

FILED

SEP 13 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 27360-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ELIAS SALGADO

Appellant.

BRIEF OF RESPONDENT

David B. Trefry WSBA #16050
Special Deputy Prosecuting Attorney
Attorney for Respondent

JAMES P. HAGARTY
Yakima County Prosecuting Attorney
128 N. 2d St. Rm. 329
Yakima, WA 98901-2621

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. The trial erred when it allegedly excluded relevant evidence.
2. The court allegedly erred when it sustained “groundless hearsay objections.
3. The court allegedly erred when it ruled regarding closing argument by the State.
4. The court allegedly erred by imposing an “unconstitutional” restriction on the defendant’s contact with his children.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The court did not exclude relevant evidence.
2. The court properly sustained hearsay objections.
3. The State’s closing argument was not improper.
4. The conditions set forth in the community custody are not “unconstitutional” restrictions on defendants ability to contact his children.

II. STATEMENT OF THE CASE

The facts of this trial have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth a specific facts section. The State will refer to specific areas or shall cite specific sections of the record as needed.

If often appears that appellants believe they deserve a perfect trial while that is a goal that all attorneys would hope to attain, it is not the standard that must be met. *State v. Colbert*, 17

Wn. App. 658, 664, 564 P.2d 1182 (1977) “The defendant is entitled to a fair and unbiased trial. *State v. Beard*, 74 Wn.2d 335, 444 P.2d 651 (1968). He is not entitled to a perfect trial. A perfect trial is always sought but seldom, if ever, attained. To suggest that a perfect trial is a normal expectation is to suggest that a judge, two attorneys, 12 jurors and innumerable witnesses, all of various ages and talents are omnipotent, not subject to human error and apparently possessing iron stomachs unaffected by repulsive testimony.”

RESPONSE TO ALLEGATION ONE – THE COURT DID NOT DENY SALGADO THE RIGHT TO PRESENT A DEFENSE.

A. The court properly excluded questions regarding Ms. Lopez, mother of the victim, had been molested in the past.

In a labored attempt to introduce prejudicial background information about the mother of the victim, trial counsel for Salgado states the reason for the need to introduce this information about the mothers prior abuse is to show the reason the mother asked the victim on a monthly basis if Salgado was abusing her was because she, the mother, was herself abused. The mother did not and the defense acknowledges that the mother will not deny the question was asked.

The mere statement that “evidence” is relevant and therefore admissible does not make it so. Salgado can not merely assert that he needs this “evidence” and that alone will make it relative and probative. There is nothing in this record where Salgado explains how this was relevant or probative other than the statements of trial counsel which are vague assertions that the reason the;

MR. DALAN: Thank you Your Honor. Uh ... once again I find myself partially in agreement with the State. Um ... the victimization of Clara Lopez is crucial issue to be determined by the jury - - in this case. However, the -- the item that Eulalia mentioned is relevant. Uh ... I’m looking for my evidence rule Your Honor. I can’t find it here but -- 401 is the rule on relevancy. And it’s very simple. Let’s see, relevant evidence means any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Well, what a simple and -- and elegant explanation for relevance. So, can you use this fact and make any other fact more or less probable, that’s important. Um ... and I believe -- the defense position, Your Honor, is that you can, indeed, look at it in this way. Um ... the -- the context of Ms. Eulalia Lopez making that statement was in the context of her description of her discussions with Clara about sexual abuse and the frequency of times that she asked Clara if anyone was sexually abusing her to which Clara responded no.

Uh ... I think the Court probably can remember that from the first trial and that was something that was a critical fact; if this stuff is happening, if this is really true then why when Eulalia Lopez, the

mother, asked her over and over and over again; that was a very, very frequent issue. I think it was something like once every month, something like that, I would ask her is anybody bothering you? Is Elias doing anything? Is anybody touching you in a way that's wrong? No mom, no.

And the re -- it's an unusual thing to ask your children about over and over and over. Why would someone just ask someone every thirty days a question like that? So it's a -- it's a fact that's important, it's a fact that's kind of unusual and so when you connect it, well I, myself, was abused as a child; that's why I asked my child so often, so frequently. (RP 119)

Trial counsel keyed on the phrase "any evidence" and fails to address the heart of the rule which is the phrase "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." This second portion of the rule is the essence of the rule. It makes it clear that the rule does not apply to just anything which a party may wish to bring forth but it pertains only those facts having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Counsel for the State hit the issue on the head when she stated "I'm asking that this not be introduced or inquired into for the -- for the simple reason that it's the victimization of her

daughter that the jury should be focusing on and whether or not Ms. Lopez was -- was a victim of sexual assault is simply not probative of the issues involving her daughter.” (RP 117)

State v. Harris, 97 Wn. App. 865, 868-69, 989 P.2d 553

(1999) sets out the test applicable here:

The Sixth Amendment to the United States Constitution grants Mr. Harris the right to confront and cross-examine adverse witnesses. *State v. Hudlow*, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983) (citing *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)). But he has the right to present only relevant evidence. *Id.* at 15. This limitation is Mr. Harris's first stumbling block.

To be relevant, evidence must be both material and probative. 1 *McCormick On Evidence* SS 185, at 773 (John W. Strong ed., 4th ed. 1992). See also *Clark*, 78 Wn. App. at 477 (“[e]vidence is admissible when relevant (i.e., when it has 'any tendency to make the existence of any fact . . . of consequence . . . more . . . or less probable' (ER 401)”). Material means that there is some logical nexus between the evidence and the factual issues the jury must resolve. *McCormick*, supra, at 773. That logical nexus is absent here.

...

The standard of review is clearly abuse of discretion, and for good reason. *Demos*, 94 Wn.2d at 736; *State v. Mendez*, 29 Wn. App. 610, 611, 630 P.2d 476 (1981). A trial judge, not an appellate court, is in the best position to evaluate the dynamics of a jury trial and therefore the prejudicial effect of a piece of evidence. See *State v. Taylor*, 60 Wn.2d 32, 40, 371 P.2d 617 (1962). Here, the trial judge had to

compare the prejudice of an obviously pregnant victim against the introduction of evidence that the victim had intercourse with another man.

This trial judge abused his discretion if the decision to exclude evidence, that Mr. Harris was not the father of the child M.T. was carrying, was based on untenable grounds or was manifestly unreasonable. *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999).

Salgado cites *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002) the State would agree the analysis in *Darden* is applicable:

Since cross-examination is at the heart of the confrontation clause, it follows that the confrontation right is also not absolute. The confrontation right and associated cross-examination are limited by general considerations of relevance. *See* ER 401, ER 403; *Hudlow*, 99 Wash.2d at 15, 659 P.2d 514.

Salgado then goes onto cite a later portion of *Darden* at 621

“The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible. *Id.* at 16, 659 P.2d 514.” Salgado fails to finish the paragraph “However, relevant evidence may be deemed inadmissible if the State can show a compelling interest to exclude prejudicial or inflammatory evidence. *Id.* (citing *People v. Redmon*, 112 Mich.App. 246, 315 N.W. 2d 909, 913-14 (1982)). (Footnote omitted.)

The information about the past sexual abuse of the victim’s mother is inflammatory and prejudicial. It is equally clear the

information is not relevant, it does not “have any tendency to make the existence of any fact that is of consequence to the determination of the rape of the under aged victim more probable or less probable than it would be without the evidence.”

The trial court judge had it correct when he asked defense counsel more than once why the sexual abuse history information was needed when the mother was going to admit on the stand and apparently the victim would confirm the mother on a regular basis would query the victim about whether or not Salgado was touching the victim. This admission would allow trial counsel to cross-examine the witness about this activity to any and all extent they wished. It is the position of the State that the reason it was asked was only to attempt to inflame the jury and/or embarrass the witness. What could be more embarrassing to any witness than having to relate in front of a group of strangers that they were sexually molested years ago, especially in a situation such as this were the witness is not the alleged victim and there is no allegation by the State that the defendant molested this witness.

Trial counsel says that he believes it is relevant because she asked this touching question over and over, the fact that she asked the question and the fact that the victim denied touching is relevant

and admissible. The court allowed this line of questioning. It does fit the standard and does meet the rational for cross-examination, “The purpose is to test the perception, memory, and credibility of witnesses. Confrontation therefore helps assure the accuracy of the fact-finding process.” *Darden* supra, 620.

ER 403 supports the position of the State and follows the actions of the trial court. “Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

The attempt by Salgado to introduce the sexual history of the mother of the victim of a sex crime is without doubt confusing. The court made a discretionary decision to not allow this line of questions. The decision of that court is supported by case law decades old.

Aptly stated in *State v. Kalamarski*, 27 Wn. App. 787, 789-90, 620 P.2d 1017 (1980):

Although the right to cross-examine is basic, it is not absolute. The limitation of cross-examination found in RCW 9.79.150 is not a denial of a defendant's due process rights. *State v. Blum*, 17 Wn. App. 37, 561 P.2d 226 (1977). The scope of such cross-examination is discretionary with the trial court, whose determination should not be disturbed unless there has been an abuse of discretion. *State v. Krausse*, 10 Wn. App. 574, 519 P.2d 266 (1974). Thus, in deciding this case, we must examine the trial court's determinations and decide if "no reasonable person would take the view adopted by the trial court." *State v. Huelett*, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979).

...

Such evidence, as it is collateral, must be material and relevant to the matters which are sought to be proved. *State v. Jones*, 67 Wn.2d 506, 408 P.2d 247 (1965). The extent of cross-examination is left to the trial court's discretion, especially when the matters are collateral to the issue. *State v. Goddard*, 56 Wn.2d 33, 351 P.2d 159 (1960); *State v. Price*, 17 Wn. App. 247, 562 P.2d 256 (1977); *State v. Battle*, 16 Wn. App. 66, 553 P.2d 1367 (1976).

(Footnote omitted.)

It is noteworthy that this analysis was with regard to information the defendant wished to elicit from the victim the attempt to introduce the statements about past abuse in this case is from a witness, albeit the mother of the victim. This court should analyze the trial court's refusal to admit this in the same manner.

As *Kalamarski* and *Harris*, supra, state this was a discretionary ruling, Salgado can not demonstrate to this court that the actions of the trial court were an abuse of that discretion.

B. The court properly sustained the states objections to questions asked during cross-examination of the victim's mother.

Even if this one objection was error Salgado has not demonstrated that there was any effect to the outcome, to the determination of the trial. The allegation was that the defendant, Salgado, repeatedly raped the victim over several years. Of what significance or purpose were the questions about the alleged boyfriend's participation in searching for victim when she ran away.

The courts have found errors which could be considered constitutional harmless if there overwhelming untainted evidence supported the conviction. Salgado does not and can not raise this allegation to a constitutional level. *State v. Thompson*, 151 Wn.2d 793, 808, 92 P.3d 228 (Wash. 2004):

This constitutional error may be considered harmless if we are convinced beyond a reasonable doubt that any reasonable trier of fact would have reached the same result despite the error. *State v. Brown*, 140 Wash.2d 456, 468-69, 998 P.2d 321 (2000). To make this

determination, we utilize the "overwhelming untainted evidence" test. *State v. Smith*, 148 Wash.2d 122, 139, 59 P.3d 74 (2002). Under this test, we consider the untainted evidence *admitted at trial* to determine if it is so overwhelming that it necessarily leads to a finding of guilt. *Id.*

Once again as cited above this is to put it mildly, a collateral issue. This is a discretionary ruling by the court.

State v. Harris, 97 Wn. App. 865, 870, 989 P.2d 553 (1999):

The deferential abuse of discretion standard gives a trial judge wide latitude on a variety of trial questions, including the admission or exclusion of evidence, the wording of instructions, the order and sequence of witnesses, and many other trial related matters. *Marks*, 90 Wn. App. at 984. And that is because the trial judge is in the middle of, and part of, the ongoing drama that is a jury trial. An appellate court, on the other hand, reads a record. *Dennis J. Sweeney, An Analysis of Harmless Error in Washington: A Principled Process*, 31 *Gonz. L. Rev.* 277, 280 (1995/96). Our role then is appropriately limited to review of questions which can best be characterized as questions of law. See *State v. Lough*, 125 Wn.2d 847, 861, 889 P.2d 487 (1995). Therefore, so long as the trial court's grounds for its decision are reasonable or tenable, they should not be subject to appellate meddling. Only in those instances where the trial court's discretionary decision clearly falls beyond the pale should we reverse. See *id.* at 861.

Salgado states “[t]he significance of the erroneous hearsay ruling is not that the subject 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" (Brief of appellant at 19) And yet the argument by Salgado in the end is that even though the information being addressed had apparently nothing to do with Salgado's defense, and therefore by definition was not "relevant" and not admissible under any rule of evidence, that none the less "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." (Brief of appellant at 20)

This overarching statement is not supported by one single instance in and citation to, the record where the defendant was precluded from presenting the information he needed to support his defense. He can not and does not cite to any situations which were "prejudicial" or where information was excluded from the record and an offer of proof was made to support the claim that he was not allowed to present his defense.

While this is not a situation where and appellant wholly fails to cite to the record the law set out in *State v. Perez-Cervantes*, 141 Wn.2d 468, 483, 6 P.3d 1160 (2000) “Perez-Cervantes' claim that the trial court was biased against him deserves no discussion because it is totally unsupported by any citation to the record.”

Further it would appear that Salgado is alleging some sort of cumulative error the analysis in *State v. Clark*, 143 Wn.2d 731, 772-3, 24 P.3d 1006 (2001) although addressing the sentencing phase of a trial, is applicable:

Here, Clark has alleged but not satisfactorily demonstrated any errors to accumulate. Further, beyond directing our attention to "all" issues, Clark does not point us toward any particular error or set of errors. The state claims any alleged errors, individually or collectively, were harmless in light of the overwhelming evidence of Clark's guilt beyond a reasonable doubt. As we have found no errors with respect to the guilt phase, we find no cumulative error to have denied Clark of a fair trial.”

The law is also clear, if the trial court sustained an objection on one basis this court may uphold that decision for any valid basis; *State v. Swan*, 114 Wn.2d 613, 659,790 P.2d 610 (1990):

While the lack of foundation objection may be considered a general objection, general objections are not prohibited. According to one Washington practice text:

The court may sustain or overrule a general objection in light of its own understanding of the merits of the objection or the evidence offered. ...

If the trial court “sustains” a general objection, the ruling will be affirmed if there was any valid basis for excluding the evidence.

(Footnotes omitted.) 5 K. Tegland, Wash. Prac., Evidence SS 10, at 32, 35 (3d ed. 1989).

A valid basis for sustaining the objection to the "potty" question was that it was a leading question improperly used on direct examination. Thus, we could affirm the court's ruling on that ground. More to the point, however, is the wording used to sustain the objection. The trial court merely ruled "sustained". It did “not” strike the testimony, as the deputy prosecuting attorney requested, nor did it instruct the jury to disregard it. The defendant's testimony thus remained in the record for the jury's consideration and defendants' position on this issue is without merit. (Footnotes omitted.)

The deputy prosecutor in this case did not request and the court did not grant a motion to strike what was said by Salgado nor was there an instruction from the court to disregard, therefor the statements made by Salgado went to the jury for their consideration as indicated in *Swan*, supra.

Defendant's choice to "self censor" was done of his own volition not at the direction of the State or the Court. His actions can not be blamed on anyone but himself.

RESPONSE TO ALLEGATION NUMBER TWO – IMPROPER ARGUMENT.

There can be no clearer discretionary ruling than what the trial court judge stated in his ruling. The use once or twice or four times of the word accountable by the State in closing is not improper argument.

THE COURT: Alright. Well, I think the question is whether the use of that phrase by the prosecution constitutes -- prosecutorial misconduct and I don't think it does. And I also think that there's -- ample opportunity in the defendant's closing argument to rebut any inference -- by way of argument as to your concern. So I don't -- I don't think it's improper argument. (RP 151)

This allegation that there was misconduct on the part of the State is specious. *State v. Brown*, 132 Wn.2d 529, 561,940 P.2d 546 (1997) "A prosecuting attorney's allegedly improper remarks must be reviewed in the context of the total argument, the issues in the case, the

evidence addressed in the argument, and the instructions given to the jury. Failure to object to an improper comment constitutes waiver of error unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury. "Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request." (Footnotes omitted.)

Salgado attempted to use as a defense the fact that he was abusive to the victim. He allowed in a multitude of information about the abusive nature of his interactions with the victim. Now his claim is the deputy prosecutor in closing argument and in rebuttal stated "...we ask you ladies and gentlemen to hold the defendant accountable"...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....And then in the light of reality I ask you in (sic)

behalf of the State ladies and gentlemen to impose accountability where it belongs and find Elias Salgado guilty...”, that this use on four occasions of the word accountable or a derivation of the word somehow “tended to divert the jury’s attention from deciding whether the State had met its burden of proof.” This in a closing argument which covers thirty-eight pages on first closing, RP 1802-1841, and twenty-three pages on rebuttal, RP 1867-83. This in a case that lasted three weeks and now the claim is these four words for were so flagrant and ill intentioned that the will of the jury was nullified and they merely found the defendant guilty because he physically and emotionally abused this victim not because he raped her.

The State has included just the last approximately, two pages of rebuttal closing by the deputy prosecutor. This deputy hammers the facts which support the rape allegations, she does not belabor the other abuse before she utters the final word that apparently overbore the will of these twelve jurors, “accountability.”

Further, even though the appellant made the request to disallow the use of this term in closing it is the State's position that he did not preserve the alleged error for review. He did not object to the actual use during closing, ask that the offensive words be stricken or a curative instruction be given. *Brown*, supra.

The State not only had to prove the elements of the crime but it also had to convince the jury beyond a reasonable doubt that the act the defendant agreed occurred, the abuse, was not the reason for the victim coming forward with the allegation of abuse. The State would have been incredibly remiss if it would have ignored the facts which Salgado wanted admitted the "abuse" which he agreed occurred as opposed to the "abuse" which he claimed did not occur. So now Salgado says in his appeal that the State by stating on four occasions the work "accountable" or a derivation of that word some how transformed the other 1700 plus pages of testimony in to thin air. That the mere uttering of the word accountable in conjunction with the agreed facts regarding abuse overbore the minds of the twelve jurors and was so ill intentioned

and prejudicial so as to encourage the jury to render a verdict not on the facts which Salgado disputed but to totally ignore the other facts and to in essence use jury nullification, in favor of the State, disregarding the law which they had just been give and which they had agreed and sworn to use.

This argument is not one of shifting burdens is it clearly an allegation of misconduct on the part of the State in closing. *State v. McNallie*, 64 Wn. App. 101, 110-11, 823 P.2d 1122 (1992) addresses the use of the word "account":

McNallie asserts prosecutorial misconduct based on the reference to the jury sitting as "representatives of this whole community" and further stating that the jury decision will determine if "**the defendant will be set free or held to account**". At the conclusion of final argument the defendant moved for a mistrial based on these statements.

On the first mention of "representatives of this community" the court overruled the objection and on the second occasion objection was sustained, but no curative instruction was requested. Assuming that the second objection was properly sustained and there was something improper in the reference to the jury being "representatives of this whole community", there is absolutely nothing about the statement which could not have been dealt with by a curative instruction. In the absence of such a

request, the statement cannot be the basis for a mistrial. We find nothing improper in the first reference, although the objection may indeed have forestalled some improper argument. There was no request to the jury to "send a message" or "protect the community" or "demonstrate community disapproval" or anything that is inconsistent with the jury's duty to apply the law to the facts and find the defendant guilty or not guilty. The failure to request a curative instruction on the second occasion suggests that the objections were prophylactic and the words spoken were not in and of themselves a matter of great concern. **Nor is there anything improper with stating that the defendant will be set free or held to account by a jury's decision; that is indeed the jury's responsibility and function.** We do not find the argument improper but even if it was, there was certainly no abuse of discretion in the court's denying the motion for mistrial. (Footnotes omitted, emphasis mine.)

If the theory presented by Salgado were to be put into effect this court would need to declare statutes such as RCW 9A.08.020 null and void as that statute says;

“(1) A person is guilty of a crime if it is committed by the conduct of another person for whom he is legally accountable.

(2) A person is legally accountable for the conduct of another person when:

...

(c) he is an accomplice of such other person in the commission of the crime. (Emphasis mine.)

The accompanying pattern jury instruction reads in part as follows: WPIC 10.51 Accomplice—Definition A

person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

(Emphasis mine.)

Even the opinions of this court would seem to be in peril,

State v. Bobenhouse, 214 P.3d 907,910, (2009):

Bobenhouse argues that, since both of his children were less than eight years old, under RCW 9A.04.050, no crime occurred. Bobenhouse argues that, under the statute, it is not a crime for a person to force (and watch) two children to have sexual intercourse with each other where the child victims are unrelated to him, unrelated to each other, less than 24-months apart in age, and are less than eight years of age. To argue as such, Bobenhouse relies on RCW 9A.04.050 (children presumed incapable of committing a crime). But this argument ignores the criminal culpability imposed under the statutes. A person can be charged and convicted in certain circumstances for acts committed by another. RCW 9A.08.020(1) provides that "[a] person is guilty of a crime if it is committed by the conduct of another person for which he is **legally accountable**." (Emphasis added.) A person is "**legally accountable**" when "[a]cting with the kind of culpability that is sufficient for the commission of the crime, *he causes an innocent or irresponsible person to*

engage in such conduct. " RCW
9A.08.020(2)(a) (emphasis added).

...
That a person in Bobenhouse's position can be convicted as a principal is consistent with or supported by *State v. BJS*, 72 Wash.App. 368, 371-72, 864 P.2d 432 (1994). Although the case was dismissed for insufficient evidence, **the Court of Appeals noted that a defendant can be held legally accountable for child molestation based on causing conduct by one three-year-old against another**, even though the defendant did not personally touch the victims. In *BJS*, the court also noted that such a defendant is considered the " perpetrator" for purposes of satisfying the child molestation statute and the " perpetrator's" age is used to satisfy the 36-month age difference required between the victim and the perpetrator of child molestation. We agree with this analysis and conclusion. (Some emphasis mine.)

**RESPONSE TO ASSIGNMENT OF ERROR THREE –
NO CONTACT.**

The Washington State Supreme Court recently ruled on this very issue in, *In re Personal Restraint Petition of Rainey*, 81244-6 (March 2010)

The court herein addressed this issue at the time of sentencing. The parties and the court had an exchange about this very issue. The original order apparently had prohibited all contact. The court stated on the record that it had a problem with

that. The court subsequently addressed on the record the history in this family of domestic violence. The court then crafted an order which is more than sufficient to meet the requirements set forth in *In re Personal Restraint Petition of Rainey*, 81244-6 (March 2010)

This portion of the sentencing is contained in Appendix 'A'

Rainey addressed this very issue:

Rainey also challenges the no-contact order with L.R. as violative of his fundamental constitutional right to parent. *See generally Santosky*, 455 U.S. 745. A defendant's fundamental rights limit the sentencing court's ability to impose sentencing conditions: "[c]onditions that interfere with fundamental rights" must be "sensitively imposed" so that they are "reasonably necessary to accomplish the essential needs of the State and public order." *Warren*, 165 Wn.2d at 32.

A. State's Interest

The State's interest in protecting Kimberly and L.R. is compelling. *See id.* at, 35 (holding that the protection of the two victims and their mother, a witness to the crime, was a compelling state interest). Each of them was a victim of the kidnapping—L.R. because she was abducted from her home and Kimberly because Rainey intended to inflict extreme emotional distress upon her. *See RCW 9A.40.020(1)(d)*. Generally, the State has a compelling interest in preventing future harm to the victims of the crime. *See Warren*, 165 Wn.2d at 33 (discussing Washington courts' reluctance to uphold no-

contact orders with persons *other* than victims).

B. Reasonable Necessity: Scope

As to the "reasonable necessity" requirement, the interplay of sentencing conditions and fundamental rights is delicate and fact-specific, not lending itself to broad statements and bright line rules. *Compare, e.g., State v. Ancira*, 107 Wn.App. 650, 27 P.3d 1246 (2001) (holding that the State did not show that no contact with the defendant's nonvictim children was reasonably necessary to protect their safety) *with Warren*, 165 Wn.2d at 34-35 (distinguishing *Ancira* because the victims' mother had testified and had previously been assaulted by the defendant).

...

Washington law recognizes that the State has a compelling interest in protecting children from witnessing domestic violence. *Ancira*, 107 Wn. App. at 654; *Warren*, 165 Wn.2d at 34-35 (treating *Ancira* as authoritative); *see also In re Welfare of Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980) (holding that the State may protect against harms to children's physical and mental health even if inflicted by their parents).

...

Although the State had a compelling interest in preventing the children from witnessing domestic violence, it had not shown that supervised visitation without the mother's presence or indirect contact such as mail would jeopardize the goal of protecting the children. *Id.* at 654-55.

The Court then concluded;

The sentencing court in this case provided no reason for the duration of the no-contact order, nor did the State attempt to justify a *lifetime* order as reasonably necessary to protect either

L.R. or Kimberly. Rainey argued that a no-contact order with L.R. might be harmful to her, and so implied that it might be counter-productive to the State's interest in her protection in the long term. VRP (Sentencing Hr'g Nov. 30, 2005) at 19, 21. There is no indication that Rainey's timely argument was considered. Given the fact-specific nature of the inquiry, we strike the no-contact order as to L.R. and remand for resentencing, so that the sentencing court may address the parameters of the no-contact order under the "reasonably necessary" standard.

We reject Rainey's *Apprendi/Blakely* argument and hold that the scope of the no-contact order with L.R. did not violate Rainey's fundamental constitutional right to parent. However, because the court below did not articulate any reasonable necessity for the lifetime duration of the no-contact order, we strike the order as to L.R. and remand for resentencing consistent with this opinion.

Further, it would appear from the Judgment and Sentence that there is presently no restriction on the appellant making contact with his biological children. In a plain reading of this document the condition initially stated; "Have no direct or indirect contact with the victim for the duration of her life or any members of the victim's family, victims mother and brother." The court struck out the section which states "or any members of the victim's" and inserted "No contact with" leaving the remainder as in the

original the condition now reads; “Have no direct or indirect contact with the victim for the duration of her life, No contact with family, mother and brother. The court then interlineated the following additional condition; “No contact with his own children w/out their consent after age 18 & agreement of community custody officer.” (CP 20 sub. 4.C.2, page 4)

It would therefore appear that the condition of no contact was limited by the court specifically to the “mother and brother” of the victim not other siblings. The comma was inserted and is the term family is modified by the following two persons, “mother and brother.”

There would not appear to be a restriction on contact with the other family members now but there would appear to be one after the age of 18 unless there is consent and notice to the community custody officer.

Salgado argues there are protection orders in place to protect Eulalia, Clara and Gabriel, “further restrictions are not reasonably necessary to protect his own children.” This assumes that the family is living as a unit and not separately. It would appear that the court did not impose a

restriction on the other members of the family. Any action on the part of Salgado to contact these children in the presence of the protected parties would be a violation, however Salgado does not allege the restriction on the victim her mother or her brother are improper. Salgado merely needs to abide by those restrictions to avoid any punishment for violating valid unchallenged conditions.

It is also the State's contention that this matter has not met the test as set forth in *First Covenant Church v. Seattle*, 114 Wn.2d 392, 787 P.2d 1352 (1990) and therefore this court need not even review the allegation:

Deciding whether a case presents a cause of action ripe for judicial determination requires an evaluation of "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967); *Standard Alaska Prod. Co. v. Schaible*, 874 F.2d 624, 627 (9th Cir. 1989). "A claim is fit for [judicial] decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." 874 F.2d at 627.

Even if this court were to consider this argument there are additional facts that need to be established and the

underlying matter is not “final.” Did the court mean to restrict the no contact to only the biological mother and brother of the victim as it would appear from the judgment and sentence and did the court actually intend for the restriction on the biological children to only take effect when they turn eighteen. These can not be answered without further action and therefore would appear to fall under *Eaton* and *Brewer*, *infra*.

State v. Eaton, 82 Wn. App. 723, 735, 919 P.2d 116 (1996):

Furthermore, because the condition has not yet been enforced nor has Eaton suffered any negative consequences from the court's order, the issue is not ripe for review. See *State v. Langland*, 42 Wn. App. 287, 292, 711 P.2d 1039 (1985) (an issue is not ripe unless the person seeking review is harmfully affected by the law or order as applied to him); see also *State v. Phillips*, 65 Wn. App. 239, 244, 828 P.2d 42 (1992) (issue of costs not ripe for review when costs imposed, but only when State attempts to collect them). In Langland, the court refused to consider whether a suspended life sentence was constitutionally prohibited cruel punishment if the suspended sentence were revoked and a life sentence imposed because there, as here, the consequences of the court's order were

merely potential, not actual. 42 Wn.
App. at 292.

State v. Brewer, 148 Wn. App. 666, 676, 205 P.3d 900
(2009)

...We do not address this issue because it is
not ripe for review.

Our Supreme Court recently addressed
pre-enforcement challenges to a
community custody condition. In *State v.*
Bahl, 164 Wash.2d 739, 193 P.3d 678
(2008), the court held that such challenges
are ripe for review when they deal with
primarily legal issues that courts can
resolve on the record before it without the
need for additional facts. *Bahl*, 164
Wash.2d at 751, 193 P.3d 678. Such is not
the case here, however.

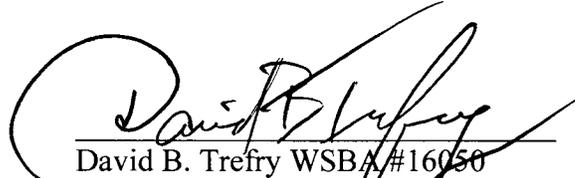
Bahl suggests the following test for
appellate courts to use in determining
whether a community custody condition
challenge is sufficiently ripe for review:
when (1) the issues raised are primarily
legal, (2) determination of these issues
requires no further factual inquiry, and (3)
the challenged action is final. 164 Wash.2d
at 751, 193 P.3d 678. Additionally, the
reviewing court must consider " the
hardship to the parties of withholding court
consideration." 164 Wash.2d at 751, 193
P.3d 678 (quoting *First United Methodist*
Church v. Hearing Exam'r, 129 Wash.2d
238, 255, 916 P.2d 374 (1996)).

(Footnote omitted.)

III. CONCLUSION

The actions of the trial court should be upheld, this matter should be dismissed. There allegations set forth by Salgado are with out merit or factual basis. There was no error on the part of the trial court when it excluded evidence, sustained hearsay objections and imposed conditions of community custody nor was the argument by the State in closing improper.

Dated this 13th day of September, 2010



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