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NO. 63166-7-I

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

REC'D
JUL 31 2009
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

NOEL RODRIGUEZ,

Appellant.

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

The Honorable Susan J. Craighead, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion and violated appellant's substantial rights by granting leave to amend the information the day of trial and denying appellant's motions for a continuance, for severance, or for a mistrial.

2. The evidence is insufficient to support appellant's witness tampering conviction.

3. Prosecutorial misconduct during closing argument denied appellant a fair trial.

4. Appellant was unfairly prejudiced by admission of testimony that his son had threatened the complaining witness's life.

5. The evidence is insufficient to support appellant's incest conviction.

6. Cumulative error deprived appellant of a fair trial.

7. The order prohibiting appellant from all contact with his son for ten years violates his fundamental constitutional rights as a parent.

Issues Pertaining to Assignments of Error

1. Under CrR 2.1, amendment of the information is permitted if substantial rights of the defendant are not prejudiced. The day trial began, the State added a charge of witness tampering. The trial court denied defense counsel's motions for a continuance, severance, or a

mistrial because she was unprepared to meet the additional charge. Did the trial court abuse its discretion and violate appellant's constitutional rights to effective assistance of counsel and to present a defense?

2. The State charged appellant with witness tampering because he asked his sister to ask his brother to explain to a witness that, despite the material witness warrant, the State could not do anything to him. Where the relevant law requires proof of attempting to induce a person to withhold testimony, has the State failed to prove the charge?

3. During rebuttal, the prosecutor argued appellant's brother, was only in the courtroom the day that witness testified. The prosecutor also relied on a statement made by a juror during voir dire in arguing that incest is extremely destructive. Were these arguments flagrant and ill-intentioned misconduct because they relied on facts not in evidence and unfairly aligned the jury with the prosecutor?

4. The trial court permitted the complaining witness to tell the jury that appellant's son threatened to kill her in a drive-by shooting if she testified. The court instructed the jury not to attribute this threat to appellant. Given the witness tampering charge, did the danger of unfair prejudice from this testimony substantially outweigh any probative value under ER 403?

5. The State charged appellant with one count of incest. The instruction proposed by the State and submitted to the jury, which became the law of the case, required the State to prove appellant was related to the alleged victim “as a descendant.” But the State failed to prove appellant was the descendant of the alleged victim. Is reversal and dismissal with prejudice required?

6. Did cumulative error violate appellant’s right to a fair trial?

7. Appellant was convicted of various domestic violence offenses against his wife in the presence of their son. There is no evidence of harm to the child other than witnessing violence between his parents. Is the order prohibiting all contact with his son an unconstitutional violation of appellant’s fundamental due process right to parent his child?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor charged appellant Noel Rodriguez with first-degree incest, second-degree assault, felony harassment, unlawful imprisonment, interference with domestic violence reporting, and witness tampering. CP 36-39. The State also alleged aggravating factors of domestic violence committed in the sight of a minor child and a pattern of abuse on three of the counts. CP 36-39. The jury found Rodriguez guilty on all counts and also found the aggravating factors were proved. CP 46-55.

The court imposed an exceptional sentence of 84 months on the assault charge relying solely on the sight of a minor child aggravator. CP 150. On the other felony charges, the court imposed concurrent standard range sentences. CP 150-153. On the misdemeanor charge of interfering with reporting of domestic violence, the court sentenced Rodriguez to 12 months, suspended on the condition that he engage in mental health evaluation and treatment. CP 146-48. As a condition of his sentence, Rodriguez is prohibited from having any contact with his son for ten years. CP 154.

2. Substantive Facts

In 2003-2004, Rodriguez went through a contentious divorce from his former wife after she kicked him out of the house. 8RP¹ 63, 124. Nevertheless, he remains an important support to his former wife and their children. 6RP 111. While the two were still married, his former wife's daughter, Sonia Ruiz,² came to Washington from Nicaragua. 6RP 16.

Ruiz had been raised by her grandparents from age 3 to age 15, and referred to them as her parents, while her biological mother lived in

¹ There are twelve separately paginated volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Jan. 21, 2009; 2RP – Jan. 22, 2009; 3RP – Jan 26, 2009; 4RP – Jan. 27, 2009; 5RP – Jan. 28, 2009; 6RP – Jan. 29, 2009; 7RP – Feb. 2, 2009; 8RP – Feb. 3, 2009; 9RP – Feb. 4, 2009; 10RP – Feb. 5, 2009; 11RP – Feb. 6, 2009; 12RP – Mar. 6, 2009.

² The record contains spelling variations on Ruiz's name, including "Sonja" and "Cruiz."

Washington. 6RP 156. When her mother brought Ruiz and Ruiz's brother Jose Munoz to live in Washington, Ruiz did not want to come. 6RP 16. After her arrival, relations between Ruiz and her long-estranged mother only deteriorated further. 6RP 156. Ruiz's mother had married Rodriguez and born two more children with him. 6RP 16. Ruiz and her brother shared a bedroom with their half-siblings and resented being punished as scapegoats for their misbehavior. 6RP 157. Ruiz testified her mother would instruct Rodriguez to punish her and Munoz for things their half-siblings, Rodriguez's own children, had done. 6RP 158. The tension cumulated in Ruiz being arrested in 2002 for assaulting her mother. 6RP 161. Rodriguez was scratched when he tried to intervene. 6RP 161.

At some point, Rodriguez and Ruiz began a sexual relationship. When she became pregnant at age 18, with no job and no money, Rodriguez invited her to move in with him, and the pair subsequently married. 6RP 16-17, 163. Their son was born March 25, 2003, when Ruiz was 19. 9RP 77.

Ruiz testified she never loved Rodriguez, and only married him because he offered to support her and the baby and because she did not want her child to be a bastard. 6RP 109-110, 163. By 2008, Ruiz had decided to leave Rodriguez. 6RP 20. She left her son with her mother, and went to Nicaragua for a month, telling Rodriguez she would be in California. 6RP 18-19. When she returned, she stayed at the home of a male friend, and did

not tell Rodriguez she was back. 6RP 22-24. When she and Rodriguez saw each other again at her mother's home, Ruiz told him she wanted to end the marriage. 6RP 26.

Approximately two weeks later, Ruiz went to Rodriguez's house to pick up their son. 6RP 30-31. Rodriguez and the child were at a neighbor's, so she lay down to wait for them. 6RP 30-31. When Rodriguez and the child returned, he tried to kiss his wife, but she turned away. 8RP 135-36. Upset, he asked her if she had been cheating on him. 8RP 140.

Ruiz testified that, when she would not answer, Rodriguez yelled at her and put his hands on her throat. 6RP 38. When she tried to leave, he told her she was not leaving. 6RP 40. When their son said, "Let go of Mommy" and grabbed Rodriguez, he let go. 6RP 48. Ruiz then grabbed her phone to call the police. 6RP 49. Rodriguez told her that was the phone she used to talk to her boyfriend and instructed her to use the phone he had given her instead. 7RP 18; 9RP 29. He then grabbed the phone and smashed it on the ground. 6RP 49-50. Finally, he grabbed Ruiz, threw her outside, and threatened to kill her and her boyfriend. 6RP 59-60.

Ruiz refused to answer questions regarding whether she had had sexual intercourse with Rodriguez before she turned 18. 6RP 84. The State

then elicited her testimony that Rodriguez's son, her half-brother Francisco³ threatened to kill her in a drive-by shooting if Rodriguez went to jail for a long time.⁴ 6RP 112.

Before trial, defense counsel moved to exclude the testimony of Louis Vila. 1RP 65; 2RP 15-16. Vila was a counselor the family was referred to during Rodriguez's divorce from Ruiz's mother. 8RP 21, 34. Vila testified Ruiz's brother Jose Munoz told him he saw Rodriguez having sex with Ruiz when she was 16. The court ruled Munoz's statements to Vila would be admitted only if Munoz also testified. 3RP 3. The State announced it would seek a material witness warrant to compel Munoz's testimony. 3RP 3.

That evening, Rodriguez called his sister from jail. 7RP 131. During their conversation, he explained the court's ruling regarding Munoz and Vila, and asked her to ask his brother Harry to explain to Munoz that despite the warrant, he could not be charged with a crime and emphasized, "it's my fucking life here."⁵ 7RP 132-33, 135.

Two days later, the day trial was to begin, the court granted the State's request to amend the information to add a charge of witness

³ Francisco is also referred to in the Verbatim Report of Proceedings as "Finco." 6RP 112-13.

⁴ This testimony is quoted in greater detail in section C.4., infra.

⁵ The text of the phone call is described in greater detail in section C.2., infra.

tampering. CP 21. At this point, the jury had already been selected and three days of pre-trial motions had been heard. 1RP-3RP. Defense counsel objected and requested the court either deny leave to amend or grant a continuance to investigate the facts and the law of the new charge. 5RP 19. While not unsympathetic to defense counsel's predicament, the court ruled the amendment was appropriate and trial would begin that afternoon, as scheduled. 5RP 20, 24. An independent translation of the phone call was obtained by the end of the day, and the prosecutor was prohibited from arguing about the new charge in opening statements. 5RP 28, 33, 47.

That afternoon when trial began, defense counsel moved to sever the witness tampering charge or for a mistrial because she was ineffective without time to prepare. 5RP 62-63. The court denied these motions as well, but granted a continuing objection.⁶ 5RP 66.

C. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED RODRIGUEZ'S CONSTITUTIONAL RIGHTS WHEN IT ALLOWED THE STATE TO ADD A NEW FELONY CHARGE THE DAY OF TRIAL BUT DENIED DEFENSE COUNSEL ANY TIME TO PREPARE.

Accused persons have a right to sufficient notice of the charges against them to permit them to mount a defense. U.S. Const. amend. V;

⁶ Defense counsel also renewed the motion to sever the witness tampering charge at the close of the State's case in chief. 8RP 66-68.

Const. art. I, § 22; State v. Purdom, 106 Wn.2d 745, 748-49, 725 P.2d 622 (1986). Under court rules, amendment of the information is permitted at any time before verdict so long as substantial rights of the defendant are not prejudiced, and continuances are generally discretionary with the trial court. CrR 2.1(d), 3.3(f). But denial of a continuance that forces the defendant to go to trial without sufficient time to prepare is a violation of due process. State v. Hartwig, 36 Wn.2d 598, 601, 219 P.2d 564 (1950) (citing Const. art. I, §§ 3, 22). And substantial rights are prejudiced, “as a matter of law,” when the information is amended the day of trial without granting a requested continuance. Purdom, 106 Wn.2d. at 748.

a. A New Trial Is Required Because Rodriguez’s Substantial Rights Were Prejudiced as a Matter of Law.

In Purdom, the charge was amended from conspiracy to deliver a controlled substance to accomplice to delivery of a controlled substance on the day trial was to begin. Id. at 746. Defense counsel was first notified of the possible amendment the Friday before the Monday trial and requested a continuance. Id. Defense counsel stated on the record he could not know the extent of the prejudice without time to look into the new charge. Id. at 749. The court agreed, remanding for a new trial and holding, “The defendant must be given an opportunity, when it is requested, to prepare to

meet the actual charge made against him when it is made for the first time on the day trial is to begin.” Id.

Rodriguez must be given the same opportunity as Purdom, and the facts of this case show a continuance was even more essential to providing a constitutionally fair trial. Rodriguez’s attorney also requested a continuance when the information was amended the very day trial was to begin, but counsel only found out about the possible amendment late the night before trial, rather than a full weekend before as in Purdom. 5RP 16-17; Purdom, 106 Wn.2d at 749. Unlike Purdom’s counsel, defense counsel in this case was able to point to specific prejudice that would occur: she would not be able to investigate facts supporting a potential defense to the new charge, would not be able to interview witnesses to prepare to cross-examine them on the new charge, and was not able to interview prospective jurors with an eye toward this new charge. 5RP 17, 62-63; 8RP 66.

Rodriguez was prejudiced because his counsel was not able to interview prospective jurors with an eye toward the new offense. When the amendment to the information adds a new charge after trial has begun, the defendant is prejudiced by the inability to adjust trial strategy. State v. Ziegler, 138 Wn. App. 804, 811, 158 P.3d 647 (2007). Specifically, voir dire of the jury is “based on the precise nature of the charge alleged in the information.” State v. Pelkey, 109 Wn.2d 484, 490, 745 P.2d 854 (1987).

For that reason, when a jury has already been empanelled, the defendant is highly vulnerable to prejudice from the addition of new charges. Id.

The denial of the continuance also prejudiced Rodriguez's due process right to present a defense to the new charge. Washington's notice jurisprudence under article I, § 22 is tailored to the precise evil of "charging documents which prejudice the defendant's ability to mount an adequate defense by failing to provide sufficient notice." Schaffer, 120 Wn.2d at 620. As a corollary, the defendant's right "to interview witnesses before trial is clearly recognized by the courts," especially for crucial State's witnesses. Kines v. Butterworth, 669 F.2d 6, 9 (1st Cir. 1981).

Rodriguez particularly needed to prepare a defense and interview witnesses because witness tampering depends not just on the words used but also on their context and their effect on the witness. State v. Rempel, 114 Wn.2d 77, 83-84, 785 P.2d 1134 (1990). The denial of a continuance meant defense counsel could not interview the people involved in the alleged tampering to investigate the context or the effect of Rodriguez's words. 8RP 66.

The transcript of the phone call revealed a possible defense, an alternative explanation for Rodriguez's intent in calling his sister. Rather than attempting to prevent Munoz from testifying, the transcript indicates Munoz may be slow or mentally challenged. 7RP 133. Rodriguez

testified he wanted his brother Harry to speak to Munoz to explain that Munoz did not need to testify falsely in order to avoid being jailed on a material witness warrant. 8RP 155-56. With a continuance, counsel would have been able to investigate other evidence that Munoz was particularly in need of explanation, such as prior psychological evaluations, school evaluations or placement, or even testimony of other family members. Because the continuance was denied, counsel was entirely unable to investigate evidence supporting this defense.

Munoz's trial testimony also revealed areas that effective defense counsel would have investigated. He testified he had surgery before meeting with Vila, and was on medications that may have caused memory problems or hallucinations. 7RP 118-19, 122. Medical records or further interviewing on this topic may have supported Rodriguez's defense by showing why Munoz needed to have the process explained to him.

The denial of the continuance also violated Rodriguez's right to effective assistance of counsel. The right to counsel requires counsel to have the opportunity to adequately prepare for trial by making a "full investigation of the facts and law applicable to the case" in an effort to discover defenses. State v. Burri, 87 Wn.2d 175, 180, 550 P.2d 507 (1976). Counsel has an initial duty to "conduct appropriate investigations to determine what defenses were available." State v. Maurice, 79 Wn.

App. 544, 552, 903 P.2d 514 (1995) (citing State v. Jury, 19 Wn. App. 256, 263- 64, 576 P.2d 1302 (1978)). In fact, if counsel fails in either of these tasks, it is ineffective assistance. Jury, 19 Wn. App. at 263-65. Thus, counsel's inability to prepare also violated Rodriguez's right to counsel. Id.; Burri, 87 Wn.2d at 180.

Here, the preparation needed to meet the new charge was even greater than in Purdom because the amendment added an entirely new substantive offense, rather than merely changing the theory of liability for the same offense. 106 Wn.2d at 746; see also, e.g., State v. Schaffer, 120 Wn.2d 616, 621, 845 P.2d 281 (1993) (impermissible prejudice less likely where the amendment merely specifies a different manner of committing the crime originally charged or charges a lower degree of the original crime). With no time to prepare to meet this new charge, as in Purdom, Rodriguez's substantial rights were prejudiced as a matter of law, and he should receive a new trial. 106 Wn.2d at 749.

b. Additionally, the Trial Court's Reasons for Denying the Continuance Were Untenable.

Courts generally have discretion to grant or deny continuances of the trial date. CrR 3.3(f); In re Dependency of V.R.R., 134 Wn. App. 573, 580, 141 P.3d 85 (2006). But the failure to grant a continuance is an abuse of discretion if based on untenable grounds. Id. at 581; State v. Warren, 96 Wn.

App. 306, 309, 979 P.2d 915, 989 P.2d 587 (1999). Specifically, denial of a continuance is an abuse of discretion if it forces a defendant to proceed to trial with counsel who has had insufficient time to prepare a defense. Hartwig, 36 Wn.2d at 601; see also V.R.R., 134 Wn. App. at 585-86 (parent's right to due process in termination trial was violated when attorney was appointed the day of trial and request for continuance was denied).

Even assuming there could be some countervailing interest justifying denial of a continuance when the defendant's rights are prejudiced, see Whitney v. Buckner, 107 Wn.2d 861, 869, 734 P.2d 485 (1987) ("the cost of protecting a constitutional right cannot justify" denying that right), no such interest was identified in this case. First, the court recognized defense counsel had valid concerns, was "sympathetic," and admitted it is "difficult to have new charges in mid-trial." 5RP 22, 34. Despite these admittedly valid concerns, the court simply stated that it was "appropriate" to permit the amendment under the circumstances. 5RP 22.

The court appeared to be concerned with keeping the jury waiting. 5RP 33. But "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." State v. Cadena, 74 Wn.2d 185, 188-89, 443 P.2d 826 (1968) (quoting Ungar v. Sarafite, 376 U.S. 575, 589, 84 S. Ct. 841, 849, 11

L. Ed. 2d 921 (1964)), overruled in part and on other grounds by, State v. Gosby, 85 Wn.2d 758, 539 P.2d 680 (1975). Inconvenience to the jury is a logistical concern, similar to courtroom congestion, which has been held insufficient reason for denying the right to a speedy trial. Warren, 96 Wn. App. at 309. The concern for the jury was an untenable basis for denying a justifiable request for delay, given the prejudice to Rodriguez.

The court also appeared to credit the State's argument that Rodriguez created the need for a continuance through his own misconduct. SRP 65. But reasonable opportunity to investigate the facts and the law regarding criminal charges cannot be denied merely on the grounds that the defendant committed a crime. Moreover, there is no evidence Rodriguez was attempting to delay the proceedings. The only other continuance specifically requested by defense counsel was granted as "required in the administration of justice" when the State previously added new charges to the information. Supp. CP ___ (sub no. 25, Order Continuing Trial).

The State also argued strenuously against a continuance because Sonia Ruiz and her son, two key State witnesses, were reluctant to testify, and the State feared a continuance would result in them not being present. SRP 20. But the State was fully capable of obtaining material witness warrants to ensure their testimony, as demonstrated by seeking such warrants against both Sonia Ruiz and Jose Munoz. Additionally, Sonia Ruiz testified

only briefly the first day of trial and returned to continue her testimony the second and third days. 5RP 107-110; 6RP 13; 7RP 16. Evidently, the State was able to procure her attendance on multiple days, indicating a brief continuance would not have prevented her testimony. The State's difficulty in obtaining witness does not justify depriving a criminal defendant of a reasonable time to prepare a defense.

If the court shared the State's concern that the witnesses would not return, it could have granted the motion to sever the witness tampering charge and proceed with trial on the other charges. The State opposed this motion as well, however, because it wanted to use the witness tampering charge to prove the other charges. 5RP 63-64. The court denied the motion to sever reasoning that the witness tampering charge was intertwined with the other charges and that severance would not have been proper if the charges had all been filed at the same time. 5RP 65. This reasoning was untenable because the charges were not all filed at the same time, and the motion to sever was not made in isolation. It was, in essence, a compromise attempt, a way to satisfy both the State's need to have its witnesses be present and the defense's valid request for time to prepare a defense to the new charge.

Finally, when counsel renewed the severance motion at the end of the State's case in chief, the court agreed defense counsel had identified a

potentially meritorious defense to the witness tampering charge. 8RP 73. But the court concluded the defense was unlikely to find any evidence that would bolster that defense enough to justify a continuance. Id. A similar argument was rejected in Hartwig, where the State argued the defendant's requested continuance was unnecessary because the facts and the law were simple. 36 Wn.2d at 601. The court rejected this argument, stating,

[N]evertheless, it was the duty of appointed counsel to make a full and complete investigation of both the facts and the law in order to advise his client and prepare adequately and efficiently to present any defenses he might have to the charges against him. No sufficient time was allowed for such purposes.

Id. Here, the court also allowed no sufficient time to investigate. Without any investigation whatsoever, it is impossible to know what evidence might have been uncovered and to what extent it might have bolstered the defense. The court should have granted reasonable time to investigate and prepare.

What constitutes a reasonable time to prepare depends on the facts and circumstances of each case. State v. Anderson, 23 Wn. App. 445, 449, 597 P.2d 417 (1979). For example, if this were a subsequent request for a second or third continuance to continue investigating a defense, the court's ruling might have been reasonable. See State v. Herzog, 69 Wn. App. 521, 525, 849 P.2d 1235 (1993) (finding no abuse of discretion in denying continuance where "numerous" previous continuances had been granted).

But that is not the case here. Defense counsel first requested a one-week continuance to obtain an independent translation of the phone call and investigate the facts and the law. 5RP 19. When that was denied and the court facilitated a translation that very day, counsel reasonably modified her request to a couple of days. Id. But the court denied the motion again and defense counsel was permitted no time whatsoever to investigate the facts and law.

The denial of any time whatsoever to prepare to meet the new charge was even more unreasonable in light of the continuance granted the State in order to locate its witnesses. 4RP 5, 7. In addition to violating Rodriguez's substantial constitutional rights, the court's ruling was an abuse of discretion because the reasons for denying the continuance were untenable under the circumstances.

2. THE STATE FAILED TO PROVE WITNESS
TAMPERING BEYOND A REASONABLE DOUBT.

Due process requires the State to prove each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). On appeal, a reviewing court must reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all the elements of the crime were proven

beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Evidence and all reasonable inferences are viewed in the light most favorable to the State. Rempel, 114 Wn.2d at 82-83.

On the other hand, the existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Hutton, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). “In order to support a determination of the existence of a fact, evidence thereof must be substantial, i.e., it must attain that character which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.” Id. (internal citations omitted).

To convict Rodriguez of witness tampering, the State bore the burden to prove beyond a reasonable doubt that Rodriguez attempted to induce a person to withhold testimony. CP 93. Specifically, under the statute,

A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person who he has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child to:

- (a) Testify falsely or, without right or privilege to do so, to withhold any testimony, or
- (b) Absent himself from such proceedings.

RCW 9A.72.120. The statute is designed to forestall the obstruction of justice. State v. Stroh, 91 Wn.2d 580, 582, 588 P.2d 1182 (1979). The

evidence was insufficient because neither the actual words used nor the context of Rodriguez's relationship with Muñoz shows an attempt to induce him to withhold any testimony.

Rodriguez's statements to his sister show he wanted someone to explain to Muñoz that, despite the material witness warrant, Muñoz could not be forced to falsely accuse him just to get out of jail. The call includes the following statements:⁷

- But anyway, they are going to call Vila's testimony, they're not going to use it unless Jose goes in first, and we're going to get an arrest warrant for Jose, and I wanted somebody to explain to Jose that if he does accuse me of that, they can't do anything to him, because they want to force him to accuse me, so we're going to get an arrest warrant or something. 7RP 132-33.
- So I wanted somebody to call Harry so he can go and explain to him, Jose, because he doesn't know anything. 7 RP 133.
- Because they can't do anything to him. He needs to know [unintelligible] kind of retarded or what. 7RP 133.
- He's saying he saw me, he saw me having sex with Sonja, ah, up to four times. 7RP 133.
- No matter what, they can't do anything to him. They can throw him in jail, but they can't put charges. So if they throw him in jail, maybe he'll accuse me just to get out. 7RP 134.
- Just so he realizes, so he realizes it's 11 years that they're going to give me if they [unintelligible] shit, just so he knows, so he's aware of that. 7RP 134.

⁷ The transcript of the entire call, as read into the record at trial, is attached as an appendix.

- [H]ave him explain it so he sees what the system is like here. 7RP 135.
- To not be afraid, because if he doesn't want to say anything, they can't force him to say shit. It's my fucking life here, he needs to realize that. 7RP 135.
- And if Jose doesn't show up, if they don't get him, take him there, that son of a bitch Vila can't say shit. 7RP 135-36.
- He's the one saying I did all that shit. 7RP 136.
- Don't forget to call Harry to explain everything. 7RP 138.

Nowhere in the conversation does Rodriguez expressly ask that Muñoz be told not to testify.

Repeated requests to “drop the charges” and “don't ruin my life” do not amount to witness tampering. Rempel, 114 Wn.2d at 82-83. Charged with criminal trespass and attempted second degree rape, Rempel phoned the complaining witness several times, asking her to drop the charges because he was sorry, he would never do it again, and it would ruin his life. Id. at 81-82. The Court first noted that the literal words used did not contain a request to withhold testimony: “The defendant's words contain no express threat nor any promise of reward. The words ‘drop the charges’ reflect a lay person's perception that the complaining witness can cause a prosecution to be discontinued.” Id. at 83. Absent circumstances showing that a request to “drop the charge” was actually an attempt to persuade the witness not to

testify, the use of such language does not support a conviction for witness tampering. Id. at 83-84.

By contrast, an actual request to change testimony or not appear at trial generally supports a conviction. Stroh, 91 Wn.2d at 582, 587. A request accompanied by promises or threats is also sufficient. State v. Scherck, 9 Wn. App. 792, 794, 514 P.2d 1393 (1973); State v. Wingard, 92 Wash. 219, 223-24, 227, 158 P.2d 725 (1916). For example, in State v. Williamson, 120 Wn. App. 903, 86 P.3d 1221 (2004), defendant Williamson asked a child he was accused of sexually abusing to tell Williamson's young stepdaughter, whom Williamson was also accused of abusing, that "daddy and mommy are going to jail if you don't recant your statement, take it back." Id. at 907. Williamson argued his message was a "true statement of the legal situation, not an inducement or attempted inducement." Id. But on appeal the court distinguished Williamson's message from that in Rempel because Williamson specifically asked his stepdaughter to recant and threatened adverse but untrue consequences. Id. at 907-08.

Here, the evidence was insufficient to convict Rodriguez because the words he used did not contain an actual request that Munoz not testify. Id. Nor did they contain threats or promises of untrue consequences. Id. Rodriguez merely asked that his brother Harry explain to Munoz, who was

unfamiliar with the criminal justice system, that he could not be charged with a crime based on his testimony. 7RP 134-35.

The State may argue Rodriguez's references to "it's my fucking life" and the amount of time he could spend in prison for his offenses are sufficient proof of an attempt to prevent Munoz from testifying. 7RP 134-35. This argument should be rejected because similar statements "that it was going to ruin his life" were insufficient to support the jury's verdict in Rempel. 114 Wn.2d at 81-82.

Additionally, asking that legal processes be explained to a family member who is being threatened with a material witness warrant is not inducement. To "induce" is defined as "to move and lead . . . as by persuasion or influence." Webster's Third New International Dictionary of the English Language Unabridged 1154 (1993). A term that is not defined in a statute will be given its ordinary meaning. State v. Pickett, 95 Wn. App. 475, 478, 975 P.2d 584 (1999). Moreover, the rule of lenity requires an appellate court to construe a statute strictly against the State and in favor of the accused. State v. Mullins, 128 Wn. App. 633, 642, 116 P.3d 441 (2005). Rodriguez did not "move" or "lead" Munoz to any particular action or use threats or promises to persuade or influence him.

To determine whether sufficient evidence supports the conviction, under Rempel it is also necessary to look beyond the words themselves to

inferences that might be drawn and to the overall context of the relationship between the parties. 114 Wn.2d at 83-84. The State argued in Rempel that the phone calls should be considered in light of the “assaultive nature of the crime.” Id. at 84. But the court noted the witness considered the calls a mere nuisance. Id. Despite the assaults, the court found the context of the entire relationship showed the calls were not a threat. Id.

Here, as in Rempel, there is absolutely no indication Munoz was worried Rodriguez posed any threat to him. Indeed, there is far less evidence of threat than in Rempel, as Rodriguez has never been charged with assaulting Muñoz. The context of their relationship does not raise a threatening inference.

The evidence was insufficient to find witness tampering. The verdict necessarily relies on speculation that Rodriguez’s words meant something other than what he said, but the context does not support such a conclusion. Without threats, promises, or an express request to withhold testimony, Rodriguez’s conviction for witness tampering should be reversed.

3. THE PROSECUTOR COMMITTED FLAGRANT MISCONDUCT BY ARGUING FACTS NOT IN EVIDENCE AND UNFAIRLY ALIGNING HIMSELF WITH THE JURY.

A prosecutor is a quasi-judicial officer, obligated to seek verdicts free of prejudice and based on reason. State v. Charlton, 90 Wn.2d 657,

664-65, 585 P.2d 142 (1978); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). A prosecutor has a special duty in trial to act impartially in the interests of justice and not as a “heated partisan.” State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). Consistent with their duties, prosecutors must not urge guilty verdicts on improper grounds. State v. Belgarde, 110 Wn.2d 504, 507-508, 755 P.2d 174 (1988). Nor may they refer to matters outside the evidence. Id.

A criminal defendant is denied a fair trial when the prosecutor makes improper comments and there is a substantial likelihood the comments affected the jury’s verdict. Reed, 102 Wn.2d at 145. When prosecutorial misconduct is so flagrant and ill-intentioned that a curative instruction could not have remedied the situation, the issue may be raised for the first time on appeal despite the lack of objection below. Belgarde, 110 Wn.2d at 507. In analyzing the prejudice resulting from prosecutorial misconduct, appellate courts do not look at the conduct in isolation, but consider the cumulative effect of the total argument, the issues in the case, the evidence, and the instructions given to the jury. State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008) (citing State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2008)).

a. The Prosecutor Committed Misconduct in Closing Argument by Relying on Statements Made by a Juror During Voir Dire.

In apparent fear the jury might not be properly appalled at Rodriguez's sexual relationship with Ruiz, the prosecutor relied on a juror's own statement that incest destroys family relationships and identity:

One of our jurors during voir dire talked about how incest even between step-daughter and stepfather would have a permanent effect on the child. It would absolutely destroy relationships as the child knows them. Who is dad if the person in the bedroom that's having sex with you is dad? Who is your sister if your sister's dad is your lover? Who is your brother? Who are you? Identity is absolutely and utterly destroyed.

9RP 130. The prosecutor committed misconduct by relying on answers given by a juror during voir dire first because those answers are not evidence and second because reliance on information from a juror improperly aligned the jury with the prosecutor.

The effects of incest on children may properly be the subject of expert testimony. But the prosecutor committed flagrant misconduct by making this argument without any supporting evidence. See Warren, 165 Wn.2d at 29. In Warren, the prosecutor explained the complaining witness's failure to report abuse immediately by arguing, without any supporting evidence, that children often delay in reporting molestation. Id. The court accepted the State's concession that the argument was

improper, although not severe enough to warrant reversal in light of the overwhelming evidence in that case. Id.

Here, the prosecutor's argument that incest is devastating, even to step-children, was similarly improper because not based on any evidence. Unlike in Warren, the evidence against Rodriguez is far from overwhelming. It consists entirely of hearsay statements allegedly made by Sonia Ruiz's brother to his counselor during a highly contentious divorce proceeding years before and Ruiz's own refusal to discuss the issue. 8RP 27.

Equally as damaging as the lack of evidentiary basis for this argument was the prosecutor's explicit reliance on a juror's statement during voir dire. Arguments calculated to align the jury with the prosecutor and against the defendant are improper. Reed, 102 Wn.2d at 147. In Reed, the prosecutor denigrated the defense's expert witnesses as "city doctors who drove down here in their Mercedes Benz." Id. at 143. The court held this argument likely affected the jury's verdict because the Reed presented a plausible defense that he lacked the necessary intent based on the expert testimony. Id. at 147-48. The court explained that the prosecutor's portrayal of the defense experts as outsiders was "calculated to align the jury with the prosecutor and against the petitioner." Id. at 147. Here, the prosecutor essentially reversed the scenario from Reed, casting

the jury as expert witnesses and insiders who, along with the prosecutor, were the only ones who understood the impact of this crime. This caused incurable prejudice because the jury could not be expected to entirely disregard argument based on a juror's own statement.

b. The Prosecutor Unfairly Bolstered the Witness Tampering Charge by Arguing Rodriguez's Brother Harry Was Only in the Gallery the Day Munoz Testified.

The witness tampering charge rested on the State's argument that Rodriguez's call to his sister was an attempt to have his brother Harry stop Jose Munoz from testifying. During rebuttal, the prosecutor argued:

When Marilyn testified on the stand she said that must have been Harry that was sitting in the courtroom the day before. Who's Harry? Harry's the person that the defendant wanted to talk to Jose. What happened the day before? Jose's testimony. *That was the only day that we saw that gentleman in the gallery.*

10RP 47 (emphasis added). Rodriguez's sister testified Harry was in the courtroom the previous day when Munoz testified. 8RP 90. But there was no evidence before the jury that that was the only day Harry was present.

This misconduct was flagrant and ill-intentioned because the State knew the proof of witness tampering was weak. This court has noted, "trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury

in a close case.” State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). Raising the specter of Harry’s singular presence on rebuttal was a flagrant and ill-intentioned attempt to bolster the State’s weak case. Considering the insufficient evidence of witness tampering and the other improper arguments and unfairly prejudicial testimony discussed below, this argument caused incurable prejudice.

c. The Prosecutor Also Committed Misconduct in Appealing to the Jury’s Fear of Chaos.

Blatant appeals to the jury’s passion, prejudice, or sympathy are misconduct. Belgarde, 110 Wn.2d at 508. Specifically, appeals to jurors’ fears and appeals to their patriotism are improper grounds for argument. State v. Perez-Mejia, 134 Wn. App. 907, 916, 143 P.3d 838 (2006).

In Perez-Mejia, the prosecutor urged the jury to continue the victim’s mission to stop violence. Id. at 917. The prosecutor pointed out that unlike the victim, the jury would “not be placed in harm’s way” as the victim was, but “what you can do as ladies and gentlemen of the jury is send a message.” Id. After defense counsel’s objection was overruled, the prosecutor continued to repeatedly urge the jury to “send a message” by holding the defendant accountable. Id. at 917-918. The court held this argument improperly invoked jurors’ patriotic sentiments that, when

combined with references to the defendant's ethnicity, prejudiced his right to a fair trial. Id. at 918. "It is unquestionably improper for a prosecutor to reference racial or ethnic prejudice or to appeal to jurors' fear and repudiation of criminal groups as a reason to convict." Id. (citing Belgarde, 110 Wn.2d at 507).

Courts need not "wink at" unfair arguments by prosecutors merely because defense counsel failed to object. State v. Neidigh, 78 Wn. App. 71, 79, 895 P.2d 423 (1995). Even without objection, such appeals to the jury's fear and patriotism can be so flagrant and ill-intentioned as to be incurable by instruction. Belgarde, 110 Wn.2d at 508. In Belgarde, the prosecutor compared the defendant's involvement in AIM, the American Indian Movement, to involvement in the Irish Republican Army, and described AIM as "butchers" who killed indiscriminately. Id. at 506-07. He argued that while the jury might not be afraid of AIM, the witnesses in this case certainly were. Id. The court held that no instruction could have cured the "fear and revulsion" the jury would have felt had they believed the prosecutor's description of AIM. Id. at 508.

During closing argument, the prosecutor in this case similarly appealed to the jury's fear of and desire to repudiate the criminal element:

See for us, this is a safe place, these walls, these halls of justice, that robe, the suit, there's formalities, there's procedures, there's rules, and they're built to keep keeping

the order, to stop the furies, from letting things get out of hand, the breaks that we take to hammer out different rulings, the arguments, the sidebars, all of this, it's a system to contain chaos, and it doesn't get much more chaotic than this.

9RP 107. Later, the prosecutor specifically applied that fear to the witness tampering charge:

[O]ur first set of elements involves the defendant violating something more fundamental than just the law. He violated something that's almost impossible to protect, and that's the integrity of the system itself, because if we can't show, if we can't protect the ability of witnesses to take the stand free from the influences of those people about whom they're going to testify, we can't put on a case. Everything we talked about, about these hallowed halls, about why it's so important to be protected from the outside world when we're in here, goes away and it's ashes.

9RP 126. Under this argument, the jury was invited not to decide factual guilt or innocence, but to defend the "hallowed halls" of the justice system against the "furies" and forces of "chaos." 9RP 107, 126.

In an additional appeal to the jury's fear, the prosecutor encouraged the jury to convict based on what might have happened to Sonia Ruiz. In discussing the proof of assault by strangulation, the prosecutor argued:

Does the fact that the defendant didn't keep strangling Sonja until he crushed her wind wipe [sic] or until she was knocked unconscious or until she was dead or scratched her neck until she was bleeding, does that mean he didn't complete a crime? No. It starts with assault in the second degree for strangulation. *Thank God we're not here for something else.*

10RP 46 (emphasis added).

The prosecutor appealed to the jury's fear of chaos, to their patriotism and belief that the "hallowed halls" of the criminal justice system will protect them, and to their fear that "something else" could have happened to Sonia Ruiz. 9RP 107, 126; 10RP 46. As in Belgarde, the fear engendered by the prosecutor's argument could not have been cured by instruction, particularly when examined in the context of the other instances of misconduct, the insufficient evidence of witness tampering, and the admission of unfairly prejudicial evidence discussed above. The entire trial was tainted with improper arguments and evidence that tipped the scale and resulted in Rodriguez's convictions.

4. RUIZ'S TESTIMONY THAT RODRIGUEZ'S SON THREATENED HER WAS UNFAIRLY PREJUDICIAL.

Even relevant evidence must be excluded under ER 403⁸ if its probative value is substantially outweighed by the danger of unfair prejudice. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists. State v. Rice, 48 Wn. App. 7, 13, 737 P.2d 726 (1987). Evidence is unfairly prejudicial "if

⁸ ER 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

it has the capacity to skew the truth-finding process.” State v. Read, 100 Wn. App. 776, 782-83, 998 P.2d 897 (2000). Sonia Ruiz’s testimony regarding her brother’s threat if she testified skewed the truth-finding process in this case. Even if relevant, it remains inadmissible under ER 403 because it was unfairly prejudicial, confused the issues and misled the jury.

On direct examination, Sonia Ruiz refused to answer questions about whether she had had sexual intercourse with Rodriguez before her 18th birthday. The following colloquy ensued:

Q. (By Mr. Gahan) Ms. Ruiz, what did Finco say would happen to you if you testified about being sexually active with the defendant before turning 18?

A. He didn’t say that specifically.

Q. What did he say?

A. He says if he goes to jail for a long time that he was going to – that the one who was going to kill me was him. He was going to do a shooting, shooting by, that’s what they call it.

Q. Shooting what?

A. Like driving in the car and shooting. I don’t know what he called that.

...

Q. Ms. Ruiz, you’ve indicated to us that Finco told you that if his father goes away to jail for a long time that he would shoot you, is that correct?

A. Yes.

6RP 112-13. Even assuming Ruiz's testimony on this issue was relevant to explain her reluctance to testify, that minimal probative value was far outweighed by its unfairly prejudicial effect, particularly as pertains to the witness tampering charge.

Evidence of third party threats against witnesses has been found not to violate ER 403 when it is clear the defendant did not make the threat and the defendant "opened the door." State v. Knight, 54 Wn. App. 143, 772 P.2d 1042 (1989). In Knight, defense counsel asked the police detective on cross-examination whether the informant had been paid to leave town. Id. at 153. Later, the prosecutor elicited testimony that this was done because the informant had received threats against himself and his family after Knight was arrested. Id. Knight argued this was unfairly prejudicial under ER 403. Id. The court found the evidence was not prejudicial because 1) the State was entitled to clarify what happened after defense counsel "opened the door" by broaching the subject, and 2) the witness carefully avoided any indication that Knight was involved in the threats. Id. at 154. The makers of the threats were "unnamed" and "unidentified." Id.

Here, by contrast, the maker of the threat was clearly identified as a member of Rodriguez's family. The trial court expressly recognized the

prejudice and the need to protect the defendant from “being tarred with a brush that he may have had nothing specifically to do with.” 6RP 115. To that end, the trial court instructed the jury this testimony was not to be attributed to the defendant in any way.⁹ 6RP 112. But under the circumstances, the jury was unlikely to be able to follow the court’s instruction.

Admission of this testimony could only “confuse the issues.” See Rice, 48 Wn. App. at 13 (danger of unfair prejudice because evidence “could have confused the issues by focusing the jury’s attention on the assault and abduction [by a witness] and away from the burglary”). Rodriguez stood accused of witness tampering, specifically by means of asking one family member, his sister, to contact another family member, their brother, about speaking to a fourth family member, his step-son, who was to testify. The State was attempting to show, essentially, that Rodriguez was pulling the strings behind other family members’ interference with witnesses.

Even without the similarities to the charged conduct, this threat by a family member was likely to be attributed to Rodriguez. See State v. Kosanke, 23 Wn.2d 211, 216, 160 P.2d 541 (1945) (“The jury had the

⁹ The full instruction reads, “Any testimony about what family members may have communicated to this witness is to be taken by the jury for its effect on this witness. It is not to be attributed to the defendant in any way.” 6RP 112.

right to conclude that whatever the wife of appellant did with reference to any persuasion to have the witnesses absent themselves from the trial was either at the request of the appellant or was done with his knowledge and consent.”). But when combined with the charge that Rodriguez had attempted to enlist other family members in preventing a different witness from testifying, the danger was enormous that the jury would attribute his son’s threat to Rodriguez.

The danger of unfair prejudice was exacerbated by the lack of evidence on the witness tampering charge. Given the weakness of the proof of witness tampering, Ruiz’s testimony of her brother’s threats were even more likely to have unfairly influenced the jury’s verdict. The circumstances of the charge made it nigh impossible for the jury not to consider other family members’ conduct, even when not expressly attributed to Rodriguez.

Under these circumstances, the trial court abused its discretion in overruling defense counsel’s strenuous objection to this highly prejudicial and only tangentially relevant evidence. 6RP 114-15. Unlike in Knight, Rodriguez in no way opened the door to this testimony, and the danger here was exceedingly great that the jury would attribute this threat to Rodriguez. Even if standing alone, this would not be reversible error, in the context of insufficient evidence and improper closing argument, it

likely contributed to the taint that pervaded this entire trial as discussed below.

5. UNDER THE LAW OF THE CASE AS GIVEN TO THE JURY, THERE IS INSUFFICIENT EVIDENCE TO SUPPORT RODRIGUEZ'S INCEST CONVICTION.

Jury instructions not objected to become the law of the case.

Hickman, 135 Wn.2d at 101-02. The State assumes the burden of proving otherwise unnecessary elements when it fails to except to such elements in the "to convict" instruction. Id. at 102. On appeal, the added elements become fair game, and a defendant may challenge the sufficiency of the evidence regarding the added elements. Id. The remedy for insufficient evidence of an added element is dismissal and reversal with prejudice. Id. at 99.

A person is guilty of first-degree incest if he or she knowingly engages in sexual intercourse with a person who is related to him or her as an ancestor, descendant, brother, or sister of either the whole or the half blood. RCW 9A.64.020(1)(a). Although RCW 9A.64.020(3)(a) provides that "[d]escendant" includes stepchildren and adopted children under eighteen years of age," it does not define descendant. Unambiguous statutes must be applied based on their plain language. State v. Hall, 112 Wn. App. 164, 167, P.3d 350 (2002). Courts routinely resort to dictionary definitions for guidance when faced with undefined plain statutory terms. State v.

Christensen, 153 Wn.2d 186, 195, 102 P.3d 789, 793 (2004). Black's Law dictionary defines a "descendant" as one "who follows in lineage, such as a child or grandchild." Black's Law Dictionary 455 (7th ed. 1999); see also Hall, 112 Wn. App. at 168.

Here, the to-convict instruction on count I states,

To convict [Rodriguez] of the crime of incest in the first degree, as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That during the period of time intervening between May 12, 1999 and May 11, 2002, [Rodriguez] engaged in sexual intercourse with Sonia Ruiz;
- (2) That [Rodriguez] was related to Sonia Ruiz either legitimately or illegitimately *as a descendant*;
- (3) That at the time [Rodriguez] knew the person with whom he was having sexual intercourse was so related to him; and
- (4) That any of these acts occurred in the State of Washington.

CP 68 (emphasis added). The instructions were proposed by the State.

Supp. CP ____ (sub no. 48, State's Instructions to the Jury). During closing argument, the prosecutor argued,

Incest in the first degree. On May 12, between May 12, 1999, and May 11th, 2002, the defendant engaged in sex with Sonja Ruiz, *that he was related to Sonja either legitimately or illegitimately, as a descendant*, that at the time that the defendant knew the person with whom he was having sexual intercourse was so related to him, and that it occurred in Washington.

9RP 129 (emphasis added).

Although there was no dispute Sonia Ruiz was Rodriguez's stepdaughter, as the jury was instructed (and as the State argued in closing) the State was required to prove Rodriguez was related to her "as a descendant," i.e., to prove Rodriguez was Ruiz's child. But Rodriguez "was related to Ruiz" as an "ancestor" or "ascendant," that is, "One who proceeds in lineage, such as a parent or grandparent," not as a "descendant." Black's Law Dictionary 84, 108.

Because there was insufficient evidence to prove first-degree incest based on these instructions, which were proposed by the State, the remedy is dismissal and reversal with prejudice. Hickman, 135 Wn.2d at 99, 101-02.

6. REVERSAL IS REQUIRED BECAUSE A
COMBINATION OF ERRORS CUMULATIVELY
PRODUCED AN UNFAIR TRIAL.

When errors cumulatively produce an unfair trial, even though individually not reversible error, a defendant is entitled to a new trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Even where some errors are not properly preserved for appeal, the court retains the discretion to examine them if their cumulative effect denies the defendant a fair trial. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992). In addition, the failure to preserve errors can constitute ineffective assistance of

counsel and should be taken into account in determining whether the defendant received an unfair trial. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980).

This trial was tainted from beginning to end. Trial counsel was not permitted time to prepare to meet a witness tampering charge added the day of trial. The State's insufficient evidence on that charge and the incest charge was unfairly bolstered by evidence Rodriguez's step-son threatened the complaining witness. The prosecutor repeatedly relied on prejudicial facts not in evidence and played on the jury's fears during closing argument. Under these circumstances, cumulative error deprived Rodriguez of a fair trial, warranting reversal of all his convictions.

7. THE ORDER PROHIBITING CONTACT WITH RODRIGUEZ'S CHILD VIOLATES HIS FUNDAMENTAL RIGHT TO PARENT.

Parents have a fundamental liberty interest in the care, custody, and control of their children. State v. Ancira, 107 Wn. App. 650, 653, 27 P. 3d 1246 (2001), citing Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). "Where a fundamental right is involved, state interference is justified only if the state can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling state interest involved." In re Custody of Smith, 137 Wn.2d 1, 15, 969 P.2d 21 (1998) (citations omitted), aff'd on narrower

grounds sub nom Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). Prevention of specific harm to children is a compelling state interest, but limitations on parental rights are constitutional only if reasonably necessary to accomplish the essential needs of the State. State v. Letourneau, 100 Wn. App. 424, 439, 997 P.2d 436 (2000). Thus, the State may not burden the fundamental right to parent via a criminal sentence condition unless the condition is reasonably necessary to prevent a specific harm to the child. Ancira, 107 Wn. App. at 654; Letourneau, 100 Wn. App. at 439.

Here, Rodriguez and his wife both asked that the court allow contact between Rodriguez and his son. 12RP 15, 28. Nevertheless, the court imposed as a condition of Rodriguez's sentence, an order prohibiting all contact with his son for ten years. CP 154. Because the no-contact order involves substantial state regulation of a fundamental right, the State has the burden of showing that the no-contact order is narrowly tailored to meet a compelling state interest. See, e.g., Smith, 137 Wn.2d at 15 (state must show statute regulating parental rights is narrowly drawn). The State cannot do so here.

Unless the State shows specific harm to a child resulting from an act of domestic violence, the State has no interest compelling enough to restrain all contact between a parent and child. Ancira, 107 Wn. App. at 654. The

facts of Rodriguez's case are similar to those in Ancira. Ancira and his wife got into an argument while their children were present. Id. at 652. Ancira then drove away with one of the children and would not return the child until his wife agreed to talk with him. Id. As part of Ancira's sentence for felony violation of a domestic violence no-contact order, the court ordered him to have no contact with his wife or children for five years because it is harmful for children to witness domestic violence even if they "aren't direct victims of physical violence themselves." Id. at 652-53.

On appeal, the court explained that the State did not demonstrate that prohibiting Ancira from all contact with his children for a lengthy period was reasonably necessary to protect them from the harm of witnessing domestic violence. Id. at 645-55. The court also found that the record did not support "the total prohibition of indirect contact with the children by telephone, mail, e-mail, etc." Id. at 655. Accordingly, the court found that "completely prohibiting him from all contact with his children is extreme and unreasonable given the fundamental rights involved." Id.

Similarly, the order here prohibits all contact between Rodriguez and his son without any showing that this is necessary to protect the child from witnessing domestic violence. CP 154. Nothing in the record indicates Rodriguez ever directly harmed his son or poses a substantial risk of doing so other than the risk of observing domestic violence between Rodriguez and

Ruiz. As in Ancira, that specific harm can be prevented by other means such as prohibiting contact with Rodriguez's wife. Ancira, 107 Wn. App. at 656. The fact that Rodriguez's son was a witness to the crime at issue, "does not ameliorate the constitutional problems." Id.

Nor are the constitutional problems ameliorated by the court's willingness to reconsider written contact after Rodriguez has been in prison for some time. There were less restrictive alternatives available to protect the child from the cycle of domestic violence while at the same time protecting Rodriguez's fundamental rights. The trial court could have narrowed the scope of the order such that it allowed for a third-party outside the family to arrange and facilitate visits or phone access. It could have required the State to arrange supervised visits. The trial court could also have referred the case to family or juvenile court to determine how best to balance the need to protect the child against Rodriguez's right to continued contact with his son.¹⁰

For the reasons stated above, the no-contact order constitutes an unconstitutional burden on Rodriguez's parental rights. Smith, 137 Wn.2d at 20-21; Ancira, 107 Wn. App. at 655. Given the similarities between this

¹⁰ As this Court has said, family and juvenile courts are better equipped to address parent-child issues. Ancira, at 655-56. Not only do those courts have the authority to investigate the best interests of minor children, but there are statutory procedures in place to protect a parent's due process rights and to assist parents in overcoming parental deficiencies so that families can be reunited. Chapter 13.34 RCW.

case and Ancira, this Court should reverse the condition of his sentence preventing Rodriguez from contacting his son because it violates his fundamental constitutional right to the care, custody, and companionship of his child. Ancira, 107 Wn. App. at 655.

D. CONCLUSION

For the foregoing reasons, Rodriguez requests this Court reverse and dismiss his convictions for witness tampering and first degree incest. This Court should also grant him a new trial on the remaining convictions or, alternatively, remand for resentencing without the unconstitutional no contact order and based on his new offender score.¹¹

DATED this 31st day of July, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC


JENNIFER J. SWEIGERT
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Attorneys for Appellant

¹¹ Without the convictions for witness tampering and incest, Rodriguez's offender score on the second degree assault charge should now be four, rather than six. RCW 9.94A.525. This makes his standard range on the second-degree assault conviction 15 to 20 months. RCW 9.94A.510. His offender score on the felony harassment and unlawful imprisonment charges is also reduced from five to three. The standard range for those offenses should be 9 to 12 months. RCW 9.94A.510.

Appendix

7RP 131-138

1 beforehand.

2 The following is an excerpt from the
3 prosecutor's response to the court's ruling on January
4 26th, 2009. "Mr. Gahan. Okay, with that being said,
5 Your Honor, the State is going to be requesting a
6 material witness warrant. I'll go through some easier
7 steps this evening to try to secure Jose, but in order
8 to avoid a confrontation clause issue then, so we'd
9 still be expecting to call Louis Vila as a witness as
0 long as we can secure Jose Munoz."

1 MR. GAHAN: The following is a phone call
2 made by the defendant to his sister, Marebel Boland,
3 on the evening of January 26th 2009. Ms. Owen-Tara
4 will be reading the part -- will be reading the
5 transcript from the jail operator recording and the
6 words of Marebel Boland. I will be reading the part
7 of the defendant from that phone call.

8 Portions of the transcript that say
9 unintelligible will simply be read and into the record
0 as unintelligible.

1 (Audio played)

2 MR. GAHAN: "Unintelligible for now, come
3 on, hurry up."

4 (Audio played)

5 MR. GAHAN: "Noel."

1 (Audio played)

2 MR. GAHAN: "Noel."

3 (Audio played)

4 MR. GAHAN: "Yes, Julio is anus, ano, Julio,
5 stands for an asshole, yeah."

6 (Audio played)

7 MR. GAHAN: "Noel."

8 (Audio played)

9 MR. GAHAN: "Hello, hi, sis."

10 MS. OWEN-TARA: "Oh, hi."

11 MR. GAHAN: "Hey, I came down from court, I
12 don't know if the attorney called you."

13 MS. OWEN-TARA: "I went there today at
14 1:00."

15 MR. GAHAN: "Uh-huh."

16 MS. OWEN-TARA: "Did you not go to court
17 today?"

18 MR. GAHAN: "No, I went to court about 2:00.
19 They took me over there."

20 MS. OWEN-TARA: "Uh-huh."

21 MR. GAHAN: "But anyway, they are going to
22 call Vila's testimony, they're not going to use it
23 unless Jose goes in first, and we're going to get an
24 arrest warrant for Jose, and I wanted somebody to
25 explain to Jose that if he does accuse me of that,

1 they can't do anything to him, because they want to
2 force him to accuse me, so we're going to get an
3 arrest warrant or something."

4 MS. OWEN-TARA: "Uh-huh."

5 MR. GAHAN: "So I wanted somebody to call
6 Harry so he can go and explain to him, Jose, because
7 he doesn't know anything."

8 MS. OWEN-TARA: "Uh-huh."

9 MR. GAHAN: "Because they can't do anything
10 to him. He needs to know, unintelligible, kind or
11 retarded or what."

12 MS. OWEN-TARA: "No, well, the thing is I
13 talked to -- he was going to talk to me today."

14 MR. GAHAN: "Uh-huh."

15 MS. OWEN-TARA: "And, uh-huh."

16 MR. GAHAN: "He's saying he saw me, he saw
17 me having sex with Sonja, ah, up to four times."

18 MS. OWEN-TARA: "But that is according to
19 what they said, what was reported."

20 MR. GAHAN: "Uh-huh, but that he said it,
21 that he was the one who said that."

22 MS. OWEN-TARA: "Uh-huh. But later on that
23 was not -- not proved."

24 MR. GAHAN: "Uh-huh, but they're using that
25 now, so it's -- they're going to throw him in jail."

1 If he doesn't want to come, they're going to throw him
2 in jail."

3 MS. OWEN-TARA: "Uh-huh."

4 MR. GAHAN: "No matter what, they can't do
5 anything to him. They can throw him in jail, but they
6 can't put charges. So if they throw him in jail,
7 maybe he'll accuse me just to get out."

8 MS. OWEN-TARA: "No, I don't believe so."

9 MR. GAHAN: "Well, don't believe that. But
10 what I want is somebody to explain to him that they
11 can't do anything to him."

12 MS. OWEN-TARA: "Uh-huh. Okay, I'm going to
13 call."

14 MR. GAHAN: "Call Harry, so he comes, and
15 explain it to Harry, so he goes talk" --

16 MS. OWEN-TARA: "And when is it supposedly?"

17 MR. GAHAN: "They're putting the order
18 today."

19 MS. OWEN-TARA: "Uh-huh."

20 MR. GAHAN: "Just so he realizes, so he
21 realizes it's 11 years that they're going to give me
22 if they unintelligible shit, just so he knows, so he's
23 aware of that."

24 MS. OWEN-TARA: "Okay, I'm going to call
25 Harry right now then."

1 MR. GAHAN: "Okay, hey, the photo, I got the
2 photo, the girl is really pretty. What did the boy
3 have there?"

4 MS. OWEN-TARA: "Yes."

5 MR. GAHAN: "I got that yesterday. I only
6 saw the photo yesterday."

7 MS. OWEN-TARA: "Oh."

8 MR. GAHAN: "Would you call Jose right now?"

9 MS. OWEN-TARA: "No, I'll call the other
10 one."

11 MR. GAHAN: "Oh, okay, and have him explain
12 it so he sees what the system is like here. We have
13 already picked out the jury. Oh, I know, anyway, can
14 you -- are you gonna call him then?"

15 MS. OWEN-TARA: "Yes, I will call him."

16 MR. GAHAN: "And you explain to Harry what I
17 want to tell you."

18 MS. OWEN-TARA: "Uh-huh, uh-huh."

19 MR. GAHAN: "To not be afraid, because if he
20 doesn't want to say anything, they can't force him to
21 say shit. It's my fucking life here, he needs to
22 realize that."

23 MS. OWEN-TARA: "Uh-huh."

24 MR. GAHAN: "And if Jose doesn't show up, if
25 they don't get him, take him there, that son of a

1 bitch Vila can't say shit."

2 MS. OWEN-TARA: "Uh-huh."

3 MR. GAHAN: "He's the one saying I did all
4 that shit."

5 MS. OWEN-TARA: "Uh-huh, um, okay, well,
6 this"...

7 MR. GAHAN: "Why aren't the kids are not
8 going to school, right?"

9 MS. OWEN-TARA: "Huh?"

10 MR. GAHAN: "Unintelligible and
11 unintelligible. Why aren't they coming?"

12 MS. OWEN-TARA: "Well, because they can't
13 because they are -- they're going to call them as --
14 to testify."

15 MR. GAHAN: "Uh-huh."

16 MS. OWEN-TARA: "And so that's the reason
17 why I can't be there either, because they're calling
18 me to testify."

19 MR. GAHAN: "Oh, well, tomorrow will be
20 the"...

21 MS. OWEN-TARA: "It starts tomorrow, and
22 it's looking like -- well, they didn't give me all the
23 information."

24 MR. GAHAN: "Are you gonna call -- have you
25 spoken to E?"

1 MS. OWEN-TARA: "Uh-huh, I saw her today."
2 MR. GAHAN: "Uh-huh, no, but after this
3 trial."
4 MS. OWEN-TARA: "No, after -- no, I saw her
5 after today, at 1:00, at"...
6 MR. GAHAN: "No, after 5:00. Right now she
7 hasn't called you, right?"
8 MS. OWEN-TARA: "She has not called, but she
9 did say she was going to send me an e-mail."
10 MR. GAHAN: "Uh-huh."
11 MS. OWEN-TARA: "And I'm going to -- I'm
12 going to go bring another phone in case she calls
13 then, but I'll get in touch with her."
14 MR. GAHAN: "Okay. He was going to call to
15 do the order that was going to be in two hours, to
16 then call for Harry to go"...
17 MS. OWEN-TARA: "Uh-huh."
18 MR. GAHAN: "And explain that to Jose."
19 MS. OWEN-TARA: "Okay."
20 MR. GAHAN: "And Sonja wants to accuse me.
21 Have you talked to Sonja?"
22 MS. OWEN-TARA: "No, I haven't talked to her
23 about that, but it's prosecuting attorney, the one
24 who's doing all that."
25 MR. GAHAN: "So Sonja wants to accuse me of

1 more shit?"

2 MS. OWEN-TARA: "I don't think so. I've not
3 asked her about that, but I'm sure -- I get the
4 impression that's not the case."

5 MR. GAHAN: "Uh-huh, okay, you better call
6 and get that shit done, will you please?"

7 MS. OWEN-TARA: "Uh-huh."

8 MR. GAHAN: "Okay, and thank you, sis."

9 MS. OWEN-TARA: "Okay. I'll talk to you
10 later then."

11 MR. GAHAN: "Okay, tell my kids, tell the
12 kids I love them, okay?"

13 MS. OWEN-TARA: "Okay, I'll do that, love
14 you."

15 MR. GAHAN: "Okay, love you, too."

16 MS. OWEN-TARA: "You know, just keep faith,
17 okay?"

18 MR. GAHAN: "Okay. Don't forget to call
19 Harry to explain everything."

20 MS. OWEN-TARA: "Okay."

21 MR. GAHAN: "All right."

22 MS. OWEN-TARA: "All righty."

23 MR. GAHAN: And that concludes the phone
24 call.

25 MS. MACDONALD: Your Honor, I think there's

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 63166-7-I
)	
NOEL RODRIGUEZ,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF JULY, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] NOEL RODRIGUEZ
DOC NO. 298017
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
2009 JUL 31 PM 4:11

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF JULY, 2009.

x Patrick Mayovsky