

NO. 38154-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

DAVID BRISTOL,

Appellant.

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DIVISION II  
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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 08-1-00285-1

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BRIEF OF RESPONDENT

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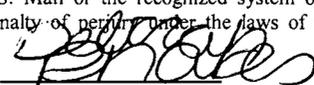
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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether Bristol's right to a public trial was violated where the victim's mother, who was charged with witness tampering, was excluded from the court room during the victim's testimony?

2. Whether the trial court acted within its discretion when it initially excluded testimony from Bristol regarding an alleged threat made by the victim, where the statement was clearly offered for the truth of the matter asserted, particularly where Bristol was ultimately permitted to testify about the statement and argued it for its truth in closing?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

David Bristol was charged by information filed in Kitsap County Superior Court with first-degree incest, based on his digital rape of his adopted daughter, MMB. CP 1. A jury found Bristol guilty as charged. 4RP 281.

### **B. FACTS**

MMB was seventeen years old. 2RP 53. David and Annicka Bristol<sup>1</sup> were her parents. 2RP 54. Bristol was not her biological father. She did not

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<sup>1</sup> To avoid confusion, Annicka Bristol, Julie and Garrett Gibbs, and Bruce, Lisa and Bryce Girkin may be referred to by their first names. No disrespect is intended. "Bristol," standing alone, will always refer to the appellant.

have a relationship with her biological father and Bristol had been her father figure since she was a baby. 2RP 54. 2RP 54.

At the time of trial MMB had been living with Julie Gibbs on and off since the previous August, and full-time for the previous three months. 2RP 55. Gibbs was the mother of her boyfriend, Garrett Gibbs. 2RP 55.

In August, Bristol molested her while Annicka was out of town. 2RP 56. MMB moved out when it happened. 2RP 56. She worked that day at Taco Time. 2RP 56. She got off work around 10:00 p.m. and Bristol picked her up because Annicka had taken MMB's car to Montana. 2RP 57.

MMB had said she was tired and exhausted when Bristol had stopped by earlier, and on the way home, Bristol told her he had a surprise: he had gotten some massage lotion and was going to give her a massage. 2RP 57-58. MMB did not find this unusual because Bristol often gave her and her siblings back rubs. 2RP 58. He had never used oil or lotion before, however. 2RP 58.

When they got home, Bristol told her to take a bath to relax. 2RP 59. He offered her a drink, but she declined. 2RP 59. She used her parents' bathroom, which was normal, since it had a large tub. 2RP 59. She assumed Bristol would give her the massage after her bath. 2RP 59. MMB came out, and went to her room and put on shorts and a sports bra. 2RP 60.

When she returned to her parents' bedroom, Bristol had music playing and about eight candles lit. 2RP 60-61. There was no one else at home. 2RP 61. MMB got under the blanket, and Bristol gave her a foot massage. 2RP 61. Then she lay on her stomach and he gave her a full body massage. 2RP 62. It was not unusual for him to give her a full body massage. 2RP 62.

After about 10 minutes, she dozed off. When she woke up, he was softly touching her vaginal area. 2RP 62-63. At first she was scared, and pretended to still be asleep. 2RP 63. Then he started to insert his fingers. 2RP 63. When he got to the first knuckle, she had had enough and told him to stop. 2RP 63.

Bristol got up and punched the bed, and she ran to her room. 2RP 63. He seemed angry. 2RP 64. Then he came to her room and knocked on the door. 2RP 64. She was "freaking out" and crying. 2RP 64. She could not believe what had happened, and was scared. 2RP 64. Bristol told her it was a mistake and an accident and would not happen again. 2RP 65. He frantically apologized and asked her not to tell anyone. 2RP 65. He seemed nervous, scared, embarrassed, and angry. 2RP 65. She was scared and angry as well. 2RP 65.

She tried to calm him down because she wanted him to take her to Garrett's house, which was the only place she felt really safe. 2RP 65. She

told him she would not say anything if he took her there. 2RP 65. He agreed and took her there on the condition she not say anything. 2RP 65. On the way there, he asked what she would say to explain why she was so upset. 2RP 66. She responded that she would say that they had had a fight. 2RP 66. Just before she got out of the car, she told him not to do anything stupid, and then left. 2RP 66. She did not want him to freak out and hurt himself or someone else. 2RP 67.

As she walked up to the house she met Garrett's sister coming out the door. The sister, Amanda, was there to pick up her son. 2RP 67. MMB began "crying and freaking out" and "pretty much told her everything" while standing in the driveway. 2RP 67. Then they went inside and she told Garrett and his mother what had happened. 2RP 67. She was crying. 2RP 68. MMB was unable to sleep that night. 2RP 68.

Around 3:00 a.m., she got up and telephoned her mother. 2RP 68. She told her she loved her, and her mother asked her what she was doing. She said she was at the Gibbs house, and Annicka asked her why, because she had just spoken to Bristol, who had said that MMB was asleep in her bed at home. 2RP 68. MMB told Annicka what had happened, and she said she would call her back. 2RP 68.

MMB got up the next day and went to work. 2RP 68. She was

depressed, but otherwise it was a pretty normal day. 2RP 68-69. She had not decided whether to call the police. 2RP 69. She was waiting to see what her mother would do. 2RP 69. Then her father flew out to Montana to drive back with Annicka. 2RP 69.

MMB stayed at the Gibbs's and had no further contact with Bristol. 2RP 70. She stayed there from August to November. 2RP 70. After CPS interviewed her, she moved back home and Garrett came with her. 2RP 70. She only visited home during the early Fall when Bristol was on duty, because he was still living there. 2RP 70.

She first spoke to NCIS in mid-October. 2RP 71. She did not know who had contacted them. 2RP 71. She told them what had happened, because it sounded to her like someone had already told them everything. 2RP 71.

After that, they arrested Bristol. 2RP 72. Annicka asked her to come home. 2RP 72. MMB did, and she and her mother argued about it. 2RP 72. Annicka told her it was too late and she could not take it back, and made her feel bad for having told the truth. 2RP 72, 75. MMB did not know what to do; she was really confused. 2RP 72. Annicka was pressuring her to change her statement. 2RP 72.

Her mother told her it was not too late to fix it and for everything to

be okay. 2RP 75. It made MMB feel very bad. 2RP 75. Annicka also urged her to think about what would be best for her sister and brother. 2RP 75. They kept telling her it was bad to lie to the police and made her feel guilty even though she had done nothing wrong. 2RP 75. MMB felt like her mother and siblings would hate her if she did not recant her statement. 2RP 76.

MMB and Garrett went to lunch with Annicka and Bruce Girkin, who was a neighbor and family friend. 2RP 76. They talked about what they would say, and Bruce reassured her. 2RP 76. Bristol was still in jail, and later that day MMB went home around 10:00 p.m. 2RP 77. Annicka called from the Girkin house and asked her to come over. 2RP 77. She and Garrett proceeded to the Girkins' house. 2RP 77.

They began typing up a statement on Bruce's computer. 2RP 77. Bruce did the typing, while all four of them contributed ideas. 2RP 77. In the recantation she stated that everything but the touching of her genitals had occurred. 2RP 92. When they were done, Bruce printed four copies, and MMB signed each one. 2RP 79. Bruce kept one, Annicka kept one, and Annicka turned the other two over to NCIS. 2RP 79.

When Garrett's mother, Julie Gibbs found out about the recantation, she became angry and told MMB that she was not going to help her if she

was going to lie about it, and kicked her out. 2RP 79. MMB moved back home, and begged Garrett to come with her, because she did not want to be there alone. 2RP 79. In December, MMB went to Montana for three weeks for Christmas. 2RP 80.

In January MMB called NCIS and told them that she had been pressured into recanting. 2RP 80. She wrote another statement setting forth what had actually happened. 2RP 81. Before the incident, she had had a good relationship with her parents. 2RP 82. They had typical fights about grades and getting in trouble, but "nothing big." 2RP 82. They liked Garrett. 2RP 82. Before the incident, she was allowed to occasionally spend the night at Garrett's house, and vice versa. 2RP 82-83. She had never asked her parents if she could live with Garrett. 2RP 83.

She moved back in with the Gibbseys after Bristol and Annicka were arrested in January. 2RP 95. MMB had not seen her mother since then. 2RP 95.

Bryce Girkin was Bruce's son, and was about MMB's age. 2RP 96. She had known him a couple of months. 2RP 96. One night Annicka was the Girkins' house visiting with Bristol. 2RP 97. Garrett and Bryce came over and played video games at her house and the boys drank tequila. 2RP 97. Their parents did not know they were drinking. 2RP 101. She did not

care for it and only had one. 2RP 97. She also had one drink of vodka. 2RP 97. She was not at all intoxicated. 2RP 97. MMB had previously told Bryce that Bristol had molested her. 2RP 98. It was not that night, she did not think she had ever discussed it with Bryce when Garrett was present. 2RP 98. She never told Bryce that she had reported the incident because she was mad at her mother because she would not let MMB live with Garrett. 2RP 99. She also never told Annicka in front of Lisa Girkin that she had done it because Annicka would not let Garrett live at their house. 2RP 99.

Garrett Gibbs testified that he lived at his mother's house. 2RP 103. One night in August, MMB arrived at his house around 1:00 a.m. 2RP 105. He was sleeping and was not expecting her. 2RP 105. She was sad and crying hysterically. 2RP 105. Garrett convinced MMB to call Annicka. 2RP 106.

Garrett was there when they went over to the Girkins' house and MMB, Annicka and Bruce prepared a new statement. 2RP 108. Garrett did not know whose idea the statement was. 2RP 109. MMB just told him they were going over there to do it. 2RP 109. He was opposed to recanting, but supported MMB and her decision. 2RP 109.

Garrett's mother was upset with MMB for recanting, and told her she could not stay at the Gibbs house if she was going to do that. 2RP 110.

Garrett went with her because she was scared to go home. 2RP 110.

Garrett was there when MMB recontacted Moody in January. 2RP 112. Garrett had told her he thought she should tell the truth. 2RP 113. When Annicka found out that MMB had gone back to NCIS, they got into a fight and MMB came back to the Gibbs's house. 2RP 113. At that point Julie Gibbs took steps to become MMB's guardian. 2RP 113. MMB had lived with them since then. 2RP 113.

Before the incident Garrett and Bristol got along well. 2RP 113. Annicka had always been nice to him as well. 2RP 114. They had never discussed living together. 2RP 114. There was no serious conflict between MMB and her parents before the incident. 2RP 114. Annicka was sometimes concerned with how much time she spent with Garrett because they were "always together." 2RP 115. Since the incident, MMB had become more angry and stressed out. 2RP 115. She and Garrett had started to fight over little things. 2RP 115. She used to be more outgoing. 2RP 116.

MMB and Garrett did not share a bedroom at his house. 2RP 118. Although MMB had slept in his bed before, his mother did not allow it. 2RP 118.

Julie Gibbs, Garrett's mother, related that MMB had called in August

around 12:30 at night. 2RP 124. She was very upset, tearful, crying and hysterical. 2RP 124. She seemed traumatized. 2RP 124. MMB told Julie what happened. 2RP 124. Julie was devastated and encouraged MMB to call her mother, but MMB was hesitant. 2RP 124. She eventually called her. 2RP 124. Julie did not call the police. 2RP 124. MMB begged her not to. 2RP 125.

Over the next few weeks things got worse. 2RP 125. MMB was very emotional and threw up a lot. 2RP 125. She was sick and distraught. 2RP 126. She felt better at the Gibbs house, but did not want to be there. 2RP 126. She wanted to be with her family. 2RP 126.

When MMB said she was going to recant her statement, Julie told her she could not support lying. 2RP 126. After she gave her first statement to NCIS, MMB seemed relieved. 2RP 127. MMB became emotional again after her parents found out she had spoken to the police. 2RP 127. The pressure to change her statement was ongoing for a while. 2RP 127. Julie understood the position MMB was in, but could not support lying because it was wrong. 2RP 128. Julie told MMB that if she was going to lie, Julie could not have her living in her house. 2RP 128. Garrett did not want go live at the Bristol house, but felt he had to stand behind MMB. 2RP 128.

Julie continued to have regular contact with MMB after she moved

out. 2RP 128. Julie let MMB move back in after she decided to contact NCIS again in January. 2RP 130. MMB has not been the same person since the incident. 2RP 130. She has become emotional, angry, snappy and depressed. 2RP 130.

Naval Criminal Investigative Service Special Agent Raymond Moody discussed the investigation of the case. 2RP 139. The referral initially came from Child Protective Services. 2RP 141. He then contacted MMB. 2RP 141.

The contact was brief, and then he attempted to set up a forensic interview with the Kitsap County Special Assault Unit. 2RP 141. MMB was scheduled to be interviewed on October 22. 2RP 142. That day, Moody received a call from the child interviewer, who informed him that they had been unable to contact MMB. 2RP 143.

Later that day, Annicka contacted Moody's supervisor and agreed to an interview. 2RP 143. The interview was to take place the next day. 2RP 143. Later that evening, Annicka sent an email to him stating that neither she nor MMB wished to speak to NCIS any further. 2RP 144. The recanting statement was attached to the email. 2RP 144.

They contacted Annicka and arranged to meet, and on October 23, they met and MMB signed the statement in Moody's presence. 2RP 144.

After that, Moody interviewed Julie Gibbs, Amanda Gibbs, and Kelly Robinson. 2RP 145. Garrett initially declined to talk to Moody. 2RP 145. Garrett eventually called Moody and said he wanted to talk. 2RP 145. Moody interviewed him on December 20. 2RP 145. Moody explained to Garrett that if MMB wanted to talk to him, she needed to initiate the contact; he would not be calling her. 2RP 145.

On January 8, 2008, MMB called. 2RP 145. She came in and gave a statement, which was reduced to writing, and which she ultimately signed. 2RP 146.

The defense called Bryce Girkin, who was the son of neighbors Lisa and Bruce Girkin. Bryce testified that one night he was at the Bristol house with Garrett and MMB. 2RP 160. No adults were present. 2RP 160. His parents were out of town and Annicka was at his house babysitting his little brother. 2RP 160. MMB's brother and sister were with their mother. 2RP 160.

They played video games and drank. 2RP 161. Garrett and MMB drank a lot. 2RP 161. Before they started drinking, Bryce asserted that MMB brought up the allegations and said that Bristol had molested her. 2RP 161. She would not elaborate. 2RP 161. Later, after the three of them had finished a fifth of vodka, Bryce asked MMB about what had happened. 2RP

162. MMB said not to worry about it because she was just mad at her mother because she would not let Garrett stay at the house. 2RP 162. Then she and Garrett left to go to sleep. 2RP 162. She showed no emotion whatsoever when made either statement. 2RP 162.

It was in October, but he could not be any more precise. 2RP 163. Bryce admitted that he did not like MMB. 2RP 164.

Bryce's mother Lisa testified that they were friends with the Bristols. 2RP 166. Annicka was one of her best friends. 2RP 170. They spent a lot of time together. 2RP 166. In March, Lisa was at the Bristol house. 2RP 167. Annicka and MMB were upstairs arguing. 2RP 167. The other two Bristol children were also upstairs in bed. 2RP 167. Lisa went upstairs to quiet them down because she was afraid they would wake the children. 2RP 154. Lisa went into the room and asked them to quiet down. 2RP 168. MMB was screaming at Annicka that the reason she had made the third statement was because she was "pissed off" that her parents would not let Garrett stay at the house. 2RP 169.

Bristol testified at trial and explained that he was the biological father of MMB's siblings. 2RP 172. He was not MMB's biological father. 2RP 172. He married Annicka when MMB was a year old, and adopted her a year after that. 2RP 172.

Bristol asserted that he and MMB had always had a good relationship. 2RP 177. MMB began to have a hard time academically when she entered high school. 2RP 178.

Bristol testified that their relationship was deteriorating during the summer of 2007. 2RP 187. The more time she spent with Garrett, the less time she wanted to be home with the family. 2RP 187. Bristol and Annicka tried talking to her, but MMB would become angry or frustrated. 2RP 187.

Annicka left before noon on August 23 to go to Montana. 2RP 188. Their younger daughter was already in Montana, and Annicka took their son with her. 2RP 189. Bristol stopped by the Taco Time where MMB worked on his way home, and MMB asked him to pick her up after work. 2RP 190.

According to Bristol, when they got home, MMB said she was going to take a bath, and Bristol went and got on the computer, which was in the master bedroom. 2RP 192. On the way home, MMB had said her feet and back were sore, and she wanted him to "pop" her back and massage her feet. 2RP 192-93. After her bath, he "popped" her back and massaged her shoulders and feet. 2RP 193-94. It took place in the master bedroom. 2RP 194.

There were candles by the tub that Annicka and MMB kept there. 2RP 195. He had the TV on, but muted and may have been playing music on

the computer. 2RP 195. He stated that did not light any candles in the bedroom or offer MMB and alcohol. 2RP 196. He also denied that he used any massage oils. 2RP 196.

He heard her leave the bathroom after her bath, 2RP 196. Shortly she returned and laid down on the bed on her stomach. 2RP 197. He was at the computer and turned around, and MMB asked if he would pop her back. 2RP 197. Bristol agreed, and went over and popped her back, which consisted of Bristol pushing gently up and down on her spine a little and then massaging her shoulders a bit. 2RP 197. MMB also said her feet were sore from standing at work, and asked him to massage them for her. 2RP 197. While he was giving the back rub, Bristol began talking to her about her grades. 2RP 199.

During the conversation Bristol could tell she was getting upset, so he finished the back and foot rub, and they sat and talked a bit longer. 2RP 199.

Bristol became upset and animated. 2RP 199. MMB and Annicka could get into screaming arguments. 2RP 200. Bristol stated that he and MMB did not argue like that. 2RP 200. But they were definitely having an argument about Garrett and school. 2RP 200.

When they were done talking MMB wanted to go to Garrett's house. 2RP 200. According to Bristol, he had had enough, so he said "Fine, I'll take

you to Garrett's house." 2RP 201. He did not originally want to take her; that was part of the argument. 2RP 201. They did not talk at all in the car; he was still "very, very mad." 2RP 201.

About an hour later, around two or three in the morning, Annicka called and asked where MMB was. 2RP 202. He told Annicka that he and MMB had had a fight, and that she had gone to Garrett's. 2RP 202.

MMB had said something about sexual touching during their argument, but Bristol did not hear about it until October. 2RP 202. Bristol was asked if his wife said anything about it that night, but he did not respond to the question, instead saying that he did not talk to anyone at the Gibbs house. 2RP 203. He denied having touched her vaginal area at any point. 3RP 213.

On cross, he maintained that he had not massaged her legs above the knee. He did not recall her falling asleep; they were talking. 3RP 216. He took her to Garrett's between 12:30 to 1:00 a.m. 3RP 216. Annicka called between 2:00 and 3:00 a.m. 3RP 217. He was not surprised, because she was still driving. 3RP 217. He did not learn about the sexual abuse allegation until October. 3RP 218. He learned about them from the police. 3RP 218. There was no mention of the subject between Bristol and MBB in the intervening two months. 3RP 218.

The night of the incident was the last time Bristol spoke with MMB. 3RP 227. They did not speak between August and October because of the argument. 3RP 228. What Bristol described as a “normal teenager-parent discussion/fight” caused them not to speak for two months. He did not talk to her after October because of a military protective order that prohibited him from contacting her. 3RP 228.

He testified that he had “learned of” the allegations the night they happened. 3RP 229. He did not ask her why she made them because he knew why. 3RP 229.

It was not possible that he could have accidentally touched her vagina. 3RP 230. They had a normal relationship before the incident. 3RP 230.

Bristol stated that he and Garrett got along okay. 3RP 230. He also opined that MBB had plenty of “typical teenager” reasons to be angry with Bristol and Annicka. 3RP 230. MMB would pretty much do what she wanted. 3RP 230. They did not have much control over what she did. 3RP 231. The reason that she was angry was because they would not let her live with Garrett. 3RP 231. Yet he earlier testified that he had “no choice” but to take her to Garrett’s house that night. 3RP 231. MMB had been at Garrett’s house for four of the previous five nights. 3RP 231. She had asked him if she could come home that night. 3RP 232. The argument was a result of him

attempting to reestablish control. 3RP 232.

On redirect he explained that the first time he learned of the allegations from the police was in October. 3RP 233. But he was aware of the allegations the night of the incident. 3RP 233. As a result of their conversation, he had reason to believe MMB would make the allegation; she said she would. 3RP 233. He was hoping that she would not make the allegations if he let her do what she wanted. 3RP 233.

### III. ARGUMENT

**A. BRISTOL'S RIGHT TO A PUBLIC TRIAL WAS NOT VIOLATED WHERE THE VICTIM'S MOTHER, WHO WAS CHARGED WITH WITNESS TAMPERING, WAS EXCLUDED FROM THE COURT ROOM DURING THE VICTIM'S TESTIMONY.**

Bristol argues in his original brief that he was denied the right to a public trial because his wife, Annicka Bristol, was excluded from the court room while the victim, MMB, testified. Annicka, however, was charged with witness tampering for her role in securing a written statement from MMB in which MMB recanted the charges. Annicka's case was still pending at the time of Bristol's trial. Under the circumstances, the trial court did not abuse its discretion in excluding Annicka from the court room while her daughter testified.

Bristol argues that under *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), and its progeny, the trial court violated his rights to a public and open trial under the Sixth Amendment and under Const. art. 1, § 22. This claim fails, however, because the procedures required by *Bone-Club* only apply to complete closures of trial proceedings.<sup>2</sup>

The Sixth Amendment to the United States Constitution and article 1, section 22, of the Washington Constitution guarantee criminal defendants the right to a public trial. *State v. Russell*, 141 Wn. App. 733, 737-38, 172 P.3d 361 (2007), *review denied*, 164 Wn.2d 1020 (2008). Additionally, article I, section 10 of the Washington Constitution states, “Justice in all cases shall be administered openly,” giving the public, in addition to the defendant, a right to open proceedings. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982). The Court reviews de novo whether a trial court has violated the right to a public trial. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

In *Brightman*, *Bone-Club*, and *In re Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004), the trial courts ordered that all spectators be excluded from the courtroom during some part of the trial. *See Brightman*, 155 Wn.2d at

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<sup>2</sup> To the extent that Bristol is alleging a violation of art. 1, § 10, his claim is also without merit because he lacks standing to assert the public’s right to open trials. *State v. Wise*, \_\_\_ Wn. App. \_\_\_, ¶ 32, 2009 WL 188186 (Jan. 27, 2009).

511; *Orange*, 152 Wn.2d at 802; *Bone-Club*, 128 Wn.2d at 256-57. The *Orange* and *Bone-Club* courts emphasized that the closures in those cases were full closures. *Orange*, 152 Wn.2d at 808; *Bone-Club*, 128 Wn.2d at 256-57. In contrast, in *State v. Gregory*, 158 Wn.2d 759, ¶ 85, 147 P.3d 1201 (2006), a case more analogous to Bristol's the Supreme Court concluded that the defendant's right to a public trial was not violated, and that these cases did not provide the analytical framework for deciding the issue.

In *Gregory*, where the defendant was charged with rape and murder, the trial court required the defendant's aunt to leave the courtroom for the duration of his grandmother's testimony where it appeared the aunt was attempting to coach the grandmother's testimony. The Supreme Court held that this did not amount to a closure of the courtroom. *Gregory*, 158 Wn.2d at ¶ 85. The Court pointedly noted that "neither *Orange*, *Brightman*, nor *Bone-Club* explicitly limited or undermined the trial court's inherent authority to regulate the conduct of a trial by excluding one person from the courtroom for a limited period of time." *Gregory*, 158 Wn.2d at ¶ 85 (citing *State v. Pacheco*, 107 Wn.2d 59, 67-68, 726 P.2d 981 (1986)).

The Court also noted that the trial judge explained the reason for excluding the aunt, and offered the defendant a chance to object, and limited the exclusion to the duration of the grandmother's testimony. *Gregory*, 158 Wn.2d at ¶ 85. Under these circumstances, the Supreme Court declined to

find “that the trial court abused its broad discretion to regulate the conduct of a trial.” *Gregory*, 158 Wn.2d at ¶ 85.

Here, the trial court excluded Annicka from the court room during MMB’s testimony because Annicka was charged with witness tampering based on her considerable, temporarily successful, efforts to get MMB to recant her claim that her father, Annicka’s husband, had digitally raped her. 2RP 48. As in *Gregory*, the exclusion was only for the duration of MMB’s testimony. 2RP 48.<sup>3</sup> Also as in *Gregory*, Bristol was given the opportunity to object, and indeed argued the point strenuously. 2RP 47-48. Given the evidence of her mother’s efforts to get her to change her story, the trial court did not abuse its “broad discretion” in excluding Annicka from the court room only while her daughter testified.

Bristol also relies on federal cases regarding the right of defendants to have family members and other supporters present at trial. *Gregory* also distinguished these cases in the present circumstances. As the Supreme Court noted, under a Sixth Amendment challenge to the exclusion of a defendant’s family member, the Constitution is satisfied where the court gives the defendant an opportunity to object. *Gregory*, 158 Wn.2d at ¶ 85 n.27 (citing *United States v. Sherlock*, 962 F.2d 1349, 1358 (1989), *cert. denied sub nom.*

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<sup>3</sup> See also 2RP 160 where witness Bryce Girkin identifies Annicka as being present in the courtroom.

*Charley v. United States*, 506 U.S. 958 (1992) (exclusion of defendant's family members during testimony of rape victim approved)).

The trial court did not abuse its broad discretion in excluding Annicka only during MMB's testimony. This claim should be rejected.

**B. THE TRIAL COURT DID NOT ERR IN INITIALLY EXCLUDING TESTIMONY FROM BRISTOL REGARDING AN ALLEGED THREAT MADE BY THE VICTIM, WHERE THE STATEMENT WAS CLEARLY OFFERED FOR THE TRUTH OF THE MATTER ASSERTED, PARTICULARLY WHERE BRISTOL WAS ULTIMATELY PERMITTED TO TESTIFY ABOUT THE STATEMENT AND THEN ARGUED IT FOR ITS TRUTH IN CLOSING.**

In his supplemental brief, Bristol claims that the trial court erred in preventing him from testifying that MMB threatened, the night of the incident, to claim that he had molested her. This claim is without merit because the ruling was correct, and regardless of the propriety of the initial ruling, the Court ultimately permitted Bristol to testify to that effect.

A trial court's ruling on admission of evidence is reviewed for abuse of discretion. *State v. Ortiz*, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992). Bristol asserts that he was entitled to testify that MMB threatened to report that he had molested her because the testimony was not offered for the truth of the matter asserted. Bristol fails, however, to explain why this statement

was not offered for the truth of the matter asserted, *i.e.*, that MMB said she would accuse him of molestation. Any relevance of the evidence for any other purpose is tangential at best.

In *State v. Roberts*, 80 Wn. App. 342, 352, 908 P.2d 892 (1996), on which Bristol relies, the Court held that it was error to prevent the defendant, from testifying that his alleged tenant had threatened him. The defendant was charged with manufacturing marijuana, and alleged that the grow actually belonged to the tenant. The threat thus went directly to the defendant's credibility because it explained why he did not report the grow to the police.

Here, however, there is no such flow of logic. The alleged threat could serve only two purposes: to support the defense theory that MMB stated that Bristol had molested her because he would not let her live with her boyfriend Garrett, or to impeach MMB's testimony that she had never made such a threat. The defense specifically disavowed the latter purpose at trial. 3RP 207. The former purpose is undeniably for the truth of the matter asserted: that MMB said she would report Bristol for molesting her.

In *Roberts*, the threat went directly to the defendant's actions: why he did not report a marijuana grow on his land, which tended to make it less likely that it was within his dominion and control. Bristol's state of mind at the time of the alleged threat here affected no such central issue in the case.

The testimony was supposedly offered only in explanation as to why Bristol agreed to drive MMB to Garrett's house on the night of the incident. But that is not the result the alleged threat sought to extort: the defense theory was that MMB made the threat because Bristol would not let MMB *live with* Garrett. 2RP 99, 162, 169; 3RP 231. It thus fails to explain Bristol's actions.

Moreover, even if the threat actually did go to Bristol's actions, *i.e.*, driving MMB to Garrett's house, the relevance would be minimal at best. It was undisputed that Bristol drove her to the Gibbs residence that evening, and that he did was far afield from any element of the crime charged. Moreover, Bristol also asserted that he drove her because he was essentially tired of arguing with her. Any jury member who had ever been involved with or observed a teenager-parent altercation would find that explanation utterly plausible, especially given the undisputed evidence that MMB often spent the night at the Gibbs home. 2RP 201. As such, the trial court was also correct in concluding that the statement's probative value was exceeded by the potential for unfair prejudice. 3RP 210 ("I think it's rife with potential issues under 403").

The concerns leading to the trial court's original ruling were borne out in Bristol's closing argument.

[MMB] apparently is willing to say whatever she needs to say

to whomever she needs to say it at any given moment to get what [MMB] wants. She will change her story. She will change it back.

How do we know this? What does [MMB] want on August 23rd? What does she want? She wants to go to Garrett's. She wants her dad to take her to Garrett's. There's an argument. She wants to stay with Garrett. She wants to spend more time with Garrett. That's what she wants at that moment. So she says "My dad touched me."

\* \* \*

What [MMB] wants at that moment is Garrett. What does she do? She calls Julie. "I've got to come over. My dad touched me." What did she get? She gets Garrett.

3RP 267-68. Clearly Bristol was not arguing that he was more credible because he acted on MMB's alleged threat when he took her to the Gibbs house that night. Bristol is arguing that MMB actually made the threat. He is not using the evidence to explain his own motives, but MMB's. Clearly the argument that he was not seeking to admit the evidence for the truth of the matter was disingenuous.

In any event, and unlike in *Roberts*, Bristol was permitted to testify about the alleged threat. He first mentioned it on direct examination:

- Q. Later in the night or actually earlier the next morning did you eventually receive word or hear that [MMB] was making allegations that you had touched her sexually?
- A. She had mentioned that -- She had said something about that to me during our fight. But I didn't hear about it until October.
- Q. Who had said something to you about that?
- A. [MMB] had.

2RP 202. Bristol gave further testimony on the subject on cross-examination:

Q. Okay. But isn't it true, Mr. Bristol, that you testified that in fact you did learn of these allegations the night that they happened?

A. Yes, sir.

Q. So from the night that they happened to October 22nd, two months passed and you never asked your daughter why she made these things up about you?

A. Yes, sir. I knew why.

Q. And you knew why because you knew you did it, right?

A. No, sir.

3RP 229. Notably his testimony went beyond the reasons for driving her that night and into the defense theory that MMB was retaliating for not being permitted to be with Garrett:

Q. And it's your testimony that the reason she was angry with you is because she wanted to live with Garrett and you guys wouldn't let her?

A. Yes, sir.

Q. Okay. In fact, you said that you had no choice but to take her to Garrett's that night?

A. Yes, sir.

Q. If your daughter did what she wanted to do when she wanted to do it, according to your testimony, then she would have no reason to make these allegations up, would she?

A. Not unless I was going to stricken [sic] the rules and make her stay at home or whatnot or -- but ...

3RP 231 (comment the court reporter's). On redirect, the subject was further explored, again going beyond the supposed reasons for the admission of the

testimony:

Q. Did you have reason to believe, because of your conversations with her, that she was going to make this allegation?

A. She said it, so yes.

Q. Okay. And Mr. Cure asked you the reason that you thought [MMB] had made these allegations up. Actually he said to you "Because you molested her?" You said, "No"; you knew why she said these things.

A. Yes, sir.

Q. Okay. Why did she say these things?

A. Because we were going -- I had basically told her that she was not going to be spending the night at Garrett's house anymore, that he was not going to be spending the night, that we were going to bring her curfew back in, because it was getting to be the beginning of the school year, it was late in August, school was getting ready to start. And my thought process was, we've got one more -- we've got one last year to help her get through this, you know, school year, graduate from high school, hopefully, and so, you know, I was going to -- I basically had planned on laying down the law of curfews and rules and what you can and can't do.

3RP 233-34. Plainly, the trial court's concerns that Bristol was attempting to introduce MMB's alleged statements for substantive purposes, to show MMB's, not Bristol's, state of mind was well-founded. Be that as it may, however, it cannot be said that Bristol was prevented from presenting the evidence.

Finally, even if there were error it would have to be deemed harmless.

An alleged violation of the confrontation clause will not result in reversal

where the error is harmless beyond a reasonable doubt. *State v. Davis*, 154 Wn.2d 291, 304, 111 P.3d 844 (2005). Here, in view of the foregoing testimony, along with testimony from both Lisa and Bryce Girkin to the same effect, 2RP 162, 169, it cannot be said that Bristol was prevented from presenting either his theory of the case or evidence supporting his credibility. This claim should be rejected.

#### IV. CONCLUSION

For the foregoing reasons, Bristol's conviction and sentence should be affirmed.

DATED February 17, 2009.

Respectfully submitted,

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