

NO. 81244-6

THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE: PERSONAL RESTRAINT OF:

SHAWN C. RAINEY,

Petitioner.

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

PETITIONER'S SUPPLEMENTAL BRIEF

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A. ISSUES FOR WHICH REVIEW WAS GRANTED

1. A parent's right to the custody, care, and companionship of his or her child is a fundamental right that may not be abridged without due process of law, and numerous statutes set forth procedures tailoring when the court may intervene in the parent-child relationship. As punishment for Shawn Rainey's criminal conviction, the sentencing court barred him from having any contact, direct or indirect, with his then four-year-old child for the rest of his life. Did the sentencing court's imposition of a permanent lifetime no-contact order between a parent and his minor biological child exceed its authority and violate Rainey's rights to parent and to receive due process of law?

2. Does the lifetime term of the no-contact order exceed the statutory maximum as explained by Blakely v. Washington, and thus violate the Sixth Amendment?

B. STATEMENT OF THE CASE.

During their marriage, Shawn Rainey and Kimberly Bernhardt had a child together, L.A.R., born on August 15, 2001.

COA 24827-5-III, Slip op. at 2; Judgment and Sentence, p. 6.¹

Rainey's marriage dissolved acrimoniously and he divorced in May 2004. Slip op. at 2. A parenting plan governed custody and care of their child. Id.

On March 9, 2005, Rainey picked up L.A.R. for a scheduled visit but did not return L.A.R. to her mother as anticipated. Slip op. at 2. Two weeks later, authorities found Rainey and L.A.R. in Texas. Id. Rainey also left harassing telephone messages for Bernhardt. Id. He was convicted of first degree kidnapping, for taking L.A.R. with the intent to cause extreme emotional distress to Bernhardt; and telephone harassment, for the phone calls he made to Bernhardt. Slip op. at 6; Judgment and Sentence, p. 1.² The court imposed 68 months confinement and ordered Rainey "shall not have contact with" L.A.R. or Bernhardt, "including, but not limited to, personal, verbal, telephonic, written or contact through a third party for life." Judgment and Sentence, p. 7.

Rainey was denied relief on direct appeal and filed a CrR 7.8 motion challenging his sentence, including the imposition of the

¹ The Court of Appeals ruling from Rainey's direct appeal that sets forth the facts of the case is referred to hereinafter as "Slip op." and is attached as Appendix A. The relevant Judgment and Sentence is attached as Appendix B.

lifetime no-contact order with his daughter L.A.R. The Court of Appeals rejected motion after it was transferred from the trial court without a ruling, but this Court granted review on the legality of the no-contact order.

C. ARGUMENT.

1. THE ORDER BARRING RAINEY FROM ANY CONTACT WITH HIS CHILD FOR THE REST OF HIS LIFE VIOLATES HIS CONSTITUTIONAL RIGHT TO CARE FOR HIS CHILD AND SUBVERTS THE STATUTORY SCHEMES FOR TERMINATING OR RESTRICTING PARENTAL RIGHTS

- a. A parent's right to care for his or her child is a fundamental interest strictly protected by the Constitution. A parent has a fundamental liberty and privacy interest in the care, custody and enjoyment of his child. Troxel v. Granville, 530 U.S. 57, 65-66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); State v. Ancira, 107 Wn.App. 650, 653, 27 P.3d 1246 (2001); State v. Letourneau, 100 Wn.App. 424, 438, 997 P.2d 436 (2000). A parent's liberty interest in his child is "perhaps the oldest of the fundamental liberty interests" recognized by the courts, as well as a

² The Judgment and Sentence for the harassment conviction, a gross misdemeanor, is attached to the State's Answer to the Motion to Modify.

fundamental privacy right. Troxel, 530 U.S. at 65; Stanley v. Illinois, 405 U.S. 645, 652, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972).

The bond between a parent and child is “more precious than . . . life itself.” In re Welfare of Myricks, 85 Wn.2d 252, 254, 533 P.2d 841 (1975). The rights to conceive and raise one’s children have been characterized as “essential,” and among the “basic civil rights of man.” Stanley, 405 U.S. at 651. Not only does the constitution require “fair process” before limiting a parent’s rights, it also substantively prohibits government intervention absent a compelling state interest that must be as narrowly tailored as possible. Troxel, 530 U.S. at 65; In re Parentage of C.A.M.A., 154 Wn.2d 52, 61, 109 P.3d 405 (2005); see also Stanley, 405 U.S. at 652 (citing Ninth and Fourteenth Amendments as textual basis of parental rights); ³ Wash. Const. Art. I, §§ 3, 7⁴

³ The Ninth Amendment provides, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

The Fourteenth Amendment says in pertinent part, “No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

⁴ Art. I, § 3 provides, “No person shall be deprived of life, liberty, or property, without due process of law.”

Art. I, § 7 provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

A parent's rights are fundamental but not absolute. The State may intervene and protect a child where a parent's "actions or decisions seriously conflict with the physical or mental health of the child." In re Sumey, 94 Wn.2d 757, 762, 621 P.2d 108 (1980) (citations omitted). A parent's right to care, custody, and companionship of child "cannot be abridged without due process of law" under Fourteenth Amendment. In re Key, 119 Wn.2d 600, 609, 836 P.2d 200 (1992), cert. denied, 507 U.S. 927 (1993). The due process protections set forth in RCW 13.34.090(1) include:

[The] right to be represented by an attorney in all proceedings . . . , to introduce evidence, to be heard in his or her behalf, to examine witnesses, to receive a decision based solely on the evidence adduced at the hearing, and to an unbiased fact-finder.

When the State intervenes, either as a monitor for dissolution issues or an entity concerned for the child's safety and welfare, an array of statutes contain procedures for restricting a parent's access to his or her children while protecting the parent's right to due process. Ancira, 107 Wn.App. at 655-56. Chapter 26.09 RCW speaks to parenting plans and chapter 13.04 RCW addresses dependency and termination proceedings. Under these procedures, family and juvenile court may address a parent's contact with his child after weighing the parent's constitutional

rights to care for a biological child, providing a meaningful opportunity to be heard prior to deprivation of that right, and determining the best interests of the child. Ancira, 107 Wn.App. at 655; Letourneau, 100 Wn.App. at 442-43.

b. A court may not disregard a parent's due process rights when it limits or bars contact between a parent and his minor biological child. Due process must be afforded to all parents, even those whose parental misconduct results in a criminal conviction. In re Sego, 82 Wn.2d 736, 740, 513 P.2d 831 (1973) (“a parent's misconduct, even if criminal in nature, does not automatically support permanent child deprivation.”). The best interests of the child, alone, do not establish compelling grounds to overrule a parent's fundamental right to care for his or her child. C.A.M.A., 154 Wn.2d at 61.

“Family court is best placed” to determine the long-term needs of the child and “finely tune” necessary restrictions on contact. In re: Marriage of Stewart, 133 Wn.App. 545, 551, 137 P.3d 25 (2006), rev. denied, 160 Wn.2d 1011 (2007). Orders restricting contact between a parent and child may not permanently supplant family court orders governing parent-child relationships.

Ancira, 107 Wn.App. at 652; State v. Sanford, 128 Wn.App. 280, 289, 115 P.3d 368 (2005); Letourneau, 100 Wn.App. at 442.

i. The sentencing court is not the proper forum for terminating a parent-child relationship as a matter of due process. A court may issue protection orders prohibiting contact between a parent and child, but these restrictions have been upheld only if of limited duration and when reasonably necessary after considering less restrictive alternatives. Stewart, 133 Wn.App. at 551; Ancira, 107 Wn.App. at 655.

In Ancira, the Court of Appeals found unconstitutional an order barring a father from contact with his two minor children for five years, imposed as a “crime-related” sentencing condition. 107 Wn.App. at 653-55. The parents in Ancira had a contentious relationship and an existing no-contact order barred the children’s father from seeing their mother. Id. at 652. One evening, the parents argued and the father refused to return one child to the mother. The father was convicted of felony violation of a no-contact order against the mother, and the court imposed a no-contact order prohibiting the father from direct or indirect contact with the children, finding contact with the father was not in the

children's best interests. Id. at 653. The no-contact would last for five years, although the court offered to review it in 18 months. Id.

The Court of Appeals reviewed the legality of the no-contact order by first recognizing that a parent's fundamental right to the care, custody, and control of his or her child precludes the court from barring parents' contact with their children unless the restriction is "reasonably necessary to prevent harm to the children." Id. at 654. Applying this standard, the court found insufficient factual support for barring any contact, even indirect communication, between the father and his young children.

The Ancira Court agreed that witnessing domestic violence is harmful to the children. But the blanket prohibition on contact was not justified. Available alternatives would protect the children while permitting some contact. Id. at 656. A pending family court proceeding would address the dissolution of the marriage and "this matter [of appropriate parent-child contact] is best resolved by the family court in the dissolution proceeding." Id.

Similarly, in Letourneau, the Court of Appeals rejected a no-contact order entered as part of a criminal sentence that permitted only supervised contact between a mother and her minor children. 100 Wn.App. at 437. In this infamous case, a mother of three

minor children was a school teacher who had sexual intercourse with a student. She was convicted of two counts of rape of a child in the second degree for her illicit relationship, but had not been accused of mistreating her biological children. Id. at 442.

The State defended the no-contact order in the interest of preventing harm to Letourneau's children. While recognizing the State's interest, the court found the restriction was not reasonably necessary. Id. at 441. There was no record of past harmful acts or sexual abuse of any of her children. Id. at 439. The court ruled there must be affirmative evidence a parent "is a pedophile" or "otherwise pose[s] a danger of sexual molestation to his or her own children" to justify restricting parent-child contact. Id. at 442.

The Letourneau court further noted there are "more appropriate forums than the criminal sentencing process to address the best interests of dependent children" with respect to their contact with their parents, such as family court for dissolution issues and juvenile court for dependency matters. Id. at 443. In these more appropriate forums, a guardian ad litem could investigate the children's needs regarding their relationship with their mother, or offer the children "professional intervention" as the

individual circumstances required. Id. at 442. A pending dissolution case would address visitation. Id. at 443. In sum,

[i]t is the business of the family and juvenile courts to address the best interests of minor children with respect to most other kinds of harm that could arise during visitation with a parent who has been convicted of a crime, including psychological harm that might arise from that parent's communications with the children regarding the crime. To that end, the family and juvenile courts . . . have broad discretion to tailor orders that address the needs of children in ways that sentencing courts in criminal proceedings cannot. Sentencing courts in criminal proceedings must necessarily operate within the limitations on court discretion contained in the SRA.

Id.

In Stewart, a civil case, the court prohibited a father from contacting his minor children for one year because of domestic violence problems between the parents pursuant to RCW 26.50.060. 133 Wn.App. at 550-51. The father argued that the existing parenting plan controlled and it should have been modified under the pertinent Parenting Act procedures.

The Court of Appeals that “a protection order cannot actually suspend a parenting plan. Nor can it impose a long-term restriction on parental contact with a minor child, or otherwise affect the terms of the parenting plan.” Id. at 554. The Stewart Court concluded that a one-year no-contact order was permissible in this context,

but it also noted that the order was “entered in contemplation of further proceedings in family court, which [the mother] initiated the same day.” Id. at 556.

As these cases indicate, a host of procedures govern the court or state’s involvement in and oversight of a parent-child relationship, and contemplate such intervention occurs only after considering all relevant factors and only when restrictions are narrowly drawn to withstand strict scrutiny, thus protecting the fundamental rights at stake.

ii. Dependency proceedings offer a meaningful opportunity to consider the needs of the parent-child relationship.

When a child has been abused or neglected, the State may institute dependency or termination proceedings. Sumey, 94 Wn.2d at 763-64. Chapter 13.34 RCW details the procedures that must be followed prior to terminating a parent’s custodial rights. Although the best interests of the child is the paramount consideration, mandatory procedures guarantee that no parent will be denied the fundamental right to parent absent extensive efforts to rectify the parent’s identified deficiencies and holding the State to a high burden of proof. Sumey, 94 Wn.2d at 763-64; RCW 13.34.136 (dependency requirements); RCW 13.34.180 (criteria for

seeking termination); RCW 13.34.190 (findings necessary for termination).

Dependency proceedings expressly require the court to actively encourage parent-child contact, and prohibit restrictions on visitation absent a court finding of actual harm to the child. In re: Dependency of T.L.G., 139 Wn.App. 1, 16-17, 156 P.3d 222 (2007); RCW 13.34.136(1)(b)(ii). The strict enforcement of this requirement stems from a court task force's finding that frequent parental contact with a child is critical to maintaining any possibility of safe reunification of a parent and child. Id. at 16 n.31.⁵ It is not a single incident, but rather the parent-child relationship as a whole that governs a court's determination of actual risk to the child from contact with a parent in a dependency proceeding. Id. at 18.

There is a procedural shortcut to termination of parental rights for parents convicted of certain criminal offenses against his or her child. RCW 13.34.180(3). The State need only prove that termination is in the best interest of the child for a parent convicted of an enumerated offense. The parent remains entitled to an

⁵ Citing Dependency and Termination Equal Justice Committee Report (2003), available at: <http://www.opd.wa.gov/Reports/Dependency%20&%20Termination%20Reports/2003%20DTEJ%20Report.pdf> (last viewed Feb. 19, 2009).

attorney and hearing prior to termination. RCW 13.34.180(4).

Rainey was not convicted of an offense that would justify cursory procedures terminating his parental rights. RCW 13.34.180(3).

iii. The Parenting Act allocates care and custody of a child between parents. When parents are divorced and have a parenting plan, as in the case at bar, the Parenting Act of 1987, chapter 26.09 RCW, details procedures for allocating parent-child contact as well as decision-making authority. See e.g., In re Marriage of Watson, 132 Wn.App. 222, 130 P.3d 915 (2006) (civil court trial involving mother's attempt to modify parenting plan); RCW 26.09.191 (statutory guidelines for restricting parent's role due to misbehavior); RCW 26.09.260 (modifying parenting plan).⁶

For example, a court must limit a parent's decision-making authority and "residential time" with the child where the parent is convicted of certain sexual offenses, has a history of domestic violence, or inflicts grievous bodily harm. RCW 26.09.191(1), (2). The limits imposed must be "reasonably calculated" to prevent

⁶ RCW 26.09.260(4) generally requires a substantial change in circumstances to modify a parenting plan, but contains the following exception:

harm to the child or primary parent, and may include supervised contact or require counseling. RCW 26.09.191(2)(m)(i). A court may deny contact only if the court “expressly finds based on the evidence that limitations on the residential time with the child will not adequately protect the child from the harm or abuse that could result.” Id.⁷

RCW 26.09.191 contains a lengthy list of directions for when a parent’s conduct may adversely affect the child’s best interests. In making decisions regarding a parenting plan, the court has tools such as a guardian ad litem or experienced service providers who may investigate the parenting arrangements. RCW 26.09.220. The sentencing court in a criminal case does not act upon this breadth of information or upon expertise in creating appropriate living arrangements. Letourneau, 100 Wn.App. at 443.

The court may reduce or restrict contact between the child and the parent with whom the child does not reside a majority of the time if it finds that the reduction or restriction would serve and protect the best interests of the child using the criteria in RCW 26.09.191.

⁷ Further criteria govern procedures for determining parent-child contact when a parent has been found to be a sexually violent predator under chapter 71.09 RCW, or who has an adult conviction for a listed sexual offense against a child. RCW 26.09.191(2)(c)-(l). These criteria do not apply to Rainey.

c. The court's sentencing order permanently barring Rainey from any contact with his four-year-old child for the rest of his life circumvents pertinent statutory schemes and violates the constitution. At the time of the incident, L.A.R. was three years old and a parenting plan governed her care and custody. Slip op. at 2. Rather than issuing a temporary order in contemplation of further family court consideration, the court effectively terminated both father and daughter's rights to have any contact whatsoever for the rest of their lives. Ancira, 107 Wn.App. at 656. Under the terms of the permanent no-contact order, any contact constitutes a criminal offense, even if initiated by the child or constituting a simple birthday card. RCW 26.50.110.

A sentencing court's authority to impose a no-contact order stems from its power to order "crime-related prohibitions" under RCW 9.94A.505(8); see also RCW 9.94A.700(5)(b) (allowing no-contact with victim as condition of community custody). But this authority does not supersede the requirement that the fundamental right to parent may not be denied absent a compelling interest and by the least restrictive means possible. Warren, 165 Wn.2d at 32; Ancira, 107 Wn.App. at 656. As this Court said in Warren, "crime-related prohibitions affecting fundamental rights must be narrowly

drawn” and “[t]here must be no reasonable alternative way to achieve the State's interest.” Id. at 34-35.

Although Warren involved a husband’s claim that a no-contact order against his wife violated the fundamental right to marriage, the decision favorably cited Ancira as instructive in its reasoning regarding the strict scrutiny required before prohibiting contact that is constitutionally protected. Id. at 33. Here, the lifetime prohibition on contact between Rainey and his young child cannot be justified as a choice rationally made by the child, or as the least restrictive alternative. Ancira, 107 Wn.App. at 655-56.

Rainey is not a pedophile or otherwise unredeemably dangerous. See Letourneau, 100 Wn.App. at 443. Rainey’s conviction stemmed from conflict with his ex-wife, Bernhardt, and his kidnapping conviction was predicated on his intent to inflict emotional distress upon Bernhardt, not L.A.R. Slip op. at 6-7. Although Rainey’s contact with L.A.R. may be properly regulated, the sentencing court is not the appropriate forum for crafting a long-term order or terminating the parental relationship. Rainey is serving a 68-month sentence, rendering him unable to have unsupervised contact with L.A.R. for a substantial period of time, and he must serve 24-48 months on community custody following

his release. The community custody order also contains no-contact provisions. Judgment and Sentence, p. 8.

In the 68 months of Rainey's incarceration, a family court could determine L.A.R.'s best interests, with professional guidance, and allow appropriate contact by letter or telephone call. The court's lifetime prohibition on any contact, "including but not limited to personal, verbal, telephonic, written or contact through a third party for life," constitutes a deprivation of the fundamental right to parent without due process and must be reversed. Warren, 165 Wn.2d at 34. The detrimental impact of the order is not simply nullifying Rainey's parental rights, but also denying L.A.R. any ability to know her father if she so chooses. The case should be remanded for the court to enter an appropriate ruling pertaining to contact with the child, or to formally defer to family court the appropriate restrictions on the father-daughter relationship.

2. THE LIFETIME REACH OF THE NO-CONTACT ORDER EXCEEDS THE STATUTORY MAXIMUM.

Sentencing authority derives strictly from statute, subject to the constitutional rights to due process, a jury trial, and prohibition against cruel and unusual punishment. Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); State v.

Ammons, 105 Wn.2d 175, 180-81, 713 P.2d 719 (1986); U.S. Const. amends. 6,⁸ 8,⁹ 14; Wash. Const. art. I, § 22.¹⁰ As the United States Supreme Court ruled in Blakely, while a certain imprisonment term may be permitted under RCW 9A.20.021, it is not the statutory maximum sentence for the charged offense. 542 U.S. at 301-02. Instead, the Court noted the maximum sentence was “the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” (Emphasis in original.) Id.

In State v. Armendariz, 160 Wn.2d 106, 119-20, 156 P.3d 201 (2007), the court found that RCW 9.94A.505, which allows a sentencing court to impose “crime-related prohibitions,” permits the court to impose no-contact orders as a sentencing condition. The court found it logical to construe the statutory maximum as the outer boundary for the length of a no-contact order and presumed that RCW 9A.20.021 sets the statutory maximum. Id. Armendariz

⁸ The Sixth Amendment provides in part, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.”

⁹ The Eighth Amendment provides, “Excessive bail shall not be required . . . nor cruel and unusual punishments inflicted.” Washington Constitution, Article I, § 14 likewise states, “excessive bail shall not be required, . . . nor cruel punishment inflicted.”

did not address whether Blakely affects the definition of the “statutory maximum.” Id.

Here, Rainey’s standard sentencing range was 51-68 months, and his community custody range 24-48 months. Judgment and Sentence, p. 3, 7. Blakely dictates that the statutory maximum is the maximum term the court may impose without any additional findings, and effectively means the statutory standard range. Accordingly, the pertinent statutory maximum in the case at bar is limited to the standard sentencing range. The no-contact order may not exceed these terms.

3. RAINEY IS PRESENTLY RESTRAINED AND ENTITLED TO RELIEF FROM THE UNLAWFUL NO-CONTACT ORDER

A person is entitled to relief by way of a Personal Restraint Petition (PRP) where the person is under unlawful restraint as defined in RAP 16.4. Rainey is presently confined at the Airway Heights Correctional Center, serving the sentence imposed in the case at bar, and is prohibited from contacting his child for the rest of his life, rendering him restrained pursuant to RAP 16.4(b). Unlawful restraint occurs where a sentence or its conditions violate

¹⁰ Article I, § 22 provides in pertinent part, “In criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury”.

the state or federal constitutions. In re the Pers. Restraint of Greening, 141 Wn.2d 687, 692-93, 9 P.3d 206 (2000); RAP 16.4 (c)(2), (6). The lifetime no-contact order imposed as a sentence condition is unlawful as it violates the state and federal constitutions .

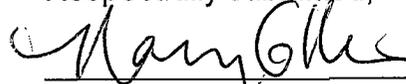
Moreover, Rainey is entitled to relief because he is actually prejudiced by the deprivation of his constitutional right to the care, custody, and companionship of his minor child. RAP 16.4 (d); In re the Matter of the Restraint of Cook, 114 Wn.2d 802, 812, 792 P.2d 506 (1990). He may not have any contact with his daughter or will face criminal prosecution. Accordingly this Court should grant him relief.

D. CONCLUSION.

For the foregoing reasons, Shawn Rainey respectfully requests this Court reverse the condition of his sentence barring him from any contact with his child for the rest of his life.

DATED this 19th day of February 2009.

Respectfully submitted,



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APPENDIX A

Wm. Tompkins

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MAR 31 2008

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MAR 22 2007

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 24827-5-III
)	
Respondent,)	
)	
v.)	Division Three
)	
SHAWN CHRISTOPHER RAINEY,)	
)	
Appellant.)	UNPUBLISHED OPINION

KATO, J.*—Shawn Rainey was charged in one case with felony stalking and telephone harassment and in another case with first degree kidnapping or, in the alternative, first degree custodial interference. The two cases were consolidated for trial. A jury convicted Mr. Rainey of telephone harassment and first degree kidnapping. He appeals, claiming his speedy trial rights were violated, the evidence did not support his conviction for kidnapping; the prosecutor committed misconduct; and he was denied effective assistance of counsel. Mr. Rainey also filed additional grounds for review. We affirm.

* Judge Kenneth H. Kato is serving as a judge pro tempore of the Court of Appeals pursuant to RCW 2.06.150.

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Shawn and Kimberly Rainey were married and had one daughter, L.R. He verbally abused and threatened Ms. Rainey. She obtained a protection order in March 2004. Despite the order, Mr. Rainey called her 10-15 times a day. He moved into a house on the same street. The couple divorced in May 2004.

Mr. Rainey continued to call and leave messages for Ms. Rainey at home and at work. She eventually contacted the police. On December 3, 2004, the State filed charges against him for harassment and stalking. On December 19, the court issued a no contact order.

In November 2004, Mr. Rainey had stopped returning their child when required to under the parenting plan. In January 2005, L.R. had a scratch on her back. Mr. Rainey took her to the doctor and Child Protective Services (CPS) was called. CPS determined there was no abuse. Mr. Rainey had also reported to CPS he was concerned about Ms. Rainey's boyfriend, Joe Bernhardt. CPS determined the concern was unfounded. The police also decided there was not enough evidence to find child abuse had occurred.

On March 9, 2005, Mr. Rainey picked up L.R. for visitation and did not return her. On March 11, a warrant was issued for his arrest. On March 29, Mr. Rainey called Ms. Rainey and told her he wanted her to move a thousand miles away, pay his attorney fees, give him custody, and tell the police she knew he had taken L.R. on vacation. When she refused, he told her "happy hunting."

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Report of Proceedings (RP) at 376. On March 30, 2005, L.R. was found in Texas and Mr. Rainey was arrested. This time, the State charged Mr. Rainey with first degree kidnapping or, in the alternative, first degree custodial interference.

The cases were consolidated for trial. Mr. Rainey testified he took L.R. because he was concerned for her safety. The jury convicted Mr. Rainey of first degree kidnapping and telephone harassment. This appeal follows.

Mr. Rainey contends his speedy trial rights were violated. On December 3, 2004, the State charged him with telephone harassment and stalking. On June 1, 2005, the State charged Mr. Rainey with first degree kidnapping or, in the alternative, first degree custodial interference.

On June 14, 2005, Mr. Rainey appeared for his omnibus hearing on the stalking and harassment charges. The State advised the court of the kidnapping charges and its intention to file a motion to consolidate the cases. The State further informed the court that defense counsel would be unavailable for trial in July and the prosecutor had a preassigned case in August, so trial would need to be scheduled for September 2005. Defense counsel said he had discussed the time frames with the prosecutor and September 19 was an available trial date. The parties then agreed to set trial for September 26 because the fall judicial

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State v. Rainey

conference was on September 19. The court told the State to submit an order setting trial on the same date for the kidnapping charges, as well.

The State filed a motion to consolidate the cases for trial. On July 9, 2005, Mr. Rainey wrote the court a letter objecting to the trial date of September 26 on the kidnapping charge. On August 8, 2005, he filed a motion on counsel's letterhead to dismiss the kidnapping charge because of speedy trial violations. The parties appeared in court on September 1 to argue the motions. Mr. Rainey's position was that the omnibus hearing continued trial on the stalking and harassment charges, but not the kidnapping charge. He claimed he did not understand that at the June 14 hearing, the kidnapping charge was also continued. He claimed trial on that charge thus had to be set on or before July 29, 2005.

The State countered that it and defense counsel had numerous conversations and were in agreement about continuing both trials to September 26, 2005. The prosecutor told the court the order of continuance did not get entered because she was unable to get Mr. Rainey's signature. The prosecutor acknowledged she agreed to get the order, but it just did not happen. She stated there was never a disagreement about the trial date. On the other hand, Mr. Rainey argued he had never waived his right to speedy trial on the kidnapping charge. The court denied the motion to dismiss, finding the parties were in

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agreement and the lack of an order was a scrivener's error. The court also granted the State's motion to consolidate the cases.

The court subsequently granted another continuance of the trial date until October 10, 2005. Mr. Rainey and his counsel objected.

Immediately prior to trial, defense counsel renewed the motion to dismiss for speedy trial violations. The court denied the motion.

For an incarcerated defendant, CrR 3.3 requires the court to set a trial date within 60 days of arraignment. CrR 3.3(b)(1)(i). A party has 10 days from receiving notice of a trial date that is not within the time limits to object. CrR 3.3(d)(3). Without an objection, any speedy trial violation is waived. *State v. Farnsworth*, 133 Wn. App. 1, 12, 130 P.3d 389 (2006), *review denied in part, granted in part on other grounds*, 2007 Wash. LEXIS 63 (Jan. 31, 2007).

Mr. Rainey's speedy trial time expired July 29, 2005, for the kidnapping charge. On June 14, 2005, however, the court stated it was continuing the trial date to September 26. Mr. Rainey was present in the courtroom at this hearing. Under CrR 3.3(d)(3), he had until June 24 to object. He failed to do so and any violation was therefore waived.

Mr. Rainey claims he was unaware the court was continuing trial on the kidnapping charge. But on July 9, 2005, he wrote a letter to the judge on this issue. On July 21, the court responded it could not take any action without a

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motion. He filed a motion on August 8. His own letter establishes that, by July 9, 2005, Mr. Rainey was aware of the September 26 trial date for the kidnapping charge. By July 21, he also knew he needed to file a motion. The August 8 filing date of his motion was more than 10 days after he knew the trial date on the kidnapping charge. Under CrR 3.3(d), (h), any objection was waived.

Mr. Rainey next contends the evidence was insufficient to support the kidnapping conviction. The test for sufficiency of the evidence is whether, after viewing the evidence and all reasonable inferences most favorably to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Atkins*, 130 Wn. App. 395, 401-02, 123 P.3d 126 (2005). A claim of insufficiency admits the truth of the State's evidence, and the reviewing court draws all reasonable inferences from the evidence in the State's favor. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We defer to the trier of fact to weigh the evidence and judge the credibility of the witnesses. *Atkins*, 130 Wn. App. at 402.

Mr. Rainey was charged with first degree kidnapping under RCW 9A.40.020(1)(d): "A person is guilty of kidnapping in the first degree if he intentionally abducts another person with intent . . . [t]o inflict extreme mental distress on him or a third person." He argues the evidence failed to establish that he acted with the intent to inflict extreme mental distress on a third person.

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Mr. Rainey wrote Ms. Rainey letters after his arrest stating that "I hope that the last three weeks has shown you how much pain I have been in for the last year not seeing [L.R.] every day." RP at 943. He also apologized in a letter for the pain he caused Ms. Rainey. He wrote other letters acknowledging that his taking the child hurt Ms. Rainey. He also called her while he had L.R. and demanded she tell police he had taken L.R. on vacation. When she did not agree, Mr. Rainey told her "happy hunting." RP at 376. Since their separation, Mr. Rainey had also harassed and threatened Ms. Rainey. From this evidence, the jury could find beyond a reasonable doubt that Mr. Rainey intended to cause her emotional distress.

He next argues the prosecutor committed misconduct by misrepresenting the facts in both her opening and closing statements. To obtain reversal of a conviction on the basis of prosecutorial misconduct, a defendant must show the prosecutor's conduct was improper and prejudicial. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996). Absent an objection, a defendant cannot claim prosecutorial misconduct unless the misconduct was so flagrant and ill intentioned that a curative instruction could not have cured any prejudice. *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). A prosecutor's remarks "must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and

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the instructions given to the jury." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

He contends the prosecutor committed misconduct in her opening statement when she stated that his friend would testify Mr. Rainey called and said he was returning to the United States to get some money. Although there was no objection, he argues the evidence did not support this statement. The purpose of an opening statement is to outline the evidence the State intends to introduce. *State v. Kroll*, 87 Wn.2d 829, 834-35, 558 P.2d 173 (1976). An opening statement should not misstate the evidence to be presented at trial. *State v. Torres*, 16 Wn. App. 254, 258, 554 P.2d 1069 (1976).

The testimony was not quite as the prosecutor suggested. One of Mr. Rainey's friends, Ed Salazar, did testify that Mr. Rainey called him from Mexico and asked him if he knew anyone who wanted to buy some tools. Mr. Salazar said this caused him to believe Mr. Rainey needed money. An FBI agent testified that another friend had said Mr. Rainey was out of money. When arrested, he only had five dollars. The reasonable inference from this evidence is that Mr. Rainey returned to get money.

Although the testimony was not exactly as characterized by the prosecutor, she did not misstate the evidence to a degree that rises to misconduct. Furthermore, any error could have been cured by an instruction.

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Mr. Rainey claims the prosecutor committed misconduct during closing when she again argued he came back to the United States for money. Attorneys have wide latitude during closing argument to draw and express reasonable inferences from the evidence. *State v. Harvey*, 34 Wn. App. 737, 739, 664 P.2d 1281, *review denied*, 100 Wn.2d 1008 (1983). As with the statement during opening, the inference was reasonable and any error could have been cured by an instruction. There was no prejudicial misconduct.

The jury was also instructed that attorney remarks were not evidence. Courts generally presume that jurors follow instructions to disregard improper evidence. *State v. Russell*, 125 Wn.2d 24, 84, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995).

Mr. Rainey claims the prosecutor committed misconduct during the sentencing hearing by reiterating that he had not attempted to turn himself in, but came back to the United States only for money. In essence, he attempts to contest his standard range sentence. Generally, a defendant cannot appeal a sentence within the standard range. *State v. Osman*, 157 Wn.2d 474, 481, 139 P.3d 334 (2006) (citing RCW 9.94A.585(1)). He was so sentenced here.

Mr. Rainey contends counsel was ineffective because his prior relationship with a witness was a conflict of interest. At trial, defense counsel noticed that Mr. Bernhardt, Ms. Rainey's new husband, looked familiar. Counsel learned after the

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trial had concluded that he had represented Mr. Bernhardt's son in 2001 against a child rape charge. Counsel had not recognized the name, had no contact with Mr. Bernhardt after early 2002, and had no independent recollection of him or the case. Defense counsel informed Mr. Rainey.

After trial, Mr. Rainey obtained different counsel and filed a motion for new trial. Because one of his defenses was that he had taken his daughter out of concern Mr. Bernhardt was abusing her, he argued his trial counsel should have done a more thorough investigation. He argued that if such an investigation had been done, counsel would have discovered the conflict of interest prior to trial. The court denied the motion, finding there was no actual conflict.

A criminal defendant is constitutionally entitled to effective assistance of counsel. U.S. CONST. amend. VI; CONST. art. I, § 22 (amend. 10); *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). To obtain reversal on this ground, a defendant bears the burden of showing his attorney's performance fell below an objective standard of reasonableness and the deficiency prejudiced him. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

In determining whether counsel's performance was deficient, there is a strong presumption of adequacy. *Id.* at 335. Competency is not measured by the result. *State v. Early*, 70 Wn. App. 452, 461, 853 P.2d 964 (1993), review

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denied, 123 Wn.2d 1004 (1994). But "counsel has a duty to make reasonable investigations or to make a reasonable decision that particular investigations are unnecessary." *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 889, 828 P.2d 1086, *cert. denied*, 506 U.S. 958 (1992) (citing *Strickland*, 466 U.S. at 691). "In an effectiveness case, a particular decision not to investigate must be assessed for reasonableness under all the circumstances." *Id.*

Trial counsel did have a member of his staff conduct a phone interview with Mr. Bernhardt. A criminal background check was done. Counsel determined Mr. Bernhardt was not a major witness and did not even know if he was going to be called. The record shows counsel made a reasonable investigation. His decision that the witness was not a major one was a tactical decision and cannot support a claim of ineffective assistance.

Mr. Rainey also takes issue with counsel's failure to cross-examine Mr. Bernhardt. A decision not to cross-examine a witness is often tactical because counsel may be concerned about opening the door to damaging rebuttal or counsel may conclude that cross examination would not provide evidence useful to the defense. *In re Pers. Restraint of Brown*, 143 Wn.2d 431, 451, 21 P.3d 687 (2001) (citing *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 404, 972 P.2d 1250 (1999)). Generally, the attorney is in a far better position to assess whether a witness will help or hurt the defendant's case than a reviewing court. See *State*

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v. Robinson, 79 Wn. App. 386, 396, 902 P.2d 652 (1995) (citing *State v. Piche*, 71 Wn.2d 583, 590-91, 430 P.2d 522 (1967), *cert. denied*, 390 U.S. 912 (1968)).

The trial was lengthy and counsel did not cross-examine several witnesses. At the hearing on the motion for new trial, counsel testified he did not cross-examine Mr. Bernhardt because he knew he would deny Mr. Rainey's allegations and the evidence did not establish any abuse of the child. This was again a tactical decision that cannot support a claim of ineffective assistance.

Mr. Rainey also claims defense counsel's prior relationship with Mr. Bernhardt was a conflict of interest. A defendant asserting a conflict of interest on the part of counsel must show only that a conflict adversely affected the attorney's performance to show a violation of his Sixth Amendment right. *State v. Dhaliwal*, 150 Wn.2d 559, 571, 79 P.3d 432 (2003). But there is no evidence of adverse performance.

Mr. Rainey claims that because Mr. Bernhardt's son was charged with child rape and was given a sexual offender sentencing alternative, the evidence should have been used at trial to show it was the son who abused his daughter. But Mr. Rainey made no allegations of sexual abuse against the son. There was also no evidence his child ever met Mr. Bernhardt's son. Thus, defense counsel's failure to personally interview Mr. Bernhardt before trial and discover

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the earlier relationship with his son cannot support an ineffective assistance of counsel claim.

In his additional grounds for review, Mr. Rainey claims the court erred by permitting the State to amend the information after it had rested. We review the trial court's grant of a motion to amend an information for abuse of discretion. *Brett*, 126 Wn.2d at 155. A trial court may allow the amendment of the information at any time before the verdict as long as the "substantial rights of the defendant are not prejudiced." CrR 2.1(d). Mr. Rainey bears the burden of demonstrating prejudice under CrR 2.1(d). *State v. Hakimi*, 124 Wn. App. 15, 26-27, 98 P.3d 809 (2004) (citing *State v. Gosser*, 33 Wn. App. 428, 435, 656 P.2d 514 (1982)), *review denied*, 154 Wn.2d 1004 (2005).

The second amended information had four charges: stalking, telephone harassment, kidnapping, and custodial interference. The third amended information made the count of custodial interference charge an alternative charge to the kidnapping. All prior informations, however, had consistently listed the custodial interference as an alternative charge. This amendment merely corrected a clerical error. Mr. Rainey has failed to show prejudice. He also claims he was not arraigned on the last information, but the record shows otherwise.

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Mr. Rainey argues the court erred by not including an instruction for "extreme mental distress" in its instructions to the jury. We review claims of erroneous jury instructions de novo. The inquiry is whether they are supported by the evidence, allow the parties to argue their theories of the case, are not misleading to the jury, and properly set forth the applicable law. *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). But Mr. Rainey failed to object. He thus waived any objections to the instructions. See *State v. Hickman*, 135 Wn.2d 97, 104-05, 954 P.2d 900 (1998).

In any event, the court was not required to define "extreme mental distress" for the jury. Trial courts must define technical words and expressions used in jury instructions, but need not define words and expressions that are of common understanding. *State v. Allen*, 101 Wn.2d 355, 358, 678 P.2d 798 (1984). When a statute defines a term, the trial court must instruct the jury on that specific legal definition. *Id.* at 361-62. "Extreme mental distress" does not have a statutory definition. In the absence of a statutory definition, whether a word used in an instruction requires further defining is a matter within the trial court's discretion. See *State v. Schimmelpfennig*, 92 Wn.2d 95, 100, 594 P.2d 442 (1979). Mr. Rainey has not established an abuse of discretion here.

He further asserts the court erred by imposing a lifetime no contact order with his child in the judgment and sentence. He argues there was no finding the

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State v. Rainey

child was his victim. The order was issued pursuant to RCW 10.99.040. RCW 10.99.020(8) defines "victim" as any family or household member who was subjected to domestic violence. RCW 10.99.020(5)(o) defines "kidnapping" as an act of domestic violence. The child was a family member subjected to the act of kidnapping and was thus properly listed as a victim.

Mr. Rainey argues that the court's finding the child was a victim violates *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), because it was a factual finding not made by the jury. But the child was a victim by statute. A factual finding was unnecessary.

Mr. Rainey contends the court erred by excluding evidence Ms. Rainey had been abused and her family covered it up. He argues this made them more likely to cover up the fact the child was being abused. The court excluded this evidence as improper reputation evidence. Mr. Rainey claims a violation of his right to present a defense was violated.

Although a defendant has a constitutional right to obtain witnesses and present a defense, a defendant has no right to the admission of irrelevant evidence. There is no constitutional error if the trial court properly finds that the evidence is irrelevant. *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). Relevant evidence is evidence that has any tendency to make the existence of a fact of consequence to the determination of the action more or less probable. ER

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401. The abuse Ms. Rainey may have suffered as a child and how her family dealt with it is not relevant. The court properly excluded the evidence.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kato JPT

Kato, J. Pro Tem.

WE CONCUR:

Sweeney, C.J.
Sweeney, C.J.

Brown, J.
Brown, J.

I certify that the foregoing document is a full, true and correct copy of the original, as the same appears of record and on file in my office.

Dated: March 25, 2008
RENEE S. TOWNSLEY

Clerk of the Court of Appeals, Division III, State of Washington

By Barbara Spencer
CASE MANAGER

I certify that this document is a true and correct copy
of the original on file and of record in my office.

ATTEST OCT 21 2008

THOMAS R. FALLQUIST, COUNTY CLERK
COUNTY OF SPOKANE, STATE OF WASHINGTON

BY:  DEPUTY

APPENDIX B

COURT COSTS 110.
 VICTIM ASSESS 500.
 RESTITUTION _____
 FINE _____
 ATTY FEES _____
 SHERIFF COSTS 37.
 METH _____
 DNA FEE 100.
 CRIME LAB _____
 OTHER COSTS 747.

FILED
DEC 01 2005
 THOMAS R. FALLQUIST
 SPOKANE COUNTY CLERK

**SUPERIOR COURT OF WASHINGTON
 COUNTY OF SPOKANE
 STATE OF WASHINGTON**

Plaintiff,
 v.
 SHAWN C. RAINEY
 WM 07/29/73
 Defendant.
 SID: 022338264

No. 05-1-01646-0
 PA# 05-9-18826-0
 RPT# CT III: 002-05-0076623
 RCW CT III: 9A.40.020(1)(D)DV-F (#46515)
 FELONY JUDGMENT AND SENTENCE (FJS)
 Prison RCW 9.94A.712 Prison
 Confinement
 Jail One Year or Less RCW 9.94A.712
 Prison Confinement
 First Time Offender
 Special Sexual Offender Sentencing Alternative
 Special Drug Offender Sentencing Alternative
 Clerk's Action Required, para 4.5 (SDOSA),
 4.1, 5.2, 5.3, 5.6 and 5.8

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the Court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 10-20-05
 by plea jury verdict bench trial of:

Count No.: III **KIDNAPING IN THE FIRST DEGREE -DOMESTIC VIOLENCE**
RCW 9A.40.020(1)(D)DV-F (#46515)
 Date of Crime March 09, 2005
 Incident No. 002-05-0076623

05909584-2
 \$20. 5-5-06 DOC

FELONY JUDGMENT AND SENTENCE (JS)
 (RCW 9.94A.500, .505)(WPF CR 84.0400 (8/2005))

as charged in the Second Amended Information.

- Additional current offenses are attached in Appendix 2.1.
- The court finds that the defendant is subject to sentencing under **RCW 9.94A.712.**
- A special verdict/finding for use of a **firearm** was returned on Count(s) ____ RCW 9.94A.602, 9.94A.533.
- A special verdict/finding for use of a **deadly weapon other than a firearm** was returned on Count(s) ____ RCW 9.94A.602, 9.94A.533.
- A special verdict/finding of **sexual motivation** was returned on Count(s) ____ RCW 9.94A.835
- The offense in Count(s) _____ was committed in a county jail or state correctional facility. RCW 9.94A.510(5)
- A special verdict/finding for **Violation of the Uniform Controlled Substances Act** was returned on Count(s) _____, RCW 69.50.401 and RCW 69.50.435, taking place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, in a public transit vehicle, or in a public transit stop shelter; or in, or within 1000 feet of the perimeter of, a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.
- A special verdict/finding that the defendant committed a crime involving the manufacture of methamphetamine including its salts, isomers, and salts of isomers, **when a juvenile was present in or upon the premises of manufacture** was returned on Count(s) _____. RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.
- The defendant was convicted of **vehicular homicide** which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030
- This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.
- The court finds that the offender has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.
- The crime charged in Count(s) **III** involve(s) **domestic violence.**
- Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 **CRIMINAL HISTORY: (RCW 9.94A.525):**

Crime	Date of Crime	Crime Type	Adult or Juv	Place of Conviction	Sent. Date
NO PREVIOUS FELONIES					

- Additional criminal history is attached in Appendix 2.2
- The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525.
- The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

- The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

2.3 **SENTENCING DATA:**

CT NO	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus enhancements*	Total Standard Range (including enhancements)	Maximum Term
III	0	X	51-68 mos	N/A	51-68 mos	Life 50,000

*(F) Firearm, (D) Other deadly weapons, (V) VUCSA In a protected zone, (VH) Vehicular Homicide, See RCW 46.61.520, (JP) Juvenile present.

- Additional current offense sentencing data in Appendix 2.3

- 2.4 **EXCEPTIONAL SENTENCE:** Substantial and compelling reasons exist which justify an exceptional sentence:
 - within below the standard range for Count(s)_____.
 - above the standard range for Count(s)_____.
 - The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

Aggravating factors were stipulated by the defendant, found by the court after the defendant waived jury trial, found by jury by special interrogatory.

Findings of fact and conclusions of law are attached in Appendix 2.4. Jury's special interrogatory is attached. The Prosecuting Attorney did did not recommend a similar sentence.

2.5 **ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.** The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753

The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753): _____

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are attached as follows _____

III. JUDGMENT

3.1 The defendant is **GUILTY** of the Counts and Charges listed in paragraph 2.1 and Appendix 2.1

3.2 The Court **DISMISSES** Counts _____

The defendant is found **NOT GUILTY** of Counts _____

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of the Court

JASS CODE

RTNR/JN \$ _____ Restitution to: _____

\$ _____ Restitution to: _____

\$ _____ Restitution to: _____
(Name and Address address may be withheld and provided confidentially to Clerk's Office)

PCV \$500.00 Victim Assessment RCW 7.88.035

\$ _____ Domestic Violence Assessment RCW 10.99.080

CRC ~~\$200.00~~ Court costs, including: RCW 9.94A.760, 9.94A.505, 10.01.160, 10.48.190, 36.18.020(h)

110.⁰⁰ Criminal Filing fee \$ _____ FRC

Witness costs \$ _____ WFR

37.⁰⁰

Sheriff service fees \$ _____ SFR/SFS/SFW/SRF
 Jury demand fee \$ _____ JFR
 Extradition costs \$ _____ EXT
 Other _____ \$ _____

PUB \$ _____ Fees for court appointed attorney RCW 9.94A.760
 WRF \$ _____ Court appointed defense expert and other defense costs RCW 9.94A.760
 FCM/MTH \$ _____ Fine RCW 9A.20.021; [] VUCSA chapter 69.50 RCW, [] VUCSA
 additional fine deferred due to indigency RCW 69.50.430
 MTH \$ _____ Meth/Amphetamine Cleanup Fine, \$3000. RCW 69.50.440,
 69.50.401(a)(1)(ii)
 CDF/LDI \$ _____ Drug enforcement fund of _____ RCW 9.94A.760
 FCD/NTF/SAD/SDI
 CLF \$ _____ Crime lab fee [] suspended due to indigency RCW 43.43.890
 \$ 100 Felony DNA collection fee of \$100 not imposed due to hardship RCW
 43.43.7541
 \$ _____ Emergency response costs (Vehicular Assault, Vehicular Homicide only,
 \$1,000 maximum) RCW 38.52.430
 \$ _____ Other costs for: _____
 \$ 747.⁰⁰ TOTAL RCW 9.94A.760

[] The above total does not include all restitution or other legal financial obligations,
 which may be set by later order of the court. An agreed restitution order may be
 entered. RCW 9.94A.753. A restitution hearing:
 [] shall be set by the prosecutor
 [] is scheduled for _____

[] RESTITUTION. Schedule attached.

[] Restitution ordered above shall be paid jointly and severally with:
 NAME of other defendant CAUSE NUMBER (Victim Name) (Amount\$)

RJN

The Department of Corrections or clerk of the court shall immediately issue a
 Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8)
 All payments shall be made in accordance with the policies of the clerk of the
 court and on a schedule established by the DOC or the clerk of the court,
 commencing immediately, unless the court specifically sets forth the rate here:
 Not less than \$ 20 per month commencing 5-5-2006 RCW
 9.94A.760.

The defendant shall report as directed by the clerk of the court and provide financial
 information as requested. RCW 9.94A.760(7)(b).

[] In addition to the other costs imposed herein the Court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the rate of \$50 per day, unless another rate is specified here:

_____ (JLR) RCW 9.94A.760

The financial obligations imposed in this judgment shall bear interest from the date of the Judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160

4.2 DNA TESTING. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754 **FAILURE TO REPORT FOR TESTING MAY BE CONSIDERED CONTEMPT OF COURT.**

[] HIV TESTING. The defendant shall submit to HIV testing. RCW 70.24.340

[] The victim, based upon their request, shall be notified of the results of the HIV test whether negative or positive. (Applies only to victims of sexual offenses under RCW 9A.44.) RCW 70.24.105(7) Lilly A. Rainey - 8-13-01

4.3 The Defendant shall not have contact with Kimberly Bernhardt 10-21-72 (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for Life years (not to exceed the maximum statutory sentence.)

[X] Domestic Violence No-Contact Order or Anti-Harassment No-Contact Order is filed with this Judgment and Sentence.

4.4 OTHER _____

4.5 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

(a) CONFINEMENT. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

68 (months) on Count No. III ;
_____ (months) on Count No. _____ ;
_____ (months) on Count No. _____ .

Actual number of months of total confinement ordered is: 68 months
_____ (Add mandatory firearm or deadly weapons enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

[] The confinement time on Count(s) _____ contain(s) a mandatory minimum term of _____ .

All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

The sentence herein shall run consecutively with the sentence in cause number(s) _____ but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589.

Confinement shall commence immediately unless otherwise set forth here: _____

(b) CONFINEMENT. RCW 9.94A.712: The defendant is sentenced to the following term of confinement in the custody of the DOC:

Count _____ minimum term _____ maximum term _____
Count _____ minimum term _____ maximum term _____

(c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: to be calculated by jail staff

4.6 [] COMMUNITY PLACEMENT is ordered as follows: Count _____ for _____ months; Count _____ for _____ months; Count _____ for _____ months.

[] COMMUNITY CUSTODY for count(s) _____, sentenced under RCW 9.94A.712, is ordered for any period of time the defendant is released from total confinement before the expiration of the maximum sentence.

[X] COMMUNITY CUSTODY is ordered as follows: Count III for a range from 24 to 48 months;

Count _____ for a range from _____ to _____ months;
 Count _____ for a range from _____ to _____ months;
 or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A.700 and .705 for community placement offenses, which include serious violent offense, second degree assault, any crime against a person with a deadly weapon finding and Chapter 69.50 or 69.52 RCW offenses not sentenced under RCW 9.94A.660 committed before July 1, 2000. See RCW 9.94A.715 for community custody range offenses, which include sex offenses not sentenced under RCW 9.94A.712 and violent offenses committed on or after July 1, 2000. Use paragraph 4.7 to impose community custody following work ethic camp.]

On or after July 1, 2003, DOC shall supervise the defendant if DOC classifies the defendant in the A or B risk categories; or, DOC classifies the defendant in the C or D risk categories and at least one of the following apply:

a) the defendant committed a current or prior:		
i) Sex offense	ii) Violent offense	iii) Crime against a person (RCW 9.94A.411)
iv) Domestic violence offense (RCW 10.99.020)		v) Residential burglary offense
vi) Offense for manufacture, delivery or possession with intent to deliver Methamphetamine including its salts, isomers, and salts of isomers		
vii) Offense for delivery of a controlled substance to a minor; or attempt, solicitation or conspiracy (vi, vii)		
b) the conditions of community placement or community custody include chemical dependency treatment		
c) the defendant is subject to supervision under the interstate compact agreement, RCW 9.94A.745.		

While on community placement or community custody, the defendant shall:
 (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC; and (6) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.712 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

The defendant shall not consume any alcohol.
 Defendant shall have no contact with: Kimberly Rainey Bernhardt
or Lilly A. Rainey

Defendant shall remain within outside of a specified geographical boundary, to wit: Per description of CCO

The defendant shall participate in the following crime-related treatment or counseling services: _____

The defendant shall undergo an evaluation for treatment for domestic violence substance abuse mental health anger management and fully comply with all recommended treatment.

The defendant shall comply with the following crime-related prohibitions: _____

Other conditions: Parenting classes must be successfully completed

For sentences imposed under RCW 9.94A.712, other conditions may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than 7 working days.

Defendant shall not reside in a community protection zone (within 880 feet of the facilities and grounds of a public or private school). (RCW 9.94A.030(8)).

4.7 **WORK ETHIC CAMP.** RCW 9.94A.690, RCW 72.09.410. The court finds that defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: _____

V. NOTICES AND SIGNATURES

- 5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this judgment and sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090
- 5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to ten years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for the purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).
- 5.3 **NOTICE OF INCOME-WITHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606
- 5.4 **RESTITUTION HEARING.**
 Defendant waives any right to be present at any restitution hearing (sign initials):

- 5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.634
- 5.6 **FIREARMS.** You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's license, identicard, or comparable identification, to the Department of Licensing along with the date of conviction or commitment). RCW 9.41.040, 9.41.047.

Cross off if not applicable:

5.7 SEX AND KIDNAPPING OFFENDER REGISTRATION. RCW 9A.44.130, 10.01.200.

Because this crime involves a sex offense or kidnapping offense involving a minor as defined in RCW 9A.44.130, you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington, but you are a student in Washington, or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.

If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within 30 days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry out a vocation in Washington, or attend school in Washington, you must register within 30 days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections.

If you change your residence within a county, you must send written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving, register with that sheriff within 24 hours of moving and you must give written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move out of Washington State, you must also send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington State.

If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier. If you become employed at a public or private institution of higher education, you are required to notify the sheriff for the county of your residence of your employment by the institution within 10 days of accepting employment or by the first business day after beginning to work at the institution, whichever is earlier. If your enrollment or employment at a public or private institution of higher education is terminated, you are required to notify the sheriff for the county of your residence of your termination of enrollment or employment within 10 days of such termination.

Even if you lack a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody or within 48 hours excluding weekends and holidays after ceasing to have a fixed residence. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report weekly in person to the sheriff of the county where you are registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. The county sheriff's office may require you to list the locations where you have stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph within the new state within 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

If you apply for a name change, you must submit a copy of the application to the county sheriff of the county of your residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If you receive an order changing your name, you must submit a copy of the order to the county sheriff of the county of your residence and to the state patrol within five days of the entry of the order. RCW 9A.44.130(7).

5.8 [] The court finds that Count _____ is a felony in the commission of which a motor vehicle was used. The court clerk is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.

5.9 If the defendant is or becomes subject to court-ordered mental health or chemical dependency treatment, the defendant must notify DOC and the defendant's treatment information must be shared with DOC for the duration of the defendant's incarceration and supervision. RCW 9.94A.562.

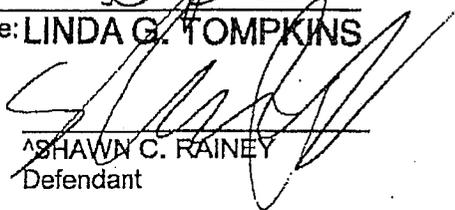
5.10 OTHER: _____

DONE in Open Court in the presence of the defendant this 30th day of November, 2005.


 JUDGE Print name: LINDA G. TOMPKINS


 DEBRA R. HAYES
 Deputy Prosecuting Attorney
 WSBA# 29326


 ROBERT GOSSEY
 Attorney for Defendant
 WSBA# 24576


 ASHAWN C. RAINEY
 Defendant

VOTING RIGHTS STATEMENT: RCW 10.64. _____. I acknowledge that my right to vote has been lost due to felony conviction. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 92A.84.660.

Defendant's signature: _____ 2005 Wash. Laws 246 § 1.

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

Interpreter signature/Print name: _____

I, _____, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action, now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____
Clerk of said County and State, by: _____ Deputy Clerk

IDENTIFICATION OF DEFENDANT

SID No. 022338264	Date of Birth 07/29/1973	
(If no SID take fingerprint card for State Patrol)		
FBI No. 800924EC8	Local ID No. 0315589	
PCN No.	Other	
DOB 07/29/1973		
Alias name		
Race:	Ethnicity:	Sex:
<input type="checkbox"/> Asian/Pacific Islander	<input type="checkbox"/> Black/African-American	<input type="checkbox"/> Caucasian
<input type="checkbox"/> Native American	<input type="checkbox"/> Other: _____	<input type="checkbox"/> Hispanic
		<input type="checkbox"/> Male
		<input type="checkbox"/> Non-hispanic
		<input type="checkbox"/> Female

FINGERPRINTS I attest that I saw the same defendant who appeared in Court on this document affix his or her fingerprints and signature thereto.

Clerk of the Court: _____, Deputy Clerk. Dated: _____

DEFENDANT'S SIGNATURE _____

