

**State of Washington**  
 Court of Appeals, Div. III  
 500 N. Cedar Street  
 Spokane, WA 99201

**PRINT ORDER**      DATE: \_\_\_\_\_  
 Printing/Binding Briefs  
**20# White Bond, 2 Sided, Thermal Bound**

Attorney/Pro Se (full name) (If indigent (OPD) do not need attorneys name-just OPD)	Case No.	Case Type No. <b>Do not send sealed, confidential, or type 5, 6, and 7 cases</b>
OPD	308006	<u>1</u>

Case Name (Short CaseTitle) St. of WA v. Craig Raymond Cosby	Quantity  5
PDF Name: Case #, Abbrev., [Party Name <u>if</u> more than one]  308006 APP	

CHECK BOX	<u>XX</u>							
COLOR	<u>GRAY</u>	GREEN	BLUE	TAN	LILAC	ORANGE	YELLOW	RED
BRIEF TYPE (delete extras)	<u>APP</u> PET	RSP CAP	APR PRB CRE	RER	APS AMI	RSB AMA	SAG	

To Be Completed By AOC	
Copy Room Staff	Financial Services
No Pages Printed: _____	Unit Cost: _____
Total Time Printing: _____	Job Cost: _____

**FILED**  
Oct 30, 2012  
Court of Appeals  
Division III  
State of Washington

NO. 30800-6-III

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

CRAIG COSBY,

Appellant.

---

---

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

The Honorable Allen C. Nielsen, Judge

---

---

BRIEF OF APPELLANT

---

---

REBECCA WOLD BOUCHEY  
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to Assignments of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. <u>Substantive Facts</u> .....	2
2. <u>Procedural Facts</u> .....	6
C. <u>ARGUMENT</u> .....	7
1. COSBY’S FIFTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE TRIAL COURT PERMITTED THE STATE TO USE, AS IMPEACHMENT, COMPELLED STATEMENTS COSBY MADE DURING A DIMINISHED CAPACITY EXAMINATION....	7
2. COSBY WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO REQUEST A LIMITING INSTRUCTION FOR TESTIMONY ADMITTED ONLY FOR IMPEACHMENT PURPOSES.....	13
3. THE SENTENCING COURT ABUSED ITS DISCRETION BY IMPOSING LIFETIME NO CONTACT ORDERS PREVENTING COSBY FROM CONTACTING HIS ADULT CHILDREN. ....	17
C. <u>CONCLUSION</u> .....	18

## TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Aho</u> 137 Wn.2d 736, 975 P.2d 512 (1999).....	14
<u>State v. Ancira</u> 107 Wn.App. 650, 27 P.3d 1246 (2001).....	17
<u>State v. Barragan</u> 102 Wn. App. 754, 9 P.3d 942 (2000) .....	15
<u>State v. Bonds</u> , 98 Wn.2d 1, 653 P.2d 1024 (1982) <u>cert. den.</u> , 464 U.S. 831, 104 S.Ct. 111, 78 L.Ed.2d 112 (1983) 8, 11	
<u>State v. Hutchinson</u> 135 Wn.2d 863, 959 P.2d 1061 (1998).....	7, 8, 11, 12
<u>State v. Johnson</u> 40 Wn. App. 371, 699 P.2d 221 (1985).....	15
<u>State v. Levy</u> 156 Wn.2d 709, 132 P.3d 1076 (2006).....	13
<u>State v. Lopez</u> 74 Wn. App. 456, 874 P.2d 179 (1994) .....	10, 11
<u>State v. Riles</u> 135 Wn.2d 326, 957 P.2d 655 (1998).....	17
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	14, 16
<u>State v. Warren</u> 165 Wn.2d 17, 195 P.3d 940 (2008).....	17

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<b><u>FEDERAL CASES</u></b>	
<u>Estelle v. Smith</u> 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) .....	9
<u>Gibson v. Zahradnick</u> 581 F.2d 75 (4 <sup>th</sup> Cir. 1978).....	8
<u>Gideon v. Wainwright</u> 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) .....	14
<u>Michigan v. Harvey</u> 494 U.S. 344, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990) .....	11
<u>Mincey v. Arizona</u> 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978) .....	11
<u>New Jersey v. Portash</u> 440 U.S. 450, 99 S.Ct. 1292, 59 L.Ed.2d 501 (1979) .....	11, 12, 13
<u>Noggle v. Marshall</u> 706 F.2d 1408 (6 <sup>th</sup> Cir.) cert. <u>denied</u> , 464 U.S. 1010 (1983).....	8
<u>Roe v. Flores-Ortega</u> 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).....	14
<u>United States v. Bohle</u> 445 F.2d 54 (7 <sup>th</sup> Cir. 1971).....	8
<u>United States v. Cohen</u> 530 F.2d 43 (5 <sup>th</sup> Cir.) cert. <u>denied</u> , 429 U.S. 855 (1976).....	8
<u>United States v. Williams</u> 456 F.2d 217 (5 <sup>th</sup> Cir. 1972).....	8

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<b><u>RULES, STATUTES AND OTHER AUTHORITIES</u></b>	
5A Wash. Prac., Evidence Law and Practice § 613.17.....	15
RAP 2.5 .....	7
RCW 9.94A.030.....	17
RCW 9.94A.505.....	17
U.S. Const. amend. V .....	1, 7, 8, 10, 13, 18
U.S. Const. amend. VI .....	14
Wash. Const. art. I, §. 22 .....	14
WPIC 5.30 .....	15

A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant Craig Cosby's Fifth Amendment rights by permitting the State to use compelled statements made by Cosby during a diminished capacity examination as impeachment evidence.

2. Cosby was deprived of effective assistance of counsel when his attorney failed to request a limiting instruction for testimony admissible only for impeachment purposes.

3. The sentencing court erred by imposing lifetime no contact orders prohibiting Cosby from contacting his adult children when these orders were not crime related.

Issues Pertaining to Assignments of Error

1. Whether Cosby's Fifth Amendment rights were violated when the trial court permitted the State to use compelled statements made by Cosby during a diminished capacity examination as impeachment evidence.

2. Whether Cosby was deprived of effective assistance of counsel when his attorney failed to request a limiting instruction for testimony admitted only for impeachment purposes.

3. Whether the sentencing court abused its discretion by imposing lifetime no contact orders preventing Cosby from

contacting his adult children when these orders were not crime related.

B. STATEMENT OF THE CASE

1. Substantive Facts

Craig Cosby, seventy years old,<sup>1</sup> and his wife, Susan Cosby,<sup>2</sup> had an unhappy marriage, and had been unhappy for several years. 1RP<sup>3</sup> 32, 60, 78, 88. By 2009, Susan had been making plans to divorce Cosby and move out of their home into a house she purchased just down the street. 1RP 20, 24-25, 32-33, 55. Cosby testified he knew Susan wanted a divorce and they were working together to agree on a division of property, as he had in the dissolution of his first marriage. 3RP 315, 331, 336. Other witnesses testified that Susan was hiding her plan to leave. 1RP 24-25, 55.

On October 3, 2009, police responded to Cosby's 911 call. 1RP 91, 103. When the police arrived, Cosby was waiting for them

---

<sup>1</sup> 3RP 310.

<sup>2</sup> To aid readability and avoid confusion, this brief refers to Mrs. Cosby as "Susan." No disrespect is intended.

<sup>3</sup> The Verbatim Report of Proceedings will be referred to herein as follows: RP--10/13/09 – 2/7/12; 1RP—3/26/12-3/27/12; 2RP—3/28/12; 3RP—3/29/12; 4RP—3/30/12-4/17/12.

on the porch, still on the phone with 911. 1RP 104. Susan Cosby was found deceased in her bedroom. 1RP 104. She had been shot. 1RP 119. There was a loaded gun in her closet. 1RP 119-21. A pistol was also found in Cosby's bedroom on the bed. 1RP 104.

Susan died from multiple gunshot wounds. 2RP 268. Ballistics established that the bullets came from Cosby's gun, a .40 caliber semi-automatic Smith and Wesson handgun. 2RP 234, 243.

Cosby did not deny he had shot his wife. Cosby said that on the evening of the shooting, he passed by Susan's bedroom and tried to engage her in a conversation about the division of their property upon dissolution. 3RP 350. She became angry and slammed the door into his arm. 3RP 353. She then dodged toward the bedroom closet, where she stored her gun. 3RP 354. She came up from a crouch, hit Cosby, and he fell back and hit his head on the wall. 3RP 354. Cosby testified he felt a surge of pain in his head and he thought he had been shot. 3RP 355. He thought he had a concussion. 3RP 355.

Cosby testified that he had several prior traumatic brain injuries,<sup>4</sup> and on the day of this incident, he suffered a concussion when Susan knocked him into the wall and he hit his head, causing him to lose consciousness. 3RP 354. He testified that he lost consciousness and did not remember shooting the gun. 3RP 355.

The next thing Cosby remembered was coming to in his bedroom, looking down, and realizing his gun cartridge was now empty. 3RP 356. Going in and out of consciousness, Cosby became aware again in his living room as he picked up the phone to call 911. 3RP 356.

Cosby testified Susan was prone to explosive outbursts of temper. 3RP 337. He stated that in the past year, she often would be physically aggressive with him, including one prior incident requiring police intervention. 1RP 96, 3RP 337-38. He said that this history, along with his age and physical infirmity, made him fear his wife. 3RP 337-38.

Cosby and other witnesses testified he would routinely carry a handgun for protection when going on walks, 1RP 74, and Cosby testified that on October 3, before the argument with his wife, he

---

<sup>4</sup> 3RP 310-11, 313-14, 315-16.

was carrying his gun because he was planning to go for his walk, 3RP 343, 348.

After Cosby's testimony, the prosecution moved the court for permission to call Dr. Randall Strandquist as a rebuttal witness. Strandquist was one of the doctors who had conducted Cosby's pretrial competency examination. 3RP 408. The prosecutor argued Cosby had made statements to Dr. Strandquist about what he remembered about the shooting that differed from his trial testimony, specifically, that he recalled turning to shoot Susan before he lost consciousness. 3RP 411. The defense objected, arguing that the prior statements were not inconsistent and that Cosby would be prejudiced by the jury learning about the sanity examination. 3RP 415.

The Court permitted the State to call Dr. Strandquist in rebuttal to testify to prior inconsistent statements, but ordered the State to sanitize his testimony by not introducing any evidence regarding the context of the examination (sanity commission). 3RP 420. Dr. Strandquist then testified:

- Cosby said he blacked out after the first shot.
- Cosby said he called 911.

- Cosby said he tried to block Susan from getting to her gun.

3RP 439. No limiting instruction was requested or given.

2. Procedural Facts:

Cosby was charged with first degree premeditated murder. CP 1-2. The State also charged both firearm and domestic violence enhancements. CP 1-2.

Prior to trial, Cosby was ordered to submit to an examination at Eastern State Hospital. RP 2, 4. The examination was to address competency, sanity at the time of the offense, and capacity to form premeditated intent. Order for Exam, p. 4, Supp. CP. He was found competent to stand trial. RP 29. Cosby did not pursue diminished capacity or insanity defenses at trial.

Cosby moved for dismissal at the close of the State's case, arguing that there was insufficient evidence of premeditation. 2RP 296. The motion was denied. 2RP 298.

Cosby was found guilty of first degree murder, with firearm and domestic violence enhancements. CP 102-104. Cosby was sentenced to the maximum of the standard range, with a 60-month enhancement, for a total sentence of 380 months. CP 161-62. The court also entered a lifetime no contact order, preventing Cosby

from contacting his two children. CP 166. This appeal timely follows. CP 171.

C. ARGUMENT

1. COSBY'S FIFTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE TRIAL COURT PERMITTED THE STATE TO USE, AS IMPEACHMENT, COMPELLED STATEMENTS COSBY MADE DURING A DIMINISHED CAPACITY EXAMINATION.<sup>5</sup>

The trial court erred when it permitted the State to impeach Cosby with statements he made during a pretrial psychological examination conducted in anticipation of a diminished capacity defense. Cosby's statements were involuntary and could not be used against him for any purpose once he removed diminished capacity from consideration. The admission of these involuntary statements violated Cosby's Fifth Amendment right to refuse to answer incriminating questions. Under Washington law, an accused has no Fifth Amendment right to refuse to answer incriminating questions during an exam conducted in anticipation of a diminished capacity defense. State v. Hutchinson, 135 Wn.2d 863, 876-77, 878, 959 P.2d 1061 (1998); State v. Bonds, 98 Wn.2d

---

<sup>5</sup> Although this issue was not raised below, it can be raised here for the first time because it is a manifest error affecting a constitutional right. RAP 2.5(a)(3).

1, 653 P.2d 1024 (1982), cert. denied, 464 U.S. 831, 104 S.Ct. 111, 78 L.Ed.2d 112 (1983). Raising diminished capacity compels the accused to submit to an examination by the State's expert. Hutchinson, at 878.

Because the defendant is compelled to participate in the exam without Fifth Amendment rights, "an expert should not be allowed to testify to a defendant's incriminating statements, e.g., confessions or admissions that he or she committed the crime charged." Hutchinson, at 878. This is well-established law. See, e.g., Noggle v. Marshall, 706 F.2d 1408, 1416 (6<sup>th</sup> Cir.), cert. denied, 464 U.S. 1010 (1983) ("Evidence of a defendant's inculpatory statements during a psychiatric examination cannot be admitted to prove guilt."); Gibson v. Zahradnick, 581 F.2d 75, 78 (4<sup>th</sup> Cir. 1978); United States v. Cohen, 530 F.2d 43, 48 (5<sup>th</sup> Cir.), cert. denied, 429 U.S. 855 (1976) (Holding that the Fifth Amendment does not bar compelled psychiatric examinations because the accused has the right "to have any incriminating factual statements resulting from the examination suppressed."); United States v. Williams, 456 F.2d 217, 218 (5<sup>th</sup> Cir. 1972); United States v. Bohle, 445 F.2d 54, 66-67 (7<sup>th</sup> Cir. 1971) ("Such an examination does not violate the 5<sup>th</sup> Amendment privilege, because its sole purpose is to

enable an expert to form an opinion as to defendant's mental capacity to form a criminal intent. It is not intended to aid in the establishment of facts showing that defendant committed certain acts constituting a crime. It cannot be so used, for it is impermissible to introduce into evidence on the issue of guilt any statement made by the defendant during the course of such an examination."); Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) (it is fundamentally unfair to introduce evidence obtained during a compelled pretrial competency exam at sentencing).

Cosby was compelled to submit to a pretrial psychological exam to determine his competency to stand trial, sanity at the time of the offense, and capacity to form premeditated intent. Order for Mental Health Evaluation by Eastern State Hospital, p. 4, Supp. CP. However, by the time of trial, Cosby's sanity and capacity to form intent were no longer at issue—he did not argue he was legally insane, nor that he lacked capacity. See 3RP 410. Therefore, the State had no right to call the psychiatrist to the stand on the issue of his mental state.

However, the State sought the introduction of Cosby's statements to Dr. Strandquist during the psychiatric examination,

arguing Cosby had made inconsistent statements to regarding what he remembered about the crime and that the State could use this for impeachment. 3RP 410. The trial court expressed its concern in this situation, where the defendant has been denied his Fifth Amendment right to refuse to answer questions during the psychiatric exam, but having those statements later admitted at trial. 3RP 418. But, relying on State v. Lopez, 74 Wn. App. 456, 874 P.2d 179 (1994), the court held Cosby's compelled statements about the shooting could be admitted for impeachment where they were inconsistent with his trial testimony. 3RP 418-20.

In Lopez, the State offered Lopez's statements to a doctor during a pre-trial examination conducted in anticipation of a diminished capacity defense. 74 Wn. App. at 458. The Court of Appeals held that the exclusionary rule did not apply to the use of such testimony for impeachment. 74 Wn. App. at 459. Lopez did not directly address the constitutional implications of using this evidence, although it cited with approval out-of-state authority for the proposition that voluntary statements obtained in violation of the defendant's Miranda rights are admissible for impeachment. The court reasoned it therefore was not error to admit the testimony. 74 Wn. App. at 460.

However, Cosby's statements during the psychological examination were compelled by law and therefore involuntary. See State v. Hutchinson, 135 Wn.2d at 876-78; State v. Bonds, 98 Wn.2d 1, 653 P.2d 1024 (1982), cert. denied, 464 U.S. 831, 104 S.Ct. 111, 78 L.Ed.2d 112 (1983). Therefore, the exclusionary rule applies.

The Lopez court was not asked to consider whether the defendant's incriminating statements were involuntary. Although Lopez cites the general exception to the exclusionary rule for statements that are given voluntarily, there is no exception for involuntary statements. When an accused's statements are involuntary, the Supreme Court has mandated the exclusion of such evidence for all purposes, including impeachment. See Michigan v. Harvey, 494 U.S. 344, 351, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990) (citing New Jersey v. Portash, 440 U.S. 450, 459, 99 S.Ct. 1292, 1297, 59 L.Ed.2d 501 (1979); Mincey v. Arizona, 437 U.S. 385, 398, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978)).

In New Jersey v. Portash, Portash was subpoenaed to testify before a grand jury. He reached an agreement with the prosecution that, if he testified before the grand jury, his statements could not be used against him in a subsequent criminal

prosecution. But when he was later tried for misconduct in office and extortion while a public official, the trial judge ruled that the prosecution could use his immunized grand jury testimony for impeachment purposes. Portash, 440 U.S. at 451-52. The Supreme Court held the trial court erred. Portash, 440 U.S. at 459-60. It noted that testimony given under immunity is inherently coerced—"the witness is told to talk or face the government's coercive sanctions, notably, a conviction for contempt." Portash, 440 U.S. at 459. The Court recognized that there is a distinction between statements taken in violation of Miranda that are nevertheless voluntary, and statements compelled by force of law, such as Portash's. 440 U.S. at 458. Accordingly, the Court held: "a defendant's compelled statements, as opposed to statements taken in violation of Miranda, may not be put to any testimonial use whatsoever against him in a criminal trial." Portash, 440 U.S. at 459.

Like Portash, Cosby's statements were compelled by law. And, like Portash, Mr. Cosby faced the government's coercive sanctions if he refused to participate. Hutchinson held that a defendant who refuses to participate in a diminished capacity exam can face the exclusion of his own expert, among other possible

sanctions for failing to comply with a court order. See Hutchinson, 135 Wn.2d at 880-81.

As in Portash, Cosby's involuntary statements could not be used against him for any purpose, including impeachment. See Portash, 440 U.S. at 459. The trial court erred in permitting the State to admit Cosby's involuntary statements to Dr. Strandquist.

An error arising from a Fifth Amendment violation is a constitutional error and can be declared harmless only if the State can show the error is harmless beyond a reasonable doubt. State v. Levy, 156 Wn.2d 709, 731-32, 132 P.3d 1076 (2006). The State cannot meet its burden here. The State used the compelled statements Cosby made to Strandquist to argue Cosby did intentionally shoot his wife, which was the central issue at trial. 4RP 478. Consequently, the error cannot be said to be harmless beyond a reasonable doubt.

2. COSBY WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO REQUEST A LIMITING INSTRUCTION FOR TESTIMONY ADMITTED ONLY FOR IMPEACHMENT PURPOSES.

If this Court holds Cosby's statements to Dr. Strandquist were admissible for the limited purpose of impeachment, he was

still deprived of effective assistance of counsel when his counsel failed to request a limiting instruction.

The federal and state constitutions guarantee the right to the assistance of counsel in a criminal prosecution. U.S. Const. amend. VI; Wash. Const. art. I, sec. 22. The right of a criminal defendant to have a reasonably competent counsel is fundamental and helps ensure the fairness of our adversary process. Gideon v. Wainwright, 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). This fundamental right to effective counsel ensures that a defendant's conviction will not stand if it was brought about as a result of legal representation that fell below an objective standard of reasonableness. Roe v. Flores-Ortega, 528 U.S. 470, 120 S. Ct. 1029, 1034, 145 L. Ed. 2d 985 (2000).

A conviction should be reversed for ineffective assistance where (1) counsel's conduct fell below an objective standard of reasonableness, and (2) but for counsel's unprofessional errors, there is a reasonable probability the outcome of the case would have been different. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999).

Counsel's performance was deficient where counsel failed to request an instruction limiting the jury's consideration of Dr. Strickland's testimony to the limited purpose of impeachment.

A jury may only consider impeachment evidence when considering the witness's credibility. It is not proof of the substantive facts therein. State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985). When the court admits such evidence, an instruction cautioning the jury to limit its consideration to its intended purpose is both proper and necessary. Johnson, 40 Wn. App. at 377. Thus, it is clear that a limiting instruction was appropriate and should have been given had counsel requested it.

There are times when courts have deemed counsel's failure to propose a limiting instruction a tactical decision to avoid emphasizing unfavorable evidence. See, e.g. State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000). But this was not a legitimate tactic here. Counsel could have requested the jury be instructed before Dr. Strandquist's testimony. See e.g., WPIC 5.30; 5A Wash. Prac., Evidence Law and Practice §613.17. This would have made its limited admissibility clear without emphasizing the evidence.

Prejudice results where there is a reasonable probability that but for counsel's deficient performance, the outcome would have differed. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Thomas, 109 Wn.2d at 226 (quoting Strickland, 466 U.S. at 694). The statements admitted could have been considered by the jury for the improper purpose of determining whether Cosby premeditated the shooting of his wife, rather than his credibility. Therefore there is a reasonable probability that his counsel's failure to request a limiting instruction for this evidence prejudiced the result of his trial.

Cosby's intent was the central issue. Thus, failing to request a limiting instruction so the jury would know that it could only consider Dr. Strandquist's testimony for credibility, rather than as substantive evidence that Cosby intentionally shot Susan was inherently prejudicial and it was counsel's responsibility to appropriately limit the scope of the jury's consideration of that evidence.

3. THE SENTENCING COURT ABUSED ITS DISCRETION BY IMPOSING LIFETIME NO CONTACT ORDERS PREVENTING COSBY FROM CONTACTING HIS ADULT CHILDREN.

“As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.” RCW 9.94A.505(8). A “crime-related prohibition” is “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(13). Sentencing conditions should be reversed where the sentencing court abuses its discretion. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008).

The court ordered that Cosby have no contact with his two adult children for life. CP 166. There is nothing in the record to indicate that these no contact orders were “crime related.” Washington courts have been critical of no-contact orders with classes of persons different from the victim of the crime. See State v. Riles, 135 Wn.2d 326, 349, 957 P.2d 655 (1998) (no-contact order with minors was not related to crime of rape of adult woman); State v. Ancira, 107 Wn.App. 650, 656, 27 P.3d 1246 (2001) (no contact order with children not necessary when defendant

convicted of domestic violence against wife). While Cosby's son, Ben, was a trial witness, he testified about the history of his parent's relationship and gun use. He was not a witness to the crime. Cosby's daughter, Kristin, was not a witness at trial or to the crime.

Because there is no connection between Cosby's contact with his adult children and the crime here, the trial court abused its discretion in entering lifetime no contact orders at sentencing. These no contact orders must therefore be reversed.

D. CONCLUSION

The trial court violated Cosby's Fifth Amendment rights by permitting the State to bring in his involuntary statements made during a competency/diminished capacity examination. Because the state cannot show this error is harmless beyond a reasonable doubt, the conviction should be reversed.

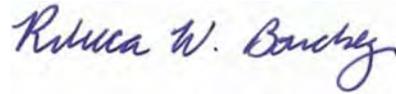
In addition, Cosby was denied effective assistance of counsel when his attorney failed to request a limiting instruction for impeachment evidence. This error also requires reversal.

Finally, the sentencing court abused its discretion in entering orders preventing Cosby from contacting his two adult children for life because these orders were not crime related. Therefore, these no contact orders must be stricken from the judgment and sentence.

DATED: October 30, 2012

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in blue ink that reads "Rebecca W. Bouchey". The signature is written in a cursive style with a large initial 'R' and a long, sweeping tail.

Rebecca Wold Bouchey  
WSBA No. 26081  
Attorneys for Appellant

ERIC J. NIELSEN  
ERIC BROMAN  
DAVID B. KOCH  
CHRISTOPHER H. GIBSON

OFFICE MANAGER  
JOHN SLOANE

LAW OFFICES OF  
**NIELSEN, BROMAN & KOCH, P.L.L.C.**

1908 E MADISON ST.  
SEATTLE, WASHINGTON 98122  
Voice (206) 623-2373 · Fax (206) 623-2488

WWW.NWATTORNEY.NET

LEGAL ASSISTANT  
JAMILAH BAKER

DANA M. LIND  
JENNIFER M. WINKLER  
ANDREW P. ZINNER  
CASEY GRANNIS  
JENNIFER J. SWEIGERT  
OF COUNSEL  
K. CAROLYN RAMAMURTI  
JARED B. STEED

---

State v. Craig Cosby

No. 30800-6-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 30<sup>th</sup> day of October, 2012, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

Stevens County Prosecuting Attorney  
[trasmussen@co.stevens.wa.us](mailto:trasmussen@co.stevens.wa.us)

Craig Cosby  
DOC No. 357420  
Washington State Penitentiary  
1313 N. 13<sup>th</sup> Avenue  
Walla Walla, WA 99362

**Signed** in Seattle, Washington this 30<sup>th</sup> day of October, 2012.

X *Patrick Mayovsky*