Supreme Court No. 89793-0
(COA No. 65576-1-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SERGIO GONZALEZ GUZMAN,

Petitioner.

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

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Federal Court Decisions

United States Constitution

Washington Constitution

Statutes

Court Rules

Other Authorities

A. IDENTITY OF PETITIONER AND DECISION BELOW.

Petitioner Sergio Gonzalez Guzman asks this Court to accept review of the Court of Appeals decision terminating review dated December 16, 2013, a copy of which is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. First degree assault requires the reckless infliction of great bodily harm. The court instructed the jury that recklessness means knowingly disregarding the risk of "a wrongful act." Cases from this Court and the Court of Appeals hold this instruction is a prejudicial misstatement of the law. The Court of Appeals agreed the instruction was wrong, but found the error harmless in an opinion that repeatedly misstates the degree of injury required for first degree assault and does not place the burden of proving harmless on the prosecution beyond a reasonable doubt. Does the Court of Appeals opinion conflict with other published cases that evaluated the same instructional error?

2. The Court of Appeals has issued conflicting decisions addressing whether it constitutes an impermissible presumption to instruct the jury that recklessness may be proved when a person acts intentionally without also explaining that the reckless infliction of injury required for a felony assault is a separate element from the

intentional assault. The Court of Appeals acknowledged the conflict but opted to follow cases that used different instructional language than in the case at bar and disregarded the more similar and favorable decision in *Hayward*.[1] Should this Court take review and resolve the conflict in the Court of Appeals?

3. When a person asks to represent himself, this Court has ruled that the trial court's options are limited to ascertaining whether the request is unequivocal, timely, and intelligently entered. The trial court ignored Gonzalez Guzman's request to represent himself. Did the trial court unreasonably deny Gonzalez Guzman his right to self-representation after his express request?

4. The right to counsel includes the right to effective communication between attorney and client. Gonzalez Guzman asked for a lawyer who spoke his language because he was having trouble communicating with his lawyer. Is the ability to communicate with counsel a fundamental aspect of the right to counsel that requires a court to inquire into whether a language barrier obstructs the attorney-client relationship?

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[1] State v. Hayward, 152 Wn.App. 632, 642, 126 P.3d 354 (2009).

5. Seeking a verdict based upon evidence not in the record or undermining a person's right to remain silent by emphasizing his failure to testify may deny a person a fair trial. Here the prosecution engaged in multiple improper tactics, including underscoring Gonzalez Guzman's failure to take the stand, arguing that he mistreated his wife by refusing to marry her, and telling the jury that its verdict should be based on its belief in the truth. Did the improper arguments deny Gonzalez Guzman a fair trial?

6. A jury's role is not to search for the truth. The court overruled Gonzalez Guzman's objection to the "abiding belief in the truth" definition of proof beyond a reasonable doubt and the prosecutor argued that "all" the jury needed was an abiding belief in the truth of the charge. Does the "belief in the truth" language from the court's instruction, coupled with argument asking for a verdict based on a belief in the truth, confuse the jury's role and misrepresent the burden of proof? Should this Court grant review to address the propriety of a criticized pattern instruction?

6. A parent may not be denied his right to have any contact with his biological child for the rest of his life absent the court's explicit weighing of the State's compelling interest in forbidding any contact

whatsoever and the possibility of lesser restrictive alternatives. Here the court engaged in no inquiry before imposing a lifetime ban on any contact between parent and child. The Court of Appeals surmised the court would have done the same even if it considered the circumstances of the case. Does the court's failure to consider a parent's interest in having some relationship with a child violate a parent's right to due process of law and does the Court of Appeals decision conflict with other decisions where this Court required a specific weighing of the evidence before imposing a bar on contact?

C. STATEMENT OF THE CASE.

Sergio Gonzalez Guzman had trouble awaking his infant son Danny and getting him to eat. 6/22/09RP 52. He woke up the child's mother, Crystal and she took him to the hospital. *Id.* at 52-53, 84.[2] Because Sergio did not speak English and they needed someone to watch their three older children, Sergio went to the hospital after he arranged care for their children. *Id.* at 53, 85.

Doctors found bleeding in Danny's brain consistent with him striking his head. 6/17/09RP 48. He had a fracture in the back of his

[2] For purposes of clarity, the family members who share the same last name are referred to by their first name as necessary. No disrespect is intended.

skull and a fracture in one leg and ribs. *Id.* at 47, 89. The injuries could have been caused by a fall but would need to be a fall from high up to have enough force. *Id.* at 51. Danny was severely injured; retina bleeding caused blindness and bleeding in his brain stunted his skull growth. 6/17/09RP 142; 6/18/09RP 39. These injuries caused lasting cognitive and physical disability. 6/22/09RP 116-19.

The "specific mechanism" causing these injuries was unknown to the doctors. 6/17/09RP 26. Pediatric neurosurgeon Samuel Boyd testified that he was not certain that the injuries were nonaccidental. 6/17/09RP 41; *see also Id.* at 58 (Dr. Robert Oxford agreeing "trauma of some type" caused injury but cannot say whether caused by abuse or accident); *Id.* at 106-07 (Dr. Rebecca Weister opining "constellation of injuries" is "highly consistent with inflicted trauma").

According to Detective Mike Thomas, Sergio said that while carrying Danny the evening before, he tripped and fell on top of his son. 6/22/09RP 135. The child seemed uninjured, so Sergio gave him a bottle and put him to bed. *Id.* at 144. The children and their parents shared a single bedroom and no one noticed anything out of the ordinary that night. *Id.* at 105, 107.

Crystal said she was at a friend's house, and then went bowling. 6/22/09RP 38-42. She said Sergio told her he accidentally tripped. Id. at 58-59. After learning the authorities suspected the child's injuries were Sergio's fault, Crystal said Sergio told her he was "willing to go to jail" for hurting his son but it was an accident. 6/22/09RP 88. Crystal also said that she had never seen Sergio take out frustration on her or the children. 6/22/09RP 77, 79. Sergio was actively involved with and "really good" at caring for their children. Id. at 65, 71, 76. Gonzalez Guzman was convicted of assault of a child in the first degree. CP 1. Pertinent facts are further addressed in the argument sections below.

D. ARGUMENT.

1. **The decision below conflicts with rulings from this Court and the Court of Appeals holding it misleads the jury and dilutes the State's burden of proof to instruct the jury that the recklessness required for felony assault requires disregard of a wrongful act**

a. *Numerous appellate decisions hold it is error to define the essential element of recklessness as disregarding the risk of a wrongful act, rather than the specific type of harm required*

Recent case law demonstrates that the jury instructions in Gonzalez Guzman's case improperly conveyed the essential element of whether Gonzalez Guzman intentionally assaulted and thereby

recklessly cause great bodily injury. *State v. Harris*, 164 Wn.App. 377, 263 P.3d 1276 (2011); *State v. Peters*, 163 Wn.App. 836, 850, 261 P.3d 199 (2011); *State v. Johnson*, 172 Wn.App. 112, 132, 297 P.3d 710 (2012), *rev. granted in part*, 178 Wn.2d 1001 (2013)[3]; *see also State v. Gamble,* 154 Wn.2d 457, 467-68, 114 P.3d 646 (2005); 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 10.03 (3d ed. 2008) ("WPIC"). When an offense includes the element that the accused person recklessly caused a certain injury, the court's inaccurate instruction on the essential elements of "recklessness" impermissibly relieves the State of its burden of proof. *Harris,* 164 Wn.App. at 388; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)**Error! Bookmark not defined.**; U.S. Const. amends. 6, 14; Const. art. I, §§ 21, 22.

Harris involves the identical error as in the case at bar. The defendant was charged with assault of a child in the first degree and the court incorrectly defined recklessness as disregarding the risk of a "wrongful act" and not great bodily harm. 164 Wn.App. at 384-85. In *Harris*, the defendant had said the injuries were accidental and he did

[3] In the pending *Johnson* case, this Court is reviewing whether it constitutes ineffective assistance of counsel for the attorney to propose this incorrect instruction

not realize he had harmed the child. 164 Wn.App. at 387. The *Harris* Court held the instruction did not require the jury to evaluate whether the defendant knew of and disregarded a substantial risk of great bodily harm, which is a necessary element of the offense. *Id.*

Here, the Court of Appeals agreed that the jury instructions were wrong as in *Harris*, but it deemed the error harmless. Its evaluation of the harm flowing from the instructional deficiency is flawed for several reasons. First, the Court of Appeals opinion treated the operative legal standard as recklessly disregarding the risk of "substantial bodily harm," but first degree assault requires disregarding the risk of "great bodily harm." Slip op. at 13-15. Second, the Court of Appeals focused on the injury rather than the jury's flawed understanding of the required mental state. Third, the Court of Appeals did not place the burden of proving harmlessness on the prosecution.

b. *The Court of Appeals applied the wrong essential element in its ruling, showing that it misunderstood the nature of the error.*

The Court of Appeals opinion repeatedly misstates the elements of the offense. Slip op at 13-15. It describes the issue as whether Gonzalez Guzman recklessly disregarded the risk of "substantial bodily

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explaining the State's burden of proving recklessness. Supreme Court No 88683-1.

harm," or some undefined "harm." Slip op. at 15, 17, 18. But the State needed to prove the reckless disregard of causing "great bodily harm." RCW 9A.36.120(1)(b)(ii).

Great bodily harm is the highest level of harm contemplated by the legislature short of death. *State v. Stubbs*, 170 Wn.2d 117, 128, 240 P.3d 143 (2010). It includes injury that "creates a probability of death." RCW 9A.04.110(4). In *Stubbs*, the court said "we cannot imagine an injury that exceeds 'great bodily harm' but leaves the victim alive." *Id.*

The Court of Appeals assessed the impact of the erroneous instruction by looking at whether sufficient evidence showed Gonzalez Guzman disregarded the risk of "substantial bodily injury." Slip op. at 13 ("This crime requires two distinct acts with two corresponding mental states . . [including] recklessly inflict substantial bodily harm on another"); *Id.* at 15 (appellant "contends that the definition should have read, substantial risk that 'substantial bodily harm may occur'").

Not only was the Court of Appeals confused about the degree of harm the State was required to prove, it misunderstood how the flawed instruction affected the case. The opinion concludes that the injuries were so severe that it was unconverted that the child suffered great bodily harm. Slip op.at 17-18. But regardless of the extent of injury, the

jury was not told that the State must prove Gonzalez Guzman knowingly disregarded the substantial risk that he would cause great bodily harm. By not evaluating Gonzalez Guzman's mental state when the injuries were inflicted, the Court of Appeals does not acknowledge there was contested evidence of how the injuries occurred. Medical professionals were not certain that the injuries were nonaccidental. 6/17/09RP 41, 58. No evidence showed how they were inflicted. No damaged furniture or eyewitnesses permitted anyone to surmise how they occurred.

The Court of Appeals did not "presume that a 'clear misstatement of the law' in a jury instruction is prejudicial" even though this standard was used in *Harris*, 164 Wn.App. at 383, 385 (citing *State v. Wanrow,* 88 Wn.2d 221, 239, 559 P.2d 548 (1977)). The Court of Appeals did not explain that the "State bears the burden of showing that the error is harmless beyond a reasonable doubt," as in *Peters*, 163 Wn.App. at 850.

The Court of Appeals referred to the lower threshold of substantial bodily harm in its analysis of the error and its harm. It did not apply the presumption of prejudice that attaches to a clear misstatement of the law. It did not examine the evidence showing that

even though the injuries were severe, medical professionals could not say how they were inflicted. The prosecution took advantage of the instructional flaw by falsely presenting the jury with only two choices: 'inflicted" trauma or accident. 6/23/09RP 6-7. These choices do not track the statutory elements and it is reasonably likely the jurors misunderstood the prosecution's burden of proof.

c. *The instructions also erroneously created a mandatory presumption.*

A mandatory presumption violates a defendant's right to due process by relieving the State of its obligation to prove every element of a charged crime; it exists if a reasonable juror would interpret a presumption to be mandatory. *Sandstrom v. Montana*, 442 U.S. 510, 514, 522, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979); *Hayward*, 152 Wn.App. at 642; U.S. Const. amend. 14.

Applying the wrong "substantial bodily harm" standard rather than "great bodily harm," the Court of Appeals misunderstood the instructions conflating intentional assault with reckless infliction of great bodily harm, which directed the jury that if it finds an intentional assault occurs, the State will have also proven the reckless infliction of harm. *See* Slip op. at 14-15.

The to-convict instruction treated as *a single element* the question of whether "the defendant intentionally assaulted Danny Gonzalez and recklessly inflicted great bodily harm." CP 34. The court further instructed the jury that "When recklessness is required to establish an element of a crime, *the element is also established if a person acts intentionally*." CP 33 (emphasis added).

These instructions directed the jury that if the State proved Gonzalez Guzman intentionally assaulted the child, the prosecution necessarily had "also established" that element's required recklessness. CP 33, 34. This created an impermissible mandatory presumption requiring the jury "to find a presumed fact from a proven fact." *Hayward*, 152 Wn.A. at 642 (citing *State v. Deal*, 128 Wn.2d 693, 699, 911 P.2d 966 (1996)). The presumption relieved the State of its burden to prove Gonzalez Guzman *recklessly* inflicted great bodily injury which is a separate element of the crime. *Id.*

The Court of Appeals acknowledged that its opinion conflicts with *Hayward* but it believed that a "different result" was required, citing *State v. McKague*, 159 Wn.App. 489, 509, 246 P.3d 558 (2011), *aff'd on other grounds*, 172 Wn.2d 802, 262 P.3d 1225 (2012). Yet *McKague* involved different instructional language than *Hayward* or

here. In *McKague*, the jury was instructed that when recklessness "as to a particular fact" is "required to establish an element," it may also be based on the person acting intentionally or knowingly. 159 Wn.App. at 509-10. By saying recklessness is based on "a particular fact," the *McKague* instruction highlighted that this was separate factual element. *Id.* Additionally, the *McKague* to-convict instruction separated the elements of intentional assault and reckless infliction of substantial bodily harm, rather than defining them as a single element. *Id.* at 508.

Unlike *McKague*, the to-convict instruction here listed the mental states as a single element. CP 34. And the definition of recklessness did not mention that recklessness must be based on a "particular fact" based on this separate element as in *McKague*. CP 33. Gonzalez Guzman's case lacks the distinguishing elements of *McKague* and the Court of Appeals opinion directly conflicts with *Hayward*. This Court should accept review to resolve this conflict.

2. **By stating, "I want to represent myself," Gonzalez Guzman unequivocally requested self-representation and *Madsen* requires the court to either honor or clarify that request, not ignore it.**

The constitution guarantees criminal defendants the right to representation by a competent attorney at all stages of a criminal

proceeding, as well as the corollary right to waive counsel and represent oneself. U.S. Const. amend. 6; Const. art. I, § 22; *Faretta v. California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). The right to elect self-representation is explicitly guaranteed by article I, section 22 and is "so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice." *Madsen*, 168 Wn.2d at 503.

When an accused person asks to represent himself, "the trial court *must* determine whether the request is unequivocal and timely." *Madsen*, 168 Wn.2d at 504 (emphasis added). Then, if the request is unequivocal, "the court *must* determine if the request is voluntary, knowing, and intelligent, usually by colloquy." *Id.* (emphasis added). Gonzalez Guzman stated to the judge, "I want to represent myself while we're in trial." 6/15/09RP 4. The judge ignored this request. *Id.*

The fact that Gonzalez Guzman also said he wanted another lawyer when answering the court's questions is "irrelevant" and does not render his statement equivocal. *Id.* at 507. "[A]n unequivocal request to proceed pro se is valid even if combined with an alternative request for new counsel." *Id.*

The court did not question Gonzalez Guzman about the voluntariness of his request to proceed pro se or evaluate his ability to timely proceed to trial. 6/15/09RP 5. The record does not disprove the validity of his plainly spoken request, "I want to represent myself while we're in trial." 6/15/09RP 4. It violates Gonzalez Guzman's right to self-representation to deny his request for self-representation without inquiry. *Madsen*, 168 Wn.2d at 504. This Court should grant review to address the trial court's obligations when confronted with a clear demand for self-representation.

3. By requesting counsel who speaks a defendant's own language, the accused triggers the court's obligation to inquire into the adequacy of attorney-client communication

A criminal defendant must be able to communicate with his lawyer to "provide needed information to his lawyer and to participate in the making of decisions on his own behalf." *Riggins v. Nevada*, 504 U.S. 127, 144, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992). Accused persons are not guaranteed the best rapport with their attorneys, but are guaranteed representation by "an effective advocate" with whom they have no irreconiable conflicts and can communicate. *Wheat v. United*

States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988); U.S. Const. amend. 6; Const. art. I, § 22.

When presented with a reason to believe there may be a conflict of interest between attorney and client, the court must inquire into the conflict. *In Re Pers. Restraint of Stenson*, 142 Wn.2d 710, 724, 16 P.3d 1 (2001); *see also United States v. Nguyen*, 262 F.3d 998, 1003 (9th Cir. 2002) ("For an inquiry regarding substitution of counsel to be sufficient, the trial court should question the attorney or defendant 'privately and in depth.'").

A conflict may exist even when the attorney is competent, because "a serious breakdown in communications can result in an inadequate defense." *Nguyen*, 262 F.3d at 1003. When an accused person complains about the attorney-client relationship, the court may not simply look at the attorney's general competence. Instead, the court must inquire into the nature of the problem. *Id.* at 1002. By limiting its inquiry into whether the attorney and client had discussed the case and the attorney was prepared to proceed, the court did not seek sufficient information about the nature of the problem. *Id.* at 1005.

When Gonzalez Guzman complained about his inability to communicate with his lawyer due to the language barrier, the court did

not pursue the complaint in private or in depth. The court merely asked Gonzalez Guzman if he had another attorney available and when Gonzalez Guzman said no, it asked defense counsel whether he was ready for trial. 6/15/09RP 5-6. The court did not ask about the nature of the communication problems or try to discern how it impeded Gonzalez Guzman's ability to discuss his case with counsel.

This inquiry was inadequate. Gonzalez Guzman said he was unable to effectively communicate with his lawyer due to the language barrier, and this problem persisted even with use of an interpreter. 6/15/09RP 4. The ability to participate in one's own defense is a fundamental right that can only be meaningfully provided when the accused person can talk to and be understood by his lawyer. *Riggins*, 504 U.S. at 144.

A court's unreasonable or erroneous refusal to substitute counsel is presumptively prejudicial and requires reversal. *Nguyen*, 262 F.3d at 1005. The court's cursory refusal to consider the nature of Gonzalez Guzman's complaints about his attorney denied Gonzalez Guzman his right to conflict-free counsel. The Court of Appeals dismisses Gonzalez Guzman's concern as unimportant, yet the trial court undertook no inquiry into how the language barrier affected the ability to prepare a

defense. Slip op. at 7. Substantial public interest favors granting review to address the court's obligations when an accused person complains of a need for a lawyer who can communicate in the accused person's language.

4. The prosecutor used a number of improper tactics to secure a conviction.

A prosecutor's misconduct violates the "fundamental fairness essential to the very concept of justice." *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); U.S. Const. amend. 14; Const. art. I, §§ 3, 21, 22. Misconduct must be judged "not so much by what was said or done as by the effect which is likely to flow therefrom." *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012) (quoting *State v. Navone,* 186 Wash. 532, 538, 58 P.2d 1208 (1936)). "The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" *Id.* (quoting *Slattery v. City of Seattle,* 169 Wash. 144, 148, 13 P.2d 464 (1932)).

a. *The prosecutor urged the jury to convict Gonzalez Guzman because he had not testified*

The Fifth Amendment "forbids" any "comment by the prosecution on the accused's silence." *Griffin v. California*, 380 U.S.

609, 615, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). Gonzalez Guzman did not testify; the prosecution introduced into evidence a statement he made to a police officer while he was at the hospital. 6/23/09P 133.

The prosecutor took pains to highlight that Crystal testified in court, and "She got up here on the stand, under oath, [and] looked you in the eyes." 6/23/09RP 9. Her testimony was "undisputed" -- "[y]ou have undisputed evidence from her that it wasn't her. And folks, that is enough." 6/23/09RP 9. He described the case to the jury as having "two sides to a story," Crystal's and Sergio's. 6/23/09RP 9. He said there was "enough" evidence to convict Sergio from Crystal's testimony, "*even if we didn't have the defendant's story or supposed story.*" *Id.* (emphasis added). Gonzalez Guzman immediately objected and the court held an unrecorded side bar, without ruling on the record. *Id.* Later, defense counsel moved for a mistrial based on the prosecution's improper references to Gonzalez Guzman's failure to testify. *Id.* at 39. The court denied it without comment. *Id.*

The prosecution's themes of argument underscored Crystal's live testimony and implicitly contrasted it with the other side of the story, which did not come live under oath. "[S]ubtle references" are effective means to press for a verdict based on improper considerations

"[l]ike wolves in sheep's clothes." *State v. Monday*, 171 Wn.2d 667, 678, 257 P.3d 551 (2011). Gonzalez Guzman's timely objection shows that counsel viewed the comments as an improper inference based on Gonzalez Guzman's failure to testify at trial.

The Court of Appeals did not address the harm flowing from the prosecutor's implicit underscoring of Gonzalez Guzman's silence at trial. The Court of Appeals misapprehends the nature of the error.

b. *The prosecution concocted a prejudicial claim designed to make Gonzalez Guzman appear guilty based on made-up manipulative behavior*

The Court of Appeals agreed that the prosecution concocted a theory that the reason Gonzalez Guzman married Crystal after the incident was that he had refused to do so for years and did it "to make up for what he did" and "because he is guilty." 6/23/09RP 18, 35. Even though the prosecutor made up all aspects of this theory and used it to claim proof of Gonzalez Guzman's guilt, the Court of Appeals relied on the "flagrant and ill-intentioned" standard to deem it harmless. Slip op. at 12. However, the proper focus is whether the "effect which is likely to flow therefrom." *Emery*, 174 Wn.2d at 762.

After introducing this theory, repeated in both segments of the State's closing argument, its effect could not have been erased from the

jurors' minds. The prosecutor encouraged the jury to speculate about Gonzalez Guzman's motives and incited them to draw inferences not based on the record. "[A] prosecutor must seek convictions based only on probative evidence and sound reason." *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012); *State v. Miles*, 139 Wn.App. 879, 886, 162 P.3d 1169 (2007) ("A person being tried on a criminal charge can be convicted only by evidence, not by innuendo."). This concocted argument was intended to inflame the jury's passion based on evidence not in the record and it created an enduring prejudice.

c. *The prosecutor used erroneous instructions to tell the jury its role was to search for the truth*

The jury does not search for the truth, but "determine whether the State has proved the charged offenses beyond a reasonable doubt." *Emery*, 174 Wn.2d at 760; *see also State v. Berube*, 171 Wn.App. 103, 120-21, 286 P.3d 402 (2012), *rev. denied*, 178 Wn.2d 1002 (2013) ("arguing that the jury should search for truth and not for reasonable doubt both misstates the jury's duty and sweeps aside the State's burden").

Over Gonzalez Guzman's objection, the court instructed the jury that proof beyond a reasonable doubt means that, after considering the

evidence, the jurors had "an abiding belief in the truth of the charge." CP 25; 6/23/09RP 2. Using this instruction, the prosecution told the jury, "Folks, all you need is an abiding belief in the truth of the charge, and you're satisfied beyond a reasonable doubt. That's the standard. It's in your jury instructions." 6/23/09RP 36.

By equating proof beyond a reasonable doubt with a "belief in the truth" of the charge, the court and prosecutor misidentified the jury's role. It encourages the jury to undertake an impermissible search for the truth and invites the error identified in *Emery*.

In *State v. Pirtle*, 127 Wn.2d 628, 657-58, 904 P.2d 245 (1995), the court held that the "abiding belief" language was not error (although unnecessary), but it was not addressing whether this language encouraged the jury to view its role as a search for the truth. 127 Wn.2d at 657-58. *Emery* demonstrates the danger of injecting a search for the truth into the definition of the State's burden of proof. It invites jury confusion about its role and serves as a platform for improper arguments about looking for the truth.

Gonzalez Guzman objected to the addition of this last sentence in the court's instruction defining the prosecution's burden of proof and proposed an instruction without the improper language. 6/23/09RP 2;

CP 16. The State used this "belief in the truth" language to minimize its burden and suggest to the jury that they should decide the case based on what they think it true rather than whether the State proved its case. 6/23/09RP 35. This Court has a supervisory role in ensuring the jury's instructions fairly and accurately convey the law. *State v. Bennett*, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). It should grant review to clarify whether directing the jury to treat proof beyond a reasonable doubt as the equivalent of having an "abiding belief in the truth of the charge," misstates the prosecution's burden of proof, confuses the jury's role, and denies an accused person his right to a fair trial by jury as protected by the constitution. U.S. amends. 6, 14; Const. art. I, §§ 21, 22.

5. **Imposing a lifetime no-contact order without evaluating the child's needs is contrary to *Rainey* and violates a parent's right to due process**

A parent has a fundamental liberty and privacy interest in the care of his child. *Troxel v. Granville*, 530 U.S. 57, 65-66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *State v. Ancira*, 107 Wn.App. 650, 653, 27 P.3d 1246 (2001). A sentencing court may not impose a no-contact order between a defendant and his biological child as a

matter of routine practice. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 377-82, 229 P.3d 686 (2010).

The court must first weigh whether the no contact order is "reasonably necessary in scope and duration to prevent harm to the child." *Id.* at 381-82. Here, the court prohibited all contact with his son for life without discussing it necessity or weighing alternatives. CP 41.

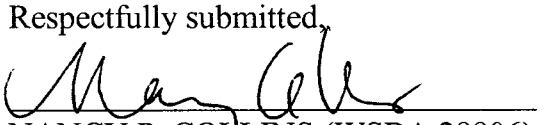
The Court of Appeals surmises that the injuries authorize this blanket, lifetime no contact order but *Rainey* explains that the court must first consider how prohibiting all contact between Gonzalez Guzman and his son is reasonably necessary. The court's order denies Gonzalez Guzman's fundamental constitutional right to parent his children without applying the analysis required in *Rainey*.

E. CONCLUSION.

Based on the foregoing, Petitioner Sergio Gonzalez Guzman respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 15th day of January 2014.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. SERGIO GONZALEZ-GUZMAN, Appellant.	)	No. 65576-1-I DIVISION ONE UNPUBLISHED OPINION FILED: December 16, 2013

APPELWICK, J. — Gonzalez-Guzman was convicted of first degree assault of a child. He appeals his conviction, alleging multiple errors: the trial court improperly denied his request for self-representation or new counsel; the prosecutor committed misconduct; the jury instructions on recklessness and reasonable doubt were improper; and the trial court abused its discretion when imposing a lifetime no-contact order between him and the victim. We affirm.

FACTS

On November 10, 2007, Sergio Gonzalez-Guzman realized that his 10 week old son, D.G., would not wake up or eat, and his eyes were rolling in the back of his head. The child's mother, Crystal Gonzalez, took D.G. to the hospital.[1] D.G. had suffered trauma to his head, ribs, and leg. The next day, Gonzalez-Guzman told a detective that he had slipped while D.G. was in his arms and fallen on top of the child. Gonzalez-Guzman and Crystal married on November 12.

Gonzalez-Guzman was charged with first degree assault of a child. He did not testify at trial, although his statement to the detective was introduced as evidence.

[1] For purposes of clarity, the defendant will be referred to by his last name, Gonzalez-Guzman, but his wife and son will be referred to as Crystal and D.G., respectively. No disrespect is intended.

Crystal did testify. She explained that the night before she took D.G. to the hospital, she spent most of her time at a friend's house and a bowling alley. Gonzalez-Guzman had been with D.G.

Numerous doctors testified about the severity of D.G.'s injuries and the extent of trauma required to inflict that much harm. Ultimately, the medical testimony suggested that D.G.'s injuries were nonaccidental and were consistent with shaken baby syndrome. The jury found Gonzalez-Guzman guilty as charged.

He appeals his conviction.

DISCUSSION

I. Request for Self-Representation or New Counsel

Gonzalez-Guzman contends that he unequivocally invoked his right to self-representation and subsequently requested new counsel with whom he could better communicate. He maintains that the court failed to sufficiently inquire into these statements.

Gonzalez-Guzman's requests proceeded as follows:

> [DEFENSE COUNSEL]: Your Honor, Mr. Gonzalez-Guzman wishes to terminate my representation today. He feels as if he would have easier communication with someone who is a native Spanish speaker. . . . And it's based on that reason that he wishes to terminate my representation.
>
> THE COURT: So you want to represent yourself in trial?
>
> [GONZALEZ-GUZMAN]: I want to represent myself while we're in trial.
>
> THE COURT: What do you propose that we do?
>
> [GONZALEZ-GUZMAN]: I would like to have a lawyer that speaks my same language.
>
> THE COURT: Do you have one here? I don't see anyone in the courtroom.
>
> [GONZALEZ-GUZMAN]: To understand better.

THE COURT: Do you have anyone here? I don't see anyone in the courtroom that could do that.
[GONZALEZ-GUZMAN]: No, I have no one here right now.
THE COURT: Who's the attorney that you're proposing is going to be prepared to try this case today for you?
[GONZALEZ-GUZMAN]: Right now? I don't have him yet.
THE COURT: Well, we're in trial; and how long has this attorney been representing you?
[GONZALEZ-GUZMAN]: I don't remember exactly.
[PROSECUTION]: Since February 28th of 2008.
THE COURT: Since February of 2008?
[PROSECUTION]: Yes, Your Honor.
THE COURT: And how many times have you asked the Court to appoint someone who speaks fluent Spanish?
[GONZALEZ-GUZMAN]: I have never asked.
THE COURT: All right. And I don't know of any way, or of any right to have that. And you're ready to go to trial today, right?
[DEFENSE COUNSEL]: I am, Your Honor.
[PROSECUTION]: Your motion is denied.
[GONZALEZ-GUZMAN]: Thank you.

Gonzalez-Guzman did not raise either issue again until his appeal.

A. Request for Self-Representation

Criminal defendants have an explicit right to self-representation under the Washington Constitution. Wash. Const. art. I, § 22; State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). We review denials of requests for pro se status for abuse of discretion. Madsen, 168 Wn.2d at 504. Discretion is abused if a decision is manifestly unreasonable or rests on facts unsupported by the record or was reached by applying the wrong standard. Id. The unjustified denial of the right to self-representation requires reversal. Id. at 503.

Gonzalez-Guzman alleges that the trial court impermissibly ignored his pro se request. When a defendant requests pro se status, the trial court must first determine whether the request is unequivocal and timely. Id. at 504. The request must be unequivocal in the context of the record as a whole. State v. Stenson, 132 Wn.2d 668,

741-42, 940 P.2d 1239 (1997). The court must indulge in every reasonable presumption against the defendant's waiver of right to counsel. In re Det. of Turay, 139 Wn.2d 379, 396, 986 P.2d 790 (1999). However, this presumption does not eliminate the need for an identifiable basis for denying a motion for pro se status. Madsen, 168 Wn.2d at 505.

Gonzalez-Guzman contends that the court failed to follow up on his demand to proceed pro se. However, this overlooks an important exchange following his request, wherein the court asked Gonzalez-Guzman, "What do you propose that we do?" Gonzalez-Guzman responded that he would like to have a lawyer that speaks his language, indicating that obtaining new counsel was his actual concern. This put into question whether his request was unequivocal.

A pro se request made in the context of expressing displeasure with one's counsel often indicates that the request is equivocal. See, e.g., State v. Woods, 143 Wn.2d 561, 587, 23 P.3d 1046 (2001). In Woods, the defendant stated that:

> I will be prepared to proceed with—with this matter here without counsel come October. . . .
>
> . . . I've—I've already consented to one continuance, Your Honor. And they—they have done nothing but grossly misuse that there. And I feel if—if they was [sic] granted a second continuance, it—it would be treated in the same manner, Your Honor.

Id. at 587. This was not an unequivocal request, but an expression of the defendant's displeasure with his counsels' motion to continue his trial. Id.

An alternative request for new counsel does not automatically render a pro se request equivocal. See Madsen, 168 Wn.2d at 507. In Madsen, the defendant

requested to proceed pro se, or alternatively, to fire his attorney. Id. 506-07. The court found his request unequivocal, because the defendant twice clearly stated that he would represent himself and even cited the Washington Constitution provision that gave him that right. Id. at 501-03. Conversely, in Turay, the defendant's pro se request was a third choice after the court either appointing the attorney of his choice or ordering his current counsel to remain. 139 Wn.2d at 398. Applying the presumption against waiver of right to counsel, the court found Turay's request equivocal. Id. at 399.

Gonzalez-Guzman's request was likewise equivocal. Viewed alone, his statement that "I want to represent myself while we're in trial" is more unwavering than those in Woods. But, the overall purpose of his exchange with the court was to obtain new counsel, and he never elaborated on or renewed his request to be pro se. His statement lacked the conviction and certainty of that in Madsen. Considering Gonzalez-Guzman's statement in context and applying the presumption against waiver of right to counsel, his request was equivocal. The trial court did not abuse its discretion.

B. Request for New Counsel

Gonzalez-Guzman contends that, because of the language barrier, he could not effectively communicate with his lawyer. He argues that the trial court impermissibly dismissed his request for new counsel.

When an attorney-client relationship completely collapses, the refusal to substitute new counsel violates the defendant's right to effective assistance. State v. Cross, 156 Wn.2d 580, 606, 132 P.3d 80 (2006). We review a trial court's refusal to appoint new counsel for abuse of discretion. Id. at 607. The factors to consider are (1) the extent of the conflict, (2) the adequacy of the trial court's inquiry, and (3) the

timeliness of the motion. In re Pers. Restraint of Stenson, 142 Wn.2d 710, 724, 16 P.3d 1 (2001) (adopting the test set out in United States v. Moore, 159 F.3d 1154, 1158-59 (9th Cir. 1998)).

We first consider the extent and nature of the attorney-client conflict. Moore, 159 F.3d at 1158-59. To warrant substitution of counsel, there must be good cause, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication. State v. Thompson, 169 Wn. App. 436, 457, 290 P.3d 996 (2012), review denied, 176 Wn.2d 1023, 299 P.3d 1172 (2013). The breakdown must prohibit the lawyer from providing effective assistance. For example, in Thompson, the court found no good cause for a substitution where the defendant verbally abused and threatened his lawyer, but counsel continued to attempt to communicate. Id. at 457-58. By contrast, courts have found that new counsel was required in situations where the breakdown resulted from counsel's bad acts. See, e.g., Frazer v. United States, 18 F.3d 778, 783 (9th Cir. 1994) (counsel used racial slurs and threatened to provide substandard performance); United States v. Moore, 159 F.3d 1154, 1159 (9th Cir. 1998) (counsel failed to inform defendant of an important plea deal development); United States v. Williams, 594 F.2d 1258, 1260 (9th Cir. 1979) (counsel and defendant had a "stormy" relationship with quarrels, bad language, exchange of threats).

Gonzalez-Guzman's request was for "a lawyer that speaks [his] same language" so that he can "understand better." Interpreters assisted communication between Gonzalez-Guzman and his attorney. Gonzalez-Guzman has not established that he has the right to an attorney fluent in his own language. Nor does he present any other

evidence that his attorney was ineffective or that there was a complete breakdown in communication.

Second, we examine the adequacy of the trial court's inquiry. Moore, 159 F.3d at 1160. A trial court's inquiry is sufficiently searching where a defendant is allowed to express his concerns and present all vital information. See Stenson, 142 Wn.2d at 731.

Here, the trial court asked Gonzalez-Guzman why he desired new counsel, who he proposed would represent him, and whether he had previously requested new counsel. Gonzalez-Guzman relies on United States v. Adelzo-Gonzalez, 268 F.3d 772. 777-78 (9th Cir. 2001), and United States v. Nguyen, 262 F.3d 998, 1004-05 (9th Cir. 2001), to argue that this inquiry was insufficient. However, those cases involved interpersonal disputes between counsel and client, for which more in-depth inquiry was necessary. See Adelzo-Gonzalez, 268 F.3d at 775; Nguyen, 262 F.3d at 1001. Gonzalez-Guzman's motion asserted only that he wanted a fluent Spanish speaker, which the trial court was able to discern and used its discretion to dismiss.

Finally, we evaluate the timeliness of the defendant's motion. Moore, 159 F.3d at 1161. The court must balance the inconvenience and delay of substituting counsel against the defendant's important constitutional right to counsel of his choice. Id. But, where the request comes during trial or on the eve of trial, the court may refuse to delay the trial to obtain new counsel. Stenson, 142 Wn.2d at 732. In Moore, the court found the defendant's motions timely when he made several attempts to substitute counsel, spanning over a month before trial. 159 F.3d at 1161. In Stenson, the court denied the defendant's motion where current counsel already spent 21 days on jury selection and new counsel would need 30 days to prepare. 142 Wn.2d at 732.

Gonzalez-Guzman did not move for new counsel until pretrial proceedings, although his attorney had represented him for over a year at that point. He did not have new counsel ready or a proposal for replacement counsel. The trial court did not abuse its discretion in denying his request.

II. Prosecutorial Misconduct

Gonzalez-Guzman alleges multiple instances of prosecutorial misconduct. Prosecutorial misconduct is grounds for reversal where the conduct is both improper and prejudicial. State v. Monday, 171 Wn.2d 667, 675, 257 P.3d 551 (2011). This court determines the effect of a prosecutor's improper conduct in the context of the full trial. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Generally, a prosecutor's comments are prejudicial only where there is a substantial likelihood that they affected the jury's verdict. Monday, 171 Wn.2d at 675.

A. Comments on testimonial silence

Gonzalez-Guzman argues that the prosecutor's comments on his failure to testify were an improper implication of guilt. The Fifth Amendment forbids comment by the prosecution on a defendant's refusal to testify. Griffin v. California, 380 U.S. 609, 615, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). A prosecutor's statement is improper if it was of such character that the jury would naturally and necessarily accept it as a comment on the defendant's failure to testify. State v. Ramirez, 49 Wn. App. 332, 336, 742 P.2d 726 (1987).

In Ramirez, the prosecutor commented that: "'She [defense counsel] lists several hypothetical questions and hypothetical situations why a person does not want to testify. . . . She left out one reason, a hypothetical reason and the only other

hypothetical reason she left out is a person is guilty.'" Id. at 336-37 (emphasis omitted (alteration in original). The court found the comments improper, because they would naturally and necessarily lead the jury to focus on the defendant's failure to testify. Id. at 337. In State v. Crawford, the prosecutor referred in general terms to "'undisputed'" and "'unrefuted'" evidence. 21 Wn. App. 146, 151, 584 P.2d 442 (1978). This was permissible, because the statements were subtle and brief enough that they did not improperly emphasize the defendant's testimonial silence. Id. at 152.

Gonzalez-Guzman contends that the prosecutor improperly commented on his failure to testify by emphasizing Crystal's testimony and Gonzalez-Guzman's earlier statement to the detective. In closing, the prosecutor told the jury that "at best, in a case like this, you're going to get medicals and you're going to get two sides to a story, and that's what you got." He then addressed Crystal's testimony, stating that "[s]he got up here on the stand, under oath, told you, looked you in the eyes. . . . You have undisputed evidence from her that it wasn't her." He continued that "[Crystal's testimony] is enough. Even if we didn't have the Defendant's story or supposed story." Then, he moved to Gonzalez-Guzman's statement, saying "But you have more. . . . You have [the Defendant's] statement to Detective Thomas, and the only thing we can do is analyze that statement at this point." Finally, he noted that Gonzalez-Guzman's statement was "a little too early" and "premature" to properly account for all of D.G.'s injuries.

These were not improper comments on Gonzalez-Guzman's failure to testify. First, the prosecutor's remarks that the jury had his side of the story accurately reflected the record: Detective Thomas testified about Gonzalez-Guzman's statement. Second,

the emphasis on Crystal's testimony was not a comment on his failure to testify. Her testimony was that she did not have control of D.G. when he was hurt. This was necessary to rebut the defense's theory that Crystal was actually the abuser. Finally, the prosecutor's comments that Gonzalez-Guzman's statement was "premature" and that "the only thing we can do is analyze that statement" focused on the fact that his statement was inconsistent with the other evidence. The contested comments did not naturally and necessarily lead the jury to focus on the defendant's testimonial silence.

B. Shift of burden of proof

Gonzalez-Guzman contends that the prosecutor improperly shifted the burden of proof by emphasizing Crystal's testimony and contrasting it with Gonzalez-Guzman's silence. It is flagrant misconduct for a prosecutor to shift the burden of proof to a defendant. State v. Miles, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007). Accordingly, a prosecutor generally cannot comment on the defendant's failure to present evidence, because the defendant has no duty to do so. State v. Thorgerson, 172 Wn.2d 438, 453, 258 P.3d 43 (2011). Prosecutors have wide latitude to make inferences about witness credibility. Id. But, it is error for a prosecutor to offer the "false choice" that the jury can find a defendant not guilty only if it believes his evidence. Miles, 139 Wn. App. at 890.

Gonzalez-Guzman argues that the prosecutor improperly suggested that he failed to discredit Crystal or to present other evidence on his own behalf. As discussed above, the challenged statements about Crystal's story being "undisputed," "enough," and "under oath" were in the context of a discussion of exclusive control. The prosecutor was instructing the jury that, if they believed Crystal, they could find that Gonzalez-Guzman had exclusive control of D.G. that night. This did not create a false choice for

the jury to either convict Gonzalez-Guzman or disbelieve Crystal. The prosecutor did not place an improper burden on Gonzalez-Guzman.

C. Speculation

Gonzalez-Guzman contests the prosecutor's speculation about his motive for marrying Crystal two days after D.G.'s injury. A prosecutor has wide latitude to argue reasonable inferences from the evidence. Thorgerson, 172 Wn.2d at 448. Statements not sustained by the record are improper. State v. Dhaliwal, 150 Wn.2d 559, 577, 79 P.3d 432 (2003).

In State v. Hoffman, the defendant challenged the prosecutor's statement that "'what happened to this gun is that Hoffman knew a police officer had been shot with it and he took it up in the hills and got rid of if it. He hid it where nobody would ever find it.'" 116 Wn.2d 51, 94, 804 P.2d 577 (1991). The evidence demonstrated that Hoffman admitted the gun was at the scene, the gun was never found after an exhaustive search of the area, and Hoffman admitted to a witness that he had disposed of the gun. Id. The court found the prosecutor's inference reasonable. Id.

Here, the prosecutor stated in his closing that Gonzalez-Guzman married Crystal because he "feels guilty about this because he is guilty. He's guilty for ruining [D.G.]'s life." Later, he reiterated the point, saying that Gonzalez-Guzman "probably gave [Crystal] something that she wanted, to make her happy, to make up for what he did wrong, to make up for what he did to [D.G.]."

The State maintains that these are reasonable inferences from the fact that the couple got married only two days after D.G.'s hospitalization, and that they lived together prior to that. But, there was no testimony or evidence presented about why the

couple got married. In fact, when the prosecutor tried to elicit testimony from Crystal on this point, the court sustained an objection as to its relevance. The prosecutor's comments in closing lack sufficient support in the record. These statements were improper.

However, Gonzalez-Guzman did not object to the closing remarks at trial. Where a defendant fails to object to improper prosecutorial conduct, the error is waived unless the conduct was so flagrant and ill-intentioned that it creates an enduring prejudice that could not have been neutralized by a curative instruction. State v. Brown, 132 Wn.2d 529, 568, 940 P.2d 546 (1997). For example, in State v. Belgarde, the court found that a curative instruction would have been ineffective where the prosecutor described members of the American Indian Movement as "a deadly group of madmen," "militant," and "butchers, that killed indiscriminately Whites and their own." 110 Wn.2d 504, 506-07, 755 P.2d 174 (1988) (emphasis omitted). By contrast, in McKenzie, there was no enduring prejudice where the prosecutor emphasized the victim's "lost innocence" in response to defense counsel's comment that the defendant would have to settle for the words "not guilty" instead of "innocent." 157 Wn.2d at 60. The court acknowledged the prosecutor went "too far in her effort to exploit defense counsel's theme," but that it was not so flagrant and ill-intentioned that it could not have been cured. Id.

The statements here do not rise to the inflammatory level of those in Belgarde. As in McKenzie, the prosecutor went too far in exploring a theme. But, his statements were not so flagrant and ill-intentioned as to be incurable.

III. Recklessness Instruction

Gonzalez-Guzman argues that the trial court improperly instructed the jury on recklessness. We review challenged jury instructions de novo, in the context of the instructions as a whole. State v. Castillo, 150 Wn. App. 466, 469, 208 P.3d 1201 (2009). Instructions must convey to the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Instructions must also properly inform the jury about the applicable law and not mislead the jury. Id.

A. Mandatory presumption

Gonzalez-Guzman first contends that the recklessness instruction created an improper mandatory presumption. A mandatory presumption is one that requires a jury "to find a presumed fact from a proven fact." State v. Deal, 128 Wn.2d 693, 699, 911 P.2d 996 (1996). Mandatory presumptions violate a defendant's due process right if they relieve the State of its obligation to prove all elements of the charged crime. Id.

Jury instruction 11, the "to-convict" instruction, enumerated the elements of assault of a child in the first degree:

> (1) That during a time intervening between November 9, 2007 and November 10, 2007, the defendant intentionally assaulted [D.G.] and recklessly inflicted great bodily harm;
> (2) That the defendant was eighteen years of age or older and [D.G.] was under the age of thirteen; and
> (3) That the acts occurred in the State of Washington.

This crime requires two distinct acts with two corresponding mental states: the defendant must (1) intentionally assault and (2) recklessly inflict substantial bodily harm on another. RCW 9A.36.120; State v. McKague, 159 Wn. App. 489, 509, 246 P.3d 558,

aff'd but criticized on other grounds by, 172 Wn.2d 802, 262 P.3d 1255 (2011). Jury instruction 10 defined "recklessness" as follows:

> A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.
>
> When recklessness is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly.

(Emphasis added.)

Gonzalez-Guzman's objection lies with the last sentence of instruction 10. He argues that it permits the jury to find that, if Gonzalez-Guzman intentionally assaulted D.G., he must have also recklessly inflicted substantial bodily harm. Gonzalez-Guzman relies on State v. Hayward, a recent Division Two case, to allege that the instruction collapsed the two elements. 152 Wn. App. 632, 217 P.3d 354 (2009). There, the instruction stated that, "'Recklessness also is established if a person acts intentionally.'" 152 Wn. App. at 643. The court found that this conflated the intent regarding the defendant's assault with his intent to cause substantial bodily harm. Id. at 645.

However, Division One addressed this issue after Hayward and reached a different result. See State v. Holzknecht, 157 Wn. App. 754, 238 P.3d 1233 (2010). In Holzknecht, the disputed "recklessness" instruction similarly provided that "'[r]ecklessness is also established if a person acts intentionally or knowingly.'" Id. at 762. This court "respectfully disagree[d]" with Hayward, id. at 765, concluding that the instruction correctly informed the jury of the applicable law. Id. at 766.

Division Two also concluded in a subsequent case that a trial court may avoid the problem in Hayward by giving a "correct" instruction. McKague, 159 Wn. App. at

509. There, the instruction stated that "'[w]hen recklessness as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly.'" Id. at 509-10 (emphasis in original). The McKague court held that this cured the defective Hayward instruction by emphasizing the link between the mens rea of recklessness and the result of great bodily harm. Id. at 510.

The instruction in Gonzalez-Guzman's trial satisfies both Holzknecht and McKague. Importantly, it emphasizes that each element must be considered independently by the jury, thereby resolving the ambiguity in Hayward. And, while it lacks the phrase, "as to a particular fact" found in McKague, this omission does not dilute the link between recklessness and the specific element of great bodily harm. The instruction did not create an improper mandatory presumption.

B. Definition of recklessness

Gonzalez-Guzman also challenges the definition of recklessness as disregard of a "'substantial risk that a wrongful act may occur.'" (Emphasis added.) Instead, he contends that the definition should have read, substantial risk that "substantial bodily harm may occur." He brings this challenge for the first time on appeal.

We may refuse to hear any claim of error that was not raised at trial. RAP 2.5(a). An exception exists for manifest errors affecting a constitutional right. Id. Pursuant to RAP 2.5(a)(3), an appellant must identify an error of truly constitutional dimension and show that it was manifest, i.e., how the error actually affected the appellant's rights at trial. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). If we determine that the claim raises a manifest constitutional error, we then perform a harmless error analysis. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

Gonzalez-Guzman urges us to consider his claim, because the improper definition of recklessness deprived him of a fair trial. Where a jury instruction relieves the State's burden of proving an element of its case, the error is of constitutional magnitude and may therefore be raised for the first time on appeal. See State v. Stein, 144 Wn.2d 236, 240-41, 27 P.3d 184 (2001). If a jury may convict a defendant without finding an essential element of the crime charged, the defendant cannot be said to have a fair trial, and the error is manifest. Id. at 241.

In State v. Peters, this court considered the same recklessness instruction in the context of manslaughter. 163 Wn. App. 836, 845-46, 261 P.3d 199 (2011). We held that the instruction relieved the State of its burden of proving an essential element of the crime, and thus the claim may be heard for the first time on appeal. Id. at 847. Under Peters, the recklessness instruction here constitutes manifest constitutional error.

However, Gonzalez-Guzman's claim is still subject to a harmless error analysis. See Lynn, 67 Wn. App. at 345. In order to determine that an error is harmless, the court must conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. Peters, 163 Wn. App. at 850. A misstatement of the law in a jury instruction is harmless if the element is supported by uncontroverted evidence. Id.

In Peters, the defendant's mental state as to the precise wrongful act was directly in question. 163 Wn. App. at 849. There, the defendant shot and killed his daughter, but maintained that it was an accident. Id. at 839-40. The recklessness instruction referring to a "wrongful act" was thus prejudicial, because the evidence did not show that the defendant disregarded a substantial risk of death. Id. at 849-50. Furthermore, the prosecutor relied on the erroneous definition to argue that "reckless" meant Peters

knew "'something really bad could happen.'" Id. at 851. This relieved the State of its burden of proof, and the error was not harmless. Id. at 851-52

In State v. Harris, this court also reviewed the same instruction scheme in a case involving first degree assault of a child. 164 Wn. App. 377, 384, 263 P.3d 1276 (2011). There, the defendant admitted that he shook the child, id. at 381, but claimed he did not realize he could inflict such severe injury by doing so. Id. at 387. He argued that, therefore, he did not knowingly disregard a substantial risk of great bodily harm. Id. Due to the recklessness instruction that referenced simply "'a wrongful act,'" the defendant was deprived of the opportunity to argue his theory of the case. Id. at 385.

Here, there was no dispute about the degree of the crime, as in Peters. See 163 Wn. App. at 848. There was no assertion that the defendant misunderstood the consequences of his actions, as in Harris. See 164 Wn. App. at 387. Instead, Gonzalez-Guzman's theory was that Crystal inflicted the serious injuries, and any harm caused while D.G. was in his care was accidental. Gonzalez-Guzman argues that his fall with D.G. calls into question his mental state as to the harm inflicted. But, the medical testimony refuted his allegation that D.G.'s injuries were accidental.

The question at trial was thus not the nature of D.G.'s injuries. Rather, the State offered so much evidence of the extent of great bodily harm that it negated Gonzalez-Guzman's accidental fall theory. The medical testimony established not only that the injuries were intentionally inflicted, but also that they were severe. One doctor described D.G.'s injuries as "devastating," the result of a "significant amount of force," and similar to trauma suffered by high speed interstate accident victims. Another testified that D.G.'s leg fracture "implie[d] sort of a torquing movement to break the

bone," and that his broken rib is a "very, very difficult rib to break, so you have to squeeze very high up into the chest." Based on this evidence, the jury could not have misunderstood the link between recklessness and the harm that D.G. suffered.

The recklessness instruction did not deprive Gonzalez-Guzman of an opportunity to argue his case. Nor did it reduce the State's burden of proof. Due to the severity of D.G.'s injuries and the lack of contrary evidence, we conclude that the jury's verdict would have been the same even without the erroneous instruction. The error was harmless.

IV. Reasonable Doubt Instruction

Gonzalez-Guzman also challenges the reasonable doubt instruction given at his trial. In Bennett, the Washington Supreme Court instructed all trial courts to use 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 4.01 (2d ed. Supp. 2005) (WPIC).on reasonable doubt until it approved a better instruction. 161 Wn.2d at 318. WPIC 4.01 contains the following optional language: "'If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.'"[2] Id. at 308.

Gonzalez-Guzman contests this optional language. He contends that it confused the jury's role, because it impermissibly suggested that the jury's job is to search for the truth.

He relies on two recent cases to support his proposition that the language was improper. First, he points to State v. Emery, where the prosecutor told the jury to

[2] There is now a third edition of the WPICs. 11 WPIC 4.01 (3d ed. Supp. 2011). The relevant language is unchanged from the version mandated by the Bennett court.

"speak the truth by holding these men accountable for what they did." 174 Wn.2d 714, 751, 278 P.3d 653 (2012). The court found the remark improper and explained that the jury's job is to determine not the truth of what happened, but whether the State proved the charged offenses beyond a reasonable doubt. Id. at 760. Similarly, in State v. Berube, the prosecutor asked the jury to "search for the truth, not a [sic] search for reasonable doubt." 171 Wn. App. 103, 120, 286 P.3d 402 (2012), review denied, 178 Wn.2d 1002, 208 P.3d 641 (2013). Again, the court highlighted that "truth is not the jury's job." Id.

The "abiding belief" language in the reasonable doubt instruction is distinguishable from the comments in Emery and Berube. In those cases, the prosecutor told the jury to search out or speak the truth, an onus that misrepresented the job before them. Here, the challenged instruction does not direct jurors to find the truth themselves. It merely elaborates on what it means to be "satisfied beyond a reasonable doubt."

Gonzalez-Guzman also argues that the instruction improperly equated "proof beyond a reasonable doubt" with an "'abiding belief in the truth,'" misstating the prosecution's burden.

Gonzalez-Guzman contends that State v. Pirtle supports his argument, Br. of Appellant, 45, despite the fact that the court upheld the same language he contests. See 127 Wn.2d 628, 658, 904 P.2d 245 (1995). The Pirtle court found that the language was "unnecessary but was not an error." Id. Gonzalez-Guzman maintains that this was "far from an endorsement," and is even less persuasive after Emery and

Berube recognized the "danger of injecting a search for the truth" into the definition of reasonable doubt.

However, multiple cases have upheld the use of this language, finding that it "adequately instructs the jury," State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988), and "could not have misled or confused" it. State v. Price, 33 Wn. App. 472, 476, 655 P.2d 1191 (1982). And, though the Pirtle court questioned its usefulness (notably before the Bennett ruling), it still found that the language did not diminish the definition of the burden of proof. 127 Wn.2d at 658. The instruction was proper.

V. Lifetime No-Contact Order

Gonzalez-Guzman argues that the lifetime no-contact order between him and his son violates his fundamental right to his parent-child relationship.[3] This court reviews sentencing conditions for abuse of discretion. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). This remains the standard even where the condition interferes with a fundamental right, such as the relationship between parent and child. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 375, 229 P.3d 686 (2010). However, this court reviews such conditions more carefully to ensure that they are sensitively imposed and reasonably necessary to accomplish the essential needs of the State and public order. Id. at 374. The State has a compelling interest in preventing harm and protecting children. State v. Corbett, 158 Wn. App. 576, 598, 242 P.3d 52 (2010).

[3] The State contends that Gonzalez-Guzman has not established that he is D.G.'s father, so the order does not implicate a fundamental right to parent. However, D.G.'s mother testified that Gonzalez-Guzman is D.G.'s father and there is no evidence disputing that fact.

Gonzalez-Guzman contends that a complete prohibition on contact with his son is not reasonably necessary to promote the State's interest. Courts will vacate no-contact orders where they are not sufficiently related to the harm they seek to prevent. For example, in State v. Letourneau, the defendant was sentenced for second degree rape of a child to whom she was not related and subsequently prohibited from unsupervised contact with her children. 100 Wn. App. 424, 426, 997 P.2d 436 (2000). Because there was no evidence that she might molest her own children, the court found that the order was not reasonably necessary to accomplish the needs of the state. Id. at 441-42.

In Rainey, the court approved the scope of a lifetime no-contact order between a father and child, though it ultimately struck the order based on duration. 168 Wn.2d at 382. There, the defendant had kidnapped his daughter and used her to gain leverage over his ex-wife. Id. at 379. The court found that it was proper to issue a no-contact order of some duration, because it was reasonably necessary to prevent the defendant from further harassing his ex-wife. Id. at 380. However, the sentencing court gave no reason for the lifetime duration of the order. Id. at 382. The appellate court thus remanded for the sentencing court to consider the duration of the order under the "reasonably necessary" standard. Id. at 382.

Unlike the children in Rainey or Letourneau, D.G. was the victim of Gonzalez-Guzman's crime: first degree abuse of his son. D.G.'s injuries were severe and numerous, including a serious brain hemorrhage and fractured skull, ribs, and leg. Multiple doctors testified that this level of trauma took a significant amount of force. Moreover, the effect of D.G.'s injuries is long-lasting. One doctor testified that D.G.'s

brain disfigurement is permanent and will have a "profound effect" on his development. According to his foster mother's testimony, two-year-old D.G. was still unable to sit up or roll over, had trouble spoon feeding, and moving his limbs, and is blind. This is distinct from Rainey, where the harm was not physical and the primary target of the harm was Rainey's ex-wife, not his daughter. See 168 Wn.2d at 380.

The severity and longevity of D.G.'s injuries support the trial court's discretion to enter a lifetime no-contact order, even between a parent and child.

We affirm.

Appelwick, J.

WE CONCUR:

Spearman, A.C.J.

Cox, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 65576-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Deborah Dwyer, DPA
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

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Date: January 15, 2014