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OCT 30 2009

King County Prosecutor
Appellate Unit

NO. 63166-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

NOEL RODRIGUEZ,

Appellant.

RECEIVED
COURT OF APPEALS
DIVISION ONE

OCT 30 2009

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

The Honorable Susan Craighead, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. ADDING A NEW CHARGE THE DAY OF TRIAL WITHOUT GRANTING TIME TO PREPARE VIOLATED RODRIGUEZ'S RIGHT TO PRESENT A DEFENSE AND HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

The State appears to argue adding a new charge to the information the day of trial did not require a continuance (or severance as an alternative) because 1) the evidence would have been cross-admissible on the other charges, 2) Rodriguez's defense attorney either had time to properly investigate or such investigation was not necessary because she did not sufficiently object, and 3) the defendant committed the newly charged crime. These arguments should be rejected.

First, cross-admissibility is irrelevant. Although cross-admissibility is generally one of the factors used to determine the propriety of severing charges, in this case severance was not proposed on its own merits, but as a compromise after the State argued it would be prejudiced by delay. Severance would have permitted the State to present without delay the testimony of the witnesses whose presence it had gone to great lengths to procure, while still permitting defense counsel time to investigate and prepare a defense to the new charges. 5RP 20, 62-63. The mistrial and severance motions were fallback positions after the court denied counsel's

reasonable request for two days to prepare to meet an entirely new substantive charge added the day of trial. Id.

Second, defense counsel repeatedly declared she needed more time even after the court granted a continuing objection. 5RP 19, 25-26, 62-63, 66; 8RP 66 68. She first asked first for a full week to prepare to meet the new charges and obtain a translation of the call. 5RP 19. When the translation was quickly obtained, she reasonably modified her request to two days. Id. When that request was denied, she understandably changed tactics and asked for severance or a mistrial. 5RP 62-63. The court granted a continuing objection. 5RP 66. At the close of the State's case in chief, defense counsel again listed the investigation and preparation she had not had time to do. 8RP 66.

Counsel also cited specific areas of investigation that were necessary. In particular, she wanted to investigate whether Jose Munoz had documented mental disabilities or challenges making it hard for him to understand the material witness warrant. 8RP 66, 68. This would have supported Rodriguez's explanation that in the allegedly incriminating jail calls, he was attempting merely attempting to explain the process and reassure his step-son. The court recognized this was a potentially valid defense, yet inexplicably denied any time to uncover supporting evidence. 8RP 73.

Counsel was also unable to question potential jurors with an eye to the new charge. 5RP 62-63.

The State is correct that it was permitted only limited mention of the new charges in opening statement and defense counsel was allowed to delay hers. Similarly, the State is also correct that witnesses testifying early in the trial did not discuss the tampering evidence. But neither of these attempts at amelioration gave defense counsel what she needed: time to investigate the charges and prepare a defense. The stipulation to the authenticity of the call limited the scope of the necessary investigation, but did not eliminate all need for investigation. Nor did any of these accommodations allow for interviewing potential jurors. Defense counsel made a clear record that she needed more time and that time was denied.

Finally, the State cites several cases all standing for the proposition that a defendant may not provoke a mistrial simply by disrupting trial or causing a conflict with his attorney. Brief of Respondent at 29 (citing State v. DeWeese, 117 Wn.2d 369, 379, 816 P.2d 1 (1991); State v. Sinclair, 46 Wn. App. 433, 437, 730 P.2d 742 (1986); State v. Young, 62 Wn. App. 895, 802 P.2d 829 (1991); United States v. Moore, 159 F.3d 1154, 1158 (9th Cir. 1998)). But that is not what occurred here. Rodriguez did not attempt to disrupt the proceedings or delay the trial or accuse his counsel of being ineffective out of the blue. Instead, based on Rodriguez's conduct outside

the courtroom, the State requested leave to amend the information and charge him with a new crime. The court's decision to grant leave to amend was likely reasonable under the circumstances. What was not reasonable was denying defense counsel any time to prepare.

The State essentially argues that by creating evidence of a new crime, i.e. by committing that crime, Rodriguez forfeited his right to prepared counsel on that charge. Setting aside the presumption of guilt that argument entails, under the State's theory, no defendants are entitled to time to prepare because all of them created the evidence against them by committing the crime.

The court abused its discretion in denying defense counsel's reasonable request for a two-day continuance when a new charge was added the day of trial. This violated Rodriguez's right to present a defense as well as his right to effective assistance of counsel. State v. Purdom, 106 Wn.2d 745, 725 P.2d 622 (1986); State v. Burri, 87 Wn.2d 175, 550 P.2d 507 (1976).

2. PARTICULARLY WHEN TAKEN CUMULATIVELY,
PROSECUTORIAL MISCONDUCT RENDERED
RODRIGUEZ'S TRIAL UNFAIR.

During closing argument and rebuttal, the prosecutor improperly aligned the State with the jury, argued facts not in evidence, and urged the jury to convict to protect the system from chaos. Instructing the jury could

not have cured the resulting prejudice. Therefore, this misconduct necessitates reversing Rodriguez's convictions.

The State argues the prosecutor's reliance on a juror's statement during voir dire was not inappropriate because it was not akin to expert testimony and did not disparage defense counsel. Brief of Respondent at 33-34; 9RP 130. This is beside the point. Prosecutors may not refer to matters outside the evidence or align themselves with the jury. E.g., State v. Warren, 165 Wn.2d 17, 29, 195 P.3d 940 (2008); State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994); State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). By relying on a juror's statement about the harmful effects of incest, the prosecutor was essentially declaring that the jury was already on the side of the State. Objection would have made defense counsel appear to be defending incest. Far from curing the prejudice, objection would only have further alienated the jury.

By arguing Rodriguez's brother Harry was only present the day Jose Munoz testified, the prosecutor was either assuming the jury took mental notes of who was in the gallery each day or asking the jury to take the prosecutor's word for it. The first assumption is unreasonable. The jury's attention should not be focused on the spectators to a trial. If, as seems likely, the jury was not entirely aware of who was present which days, it was encouraged to rely on the prosecutor's assertion as if it were evidence. No

objection would have been effective because there is no way to correct this information. Undersigned counsel is unaware that any record is kept of the attendees at a criminal trial.

Also not in evidence was what might have, but did not, happen to Sonia Ruiz. Yet the prosecutor urged the jury to convict on this basis. 10RP 46. The prosecutor also urged the jury to convict Rodriguez to protect the system from chaos, instead of because the evidence supported guilt beyond a reasonable doubt. 9RP 126. Even if these arguments, in isolation, would not have caused incurable prejudice, together, the repeated reliance on improper bases for conviction requires a new trial.

3. THE UNFAIR PREJUDICE CAUSED BY EVIDENCE THAT RODRIGUEZ'S SON THREATENED RUIZ SUBSTANTIALLY OUTWEIGHED THE MINIMAL PROBATIVE VALUE.

Even relevant evidence is inadmissible if the probative value is outweighed by the danger of unfair prejudice. ER 403. The test is one of balancing. Thus, if probative value is low, it may more easily be outweighed by unfair prejudice. The State argues that if prior bad acts by the defendant against the witness are admissible, then prior bad acts by someone other than the defendant must certainly be admissible because they are less prejudicial. Brief of Respondent at 43 (citing State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008); State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996); State v.

Nelson, 131 Wn. App. 106, 125 P.3d 1008 (2006)). Certainly, the prejudice may be less when the miscreant is someone other than the defendant. But that fact is not decisive for three reasons. First, the familial association between Rodriguez and his son magnified the prejudice. Second, the evidence has far less probative value when the threats are not relevant to an element of the crime. Finally, the other reasons for admitting evidence of threats to witnesses do not apply in this case.

Despite the court's limiting instruction, the jury was extremely likely to attribute the threat to Rodriguez. The State was trying to prove Rodriguez had enlisted a different family member, his brother Harry, to tamper with a different witness, Jose Munoz. Even without that prominent evidence, juries are likely to attribute acts by one family member to another.¹ Thus, the prejudice remained strong.

On the other hand, the probative value was minimal because threats by Rodriguez's son were not relevant to any element of the crimes charged. In Magers and Nelson, the reasonableness of the victim-witness's fear of the defendant was an essential element of the crime. Magers, 164 Wn.2d at 181-83; Nelson, 131 Wn. App. at 116. Therefore, the court concluded the probative value was substantial because past mistreatment of the witness by the defendant was directly relevant to that element. Magers, 164 Wn.2d at

¹ It is for this proposition alone that Rodriguez relies on State v. Kosanke, 23 Wn.2d 211, 160 P.2d 541 (1945).

181-83; Nelson, 131 Wn. App. at 116. By contrast, in this case, the misconduct at issue was committed not by Rodriguez, but by his son. The probative value is significantly diminished because Ruiz's fear of Rodriguez's son was not an element of any charged offense.

The State is correct that State v. Knight, 54Wn. App. 143, 772 P.2d 1042 (1989), did not explicitly state conditions for admitting evidence of threats against a witness. However, the court stated two reasons why it found the evidence admissible in that case, even if it were willing to overlook the lack of objection. Id. at 153-54. Those two reasons were 1) the defendant had opened the door to the evidence and 2) the threats were not attributed to the defendant. Id. Nowhere did the court state that this evidence was "clearly admissible." Brief of Respondent at 45. Neither of the Knight court's two reasons for finding the evidence admissible exists in this case. Evidence of threats by Rodriguez's son, should have been excluded because it caused substantial prejudice and lacked probative value.

4. BECAUSE RODRIGUEZ IS NOT HIS STEP-DAUGHTER'S DESCENDANT, THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE OF INCEST.

The State appears to have misinterpreted Rodriguez's argument that his incest conviction is not supported by sufficient evidence. Under the jury instructions provided by the State, Rodriguez is not guilty of incest unless he is Sonia Ruiz's descendant. CP 68. This it cannot do. Minor stepchildren

are descendants. RCW 9A.64.020. Step-parents are not. Because Rodriguez is Ruiz's step-parent, her ancestor, not her descendant, he is not guilty of incest under the jury instructions which became the law of the case. State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998).

5. THE ORDER PROHIBITING ALL CONTACT BETWEEN RODRIGUEZ AND HIS SON FOR TEN YEARS VIOLATES HIS FUNDAMENTAL CONSTITUTIONAL RIGHT TO PARENT HIS CHILD.

Washington's dependency and termination law is set up to address circumstances in which a child's health, safety and welfare requires restriction of a parent's fundamental right. See Chapter 13.34 RCW. That statutory process includes procedural safeguards mandated by the constitution such as fair notice, a meaningful opportunity to be heard, and a burden of proof higher than that required in ordinary civil proceedings. See, e.g., Santosky v. Kramer, 455 U.S. 745, 756, 769-70, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (mandating that proof of allegations in termination of parental rights cases must be by clear, cogent, and convincing evidence). In this criminal trial, Rodriguez received none of the constitutionally mandated protections afforded to parents under our dependency and termination law, and the condition of his sentence prohibiting all contact with his son for ten years violates his fundamental constitutional right to parent his child.

The “harm” to the child standard requires more than a mere judgment that a child would be better off without the parent. “For the state to delegate to the parents the authority to raise the child as the parents see fit, except when the state thinks another choice would be better, is to give the parents no authority at all.” In re Custody of Smith, 137 Wn.2d 1, 20, 969 P.2d 21 (1998), aff’d sub nom. Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). Washington’s Supreme Court “has emphasized that a state can only intrude upon a family’s integrity pursuant to its *parens patriae* right when ‘parental actions or decisions seriously conflict with the physical or mental health of the child.’” Smith, 137 Wn.2d at 18 (quoting In re Welfare of Sumey, 94 Wn.2d 757, 762, 621 P.2d 108 (1980)). State intervention “to better a child’s quality of life” is not justified. Id. at 20.

Here, the court pointed to no action or decision by Rodriguez that seriously conflicts with the welfare of his son, with the exception of the crime against his son’s mother. As the court noted in State v. Ancira, 107 Wn. App. 650, 27 P. 3d 1246 (2001), this situation does not necessitate prohibiting all contact with the child. The Ancira court conceded that witnessing domestic violence was harmful to children and the defendant was not an exemplary parent. Id. at 654. Nevertheless, it concluded that witnessing domestic violence, and even being kidnapped by the father during

dissolution proceedings, was not sufficient to justify “this extreme degree of interference with fundamental parental rights.” Id.

The State also cites State v. Berg, 147 Wn. App. 923, 198 P.3d 529 (2008), but that case is in line with Ancira and State v. Letourneau, 100 Wn. App. 424, 997 P.2d 436 (2000). No contact orders are proper when they protect the victim of the crime, or others in the same category of victim, such as the female children in Berg. 147 Wn. App. at 942. But when the parent is not charged with a crime against the child, and the child is not in the category of victims, then an order prohibiting contact with the child is not crime-related and violates the parent’s fundamental rights. See Letourneau, 100 Wn. App. at 441-42.

Last year, the Washington Supreme Court considered a no-contact order that interfered with a fundamental right in State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008). Warren was convicted of raping his two step-daughters. Id. at 31-32. On appeal, he challenged the condition of his sentence prohibiting all contact with the girls’ mother, his wife. Id. The court held the order did not violate the fundamental right to marriage based on several salient facts. Id. at 33-35.

First, protecting Warren’s wife was directly related to protecting her daughters. Id. at 33-34. Warren’s wife also needed protecting in her own right. Warren had tried unsuccessfully to prevent her from testifying against

him and had been convicted of assaulting her in the past. Id. at 34. Finally, nothing in the record suggested Warren's wife objected to the no-contact order. Id. The court concluded that "under these unique facts" the order was reasonably necessary to protect Warren's wife and thus did not violate his fundamental right to marriage.

Like Ancira's children, Rodriguez's son is not the victim of the crimes at issue. Nor does he belong to the general class of victims, as in Berg. Nor has he previously been assaulted like the wife in Warren. Supervised visitation or other restricted contact can protect Sonia Ruiz without denying Rodriguez all contact with his son. Rodriguez has no history of harming his son. Ruiz, who is also presumed to act in the best interests of her child, objected to the no-contact order. 12RP 15; see Troxel, 530 U.S. at 68 (parents who have not been demonstrated unfit must be presumed to act in best interests of their children).

The State argues Rodriguez's psychological evaluation was sufficient basis for prohibiting all contact with his son. Brief of Respondent at 53-54. But the evaluation did not assess Rodriguez's parenting or his relationship with his son. Supp. CP ____ (Sub no. 82B Mar. 6, 2009).² Mental illness alone does not justify severing the parental bond. See, e.g., In re Dependency of T.L.G., 126 Wn. App. 181, 203, 108 P.3d 156 (2005).

² Supplemental clerk's papers were designated October 26, 2009.

“It is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a ‘better’ decision.” Smith, 137 Wn.2d at 20. The sentence condition prohibiting contact with his son violates Rodriguez’s fundamental constitutional rights as a parent.

B. CONCLUSION

For the foregoing reasons and for the reasons stated in the Brief of Appellant, Rodriguez respectfully requests this court reverse and dismiss his convictions for witness tampering and first-degree incest and either grant him a new trial on the remaining convictions, or remand for resentencing.

DATED this 30th day of October, 2009.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 63166-7-1
)	
NOEL RODRIGUEZ,)	
)	
Appellant.)	

DECLARATION OF SERVICE

**RECEIVED
COURT OF APPEALS
DIVISION ONE**
OCT 30 2009

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 30TH DAY OF OCTOBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] NOEL RODRIGUEZ
DOC NO. 298017
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF OCTOBER, 2009.

x Patrick Mayovsky

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