, 113 Wn. App. 122, 131, 52 P.3d 545 (2002).

In *Clinton*, Mr. Clinton was intentionally swinging a pipe at Mr. Miller when the pipe slipped and hit Ms. Miller. *Clinton*, 25 Wn. App. at 401-02. Mr. Clinton was charged with and convicted of the second degree assault of Ms. Miller. *Id.* at 401. The jury was instructed on the theory of transferred intent. *Id.* Mr. Clinton contended that the jury instruction was misleading because it allowed the jury to convict him without finding that he acted knowingly in his assault of Ms. Miller. *Id.* at 402. The Court of Appeals approved the jury instruction and confirmed the conviction, concluding that the transferred intent instruction allowed the jury to convict Mr. Clinton, “if, with the intent to assault the victim’s husband, he mistakenly, accidentally, or inadvertently struck the

victim instead.” *Id.* at 403.

Also in *Clinton*, Mr. Clinton argued that he was not sufficiently advised of the nature of the charge because he was charged with “knowingly” assaulting Ms. Miller. *Id.* at 403-04. The court rejected this contention based in part on the common-law acceptance of the transferred intent doctrine. *Id.* at 404. The court concluded that Mr. Clinton was sufficiently and adequately prepared to defend against the charge. *Id.*

In Mr. Cortes’s trial, jury instructions defined “assault” as “an intentional touching, striking, or cutting of another person that is harmful or offensive.” CP at 79.

The jury was also given an instruction on transferred intent, stating:

If a person acts with intent to assault another, but the act harms a third person, the actor is also deemed to have acted with intent to assault the third person.

The State is not required to prove that the person actually injured is the person whom the defendant intended to injure.

CP at 86.

We conclude that sufficient evidence supports Mr. Cortes’s conviction for second degree assault against his daughter. Specifically, the evidence is sufficient to establish the element of intent. As in *Clinton*, and in light of the jury instructions, the jury was permitted to conclude that Mr. Cortes’s intent to assault Ms. Arroyo Alejandre transferred to his daughter. Evidence of such intent was presented at trial. According to Officer

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Kellogg, Mr. Cortes admitted that he intended to injure Ms. Arroyo Alejandre with a knife. Mr. Cortes injured his daughter as she tried to block the assault. Therefore, based on the doctrine of transferred intent, there is sufficient evidence to support the conviction for second degree assault.

No Contact Order. Mr. Cortes contends that the no contact order is erroneous because his children were not victims of the crime. He also contends that the trial court failed to make findings or apply a legal standard before entering the no contact order.

A trial court's decision to impose crime-related prohibitions is reviewed for an abuse of discretion. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). Even with this standard, a court will more carefully review a condition that interferes with a fundamental constitutional right. *Id.*

In Washington, a court may impose "crime-related prohibitions" as conditions of a sentence. RCW 9.94A.505(8). Conditions on a sentence that impose limitations on a fundamental right must be "sensitively imposed" so that they are "reasonably necessary to accomplish the essential needs of the State and public order." *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008).

Parents have a fundamental liberty interest in the care, custody, and control of their children. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599

(1982). A court may impose a condition on a criminal sentence that restricts a fundamental right to parent if the condition is reasonably necessary to prevent harm to a child. *State v. Ancira*, 107 Wn. App. 650, 654, 27 P.3d 1246 (2001). “Prevention of harm to children is a compelling state interest, and the State does have an obligation to intervene and protect a child when a parent’s ‘actions or decisions seriously conflict with the physical or mental health of the child.’” *Id.* at 653-54 (quoting *In re Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980)).

Despite Mr. Cortes’s contentions, the trial court did address the reason for imposing the no contact order. Before entering the sentence and no contact order, the trial court summarized the crucial evidence and pondered the impact the events would have on the children. The trial court recounted that witnesses testified to the horrific, bloody scene where the daughter was found holding her mother. The court recognized that the children witnessed their father kill their mother. The court pointed out that Mr. Cortes left the house despite his daughter’s pleas to stay and that his first instinct was to ask a family friend for a place to hide. Additionally, Mr. Cortes stabbed his daughter, making her a direct victim, too.

Finally, the trial court acknowledged Mr. Cortes’s failure to take responsibility for the killing. Mr. Cortes told the court during the sentencing hearing that the events were

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not his fault because Ms. Arroyo Alejandre was hiding things from him. Mr. Cortes stated if she had not hidden things, he would not be here today. The trial court noted that Mr. Cortes's violent attack on his wife was an act of domestic violence, as established by the jury's findings.

Based on these facts, the trial court did not abuse its discretion by imposing a 10-year no contact order between Mr. Cortes and his children. The State had a compelling interest in protecting the children from reliving the emotional trauma associated with their mother's death. The court recognized that both children were victims of the crime, either directly or indirectly, and that the children experienced distress by witnessing the event and having to testify against their father. The children are subject to further distress because Mr. Cortes continues to place blame on the children's mother, and this action seriously conflicts with the mental health of his children. Furthermore, the 10-year length of the no contact order allows Mr. Cortes to regain contact with his children when the children are at a more mature age and can address their relationship with their father in light of the events that occurred. The condition was reasonably necessary to protect the emotional well being of the children.

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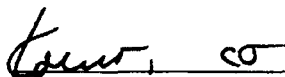
STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW


In his statement of additional grounds, Mr. Cortes contends that he received ineffective assistance of counsel because his attorney did not act on Mr. Cortes's instructions. He also contends that his attorney, the prosecutor, and the judge acted inappropriately by conversing in private, that the prosecutor accepted a bribe, and that a juror was unexpectedly missing on the last day of trial. We find no support in the record for these contentions. Thus, we find no error.

We affirm the convictions for first degree murder and second degree assault.


Kulik, J.

WE CONCUR:


Korsmo, C.J.


Siddoway, J.