IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. NOEL ALI RODRIGUEZ, Appellant.	))))))))))	NO. 63166-7-I DIVISION ONE UNPUBLISHED OPINION FILED: June 7, 2010

Leach, A.C.J. — Noel Ali Rodriguez appeals his convictions for incest in the first degree, assault in the second degree, felony harassment, unlawful imprisonment, interfering with reporting domestic violence, and tampering with a witness, contending that the trial court committed several errors during trial. He also challenges the denial of his motions to continue or sever the witness tampering charge added to the information after the court impaneled the jury and on the same day the prosecution made its opening statement. In addition, he claims that a no-contact order included as a condition of his judgment and sentence violated his fundamental right to parent.

We hold that the trial court abused its discretion when it denied Noel's motion for a continuance because this deprived him of a meaningful opportunity

to investigate and prepare an adequate defense to the new charge. We also hold that the no-contact order violated Noel's right to parent because the State failed to demonstrate why an absolute prohibition on contact between Noel and his child is reasonably necessary to accomplish the State's compelling interest in protecting this child from witnessing domestic violence. We reject Noel's remaining assignments of error.

FACTS

Cela Rodriguez immigrated to the United States from Nicaragua. She left four children behind, including Sonia Munoz-Ruiz and Jose Munoz-Ruiz. In 1991, Cela married Noel.[1] The couple had two children together, Sarah and Francisco.

In 2000, Cela brought Sonia and Jose to Washington to live with her and Noel. At that time, Sonia was 15, Jose was 13, and Noel was 35. The following year, Noel began abusing Sonia. In one incident, he badly beat her in front of her family. He pushed her into a wall, pulled her hair, slapped her face, and choked her, saying, "Don't fuck with me, because I'll kill you."

The couple separated in 2002, and around the same time, Cela obtained restraining orders against Noel from King County and the City of Burien. They divorced in 2004. Their decree of dissolution imposed continuing restraints against Noel.

From the spring of 2003 to the fall of 2004, Sonia, Jose, and Cela met

[1] To avoid confusion, first names will be used. No disrespect is intended.

with Louis Raphael Vila, a psychotherapist on staff in the mental health department of Consejo Counseling and Referral. During these sessions, Jose informed Louis that when he was 14 and his sister was 16, he witnessed Noel and Sonia have sexual intercourse on four occasions. Child Protective Services was notified, but no prosecution followed.

When Sonia turned 18, she moved in with her stepfather, Noel. They conceived a child, N.R., who was born in 2003. Sonia was 19 at the time. She and Noel later married, though the record is unclear as to when.

Noel's abuse of Sonia continued well into their marriage. When Sonia was four months pregnant, Noel, in front of his friends, became angry and hit her in the face with an open hand. He stopped hitting her when his friends began laughing and the group left the house. And in 2008, after the couple got into a fight while driving north on Interstate 5, he hit her in the face while she was driving and grabbed the steering wheel, causing her to lose control of the vehicle. N.R. was in the back seat. Not long after this incident, Sonia decided she wanted to divorce Noel.

The events producing this case began the evening of October 1, 2008, when Sonia went to Noel's house to pick up her son. Nobody was home, so she waited. She eventually fell asleep watching TV. Around 2:00 a.m., Noel and N.R. returned to the house. Because it was late, Sonia planned to stay the night and leave the next morning.

Noel tried to kiss Sonia, but she turned away. She also refused to answer

his questions about whether she had another boyfriend. He became angry and accused her of cheating on him. Sonia testified that he put both hands on her throat and immobilized her. She also testified that she could smell alcohol on his breath. According to the same testimony, N.R. tried to push his father away and asked repeatedly for him to let go of his mother. Sonia reached for her cellular phone, but Noel held her against the wall by her throat. Sonia testified that the pressure hurt, making it difficult for her to breathe. She also reported to the police that he pulled her hair, bit her face, and threatened to kill her. When he let her go, Sonia again reached for her cellular phone, but Noel took the phone away and smashed it on the ground.

The State charged Noel with one count of assault in the second degree (domestic violence), one count of felony harassment (domestic violence), unlawful imprisonment (domestic violence), incest in the first degree, interfering with reporting domestic violence, and one count of domestic violence in the fourth degree.

In a motion in limine, defense counsel sought to exclude Louis's testimony regarding Jose's statements made in the 2003 counseling sessions. On January 26, a Monday, the trial court ruled that if Jose testified, Louis's testimony could then be admitted. The court impaneled a jury the same day and scheduled opening statements for the following morning.

That Monday night, Noel called his sister, Marilyn Boland, from jail. He asked her to tell his brother, Harry, to speak to Jose so he realizes "it's my

fucking life here," "it's 11 years that they're going to give me," and "if Jose doesn't show up, if they don't get him, . . . that son of a bitch Vila can't say shit." On Tuesday morning, the prosecutor asked to reschedule opening statements for Wednesday afternoon because the State was unable to make contact with Sonia. The court granted the request. Then, Tuesday evening, the State notified defense counsel of its intent to amend the information to add a witness tampering charge based on Noel's phone call to his sister.[2] Wednesday morning, the court, over defense counsel's objection, granted the State's motion to amend. Defense counsel then motioned for a continuance, severance, or a mistrial, all of which were denied.

At trial, Sonia refused to answer the prosecutor's questions about when she and Noel first had sex, stating, "It's something that I don't want to talk about." Jose was also reluctant to testify. He admitted that he underwent counseling for trauma suffered at home but couldn't remember ever witnessing Noel and Sonia have sex. Louis then testified that Jose had disclosed to him in 2003 that on four occasions Jose saw Noel and Sonia have intercourse. At the time she was only 16 years old.

A jury found Noel guilty of all six charges. In addition, for the assault, felony harassment, and unlawful imprisonment charges, the jury found two aggravating factors: these crimes were committed as part of an ongoing pattern of domestic violence and were committed in front of a child. At sentencing, the

[2] The State also dropped the assault in the fourth degree charge.

court imposed a total period of confinement of 84 months and a no-contact order prohibiting Noel from having any contact with Sonia or N.R. for a period of 10 years.

ANALYSIS

Denial of Defense Motion to Continue

Noel contends that the trial court abused its discretion when it denied his motion for a continuance after permitting the State to amend the information to add a witness tampering charge on the day trial began. We agree.

CrR 3.3(f) allows a court to grant a motion for a continuance if it "is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." We review a trial court's decision under this rule for an abuse of discretion.[3] A trial court abuses its discretion when it bases its decision on untenable grounds or reasons.[4]

Article 1, section 22 of the Washington Constitution guarantees that "'an accused person must be informed of the criminal charge he or she is to meet at trial, and cannot be tried for an offense not charged.'"[5] Denial of a continuance that results in a defendant receiving inadequate notice abridges due process of law and constitutes an abuse of discretion.[6]

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[3] State v. Nguyen, 131 Wn. App. 815, 819, 129 P.3d 821 (2006).

[4] Nguyen, 131 Wn. App. at 819.

[5] State v. Schaffer, 120 Wn.2d 616, 620, 845 P.2d 281 (1993) (quoting State v. Irizarry, 111 Wn.2d. 591, 592, 763 P.2d 432 (1988)).

[6] Schaffer, 120 Wn.2d at 620 (citing State v. Leach, 113 Wn.2d 679, 695-96, 782 P.2d 552 (1989)).

In State v. Purdom,[7] our Supreme Court reversed a conviction where, as here, the information was amended on the first day of trial, and the trial judge denied defense counsel's subsequent motion for a continuance. In that case, the prosecutor advised defense counsel three days before trial that it would seek to replace the charge of conspiracy to deliver a controlled substance to accomplice to delivery of a controlled substance. The court observed that "'[a]n amendment to an information at trial may prejudice a defendant by leaving him without adequate time to prepare a defense to a new charge.'"[8] Because the trial court's decision deprived the defendant of that opportunity, the court held that "as a matter of law [the] substantial rights of the defendant were violated by amending the charge on the day of trial without granting a continuance when one was requested."[9]

Like Purdom, the State's motion to amend the information to add a new charge on the day of trial caught Noel's counsel by surprise. In fact, Noel's counsel had even less time to prepare than did defense counsel in Purdom. Here, the prosecutor informed Noel less than 24 hours before the motion was made, whereas Purdom was given approximately 72 hours' advance notice.

Additionally, unlike Purdom, the State amended the information in this case after a jury had been impaneled. The new charge could not have been the

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[7] 106 Wn.2d 745, 725 P.2d 622 (1986).

[8] Purdom, 106 Wn.2d at 749 (quoting State v. Jones, 26 Wn. App. 1, 6, 612 P.2d 404 (1980)).

[9] Purdom, 106 Wn.2d at 748.

subject of jury voir dire. As our Supreme Court has observed, when a new charge is added after the jury has been empanelled, a "defendant [becomes] highly vulnerable to the possibility that jurors will be confused or prejudiced by a variance from the original information."[10]

We conclude that the trial court abused its discretion in denying Noel's motion for a continuance.[11] He was, in violation of his substantial rights, denied a meaningful opportunity to investigate the new charge and prepare an adequate defense. We reverse, without prejudice, the witness tampering conviction.

Witness Tampering

Although we have reversed the witness tampering charge, we must still consider Noel's challenge to the sufficiency of the evidence on this charge because a retrial following reversal for insufficient evidence is constitutionally prohibited.[12] When reviewing a challenge to the sufficiency of the evidence, we determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[13] All reasonable inferences are drawn in the prosecution's favor and interpreted most strongly against the defendant.[14]

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[10] State v. Pelkey, 109 Wn.2d 484, 490, 745 P.2d 854 (1987).

[11] Since Purdom controls, we do not reach the issue of whether a constitutional violation occurred. See State v. Speaks, 119 Wn.2d 204, 207, 829 P.2d 1096 (1992) (noting that an appellate court should avoid deciding constitutional issues if a case can be decided on nonconstitutional grounds).

[12] State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

[13] State v. Brockob, 159 Wn.2d 311, 336, 150 P.3d 59 (2006).

Circumstantial evidence and direct evidence are equally reliable.[15]

To convict Noel of witness tampering, RCW 9A.72.120, the State had to prove that (1) Noel, without right or privilege to do so, attempted to induce Jose to withhold any testimony" and (2) Jose was a witness or a person Noel had reason to believe was about to be called as a witness in an official proceeding. But proof of actual communication with Jose, either directly or through intermediaries, was not required.[16]

The State's evidence included a transcript of Noel's phone call to Marilyn, pertinent parts of which are provided below.

> Noel: But anyway, they are going to call Vila's testimony, they're not going to use it unless Jose goes in first . . . .
>
> Marilyn: Uh-huh.
>
> Noel: So I wanted somebody to call Harry so he can go and explain to him, Jose, because he doesn't know anything.
>
> . . . .
>
> Noel: No matter what, they can't do anything to him. They can throw him in jail, but they can't put charges. So if they throw him in jail, maybe he'll accuse me just to get out.
>
> Marilyn: No, I don't believe so.
>
> Noel: Well, don't believe that. But what I want is somebody to explain to him that they can't do anything to him.
>
> Marilyn: Uh-huh. Okay, I'm going to call.

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[14] State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006).

[15] State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

[16] State v. Williamson, 131 Wn. App. 1, 6, 86 P.3d 1221 (2004) ("A person violates the witness intimidation statute even if the threat is not communicated to the victim.").

> . . . .
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> Noel: Just so he realizes, so he realizes it's 11 years that they're going to give me if they (unintelligible) shit, just so he knows, so he's aware of that.
>
> . . . .
>
> Noel: To not be afraid, because if he doesn't want to say anything, they can't force him to say shit. It's my fucking life here, he needs to realize that.
>
> Marilyn: Uh-huh
>
> Noel: And if Jose doesn't show up, if they don't get him, take him there, that son of a bitch Vila can't say shit.

At trial, Noel stipulated that he made the call but testified that he only wanted to warn Jose about "how the system works" because he is "a little bit on the slow side."

Noel notes that the literal words he used do not constitute an unequivocal request to withhold testimony. But as our Supreme Court observed in State v. Rempel, "The State is entitled to rely on the inferential meaning of the words and the context in which they were used."[17] In other words, affirmative requests, threats, or promises of reward may be sufficient,[18] but direct statements are not necessary to convict for witness tampering.[19]

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[17] 114 Wn.2d 77, 83-84, 785 P.2d 1134 (1990).

[18] See, e.g., Williamson, 131 Wn. App. at 5 (bluntly asking a witness to "recant" and "take it back" or else "daddy and mommy are going to jail" constituted witness tampering).

[19] See State v. Scherck, 9 Wn. App. 792, 794, 514 P.2d 1393 (1973) ("The jurors were required to consider the inferential meaning as well as the literal meaning of [the accused's] conversation with the witness.").

A rational juror could reasonably infer from the record that Noel was attempting without right or privilege to dissuade Jose from testifying. And since Noel's statements also evidence his awareness that the State intended to call Jose as a witness, a rational juror could have found the elements of witness tampering proven beyond a reasonable doubt.

Threat Testimony

At trial, Sonia testified that Francisco, her half-brother, threatened to shoot her if Noel went to jail. The trial judge instructed the jury "not to . . . attribute[] [Sonia's testimony] to the defendant in any way." Noel contends that this testimony was either not relevant or resulted in unfair prejudice. We disagree. Relevant evidence is evidence that has any tendency to prove or disprove a fact that is of consequence to the case in the context of other facts and applicable law.[20] Here, Sonia's testimony was relevant to explain why she may have refused to answer questions about when she and Noel first had sex.

A trial court has broad discretion to balance the probative value of evidence against any unfair prejudicial impact.[21] Relevant evidence is properly excluded where its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues.[22] Unfair prejudice results from the admission of evidence that causes the jury to make an emotional response rather than a rational decision.[23]

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[20] State v. Rice, 48 Wn. App. 7, 12, 737 P.2d 726 (1987); ER 401.
[21] State v. Hughes, 106 Wn.2d 176, 201, 721 P.2d 902 (1986); ER 403.
[22] ER 403.
[23] Rice, 48 Wn. App. at 13.

State v. Knight[24] is illustrative. There, defense counsel elicited testimony from an officer on cross-examination that an informant had been paid $600 to move out of the area.[25] In response, the prosecutor presented testimony from a different officer explaining that the informant was paid to move because he and his family received telephone threats from an "unidentified" caller shortly after the defendant's arrest.[26] On appeal, the defendant complained that the latter officer's testimony was highly prejudicial and should have been excluded.[27] The court disagreed, finding, in part, that any prejudicial effect was attenuated by the witness's avoidance of directly attributing the threats to the defendant.[28]

Like the officer's testimony in Knight, we cannot say that Sonia's testimony was unfairly prejudicial. Juries are presumed to follow instructions;[29] thus, the trial judge's instruction to the jury not to attribute Francisco's threat to Noel cured

any possibility of unfair prejudice.

Prosecutor Misconduct

Noel claims that the prosecutor committed misconduct during closing argument by (1) arguing two facts not supported by evidence in the record, (2) improperly aligning the jury with the prosecution, and (3) invoking the jury's

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[24] 54 Wn. App. 143, 772 P.2d 1042 (1989).
[25] Knight, 54 Wn. App. at 153.
[26] Knight, 54 Wn. App. at 154.
[27] Knight, 54 Wn. App. at 153.
[28] Knight, 54 Wn. App. at 154.
[29] State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).

general fear of crime. These complaints are unsupported by the record and case law.

To establish prosecutorial misconduct, the defendant bears the burden of showing that the prosecutor's closing remarks were both improper and prejudicial.[30] In analyzing prejudice, the reviewing court looks at the remarks in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions to the jury.[31] Only where the defendant shows that there is a substantial likelihood that the prosecutor's statements affected the jury's verdict will prejudice be found.[32]

The first factual assertion Noel claims was unsupported by the evidence involves Harry's attendance at trial. The prosecutor remarked,

> When Marilyn testified on the stand she said that must have been Harry that was sitting in the courtroom the day before. Who's Harry? Harry's the person that the defendant wanted to talk to Jose. What happened the day before? Jose's testimony. That was the only day that we saw that gentleman in the gallery.

Noel did not object to the prosecutor's statement or request a curative instruction. He therefore carries an increased burden of showing that any erroneous statement was so "'flagrant and ill intentioned that it cause[d] an enduring and resulting prejudice'" that a curative instruction could not have neutralized.[33]

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[30] State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008), cert. denied, ___ U.S. ___, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009).

[31] State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

[32] Brown, 132 Wn.2d at 561.

Noel cannot meet this burden primarily because the evidence presented supports the prosecutor's statements. Prosecuting attorneys have wide latitude to express reasonable inferences from the evidence.[34] Here the evidence included Marilyn's testimony that she saw Harry in court the same day Jose testified. Since the pertinent part of the prosecutor's remarks was that Harry was in the courtroom on the day Jose testified, not that he was absent from the courtroom on any other day of trial, the prosecutor's statement adequately summarized evidence presented. Even if the remark was not supported by the evidence, it was not so flagrant or ill intentioned that it could not have been cured with an instruction.

The second remark Noel claims was unsupported by the record addressed a juror's comment made during jury selection. The prosecutor stated,

> One of our jurors during voir dire talked about how incest even between stepdaughter and stepfather would have a permanent effect on the child. It would absolutely destroy relationships as the child knows them. Who is dad if the person in the bedroom that's having sex with you is dad?[35]

Again, defense counsel failed to object to the prosecutor's remarks. Moreover, incest is a crime. And while the issue of particularized trauma may properly be the subject of expert inquiry, it is generally unassailable that this

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[33] State v. Warren, 134 Wn. App. 44, 69, 138 P.3d 1081 (2006) (quoting State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)), aff'd, 165 Wn.2d 17, 195 P.3d 940 (2008), cert. denied, ___ U.S. ___, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009).

[34] State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991).

[35] We do not have a transcript of voir dire. The only record available to us of what the juror actually said is as reported in the prosecutor's statement.

crime is likely to leave emotional and psychological scars on its victims. For this reason, we find no error in this remark.[36]

Next, Noel asserts that, by mentioning a juror's comment about the impacts of incest, the prosecutor sought to improperly align the jury with the State. To support his argument, he compares the prosecutor's comments to those made in State v. Reed.[37] The comments are not comparable.

In Reed, the prosecutor attempted to influence the jury's assessment of the defendant's expert witness testimony by appealing to the jurors' hometown instincts. In attacking the defendant's diminished capacity defense, the prosecutor remarked,

> [W]e've got education down here in the woods . . . . He had no more ability to tell you what Gordon Reed intended on the day of the crime than the detective . . . . Are you going to let a bunch of city lawyers come down here and make your decision? A bunch of city doctors who drive down here in their Mercedes Benz?[38]

The statements made by the prosecutor in Noel's case are not in any way comparable to this kind of misbehavior. The prosecutor merely referred to the fact a juror made a comment about something widely believed. Reed is simply

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[36] This conclusion is consistent with this court's decision in Warren, 134 Wn. App. at 68-69. There, the prosecutor remarked on how children often delay disclosure of sexual abuse to explain why the victim's testimony in that case was believable. This court held that the remarks, though improper, were not prejudicial because delayed reporting was largely part of common knowledge and not particularly relevant to the case. Our Supreme Court affirmed, holding that "[g]iven the weight of the properly admitted evidence against Warren, he has failed to show that he was prejudiced by the prosecutor's comments." Warren, 165 Wn.2d at 29.

[37] 102 Wn.2d 140, 684 P.2d 699 (1984).

[38] Reed, 102 Wn.2d at 143.

inapposite.

Noel also complains that the prosecutor encouraged the jury to convict based on the need to protect the judicial process and on the jury's fear of the criminal element in society rather than on the strength of the evidence presented at trial. Specifically, he challenges the following remarks, even though he did not object to them at trial:

> See, for us, this is a safe place, these walls, these halls of justice, that robe, the suit, there's formalities, there's procedures, there's rules, and they're built to keep the order, to stop the furies, from letting things get out of hand, the breaks that we take to hammer out different rulings, the arguments, the sidebars, all of this, it's a system to contain chaos, and it doesn't get much more chaotic than this.

And later,

> [O]ur first set of elements involves the defendant violating something more fundamental than just the law. He violated something that's almost impossible to protect, and that's the integrity of the system itself, because if we can't show, if we can't protect the ability of witnesses to take the stand free from the influences of those people about whom they're going to testify, we can't put on a case. Everything that we talked about, about these hallowed halls, about why it's so important to be protected from the outside world when we're in here, goes away and it's ashes.

Finally,

> Does the fact that the defendant didn't keep strangling Son[i]a until he crushed her wind [p]ipe or until she was knocked unconscious or until she was dead or scratched her neck until she was bleeding, does that mean he didn't complete a crime? No. It starts with assault in the second degree for strangulation. Thank God we're not here for something else.

Noel equates these remarks with those made in State v. Perez-Mejia[39]

[39] 134 Wn. App. 907, 143 P.3d 838 (2006).

and State v. Belgarde,[40] noting that appeals to jury passion and prejudice are inappropriate for closing argument. Though Noel correctly describes the general rule,[41] the cases he cites are distinguishable. In Perez-Mejia, for instance, the prosecutor implored the jury to

> [s]end a message . . . to other members of his gang . . . [t]hat we as citizens of the State of Washington and the United States of America, we have the right to life, liberty and the pursuit of happiness and we will no longer allow those who choose to dwell in the underworld of gangs to stifle our rights.[42]

This court held that asking jurors to "send a message" to gang members and overtly arousing the jurors' sense of patriotism by "cast[ing] the defendant as an oppressor of the inalienable rights listed in our nation's Declaration of Independence" constituted reversible error.[43]

And in Belgarde, the defendant was a member of the American Indian Movement (AIM) standing trial for murder. Our Supreme Court held that the prosecutor deliberately inflamed the jury's prejudice and passion, and argued facts not supported by the evidence, by likening AIM to a "deadly group of madmen" on par with Sean Finn or Kadafi, "feared throughout the world."[44] The prosecutor went on to invite the jury to consider Wounded Knee, stating, "[Wounded Knee] is one of the most chilling events of the last decade. You might talk that over once you get in there. That was the American Indian

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[40] 110 Wn.2d 504, 755 P.2d 174 (1988).
[41] See, e.g., State v. Claflin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984).
[42] Perez-Mejia, 134 Wn. App. at 917.
[43] Perez-Mejia, 134 Wn. App. at 918.
[44] Belgarde, 110 Wn.2d at 506.

Movement. That was a faction of the American Indians that were militant, that were butchers, that killed indiscriminately."[45]

In contrast to Perez-Mejia, the prosecutor's statements in this case were devoid of any open request to "send a message" or base a guilty verdict on patriotic duty. Neither did the comments seek to stir the jury's passion and prejudice by likening Noel to a crazed villain as was attempted in Belgarde. Instead, the prosecutor's comments provided an explanation why witness tampering is a crime. We conclude that Noel failed to meet his burden of proving incurable prejudice and reject his claimed errors of prosecutorial misconduct.

Jury Instruction on Incest

Noel claims that there is insufficient evidence to support his conviction for incest because the "to convict" jury instruction required the State to prove that he was a descendant of Sonia.

This court reviews the adequacy of jury instructions de novo.[46] Under the law of the case doctrine, "the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instruction."[47] The defense may challenge for the first time on appeal the sufficiency of the evidence provided in support of the

[45] Belgarde, 110 Wn.2d at 507.
[46] State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).
[47] Hickman, 135 Wn.2d at 102 (citing State v. Lee, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995)).

added element.[48] Evidence is sufficient to support a guilty verdict if, when viewed in the light most favorable to the State, any rational trier of fact could find each element of the crime proved beyond a reasonable doubt.[49]

We do not agree that the "to convict" instruction added an unnecessary element. Instruction 6 read, "To convict . . . of incest in the first degree, . . . [it] must be proven beyond a reasonable doubt . . . [t]hat the defendant was related to Sonia Ruiz either legitimately or illegitimately as a descendant." Under a strained interpretation, this instruction can be read to require that the jury find that Noel was a descendant of Sonia.

But this language is subject to another, much more plausible interpretation. The instruction can also be read as requiring that the State establish simply that a stepdaughter-father relationship existed between Sonia and Noel when they first had sexual intercourse.[50] Stated differently, the word "descendant" describes Sonia, not Noel. That this was the jury's actual interpretation is supported by the fact that the statement, "Noel is a descendant of Sonia," posits a factual absurdity. In light of this alternative and much more reasonable construction, we decline to adopt Noel's reading and conclude that

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[48] Hickman, 135 Wn.2d at 103 n.3 (citing State v. Alvarez, 128 Wn.2d 1, 9, 904 P.2d 754 (1995)). Presumably, this is why neither party addresses the fact that Noel did not object to the jury instruction at trial.

[49] State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), overruled on other grounds by Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995).

[50] Instruction 7 defined "descendant" as "any child or grandchild or great grandchild of the defendant. A descendant includes any stepchild or adopted child of the defendant who is under eighteen years of age."

the "to convict" instruction did not contain an added element.

The next question is whether the State presented sufficient evidence at trial to support a guilty verdict under this "to convict" instruction. Louis testified that according to Jose, Noel and Sonia had intercourse in Sonia's and Jose's bedroom when she was 16 years old and Noel was her stepfather. Sonia refused to answer the prosecutor's questions about when she and Noel first had intercourse. A reasonable inference can be drawn from her silence and demeanor that she in fact had sexual intercourse with her stepfather at that early age and wished to conceal this inculpatory evidence from the jury. A reasonable juror could have found beyond a reasonable doubt that Noel committed all essential elements of the crime of incest. Accordingly, we find no error in the jury instruction.

No-Contact Order

Noel claims that the scope of the no-contact order prohibiting all contact with his son, N.R., violated his constitutional right to parent. We agree.

RCW 9.94A.505(8) confers on the sentencing court broad power to impose "crime-related prohibitions" as a condition of sentence.[51] Generally, we review sentencing conditions for an abuse of discretion.[52] But when a condition abridges a fundamental right, like an individual's right to parent, we apply a strict scrutiny standard. Under this standard, we determine whether the State proved

[51] Warren, 165 Wn.2d at 32.

[52] Warren, 165 Wn.2d at 32 (citing State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993)).

that the restriction on the right to parent was "'sensitively imposed'" and "'reasonably necessary to accomplish the essential needs of the State.'"[53]

The State has a recognized interest in protecting children from witnessing domestic violence.[54] But although witnessing domestic violence harms children, broad assertions about this harm, unsupported by factual evidence, do not provide a sufficient basis for interfering with the fundamental right to parent.[55] Thus, the inquiry is necessarily a fact-specific one that is not amenable to a bright line rule.[56]

In In re Personal Restraint of Rainey,[57] the State proved that the defendant had been convicted of a violent crime against his child (first degree kidnapping) and had a record of attempting to leverage the child to inflict emotional distress on the mother. These facts were sufficient to establish that a total no-contact ban, including indirect or supervised contact, was reasonably necessary to protect the child and the mother.[58] Nevertheless, the court

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[53] In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, ___ P.3d ___ (2010) (quoting Warren, 165 Wn.2d at 32).

[54] Rainey, 168 Wn.2d at 378; State v. Ancira, 107 Wn. App. 650, 653-54, 27 P.3d 1246 (2001) ("Prevention of harm to children is a compelling state interest, and the State does have an obligation to intervene and protect a child when a parent's 'actions or decisions seriously conflict with the physical or mental health of the child.'" (citation omitted) (quoting In re Welfare of Sumey, 94 Wn.2d 757, 762, 621 P.2d 108 (1980))).

[55] Ancira, 107 Wn. App. at 654 ("[B]road assertions, standing alone, do not form a sufficient basis for this extreme degree of interference with fundamental parental rights.").

[56] Rainey, 168 Wn.2d at 377 (It is a fact-specific inquiry whether a total ban on contact is reasonably necessary to realize the State's compelling interest in protecting a child from witnessing domestic violence.).

[57] 168 Wn.2d 367, ___ P.3d ____ (2010).

[58] Rainey, 168 Wn.2d at 379-80.

reversed the no-contact order because the sentencing court provided no justification for the order's lifetime duration and the State failed to show why the lifetime prohibition was reasonably necessary.[59]

Here, in contrast to Rainey, the record contains no evidence that Noel was ever convicted of a crime against N.R. Neither does the record detail systematic attempts by Noel to use his son to harm Sonia. The State also fails to explain why a no-contact order with Sonia or allowing indirect or supervised contact with Noel would be inadequate to protect N.R. from witnessing domestic violence. Finally, the trial judge made no formal findings on the no-contact order. We therefore strike the no-contact order as it pertains to N.R. only.

CONCLUSION

We hold that the trial court erred when it denied Noel's motion for a continuance after granting the State's motion to add a new charge on the first day of trial. Additionally, the no-contact order imposed at sentencing violated Noel's fundamental right to parent, and we strike the no-contact order with respect to N.R. only. We reject Noel's remaining assignments of error. Accordingly, we reverse the witness tampering conviction, affirm the remaining convictions, and remand for further proceedings consistent with this opinion.

Leach, A.C.J.

WE CONCUR:

[59] Rainey, 168 Wn.2d at 381.

Grosse, J.

Becker, J.