

COA NO. 67495-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MORRIS

Appellant.

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

The Honorable Ronald L. Castleberry, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Insufficient evidence supports the conviction for first degree child assault.

2. The court erred in imposing psychological evaluation and treatment as a condition of community custody.

3. The court imposed no-contact orders that unjustifiably restrict contact with appellant's children.

Issues Pertaining to Assignments of Error

1. Must the first degree assault conviction be reversed because the State fail to prove great bodily harm or that appellant recklessly caused that level of harm?

2. Did the court erroneously impose psychological evaluation and treatment as a condition of community custody in failing to follow statutorily required procedures?

3. Must the no-contact orders involving appellant's children be stricken because their scope and duration are not reasonably necessary to protect appellant's children from harm?

B. STATEMENT OF THE CASE

1. Procedural History

The State charged Michael Morris with first degree assault of a child, alleging the aggravating circumstance that the crime was committed

against a particularly vulnerable person. CP 201-02. A jury found Morris guilty. CP 54-56. The court sentenced Morris, who had no prior criminal history, to an exceptional sentence of 147 months in confinement. CP 14-15, 25-26. This appeal follows. CP 1-13, 17-19.

2. Trial

Morris served his country in the United States Navy. 5RP¹ 148. He lived with his wife, Brittany Morris, and his two daughters, T.M. (age 18 months) and A.M. (age six weeks). 5RP 146-48.

a. Circumstances Surrounding Onset of Emergency

Brittany² took A.M. to the doctor on May 26, 2009 for a cough and runny nose. 5RP 184. A.M. had been fussy that week. 4RP 644.

In the early afternoon of May 29, Brittany left A.M. with neighbor Cheralyn Orkiz. 5RP 75, 79, 151. Cheralyn's husband, Cristian Orkiz, was away at work.³ 5RP 74, 107. Cheralyn maintained nothing unusual happened while A.M. was in her care. 5RP 83. A.M. did not cry or fuss. 5RP 82. According to Cheralyn, A.M. was "totally normal" and was not

¹ The verbatim report of proceedings is referenced as follows: 1RP - 2/10/11; 2RP - 2/25/11; 3RP - 3/25/11; 4RP - eight consecutively paginated volumes consisting of 5/6/11, 5/27/11, 6/6/11, 6/7/11, 6/8/11, 6/9/11, 6/10/11, 6/13/11, 7/1/11, 7/28/11; 5RP - 6/1/11; 6RP - 6/2/11; 7RP - 6/3/11.

² For clarity, Brittany Morris will be referred to as "Brittany." Michael Morris will be referred to as "Morris."

³ For clarity, Cheralyn Orkiz will be referred to as "Cheralyn" and Cristian Orkiz will be referred to as "Cristian."

congested or sick. 5RP 82. A.M. was in Cheralyn's care for an hour or two. 5RP 83.

After dropping A.M. off at Cheralyn's house, Brittany took T.M. to see a doctor at the naval base because she was not feeling well. 5RP 151-52, 184. The triage nurse referred them to Stevens Hospital. 5RP 152. Brittany picked Morris up at the Edmonds ferry following work and then picked A.M. up from Cheralyn's residence. 5RP 153-54. Upon returning home, Brittany did not notice anything unusual in regard to A.M. 5RP 154-55.

After dinner, Brittany took T.M. to Stevens Hospital at around 7 p.m. 5RP 154-55. Morris stayed home with A.M. and began to feed her from a bottle as Brittany was leaving. 4RP 645; 5RP 155-56, 185.

Morris testified he tried to burp A.M. after Brittany left, but she did not burp. 4RP 645. He continued feeding her. 4RP 645. A.M. was having a problem finishing the bottle and was "acting different." 4RP 645. When he held A.M. up to burp, vomit poured from her mouth and nose. 4RP 645-47. Morris was scared. 4RP 647. He patted her on the back to see if she had more vomit left. 4RP 647. A.M. did not respond. 4RP 647. She went limp. 4RP 647.

Morris laid her on the couch and found a pulse, but she was not breathing. 6RP 647. Morris tried to clear her airway by tilting her head

back and blowing into her mouth. 4RP 647-48. This did not work. 4RP 648.

Morris then picked A.M. up and shook her to try to get her to respond. 4RP 648. There was no response. 4RP 648. Morris, still scared, shook her again, harder this time. 6RP 648. This was the only thing he could think of to do — it was just a reaction. 4RP 648.

Morris ran across the street to the Orkiz residence and pounded on the door. 4RP 648; 5RP 125. When Cristian answered the door, Morris had A.M. in his arm and said they needed to go to the hospital because there was something wrong with his daughter. 5RP 126-27. Cristian described Morris as in shock. 5RP 126. Morris did not have a shirt on. 5RP 85. Cristian noticed A.M. was having trouble breathing. 5RP 128. Cheralyn came to the door and saw Morris holding A.M. to his chest, saying she was not breathing. 5RP 110.

Cristian drove Morris and A.M. to Stevens Hospital. 5RP 128. Morris told Cristian that the baby had all of a sudden vomited out of her nose and mouth. 5RP 129. On the way to the hospital, Morris rubbed A.M.'s chest and patted her back to help her breathe. 4RP 649; 5RP 128. A.M. began breathing again, but was gasping for air. 4RP 649; 5RP 136. Cristian got lost on the way to the hospital. 5RP 129. Meanwhile, Cheralyn had called Brittany and told her of the situation. 5RP 90.

Brittany located Cristian and Morris and led them to the hospital. 5RP 158.

Morris or Brittany took A.M. into the hospital. 4RP 654; 5RP 130, 160. Morris was not wearing shirt or shoes. 4RP 650; 5RP 160. He obtained clothing from the family car, dressed himself and then went into the hospital. 4RP 650; 5RP 160, 189.

b. Steven's Hospital

Dr. Borrromeo, an emergency room physician, treated A.M. at Stevens Hospital. 5RP 3, 5, 7, 10. A.M. did not move her extremities in response to tactile stimulation. 5RP 10-11. Due to breathing concerns, a device was used to deliver oxygen. 5RP 11-12. A.M. became more responsive after insertion of an intravenous line. 5RP 12.

There was a bruise on A.M.'s left jaw. 5RP 14, 46. Brittany did not realize the bruise under the chin was there and did not know when it happened. 5RP 164, 193.

The radiologist who performed a chest x-ray at Stevens did not report specific lung abnormalities. 5RP 12-13. Physical examination, however, revealed the presence of coarse rhonchi, meaning a "junky" sound when listening to the lungs that could be evidence of infection, lung inflammation or fluid in the lungs. 5RP 13-14, 47-48.

A.M.'s fontanel⁴ on the top of her head was "full," raising concern of increased pressure within the brain. 5RP 17. A full fontanel, lethargy, an increased white blood count, respiratory difficulties and vomiting can be symptoms of meningitis. 5RP 50-51, 65. A.M.'s initial temperature was 99.8 degrees, which is normal. 5RP 37. Her temperature later decreased to 97 degrees. 5RP 37, 66. Dr. Borromeo did not consider an infectious process such as meningitis as the cause for A.M.'s condition because A.M. did not have a fever. 5RP 38, 65.

There was fluid in the mastoid area behind A.M.'s ears, which could indicate the abnormal presence of an ear infection or inflammatory or bleeding process. 5RP 55-56. No other abnormalities were noticed as part of the physical exam. 5RP 27-28, 48-49.

Her Co2 level was low, indicating "something going on within her system that wasn't right." 5RP 30-31, 57-58. The white blood cell count was slightly elevated, which could be a sign of infection. 5RP 31-32, 58.

The radiologist reported a possible "tiny" one millimeter layering of subdural hemorrhage, meaning bleeding in an area of the brain. 5RP 20. A.M. continued to be lethargic. 5RP 19-20. In preparation for transport to

⁴ Fontanels are openings in the skull of infants that are present before the skull fuses. 5RP 17.

Harborview Medical Center, Dr. Borromeo intubated A.M. (placed a breathing tube down her throat) due to breathing concerns. 5RP 21-23.

c. Harborview Hospital

A.M. was air transported to Harborview Medical Center later that evening. 5RP 23, 41. Brittany went to Harborview with Cheralyn. 5RP 163. Morris stayed at home to care for T.M. and went to Harborview the following day. 5RP 163, 166-67, 190.

Harborview social worker Quesada did not notice Morris having physical contact with A.M. at the hospital on May 31. 6RP 61, 63-64, 67. Morris, upon entering A.M.'s room, immediately went to her bedside and sat down. 6RP 63. He wanted to see A.M. 6RP 68. Quesada thought it noteworthy that Morris did not immediately want to pick his child up because she had been extubated and most parents want to hold their child immediately. 6RP 64. A.M. was hooked up to monitoring wires during her stay at Harborview. 7RP 63.

Pediatrician Dr. Feldman testified for the State. 6RP 96. He is a child abuse consultant. 6RP 113. Dr. Feldman examined A.M. at Harborview on May 31. 6RP 117, 131.

Upon arrival at Harborview, A.M. had a temperature of below 96 degrees. 7RP 57. She was not responding normally. 6RP 123. Feldman noticed some bleeding in the white of her left eye, a yellowing bruise two

centimeters in size under her chin, and a full fontanel. 6RP 124; 7RP 78. There were profuse retinal hemorrhages. 6RP 135-36. The bulging fontanel indicated increased pressure inside the head. 6RP 125.

Feldman was aware that Brittany had observed Morris cursing at A.M. on a previous occasion. 6RP 134. Brittany learned from Morris that the bruise on A.M.'s chin might have occurred the week before when A.M. fell and struck Morris's knee. 6RP 134. It usually takes a minimum of a day and a half to three days for a bruise to yellow. 6RP 131; 7RP 79. Dr. Feldman made a very strong preliminary diagnosis of abusive trauma. 6RP 137.

d. Children's Hospital

A.M. arrived at Children's Hospital on May 31. 6RP 138. Dr. McGuire, a pediatric intensive care physician at Children's Hospital, testified for the State. 4RP 660. He was the attending physician responsible for A.M.'s care on May 31. 4RP 679. Dr. McGuire decided A.M. needed to be intubated after she began to have more severe apneas (episodes of stopped breathing) after her arrival. 7RP 79. Intubation is the process of placing a tube into the airway or trachea to provide assisted breathing. 4RP 674.

During the intubation process, there was concern that the tube became plugged with mucus. 4RP 723-26. There was a copious amount

of mucus in the upper airway. 4RP 703-05, 725. The mucus was a contributing factor to the recurrent desaturation.⁵ 4RP 742. Dr. McGuire believed the mucus was the likely consequence of impaired neurological function. 4RP 736. The intermittent desaturations were concerning and required intervention. 4RP 736-37. The long term impact of the intubation on A.M. was uncertain. 4RP 739-40.

e. Dr. Feldman's Opinion

Dr. Feldman reviewed the case again after A.M. was transferred to Children's Hospital. 6RP 138. By that time, an MRI confirmed subdural bleeding and areas of the brain that were damaged. 6RP 138. Areas of the brain had hypoxic ischemic changes, meaning tissue injured as a result of a shortage of blood/oxygen or trauma. 6RP 138, 147-49.

Dr. Feldman believed the injuries were the result of abusive head trauma. 6RP 156-57; 7RP 13. Feldman opined the retinal bleeding, the subdural bleeding and the brain injury sustained by A.M. were typically the result of whiplash forces on the head. 7RP 5, 39.

Feldman acknowledged the existence of a debate about whether shaking can cause these injuries. 7RP 7, 21. Shaking is a force that causes whiplashes. 7RP 7. The kind of whiplash at issue involved acceleration and deceleration, such as when a baby's head impacts against

⁵ Desaturation means the oxygen level in the blood falls. 4RP 509.

a hard or soft surface. 7RP 6-8, 39-40. There was no physical evidence of any impact in A.M.'s case. 7RP 7. It takes very high levels of acceleration or deceleration to cause these injuries. 7RP 9.

Feldman maintained a child with these injuries would be immediately symptomatic and would not undergo a lucid interval where the condition appeared to improve before worsening again. 7RP 18. A lucid interval of total normality would be unlikely. 7RP 94.

Feldman did not believe there was a nontraumatic cause for the injuries. 7RP 5. Feldman dismissed A.M.'s prior fall onto Morris's knee as a cause of injury because the child would have been symptomatic before May 29. 7RP 10. Such a fall would not explain the profuse retinal hemorrhages. 7RP 10-12.

Feldman also dismissed the idea that dysphagic choking (child cannot breathe because something stuck in throat) could cause these injuries. 7RP 14-15. According to Feldman, Morris's explanation that the child vomited, choked and stopped breathing was not the cause. 7RP 14. Vomiting and choking was a consequence rather than the cause of a damaged brain. 7RP 17.

Feldman did not believe the prolonged intubation process at Children's Hospital had anything to do with the injuries he observed or that there was a nontraumatic cause for the injuries. 6RP 155; 7RP 116.

Nor did he think a venous sinus thrombosis (blood clot) was involved. 7RP 20, 30.

Dr. Feldman rejected viral meningitis as a cause of A.M.'s injuries. 7RP 30-33, 109-10. He acknowledged a doctor saw A.M. for congestion during the preceding week. 6RP 133; 7RP 50-52. Medical notes indicated A.M. had loss of appetite, loose foul smelling stool, and congestion. 7RP 52. She was diagnosed with a viral cold at the time. 7RP 57. A preexisting viral infection can move to the brain. 7RP 58. Meningitis symptoms can surface several days after a child has had signs of a cold or other infection. 7RP 123. Symptoms of meningitis included poor feeding, vomiting, fever, lower than normal temperature, a bulging fontanel, lethargy and seizures. 7RP 56-57. A.M. had all of these symptoms. 7RP 57, 90.

f. Dr. Herlihy's Opinion

Dr. Herlihy, a pediatric ophthalmologist, testified for the State. 4RP 279. She examined A.M. on June 1, 2009. 4RP 309. Severe retinal hemorrhaging was present. 4RP 300-02, 305. The hemorrhaging could have occurred hours or a week before Herlihy examined her. 4RP 335. Pigmentary changes in the center of the retina were "suggestive" that there

had been a schisis cavity (split in the retina layers).⁶ 4RP 320, 334. A schisis cavity is another indicator of severe trauma forces to the eye involving acceleration/deceleration. 4RP 320-21.

Herlihy believed the injury was related to severe head trauma and that nothing else could have been the cause. 4RP 312. A shearing, acceleration/deceleration type of force was responsible for the hemorrhaging. 4RP 312-14.

Dr. Herlihy ruled out other causes for the retinal injury. 4RP 313-17, 361. According to Herlihy, hemorrhages like this would not be caused by an accidental fall or jostling. 4RP 313. Elevated intracranial pressure can cause minor retinal hemorrhages, but not to the extent of hemorrhage at issue here. 4RP 314-15. An event combining decrease in oxygen and change in blood pressure would not cause this degree of hemorrhaging. 4RP 361. Hypoxia ischemia (low oxygen level in blood with resulting lack of oxygen delivery to organ) was not a potential cause. 4RP 316-17.

Herlihy acknowledged meningitis could cause retinal hemorrhages, although it was very unusual. 4RP 315. Meningitis could not cause the extent or kind of retinal injury at issue here. 4RP 315. The most likely

⁶ Dr. Feldman relied on this evidence in forming his opinion. 7RP 12-13, 16.

medical explanation was severe trauma of an acceleration/deceleration type of force. 4RP 316.

g. Dr. Barnes's Opinion

Dr. Barnes, a pediatric radiologist and neuroradiologist, testified for the defense. 4RP 375. Barnes was part of a multidisciplinary team at his hospital that reviewed suspected cases of child abuse. 4RP 380-81. He was also versed in recognizing conditions that mimic child abuse. 4RP 378.

Dr. Barnes reviewed A.M.'s CT and MRI scans. 4RP 390. In his opinion, those scans showed a brain injury most consistent with a lack of oxygen or blood flow, i.e., hypoxia ischemia. 4RP 390-91. Bleeding between A.M.'s brain and skull (subdural bleeding) was also consistent with hypoxia ischemia. 4RP 391, 400.

Dr. Barnes explained lack of oxygen damages brain tissue and the blood vessels that carry blood to the brain. 4RP 391. Blood vessels injured from lack of oxygen leak blood that can produce the type of hemorrhaging found in A.M.'s case. 4RP 391-92. The lack of oxygen in a baby is usually caused by a blocked airway in the mouth or throat, such as when a baby chokes on a feeding. 4RP 392. Dysphasic choking is the term used to describe choking during feeding, which blocks a baby's

airway and leads to apnea (stoppage of breath) and arrest (stoppage of heart). 4RP 396, 428-29.

The traditional triad of injuries associated with child abuse are subdural hemorrhage, retinal hemorrhage and brain injury. 4RP 384. That injury pattern, however, can be due to lack of oxygen as opposed to physical abuse. 4RP 397. The MRI scan done at Children's Hospital showed areas of the brain that suffered from lack of oxygen or blood flow. 4RP 402-03.

Based on the CT and MRI exams, Dr. Barnes made the following differential diagnosis, from most likely to least likely possible cause: (1) lack of oxygen or blood flow to the baby's brain (hypoxia ischemia); (2) bleeding or clotting problem; (3) infection; (4) trauma (accidental versus nonaccidental). 4RP 405. Based on the MRI, the most likely cause of the brain injury was lack of oxygen or blood flow. 4RP 403-04.

Venous sinus thrombosis was also a possible cause, which in turn may be caused by an infection. 4RP 424. Venous sinus thrombosis is a blood clot inside a vein that ruptures the vein and causes bleeding. 4RP 425. A blood clot can also back up into the brain and cause hemorrhage. 4RP 425.

Based on the MRI, the brain injury due to lack of oxygen could be two to three days old. 4RP 404-05. The bleeding or clotting and thrombosis in the brain could be up to one week old. 4RP 404-05.

Dr. Barnes believed clinical symptoms could be delayed as opposed to immediate. 4RP 434. A hemorrhage may occur followed by a lucid interval of hours or days until the baby crashes or stops breathing. 4RP 435.

h. Dr. Gabaeff's Opinion

Dr. Gabaeff, an emergency room physician and clinical/forensic practitioner, testified for the defense. 4RP 460. Dr. Gabaeff opined A.M. had viral meningitis. 4RP 492-93. Meningitis is an infection of the tissues surrounding the brain. 4RP 495, 498.

A.M.'s symptoms showed meningitis. 4RP 638. A.M. had meningitis symptoms before May 29 as shown by records associated with the May 26 visit to A.M.'s doctor. 4RP 494. These signs included decreased appetite, diarrhea, respiratory symptoms, and the presence of a virus. 4RP 494. Other meningitis symptoms exhibited by A.M. included low temperature, low blood pressure, low white blood cell count, and rapid respiratory rate. 4RP 500-03. Fluid in A.M.'s sinuses and middle ear were also symptoms of meningitis. 4RP 496-97. Sinus infections can

migrate to the brain, at which point it can turn into meningitis. 4RP 497.

Dr. Gabaeff believed this process happened in A.M.'s case. 4RP 497.

Dr. Gabaeff explained viral meningitis causes an inflammatory response, which in turn causes fluid to build up in the brain. 4RP 495. Increased intracranial pressure is the result. 4RP 495. Increased cranial pressure causes people to have decreased appetite and to vomit. 4RP 495. A.M.'s bulging fontanel was a sign of meningitis. 4RP 495-96. Increased intracranial pressure from meningitis can cause retinal hemorrhages. 4RP 637.

The first CT scan showed the covering of the brain was bleeding, infected and inflamed. 4RP 498. There was also a small area of bleeding in the brain tissue itself. 4RP 499. Those are exactly the findings one would expect to see in meningitis. 4RP 499. Viral meningitis was the cause. 4RP 576.

Dr. Gabaeff believed A.M. choked and vomited while feeding. 4RP 504. A healthy baby will cough up the vomit. 4RP 504. But a baby in a compromised neurologic state, which meningitis can produce, cannot effectively cough the vomit out. 4RP 504. Instead, the vomit remains in the pharynx, which activates a reflex to close down the windpipe and causes the baby to stop breathing. 4RP 505. The baby will resume breathing if the vomit is moved out by various means, such as shaking the

baby, turning him upside down, or patting him on the back. 4RP 505. Dr. Gabeaff believed this is what happened to A.M. 4RP 505-06.

Dr. Gabaeff also opined A.M. suffered a protracted lack of oxygen as a result of failed intubations at Children's Hospital. 4RP 492-93. This severe hypoxia ischemic event damaged the brain. 4RP 493-94, 577-78.

At Harborview and Children's Hospital, A.M. had seizures, which is a common complication of meningitis. 4RP 506-07. A.M.'s apneas (episodes of stopped breathing) at Children's Hospital were probably related to the seizures. 4RP 507-09. The oxygen level in A.M.'s blood fell during the intubation process at Children's Hospital. 4RP 509-10. There were six failed intubation attempts before a seventh succeeded. 4RP 525. Radiologist's reports of CT and MRI scans done at Children's Hospital after intubation indicated the presence of massive hypoxic ischemic encephalopathy — a massive amount of brain death and damage caused by low oxygen level and blood flow. 4RP 546-52. The MRI in particular showed a possible blood clot in the brain (cerebral venous thrombosis). 4RP 551. These CT and MRI findings were inconsistent with an event that happened approximately 64 hours before. 4RP 552.

Retinal hemorrhage is primarily related to increased intracranial pressure. 4RP 569. Causes for intracranial pressure include infection, stroke, and trauma. 4RP 570. Hypoxic ischemic encephalopathy with

swelling can cause retinal hemorrhage. 4RP 570. Meningitis with a related increase in intracranial pressure can cause retinal hemorrhaging. 4RP 570. Lack of oxygen during an intubation sequence can cause retinal hemorrhages. 4RP 570-71.

The retinal hemorrhages are completely consistent with Dr. Gabaeff's opinion that A.M. suffered from meningitis and the effects of intubation. 4RP 571. An acceleration/deceleration force was unlikely to cause the subdural and retinal hemorrhages. 4RP 571. Dr. Gabaeff ruled out acceleration/deceleration as the cause of these injuries because A.M. did not have a neck injury. 4RP 572-74, 578. He ruled out impact as the cause because there was no evidence of it. 4RP 574-75, 578. A.M.'s CT scan of her neck and her skeletal survey were normal. 4RP 575-76.

i. Prior Relationship and Post-Event Statements

At a barbeque on Mother's Day 2009, Cheralyn observed Morris get frustrated when Brittany asked him to feed A.M. or put her down for a nap because he wanted to play video games with Cheralyn's husband. 5RP 100-01, 117. Cheralyn and Cristian had never seen Morris act violent toward A.M. 5RP 117-18, 138. Brittany recalled one time when Morris used a cuss word in relation to A.M. when she would not stop crying in the middle of the night. 5RP 175. She never observed Morris act physically aggressive or violent toward A.M. 6RP 5.

On the night of the incident, CPS social worker Krausz and police officer Kilpatrick went to the Morris residence near midnight. 6RP 7-8, 22-23, 30. They did not notice anything out of the ordinary. 6RP 9-10, 14, 24. T.M. slept comfortably in her bedroom. 6RP 31. Morris was emotional and upset. 6RP 10-11. Morris told Krausz that he was feeding A.M. when she choked and he panicked and ran across the street. 6RP 25. When asked about the bruise on A.M.'s jaw, Morris said he thought it came from when her pacifier popped out of her mouth. 6RP 26.

On June 2, Officer Murphy interviewed Morris. 6RP 37. Morris said he had been watching A.M. while his wife took their other child to the doctor. 6RP 37-38. A.M. began to vomit while he was feeding her and stopped breathing. 6RP 38, 53. He placed A.M. on the couch and attempted CPR. 6RP 3, 53-54. Morris held A.M. out from his chest and shook her for five seconds and then another five seconds because she was not breathing. 6RP 41, 52. He then ran to his neighbor's house with A.M. 6RP 38, 54. Morris thought the injury might have been caused when he ran across the street without supporting A.M.'s head. 6RP 39, 52. Morris also connected the injury to when he put A.M. on the couch to do CPR. 6RP 38. Morris also remembered a time when T.M. grabbed a knife while he was holding A.M. 6RP 39. Morris reacted instinctively to grab the

knife, and in so doing accidentally dropped A.M. on his lap while he was holding her, jogging her head. 6RP 39.

At some point before June 12, 2009, Morris sent a text message to Brittany that read "I did shake her after she stopped breathing, but she would not respond to me. Am I a bad parent? I am so sorry, Baby. I forgot. This is all my fault." 5RP 168-73, 196. Morris denied ever intentionally harming A.M. or touching her out of anger. 4RP 650.

C. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MORRIS CAUSED GREAT BODILY HARM OR THAT HE ACTED RECKLESSLY AS TO THAT RESULT.

The State did not prove Morris caused A.M. "great bodily harm," as is required to sustain the first degree child assault conviction in this case. Even if the State proved the requisite level of harm, it still failed to prove Morris had subjective knowledge that shaking A.M. or otherwise subjecting her to an acceleration/deceleration force posed a substantial risk of great bodily harm. The conviction for first degree child assault must be reversed due to insufficient evidence.

- a. The Evidence Is Insufficient To Show Great Bodily Harm.

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.

Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the State, a rational trier of fact could find each essential element of the crime beyond a reasonable doubt. State v. Chapin, 118 Wn.2d 681, 691, 826 P.2d 194 (1992). In determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006).

To convict Morris of first degree assault, the State needed to prove beyond a reasonable doubt that he intentionally assaulted A.M. and "recklessly inflicted great bodily harm." CP 65 (Instruction 5); see also RCW 9A.36.120(1)(b)(i) (defining crime). "Great bodily harm" means "bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(c); accord CP 70 (Instruction 10).

The evidence, looked at in the light most favorable to the State, does not establish the infliction of great bodily harm.

Dr. Herlihy examined A.M. on July 17, 2009 and determined she had subnormal visual behavior. 4RP 317-19. At trial, Herlihy gave "a

guarded diagnosis, but it was really too early to tell exactly what her visual outcome would be." 4RP 322. She said time would tell. 4RP 323. When asked at trial if there was potential for a full recovery, Herlihy responded she had seen children with severe retinal hemorrhages do surprisingly well from a visual standpoint, and had also seen more children have a pretty devastating visual outcome. 4RP 323. It would not be until age two or three that a reasonable determination about A.M.'s vision could be made. 4RP 324.

At trial, Brittany reported an April 2010 ophthalmology exam showed A.M. had 20/80 vision. 5RP 180. According to Dr. Herlihy, 20/80 vision for a one year old would be okay. 4RP 323. Brittany testified A.M. was not given glasses following the eye exam. 5RP 198-199.

Dr. Herlihy's expert testimony does not show the presence of a bodily injury that creates a probability of death, or which "causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(c). Dr. Herlihy did not know whether there would be lasting damage to A.M.'s eyes. It was too soon to tell. No evidence was presented that A.M., at the time of trial, had any vision problems resulting

from the injury. The State did not prove permanent impairment with respect to A.M.'s eyes or vision.

In closing argument, the State argued "great bodily harm" was proved because there were concerns about A.M.'s speech development and Dr. Feldman said there was an indication of neurological delay. 4RP 772-73.

Brittany testified A.M.'s hearing appeared normal and she was walking. 5RP 199-201. There was concern about speech development, but she was doing well with her speech therapist. 5RP 201-02.

Dr. Feldman testified "whenever we see changes in the substance of the brain on the MRI such as you saw, whenever we see a child like this who has convulsions who has a very low level of consciousness to start with, then there's likelihood that child will have permanent brain injury. By the time she was ready to leave the hospital, she still wasn't quite safe to eat on her own. She hadn't developed enough coordination again to do that. She still had a little bit of that paralysis on the right side. So all of those things left me very worried that she was likely to sustain some permanent brain damage from that." 7RP 18-19.

Based on review of subsequent records, Feldman "determined that [A.M.] actually did a little better than I suspected she might do, but she still is showing significant developmental delays in her motor function, in

her language function. She's doing a lot better in her vision than we had anticipated. She had a seizure disorder for a while, but it's my understanding that that's doing better now. I think the way she's progressed, she's going to be a much more functional member of society that I thought she might have been but will still be an impaired member of society." 7RP 20. Concerns about speech as relayed through Brittany's testimony was one part of this opinion, although neurology notes from the summer of 2010 "spoke of her having a global developmental delay." 7RP 20.

Dr. Feldman was unable to conclude A.M. suffered a significant, permanent loss or impairment of the function of any bodily part or organ. The most he could say was that he was worried that a permanent brain injury was likely, not that she did in fact have one. While he did say A.M. would be an impaired member of society, he did not testify such impairment would be significant. Nor did he express that opinion to a reasonable degree of medical certainty. Dr. Feldman acknowledged A.M. will be a "much more functional member of society." 7RP 20. The State failed to prove Morris inflicted great bodily harm.

b. The Evidence Is Insufficient To Show Morris Acted Recklessly As To The Result.

Even if the State proved infliction of great bodily harm, it still failed to prove the recklessness element of the offense.

The jury was instructed "[a] person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that great bodily harm may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation." CP 68 (Instruction 8). This instruction sets forth the correct standard for recklessness in assault cases involving great bodily harm. State v. Harris, 164 Wn. App. 377, 385, 387-88, 263 P.3d 1276 (2011); State v. Gamble, 154 Wn.2d 457, 468, 114 P.3d 646 (2005).

In order to prove recklessness, the State needed to prove Morris knew of but disregarded a substantial risk that great bodily harm may result from his intentional act. Reckless conduct includes a subjective and objective component. State v. R.H.S., 94 Wn. App. 844, 847, 974 P.2d 1253 (1999). "Whether an act is reckless depends on both what the defendant knew and how a reasonable person would have acted knowing these facts." R.H.S., 94 Wn. App. at 847.

"The trier of fact is permitted to find actual subjective knowledge if there is sufficient information that would lead a reasonable person to

believe that a fact exists." Id. Stated another way, a jury is permitted to find subjective knowledge if an ordinary person would have had knowledge under the circumstances. State v. Shipp, 93 Wn.2d 510, 516, 610 P.2d 1322 (1980).

In Harris, evidence was sufficient to show a reasonable juror could find Harris knew, but disregarded, the substantial risk that shaking a baby could cause great bodily harm. Harris, 164 Wn. App. at 379-80, 391. Harris is distinguishable.

Affirmative evidence showed Harris vigorously shook a two month old infant causing the baby's head to flop around. Id. at 390. The court pointed out Harris was one of the baby's primary caregivers and that Harris cared for her while the mother was at work. Id. at 391. Harris told police that on occasion he would pick up the baby too quickly without properly supporting the head, causing the baby's head to fling back. Id. Harris said Weaver, the mother, would yell at him and be "all over him" about it. Id. Weaver instructed Harris on how to properly hold and pick up the baby. Id.

From these set of facts, a jury could conclude Harris knew how to properly hold and take care of the baby. Id. Interpreting the evidence in the light most favorable to the State, a reasonable juror could find Harris had experience taking care of the baby and that Harris knew the baby was

young and fragile and that not handling the baby properly could result in serious injury. Id.

Unlike the father in Harris, Morris was not the primary caregiver of his child. Brittany was the children's primary caregiver. 5RP 147-48. A.M. was always with Brittany. 5RP 101. Morris's work took him away from home for 13-16 hours of the day. 5RP 148-49, 640-41, 651. In addition, Morris was not present during T.M.'s early childhood because of his Navy deployment. 6RP 133. He had little experience caring for a young baby such as A.M.

Furthermore, the father in Harris, before inflicting substantial bodily harm on the child, had been warned about how to properly handle a baby, including how to avoid causing the baby's head to fling back in the absence of support. Harris, 164 Wn. App. at 391. There was an evidentiary basis to infer that Harris actually knew of the risk in not properly supporting a baby's head. No such basis for knowledge exists in Morris's case.

Dr. Feldman did not know the specific mechanism that caused the injury. 7RP 16-17. According to Feldman, nobody could know what actually happened. 7RP 17. The inability to specify what action caused the harm hampers the ability of any rational trier of fact to find Morris knew but disregarded a substantial risk that such action could cause great

bodily harm. In determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. Colquitt, 133 Wn. App. at 796.

Consistent with earlier statements, Morris testified he shook A.M. twice in an effort to get her to breath after she vomited and choked. 4RP 648; 5RP 196; 6RP 41, 52. Shaking is an acceleration/deceleration force that causes whiplashes. 7RP 7. Dr. Feldman opined the acceleration/deceleration force involved impact on either a hard or soft surface. 7RP 6-8, 39-40. Examination of A.M. revealed no physical evidence of impact on a hard surface. 7RP 7. Feldman noted the tools for detecting evidence of physical impact were limited, implying such impact could remain undetected. 7RP 7-8. The fact of impact against a hard surface remains conjecture in A.M.'s case and does not contribute to the quantum of evidence that may be relied upon to determine sufficiency. Colquitt, 133 Wn. App. at 796.

A jury is permitted to find subjective knowledge only if an ordinary person would have had knowledge under the circumstances. Shipp, 93 Wn.2d at 516. Dr. Feldman implied impact against a soft surface, such as a couch, could suffice to create A.M.'s injuries. 7RP 8. Dr. Feldman, an expert witness with years of specialized training and

experience,⁷ was able to testify that the injuries sustained by A.M. were inflicted by a severe acceleration/deceleration force. But the State presented no evidence that an ordinary, young parent such as Morris who did not possess such training and experience would know of a substantial risk that great bodily harm may occur from application of whiplash force with possible impact against a soft surface.⁸

Moreover, the State presented no evidence regarding the probabilities of causing great bodily harm by shaking or otherwise causing a whiplash effect on a baby. To prove recklessness, the State needed to prove Morris disregarded a *substantial* risk of great bodily harm, not merely any risk. The State failed to present sufficient evidence that Morris personally knew there was a substantial risk that shaking a baby or doing some other action involving an acceleration/deceleration force may cause great bodily harm.

The conviction for first degree child assault must be reversed and the charge dismissed with prejudice due to insufficient evidence. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003) (setting forth remedy where evidence insufficient to sustain conviction). The constitutional

⁷ 6RP 96-117.

⁸ Morris was only 20 years old at the time of the incident. 5RP 147.

prohibition against double jeopardy forbids retrial. State v. Anderson, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982).

2. THE COURT ERRED IN ORDERING PSYCHOLOGICAL EVALUATION AND TREATMENT AS A CONDITION OF COMMUNITY CUSTODY.

As a special condition of community custody, the court ordered Morris to participate in a "psychological evaluation" and "fully comply with all recommended treatment." CP 27. Such a sentencing condition may be imposed only when specific statutory prerequisites are followed. The court's failure to follow the mandated procedure requires reversal of this portion of the sentence.

A court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). RCW 9.94B.080⁹ provides:

The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status

⁹ The heading of chapter 9.94B RCW states the chapter applies to crimes committed prior to July 1, 2000, but RCW 9.94B.080 is applicable to crimes committed after 2000. See Laws of 2008, ch. 231, § 55(1) ("Sections 6 through 58 of this act apply to all sentences imposed or reimposed on or after August 1, 2009, for any crime committed on or after the effective date of this section.").

evaluation or treatment must be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.

RCW 9.94B.080 authorizes a trial court to order mental health evaluation and treatment as a condition of community custody only when the court follows specific procedures. State v. Brooks, 142 Wn. App. 842, 851, 176 P.3d 549 (2008) (addressing former RCW 9.94A.505(9), now codified at RCW 9.94B.080). A court must not order an offender to participate in mental health treatment as a condition of community custody "unless the court finds, based on a presentence report and any applicable mental status evaluations, that the offender suffers from a mental illness which influenced the crime." State v. Jones, 118 Wn. App. 199, 202, 76 P.3d 258 (2003); accord State v. Lopez, 142 Wn. App. 341, 353, 174 P.3d 1216 (2007).

The court must find that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025. RCW 9.94B.080; Brooks, 142 Wn. App. at 851. The term "mentally ill person" is specifically defined under RCW 71.24.025(18). Only offenders who meet that definition are subject to mental health conditions as part of community custody under the plain language of RCW 9.94B.080.

The court, in sentencing Morris, did not make the statutorily mandated finding that Morris was a "mentally ill person" as defined by RCW 71.24.025 and that this mental illness influenced the crime for which he was convicted based on a presentence report and applicable mental status evaluations. The court simply stated, "I would also order that as a condition of the community supervision that he undergo appropriate evaluation in terms of psychological evaluation and follow any and all of the recommendations thereof." 4RP 851. The trial court thus erred in imposing the mental health treatment condition. Jones, 118 Wn. App. at 202; Lopez, 142 Wn. App. at 353-54.

In the community custody portion of the judgment and sentence, the phrase "mental health" is crossed out and replaced with the word "psychological" with reference to evaluation and treatment. CP 27. The State may claim imposition of a "psychological" evaluation and treatment as opposed to "mental health" evaluation and treatment removes the condition from the ambit of RCW 9.94B.080. That claim fails.

There is no meaningful difference between a psychological evaluation and mental health evaluation. This Court in Lopez used the terms "psychological," "psychiatric," and "mental health" evaluation interchangeably in holding the court erred in failing to follow required procedures. Lopez, 142 Wn. App. at 345, 353-54.

Certainly the trial court articulated no distinction. A mental health professional faced with conducting such an evaluation would have no clue as to what the difference could be. The strict statutory prerequisites for imposing mental health evaluation and treatment cannot be circumvented simply by changing the label of the evaluation.

Whatever label is used, the court has commanded Morris to allow a stranger to probe his thought processes. Any type of mental examination entails an invasion of privacy. Guilford Nat'l Bank of Greensboro v. Southern Ry. Co., 297 F.2d 921, 924 (4th Cir. 1962); Russenberger v. Russenberger, 623 So.2d 1244, 1245 (Fla. Dist. Ct. App. 1993). It cannot seriously be disputed an involuntary psychological examination does not entail revelation of intimate details of a person's life. An analyst conducting a mental examination undertakes "by careful direction of areas of inquiry to probe, possibly very deeply, into the psyche, measuring stress, seeking origins, tracing aberrations, and attempting to form a professional judgment or interpretation of the examinee's mental condition." Edwards v. Superior Court, 16 Cal.3d 905, 911, 130 Cal. Rptr. 14 (Cal. 1976).

Moreover, one purpose of the Sentencing Reform Act is to "[m]ake frugal use of the state's and local governments' resources." RCW 9.94A.010(6). That purpose would be frustrated if resource-intensive psychological evaluation and treatment could be imposed as a condition of

community custody simply by virtue of a conviction. The Legislature did not intend to throw open the doors to such evaluation whenever a person commits a crime. The specific statutory requirements that must be met before evaluation and treatment can be imposed demonstrates intent to limit that sentencing condition to a small class of offenders.

"In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal." State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). "[A] sentencing error can be addressed for the first time on appeal under RAP 2.5 even if the error is not jurisdictional or constitutional." In Re Pers. Restraint of Fleming, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (citing State v. Moen, 129 Wn.2d 535, 543, 919 P.2d 69 (1996)).

The rule applies to erroneous community custody conditions in general and the erroneous imposition of mental health evaluation and treatment in particular. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (in general); Jones, 118 Wn. App. at 204 (mental health evaluation and treatment). The condition pertaining to psychological evaluation and treatment must be stricken from the judgment and sentence. Lopez, 142 Wn. App. at 354.

3. THE COURT VIOLATED MORRIS'S FUNDAMENTAL RIGHT TO PARENT HIS CHILDREN WHEN IT IMPOSED A SENTENCING CONDITION THAT UNJUSTIFIABLY RESTRICTED CONTACT WITH HIS CHILDREN.

Parents have a fundamental liberty interest in the care and companionship of their children protected by due process. Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); In re Welfare of Sumey, 94 Wn.2d 757, 762, 621 P.2d 108 (1980); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. The sentencing orders that prohibit Morris from having contact with his minor biological children unconstitutionally infringe on his fundamental parental rights because the prohibition is not reasonably necessary. The orders must therefore be stricken.

a. The Court Did Not Explain Why It Was Reasonably Necessary To Impose The No Contact Orders.

At the sentencing hearing, the court stated, "In terms of the no contact order with [A.M.], I would order there to be no contact unless legally permitted under a court-ordered parenting plan. Absent a court-ordered parenting plan, there is to be no contact, and he is not to have contact with his other child unless supervised, and I would not allow Ms. Morris to be the supervisor." 4RP 851.

In the written judgment and sentence, the court ordered Morris to have no contact with A.M. for life unless permitted by a court ordered parenting plan. CP 27, 29. The scope of the no contact order includes, but is not limited to, "personal, verbal, telephonic, written or contact through a third party[.]" CP 29. The judgment and sentence also contains an order for a post-conviction domestic violence no contact order involving A.M. CP 29. That order likewise requires Morris to have no contact with A.M. for life "unless pursuant to a court ordered parenting plan." Supp CP ___ (sub no. 141, Domestic Violence No Contact order, 7/1/11).

The court further ordered Morris, as a condition of community custody, to have "no contact with minors unless supervised by an adult approved by CCO. Brittany Morris may not supervise contact." CP 27.

b. The Court's Prohibition On Contact With A.M. Is Unconstitutional In Scope and Duration.

The court may impose and enforce crime-related prohibitions in appropriate circumstances. RCW 9.94A.505(8). A "crime-related prohibition" is "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(13). Crime-related prohibitions may include orders prohibiting contact with specified individuals for the statutory

maximum term. State v. Armendariz, 160 Wn.2d 106, 116, 156 P.3d 201 (2007).

The imposition of crime-related prohibitions is generally reviewed for abuse of discretion. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). But courts more carefully review conditions that interfere with a fundamental constitutional right, such as the fundamental right to the care, custody, and companionship of one's children. Rainey, 168 Wn.2d at 374. The trial court necessarily abuses its discretion when its decision is based on an erroneous view of the law or involves application of an incorrect legal analysis. Dix v. ICT Group, Inc., 160 Wn.2d 826, 833, 161 P.3d 1016 (2007). Moreover, "a court 'necessarily abuses its discretion by denying a criminal defendant's constitutional rights.'" State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009) (quoting State v. Perez, 137 Wn. App. 97, 105, 151 P.3d 249 (2007)).

State interference with a fundamental right is subject to strict scrutiny. In re Parentage of C.A.M.A., 154 Wn.2d 52, 60-61, 109 P.3d 405 (2005). Strict scrutiny requires the infringement be narrowly tailored to serve a compelling state interest. C.A.M.A., 154 Wn.2d at 61.

Under this standard, a reviewing court must determine whether the State proved the restriction on the right to parent was "sensitively

imposed" and "reasonably necessary to accomplish the essential needs of the State." Rainey, 168 Wn.2d at 374 (quoting State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008)). To withstand constitutional scrutiny, no contact orders relating to biological children must be reasonably necessary to protect them from harm. Rainey, 168 Wn.2d at 377; State v. Letourneau, 100 Wn. App. 424, 439, 997 P.2d 436 (2000). The determination is a delicate one that resists bright line rules. Rainey, 168 Wn.2d at 377.

Under the controlling legal standard, the scope of the no contact order involving A.M. is invalid. The court here prohibited all contact, "including, but not limited to, personal, verbal, telephonic, written or contact through a third party for life." CP 29. Even if a prohibition on unsupervised in-person contact was appropriate in this case, there is no evidence to suggest Morris somehow posed a danger to A.M. by contacting her with an adult present, writing to her, speaking with her on the telephone or some other medium, or communicating with her through third parties.

The order is not narrowly tailored. C.A.M.A., 154 Wn.2d at 61. Prohibiting all contact with A.M., including indirect or supervised contact, simply because she was a victim of the crime is not reasonably necessary to realize a compelling interest. See Rainey, 168 Wn.2d at 378 ("It would

be inappropriate to conclude that, simply because L.R. was a victim of Rainey's crime, prohibiting all contact with her was reasonably necessary to serve the State's interest in her safety.").

Banning all contact "unless permitted by a court ordered parenting plan" does not render the restriction reasonably necessary in scope. Nothing in the record shows a separation or dissolution proceeding was pending. There is no way to know whether a court proceeding involving a parenting plan will ever come to fruition. The theoretical existence of a future court proceeding in this state or another¹⁰ does not make the no-contact order narrowly tailored under the constitutional standard.

Moreover, the lifetime nature of the no-contact ban ensures that even if Morris were allowed contact with A.M. as part of a court ordered parenting plan in the future, the period of lawful contact would likely cease once A.M. reaches the age of majority. At that point, there would no longer be a parenting plan for a minor child in effect, yet Morris would again be prohibited from contacting A.M. as a result of the no contact orders entered in this criminal case. It would make no sense for Morris to be allowed contact with A.M. while she was a child as part of a court ordered parenting plan yet be banned from contacting her once she becomes an adult.

¹⁰ A.M. and her mother live in Missouri. 5RP 145-46, 148, 179-80.

Sentencing conditions that interfere with fundamental rights must be "sensitively imposed." Rainey, 168 Wn.2d at 377. The sentencing court did not carefully consider the ramifications of a lifetime ban.

Reasonable necessity encompasses not only scope (extent of contact, if any) but also duration. Id. at 381. The length of the no contact order must also be reasonably necessary. Id. As explained in Rainey, "[t]he duration and scope of a no-contact order are interrelated: a no-contact order imposed for a month or a year is far less draconian than one imposed for several years or life. Also, what is reasonably necessary to protect the State's interests may change over time. Therefore, the command that restrictions on fundamental rights be sensitively imposed is not satisfied merely because, at some point and for some duration, the restriction is reasonably necessary to serve the State's interests." Id.

In Rainey, the defendant was convicted of a violent crime against his child (first degree kidnapping) and had a record of continually inflicting measurable emotional damage on his daughter and attempting to leverage the child to inflict emotional distress on the mother. These facts were sufficient to establish that a total no-contact ban, including indirect or supervised contact, was reasonably necessary to protect the child and the mother. Id. at 379-80. Nevertheless, the Court reversed the no-contact order because the sentencing court provided no justification for the order's

lifetime duration and the State failed to show why the lifetime prohibition was reasonably necessary. Id. at 381.

As in Rainey, the sentencing court in this case provided no reason for the duration of the no-contact order, nor did the State attempt to justify the lifetime order as reasonably necessary to protect A.M. Id. at 381; 4RP 836-37, 851-52. "A court abuses its discretion if, when imposing a crime-related prohibition, it applies the wrong legal standard." Rainey, 168 Wn.2d at 375. That is what happened here.

What is reasonably necessary to protect the State's interests may change over time. Id. at 381. The reason behind prohibition on contact with A.M. while she is a vulnerable child may not be present when she grows older and eventually becomes an adult. The sentencing court erred in not considering whether the lifetime duration of the order was reasonably necessary to serve the State's interests.

c. The Court's Prohibition On Contact With T.M. Is Unconstitutional In Scope and Duration.

The court imposed a 36-month term of community custody. CP 27. The court ordered Morris, as a condition of community custody, to have "no contact with minors unless supervised by an adult approved by CCO. Brittany Morris may not supervise contact." CP 27. This prohibition applied to Morris's other daughter, T.M. 4RP 851.

The State generally has a compelling interest in preventing future harm to the victims of the crime. Rainey, 168 Wn.2d at 377. But Morris committed no crime against T.M. The court failed to explain why this prohibition on contact was reasonably necessary to protect T.M. The court again abused its discretion in failing to apply the correct legal standard to the no contact order for T.M. Id. at 375.

The prohibition, imposed as part of community custody, will not take effect until community custody begins following completion of Morris's 147-month sentence of confinement. See In re Pers. Restraint of Crowder, 97 Wn. App. 598, 600, 985 P.2d 944 (1999) (community custody begins upon completion of the term of confinement or at such time as the offender is transferred to community custody). The court did not justify why this prohibition on unsupervised contact was necessary to protect T.M. for a period of three years beginning approximately 147 months from sentencing.

Furthermore, the scope of the no contact order is invalid insofar as it does not allow Morris to have unsupervised contact with T.M. by means of written communication or speaking on the telephone or comparable medium. Nothing in the record establishes Morris has harmed or will harm T.M. if such communication were allowed.

The anomaly between the no contact orders involving A.M. and T.M. must also be pointed out. Morris is theoretically allowed contact with A.M. under a court ordered parenting plan. CP 29. Yet no parenting plan exception was made applicable to contact with T.M., who was not even involved in the crime for which Morris was convicted. This disparity is further proof that the sentencing court failed to sensitively impose the no contact condition in relation to T.M.

For the reasons set forth above, the court's prohibition on unsupervised contact with Morris's biological daughters is not reasonably necessary to protect his child from abuse. This Court should therefore strike the no-contact orders and remand for resentencing. Rainey, 168 Wn.2d at 371.

D. CONCLUSION

For the reasons stated, this Court should reverse the conviction and challenged sentencing conditions related to psychological evaluation and no contact orders.

DATED this 30th day of April 2012.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 67495-1-I
)	
MICHAEL MORRIS,)	
)	
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 30TH DAY OF APRIL, 2012, 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.

- SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201

- MICHAEL MORRIS
DOC NO. 352838
CLALAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 APR 30 PM 4:25

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF APRIL, 2012.

x Patrick Mayovsky