

03166-7

03166-7

NO. 63166-7-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

NOEL RODRIGUEZ,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE SUSAN CRAIGHEAD

---

**BRIEF OF RESPONDENT**

---

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**A. ISSUES PRESENTED**

1. Could a rational trier of fact have found Rodriguez guilty of tampering with a witness?

2. During pretrial hearings Rodriguez attempted to tamper with a witness. The evidence was admissible in his trial. Did the trial court abuse its discretion in allowing the State to add a count of witness tampering and in denying Rodriguez's request to recess trial?

3. Rodriguez alleges for the first time that the prosecutor committed misconduct in closing argument. Should this Court reject Rodriguez's claim that the alleged misconduct was so flagrant and ill-intentioned that he should be excused from having failed to object and his convictions reversed?

4. Did the trial court abuse its discretion in allowing testimony that the victim, Sonja Ruiz, was threatened by her stepbrother that if she testified, he would harm her?

5. Could a rational trier of fact have found Rodriguez guilty of incest for having sexual intercourse with his minor stepdaughter?

6. Should this Court find that Rodriguez has failed to prove multiple errors that taken together caused such substantial prejudice that he can avail himself of the cumulative error doctrine?

7. Did the trial court appropriately put restrictions on Rodriguez's ability to contact his son, NRJr, a son conceived from his incestuous relationship with his stepdaughter?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

Rodriguez was charged by Fourth Amended Information as follows:

- Count I: Incest in the First Degree
- Count II: Assault in the Second Degree  
With aggravators that the crime was committed within sight or sound of his or the victim's minor child and that there was evidence of an ongoing pattern of psychological, physical or sexual abuse of the victim.
- Count III: Felony Harassment  
With aggravators that the crime was committed within sight or sound of his or the victim's minor child and that there was evidence of an ongoing pattern of psychological, physical or sexual abuse of the victim.
- Count IV: Unlawful Imprisonment  
With aggravators that the crime was committed within sight or sound of his or the victim's minor child and that there was evidence of an ongoing pattern of psychological, physical or sexual abuse of the victim.

Count V: Interfering with Reporting Domestic Violence

Count VI: Tampering with a Witness

CP 36-39. A jury found Rodriguez guilty as charged. CP 46-48, 50-55.

Based on the aggravating circumstances, the court imposed an exceptional sentence of 84 months on count II (the standard range was 33 to 43 months) and concurrent standard range sentences for lesser amounts on counts I, III, IV and VI. CP 150, 152. The court imposed a suspended sentence on count V, a gross misdemeanor. CP 146.

## **2. SUBSTANTIVE FACTS**

### **a. The Incest**

Sonja Munoz Ruiz was 24 years old at the time of trial. 5RP<sup>1</sup> 107. She was raised by her grandparents in Nicaragua after her mother, Cela, left her and moved to the United States. 5RP 108-10; 6RP 15. Jose Munoz Ruiz is her younger brother. 5RP 110.

Sonja has a son, NRJr, fathered by her stepfather, the defendant, Noel Rodriguez. 6RP 16, 18. She became pregnant when she was just 18 years old. 6RP 13, 18, 98. Rodriguez, 20 years her senior, was married to Sonja's mother at the time. 6RP 13, 16; 6RP 104, 108, 110. Rodriguez

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<sup>1</sup> The verbatim report of proceedings is cited as follows: 1RP--1/21/09; 2RP--1/22/09; 3RP--1/26/09; 4RP--1/27/09; 5RP--1/28/09; 6RP--1/29/09; 7RP--2/2/09; 8RP--2/3/09; 9RP--2/4/09; 10RP--2/5/09; 11RP--2/6/09; and 12RP--3/6/09.

then divorced Cela and married Sonja so her baby wouldn't be "a bastard."  
8RP 125.

Rodriguez met Sonja years earlier. When Sonja was 15 years old, Cela returned to Nicaragua and brought her and Jose to the United States. 5RP 108; 6RP 16; 8RP 121. Sonja and Jose moved into Rodriguez's home with a stepbrother, Francisco, and stepsister, Sarah. 6RP 16. It is during this time period that Rodriguez was alleged to have had sexual intercourse with Sonja.

At trial, when Sonja was asked about Rodriguez's incestuous relationship with her, she refused to answer the prosecutor's questions, stating "it's something that I don't want to talk about."<sup>2</sup> 6RP 83-84, 102, 114. Sonja said she was forced to testify by the prosecutor upon threat of arrest. 5RP 108; 6RP 89. She added that her mother, Cela, was unhappy with her testifying and that she wanted Rodriguez freed so he could help support her kids, Francisco and Sarah. 6RP 111. Sonja said that Francisco was also upset with her testifying and that he told her that if Rodriguez went to jail, he, Francisco, would kill her. 6RP 112-13.

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<sup>2</sup> The court later put on the record that "[t]his is something that probably would not be apparent from the record, but her body language and her tone of voice conveyed that probably there was sex before eighteen." 7RP 53.

Jose testified that when he was living with Sonja, his mother and Rodriguez, he underwent counseling with Luis Vila, a therapist at Consejo, a community mental health agency. 7RP 115-17, 122; 8RP 13. Jose said he received treatment because of the things he suffered through at home. 7RP 117. However, when asked if he had witnessed Rodriguez having sex with Sonja, he said he did not remember. 7RP 119.

Luis Vila testified that he treated Jose for approximately two years, starting when Jose was 14 and Sonja 16. 8RP 25-26. Jose disclosed to him during therapy that when Cela traveled to Nicaragua because of the death of her mother, Rodriguez came into the room Jose shared with Sonja and on four separate occasions had sexual intercourse with Sonja when she was just 16 years old. 8RP 27. Jose angrily told Luis that he just watched from the other bed. 8RP 27.

**b. The Assault, Harassment, Unlawful Imprisonment, And Interfering With Reporting Domestic Violence**

In the summer of 2008, Sonja went to Nicaragua to see her family. 6RP 18. She lied and said she was going to California because Rodriguez forbade her that she could not go to Nicaragua. 6RP 19. Before Sonja left, she also decided that she was going to leave Rodriguez. 6RP 20. Sonja testified that it was not a happy marriage, that she never loved Rodriguez

and that there had been multiple acts of domestic violence.<sup>3</sup> 6RP 109.

Sonja said she married Rodriguez only because of the baby. 6RP 110.

When Sonja returned to the United States she stayed with a friend instead of moving back home with Rodriguez. 6RP 22. She told Rodriguez the marriage was over. 6RP 26.

About two weeks later, on October 1, 2008, Rodriguez went to Cela's house and took NRJr. 6RP 28. Rodriguez then called Sonja and told her to pick NRJr up at his house. 6RP 29-30. When Sonja arrived, however, nobody was home. 6RP 31. Sonja waited inside but eventually fell asleep. 6RP 31.

At about 2:00 a.m., Sonja was awakened by the noise of Rodriguez and NRJr coming home. 6RP 32-33. Rodriguez demanded to know if Sonja had a boyfriend. 6RP 35. Because of his anger, Sonja remained quiet, although this just increased Rodriguez's rage. 6RP 35-37. Sonja

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<sup>3</sup> Admitted into evidence was a 2001 incident wherein Rodriguez pushed Sonja to the ground, grabbed her by the hair and slapped her in the face when she tried to use the phone to call her grandmother. 6RP 91-93. Rodriguez also grabbed Sonja by the throat and threatened, "Don't fuck with me because I'll kill you." 6RP 94. Another incident occurred when Sonja was four months pregnant. Rodriguez had been drinking and began hitting Sonja in the face, stopping only when his friends started laughing. 6RP 95-97. A third incident occurred on NRJr's fifth birthday. 6RP 98. Rodriguez had been drinking and started fighting with Jose. Later, while driving on I-5 with NRJr in the back seat, Rodriguez became angry because Sonja told him not to fight with Jose. Rodriguez then struck Sonja in the mouth and grabbed the steering wheel causing Sonja to lose control of the car. 6RP 98-101.

said she wanted to leave whereupon Rodriguez grabbed her by the neck and threatened, "you're not leaving yet." 6RP 38-40.

Rodriguez then began assaulting Sonja. 6RP 41. When NRJr tried to push Rodriguez away, Sonja grabbed her cell phone and threatened to call the police. 6RP 46. Rodriguez then grabbed the phone, smashed it, and grabbed Sonja by the neck yet again. 6RP 46, 50. Rodriguez told Sonja she wasn't leaving until she answered his questions. 6RP 42, 44. He then called Sonja a whore and threw her against the refrigerator. 6RP 57.

When NRJr said the police were going to come, Rodriguez threw Sonja out the door. 6RP 57. But when Sonja ran to her car, Rodriguez chased after her, grabbed her by the hair and threatened to kill her. 6RP 55, 60. As Sonja yelled for help, Rodriguez ran back inside. 6RP 61.

Police arrived shortly thereafter and found Sonja outside crying and disheveled. 6RP 120-23. Sonja had visible marks on her neck. 6RP 124. Sonja told the officers that Rodriguez had come home drunk, assaulted her, and that her five-year-old son was still inside. 6RP 125.

Officers loudly knocked on the door and announced their presence. 6RP 127. Rodriguez did not respond. 6RP 127. After making their way inside, officers found Rodriguez, clad only in his underwear, in the bedroom with his crying son. 6RP 130-31. Rodriguez refused to put on a

shirt or shoes and proceeded to launch into an intoxicated and profanity laced diatribe blaming Sonja for his problems. 6RP 144; 7RP 51. Much of the diatribe was recorded via the officer's in-car audio/video system. Exh 21; 7RP 52, 56. NRJr told the officers that "daddy was hitting mommy." 6RP 155.

At trial, NRJr initially refused to even give his name. 5RP 81. Then, after a number of family members left the courtroom, NRJr described how Rodriguez had assaulted his mother, choked her, threatened to kill her, and smashed her phone. 5RP 86-89. He also said Rodriguez threatened to kill him. 5RP 89. NRJr admitted that he had not wanted to testify earlier because his aunt was in the courtroom.<sup>4</sup> 5RP 103.

The day after the assault, Rodriguez called Sonja from jail. Exh 6<sup>5</sup>; 6RP 70. Rodriguez began the call by calling Sonja a "tontito," or dumb ass. 6RP 71. Sometime thereafter, Marilyn Boland, Rodriguez's

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<sup>4</sup> The court put on the record that during an in-chambers conference held after NRJr initially refused to answer any questions, NRJr said he would feel better about testifying if his family was not in the courtroom. 5RP 82; 6RP 4-5. NRJr was told by Cela that if he testified against Rodriguez that he would take him away and he would never see his family again. 6RP 4. NRJr also said that he thought his aunt would tell Cela if he testified. 6RP 4. After the in-chambers conference, defense counsel spoke with the family members and they stepped out of the courtroom. 5RP 83; 6RP 5.

<sup>5</sup> The second track on Exhibit 6 is a recorded call made by Rodriguez to his sister, Alba, discussing the incident. 6RP 74.

sister, had Sonja write a letter saying she did not want any charges brought against Rodriguez. 6RP 77, 86-87.

**c. The Defense Case**

Boland testified and admitted providing the paper and pen so Sonja could write the letter referenced above, but she claimed she did not tell Sonja what to write. 8RP 85-86. She also admitted to being very actively involved in the case. 8RP 92-93.

Rodriguez testified and claimed that Sonja "poisoned" his marriage with Cela, had "tricked me," and that he married her because "I didn't want my kid to be a bastard." 8RP 121-22, 125. He claimed he never had sex with Sonja until after she turned 18. 8RP 124.

In regards to the October 2008 assault, Rodriguez testified he was meeting Sonja because "she had been promising sex for the last two weeks so I was very excited about it." 8RP 132. However, when he arrived home at 8:00 p.m., he and NRJr went to a party until shortly before the assault occurred the next morning. 8RP 133-34. He claimed he only had two beers and a glass of wine the entire time. 8RP 134; 9RP 25.

When he finally arrived home he testified he tried to kiss Sonja but she ignored him. 8RP 135. When he tried again and was rebuffed, Rodriguez said he asked Sonja if she was cheating on him. 8RP 140. He claimed that Sonja tried to slap him so he grabbed her and threw her out of

the house. 8RP 140, 143. He admitted that he broke her phone because, he claimed, it "represented all the pain." 8RP 144-45. He said that when the police arrived, he ignored them because he had done nothing wrong. 8RP 148-49. When confronted with his behavior seen on the video from the patrol car, Rodriguez testified that the "stuff about God and the virgin stuff it's because my life is a battle between good and evil. I see my soul as the war, the place of war. I see the devil as Sonja." 8RP 151. He admitted that he might have injured Sonja's neck during the assault. 9RP 28.

As far as the past domestic violence, Rodriguez claimed the incident on the freeway did not happen as Sonja testified. Rodriguez professed that he never struck Sonja and that she slammed on the brakes herself while doing about 60 miles per hour. 9RP 4. In regards to the incident where he threw Sonja to the ground, Rodriguez admitted that he had pled guilty to assault but claimed that Sonja attacked him first. 9RP 6-7, 39. On cross, Rodriguez also admitted that he told the police at the time that if he had been drinking, he would have killed her. 9RP 47.

**d. The Witness Tampering**

As stated above, Jose Munoz had disclosed to his therapist, Luis Vila, that he had observed Rodriguez having sex with Sonja on multiple occasions when she was a minor. During pretrial motions, the State

informed the court that Jose was refusing to cooperate, but that the State would be moving to admit Jose's statements through the testimony of Luis Vila. 1RP 60-62, 67. On January 26, 2009, the court ruled that the State was prohibited from eliciting Jose's statements through Luis Vila unless Jose testified. 3RP 2-3. The State then informed the court that it would be seeking a material witness warrant to procure Jose's presence. 3RP 3. It is in this context that the witness tampering charge arose--a phone call placed by Rodriguez after he was returned to the King County Jail following the court's ruling.

To provide the jury with the context in which the call was made, the parties had the following stipulation read to the jury:

On January 26, 2009, the Court ruled that the State may not elicit the testimony of Louis [sic] Vila unless Jose Munoz is available to testify and be cross-examined beforehand.

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

7RP 130-31; CP 40.

The call made by Rodriguez was recorded, translated and read to the jury in a question and answer format, with the prosecutor reading the

part of Rodriguez, and a witness reading the part of Rodriguez's sister, Marilyn Boland. 7RP 131. For ease in understanding, the "defendant" and "Boland" are used in place of the names of the prosecutor and witness.

Defendant: Hello, hi, sis.

Boland: Oh, hi.

Defendant: Hey, I came down from court, I don't know if the attorney called, you.

Boland: I went there today at 1:00.

Defendant: Uh-huh.

Boland: Did you not go to court today?

Defendant: No, I went to court at 2:00. They took me over there.

Boland: Uh-huh.

Defendant: 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.

Boland: Uh-huh.

Defendant: So I wanted somebody to call Harry so he can go and explain to him, Jose, because he doesn't know anything.

Boland: Uh-huh.

Defendant: Because they can't do anything to him. He needs to know (unintelligible), kind or retarded or what.

Boland: No, well, the thing is I talked to -- he was going to talk to me today.

Defendant: Uh-huh.

Boland: And, uh-huh.

Defendant: He's saying he saw me, he saw me having sex with Sonja, ah, up to four times.

Boland: But that is according to what they said, what was reported.

Defendant: Uh-huh, but that he said it, that he was the one who said that.

Boland: Uh-huh. But later on that was not -- not proved.

Defendant: Uh-huh, but they're using that now, so it's -- they're going to throw him in jail. If he doesn't want to come, they're going to throw him in jail.

Boland: Uh-huh.

Defendant: 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.

Boland: No, I don't believe so.

Defendant: Well, don't believe that. But what I want is somebody to explain to him that they can't do anything to him.

Boland: Uh-huh. Okay, I'm going to call.

Defendant: Call Harry, so he comes, and explain it to Harry, so he goes talk --

Boland: And when is it supposedly?

Defendant: They're putting the order today.

Boland: Uh-huh.

Defendant: 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.

Boland: Okay, I'm going to call Harry right now then.

Defendant: Okay, hey, the photo, I got the photo, the girl is really pretty. What did the boy have there?

Boland: Yes.

Defendant: I got that yesterday. I only saw the photo yesterday.

Boland: Oh.

Defendant: Would you call Jose right now?

Boland: No, I'll call the other one.

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

Boland: Yes, I will call him.

Defendant: And you explain to Harry what I want to tell you.

Boland: Uh-huh, uh-huh.

Defendant: 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.

Boland: Uh-huh.

Defendant: And if Jose doesn't show up, if they don't get him, that him there, that son of a bitch Vila can't say shit.

Boland: Uh-huh.

Defendant: He's the one saying I did all that shit.

Boland: Uh-huh, um, okay, well, this...

Defendant: Why aren't the kids are not going to school, right?

Boland: Huh?

Defendant: (unintelligible) Why aren't they coming?

Boland: Well, because they can't because they are -- they're going to call them as -- to testify.

Defendant: Uh-huh.

Boland: And so that's the reason why I can't be there either, because they're calling me to testify.

Defendant: Oh, well, tomorrow will be the...

Boland: It starts tomorrow, and it's looking like -- well, they didn't give me all the information.

Defendant: Are you gonna call -- have you spoken to E?

Boland: Uh-huh, I saw her today.

Defendant: Uh-huh, no, but after this trial.

Boland: No, after -- no, I saw her after today, at 1:00, at...

Defendant: No, after 5:00. Right now she hasn't called you, right?

Boland: She has not called, but she did say she was going to send me an e-mail.

Defendant: Uh-huh.

Boland: And I'm going to -- I'm going to bring another phone in case she calls then, but I'll get in touch with her.

Defendant: Okay. He was going to call to do the order that was going to be in two hours, to then call for Harry to go...

Boland: Uh-huh.

Defendant: And explain that to Jose.

Boland: Okay.

Defendant: And Sonja wants to accuse me. Have you talked to Sonja?

Boland: No, I haven't talked to her about that, but its prosecuting attorney, the one who's doing all that.

Defendant: So Sonja wants to accuse me of more shit?

Boland: I don't think so. I've not asked her about that, but I'm sure -- I get the impression that's not the case.

Defendant: Uh-huh, okay, you better call and get that shit done, will you please?

Boland: Uh-huh.

Defendant: Okay, and thank you, sis.

Boland: Okay. I'll talk to you later then.

Defendant: Okay, tell my kids, tell the kids I love them, okay?

Boland: Okay, I'll do that, love you.

Defendant: Okay, love you, too.

Boland: You know, just keep faith, okay?

Defendant: Okay. Don't forget to call Harry to explain everything.

Boland: Okay.

Defendant: All right.

Boland: All righty.

7RP 131-38.

Rodriguez testified that he made the call, but he claimed he wanted only to warn Jose "because he does not know how the system works."

8RP 153. In his opinion, José is "a little bit on the slow side." 8RP 155.

Boland confirmed she talked to the defendant about Jose but she claimed that she never had any intention of actually talking to Jose.

8RP 87.

Additional facts are included in the sections they pertain.

**C. ARGUMENT**

**1. THERE WAS SUFFICIENT EVIDENCE TO FIND RODRIGUEZ GUILTY OF WITNESS TAMPERING.**

Rodriguez argues that the evidence presented was insufficient for any rational trier of fact to have found him guilty of witness tampering.

This claim should be rejected. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn

therefrom. Rodriguez's argument is nothing more than a desire to have this Court adopt an interpretation of the evidence most favorable to him-- that when he said "if he doesn't want to say anything, they can't force him to say shit," he meant to merely educate Jose about the legal system. However, it was perfectly reasonable for the jury to reject Rodriguez's theory and to find that he was attempting to induce Jose to withhold testimony.

As charged here, the State was required to prove that Rodriguez "without right or privilege to do so, attempted to induce a person [Jose Munoz] to withhold any testimony," and "the other person was a witness or a person the defendant had reason to believe was about to be called as a witness in any official proceedings." CP 39, 93; RCW 9A.72.120.

As the stipulation indicates, and Rodriguez admitted (9RP 13-14), he was fully aware that the State sought to introduce the testimony of Luis Vila, and that on January 26, 2009, the trial court had ruled that the only way the testimony of Luis Vila would be admissible is if the State procured the testimony of Jose Munoz. Still, Rodriguez contends that he cannot be convicted of witness tampering because he did not use words explicitly asking Jose not to testify, and he did not use any threats or promises. Rather, Rodriguez contends, he merely wanted to educate Jose

about the criminal justice system. This argument fails for multiple reasons.

First, the use of a threat or promise is not an element of the crime. The State needed to prove no more than that the defendant attempted to induce Jose to withhold any testimony. RCW 9A.72.120. Induce simply means "to move by persuasion or influence." Merriam-Webster's Collegiate Dictionary, Eleventh Edition 637 (2003).

Second, Rodriguez's argument focuses on his theory, how he wanted the jury to interpret his phone call. That, however, is not the test for adjudging the sufficiency of the evidence. A reviewing court will affirm a conviction if, "after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A claim of insufficiency "admits the truth of the State's evidence." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In addition, "all reasonable inferences from the evidence must be drawn *in favor of the State* and interpreted *most strongly against the defendant*." Id. (emphasis added). A factual sufficiency review "does not require the reviewing court to determine whether it believes the evidence at trial established guilt beyond a

reasonable doubt but rather only whether any rational trier of fact could be so convinced." State v. Smith, 31 Wn. App. 226, 640 P.2d 25 (1982).

Third, Rodriguez fails to address the substance of his call in the context it was made. His call followed directly on the heels of the court's ruling that procuring Jose's testimony was required before the State could admit the damning testimony of Luis Vila. It is certainly reasonable for a jury to infer that his statement "if he [Jose] 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," was his attempt to make sure Jose understood that he was not to testify against him. Rodriguez made this statement just prior to telling his sister that if Jose doesn't testify, "that son of a bitch Vila can't say shit." Viewed as it must be on appeal, in the light most favorable to the State, there is no question that a rational trier of fact could have found Rodriguez was attempting to keep Luis Vila's damning testimony from the jury by having Jose withhold his testimony.

**2. THE TRIAL COURT PROPERLY ALLOWED THE STATE TO ADD A WITNESS TAMPERING CHARGE AND TO ALLOW TRIAL TO CONTINUE.**

As stated in section 1 above, while pretrial motions were being heard by the court, Rodriguez attempted to tamper with a witness. When discovered, the State immediately informed defense counsel and added a tampering charge. Rodriguez contends that despite the fact he created the

situation he faced through his own nefarious conduct, his convictions must be reversed because the trial court abused its discretion in allowing the tampering charge to be added and because the court denied his request for a continuance. This claim should be rejected. The tampering evidence was admissible whether or not a tampering charge was added. In addition, (1) with the State's sole evidence being a recorded phone call, (2) the two parties to the call being Rodriguez and his sister--an already endorsed defense witness, (3) and the gravamen of the crime--and defense theory--being Rodriguez's intent, the court did not abuse its discretion in denying a continuance as the defense had plenty of time to develop a strategy to contest the evidence and charge.

**a. The Factual History**

Trial commenced on Wednesday, January 21, with the court hearing ruling on multiple pretrial motions.<sup>6</sup> CP 473-96; 1RP 9-75. Defense counsel submitted a trial memorandum endorsing Jose Munoz and Marilyn Boland as witnesses. CP 11. Counsel also entered into a stipulation regarding other jail phone calls, agreeing to the authenticity of the calls and that Rodriguez was the caller. 1RP 51; CP 34.

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<sup>6</sup> For speedy trial purposes, trial commences when a case is assigned or called for trial and the trial court hears and disposes of preliminary motions. State v. Carson, 128 Wn.2d 805, 820, 912 P.2d 1016 (1996).

On Thursday, January 22, voir dire commenced. 2RP 27.

On Monday, January 26, a jury was selected and sworn.<sup>7</sup> 3RP 2; CP 473-96. The court then denied the State's motion to admit Jose's statements through Luis Vila; ruling that the State needed to procure the testimony of Jose first. 3RP 2-3. The prosecutor then informed the court that he would be seeking a material witness warrant for Jose. 3RP 3. It is that evening that Rodriguez placed the call to Marilyn Boland in an attempt to tamper with a witness.

On Tuesday, January 27, the prosecutor informed the court that he had just recently lost contact with Sonja Ruiz and that he would be seeking a material witness warrant. 4RP 4-5. The court put on the record that Sonja had been in contact with the State and had recently completed a defense interview. 4RP 5. The prosecutor also had admitted a letter from Marilyn Boland critical of Sonja. 4RP 21, 23; 5RP 7. With defense counsel's agreement, the court recessed trial until noon the following day. 4RP 7. Opening statements had not yet been given.

The first thing Wednesday morning, January 28, the prosecutor informed the court that he had discovered and obtained a copy of the phone call made by Rodriguez at 5:30 Monday evening. 5RP 7-8. The

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<sup>7</sup> Jeopardy attaches when a jury is empanelled and sworn. Crist v. Bretz, 437 U.S. 28, 38, 98 S. Ct. 2156, 57 L. Ed. 2d 24 (1978).

prosecutor provided a certified translation of the call to defense counsel. 5RP 10, 17. Defense counsel acknowledged that she had been notified about the call on Tuesday evening and had been informed about the adding of a tampering charge. 5RP 16-17. Rodriguez then interjected, "I only called one number for God's sake." 5RP 15.

Defense counsel objected to the motion to add a tampering charge, and in the alternative, counsel asked for a continuance *until Monday* to obtain funding so another translator could listen to the recording.<sup>8</sup> 5RP 19. The court indicated funding could be obtained immediately. 5RP 19. The State objected to any continuance, noting that the court and defense were well aware of the difficulties the State already had in procuring the witnesses, and that a continuance would give Rodriguez exactly what he wanted. 5RP 20. The court allowed the amendment to the Information. 5RP 22, 24.

Defense counsel then stated that there were additional reasons to grant a continuance. 5RP 25. Counsel said that she was "not ready to proceed *this afternoon* having not had a chance to review the translation," talk to her client, look at the elements of the crime or decide how to question the witnesses. 5RP 25 (emphasis added). The prosecutor

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<sup>8</sup> While defense counsel used the term "continuance," trial had commenced for both speedy trial and double jeopardy purposes. The only possible delay would have been to grant a recess of proceedings.

informed the court that none of the witnesses that day would be testifying about the tampering charge. 5RP 27.

While the court understood counsel's need to speak to her client, the court stated that considering the circumstances it was difficult to see what other actual investigation needed to be done. 5RP 26. The court ruled that trial would continue, the State was precluded from discussing the tampering charge in opening, and that counsel could revisit the issue later if needed. 5RP 33.

During the afternoon session, defense counsel moved for a mistrial or severance of the tampering charge, claiming in broad conclusory terms that she was ineffective and had not been able to question the jurors about the tampering charge. 5RP 62-63. The court ruled that a defendant cannot create his own mistrial, and that severance was not appropriate. 5RP 65. The State then gave its opening statement, with defense counsel reserving opening statement until the start of the defense case. 5RP 77-78. The State called Sonja Ruiz and NRJr as witnesses, neither of whom testified about the tampering charge. 5RP 83-110. During Sonja's testimony Rodriguez caused a disruption that resulted in the court recessing trial for the remainder of the day. 5RP 111-13.

Trial commenced again on Thursday, January 29, with the State calling Sonja and Officer Roberson as witnesses; neither of whom testified

about the tampering charge. The court then recessed for four days, until February 2. CP 473-96.

On February 2, Sonja concluded her testimony and the State called Officer Compton, Officer Verhoff and Jose Munoz as witnesses--none of whom testified about the tampering charge. 7RP 15, 38, 69, 113. At the end of the day, the stipulation regarding the jail phone call, and the transcription of the call, were read to the jury. 7RP 130-38. The court then recessed for the day.

On February 3, the State called Luis Vila and Detective Ellis as witnesses--neither of whom testified about the tampering charge. 8RP 13, 46. The State then rested its case. Defense counsel renewed her motion to sever the tampering count, stating that if she had more time she would have attempted to find evidence concerning any medical/memory issues Jose might have to help put the call into context. 8RP 66-68. The court denied the motion, stating "[i]t is not at all apparent to me that more investigation would make a difference in the defendant's ability to challenge the tampering charge." 8RP 73. Counsel did not ask for additional time. Defense counsel then gave her opening statement.<sup>9</sup> Rodriguez and Boland both testified about the phone call, Rodriguez

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<sup>9</sup> Rodriguez's appellate counsel has chosen not to obtain a transcript of defense counsel's opening statement.

admitting he made the call but claiming he did not intend to tamper with a witness. 8RP 87-89, 153-55.

The next day, February 4, Rodriguez continued his testimony. Defense counsel did not call Jose as a witness. The parties then gave closing arguments.

**b. The Trial Court Acted Within Its Discretion**

CrR 2.1(d) provides that the court may permit an Information to be amended at any time before verdict if substantial rights of the defendant are not prejudiced. Substantial rights that may be prejudiced include the right to effective representation by counsel and the right to a speedy trial. State v. Earl, 97 Wn. App. 408, 410, 984 P.2d 427 (1999). The rule "permits liberal amendment." State v. Ziegler, 138 Wn. App. 804, 808, 158 P.3d 647 (2007). Where an amendment is made before the State rests, "the defendant has the burden of demonstrating prejudice." Ziegler, 138 Wn. App. at 809 (citing State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988)); State v. Gutierrez, 92 Wn. App. 343, 961 P.2d 974 (1998).

Because the circumstances involving the possibility of an amendment "will vary in each case," the Supreme Court has stated that "[i]t is for the trial court to judge each case on its facts." State v. Schaffer, 120 Wn.2d 616, 621-22, 845 P.2d 281 (1993). A trial court's decision to allow the State to amend an Information is reviewed for abuse of

discretion. State v. Haner, 95 Wn.2d 858, 864, 631 P.2d 381 (1981).

Rodriguez has failed to show prejudice or an abuse of discretion.

While no attorney wants to find himself or herself in the position of having to address new evidence during the course of trial, Rodriguez's creation of new admissible evidence did not render his counsel constitutionally ineffective and did not necessitate a mistrial or continuance. The defendant's focus on the addition of the tampering charge, and his broad conclusory claim of ineffective assistance of counsel, ignore important aspects of the situation he created.

First, Rodriguez's argument that adding a count of tampering created prejudice by allowing for new evidence to be admitted is untenable. The tampering evidence was admissible regardless of whether or not a tampering charge was added.

At trial, Rodriguez rightfully did not object to the admission of the tampering evidence. Evidence of tampering necessarily has a nexus with the underlying crime and has as its purpose the obstruction of justice. State v. Sanders, 66 Wn. App. 878, 884, 833 P.2d 452 (1992) (citing State v. Stroh, 91 Wn.2d 580, 582, 588 P.2d 1182 (1979)), rev. denied, 120 Wn.2d 1027 (1993). An act of tampering, just like evidence of flight, is an "act of one who is conscious of his guilt." Sanders, 66 Wn. App. at

885-86. Thus, evidence of tampering is "admissible as circumstantial evidence of guilt." Id.

Moreover, evidence of tampering is admissible regardless of whether or not a charge of tampering is added. Sanders, at 886. Sanders, like the defendant here, argued that the trial court should have severed the tampering counts from the trial on his underlying offense. Sanders claimed the failure to sever the tampering counts was prejudicial. Both the trial court and this Court disagreed. This Court held that the evidence of tampering "would have been admissible in a trial on the rape charge even if severance had been granted." Sanders, at 886. Thus, contrary to Rodriguez's assertion, the addition of the tampering charge did not prejudice him by allowing for additional evidence to be admitted; that evidence was admissible regardless of the granting of the motion to amend or denial of the motion to sever.<sup>10</sup>

Second, a party cannot create their own exigent circumstance, whether to force substitution of counsel, create a mistrial or the need for a continuance. In other words, what a defendant cannot obtain because of a

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<sup>10</sup> There is no issue here with inexcusable delay, such as occurred with the late amendments in State v. Michielli, 132 Wn.2d 229, 937 P.2d 587 (1997). See also State v. Price, 94 Wn.2d 810, 620 P.2d 994 (1980) (reversal required where defendant proves State failed to act with due diligence and delay compelled him to choose between right to speedy trial and right to effective counsel). Here, the evidence and amendment did not exist until Rodriguez attempted to tamper with a witness. Thus, the timing was completely dictated by Rodriguez's own actions.

lack of a valid reason, he should not be able to obtain through manipulation. State v. DeWeese, 117 Wn.2d 369, 379, 816 P.2d 1 (1991) (court properly refused defendant's demand for new counsel); State v. Sinclair, 46 Wn. App. 433, 437, 730 P.2d 742 (1986) (a defendant cannot force the appointment of new counsel by filing a bar complaint), rev. denied, 108 Wn.2d 1006 (1987); State v. Young, 62 Wn. App. 895, 802 P.2d 829 (a defendant cannot simply allege ineffective assistance of counsel to create a conflict of interest), remanded on other grounds, 117 Wn.2d 1002 (1991); United States v. Moore, 159 F.3d 1154, 1158 (9<sup>th</sup> Cir. 1998) (the filing of a lawsuit against counsel cannot by itself create a conflict otherwise defendants could manufacture conflicts at will).<sup>11</sup>

Third, Rodriguez's attempt to show prejudice by making a conclusory statement counsel did not have time to prepare and was ineffective is not supported by the record. The evidence and amendment occurred prior to opening statements. Defense counsel was provided with a certified translation of the call, and obtained her own translation the same day. The day the evidence was discovered, counsel said she was not

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<sup>11</sup> Also People v. Johnson, 810 N.Y.S.2d 190 (2006) (any prejudice arising from defendant's courtroom outburst was of his own making and did not entitle him to a mistrial), rev. denied, 821 N.Y.S.2d 820 (2006); Shriner v. State, 829 N.E.2d 612 (2005) (defendant who mentioned a lie detector test was not entitled to mistrial since he created the cause for mistrial); State v. Bridgewater, 823 So.2d 877 (2002) (defendant's outburst in response to State's rebuttal was deliberate move from which he cannot benefit), cert. denied, 537 U.S. 1227 (2003).

prepared to proceed "this afternoon," and requested a recess of only two court days (if you include the day she made the motion).

The State's evidence consisted of nothing more than a recorded phone call. The State was prohibited from discussing the tampering charge in opening and no State's witness ever testified about the tampering charge. The transcript of the call was not introduced until the end of the day Monday, February 2, the day defense counsel had originally requested trial be recessed to. Further, counsel never took up the court's offer to revisit the issue of a recess, suggesting counsel was fully prepared to meet the charge when the evidence was finally introduced at trial.

While the State was prohibited from discussing the tampering evidence in opening, defense counsel had an entire week to craft its opening statement. With no State's witness testifying about the tampering evidence, there was no cross-examination for defense counsel to prepare. Every civilian witness in the case was a member of Rodriguez's family, with the other party to his call being his sister, a witness who was already actively helping defense counsel and already an endorsed witness for the defense. Defense counsel stipulated to the authenticity of the recorded call and the circumstances in which the call was made. The only issue at trial was Rodriguez's intent in making the call, a matter uniquely within his purview.

Rodriguez argues on appeal that if counsel had had more time, she would have attempted to obtain records, if they exist, showing Jose had medical/memory issues and that this would have supported his argument that he was merely trying to educate Jose. There are multiple problems with this claim. The alleged medical/memory problem Rodriguez alludes to existed over five years prior and existed because Jose was taking medication after he underwent surgery. 8RP 36. Further, Jose was available to testify on the subject during cross, or he could have been called as a defense witness.<sup>12</sup> Moreover, Rodriguez's own testimony strongly suggests his claim that records might exist is not well taken. Rodriguez testified that "It is my opinion...I think he's a little bit on the slow side. Under no circumstances do I want him to know that."

8RP 155. In other words, it was simply his personal opinion that Jose has issues.<sup>13</sup>

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<sup>12</sup> The jury was also able to fully observe Jose and make their own conclusions about his mental health status.

<sup>13</sup> If there was documentary evidence, being Jose's father, Rodriguez likely possessed the documentation or has access to it. Thus, counsel, in a week's time, should have been able to secure the records or make it known to the court that the records existed. Instead of asking this Court to rule based on speculation, a claim such as this is better raised in a motion for a new trial or a Personal Restraint Petition wherein the record can be supplemented.

Rodriguez's claim also presumes the records would have been admissible. Courts have long recognized that trial courts have the authority and legitimate interest of preventing mini-trial on collateral matters. United States v. Scheffer, 523 U.S. 303, 314, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998); State v. Kalamarski, 27 Wn. App. 787, 790, 620 P.2d 1017 (1981).

In sum, Rodriguez has not shown either abuse of discretion or prejudice. Despite counsel's conclusory remarks, the trial court could reasonably conclude defense counsel had ample time, and did adequately address the tampering charge and evidence.

**3. RODRIGUEZ HAS FAILED TO SHOW THE PROSECUTOR COMMITTED MISCONDUCT AND WHY HIS FAILURE TO OBJECT SHOULD BE EXCUSED.**

Rodriguez claims that on three occasions during closing--none of which were objected to below--the prosecutor committed such egregious misconduct that his convictions must be reversed. This claim should be rejected. Even if Rodriguez could show the comments constituted misconduct, any prejudice could easily have been eviscerated with a timely objection.

First, in discussing the rather unusual charge of incest, the prosecutor referenced the fact that a juror during voir dire (not transcribed by the defense) talked about the harm incest could have on a child. Specifically, the prosecutor stated, "So what's wrong with it [incest]? One of our jurors during voir dire talked about how incest even between stepdaughter and stepfather would have a permanent effect on the child." 9RP 130. Rodriguez did not object to this comment. The prosecutor then made the rhetorical comments, "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. Rodriguez claims this amounted to introducing expert testimony and that the prosecutor "aligned" himself with the juror as the only ones who understood the harm of incest.

When a defendant alleges that a prosecutor's argument prejudiced his right to a fair trial, he first bears the heavy burden of establishing the impropriety of the comments. State v. Reed, 102 Wn.2d 140, 145, 685 P.2d 699 (1984). Prejudicial error does not occur until such time as it is clear and unmistakable that counsel has committed misconduct. State v. Sargent, 40 Wn. App. 340, 344, 698 P.2d 598 (1985). Generally, greater latitude is given in closing argument than elsewhere during trial. State v. Stover, 67 Wn. App. 228, 232, 834 P.2d 671 (1992), rev. denied, 120 Wn.2d 1025 (1993).

The prosecutor's comments were not misconduct and not akin to "expert testimony." Rather, the comments conveyed what any person would think when considering the harm associated with an incestuous relationship.

This is not, as Rodriguez asserts, akin to the situation that existed in State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008). In Warren, a sexual assault victim delayed reporting, ultimately reporting to the

prosecutor involved in her sister's case. In closing, the prosecutor discussed reasons sexual assault victims do not immediately report and that the victim reported to her because she trusted her. Thus, the prosecutor asserted, the late disclosure could be believed. The prosecutor's comments were not based on the evidence, were intended to show the jury why the disclosure could be trusted, and dealt with a topic that could have been subject to expert testimony. Such is not the case here.

In addition, simply referring to the fact that a juror may have made a comment on the same subject is not misconduct. Nonetheless, Rodriguez equates the prosecutor's passing reference here to the prosecutor's argument in Reed wherein the prosecutor disparaged the defendant's out-of-town counsel and witnesses stating, "Are you going to let a bunch of city lawyers come down here and make your decision? A bunch of city doctors who drive down here in their Mercedes Benz?" Reed, 102 Wn.2d at 143. There is no indication here the prosecutor was trying to disparage defense counsel, any witness, nor align himself with the jury.

Next, Rodriguez contends that the following comments were misconduct because they referred to matters not in evidence.

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.

Marilyn Boland testified Harry was in court when Jose testified, but was not in court the next day. 8RP 90. According to Rodriguez, even though the jurors would have been able to observe whether Harry was present or not on any given day, the prosecutor's one sentence that includes other days beyond what Boland testified is reversible misconduct. Rodriguez cites to no case wherein referring to what jurors could observe is misconduct. Further, the prosecutor's point was that Harry appeared to specifically make himself present the day Jose testified. This is a reasonable inference supported by the evidence. Counsel may draw and express reasonable inferences from the evidence. State v. Harvey, 34 Wn. App. 737, 739, 664 P.2d 1281, rev. denied, 100 Wn.2d 1008 (1983).

Finally, Rodriguez claims the prosecutor made blatant appeals to the jury's passion, prejudice, and fears. In discussing how the court system seeks to unravel what may be chaotic events the prosecutor stated:

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. While not particularly persuasive, and it is difficult to know exactly what the prosecutor's point was, Rodriguez fails to show how this comment is misconduct.

Later, the prosecutor, in discussing the tampering charge made the following comments:

That the defendant tampered with a witness on that date. Now, what's evidence of this? This evidence got interesting, because our 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 that 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. Again, while not particularly persuasive, in discussing the purposes for having a crime of tampering, the prosecutor was not attempting to persuade the jury to convict for improper reasons like the cases cited by Rodriguez.

In State v. Perez-Mejia, 134 Wn. App. 907, 918, 143 P.3d 838 (2006), the prosecutor told the jury in a gang murder case, to "send a message. . .to other gang members. . .we will not tolerate it [violent gangs]

any longer. . .[t]hat message can be sent by holding the defendant responsible for his actions." In State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988), a murder case involving a member of the American Indian Movement (AIM), the prosecutor "deliberately" attempted to appeal to the jury's passion and prejudice, calling the AIM "a deadly group of madmen," "butchers that kill indiscriminately," and likened members to Kaddafi and Sean Finn. While Rodriguez wants this Court to find these cases are equivalent to his, they are not. As the Supreme Court has stated:

Isolated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence, do not reach the same proportions. Such arguments, like all closing arguments of counsel, are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general observations in no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

Donnelly v. DeChristoforo, 416 U.S. 637, 646-47, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974).

Finally, Rodriguez attacks a single sentence in the following passage made in rebuttal:

Do the pictures make this case mundane? Does the fact that the defendant didn't keep strangling Sonja until he crushed her wind pipe 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.*

The fact that the final outcome on her neck was minimal doesn't mean those harrowing moments, when her five-year-old was watching him strangle her, didn't happen. It means she was lucky it didn't get worse.

10RP 46.

Defense counsel during closing downplayed the severity of the assault, questioning if there could have been such assaultive conduct as described by the prosecutor. A prosecutor is an advocate and may respond to defense arguments even if these arguments may otherwise be improper. State v. Dykstra, 127 Wn. App. 1, 8, 110 P3d 758 (2005), rev denied, 156 Wn.2d 1004 (2006). Even if the single comment was misconduct--and it is not--it was in response to the defense argument trying to downplay the severity of the assault on Sonja.

In any event, Rodriguez may not even raise an issue of misconduct unless a proper objection, request for a curative instruction, or a motion for a mistrial was made at trial, or the misconduct was so flagrant and ill-intentioned that no curative instruction could have obviated the resulting prejudice. State v. Neidigh, 78 Wn. App. 71, 895 P.2d 423 (1995). "One may not elect voluntarily to submit his case to a jury

satisfactory to him, and then, after an adverse verdict, for the first time on appeal claim error which, if it did exist, could have been cured or otherwise redressed by some action on the part of the trial court." State v. Case, 49 Wn.2d 66, 72, 298 P.2d 500 (1956) (internal citations omitted). The Supreme Court has "repeatedly stated that misconduct in the form of improper argument cannot be urged as error unless the aggrieved party had requested the trial court to correct it by instructing the jury to disregard it, and had taken exception to the court's refusal to do so." Id.

One of the reasons for placing the burden on the defense to object is that "the defendant and defense counsel are the persons most acutely attuned to perceive the possible prejudice of the prosecutor's remarks." State v. Klok, 99 Wn. App. 81, 85, 992 P.2d 1039, rev. denied, 141 Wn.2d 1005 (2000). Once raised, "[t]rial judges have a variety of options available to deal with prosecutorial misconduct in argument." Klok, at 84.

Here, Rodriguez never raised an objection. If he believed the prosecutor was committing such egregious misconduct, a simple objection could have stopped the prosecutor from continuing or eviscerated any prejudice with an admonishment and curative instruction. Rodriguez cannot provide a reason why his failure to object should be excused.

Finally, a conviction will be reversed upon a claim of prosecutorial misconduct only if the defendant can show that there is a substantial

likelihood that the alleged misconduct affected the verdict. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert. denied, 115 S. Ct. 2004 (1995). The prosecutor's comments here were of little moment, even if considered misconduct. Rodriguez simply cannot prove there is a substantial likelihood that but for the comments, the outcome of trial would have been different.

**4. THE TRIAL COURT PROPERLY ALLOWED THE PROSECUTOR TO ELICIT TESTIMONY THAT FRANCISCO RODRIGUEZ THREATENED TO HARM SONJA RUIZ IF SHE TESTIFIED.**

Sonja Ruiz was a reluctant witness who testified, she said, only because the prosecutor forced her under threat of arrest. Sonja also testified that her stepbrother, Francisco Rodriguez, did not want her to testify and told her that if Rodriguez went to jail for a long time he was going to kill her. Rodriguez now claims that his convictions must be reversed because the threat from Francisco was inadmissible under ER 403. This claim must be rejected. The trial court has wide discretion when addressing the admission of evidence. Here, the court considered Rodriguez's objection, gave a limiting instruction to prevent the prejudice he feared, and exercised its discretion in admitting the evidence. Rodriguez cannot show the court acted outside its discretion.

Sonja Ruiz was a very reluctant witness, testifying only because she was threatened with arrest. 5RP 108; 6RP 89. She testified that she never wanted Rodriguez charged with a crime. 6RP 87-88. She also refused to answer any question about whether he had sexual intercourse with her prior to her 18<sup>th</sup> birthday. 6RP 83-84, 102, 114.

At one point, the prosecutor asked Sonja about her obvious reluctance in testifying. Sonja testified that her mother was not happy with her and that she wanted Rodriguez out of jail so he could provide child support for her children--Francisco and Sarah. 6RP 111. Over objection, the court allowed this evidence as relevant to Sonja's state of mind.<sup>14</sup> 6RP 111.

The prosecutor then asked if Francisco had said anything to her in regards to testifying about her sexual relationship with Rodriguez. 6RP 112. Before Sonja answered the court gave the following limiting instruction:

Ladies and gentlemen, I have an instruction to give you at this time. 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.

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<sup>14</sup> Rodriguez has not challenged the admission of this evidence on appeal.

6RP 112.<sup>15</sup> Sonja then testified that Francisco had told her that if Rodriguez went to jail for a long time, he, Francisco, was going to kill her. 6RP 112-13. The prosecutor then asked Sonja, yet again, about the incest. She again refused to answer. 6RP 114.

The admission of evidence lies within the sound discretion of the trial court. State v. Norlin, 134 Wn.2d 570, 576, 951 P.2d 1131 (1998). A decision to admit evidence will not be reversed absent a showing of abuse of discretion. State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1992). While reasonable minds might disagree with the trial court's evidentiary ruling, that is not the standard. State v. Willis, 151 Wn.2d 255, 264, 87 P.3d 1164 (2004). To prevail on appeal, a defendant must prove that no reasonable person would have taken the position adopted by the trial court. Robtoy, 98 Wn.2d at 42. That, Rodriguez cannot do here.

Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. Minimal logical relevance is all that is required. State v. Bebb, 44 Wn. App. 803, 814, 723 P.2d 512 (1986), aff'd, 108 Wn.2d 515 (1987).

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<sup>15</sup> The court later explained that defense counsel had objected at side bar and expressed concern that jurors might attribute statements made by family members to Rodriguez. 6RP 114-15. The court said this is why it gave the limiting instruction. 6RP 114-15.

Relevant evidence will be excluded only if the probative value is substantially outweighed by the danger of unfair prejudice. ER 403. The burden is on the defendant to prove the evidence should have been excluded as there is a presumption of admissibility under Rule 403. Carson v. Fine, 123 Wn.2d 206, 867 P.2d 610 (1994). The "trial judge has wide discretion in balancing the probative value of evidence against its potential prejudicial impact." State v. Coe, 101 Wn.2d 772, 782, 684 P.2d 668 (1984).

In assessing the state of mind and the credibility of a reluctant or recanting witness courts have repeatedly permitted the introduction of prior bad acts committed by a defendant against the witness. See e.g., State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008); State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996); State v. Nelson, 131 Wn. App. 108, 125 P.3d 1008, rev. denied, 157 Wn.2d 1025 (2006). Reviewing courts have held that the prior bad act evidence is relevant, necessary and not outweighed by the potential prejudice, even though the prior bad act was committed by the defendant. Id.

Here, the testimony admitted pertained to a threat that was *not* attributed to Rodriguez. Rodriguez fails to explain how prior bad acts actually committed by a defendant are admissible to gauge the credibility and state of mind of a witness where the potential prejudice to the

defendant is obviously great, but inadmissible wherein the evidence is admitted for the same relevant purpose but the conduct is not attributed to the defendant.

In addition, the trial court gave a limiting instruction to specifically address the potential prejudice identified by Rodriguez. Jurors are presumed to follow instructions. State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). Rodriguez fails to identify why this Court should find the limiting instruction insufficient here.

Rodriguez's citation to Knight,<sup>16</sup> and Kosanke,<sup>17</sup> is unavailing. Rodriguez asserts that Knight stands for the proposition that unless it is clear the defendant did not make the threat against a witness, the evidence is not admissible. The court said no such thing.

In Knight, a trafficking in stolen property case, a confidential informant did not testify at trial. After defense counsel elicited testimony that a detective gave the informant \$600 to leave town, the detective was allowed to testify on redirect that the informant had received threats from an "unidentified" person after Knight was arrested. The Court of Appeals stated that even if ER 403 were applied (there was no objection below and

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<sup>16</sup> State v. Knight, 54 Wn. App. 143, 772 P.2d 1042, rev. denied, 113 Wn.2d 1014 (1989).

<sup>17</sup> State v. Kosanke, 23 Wn.2d 211, 160 P.2d 541 (1945).

the door had been opened to the evidence), the evidence was clearly admissible. Knight, 54 Wn. App. at 153-54. The Court did not put the limitations on the admission of the evidence as Rodriguez suggests. Additionally, the court in Knight held the evidence was admissible even though the caller was "unidentified," a situation that could lead a jury to speculate the threat originated from the defendant far more than the threat here that came from a known person and where an instruction was given that the threat could not be attributed to Rodriguez.

The Court in Kosanke addressed a completely different issue. Kosanke was charged with a sex crime committed against a child. Kosanke's wife met with the victim's family and attempted to tamper with a witness, the child. The question before the Supreme Court was whether there was sufficient evidence to tie the tampering back to Kosanke in order to make the tampering evidence admissible by showing his guilty knowledge. Kosanke, 23 Wn.2d at 214-16. The evidence here was not admitted for that purpose. The Kosanke case had nothing to do with threats made to the witness and the effect the threats could have on the credibility of the witness.

In any event, any error was harmless. Reversal for an evidentiary error is not required if the error was harmless. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). In order to obtain a reversal, the defendant

must show that “within reasonable probabilities,” but for the error, the outcome of the trial would have been different. Id. To determine the probable outcome, the reviewing court must focus on the evidence that remains after excluding the tainted evidence. State v. Thamert, 45 Wn. App. 143, 151, 723 P.2d 1204, rev. denied, 107 Wn.2d 1014 (1986).

Here, even if the trial court's ruling was in error, the error was harmless. The evidence Rodriguez complains about was potentially favorable to him. Clearly Sonja was a reluctant witness who was refusing to answer certain questions about him. As the judge noted, Sonja's body language and demeanor suggested he did have sex with her prior to her 18<sup>th</sup> birthday. Absent the evidence her stepbrother threatened her, the jury could have speculated Sonja was reluctant to testify because she feared or had been threatened by Rodriguez. This potential for speculation was cast aside when evidence was admitted that the pressure upon Sonja was coming from her mother, her stepbrother and the prosecutor, not Rodriguez. In addition, Sonja did not provide the evidence of incest needed to convict; that evidence came from Luis Vila, the therapist Jose confided in. Rodriguez has failed in his burden to prove the court erred and failed to prove prejudice.

**5. THE JURY'S FINDING THAT RODRIGUEZ  
COMMITTED THE CRIME OF INCEST IS  
SUPPORTED BY THE EVIDENCE.**

Rodriguez argues that the evidence presented at trial was insufficient for any rational trier of fact to have found him guilty of incest; a crime that makes it illegal to have sexual intercourse with a "descendant." He makes this claim by applying a dictionary definition of descendant, a definition that does not include a stepchild. This argument is misguided. A stepchild is included in the statutory definition of "descendant;" a definition that was given to the jury.

A person is guilty of incest in the first degree if "he or she engages in sexual intercourse with a person whom he or she knows to be related to him or her, either legitimately or illegitimately, as an ancestor, descendant, brother, or sister of either the whole or the half blood." RCW 9A.64.020(1)(a). "Descendant," the statute provides, "includes stepchildren and adopted children under eighteen years of age." RCW 9A.64.020(3)(a).

Here, the "to convict" instruction contained all the elements of the crime and read as follows:

To convict the defendant of the crime of incest in the first degree...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, the defendant engaged in sexual intercourse with Sonja Ruiz;

(2) That the defendant was related to Sonja Ruiz either legitimately or illegitimately as a descendant;

(3) That at the time the defendant 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. This instruction is consistent with WPIC 46.06.

The court also gave the following definitional instruction:

Descendant means any child or grandchild of the defendant. A descendant includes any stepchild or adopted child of the defendant who is under eighteen years of age.

CP 69. This instruction is consistent with WPIC 46.07.

Rodriguez's sufficiency of the evidence argument is based on his claim that a stepchild is not included within Black's Law Dictionary definition of descendant. Thus, he asserts, there is no evidence he violated the statute. This argument is misguided. For an unknown reason, Rodriguez completely ignores the fact that the jury was provided with the legal definition of descendant that includes a stepchild.

It is true that one can resort to a dictionary definition when interpreting a statute if the legislature did not define a term or the meaning of a statute is unclear. State v. Christensen, 153 Wn.2d 186, 195, 102 P.3d

789 (2004). But this is not a case of statutory interpretation. The incest statute is clear, unambiguous, and defines the essential elements of the crime. State v. Hall, 112 Wn. App. 164, 169, 48 P.3d 350 (2002). The jury was so instructed. See State v. Hickman, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998) (the jury instructions are the law of the case). There is simply no legal merit to Rodriguez's argument that a different definition of descendant, one not provided to the jury, one different than the statutory definition given, is how his sufficiency of the evidence claim must be weighed.

**6. RODRIGUEZ IS UNABLE TO SUSTAIN HIS BURDEN IN SEEKING REVERSAL PURSUANT TO THE CUMULATIVE ERROR DOCTRINE.**

An accumulation of non-reversible errors may deny a defendant a fair trial. Coe, 101 Wn.2d at 789. Rodriguez asserts such is the case here. It is axiomatic; however, that to seek reversal pursuant to the cumulative error doctrine, a defendant must establish the presence of multiple trial errors and that the accumulated prejudice affected the verdict. Here, as explained in the sections above, Rodriguez has not proven there were multiple errors. In addition, he has not shown a nexus between the alleged errors such that the cumulative effect of the alleged errors rendered his trial fundamentally unfair.

**7. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN RESTRICTING RODRIGUEZ'S CONTACT WITH NRJr.**

Rodriguez challenges the sentencing condition restricting his contact with the son he fathered via an incestuous relationship with his stepdaughter. He argues that simply prohibiting him from contacting Sonja is sufficient to prevent any harm to NRJr. This argument should be rejected. The sentencing judge carefully considered Rodriguez's drug abuse, mental health problems, alcohol abuse, anger problems and inability to control his emotions, and determined that until he received treatment, it would be unhealthy for him to have contact with NRJr.

The order restricting contact was imposed pursuant to RCW 9.94A.505(8). RCW 9.94A.505(8) provides the court with the authority to impose "crime-related prohibitions." This Court reviews the imposition of crime-related prohibitions for an abuse of discretion. State v. Riley, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993).

Determining whether a relationship exists between the crime and an order limiting contact is generally left to the discretion of the sentencing judge. State v. Berg, 147 Wn. App. 923, 942, 198 P.3d 529 (2008). Careful review of a sentencing condition is required where the condition interferes with a fundamental constitutional right. Warren, 165 Wn.2d at 32. 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). But crime-related prohibitions that limit fundamental rights are permissible, provided they are imposed sensitively and the restrictions are reasonably necessary to accomplish the essential needs of the State and public order.<sup>18</sup> Riley, 121 Wn.2d at 38.

Rodriguez argues that the order restricting his contact with NRJr is unlawful because there is no evidence that he presents a harm to NRJr that could not be prevented simply by prohibiting his contact with Sonja. He cites to Ancira, supra, a domestic violence no-contact order case involving Ancira's wife wherein the trial court entered an order preventing the defendant from contacting his children. The only identified potential harm to Ancira's children was the witnessing of domestic violence; a harm eliminated by the no-contact order with his wife. In contrast, here, there was a plethora of evidence showing Rodriguez posed a harm to NRJr outside of the mere witnessing of domestic violence.

Judge Craighead began sentencing by having the prosecutor cite a research finding that more than half of school age children in domestic violence shelters who have witnessed domestic violence suffer from

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<sup>18</sup> In Riley, for example, the defendant was convicted of computer trespass and was prohibited from communicating with all other persons via computer bulletin boards. Riley claimed this violated his fundamental right of association. The Supreme Court held that the broad restriction was a permissible and reasonable crime related means of discouraging Riley's communication with other hackers. Riley, at 37-38.

anxiety or PTSD that manifest itself in constant fearfulness and hyper-vigilance. 12RP 10. The court was informed that the strongest risk factor for transmitting violent behavior from one generation to the next is the exposure of children to their fathers abusing their mothers. 12RP 11. In this context, the court was aware that Rodriguez had previously failed to abide by a no-contact order (see CP 461, 468), and that the current convictions were not isolated incidents.<sup>19</sup>

The court knew that Rodriguez had spent 38 months for arson and had prior convictions for assault, drugs, a DUI, attempting to elude and malicious mischief. Id. In addition, the court noted, NRJr not only witnessed domestic violence, he was involved in it, as he tried in vain to prevent Rodriguez from assaulting his mother. 12RP 60.

Defense counsel provided the court with a report that contained a psychological evaluation of Rodriguez.<sup>20</sup> 12RP 20-21. The report indicated that Rodriguez suffers from mental health problems, has never received treatment, and that he self-medicates with drugs and alcohol. 12RP 21. His counsel indicated that imposing domestic violence

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<sup>19</sup> The jury found that that the violence against Sonja was "part of an ongoing pattern of psychological, physical or sexual abuse. . . manifested by multiple incidents over a prolonged period of time." CP 162.

<sup>20</sup> Trial counsel had the report sealed and Rodriguez's appellate counsel has not designated the report to this Court. 12RP 68.

treatment, mental health treatment, alcohol treatment, and drug treatment would be conditions that should be imposed to protect the public.

12RP 22, 27. Even Rodriguez's sister told the court that "he's not able to control his emotions," and begged the court to "mandate that he is given the proper psychiatric help that he desperately needs." 12RP 32, 34.

Judge Craighead said she was very concerned about Rodriguez's mental health status and ability to get treatment. 12RP 24. She expressed exasperation that the entire family had long been aware of the mental health problems but had made no efforts to protect the children or help Rodriguez. 12RP 33, 35. She noted, for example, that on the night Rodriguez strangled Sonja, he was out drinking at a party with NRJr until the early morning hours--not "the kind of structure that we ordinarily expect to see in the life of a five-year old." 12RP 35.

The judge also had viewed at trial a rather disturbing video of Rodriguez taken the morning after his arrest. See Exh 21. "One of my fears," the judge said, "is just how emotional Mr. Rodriguez is and that it could put a tremendous amount of pressure and anxiety on the child." 12RP 36. During trial, the court was able to observe how difficult it was for NRJr to testify in front of Rodriguez and his family.

Judge Craighead believed psychological evaluation was "100 percent on target," consistent with her observations; "the wide shifts

in mood that you've shown, from tears to defiance and back again."

12RP 57. She noted that the borderline personality disorder Rodriguez suffers from is an "extremely difficult problem to treat," and that he has been a substance abuser for many years. 12RP 58-59. Judge Craighead stated that due to Rodriguez's many problems, a no-contact order was unlikely to be effective. 12RP 60.

In restricting contact, Judge Craighead stated that she "absolutely" did not feel NRJr should have in-person contact with Rodriguez while he was in prison, but that she would consider allowing written contact if he were stabilized on psychiatric medications. "[T]he reason for that," the judge said, "is that he's unable to control himself well enough to interact in a healthy way with a five-year-old, especially over the phone or in writing from prison." 12RP 64. The court also ordered domestic violence batterers treatment, drug treatment, alcohol treatment and mental health treatment. 12RP 63.

The prevention of harm to children is a compelling state interest. Prince v. Massachusetts, 321 U.S. 158, 166-67, 64 S. Ct. 438, 88 L. Ed. 645 (1944); Ancira, 107 Wn. App. at 654-55. In fact, the State has "an obligation to intervene and protect a child when a parent's actions or decisions seriously conflict with the physical or mental health of the child." Ancira, at 655 (citing In re Sumey, 94 Wn.2d 757, 762, 621 P.2d

108 (1980)); Berg, 147 Wn. App. at 942 (court properly prohibited Berg from contacting his biological daughter after being convicted of raping his girlfriend's daughter).

On appeal, Rodriguez mentions none of his substantial problems or the concerns shown by Judge Craighead. Protecting NRJr from harm is not accomplished simply by restricting (or trying to restrict) Rodriguez's contact with Sonja. Rather, the trial court appropriately imposed restrictions on Rodriguez's ability to contact NRJr, imposed treatment conditions to address his many mental, emotional and substance abuse problems, and stated that she would revisit the no-contact restrictions once he was stable.

Rodriguez has not shown that Judge Craighead abused her discretion in finding these restrictions and conditions were reasonably necessary to protect the physical and mental health of a five-year-old child.<sup>21</sup> While reasonable minds might differ, that is not the standard Rodriguez must meet to overrule the trial court's action. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). To prevail, Rodriguez must

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<sup>21</sup> Rodriguez cites to State v. Letourneau, 100 Wn. App. 424, 997 P.2d 436 (2000) and asserts that family court is a better place to deal with contact restrictions. However, unlike the situation in Letourneau where there was a pending family law action, there is nothing in the record here indicating that the parties were engaged in family law court. Further, Rodriguez cites to no authority whereby a criminal court can *sua sponte* commence an action in family court as he suggests. Nor is it realistic to believe such a procedure would occur.

prove that no reasonable person would have taken the position adopted by the trial court. Robtoy, at 42.

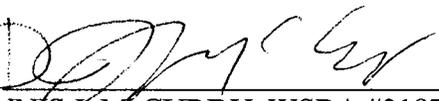
**D. CONCLUSION**

For the reasons cited above, this Court should affirm Rodriguez's conviction and sentence.

DATED this 13 day of October, 2009.

Respectfully submitted,

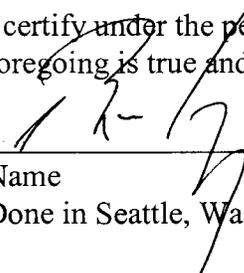
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Certificate of Service by Mail

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to Jennifer Sweigert, of Nielsen, Broman and Koch, P.L.L.C., at the following address: Central Building, 1908 East Madison Street, Seattle, WA 98122, the attorney of record for the appellant, containing a copy of the Brief of Respondent in STATE V. RODRIGUEZ, Cause No. 63166-7-I in the Court of Appeals of the State of Washington, Division I.

I certify under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
Name

Done in Seattle, Washington

10-13-2009  
Date