

FILED
November 19, 2012
Court of Appeals
Division III
State of Washington

No. 30738-7-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

SEBASTIAN CORTES AGUILAR,
Defendant/Appellant.

BRIEF OF RESPONDENT

Douglas J. Shae WSBA #17942
Chelan County Prosecuting Attorney

Chelan County Prosecuting Attorney's Office
P.O. Box 2596
Wenatchee, Washington 98807-2596
(509) 667-6204

TABLE OF CONTENTS

	<u>Page</u>
I. <u>FACTS</u> -----	1
II. <u>ISSUES AND ARGUMENT</u> -----	18
A. <u>THE COURT DID NOT ERR IN DETERMINING THERE WAS SUFFICIENT EVIDENCE TO SUPPORT A CONVICTION FOR MURDER IN THE FIRST DEGREE.</u> -----	18
B. <u>THE COURT DID NOT ERR BY ALLOWING THE STATE TO REOPEN AND AMEND THE ASSAULT IN THE FIRST DEGREE CHARGE PERTAINING TO THE SECOND VICTIM, JANELI, TO ASSAULT IN THE SECOND DEGREE.</u> -----	24
C. <u>THE COURT DID NOT ERR IN ENTERING A NO CONTACT ORDER WITH RESPECT TO THE DEFENDANT'S CHILDREN.</u> -----	26
III. <u>CONCLUSION</u> -----	28

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>In re Rainey</u> , 168 Wn.2d 367, 229 P.3d 686 (2010)-----	27,28
<u>State v. Clinton</u> , 25 Wn. App. 400, 606 P.2d 1240 (1980)-----	25
<u>State v. Drum</u> , 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010)-----	20
<u>State v. Foster</u> , 91 Wn.2d 466, 471-72, 589 P.2d 789, 794-95 (1979) -----	25
<u>State v. Frazier</u> , 81 Wn.2d 628, 630-31, 503 P.2d 1073, 1075-76 (1972) -----	25
<u>State v. Gentry</u> , 125 Wn.2d 570, 596-97, 888 P.2d 1105, <i>cert denied</i> , 516 U.S. 843 (1995) -----	18,22,23
<u>State v. Hayes</u> , 81 Wn. App. 425, 430, 914 P.2d 788 (1996), <i>review denied</i> , 130 Wn.2d 1013 (1996) -----	21
<u>State v. Salinas</u> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)-----	20
<u>State v. Thomas</u> , 150 Wn.2d 821, 874, 83 P.3d 970 (2004) -----	21
 <u>Rules and Statutes</u>	 <u>Page</u>
RCW 9.94A.505(8) -----	27
RCW 9A.32.030(1)(a) -----	18

I. FACTS

A jury trial was held on March 7, 2012, before the Honorable John E. Bridges in Chelan County Superior Court in the matter of State of Washington v. Sebastian Cortes Aguilar, Chelan County Superior Court Cause No. 11-1-00340-1. The defendant now appeals his convictions of Murder in the First Degree and Assault in the Second Degree-Domestic Violence.

Testifying in this case first was Dr. Jonathan Kim, an emergency medicine physician. RP 120, In. 8-10. Dr. Kim testified that he treated a stab wound to a 13-year-old girl on the 21st of August, 2011. RP 120, In. 22-24. He testified that when he observed her, she was tearful and emotional. RP 122, In. 11. Also, that she made a statement that her father had become drunk and had slit her mother's throat and that he had done this because he thought her mother had been cheating on him, and she was also cut in the process of trying to hold her mother after the event. RP 122, In. 18-23. Her wound was a deep wound and serious. RP 123, In. 22-25; RP 124, In. 1-2. Dr. Kim further believed that the wound occurred from a knife which was medically consistent with what he saw. RP 125, In. 12-16.

Next testifying was Detective Sergeant John Kruse of the Wenatchee Police Department. RP 126, In. 22-24. Detective Kruse indicated that he received a call from dispatch that there had been a stabbing within the Wenatchee city limits at 830 Methow Street and that there was a deceased female. RP 127, In. 12-16. He further testified that at the crime scene they found one of the victim's children, a 7-year-old son Jovani, and learned that the 13-year-old daughter was being treated at the hospital. RP 128, In. 6-7; 13-15. Eventually, the defendant, Mr. Aguilar Cortes, was located in East Wenatchee by police officers. RP 129, In. 11-12.

Detective Kruse described the scene as a basement apartment to which Ortencia and her children had just moved. RP 130, In. 8-9; RP 132, In. 9. There was quite a bit of blood at the top of the stairs and more blood as you moved down the stairs. Inside the doorway, he could see Ortencia, the deceased female, lying on the floor of the residence. A few feet from the doorway, but right near the doorway itself, was a black-handled knife. RP 131, In. 11-17. There was a long room, but only in relationship to the rest of the residence. It was a fairly small living area, but there was one long sort of living room that was down there. RP 132, In. 2-5. They had a TV and some other items, but no furniture. RP 132, In.

7-8. There was a large amount of blood spatter on the doorway and also on the walls. RP 132, In. 17-19. To the left of the front door was a bedroom. RP 132, In. 19-20. Standing in the main room, again as you moved to the back where the staircase door is, to the left there is a laundry room and next to that is the kitchen. Just off the kitchen is a small bathroom. RP 133, In. 1-8.

The murder weapon was the only sharp knife found in the residence. RP 134, In. 10-15. There was blood found in the general area of Ortencia and also a clump of hair. RP 137, In. 5-6. Fingernails were also found in the area. RP 136, In. 20-21; RP 137, In. 11. Detective Kruse further testified that he took pictures of the house and he testified about Ortencia's wounds. He identified a laceration on the deceased victim's upper left arm, another laceration on her shoulder area of her left arm, two lacerations above the nipple on the right side and whatever wounds that were on her neck were covered by bandaging done by the paramedics when they got there. There was also some sort of marks on her head near her chin, but it wasn't immediately obvious what kind of injuries those were; just that they were injuries. The other ones appeared to be knife marks. RP 147, In. 13-25; RP 148, In. 1. Detective Kruse further indicated there was a broken

top of a Modelo beer bottle that was found inside the main living room as well. RP 148, In. 21-22. A twenty-year veteran, Detective Kruse also testified he had never seen so much blood in such a confined space. RP 131, In. 20-22.

Officer Jared Reinfeld of the Wenatchee Police Department also testified. RP 159, In. 5-8. Officer Reinfeld testified that he and Deputy Jason Mathews arrived at the scene at approximately the same time. RP 160, In. 8-10. He testified that when he exited his car and could hear screaming from a young girl, Janeli Cortes, as she was identified, who came up out of the stairs of the basement where the home was located. RP 160, In. 15-20. She was screaming and she was covered in blood. Her clothes were soaked in blood, her hair was bloody, her arms were covered in blood, basically from head to toe. RP 160, In. 21-24. She then ran back. RP 161, In. 1-2. As Officer Reinfeld entered the room, Janeli Cortes was sitting on the floor holding the victim in her lap. RP 161, In. 7-9. As the officers checked the room to find if anybody else was there, Officer Reinfeld went back to Janeli who was screaming, "My mom is dead" and he held her arms and asked her, "Who did this?" and she responded by saying, "My dad killed my mom." RP 162, In. 1-9. The officer eventually identified that

Janeli had also been hurt. He could see a large cut in her left arm about a half inch to an inch wide open in the forearm. RP 163, In. 1-8. Sebastian Aguilar Cortes' vehicle was located later that day, identified as a white Toyota, in East Wenatchee off of Kentucky Street. RP 179, In. 11-19.

Officer John Matney of the Wenatchee Police Department responded to the scene, which he described as "ghastly" and "utter horror." RP 182, In. 20. Officer Matney was sent to be with the 13-year-old girl at the hospital and collected her clothing, as well as took photographs of her arm which showed the deep laceration on her left forearm. RP 183, In. 12-25. He spoke with her about what happened and referenced her demeanor as sobbing, crying very hard, very upset, and she made a statement as to what occurred. Janeli said that "My father was drunk and he killed my mother." RP 184, In. 1-14. She gave her father's name and a description of the car he was driving and the license plate of the car. She further gave some names and addresses of some relatives that she thought her father might go to. RP 185, In. 15-19.

Aaron Jacobs, an EMT with Lifeline Ambulance testified. RP 192, In. 1-5. He indicated that he entered the basement and noticed blood on the stairwell, there was blood scattered

throughout the room, and turning to the left there was a patient lying in the corner with her daughter at that point who was clinging on to her and crying hysterically. Both the patient and the daughter were covered with blood from head to toe, as was the corner and walls in the room that pretty much from floor to ceiling had blood on them. RP 195, In. 1-8. They initiated basic life support with CPR; one individual attending to her major injuries with trauma dressing, and they put her on a cardiac monitor and tried to intubate her. RP 195, In. 15-19. Mr. Jacobs described the injuries to the victim. He indicated that the primary wound that they were treating was a large laceration across the entire anterior aspect of her neck. They made note of other multiple puncture wounds: there was a large one on her cheek that was the full length from the corner of her mouth down to the bottom of her jaw, as well as other multiple puncture wounds throughout her body. RP 196; In. 17-23. She was pronounced dead with the assistance of a doctor to pronounce death. RP 197, In. 9-13.

Also testifying was Johnny Rebel, a paramedic with Lifeline Ambulance. RP 198, In. 16-18. Mr. Rebel's focused attention on Janeli, the daughter of the murder victim. RP 200, In. 17-20.

Others had bandaged her wounds and he took her to the hospital.
RP 201, In. 9-14.

Next testifying was Mariah Low who worked as a forensic scientist with the Washington State Patrol Crime Lab. RP 204, In. 18-22. She is trained to do DNA analysis. RP 205, In. 24-25. The blood on the shirt of Sebastian Cortes Aguilar matched the blood of Ortencia Alejandre Arroyo, the victim in the murder case. RP 210, In. 1-7. Also a swab of blood was taken from the vehicle hood that was identified as the vehicle Sebastian Cortes Aguilar had been driving, and the swabbed blood also matched the blood of Ortencia Alejandre Arroyo. RP 210, In. 8-16. Mariah Low also received a swab from the vehicle's driver's seat that was mixed in origin, meaning more than one person contributed to the profile. She was able to identify that she had a mixture of two females; one of the females was Ortencia Alejandre Arroyo. RP 210, In. 17-23. Another item tested was the right sandal of the defendant and it was also consistent with the DNA of Ortencia Alejandre Arroyo. The blood from the knife found at the scene also matched the dead victim. RP 211, In. 13-21. Further, a blood swab from the front door was tested, and it was again a mixture of blood consistent with two females; Ortencia Alejandre Arroyo was identified as one of

those individuals. RP 211; In. 22-25. The last item tested was a swab from the driveway which was consistent with blood that was a mixture of two individuals, one female and one male. The female one was a major component and it matched Ortencia Alejandre Arroyo. RP 212, In. 5-12.

Deputy Bo Allen from the Douglas County Sheriff's Department also testified. RP 215, In. 18-20. He is a patrol deputy who found the defendant's foot sticking out of a plant behind a house in East Wenatchee. As he pushed the plant back, they saw a body and a face and someone said, "That's him, that's the guy." It turned out to be the defendant, Sebastian Cortes Aguilar. He was taken into custody. RP 217, In. 15-18; RP 218, In. 14-22. They also found his sandals. RP 218, In. 25; RP 219, In. 1-6.

Keith Kellogg testified as a member of the Wenatchee Police Department and that he was called to assist with translation. RP 222, In. 1-8. Officer Kellogg testified that Mr. Cortes Aguilar was cooperative with him and that Mr. Cortes Aguilar indicated he had an intention to stab Ortencia in the throat. RP 227, In. 19-20. Further, that Mr. Cortes Aguilar did admit to being the person who had killed his wife. RP 229, In. 6-7. Mr. Cortes Aguilar further indicated that he accidentally cut his daughter's arm, because he

did not cut her on purpose. RP 228, In 2-5. Officer Kellogg testified that the defendant showed no remorse during the police interview. RP 239, In. 19-21. Officer Kellogg also testified the defendant knew he had stabbed his wife multiple times. RP 241, In. 5-9; RP 243, In. 22-23.

Next testifying was Edgar Reinfeld, a detective with the Wenatchee Police Department. RP 245, In. 5-7. Detective Reinfeld testified that he had contact with the defendant but also searched the car and took pictures of the vehicle. RP 267, In. 1-15. He also testified that during the course of the interview of the defendant he learned that there had been an argument between the defendant and his wife about his wife talking to another man, or the defendant's perception that his wife had talked to another man. RP 276, In. 20-24. As Reinfeld continued to talk with Mr. Cortes Aguilar about what happened with the actual stabbing of his wife, the defendant said that once he had the knife he had been "cutting at" Ortencia. Reinfeld testified those were the words the defendant used in English; that he had cut her and had been cutting her. RP 277, In. 1-5. Mr. Cortes Aguilar demonstrated with an ink pen that he held the knife a certain way and indicated that his daughter tried to make him stop and had tried to get in the way; he eventually

admitted that he also cut his daughter during the period when he was trying to cut Ortencia. He eventually admitted that he had cut Ortencia in the neck or the throat with the knife. RP 277, In. 6-15. Officer Reinfeld testified that Mr. Cortes Aguilar didn't remember how many times he had cut Ortencia, but he acknowledged that he cut her somewhere in addition to cutting her on the neck. RP 278, In. 1-5. He further acknowledged that he was the one who killed Ortencia and cut Janeli when she was trying to intercede. RP 280, In. 2-10.

Forensic pathologist Dr. Gina Fino also testified. RP 289, In. 5-8. Dr. Fino performed the autopsy for the State of Washington. RP 289, In. 24 to RP 290, In. 2. She testified that Ortencia was approximately 140 pounds and about 4 feet 10 inches tall. RP 290, In. 10-14. It appeared from her evaluation that there were multiple sharp force injuries. Sharp force injuries are a collection of injuries that actually show damage to the tissue by a sharp instrument. RP 291, In. 15-24.

Dr. Fino further testified that the first wound was a penetrating stab wound of the anterior neck. There were other injuries to the neck, but the first wound Dr. Fino described as being a stab wound caused by a knife because it had a single edge to the

blade. The sharp portion of the blade caused the pointed configuration but the flat portion of the blade doesn't cut the skin. RP 294, In. 8-15. This wound actually continued under the collarbone and it appeared to end in the right anterior upper lung lobe so they could actually see a cut mark in the lung. RP 294, In. 21-15; RP 295, In. 1: It was about six inches deep. RP 295, In. 3-6.

The second wound Dr. Fino testified to was a wound to the right upper chest located 48 and a quarter inches above the heel, three and a half inches right of the anterior midline; it was a two-inch curved linear horizontal stab wound. RP 295, In 12-15. This wound left tool marks on the incision of the rib. The depth of this wound was approximately six inches and then it passed from front to back slightly right to left and downward. RP 296, In. 6-8; In. 16-18. Dr. Fino found this to be a penetrating wound. RP 296, In. 20-21. She found that can also be an indication of the force used. RP 297, In. 22-23.

Dr. Fino went on further to describe a stab wound to the right mid-chest. The wound passed through the chest and through the right anterior sixth rib and it completely cut through the rib and continued into the middle portion of the right lung and ended in the

lower lung lobe and caused a half-inch incision to that particular portion of the lung and the bleeding associated with that. This wound was also estimated to be six inches in depth as it passed from front to back. RP 297, In. 25; RP 298, In. 10-19.

The fourth wound was on the left anterior shoulder and was 49 and three-quarter inches from the heel and six inches left of the anterior midline. This wound was also six and a half inches deep. It appeared to end in the left shoulder. RP 299, In. 4-12.

The fifth wound passed through the skin and soft tissues of the posterior shoulder and ended in the left upper back. This wound was three and three-quarter inches deep and passed from back to front. RP 299, In. 15-23. This wound was on the back. RP 300, In. 2.

There were also multiple cuts on the deceased's body. RP 300, In. 6-16. Dr. Fino described an injury to the victim's forehead. It was to the right upper forehead, about three-quarters inches long and has irregular wet edges. The skull in this area showed a one-quarter inch tool mark so the injury was completely through the skin, it made a mark on the skull and a hemorrhage was associated with it. RP 300, In. 20-25.

Dr. Fino also described an injury to the anterior chin as a two-inch long incision that had minimal associated hemorrhage with it. RP 301, In. 3-5.

In addition, Dr. Fino described a two-inch injury to the folds of the neck. RP 301, In. 18-22. She also found defensive wounds. RP 302, In. 6-7. There were injuries to the victim's hands as well as her wrist and forearm. RP 302, In. 20-23; RP 303, In. 2-7.

Dr. Fino concluded her testimony by saying that the mechanism of death in this case, as is most of the time with stab wounds, was bleeding from the stab wounds themselves. In this particular case, there was damage to the lungs and the lungs are considered vital organs. Her conclusion was that the victim died from multiple stab wounds to the neck and the chest. RP 303, In. 17-22.

Jose Barragan testified that he was a neighbor across the street from 830 Methow Street and saw a man with bloody hands come running out of that house who took off in his car quickly in reverse going toward Ferry Street. One or two minutes later he saw a boy or a girl come running out yelling and asking for help as her mom was laying there. They called 911. RP 310, In. 1-2; In. 17-25.

Also testifying was Ms. Daney Gonzalez, a neighbor living with Mr. Barragan, who indicated that she saw a person come outside and it was a man who was bathed in blood. He got into his car, quickly put it into reverse and took off towards the store by Ferry Street. A child came out yelling, "Daddy, don't leave." RP 312, In. 3-5; In. 21-25; RP 313, In. 1-8.

Also testifying in the case was Jorge Torres Cortes, who is the godfather of the children. RP 314, In. 7-25. He indicated that he had received a phone call that day from Mr. Cortes Aguilar. RP 315, In. 8-10. Mr. Cortes Aguilar asked Mr. Torres if he could hide in his garage and Mr. Torres asked what happened. The defendant replied by saying, "I killed Ortencia." "Yeah, I did." The defendant also asked Torres to pick up the kids. RP 315, In. 8-22.

Next testifying was Jovani Cortes, the son of the victim and the defendant. RP 320, In. 12-25; RP 321, In. 1-5. Jovani testified as to what happened on the day his mother died. He indicated that when everything was happening, he was in the kitchen filling his water gun and he heard a bottle crack and went into the living room to see what was happening. When his sister was trying to protect his mom, he opened the door and called for help and kept going outside and inside again. RP 321, In. 13-25. He said he then saw

his dad get a knife. He was in the living room and got the phone to call 911. When he heard screaming, that's when his dad started to stab his mom. RP 322, In. 2-7. Jovani testified that his dad used a different knife to stab his mom from the one he was opening the beer with, then he saw him pulling his mom's hair as she was trying to get away. RP 323, In. 1-16.

Next testifying was Janeli Cortes, the 13-year-old daughter of the victim and the defendant. RP 326, In. 15-21. She was able to point out her dad in the courtroom. RP 328, In. 1-2. She further indicated that her mom and dad got into an argument that day. RP 328, In. 13-15. Janeli stated she was in the other room listening to the TV and she heard a bottle crack. RP 328, In. 20-25. She turned the TV off and ran to see what it was and she saw her dad beating up her mom. RP 329, In. 1-3. She said he continued to punch her mom and pull her hair, and then he took off his belt and started beating her. RP 329, In. 5-9. She said he continued to beat up her mom and then Janeli said, as she was trying to defend her mom, her dad ran to the kitchen. She said she was trying to pick up her mom and take her out so she could run away. RP 329, In. 14-18. Janeli then testified, after being asked why would you do that, because she knew he was going to get a knife because she

had observed that before. RP 329, In. 14-24. She was afraid for her mom. RP 329, In. 25; RP 330, In. 1. She said her dad started trying to punch her and Janeli was trying to hit her father so he would stop and she was yelling and looked at the floor and saw blood and turned around and saw her mom full of blood. She saw her mom get stabbed by the knife and that she—Janeli—got cut in the arm. RP 330, In. 11-25. Janeli knew her mom was going to die. RP 331, In. 3-4. She said her dad then ran away. RP 331, In. 24-25. Janeli said they were unable to help her mom because she was already dead, and that she was taken to the hospital. RP 333, In. 1-6. Neither she nor her mom had threatened her dad that day. RP 336, In. 15-20.

Detective Ryan Weatherman testified that he was a detective for the Wenatchee Police Department and worked on this case. RP 337. Ln. 19-24. State's Exhibit 33 was marked and admitted which was the tape of the 911 call that Jovani dialed. The phone line was open and there was a recording made of the assault. RP 341, In. 10-25. The 911 call was played for the jury. RP 342, In. 1.

The State rested and the defense attorney argued that the Information referencing the Assault in the First Degree did not

indicate transferred intent language and therefore the court should dismiss that count. However, the court allowed the State to reopen and amend to Assault in the Second Degree for the injury to Janeli Cortes. That amendment was made without objection. RP 351, In. 18-19; RP 362, In. 12-16.

The jury convicted Sebastian Cortes Aguilar of Murder in First Degree-Domestic Violence and Assault in the Second Degree-Domestic Violence. RP 413, In. 7-25. Sentencing was held on March 27, 2012. Mr. Cortes Aguilar was represented by counsel. A 24-month weapon enhancement was added to the Murder in the First Degree conviction; the Assault in the Second Degree conviction was for assaulting his daughter. A ten year no contact order based upon the domestic violence finding in this case was ordered.

At the sentencing hearing, Mr. Cortes Aguilar addressed the court. He indicated that what happened wasn't fair, that everything was being blamed on him. Further, that the victim was hiding things at the time of the incident and that he didn't see that he had cut his daughter. Sentencing Hearing RP 35-36.

II. ISSUES AND ARGUMENT

A. THE COURT DID NOT ERR IN DETERMINING THERE WAS SUFFICIENT EVIDENCE TO SUPPORT A CONVICTION FOR MURDER IN THE FIRST DEGREE.

Appellant argues the State did not prove beyond a reasonable doubt all the elements of Murder in the First Degree. The standard for reviewing the sufficiency of evidence in a criminal case is well settled. That standard is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. State v. Gentry, 125 Wn.2d 570, 596-97, 888 P.2d 1105, *cert denied*, 516 U.S. 843 (1995). RCW 9A.32.030(1)(a) establishes that a person is guilty of first degree murder if he acted with premeditated intent to cause the death of another person. The jury instructions in this case identified premeditation. CP 132. The court gave WPIC 26.01.01 as the instruction regarding premeditation. That instruction read as follows:

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of a settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed. CP 132.

The children who were in the room prior to and during the murder testified they had witnessed their mother being beaten and likely hit over the head with a beer bottle. Her hair was being pulled. She was also beaten with a belt before the murder occurred. The beating went on for a while and then the defendant stopped and walked to the kitchen to get a knife. He returned and used that knife on his wife, Ortencia Alejandre Arroyo, stabbing her multiple times and at least four wounds were six inches deep. The defendant further intended on cutting her throat based upon what he told the officers. Cutting her throat would likely kill her. He had a deliberate formation of thought, intended to mortally wound her, and was intent on taking her life. He stabbed his wife even after his 13-year-old daughter tried to drag her out of the house away from him, and stabbed his wife after his daughter placed herself physically between him and her mom. And he stabbed his wife

despite his daughter trying to punch him while she was interceding between her mom and dad. Whether he wants to acknowledge it or not, his actions were such that he had time to decide what he was going to do, how he was going to do it, and complete the act of killing Ortencia.

The appellant claims that there is insufficient evidence to support the jury's verdict in this case. Instead, he refers to the murder as an impulsive or spontaneous act and that it was not premeditated. The State submits that this case is controlled by well-settled law and therefore this appeal is without merit.

Evidence is sufficient to sustain a conviction when any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Drum, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010). This standard of review is well-settled:

When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.

See, State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“The reviewing court will defer to the trier of fact to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences therefrom.” State v. Hayes, 81 Wn. App. 425, 430, 914 P.2d 788 (1996), *review denied*, 130 Wn.2d 1013 (1996). Credibility determinations are for the trier of fact and are not subject to review. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

It is the jury's role to evaluate the credibility of the witnesses, to resolve evidentiary conflicts, and to determine what facts were proven. A reviewing court does not substitute its view of the evidence. Accepting the State's evidence as true, and drawing all inferences in favor of the State, the verdict is amply supported by the evidence.

To recall the testimony of both witnesses in this case, Jovani and Janeli, they witnessed the beating of their mother by their father, as well as what was likely her being hit with a beer bottle, and whipped with his belt. They further witnessed the defendant walk to the kitchen to get a knife, and they knew he was going to get a knife because they had seen this take place before. Combining this with the testimony of Officer Kellogg and Officer Reinfeld that the defendant admitted he was going to cut Ortencia's throat, demonstrated he was able to think about that and knew

what he was going to do. Further, recalling the testimony of Dr. Fino there were multiple contusions and multiple six inch deep stabbings of the victim in and around the facial area and neck, clearly the defendant had made the plan and had the intent to kill his wife. Furthermore, after the act occurred, he left and he was seen running out of the house and driving away in his car.

In State v. Gentry, supra, the court reviewed precedence for sufficiency of evidence of the court reviewed precedence for sufficiency of evidence of premeditation:

Premeditation may be proved by circumstantial evidence where the inferences drawn by the jury are reasonable and the evidence supporting the jury's finding is substantial. A number of appellate cases have considered the sufficiency of evidence with respect to premeditation and demonstrate that a wide range of proven facts will support an inference of premeditation. For example, State v. Rehak, 67 Wn. App. 157, 834 P.2d 651 (1992), held that evidence showing the victim was shot three times in the head, two times after he had fallen on the floor, was sufficient to establish premeditation. State v. Massey, 60 Wn. App. 131, 803 P.2d 340 (1990), *cert. denied*, 499 U.S. 960, 113 L.Ed.2d 648, 111 S. Ct. 1584 (1991), held evidence that defendant brought a gun to the murder site supported finding of premeditation. State v. Woldegiorgis, 53 Wn. App. 92, 765 P.2d 920 (1988), *review denied*, 112 Wn.2d 1012 (1989), held that evidence supported a

finding of premeditation where the victim had gone to bed prior to the attack, was stabbed multiple times, had defensive wounds and there was longstanding animosity between the victim and defendant. State v. Longworth, 52 Wn. App. 453, 761 P.2d 67 (1988), *review denied*, 112 Wn.2d 1006 (1989), held evidence that a weapon had been procured, and that the victim was stabbed in the back while being held by another and was killed to keep her from reporting a burglary was sufficient to support a finding of premeditation. State v. Gibson, 47 Wn. App. 309, 734 P.2d 32 (1987), held evidence that there was a sufficient lapse of time between beating and strangling the victim was sufficient to support finding of premeditation. State v. Bushey, 46 Wn. App. 579, 731 P.2d 553 (1987), held that evidence that the victim had been strangled, that she had received blunt injuries to her face, and that her hands had been tied was sufficient to support finding of premeditation. State v. Giffing, 45 Wn. App. 369, 725 P.2d 445 (1986), held that evidence the victim was transported some distance to an isolated spot and killed, when the attacker approached her from behind and slit her throat after stabilizing her, supported a finding of premeditation. State v. Sargent, 40 Wn. App. 340, 698 P.2d 598 (1985), held evidence that victim was struck by two blows to the head, with some interval passing between the blows, while she was lying face down, supported a finding of premeditation.

State v. Gentry, 125 Wn.2d 570 at 598-599.

In this case, evidence was introduced of a history of domestic violence, a pause in the initial attack to leave the

immediate area to retrieve a lethal weapon, multiple deep wounds located in critical areas, the presence of defensive wounds, continued stabbing throughout direct physical intervention by a young daughter, and continued stabbing after the collapsing of the decedent to the floor.

B. THE COURT DID NOT ERR BY ALLOWING THE STATE TO REOPEN AND AMEND THE ASSAULT IN THE FIRST DEGREE CHARGE PERTAINING TO THE SECOND VICTIM, JANELI, TO ASSAULT IN THE SECOND DEGREE.

At the close of the State's evidence, the defense made a motion to dismiss Count II of the Information, Assault in the First Degree. Defense counsel asserted that the State had not indicated the transferred intent on the assault from Ortencia Alejandre Arroyo to Janeli Cortes, thus the assault charge should be dismissed. The court allowed the State to reopen and to amend the charge to Assault in the Second Degree by criminal negligence, which was done with no objection from the defense.

The State relied on the theory that an assault can be committed even though the victim is entirely unaware of it. State v. Frazier, 81 Wn.2d 628, 630-31, 503 P.2d 1073, 1075-76 (1972). If the defendant, while attempting to injure one person, accidentally injured another, the defendant is guilty of the assault under the doctrine of transferred intent. State v. Clinton, 25 Wn. App. 400, 606 P.2d 1240 (1980). Because the court felt that the name of Ortencia Alejandre Arroyo should have been mentioned in the Information, the court was of a mind to dismiss that count. However, the court did allow an amendment of Count II to allege a violation of RCW 9A.36.021(1)(e), that Janeli Cortes Alejandre was assaulted while the defendant intentionally committed a felony. Said assault caused bodily harm accompanied by substantial pain which extended for a period sufficient to cause considerable suffering. This amendment was made with no objection from the defense.

It should further be noted that every degree of assault is a lesser included offense of all higher degrees of assault. State v. Foster, 91 Wn.2d 466, 471-72, 589 P.2d 789, 794-95 (1979). Assault in the Second Degree is a lesser included of Assault in the First Degree and it should have come as no surprise to the defense

that the jury could have found the defendant guilty of Assault in the Second Degree. The defendant had notice by virtue of the Amended Information that he was accused of assaulting Janeli Cortes Alejandro on or about August 21, 2011. By virtue of the Second Amended Information, the defendant had notice that he was accused of assaulting the same victim at the same time; only the degree alleged was less. The second amendment conformed to the evidence presented at trial and it was reasonable for the court to allow it.

C. THE COURT DID NOT ERR IN ENTERING A NO CONTACT ORDER WITH RESPECT TO THE DEFENDANT'S CHILDREN.

The appellant indicates that Jovani Cortes and Janeli Cortes were not victims in this case and, therefore, upon the defendant's conviction of the crimes, the trial court should not have imposed a ten year no contact order. The mother of Jovani Cortes and Janeli Cortes was murdered. To say that Jovani and Janeli are not victims of this crime is absurd. Not only is it a fact that their mother is dead and their father is now in prison for a long period of time,

but they were present when the murder took place. They are now living with their mother's brother and a no contact order was issued in this case by Judge Bridges after hearing all of the evidence at trial.

The facts of this case show that Mr. Cortes Aguilar is a controlling and violent man. In his statement to the court at his sentencing hearing (Sentencing Hearing RP 39), the defendant indicated when he said, "And I know I ruined my life; I ruined her life; I ruined her family's life; I ruined my family's life. And my own, as well." The defendant further stated (Sentencing Hearing RP 35), "What happened here isn't really fair that everything be blamed on me."

Upon conviction of a crime, the Sentencing Reform Act of 1981 authorizes a trial court to impose crime-related prohibitions such as the entry of no contact orders. RCW 9.94A.505(8). The no contact order was a crime related prohibition; the jury found the crimes to be domestic violence and the no contact order relates only to the family members who were present. Janeli who was injured physically, and seven year old Jovani. Common sense dictates both were emotionally injured. See, In re Rainey, 168 Wn.2d 367, 229 P.3d 686 (2010). The court reviews this to

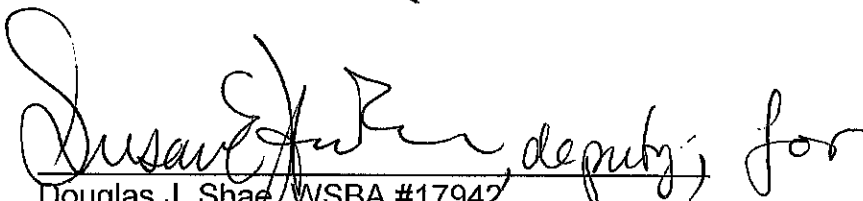
determine if there was an abuse of discretion. In this case there was none. There is no indication that the judge found any facts beyond the jury verdict when imposing the no contact order in this case; just as the court in the Rainey case. The imposition of a no contact order does not improperly infringe upon this defendant's parental rights and his challenge to the order must fail. Clearly, these two children, ages 7 and 13, are victims of this crime.

III. CONCLUSION

The respondent, State of Washington, respectfully requests the court to uphold the convictions of the defendant, Sebastian Cortes Aguilar.

DATED this 19th day of November, 2012.

Respectfully submitted,


Douglas J. Shae WSBA #17942
Chelan County Prosecuting Attorney

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

STATE OF WASHINGTON,)
)
 Plaintiff/Respondent,)
)
 vs.)
)
 SEBASTIAN CORTES AGUILAR,)
)
 Defendant/Appellant.)

No. 30738-7-III
Superior Court No. 11-1-00340-1

DECLARATION OF SERVICE

I, Cindy Dietz, under penalty of perjury under the laws of the State of Washington, declare that on the 19th day of November, 2012, I electronically transmitted to:

Renee S. Townsley
Clerk/Administrator
Court of Appeals, Div. III
500 N. Cedar Street
Spokane, WA 99201

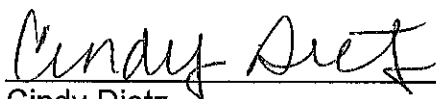
AND deposited in the United States Mail properly stamped and addressed envelopes directed to:

David R. Partovi
Partovi Law, P.S.
900 N. Maple, Lower Level
Spokane, WA 98101

Sebastian Cortez Aguilar #356954
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99363

1 said electronic transmission and envelopes containing true and correct copies of Brief of
2 Respondent.

3 Signed at Wenatchee, Washington, this 19th day of November, 2012.

4 
5 _____
6 Cindy Dietz
7 Legal Administrative Supervisor
8 Chelan County Prosecuting Attorney's Office
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25