

FILED

JUN 01 2009

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

27360-1-III

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OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ELIAS SALGADO, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

APPELLANT'S BRIEF

Janet G. Gemberling
Attorney for Appellant

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Seattle, WA 98122
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INDEX

A.	ASSIGNMENTS OF ERROR.....	1
B.	ISSUES	1
C.	STATEMENT OF THE CASE	2
D.	ARGUMENT.....	12
	1. THE COURT’S RULINGS EXCLUDING EVIDENCE DENIED MR. SALGADO’S RIGHT TO PRESENT A DEFENSE	12
	a. Relevance Ruling Interfered With Impeachment Testimony	12
	b. Hearsay Rulings Unfairly Interfered With Defendant’s Testimony.....	15
	2. THE PROSECUTOR’S REPEATED ARGUMENT THAT THE DEFENDANT SHOULD BE “HELD ACCOUNTABLE” VIOLATED DUE PROCESS BY SHIFTING THE BURDEN OF PROOF	20
	3. THE NO CONTACT PROVISION VIOLATED A FUNDAMENTAL LIBERTY INTEREST	23
E.	CONCLUSION.....	27

TABLE OF AUTHORITIES

WASHINGTON CASES

IN RE SUMEY, 94 Wn.2d 757, 621 P.2d 108 (1980)	24
STATE V. ANCIRA, 107 Wn. App. 650, 27 P.3d 1246 (2001)	24, 25
STATE V. ARMENDARIZ, 160 Wn.2d 106, 156 P.3d 201 (2007)	23, 24
STATE V. BURRI, 87 Wn.2d 175, 550 P.2d 507 (1976)	13
STATE V. CHARLTON, 90 Wn.2d 657, 585 P.2d 142 (1978)	20
STATE V. DARDEN, 145 Wn.2d 612, 41 P.3d 1189 (2002)	14
STATE V. DENNISON, 115 Wn.2d 609, 801 P.2d 193 (1990)	22
STATE V. FITZSIMMONS, 93 Wn.2d 436, 610 P.2d 893 (1980)	14
STATE V. HUDLOW, 99 Wn.2d 1, 659 P.2d 514 (1983)	13, 14
STATE V. HUSON, 73 Wn.2d 660, 440 P.2d 192 (1968), <i>cert. denied</i> , 393 U.S. 1096 (1969).....	21
STATE V. LETOURNEAU, 100 Wn. App. 424, 997 P.2d 436 (2000)	26
STATE V. REED, 101 Wn. App. 704, 6 P.3d 43 (2000)	14

STATE V. REED, 102 Wn.2d 140, 684 P.2d 699 (1984)	21
STATE V. REHAK, 67 Wn. App. 157, 834 P.2d 651 (1992), <i>review denied</i> , 120 Wn.2d 1022 (1993).....	12
STATE V. SMITH, 67 Wn. App. 838, 841 P.2d 76 (1992)	22
STATE V. STITH, 71 Wn. App. 14, 856 P.2d 415 (1993)	21
STATE V. YORK, 28 Wn. App. 33, 621 P.2d 784 (1980)	15

OTHER CASES

STATE V. MONTJOY, 366 N.W.2d 103 (Minn.1985).....	22
---	----

SUPREME COURT CASES

CHAMBERS V. MISSISSIPPI, 410 U. S. 284, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973).....	13
DAVIS V. ALASKA, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).....	14
SANTOSKY V. KRAMER, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).....	24
WASHINGTON V. TEXAS, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).....	14

CONSTITUTIONAL PROVISIONS

CONST. ART. 1, § 22	13
SIXTH AMENDMENT.....	13

STATUTES

RCW 9.94A.030(13).....24
RCW 9.94A.505(8).....24

COURT RULES

ER 801(c).....16

A. ASSIGNMENTS OF ERROR

1. The court erred in excluding relevant evidence.
2. The court erred in sustaining groundless hearsay objections.
3. The court erred in ruling that the State could present an improper closing argument.
4. The court erred in imposing unconstitutional restrictions on the defendant's contact with his children.

B. ISSUES

1. Does the court violate a defendant's constitutional right to present a defense by excluding evidence that is relevant to challenging the credibility of the complaining witness?
2. Does the court violate a defendant's constitutional right to present a defense by sustaining groundless hearsay objections that interfere with cross examination and with the defendant's ability to testify on his own behalf?
3. When the evidence is replete with testimony about acts of violence and other offenses with which the defendant has not been charged, does the prosecutor's repeated argument that the defendant should be "held accountable" violate Due Process by shifting the burden of proof?

4. Does a sentencing provision that unreasonably and unnecessarily prohibits or restricts the defendant's contact with his biological children violate a fundamental liberty interest?

C. STATEMENT OF THE CASE

From the time Clara Lopez was five years old, her mother Eulalia Lopez (Ms. Lopez) maintained a turbulent relationship with Elias Salgado. (RP 420, 536, 819) For over ten years Ms. Lopez, Clara and Clara's younger brother Gabriel Lopez lived with Mr. Salgado for various lengths of time. Their lives were interrupted by frequent intervals of separation, and punctuated with numerous incidents of domestic violence. (RP 436, 440, 456, 462, 470) During this time Clara lived in at least seven different homes, excluding brief stays in motels, in shelters, and with various relatives. (RP 422, 444, 446, 456, 462-63, 531) Despite her difficult home life, Clara was a star student. (RP 546-47)

Ms. Lopez and Mr. Salgado moved, with her children, to Las Vegas in 1996. (RP 422) During the time the family lived in Las Vegas, Mr. Salgado repeatedly assaulted Ms. Lopez, and subjected her to verbal abuse. (RP 433-34, 720) The physical abuse included hitting, kicking, hair pulling and throwing her to the ground. (RP 434) The assaults

occurred as often as three or four times a week, often in the presence of Gabriel and Clara. (RP 434-35) On some occasions, Mr. Salgado assaulted Clara and Gabriel, with hitting, slapping and hair pulling, and when Ms. Lopez attempted to intervene she would be assaulted too. (RP 435-36, 724) Clara remembers being beaten with belts and shoes. (RP 716) When she tried to run away, Mr. Salgado whipped her with her own belt. (RP 723)

Ms. Lopez and Mr. Salgado's first child, Rico Salgado, was born in 1997, and his sister Sevilla was born two years later. (RP 417, 419) Before Rico was born, when Clara was six years old, she told her mother she was uncomfortable with the way Mr. Salgado hugged her. (RP 425) Ms. Lopez confronted Mr. Salgado, who denied any inappropriate behavior. (RP 432) Afterwards, Clara retracted her concerns. (RP 432)

Thereafter Ms. Lopez frequently, almost daily, asked Clara if there were any problems with Mr. Salgado touching her. (RP 469, 684, 726) Apart from the single incident in 1997, Clara always denied having any problems like that. (RP 470) Even on those occasions when Ms. Lopez had taken the children away from Mr. Salgado, Clara would deny that there had been any sexual abuse. (RP 728) She would hope her mother was not going to go back to him. (RP 728) After she learned about "bad

touches” in school, she continued to deny any sexual abuse when questioned by her mother. (RP 729)

A few months after Rico was born, Mr. Salgado assaulted Ms. Lopez’s sister. (RP 436) Ms. Lopez left him, taking Clara and Gabriel with her. (RP 436) When she returned to get Rico, however, Mr. Salgado persuaded her to stay with him. (RP 438)

On the many occasions Ms. Lopez left Mr. Salgado, taking her children with her, she repeatedly told them she was leaving for good and they would not be going back. (RP 530, 628-30) And often, after abusing Clara and Gabriel, Mr. Salgado would apologize and promise not to do it again. (RP 676)

The physical abuse against Ms. Lopez and her children continued through their stay in Las Vegas, although the violence against the children gradually lessened. (RP 439-40) In June 2002, following a family dispute, Ms. Lopez left Las Vegas, taking Clara and Gabriel to stay with her family in Walla Walla. (RP 440-441) After three weeks, Mr. Salgado persuaded her to return to him. (RP 442) But a month later, in August, she left again, this time taking all four children with her and going to Spokane to stay with relatives. (RP 444)

In September 2002, Mr. Salgado moved to Granger, Washington, and eventually persuaded Ms. Lopez to bring her children and come live

with him there. (RP 446) Following their move to Granger, Mr. Salgado's violence toward Clara and her mother resumed, becoming more abusive. (RP 448, 753) He continued to assault Gabriel as well, but with less frequency. (RP 449)

A few days before Christmas 2002, Ms. Lopez and Mr. Salgado got into a fight, which escalated. (RP 453) Ms. Lopez lost consciousness, and Mr. Salgado continued to hit her until his parents arrived. (RP 454, 749-51) Clara and Gabriel were present throughout this incident, and he was hitting them as well. (RP 455, 750) Shortly after Christmas Ms. Lopez took all of her children to live in Walla Walla. (RP 456)

After staying in a shelter for about a month, Ms. Lopez was able to move to subsidized housing. (RP 457, 632) She had obtained a restraining order prohibiting contact with Ms. Salgado, and one of the conditions for living in the subsidized housing was that there would be no violations of that order. (RP 633, 678) But after a few months, she invited him to come visit on Mother's Day, in violation of the no-contact order. (RP 532, 633-35) Upon discovering that Mr. Salgado had come to Walla Walla, her family notified the police. (RP 634) Mr. Salgado and Ms. Lopez were arrested, and she and her children were evicted. (RP 531, 641)

In June 2003, Ms. Lopez moved to Yakima, where she lived with her children and Mr. Salgado in a house on Naches. (RP 531) Mr. Salgado abused Clara verbally, but was not physically violent with the children. (RP 462) This eventually changed, however, and by the end of the year an event apparently involving violence occurred. (RP 462-63, 1098-1100) Ms. Lopez sent her younger children to live with relatives in Walla Walla while she and Clara went to live with a friend in Yakima. (RP 462, 467, 551) While Ms. Lopez and Clara were living apart from Mr. Salgado, Ms. Lopez allowed her more freedom to have a social life and enjoy herself. (RP 555-56)

By May of 2004, Ms. Lopez was reunited with Mr. Salgado once again and moved herself and her children into his apartment. (RP 463-64) At this time, Mr. Salgado believed Clara was becoming involved with gangs and began placing strict limits on her clothing, choice of friends and after-school activities. (RP 539-41, 661-62) He was critical of Ms. Lopez's efforts to give Clara personal freedom. (RP 541-43)

On the many occasions Ms. Lopez left Mr. Salgado, taking her children with her, she also repeatedly told them she was leaving for good and they would not be going back. (RP 530, 628-30) And often, after abusing Clara and Gabriel, Mr. Salgado would apologize and promise not to do it again. (RP 676)

Mr. Salgado's third child, Leonardo, was born in June 2005. (RP 507) After a violence free period, Mr. Salgado again became physically abusive after Leonardo's birth. (RP 525) On Thanksgiving, while in the car with the children, he threatened Ms. Lopez. (RP 524) The next day, he provoked an argument, then began shoving and choking her. (RP 529) Ms. Lopez went to the police station and obtained a no-contact order prohibiting Mr. Salgado from coming to her home. (RP 470-71, 569) She promised her children she would not let Mr. Salgado back into their lives. (RP 530-31, 569)

But Mr. Salgado persisted in calling Ms. Lopez and coming to her home. (RP 574) After a couple of weeks she agreed to have him to come to spend a weekend with her and her children. (RP 574) When Clara came home from school on Friday and found Mr. Salgado there she was visibly unhappy. (RP 575) She told her mother she "had a feeling it was going to be like the other times that she had a feeling he was going to try to talk [her mother] into letting him stay and things weren't ever going to change." (RP 575) Nevertheless, Mr. Salgado was allowed to remain in the home through the weekend. (RP 575)

On Friday, Ms. Lopez had received a telephone call advising that Clara had skipped school the previous week. (RP 575) Throughout the weekend, Mr. Salgado questioned Clara about the alleged truancy and

accused her of lying (RP 579, 583, 789) Clara became angry and withdrawn. (RP 581, 757)

On Monday morning, Ms. Lopez went to Clara's school to find out about the alleged truancy. (RP 586) Upon learning that Clara had indeed been skipping school, Ms. Lopez had Clara called to the school office. (RP 591) She told the school counselor she was taking Clara home, and she wasn't sure whether Clara would be coming back. (RP 593) When Ms. Lopez confronted Clara, Clara responded by refusing to return home if Mr. Salgado was still there, and telling her mother that Mr. Salgado had been sexually abusing her. (RP 473, 594, 791-92)

Ms. Lopez went to her home where she confronted Mr. Salgado and then called the police. (RP 476)

Clara testified that Mr. Salgado began abusing her when she was four or five years old. (RP 702-705) She recalled that Mr. Salgado told her that he was being a father to her and not doing anything wrong. (RP 710) He never told her not to tell anyone. (RP 710, 739)

Clara described for the jury an incident in which her mother had to take her half-brother Rico to the emergency room. (RP 732) Her brother Gabriel went with them. (RP 732) According to Clara, while they were gone, Mr. Salgado raped her. (RP 735-37)

Clara testified about an incident in which Mr. Salgado raped her, and then tore posters off her bedroom wall. (RP 760-62) She had previously told police officers that she had successfully rejected his advances on this occasion. Her brother Gabriel recalled the poster incident, and that he had been nearby throughout that time and was not aware of anything unusual prior to the tearing of the posters.

Clara told the jury about two incidents that occurred in May 2005. She recalled that Mr. Salgado was not living with her family at that time. She went to visit him in his apartment several times. (RP 772-73) One night he raped her. (RP 773-76) A few weeks later, Mr. Salgado had tickets to a concert for himself and Ms. Lopez. Ms. Lopez decided she didn't want to go, so Clara went with Mr. Salgado. (RP 777) According to Clara, after the concert she returned to Mr. Salgado's apartment, where he raped her repeatedly. (RP 778-79)

From 1995 until 2005 Ms. Lopez frequently, almost daily, asked Clara if there were any problems with Mr. Salgado touching her. (RP 469, 684, 726) Apart from the single incident in 1997, Clara always denied having any problems like that. (RP 470) Even on those occasions when Ms. Lopez had taken the children away from Mr. Salgado, Clara would deny that there had been any sexual abuse. (RP 728) She would hope her mother was not going to go back to him. (RP 728) After she

learned about “bad touches” in school, she continued to deny the abuse when questioned by her mother. (RP 729)

Clara testified that she had told her brother Gabriel about the sexual abuse once, while they were living in Granger, and later, when they were living in an apartment with Mr. Salgado. (RP 746, 793) Gabriel discouraged her from telling their mother. (RP 747) They both said that at one point Clara wrote a note to her mother telling her about the sexual abuse, but that when she told Gabriel she had done so he found the note and destroyed it.

Mr. Salgado testified, admitting that there had been acts of violence during his relationship with Ms. Lopez and her children. (RP 1455, 1551) He denied a number of specific allegations of assaulting Clara and her mother, but admitted that he had been a harsh disciplinarian, and that he had made mistakes. (RP 1444, 1452) He tried to explain that the domestic disputes had not been one-sided and that he had often felt manipulated by Ms. Lopez. (RP 1463, 1482)

Defense counsel asked the jury to find that Clara had invented the allegations of sexual misconduct in order to put an end to the pattern of disruptive violence, separation and reconciliation that had become a way of life for her family. (RP 1851-52) The defense theory of the case was, in essence, that Clara was motivated to lie not only by the fact of Mr.

Salgado's physical abuse, but also by her mother's complicity in this abuse. (RP 1866-67)

The prosecutor argued that the jury should hold Mr. Salgado accountable:

I ask you respectfully after giving defense counsel the fair opportunity that you have given to me to summarize the evidence that you, yourselves have heard first hand. When you have an opportunity later to retire to deliberate, to do your own consideration of the testimony and the evidence that you have seen and heard in this witness stand, we ask you ladies and gentlemen to hold the defendant accountable.

You've heard testimony about the defendant's rules, about the authority that he exerted over these children; the authority that he told you was significant and important to him. He told you about how his words should be considered more important than merely anything in different ways. You heard how he told the children to call him jefe. He wasn't comfortable with dad, he wasn't comfortable with that word because he wasn't at the point, he told them to call him jefe. And you'll remember the defendant's statement from the witness stand my way or the highway.

We ask you ladies and gentlemen to consider accountability, how the buck stops here and we ask you in focusing on the evidence in this case that you have heard from the witness stand as well as the physical evidence to hold this man accountable for his conduct.

(CP 1841-43)

And again, at the close of rebuttal argument, the deputy prosecutor argued:

We ask you to assess the evidence, looking below the surface and assessing the life that this, yes, child, has

lived. The life with her mother and what her mother has done and what her mother has not done.

And then in the light of reality I ask you in behalf of the State ladies and gentlemen to impose accountability where it belongs and to find Elias Salgado guilty . . .

(RP 1887)

D. ARGUMENT

1. THE COURT'S RULINGS EXCLUDING EVIDENCE DENIED MR. SALGADO'S RIGHT TO PRESENT A DEFENSE.

a. Relevance Ruling Interfered With Impeachment Testimony.

Before trial, defense counsel moved to introduce evidence Ms. Lopez had been molested as a child. (RP 117-18) Defense counsel argued the evidence was relevant to explain Ms. Lopez's anticipated testimony that she repeatedly questioned Clara as to whether she was being molested. (RP 119-21) The court granted the State's motion. (RP 122, 171)

A defendant in a criminal case has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992),

review denied, 120 Wn.2d 1022 (1993). The Sixth Amendment¹ to the United States Constitution and Const. art. 1, § 22² grant criminal defendants two rights: (1) the right to present evidence in one's defense and (2) the right to confront witnesses. *State v. Hudlow*, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). *see also Chambers v. Mississippi*, 410 U. S. 284, 294, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973); *State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976). Although these rights are of constitutional magnitude, they are subject to the following limits: (1) the evidence sought to be admitted must be relevant; and (2) the defendant's right to introduce relevant evidence must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process. *See Washington v. Texas*,

¹ The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

² Const. art. 1, § 22 provides in relevant part:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases[.]

388 U.S. 14, 16, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002); *State v. Hudlow*, 99 Wn.2d at 15; *State v. Reed*, 101 Wn. App. 704, 709, 6 P.3d 43 (2000).

Under these criteria, a defendant must be permitted to present even *minimally* relevant evidence unless the State can demonstrate a compelling interest for its exclusion. Moreover, no State interest can be compelling enough to preclude evidence with high probative value. *Hudlow*, 99 Wn.2d at 16; *Reed*, 101 Wn. App. at 715.

"The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible." *State v. Darden*, 145 Wn.2d at 621. A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. *Darden*, 145 Wn.2d at 619. A denial of the right to confront and cross-examine adverse witnesses is presumed prejudicial and requires reversal unless no rational jury could have a reasonable doubt that the defendant would have been convicted even if the error had not taken place. *Davis v. Alaska*, 415 U.S. 308, 318, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); *State v. Fitzsimmons*, 93 Wn.2d 436, 452, 610 P.2d 893 (1980).

A court's limitation on the scope of cross-examination will be reversed when it is the result of manifest abuse of discretion. *Darden*,

145 Wn.2d at 619. “[T]he more essential the witness is to the prosecution’s case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters.” *Darden*, 145 Wn.2d at 619.

A criminal defendant should be given extra latitude in cross-examination to show motive or credibility, especially when the particular prosecution witness is essential to the State's case; any fact which goes to trustworthiness of the witness may be elicited if it is germane to the issue. *State v. York*, 28 Wn. App. 33, 36, 621 P.2d 784 (1980).

Ms. Lopez’s testimony that Clara had repeatedly denied the occurrence of any sexual abuse was a significant part of Mr. Salgado’s defense. Clara’s credibility was central to the State’s case; any evidence supporting his claim that the allegations had been recently fabricated was extremely relevant, and the exclusion of this evidence was prejudicial.

b. Hearsay Rulings Unfairly Interfered With Defendant’s Testimony.

Early in the trial, the State objected to portions of defense counsel’s cross-examination of Ms. Lopez, alleging the questions were eliciting hearsay:

Ms. Lopez was explaining an incident in which Clara had run away from home and her boyfriend had purported to be participating in the search for her:

A. Um ... he came back, the boy got in the van with me and we started talking and he said that he didn't know --

MS. POWERS: I'm going to object to the hearsay.

MR. DALAN CONTINUES

Q. Well -- Eulalia remember, -- Ms. Lopez -- we can't really always say what someone else said except for under limited circumstances but you can tell the story from your perspective as best as you can remember.

A. Okay. Well --

THE COURT: Well, I'm sustaining the objection. She can't repeat out of Court statements made by someone else.

MR. DALAN: I understand Your Honor.

MR. DALAN CONTINUES

Q. So the question was what happened next but keep in mind the constraints that we can't necessarily say what other people said.

A. Okay. Elias -- got in the van with me. The boy was in the van and -- we drove around for awhile and, you know, he was helping us try to find Clara, he gave us an idea where we could find her and he showed us where he lived, we went and dropped him off and we continued to look for Clara and we just told him that if she came back to where he was staying for him to give us a call so that I could go pick her up.

(RP 564-65)

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). The boy's statement could not have been offered for its truth, since there is no suggestion that he knew any fact that would assist the defendant. In fact, taken in context, it

appears the significance of the boy's statement was that he was attempting to mislead Clara's parents by misrepresenting his knowledge of Clara's whereabouts. Thus, the statement was offered to show his untruthfulness, and the trial court's ruling was error.

During Mr. Salgado's testimony, he frequently related events that included statements made by others that were relevant only to explain what happened next in the narrative. The court repeatedly sustained hearsay objections, although it was evident the testimony did not involve hearsay:

I -- I went to the casino in the van. The Mustang was working fine. I don't know why she took off walking. She said walking. Later on she accused me of --
MS. POWERS: I'm going to object to hearsay.
THE COURT: Sustained.

(RP 1480) The context makes it quite clear that Mr. Salgado was not purporting to relate Ms. Lopez's truthful accusation but to give an example of an unfair accusation, clearly not an instance of hearsay.

Later, Mr. Salgado was attempting to describe a situation in which Ms. Lopez had failed to show up after promising to meet with him:

Q. Okay. And -- how long did you end up ultimately waiting there?
A. Two or three hours.
Q. And -- did she -- did she ever show up?
A. No she didn't.
Q. And what did you do?

A. I got upset over that on the phone with her. And that's when she said --

MS. POWERS: I'm going to object Your Honor anticipating hearsay.

THE COURT: Sustained.

MR. DALAN: Okay.

MR. DALAN CONTINUES

So things didn't end very well between you guys on the phone?

(RP 1544) Whatever Ms. Lopez might have said in response to Mr.

Salgado's complaint, it is unlikely that it was offered for its truth. Mr.

Salgado attempted to continue his description of events:

A. It was a Saturday morning. I was asleep at -- at the time, it was at my parent's house and it was about six -- six in the morning probably and -- my mom tells me get up Eulalia's -- Eulalia's in the driveway. So I -- I come outside and she's in the -- in her -- in the van and she -- I come to the van, she rolls down the window and she had some shoes of mine I guess she brought with her from Las Vegas and she -- throws them out the window and she tells me here I thought you --

MS. POWERS: Objection. Hearsay.

THE COURT: Sustained.

(RP 1545)

And later, the court sustained a hearsay objection to Mr. Salgado's attempt to relate a statement precisely because he believed it was untruthful:

Sunday, it was Mother's Day. Um ... her -- her brother -- her brothers or brother, I can't remember -- came to the house. I never saw them, they never saw me. Uh ... but she said her brother -- her brother was coming. He

knocked on the door -- she said -- that they were busy, that they were getting -- she lied to him saying --

MS. POWERS: Your Honor I'm going to object to his -- his opinion, and again to hearsay.

MR. SALGADO: It's --

THE COURT: Wait -- wait a minute. Mr. Dalan?

MR. DALAN: Okay. Um ...

MR. SALGADO: She lied to him.

THE COURT: Wait, wait, wait. I have to make a ruling.

MR. SALGADO: Oh.

MR. DALAN: Let me ask another question before you give an answer.

THE COURT: I sustain the objection.

(RP 1587-88)

The significance of the erroneous hearsay rulings is not that the subject matter was necessarily central to Mr. Salgado's theory of the case. Rather, the effect was to prevent him from being able to testify in his own behalf. In an effort to avoid the interruptions, he eventually censored himself:

A. The kids could go to school here in Granger, how -- how they were going before. She said no, she goes I -- I don't want to live by -- next door to your mother and father.

Q. That --

A. That's hearsay I know.

Q. The -- the -- the case -- the case was -- the charges against you from December of 2002 were eventually dismissed correct?

(RP 1594)

None of the court's evidentiary rulings, taken separately, was prejudicial, but the net effect was to seriously interfere with Mr. Salgado's ability to present a defense.

2. THE PROSECUTOR'S REPEATED ARGUMENT THAT THE DEFENDANT SHOULD BE "HELD ACCOUNTABLE" VIOLATED DUE PROCESS BY SHIFTING THE BURDEN OF PROOF.

Because the defense theory of the case relied on informing the jury that Mr. Salgado was physically abusive, in order to explain Clara's motive for fabricating allegations of sexual abuse, defendant did not ask the court to exclude evidence of prior bad acts. Nevertheless, admission of that evidence raised the specter that the jury would conclude Mr. Salgado was a generally abusive person and should be punished. Accordingly, before trial, counsel asked the court to prohibit the State from arguing that Mr. Salgado should be "held accountable," as that would encourage conviction based on a view that his abusive conduct justified punishment. (RP 149-151) The court denied the defense motion. (RP 151)

The prosecutor, as a quasi-judicial officer, must seek a verdict free of prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978); *State v. Huson*, 73 Wn.2d 660, 663,

440 P.2d 192 (1968), *cert, denied*, 393 U.S. 1096 (1969). The court in

Huson stated:

[The prosecutor] represents the state, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial. . . . We do not condemn vigor, only its misuse. . . . No prejudicial instrument, however, will be permitted. His zealotry should be directed to the introduction of competent evidence. . . .

Huson, 73 Wn.2d at 663 (citation omitted); *see also*, *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984) (citation omitted) (prosecutor has a special responsibility "to act impartially in the interest only of justice").

To determine whether prosecutorial comments constitute misconduct, the reviewing court must decide first whether such comments were improper and, if so, whether a "substantial likelihood" exists that the comments affected the jury. *Reed*, 102 Wn.2d at 145. The burden is on the defendant to show that prosecutorial comments rose to the level of misconduct, requiring a new trial. *State v. Stith*, 71 Wn. App. 14, 19, 856 P.2d 415 (1993) The State has a duty to ensure a verdict is free from prejudice and based on reason, not passion. *Huson*, 73 Wn.2d at 663.

Comments meant to appeal to the jury's prejudice and encourage it to render a verdict on facts not in evidence are improper. *State v. Smith*,

67 Wn. App. 838, 844, 841 P.2d 76 (1992) (citing *State v. Dennison*, 115 Wn.2d 609, 801 P.2d 193 (1990)).

The prosecutor's comments in this case were similar to those in *State v. Montjoy*, 366 N.W.2d 103, 108, (Minn.1985), where the prosecutor stated that the whole trial came down to the word accountability, and that people who break the law have to be held accountable for their actions:

It is proper for a prosecutor to talk about what the victim suffers and to talk about accountability, in order to help persuade the jury not to return a verdict based on sympathy for the defendant, but the prosecutor should not emphasize accountability to such an extent as to divert the jury's attention from its true role of deciding whether the state has met its burden of proving defendant guilty beyond a reasonable doubt.

State v. Montjoy, 366 N.W.2d at 109 .

The prosecutor's "accountability" argument tended to divert the jury's attention from deciding whether the State had met its burden of proof. By framing the accountability argument with a recitation of the evidence of physical and emotional abuse, the State encouraged the jury to find Mr. Salgado guilty because he was physically abusive, rather than because the State had proved the rape charges beyond a reasonable doubt.

In *Montjoy* the court declined to reverse because the evidence of defendant's guilt was strong, and the defense counsel never objected to the

prosecutor's closing argument. *Id.* Here the State's case rested on the credibility of two young victims of traumatic emotional and physical abuse and the evidence of sexual abuse was far from overwhelming. Apart from Gabriel's testimony that Clara had alleged the sexual abuse prior to her disclosure on the day of Mr. Salgado's arrest, and some highly ambiguous DNA evidence found on a sex toy, no evidence corroborated Clara's testimony.

This is an appropriate case in which to clarify that because the jury's duty is to determine guilt beyond a reasonable doubt of the crimes with which a defendant is charged, not simply to determine whether he has engaged in other wrongful or even criminal behavior, the "hold the defendant accountable" argument violates the right to a fair trial.

3. THE NO CONTACT PROVISION VIOLATED A FUNDAMENTAL LIBERTY INTEREST.

Among conditions of community custody, the court provided that Mr. Salgado was to have "No direct or indirect contact with . . . his own children w/out their consent after age 18 and agreement of community custody officer." (CP 20) This was in addition to prohibiting contact with the victim and her brother, who are not his biological children. (CP 20)

Crime-related prohibitions are reviewed for an abuse of discretion. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

Discretion is abused when “the decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons.” *State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001).

Under RCW 9.94A.505(8), a sentencing court has the authority to impose crime-related prohibitions, including no-contact orders. *Armendariz*, 160 Wn.2d at 113. 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).

“Parents have a fundamental liberty interest in the care, custody, and control of their children.” *Id.* (citing *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)). Importantly, the State also has a compelling interest in preventing harm to children, and an obligation to intervene to protect children from actions that would jeopardize their physical or mental health. *In re Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980).

A no-contact order to protect children is within a court's discretion if the order is reasonably necessary to protect children from harm and there is the appropriate nexus between the offense committed and the sentencing condition. *Ancira*, 107 Wn. App. at 653-54.

First, the restriction on having contact with his biological children is not reasonably necessary to protect their physical or mental health.

In *Ancira*, Mr. Ancira was convicted of violating a domestic violence no-contact order against his wife. The court issued a no-contact order that included his children. *Ancira*, 107 Wn. App. at 652-53. The court reasoned that the no-contact order was necessary to prevent further harm to the children who had witnessed the abuse of their mother. The appellate court considered whether the no-contact order was necessary to protect the children from the harm of witnessing domestic violence. *Id.*

We conclude that the State has failed to demonstrate that this severe condition was reasonably necessary to prevent the children from witnessing domestic violence. There can be no doubt that witnessing domestic violence is harmful to children. And there is ample evidence in the record that Ancira has not been an exemplary parent. But, contrary to the State's view, these broad assertions, standing alone, do not form a sufficient basis for this extreme degree of interference with fundamental parental rights.

Ancira, 107 Wn. App. at 654. The court reversed the no-contact order, concluding that the no-contact order protecting the wife was sufficient to protect the children from witnessing domestic violence. *Id.* at 665.

Here, there is no evidence in the record suggesting Mr. Salgado ever abused his biological children in any way, nor any evidence that they directly witnessed any abuse of their mother or their half-siblings. Even if there were evidence that they observed abuse in the past, the abuse only

involved Eulalia, Clara and Gabriel. Since the judgment prohibits Mr. Salgado from having contact with those three, further restrictions are not reasonably necessary to protect his own children.

Moreover, there is no nexus between the restriction and the crimes of which Mr. Salgado was convicted. In *State v. Letourneau*, 100 Wn. App. 424, 997 P.2d 436 (2000), Ms. Letourneau was convicted of two counts of second degree rape of a child who was unrelated to her. As part of her judgment and sentence, Ms. Letourneau was ordered to have no in-person contact with her biological children unless supervised. *Id.* at 426-27. The appellate court reversed the no-contact order because there was no evidence that Ms. Letourneau was a pedophile or that she otherwise posed a risk to molest her own children. The court concluded that the no-contact order was not reasonably necessary to prevent harm to Ms. Letourneau's children. *Id.* at 441.

Mr. Salgado was convicted of crimes that involved sexual contact with a single child to whom Mr. Salgado was not related. There is no more reason to prohibit contact with his own children than to prohibit contact with all children regardless of age or gender.

By prohibiting contact between Mr. Salgado and his own children during their infancy and subjecting contact to restrictions, especially requiring approval by his community custody officer, the sentence

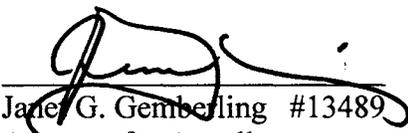
condition unreasonably and unnecessarily infringes Mr. Salgado's fundamental liberty interest in attempting to maintain a relationship with his biological children.

E. CONCLUSION

Because of numerous erroneous evidentiary rulings and the ruling permitting the State to make an improper closing argument, Mr. Salgado's conviction should be reversed. Alternatively, the court should strike the challenged community custody condition as an unconstitutional interference with Mr. Salgado's liberty interest in having contact with his biological children.

Dated this 29th day of May, 2009.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 27360-1-III
)	
vs.)	CERTIFICATE
)	OF MAILING
ELIAS SALGADO,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on May 29, 2009, I mailed copies of Appellant's Brief in this matter to:

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Signed at Seattle, Washington on May 29, 2009.



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