

67114-6

67114-6

No. 67114-6-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JAMEL ADAMS,

Appellant.

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

The Honorable James D. Cayce

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting irrelevant and prejudicial evidence of abuse allegedly inflicted upon the complainant by the accused's mother.

2. The sentencing condition prohibiting contact with minors was not a reasonable crime-related prohibition.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Principles of due process entitle an accused person to a fair trial. Under ER 403, evidence must be excluded if its probative value is substantially outweighed by its prejudicial effect. Although defense counsel did not make any issue of the complainant's delay in reporting alleged sexual abuse by Adams, the State introduced evidence that the complainant was abused and neglected by Adams' mother to provide "context" for the allegations and explain the "course of the investigation" by child protective services. But neither of these was pertinent to the charges and the evidence was likely to inflame the jury's sensibilities in a case that depended on the credibility of the complainant. Should this Court conclude the admission of the evidence deprived Adams a fair trial?

(Assignment of Error 1)

2. Although a sentencing court has the authority to order crime-related prohibitions, such prohibitions must be directly related to the circumstances of the crime. Further, where a sentencing condition impinges upon a fundamental constitutional right, the condition must be shown to be reasonably necessary to accomplish the essential needs of the State and public order. Where it was not shown that L.S.'s minor status was a factor in the crime's commission, should this Court strike a sentencing condition prohibiting Adams from having contact with minors because it is not a reasonable crime-related prohibition? (Assignment of Error 2)

### C. STATEMENT OF THE CASE

Jamel Adams is the youngest son of Sandra Sly, who for many years operated a licensed foster home in western Washington. L.S., born November 27, 1990, and her sister started living in Sly's home when L.S. was seven years old. Trial RP 181.<sup>1</sup> When L.S. was eight or nine years old Sly adopted both girls. Trial RP 183.

On November 30, 2007, seventeen-year-old L.S. and her sister were removed from the Sly home. When she was questioned

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<sup>1</sup> Consecutively numbered transcripts of pretrial and trial proceedings are referenced herein as "Trial RP" followed by page number. Other transcripts are referenced by date followed by page number.

by Federal Way police detective Doug Deyo, L.S. said that things in Sly's home were fine and that "it was fun." Trial RP 90. After that interview she was placed in a receiving home in Kirkland, where two staff persons from the Department of Social and Health Services ("DSHS"), Steve Spero and Geri Ishii, attempted to interview her. Trial RP 92, 135. They were unsuccessful, however, because the day after being placed in the home, L.S. ran away back to the Sly home. Trial RP 135, 204.

Spero visited the Slys, who denied knowing L.S.'s whereabouts. Trial RP 136. L.S. later claimed that the Slys ordered her to hide in a crawl space behind a closet in the upstairs bathroom when DSHS personnel came to look for her. Trial RP 206.

On December 11, 2007, Federal Way police officer Shon Lunt responded to a welfare check at a Fred Meyer in a Federal Way. Trial RP 79-80. L.S. was there, having run away from the Sly home. She told Lunt that she had been sexually abused by Jamel Adams between 30 and 100 times, and that the last time had been the previous weekend. Trial RP 82. Lunt ascertained that Deyo was assigned to the case, and Deyo responded to the precinct to interview L.S.

During Deyo's interview of L.S., she reported two alleged instances of abuse. She stated that the last time had been the weekend before she was picked up by police, during a family trip to Portland. Trial RP 96, 109. She also stated that there had been another incident that summer. Trial RP 108. L.S. said that she had difficulty remembering the incident in the summer because it had occurred "a long time ago." Trial RP 110. She described a biting incident, but Deyo could not tell whether this had occurred in a sexual context. Trial RP 112.

Deyo arranged a subsequent interview at the King County Prosecutor's Office, which took place on December 19, 2007. Trial RP 101. L.S. described an incident of alleged sexual abuse that occurred when she was "picking" Adams' feet. Trial RP 116. She stated during this interview that this incident happened when she was fifteen years old, a "fact" she did not mention during Deyo's interview of her on December 11, 2007. L.S. also said that during the "toe-picking" incident, Adams was unable to penetrate her because she was squirming too much. Trial RP 117.

L.S. also stated that after the "toe-picking" incident, Adams did not touch her again until the trip to Portland. Trial RP 119. Indeed, when specifically pressed to describe the "second time" a

sexual advance had been made by Adams towards her, L.S. stated this was the Portland incident. Trial RP 129-30.

Spero and Ishii interviewed L.S. on December 31, 2007. During this interview, L.S. again identified only two instances of alleged abuse. She did not describe the first incident. Trial RP 177. The second incident of alleged abuse occurred in Oregon, during which time L.S. claimed she was locked in a room. Trial RP 165-66.

Adams initially was charged with one count of attempted rape in the third degree.<sup>2</sup> CP 3. During a defense interview of L.S. in December 2010, however, L.S. for the first time disclosed a third alleged incident. Trial RP 245. She claimed that when she returned to the Sly home in October 2007 after having been placed in the Kirkland receiving home, Adams attempted to have sexual intercourse with her while she was sitting on the couch downstairs, watching television. Trial RP 208. She alleged that Adams sat her down on top of his penis and when she struggled he bit her. Trial RP 213-14. She said she “kinda, not really” felt his penis go inside her. Trial RP 215.

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<sup>2</sup> L.S.’s sister alleged that Adams’ brothers, James Sly and Curtis Adams Jr., abused her on multiple occasions. Although charged in the same information as Adams, their trial was severed from Adams’ case and these allegations are not addressed further in this appeal. CP 154.

She also added substantial detail to her account of the “toe-picking” incident. She claimed that Adams regularly made her pick his toes with tweezers, but on that this occasion, in his bedroom, he reached around, felt her bottom, and then forced her onto the bed and had intercourse with her. Trial RP 195-201.

L.S. claimed that she had lied to Deyo when she denied any sexual misconduct the very first time she was interviewed because she was scared of what would happen to her if she told the truth. Trial RP 203-04. L.S. said that she had initially denied sexual intercourse occurred during the “toe-picking” incident because she felt uncomfortable talking about it, even though during the same interview she freely discussed an alleged sexual encounter in Portland. Trial RP 260, 271.

In response to the new allegation, the State moved to amend the charges against Adams to add a count of rape in the third degree, specifying that the attempted rape now referred to the alleged incident on the couch, whereas the rape referred to the “toe-picking” incident. Trial RP 9, 15; CP 150-53.

Adams proceeded to a jury trial on the charged offenses. Prior to trial, Adams moved to prohibit L.S. from testifying about alleged physical and emotional abuse by Sandra Sly, on the bases

that (1) the evidence was not relevant to whether Adams had committed the charged offenses, (2) the evidence would inappropriately dispose the jury to be sympathetic towards L.S., and (3) the jury might be biased against Adams because of the evidence of this abuse. Trial RP 35. The court nevertheless ruled that the evidence would be admissible at Adams' trial. Trial RP 39. The court granted Adams a standing objection to the evidence. Trial RP 41.

The prosecutor framed her opening statement in terms of the abuse inflicted by Sly, linking this abuse to the alleged abuse by Adams. Trial RP 53-60. L.S. herself testified that Sly had started physically abusing her almost immediately after she adopted her. Trial RP 183. She testified that following the adoption, Sly began to beat her with a belt, her hands, or a switch. Trial RP 184-85. She said that for "time-outs" Sly would make her squat against a wall with her hands in front of her, sometimes for an hour or more. Trial RP 186. L.S. said that on one occasion, she was unable to hold this position and Sly threw a metal can at her, cutting her above her eyebrow. Id. She said that Sly did not allow her to go out and play and instead she had to help take care of the foster children in the home. Trial RP 190. She said that when she did not care for the

foster children she would get “a whooping.” Id. She explained that the “toe-picking” incident happened in part because Sly used to make her pick her toes, and Adams followed suit. Trial RP 195-96. L.S. did not otherwise testify that Adams was aware of Sly’s abuse.

In closing argument the State characterized L.S.’s life a “living hell” “full of secrets, full of pain, full of abuse.” Trial RP 313. She contended that Adams, who “was there through the years of abuse and pain she was put through,” “knew the fear she felt towards their mother,” and “knew she would not say anything.” Id. She argued that “with that knowledge, he seized an opportunity and became part of her secrets, part of her pain, and part of her hurt.” Id. Although Adams had not made an issue of L.S.’s delayed reporting during the trial, the prosecutor also argued that Sly’s abuse explained why L.S. had not disclosed the abuse sooner. Trial RP 319.

The jury convicted Adams of both counts as charged. CP 221-22. Adams appeals. CP 223.

#### D. ARGUMENT

##### 1. THE ADMISSION OF PREJUDICIAL AND IRRELEVANT EVIDENCE OF ABUSE ALLEGEDLY INFLICTED BY L.S.'s ADOPTIVE MOTHER DENIED ADAMS THE FUNDAMENTALLY FAIR TRIAL GUARANTEED BY DUE PROCESS.

a. The Sixth and Fourteenth Amendments guarantee an accused person a fair trial. Principles of due process entitle an accused person to a fair trial, and only a fair trial is a constitutional trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The erroneous admission or misuse of evidence may deny an accused person a fair trial. Dudley v. Duckworth, 854 F.2d 967, 970 (7th Cir. 1988); see also, Pulley v. Harris, 465 U.S. 37, 41, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984); State v. Fisher, 165 Wn.2d 727, 757, 202 P.3d 957 (2010).

b. The evidence of Sly's abuse of L.S. was erroneously admitted and denied Adams a fair trial. Evidence is not admissible unless it is relevant. ER 401, ER 402. And even relevant evidence must be excluded if its probative value is substantially outweighed by its prejudicial effect. ER 403. "When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists." Salas v. Hi-

Tech Erectors, 168 Wn.2d 664, 671, 230 P.3d 583 (2010) (citing State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995)).

Evidentiary rulings are reviewed for an abuse of discretion. A trial court necessarily abuses its discretion when it bases a ruling on an erroneous view of the law. In re Detention of Pouncy, 168 Wn.2d 382, 394, 229 P.3d 698 (2010).

In Fisher, the defendant was prosecuted for alleged sexual molestation of his stepdaughter, Melanie. Over defense counsel's objection, the trial court permitted the State to introduce evidence that Melanie had witnessed Fisher engaging in misconduct against – i.e., slapping, spanking, hitting and kicking – his biological son and other stepchildren. 165 Wn.2d at 734. Although the trial court recognized that the evidence was prejudicial, the court reasoned that the evidence would be relevant if the defense made an issue of Melanie's delayed reporting of the abuse.<sup>3</sup> Id. The trial court offered to issue a limiting instruction, but defense did not request it and none was given. Id.

During the trial, Fisher's defense counsel did not make an issue of the delayed reporting. Id. at 735-36. Nevertheless, the prosecutor referenced the abuse extensively in opening statements

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<sup>3</sup> Melanie alleged that the abuse occurred in 2003, when she was 12, but did not report it to her mother until six years later. 165 Wn.2d at 733.

and elicited substantive testimony regarding the abuse from Melanie, from the other stepchildren, and from the mother of Fisher's biological children. Id. at 735-37.

On review, the Supreme Court concluded that the trial court identified a proper purpose for admitting the evidence – specifically, to explain the delayed reporting if the defense made an issue of it at trial. Id. at 745. The relevancy of the evidence was thus conditioned on the defense posture at trial. Id. However, not only did the State not wait for defense to raise the issue, the State did not abide by the limitation set by the trial court upon the permissible use of the evidence. Id. at 746-48. The Court held that this misuse of the evidence denied Fisher a fair trial. Id. at 748-49.

In this case, Adams' defense counsel made a point of alerting the trial court that he did not intend to make an issue of L.S.'s delayed reporting. Trial RP 31. Defense counsel stated that he was even willing to agree to stipulate to exclude evidence of L.S.'s initial denial in October 2007, and instead start with L.S.'s statements to Officer Lunt on December 10, 2010. Id. Defense counsel contended, "[the prosecutor's] sort of creating her own issue by bringing in things she then has to explain." Id.

Defense counsel noted,

[T]here's an old saying: The acorn does not fall far from the tree. And I'm concerned that when the jury hears this evidence about Sandra Sly and all the evidence about all the kids being taken out by CPS, I'm very concerned that they're going to sort of look at him as he's guilty because of the misdeeds of his mom, or the alleged misdeeds of his mom.

Trial RP 32-33.

The prosecutor responded with the claim that the evidence provided "context" as well as explaining "the course of the investigation." Trial RP 33. The prosecutor also contended that Sly's abuse was "part of the State's theory as to why [L.S.] was victimized, and why she was picked as a victim in this case." Id.

Notwithstanding the holding of Fisher and defense counsel's assurance that he would not make an issue of delayed reporting, the trial court insisted, "whether you argue it or not, it's still evidence in the case that [the jury] can consider." Trial RP 37. The trial court also refused defense counsel's request to prohibit the prosecutor from focusing on Sly's abuse in her closing argument. Trial RP 39-40. The court stated, "I think if she does that, it's a pretty good argument that favors your client. She's not focusing on this case because she's got a lot of proof problems in this case so she's focusing on mom's case." Id.

The admission of the evidence was prejudicial error. Neither the “context” of the report nor the “course of the investigation” was relevant to any material issue at trial. Nor, as in Fisher, did defense make any issue of L.S.’s delay in reporting the alleged abuse by Adams.

The court cavalierly concluded that Adams was not likely to be prejudiced by the introduction of the evidence. But even though there was no proof that Adams was aware of Sly’s alleged abuse, the State argued that Adams knew of L.S.’s circumstances and targeted her because he believed she would be easily victimized.

The evidence was in no way relevant towards whether Adams had committed the charged offenses. Since defense counsel did not make any issue of L.S.’s delay in reporting the alleged offenses, it was not relevant to explain this circumstance. Because there was no evidence that Adams was aware of Sly’s alleged abuse of L.S., it was not probative of the State’s “theory” that Adams took advantage of L.S.’s situation. The evidence was inadmissible, and should have been excluded.

c. The trial court’s reliance on *Grant* and *Magers* was misplaced. The court asserted that two cases, *State v. Magers*, 164 Wn.2d 174, 189 P.3d 126 (2008) and *State v. Grant*, 83 Wn.

App. 98, 920 P.2d 609 (1996), supported its ruling to admit the evidence. The court was mistaken.

In Magers, the defendant was charged with assault in the second degree (among other offenses). 164 Wn.2d at 182. Although the alleged victim apparently reported the assault to the officer who arrested Magers, she subsequently provided two letters to the prosecutor's office recanting this statement. 164 Wn.2d at 179-80. Over defense objection, the court permitted the State to introduce evidence that Magers had previously been "in trouble", that he had recently been released from jail, and that a previous domestic violence conviction resulted in a no-contact order being entered. Id. at 180.

The Court reasoned that the admission of this evidence was relevant to prove an element of the charged offense. Id. at 182. With regard to the assault charge, the jury was instructed, in part, that:

An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

Id. at 183 (emphasis added). Because of this instruction, the victim's reasonable fear was an issue in the case and the Court found the evidence properly admitted.<sup>4</sup> Id.

The Court also concluded that the evidence was admissible on the question of the victim's credibility.<sup>5</sup> 164 Wn.2d at 185-86. However, the Court's holding was far narrower than the trial court appeared to realize. The Court in Grant had concluded that evidence of the defendant's prior abuse was probative of the victim's credibility and helped explain why she told conflicting stories, because victims of domestic violence will minimize abuse in order to placate their abusers and avoid further violence. Grant, 83 Wn. App. at 106-07.

The Supreme Court adopted this holding only with respect to prior acts of domestic violence between the defendant and the victim. Magers, 164 Wn.2d at 185-86. The Court's narrow holding reads: "prior acts of domestic violence, involving the defendant and

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<sup>4</sup> Only a plurality of the Court joined in this part of the opinion. Where there is no majority agreement as to the rationale for a decision, "the holding of the court is the position taken by those concurring on the narrowest grounds." Lauer v. Pierce County, 157 Wn. App. 593, 600, 283 P.3d 539 (2010). A plurality opinion has limited precedential value and is not binding on other courts.

<sup>5</sup> Concurring justices Madsen and Fairhurst joined in this part of the opinion.

the crime victim, are admissible in order to assist the jury in judging the credibility of a recanting victim.” Id. at 186 (emphasis added).

Here, however, the prior alleged abuse did not concern Adams, but rather his mother. The allegations at trial bore no relation to this abuse, and the inference that Sly’s treatment of L.S. had some relevance to L.S.’s credibility with regard to her shifting stories about Adams was tenuous or nonexistent. The trial court was wrong to conclude that Magers and Grant, rather than Fisher, controlled whether the evidence should be admitted. The court’s ruling was an abuse of discretion.

d. The error was prejudicial. An error in the admission of evidence will require reversal if “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” State v. Calegar, 133 Wn.2d 718, 727, 947 P.2d 245 (1997). For reasons that are difficult to understand, the trial court disagreed that evidence Sly had abused and mistreated L.S. would prejudice the jury deciding whether her biological son had raped L.S. in her home. But as defense counsel pointed out, “[t]he acorn does not fall far from the tree.” Trial RP 32.

There was no physical corroboration of L.S.'s accusations, nor were there any witnesses to any alleged misconduct by Adams. L.S. was a problematic witness for the State given that the inconsistencies in her various stories about what allegedly had happened to her were substantial and not easily explained by her claimed nervousness or discomfort. The evidence that L.S. was subjected to years of sustained abuse and neglect by Adams' mother was extremely inflammatory, as was the fact that the State contended Adams took advantage of this situation when he allegedly sexually assaulted her. This Court should conclude that there is a reasonable probability that the admission of the evidence affected the jury's verdict. Adams' convictions should be reversed.

**2. THE TRIAL COURT ERRED IN ORDERING  
ADAMS NOT TO HAVE CONTACT WITH  
MINORS AS A CONDITION OF HIS SENTENCE.**

At sentencing, the State requested as a condition of Adams' sentence that he be prohibited from having contact with "minors." 5/6/11 RP 6. Adams objected to this condition, noting that he had a young son and that although L.S. was 16 or 17 when the alleged assaults occurred, "it wasn't charged as a crime against a child." 5/6/11 RP 12. The trial court nevertheless imposed the condition,

prohibiting Adams from having contact with minors except his own children. 5/6/11 RP 16; CP 237.

According to statute, the court may “impose and enforce crime-related prohibitions” as part of the judgment and sentence. RCW 9.94A.505. A crime-related prohibition must be “directly relate[d] to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030. Thus, a no-contact order with the victim is a crime related prohibition. In re Personal Restraint of Rainey, 168 Wn.2d 367, 376, 27 P.3d 1246 (2010). A no-contact order with all minors, however, is not a crime-related prohibition unless there is some indication that the circumstances of the crime warrant the prohibition. RCW 9.94A.030.

A crime-related prohibition is usually reviewed for an abuse of discretion. State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). Where, however, those conditions interfere with a fundamental constitutional right, a “[m]ore careful review of sentence conditions is required.” State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008), cert. denied, 129 S.Ct. 2007 (2009).

Conditions that interfere with fundamental rights must be reasonably necessary to accomplish the essential needs of the State and public order. . . Additionally, conditions that interfere with fundamental rights must be sensitively imposed.

Id. (internal citation omitted).

Adams has the First Amendment right to freedom of association. Roberts v. United States Jaycees, 468 U.S. 609, 617-18, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). A broad prohibition on contact with minors impacts this right.

Although L.S. had not yet turned 18 when Adams allegedly assaulted her, there is no indication from the facts of the case that he poses any threat to minors. Indeed, because the charging period spanned a time between 2005 and 2007 and the State could not prove precisely when any alleged assault occurred, the State could not have prosecuted Adams for rape of a child, and did not do so.

There is no suggestion that Adams was a pedophile. There was no indication that Adams attempted any untoward conduct before L.S. attained sexual maturity; in fact, by her own testimony, for most of her life in the Sly home she did not suffer any sexual abuse. Trial RP 236-37, 254.

In short, there is only the most tenuous of links between Adams' alleged abuse of L.S. and the essential needs of the State and public order. This Court should conclude that the prohibition

on contact with minors is not a reasonable crime related prohibition and order it stricken.

E. CONCLUSION

This Court should conclude that the trial court erroneously admitted evidence of Sandra Sly's abuse of L.S., preventing Adams from receiving a fair trial on the charged offenses, and reverse Adams' convictions. In the alternative, this Court should order the sentencing condition prohibiting him from having contact with minors stricken.

DATED this 24<sup>th</sup> day of October, 2011.

Respectfully submitted:

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 67114-6-I
v.	)	
	)	
JAMEL ADAMS,	)	
	)	
Appellant.	)	

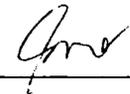
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I, MARIA ARRANZA RILEY, STATE THAT ON THE 24<sup>TH</sup> DAY OF OCTOBER, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<p>[X] JAMEL ADAMS BA" 211014300 KING COUNTY JAIL-KENT 620 WEST JAMES ST KENT, WA 98032</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

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X \_\_\_\_\_ 

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