

63718-5

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NO. 63718-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOSE SANCHEZ-FLORES

Appellant.

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION ONE
FILED

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

The Honorable Dave Needy, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

Appellant Jose Sanchez-Flores is appealing his conviction for felony violation of a no contact order, based on assault, allegedly committed against his wife Brittani Martinez, when Sanchez-Flores came over to visit on New Year's Eve 2008/2009. It was the defense theory that Sanchez-Flores did not intentionally hit his wife. Rather, on the verge of passing out drunk in bed, he flailed his arm and accidentally hit her in the nose. In support of this theory, a witness testified Sanchez-Flores' conduct could have been accidental.

In closing argument, the prosecutor argued the judge who entered the no contact order was "right," because he "knew Brittani wasn't safe around Jose Sanchez-Flores." Although defense counsel immediately objected, the court overruled counsel's objection, as well as her motion for a mistrial during the next break.

Sanchez-Flores asserts the prosecutor's argument and the court's rulings described above deprived him of his right to a fair trial, as did the court's instructions to the jury, which described Martinez as "the victim." As argued infra, Sanchez-Flores also asserts the state failed to prove an essential element of the offense, because the underlying no contact order was inapplicable.

B. ASSIGNMENTS OF ERROR

1. The state failed to prove every element of the charged crime beyond a reasonable doubt.
2. The trial court erred in admitting the underlying no contact order.
3. Prosecutorial misconduct in closing argument deprived Sanchez-Flores of his right to a fair trial.
4. The trial court erred in overruling defense counsel's objection to the prosecutor's improper closing argument.
5. The trial court erred in denying the motion for a mistrial, based on the prosecutor's improper argument.
6. The trial court improperly commented on the evidence when, in an instruction, it referred to Martinez as "the victim."
7. Cumulative error deprived Sanchez-Flores of his right to a fair trial.

Issues Pertaining to Assignments of Error

1. To prove a violation of a no contact order, the state must establish the existence of an applicable order beyond a reasonable doubt. In Sanchez-Flores' case, was the order insufficient to sustain the conviction because the mandatory legend appeared on the back of the order and after the judge's signature?

2. Whether the trial court erred in admitting the no contact order, where the state failed to prove its applicability?

3. Whether the trial court erred in overruling defense counsel's objection that the prosecutor was arguing facts not in evidence when the prosecutor argued the judge who issued the no contact order "was right," because he "knew that Brittani wasn't safe around Jose Sanchez-Flores?"

4. Whether the trial court erred in denying the motion for a mistrial, based on defense counsel's additional objection that the prosecutor was not only arguing facts not in evidence, but invoking a pseudo judicial comment on the evidence by vouching for the issuing judge's personal beliefs that Sanchez-Flores is a violent man?

5. The defense theorized Sanchez-Flores did not intentionally hit his wife, but flailed his arm involuntarily while on the verge of passing out drunk. Did the trial court comment on the evidence and remove an issue of fact from the jury's consideration when in the aggravator to-convict instruction, it described the complainant as "the victim?"

6. Whether cumulative error deprived Sanchez-Flores of his right to a fair trial?

C. STATEMENT OF THE CASE

1. Procedural Facts

Following a jury trial in Skagit County Superior Court, appellant Sanchez-Flores was convicted of felony violation of a no contact order, allegedly committed against his wife within the presence of the couple's minor son. CP 1-2, 5-6; RCW 26.50.110(4), RCW 9.94A.535(3)(h)(ii). Although the jury found the aggravator proven, the court did not find an exceptional sentence warranted under the circumstances of the case.¹ 3RP 7-8.²

2. Motion to Exclude Underlying No Contact Order

The defense moved in limine to exclude the underlying no contact order on grounds it did not comply with statutory directives and was therefore was invalid. CP 26-30; RP 11. In discovery, the defense received a one-sided copy of the order that did not contain the warnings required under RCW 10.99.040(4)(b).³ CP 27; RP 12.

¹ As the court noted at sentencing: "Clearly, the child was present; although the testimony was apparently that despite the loud voices that the child did not awaken during the incident and was not specifically aware of what happened." 3RP 6.

² This brief refers to the transcripts as follows: "RP" – jury trial on May 19, 2009; 2RP – closing arguments on May 20, 2009; and 3RP – sentencing on June 11, 2009.

³ Orders entered under RCW 10.99.040, like that concerned here (Ex 5), shall bear the legend:

By the time of trial, however, the state had obtained a certified copy of the no contact order. It was two-sided and bore the warnings on the back of the order. Ex 5; RP 12, 15-16. Defense counsel maintained it was invalid, because the warnings were not part of the text of the order appearing before the judge's signature, but merely set forth on the back with no signature line below. RP 12-13, 20; Ex 5. The court denied the motion. RP 13.

3. Trial Testimony

On New Year's Eve 2008, Sanchez-Flores was drinking vodka with Hipolito Hernandez at the Mount Vernon home where Sanchez-Flores' wife, Brittani Martinez, and their three kids lived, together with Martinez's mother, Kimberlee Coggins. RP 36-37. Hernandez was Coggins' boyfriend. RP 62, 99. He invited Sanchez-Flores to drink with him because it was New Year's Eve. RP 101. Everyone was getting along. RP 37, 90.

"Violation of this order is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest; any assault, drive-by shooting, or reckless endangerment that is a violation of this order is a felony. You can be arrested even if any person protected by the order invites or allows you to violate the order's prohibitions. You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order."

Martinez testified she went to bed the same time as the kids. RP 38. It was her expectation Sanchez-Flores would sleep upstairs with her that night. RP 55.

According to Martinez, Sanchez-Flores came up later and woke her up. Their two-year-old son was sleeping next to Martinez in the middle of the bed. RP 39. Martinez testified Sanchez-Flores was arguing with her "a little bit." RP 41. Hernandez and Coggins heard the couple arguing and came upstairs into the bedroom. RP 42-43, 64, 67.

Hernandez told Sanchez-Flores it was too late to be arguing. RP 68. Coggins testified she and Hernandez told Sanchez-Flores to: "just stop. Lay down. Pass out." RP 68-69. Sanchez-Flores lay down on the other side of the couple's son. RP 40.

Martinez testified that about two minutes passed, when "all the sudden he flung his hand, and it hit me in the nose."⁴ RP 42, 56. Martinez's nose started bleeding. RP 42. She jumped up and ran to the bathroom, where she "just washed it off."⁵ RP 42. To Hernandez, what happened "could have been an accident." RP 107.

⁴ Coggins testified it was about a minute between the time Sanchez-Flores lay down and the time he struck Martinez in the nose. RP 87.

Meanwhile, Martinez's mother ran to the home of neighbor Teresa Fryer and asked her to call 911. RP 43, 88. Teresa sent her sister Kim Fryer to go check on Martinez. RP 43. Kim returned with Martinez to Teresa's. RP 43.

Police arrived and arrested Sanchez-Flores. RP 120. An aid car also arrived, but Martinez declined treatment, because she "felt just fine." RP 58.

Police took Sanchez-Flores to the hospital, however. He had jumped out the bedroom window when police arrived. RP 120, 128. The doctor at the hospital told police that due to Sanchez-Flores' high blood-alcohol level, he would not be cleared for jail right away. Instead, the doctor would contact police when he was medically ready. RP 124.

4. Closing Argument

In closing, the prosecutor commented on the prior judge's wisdom in entering the initial no contact order:

You learned that the judge was right. We learned that the judge knew that Brittani wasn't safe around Jose Sanchez-Flores. And the wisdom of the judge's order is proving overwhelmingly –

2RP 6.

⁵ Sanchez-Flores and Martinez's son did not wake up during the incident. RP 54.

At this point, defense counsel objected the prosecutor was arguing “[f]acts not in evidence.” 2RP 6. The court overruled the objection, however, stating “this is closing argument.”

Ladies and Gentlemen, this is closing argument. You don't have your notebooks because this is not evidence. I'm going to overrule the objection but simply remind you to rely on the facts in evidence as it came in through the testimony and the exhibits.

2RP 6.

After the prosecutor's opening closing argument, outside the jurors' presence, defense counsel argued a second basis for her earlier objection and moved for a mistrial:

I have an additional objection. When Mr. Norton [the prosecutor] was speaking, I made an objection based on arguing facts not in evidence. As my college [sic] has pointed out, I think there is an additional objection to be made. That is, Mr. Norton is invoking the authority of a judicial hearing to argue that somehow it was in the judge's mind that my client is dangerous. I think it's really damaging. I don't think that there's any instruction that you can give them that will unring that bell. I think that prejudices him to a level that is unacceptable, and I would ask for a mistrial.

2RP 19.

The court appeared to agree with defense counsel, but denied the motion regardless:

THE COURT: He talked about the judge's wisdom and knowing that he was dangerous. The record will

remain as it is. I would tend to agree with Ms. Candler [defense counsel]. Any additional instructions at this point in time would simply emphasize [sic] that particular point. I did remind the jury to rely only on the evidence and testimony presented. It was not on argument, but I will deny the motion.

2RP 20.

After the verdict, the defense moved for reconsideration of the court's ruling denying the motion for a mistrial, but the court stuck to its previous ruling. CP 59-60; 3RP 2-3.

5. Special Verdict Form

Regarding the alleged aggravator, the court instructed the jury in relevant part:

To find that this crime is an aggravated domestic violence offense, each of the following two elements must be proved beyond a reasonable doubt:

(1) That the victim and the defendant were family or household members; and

(2) That the offense was committed within the sight or sound of the victim's and/or defendant's child who were under the age of 18 years[.]

CP 48 (emphasis added).

D. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT SANCHEZ-FLORES VIOLATED AN APPLICABLE NO CONTACT ORDER.

A charge of violation of a no contact order must be based on an "applicable" order. State v. Miller, 156 Wn.2d 23, 31-32, 123 P.3d 827 (2005). A no contact order is applicable only if it contains the mandatory legend set forth in RCW 10.99.040. RCW 10.99.045(5); Miller, 156 Wn.2d at 31; State v. Marking, 100 Wn. App. 506, 511, 997 P.2d 461, review denied, 141 Wn.2d 1026 (2000), overruled on other grounds by Miller, 156 Wn.2d at 31. The question of an order's applicability is one of law to be decided as a threshold matter by the trial court. Miller, 156 Wn.2d at 31.

Sanchez-Flores does not challenge the adequacy of the contents of the information printed on the back side of the Skagit County District Court no contact order, but rather its placement. General Rule 14 generally forbids putting information on the backside of a court document. According to the rule, the writing or printing contained in "[a]ll pleadings, motions, and other papers filed with the court . . . shall appear on only one side of the page." GR 14(a). This "one side only" rule applies "to all proceedings in all

courts" in Washington unless otherwise specified by court rule. GR 14(c). GR 14 applies specifically to criminal courts of limited jurisdiction. CrRLJ 1.5.

Orders are "papers filed with the court." See CR 54(a)(2); Seattle-First Nat. Bank v. Marshall, 16 Wn. App. 503, 508, 557 P.2d 352 (1976) ("Every direction of a court or judge, made or entered in writing, not included in a judgment, is denominated an order."), review denied, 89 Wn. 2d 1007 (1977). The prohibition on double-sided documents therefore applies to orders, rendering the purportedly violated order inapplicable in Sanchez-Flores' case.

Application of GR 14 should apply with even greater force to domestic violence no-contact orders given that violation of the terms of such an order can result in a felony conviction. A felony conviction is obviously a more onerous consequence than is a waiver of the right to sue for money or other civil damages. Yet, in contracts cases, exculpatory agreements are enforceable only if they are conspicuous and do not violate public policy. Chauvlier v. Booth Creek Ski Holdings, Inc., 109 Wn. App. 334, 339, 35 P.3d 383 (2001).

For example, a disclaimer that appeared in middle of a golf cart rental agreement was not sufficiently conspicuous to excuse

the city from liability from injuries caused when the cart crashed. Baker v. City of Seattle, 79 Wn.2d 198, 202, 484 P.2d 405 (1971). In contrast, this Court found sufficiently conspicuous a release that was placed apart from other language in a ski resort agreement, used capital letters for important words, and contained explicit waiver language just above the signature line. Chauvlier, 109 Wn. App. at 342. In Nelson v. Southland Corp.,⁶ an employer's disclaimer that appeared at the beginning of the statement of corporate policies and procedures, and similar disclaimers that appeared in a variety of documents, at least two of which were signed by the employee directly below the disclaimer, were found to be effective as a matter of law. Nelson, 78 Wn. App. at 28-32 & n.2.

The order Sanchez-Flores allegedly violated did not conspicuously display the legend. Although defense counsel argued the order was invalid on such grounds (RP 11-20), the court held the order was sufficient because Sanchez-Flores appeared to have signed it in court, and because it contained all the necessary statutory warnings, albeit on the backside of the document. RP 22. The court's ruling erroneously disregarded GR 14's requirement of

⁶ 78 Wn. App. 25, 894 P.2d 1385 (1995).

one-sided documents. The placement of the legend on the reverse side rendered it inconspicuous. Because the import of the order appeared on the front, Sanchez-Flores would have no cause to even look at the back. The order was therefore invalid.

Sanchez-Flores acknowledges that in certain circumstances, substantial compliance with statutory requirements for legal documents has been sufficient to validate a document. An example is Kim v. Lee,⁷ a case that addressed compliance with laws governing the entry of civil judgments. Kim involved an interpretation of RCW 4.64.030(2)(a), which mandates that a succinct information summary appear on the first page of each judgment.

The summary in Kim began on the first page but spilled over to the second because of the length of the caption. Kim, 102 Wn. App. at 590-91. This Court rejected a challenge to the summary's continuation onto the second page of the judgment. Kim, 102 Wn. App. at 591. Applying the doctrine of substantial compliance with a statutory requirement, this Court found the judgment was effective in substantial part because the judgment summary began on the first page of the judgment. Kim, 102 Wn. App. at 591-92.

Although the pertinent statute in Sanchez-Flores' case, RCW 10.99.040, does not require the legend to appear on the first page of the order, GR 14 does prohibit two-sided court documents. Unlike in Kim, where at least part of the summary appeared on the required front page, the Skagit County District Court did not substantially comply with GR 14 or comply with the rule at all. Instead, the court disregarded the rule by placing the legend and other important information regarding the no contact order wholly on the reverse side of the order itself. The doctrine of substantial compliance therefore does not excuse the court's violation of the rule here.

Sanchez-Flores also acknowledges that in other circumstances, courts have been willing to permit the incorporation into a legal document information contained in other documents or elsewhere in the same document by specific reference to the information. See State ex rel. Bloom v. Superior Court, 171 Wash. 536, 539, 18 P.2d 510 (1933) (trial court properly incorporated auditor's report into proposed findings of fact and conclusions of law).

⁷ 102 Wn. App. 586, 590, 9 P.3d 245 (2000), reversed on other grounds, 145 Wn.2d 79, 31 P.3d 665, 43 P.3d 1222 (2001).

Incorporating information by reference to attached appendices is a common characteristic of judgments and sentences in Washington criminal cases. In Sanchez-Flores' case, for example, the judgment and sentence form document gave the court the option of incorporating by reference additional criminal history "attached in Appendix 2.2" and additional current offenses "attached in Appendix 2.3." CP 62-63. These references by incorporation appear in the main text of the "criminal history" and "sentencing data" sections of the judgment and sentence form document. They also appear above Sanchez-Flores' signature. CP 67.

But the district court judge did not incorporate the mandatory legend or any other information from the reverse side of the no-contact order into the order itself. In fact, the front side of the order makes no reference to the information contained on the backside. The order is thus insufficient for this reason as well.

To summarize, GR 14 applies to the no contact order, the legend is not conspicuous because it appears after the judge's signature and on the reverse side of the order, and the "order" portion of the document makes no reference to the reverse side. For all of these reasons, the no contact order Sanchez-Flores

purportedly violated is not valid. Under Miller, the order is therefore inapplicable to the charged offense. Without an applicable order, the state lacked sufficient evidence to sustain the charge. This Court should reverse the judgment and remand for dismissal with prejudice. State v. Nam, 136 Wn. App. 698, 707, 150 P.3d 617 (2007).

2. PROSECUTORIAL MISCONDUCT DEPRIVED SANCHEZ-FLORES OF HIS RIGHT TO A FAIR TRIAL.

Prosecutorial misconduct during closing argument deprived Sanchez-Flores of his right to a fair trial. In closing, the prosecutor argued the jury learned the judge who issued the no contact order was “right,” because he “knew Brittani wasn’t safe around Jose Sanchez-Flores,” and that the wisdom of the judge’s order was overwhelmingly proven. 2RP 6. Not only was the prosecutor arguing facts not in evidence, but he was also vouching for the personal feelings of the issuing judge, essentially instilling a pseudo judicial comment that Sanchez-Flores is a violent man. The trial court erred in overruling defense counsel’s timely objection and in denying the subsequent motion for a mistrial.

A prosecutor is a quasi-judicial officer of the court, charged with the duty of insuring that an accused receives a fair trial. State

v. Boehning, 127 Wn. App. 511, 111 P.3d 899 (2005). In order to establish prosecutorial misconduct, a defendant must show that the prosecutor's conduct was improper and prejudiced his right to a fair trial. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Prejudice is established where there is a substantial likelihood the instances of misconduct affected the verdict. Dhaliwal, 150 Wn.2d at 578.

This Court reviews a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. Dhaliwal, 150 Wn.2d at 578. A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). However, a prosecutor may not make statements that are unsupported by the evidence and prejudice the defendant. State v. Jones, 71 Wn. App. 798, 808, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018, 881 P.2d 254 (1994).

Division Two's decision in State v. Boehning, 127 Wn. App. 511, provides an example of the type of misconduct at issue here. Boehning was charged with three counts of first degree rape of a

child or alternatively, three counts of first degree child molestation for acts allegedly committed against his former foster child, H.R. Boehning, 127 Wn. App. at 515. At trial, H.R. described three acts of child molestation. Her current foster mother (Tomlinson), a counselor (Price) and a detective (Holladay) each testified H.R. had disclosed the abuse to them, although the court excluded the substance of H.R.'s reported out-of-court statements. Boehning, 127 Wn. App. at 515-16, 521. At the close of the state's case, the state dismissed the three rape charges and amended the information to charge only the molestation charges. Boehning, 127 Wn. App. at 517.

In closing argument, however, the prosecutor argued inter alia:

[H.R.] was not able, the [s]tate submits, to talk with this group of strangers as well as she was able to do it one-on-one in the past with somebody like Detective Holladay. There were some other charges, those charges aren't present anymore because she didn't want to talk about this as much as she was willing to talk about it before.

Boehning, 127 Wn. App. at 519.

In response to Boehning's prosecutorial misconduct claim, the state argued the prosecutor was merely raising reasonable inferences from the evidence. Because the jury was aware that

Boehning had been charged with three counts of rape and that those charges were dropped, the state posited the jury could then reasonably infer that H.R. had initially disclosed information supporting rape charges, but was not willing or able to do so at trial. Boehning, 127 Wn. App. at 521-22.

Division Two rejected this rationalization, reasoning that the prosecutor's action of dropping the rape charges was not "evidence:"

That the prosecutor dropped the three rape charges was not "evidence" from which reasonable inferences and arguments about the molestation charges could be made. "[E]vidence" is "[s]omething (including *testimony, documents, and tangible objects*) that tends to prove or disprove the existence of an alleged fact." BLACK'S LAW DICTIONARY 595 (8th ed. 2004) (emphasis added). Moreover, the dismissed rape charges were wholly irrelevant to the State's case, and no reasonable inference regarding the content of H.R.'s out-of-court statements flows from the three dismissed rape counts or her reluctance to describe the abuse at trial. The prosecutor was not raising reasonable inferences and arguments based on the evidence at trial.

Boehning, 127 Wn. App. at 522. The court concluded that the prosecutor's argument was an invitation to determine guilt based on improper grounds, i.e. guilt on the dismissed counts, which required reversal. Boehning, 127 Wn. App. at 522.

Just as the prosecutor's conduct in dismissing charges in Boehning was not "evidence," the prosecutor's speculation about the issuing judge's personal beliefs in this case likewise was not "evidence." It was not based on testimony, documents or tangible objects. On the contrary, it was sheer speculation, as the issuing judge did not testify. And significantly, there is no requirement that the judge issuing a pre-disposition no contact order under RCW 10.99.040, as was the case here, find there is any likelihood of future violence between the parties.⁸ There was simply no basis in law or fact for the prosecutor to vouch for the issuing judge's reasoning for entering the no contact order.

Whereas the prosecutor in Boehning made statements that weren't supported by the evidence to argue Boehning was guilty of dismissed rape charges, the prosecutor here made statements that weren't supported by the evidence to argue Sanchez-Flores has a propensity for violence. The misconduct here is just as flagrantly

⁸ RCW 10.99.040(2)(a) provides:

Because of the likelihood of repeated violence directed at those who have been victims of domestic violence in the past, when any person charged with or arrested for a crime involving domestic violence is released from custody before arraignment or trial on bail or personal recognizance, the court authorizing the release may prohibit that person from having any contact with the victim.

Emphasis added.

improper as that in Boehning. Defense counsel's objection that the prosecutor was arguing facts not in evidence was entirely appropriate and should have been sustained.

But as defense counsel also pointed out during the break, there was yet an additional problem with the prosecutor's argument: "Mr. Norton [the prosecutor] is invoking the authority of a judicial hearing to argue that somehow it was in the judge's mind that my client is dangerous." 2RP 19. Stated another way, the prosecutor was injecting a pseudo judicial comment on the evidence into the case.

Under Article 4, section 16 of the Washington Constitution, a judge is prohibited from conveying to the jury his personal opinion about the merits of the case. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Any remark "that has the potential effect of suggesting that the jury need not consider an element of an offense" could qualify as a judicial comment. Levy, 156 Wn.2d at 721. Similarly, a statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement. State v. Lane, 125 Wash.2d 825, 838, 889 P.2d 929 (1995).

The main issue in the case was whether Sanchez-Flores intentionally hit his wife or merely flung his arm in a drunken stupor and inadvertently hit her. The fact (expressed through the prosecutor) that the judge “knew that Brittani was not safe around Jose Sanchez-Flores” more than suggests the judge’s evaluation of the disputed issue, *i.e.* whether Sanchez-Flores intentionally hit his wife. The statement shows the judge believes Sanchez-Flores is a wife-beater who intentionally hits his wife and must therefore have done so on this occasion as well.

Obviously, the judge who issued the no contact order here cannot be said to have commented on the evidence. But by arguing to the jury that they learned that the judge was “right,” that the judge “knew Brittani wasn’t safe around Jose Sanchez-Flores,” the prosecutor injected what jurors would perceive to be the judge’s personal feelings. Because of the prosecutor’s role in society, this pseudo comment on the evidence was just as prejudicial as if it came from the issuing judge. “[T]he prosecutor’s opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government’s judgment rather than its own view of the evidence.” United States v. DiLoreto, 888 F.2d 996, 999 (3rd Cir. 1989) (citing Berger v. United States, *supra*, 295 U.S. at 88-89, and

quoting United States v. Young, 470 U.S. 1, 18, 84 L. Ed. 2d 1, 105 S. Ct. 1038 (1985)).

The court's instruction that "this is closing argument" and reminder to "rely on the facts in the evidence as it came in through the testimony and the exhibits" did nothing to obviate the prejudice resulting from the prosecutor's argument. 2RP 6. It is highly unlikely any juror would know that a RCW 10.99.040 pre-disposition no contact order requires no prediction of future violence. Indeed, such might seem illogical to a layperson. Accordingly, jurors might consider the prosecutor's argument a reasonable inference from the fact of the no contact order itself. The court's instruction did nothing to prevent the jury from making this inference.

Indeed the court seemed to recognize the severity of the potential prejudice when ruling on the motion for a mistrial:

He talked about the judge's wisdom and knowing that he was dangerous. The record will remain as it is. I would tend to agree with Ms. Candler. Any additional instructions at this time would simply emphasis [sic] that particular point. I did remind the jury to rely only on the evidence and testimony presented. It was not on argument, but I will deny the motion.

2RP 20.

In light of counsel's additional objection, the trial court erred in denying the motion for a mistrial. See e.g. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). As recounted above, the nature of the prosecutor's misconduct was serious. Not only did he argue facts not in evidence, but he injected a pseudo judicial comment favoring the state's theory into the case. The issuing judge's opinion was not cumulative of any evidence, and the court's instruction to the jury was entirely insufficient to ameliorate the resulting prejudice. And as the judge recognized, any further instruction would have exacerbated the error. At that point, the only remaining option to ensure Sanchez-Flores received a fair trial was to grant a mistrial. See e.g. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994) (discussing criteria for granting a mistrial); Escalona, 49 Wn. App. at 254 (same). The trial court's failure to do so requires reversal.

3. THE TRIAL COURT IMPERMISSIBLY COMMENTED ON THE EVIDENCE WHEN IT INSTRUCTED THE JURY MARTINEZ WAS "THE VICTIM."

The trial court commented on the evidence when it referred to Martinez in the aggravator to-convict instruction as "the victim." CP 48. Although the jury would have had to find Sanchez-Flores guilty before deciding whether the aggravator was proven, the court

read the jury instructions to the jury before the jury began its deliberations. 2RP 5. Accordingly, the jury was instructed Martinez was “the victim,” according to the court, before it found Sanchez-Flores guilty of the underlying offense. As a result, the state cannot prove the comment in the instruction was harmless.

As recounted in the previous section, under Article IV, § 16 of our constitution, a judge is prohibited from conveying to the jury his personal opinion about the merits of the case or from instructing the jury that a fact at issue has been established. Levy, 156 Wn.2d at 721. Whether an instruction is legally correct is reviewed de novo. State v. Becklin, 163 Wash.2d 519, 525, 182 P.3d 944 (2008).

Any remark “that has the potential effect of suggesting that the jury need not consider an element of an offense” could qualify as a judicial comment. Levy, 156 Wn.2d at 721. Similarly, a statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement. State v. Lane, 125 Wash.2d 825, 838, 889 P.2d 929 (1995) (quoting Wash. Const. art. IV, § 16). Reversal is required unless the state shows that the defendant was not prejudiced or the

record affirmatively shows that no prejudice could have resulted. Levy, 156 Wn.2d at 723.

It appears there is only one published Washington decision where the court's reference to the complainant as "the victim" was addressed. State v. Alger, 31 Wn. App. 244, 640 P.2d 44 (1982). During Alger's trial for statutory rape, the jury was brought in for the court to read a stipulation entered by the parties, stating: "that Mr. Alger's age is 36, and that he has never been married to the victim[.]" Alger, 31 Wn. App. 248. Although Alger moved for a mistrial later in the trial, it was denied.

Because it was a stipulation, the appellate court nearly declined to reach the issue, reasoning defense counsel had come close to inviting the error. Alger, 31 Wn. App. at 249. Ultimately, the court found the single reference harmless:

Although neither encouraged nor recommended, we conclude that the one reference to "the victim" by the trial judge, did not, under the facts and circumstances of this case, prejudice the defendant's right to a fair trial by constituting an impermissible comment on the evidence.

Alger, 31 Wn. App. at 249.

The facts and circumstances of this case, however, compel a different conclusion. In contrast to the one verbal reference to the

complainant as the victim at issue in Alger, the reference to “the victim” by the trial judge in this case was contained in its charge to the jury. Under such circumstances, other jurisdictions have found the reference error:

Veteto also believes the trial court commented on the weight of the evidence in paragraph nine by failing to use the word “alleged” to describe the victim. The sole issue of Veteto’s case was whether he committed the various assaults on A.L. Referring to A.L. as the victim instead of the alleged victim lends credence to her testimony that the assaults occurred and that she was, indeed, a victim. This situation is similar to a case where consent is the sole issue in a rape trial. The Eastland Court of Appeals has held in a rape case involving consent that a reference to the complainant as a victim in the charge to the jury implied that the sexual encounter was not consented to and was thus an improper comment on the weight of the evidence by the court. Talkington v. State, 682 S.W.2d 674, 675 (Tex. App. – Eastland 1984, pet. Ref’d).⁹ Thus, the trial court also commented on the weight of the evidence by failing to refer to A.L. as the “alleged” victim.

Veteto v. State, 8 S.W.3d 805, 816-17 (Tex. App. 2000), abrogated on other grounds by, State v. Crook, 248 S.W.3d 172 (Tex. App. 2008); see also State v. Molnar, 79 Conn. App. 91, 829 A.2d 439 (2003) (Conn. App. 2003) (any impermissible effect of use of the term victim to refer to the complainant was ameliorated by the trial

⁹ In Talkington, the court held court’s reference to complainant as “victim” in its charge to the jury constituted reversible error. Talkington, 682 S.W.2d at 675.

court's twice stated instruction it was up to the jury to decide if the complaining witness was a victim).

The facts of this case are markedly similar to those in Veteto. The main issue in the case was whether Sanchez-Flores intentionally hit his wife or whether it happened accidentally. The judge's opinion that Martinez was "the victim" expressed the judge's opinion that Sanchez-Flores' actions were intentional. Moreover, the instruction was read to the jury before it began deliberations. As a result, the state cannot prove the comment in the instruction was harmless.

4. CUMULATIVE ERROR DEPRIVED SANCHEZ-FLORES OF HIS RIGHT TO A FAIR TRIAL.

The cumulative error doctrine applies to cases in which "there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); State v. Coe, 101 Wn.2d 772, 789 684 P.2d 668 (1984).

Not only did the prosecutor argue facts not in evidence, but he vouched for the personal feelings of the issuing judge, injecting a pseudo judicial comment that Sanchez-Flores is a violent man

around whom his wife is not safe. The prejudice resulting from the prosecutor's misconduct was magnified by the trial court's own instruction stating its opinion that Martinez was indeed a victim. In light of the defense theory – that Sanchez-Flores acted unintentionally – the judges' opinions were particularly prejudicial. Assuming each error alone does not compel reversal, their combination does.

D. CONCLUSION

For the reasons stated herein, this Court should reverse Sanchez-Flores' conviction.

Dated this 28th day of December, 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. 63718-5-1
)	
JOSE SANCHEZ-FLORES,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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 28TH DAY OF DECEMBER 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] EDWIN NORTON
SKAGIT COUNTY PROSECUTOR'S OFFICE
COURTHOUSE ANNEX
605 S. THIRD
MOUNT VERNON, WA 98273

- [X] JOSE SANCHEZ-FLORES
**NO LONGER IN CUSTODY
WAS @ SKAGIT COUNTY JAIL
ATTEMPTING TO LOCATE**

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF DECEMBER 2009.

x *Patrick Mayovsky*