NO. 65576-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SERGIO GONZALEZ GUZMAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES CAYCE

SUPPLEMENTAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

Statutes

Washington State:

Other Authorities

A. SUPPLEMENTAL ISSUES PRESENTED

1. Whether Gonzalez Guzman has not preserved for review on appeal the newly claimed error in the jury instruction defining "recklessly" because he has failed to establish that it was constitutional error with practical and identifiable consequences in this trial, where recklessness was not contested.

2. Whether the first sentence of the jury instruction defining "recklessly," which defined the term using the statutory language, was a correct statement of the law.

3. Whether any error in the definition of "recklessly" was harmless because Gonzalez Guzman did not dispute that the great bodily harm inflicted in this case was recklessly caused.

B. SUPPLEMENTAL STATEMENT OF THE CASE

The defendant, Sergio Gonzalez Guzman, was permitted to add a new issue in his reply brief, over the objection of the State. The Court has given the State an opportunity to file a supplemental brief in response to the new issue.

The court's instructions to the jury included the following, quoted in pertinent part:

Instruction 11 set out the elements of the crime:

> (1) That during a time intervening between November 9, 2007 and November 10, 2007, the defendant intentionally assaulted [DG] and recklessly inflicted great bodily harm;
>
> (2) That the defendant was eighteen years of age or older and [DG] was under the age of thirteen; and
>
> (3) That the acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. ....

CP 34; RCW 9A.36.120.

Instruction 10 defined "recklessly":

> 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.

CP 33; RCW 9A.08.010.

The procedural and substantive facts were included in the State's initial brief and are incorporated here by reference.

C. ARGUMENT

Gonzalez Guzman claims that the first sentence of Instruction 10, defining "recklessly," relieved the State of its burden of proving an element of assault of a child in the first degree because the term "wrongful act" was not replaced with the term "great bodily harm." He did not request that language in the trial court and this new claim would not constitute a manifest constitutional error, so any error has not been preserved for review. The claim also is substantively without merit because the jury was correctly instructed as to the elements of the crime: that the jury must find that the defendant "recklessly inflicted great bodily harm." CP 34. Finally, even if the term "wrongful act" should have been more specific, that error was harmless beyond a reasonable doubt because the required recklessness was not disputed by Gonzalez Guzman.

1. THIS CLAIM SHOULD NOT BE REVIEWED: IT IS NOT AN ISSUE OF CONSTITUTIONAL MAGNITUDE, NOR DID IT ACTUALLY PREJUDICE GONZALEZ GUZMAN AT TRIAL.

Gonzalez did not propose an instruction defining "recklessly" or object to the instruction given by the court. CP 10-17; 6/23RP 2-

3.[1] Ordinarily, an appellate court will consider a constitutional claim for the first time on appeal only if the claim is truly constitutional, and manifest. State v. Davis, 41 Wn.2d 535, 250 P.2d 548 (1952); RAP 2.5(a)(3). "Failure to object deprives the trial court of [its] opportunity to prevent or cure the error." State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). The defendant must show both a constitutional error and actual prejudice to his rights. Id. at 926-27. To demonstrate actual prejudice, there must be a "plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case." Id. at 935.

The alleged error in this case is not a constitutional error because the instructions given accurately set out the elements of the crime, satisfying the demands of due process. To satisfy due process, "jury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case." State v. O'Hara, 167 Wn.2d 91, 105, 217 P.3d 756 (2009). The jury must be instructed as to each element of the crime charged, but the failure to further

[1] The record of proceedings is in eight volumes, including eight dates from June 11, 2009, to July 24, 2009. References to the record identify the volume by month and day, for example, June 11, 2009, is cited as 6/11RP.

define one of the elements is not a constitutional error. Id. At most, the error identified here is a failure to define a term with as much specificity as possible in light of the crime charged, which is not an error of constitutional dimension. Id. at 105-07.

The State was not relieved of its burden of proof as to any element in this case because the to-convict instruction, Instruction 11, included every element of the crime – that instruction has not been challenged in this appeal. The instruction defining the crime also informed the jury that assault of a child in the first degree occurs when a person "intentionally assaults the child and recklessly inflicts great bodily harm." CP 29 (Instruction 6). The use of the statutory term "wrongful act" in the definition of "recklessly" did not relieve the State of the burden of proving that Gonzalez Guzman recklessly inflicted great bodily harm. CP 34. The jury was instructed that they were required to "consider the instructions as a whole." CP 24. There is no reason to believe that the jury ignored Instructions 6 and 11, relating to the specific crime, because "recklessly" was defined in general terms.

The trial court instructed the jury three times that the State had the burden of proving the elements of the charge beyond a reasonable doubt. CP 25, 34; 6/16RP 32. The jury was properly

instructed and is presumed to have followed its instructions. State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008). In his initial closing argument, the deputy prosecutor also reminded the jury of the court's instruction that the State's burden of proof was to prove the elements of the crimes beyond a reasonable doubt. 6/23RP 5-6. The prosecutor reiterated that the State was required to prove that Gonzalez Guzman intentionally assaulted DG and "recklessly inflicted great bodily harm." 6/23RP 6.

Use of the more general term "wrongful act" would not have misled jurors about the State's burden of proof. This Court's analysis in State v. Johnson, 172 Wn. App. 112, 297 P.3d 710 (2012), supports this conclusion. The court in that case concluded that the definition of "recklessly" should have specified the wrongful act related to the assault in the second degree charged, but held that it was not deficient performance for defense counsel to propose an instruction without that specificity. Id. at 134-35. The court could not have reached that conclusion if use of the "wrongful act" language would be misleading to the jury.

Even if the error was constitutional, review is not appropriate because it had no practical consequence in this case. Under the instructions given, if the jury had concluded that Gonzalez Guzman

did not recklessly inflict great bodily harm, it would have acquitted him, as it was directed by Instruction 11, the to-convict. CP 34; see O'Hara, 167 Wn.2d at 108 (no practical consequence if the jury could make all the necessary findings under the instructions given). When the elements instruction is clear and correct, an alleged error in a definitional instruction does not have "practical and identifiable consequences," and thus, is not manifest constitutional error. State v. Pittman, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

Most significantly, the question of whether great bodily harm was recklessly inflicted was not in dispute in this case, and the defense theory was unrelated to that element of the crime. The prosecutor noted the State's burden of proving that element but then noted that it was not one of the contested issues in the case, just as the issues of the age of the defendant and DG were not contested. 6/23RP 6. The prosecutor was correct – this element was not contested in the defense closing argument, which challenged only the proof of the identity of the person who assaulted DG. 6/23RP 18-31. The defense attorney never referred to recklessness. If the jury had concluded that the injuries to DG were accidentally inflicted (a theory thoroughly refuted by the medical testimony), it would have acquitted because the State

would have failed to prove an intentional assault, an element as to which recklessness also is irrelevant.

2. THE JURY INSTRUCTION DEFINING RECKLESSNESS WAS CORRECT.

The Supreme Court has never held that the definition of recklessness must specify the wrongful act at issue as to the particular crime charged in every case. Because the to-convict instruction in this case clearly stated every element, including that the defendant "recklessly inflicted great bodily harm," the statutory definition of recklessness that the jury was given was not error.

The first case that analyzed the use of the general term "wrongful act" in an instruction defining recklessness was State v. Peters, 163 Wn. App. 836, 261 P.3d 199 (2011). In that case, the defendant was charged with manslaughter in the first degree. Id. at 837. The jury was instructed that the elements of that crime were (1) that the defendant engaged in reckless conduct, and (2) that the victim died as a result of the defendant's reckless acts. Id. at 845. The court observed that the relevant statutory definition of the crime was more specific than provided in the to-convict instruction – the statutory definition is that a person "*recklessly causes the death* of

another person." Id. at 847 (citing RCW 9A.32.060(1)(a)) (emphasis in original).

The court in Peters concluded that because the jury was instructed only that recklessness was established by disregard of a substantial risk that a wrongful act would occur, the State was relieved of its burden of proving that the defendant disregarded a substantial risk that a death would occur. Id. at 850. The jury was not informed in either the to-convict instruction or in the definition of "recklessly" that the State must prove that the defendant disregarded a risk that death would occur, so nowhere were they instructed of the State's burden to prove that element.

The court in Peters relied in part upon the Supreme Court's decision in State v. Gamble[2] for the proposition that manslaughter in the first degree requires that a defendant disregard a substantial risk of death. Id. at 848. The court in Gamble considered that issue in distinguishing the recklessness elements of felony murder predicated on assault (where the risk disregarded would be substantial bodily harm) from manslaughter in the first degree (where the risk disregarded is death). 154 Wn.2d at 467-69. The issue in Gamble was whether manslaughter is a lesser included

[2] 154 Wn.2d 457, 114 P.3d 646 (2005).

offense of felony murder predicated on assault; there was no analysis or discussion of any jury instruction defining recklessness in that case. Id. at 462-69. Although Gamble does establish that for purposes of manslaughter, the State must prove that the defendant disregarded a substantial risk of death, it does not require that this information be included in the definition of recklessness.

In contrast with Peters, in the case at bar the jury was specifically instructed as to the recklessness required by the statutory definition of the crime: in the to-convict instruction. CP 34. Instructions are sufficient if when read as a whole they properly inform the jury of the law and if they allow the parties to argue their theories of the case. O'Hara, 167 Wn.2d at 105. Each instruction must be evaluated in the context of the instructions as a whole. State v. Sublett, 176 Wn.2d 58, 81, 292 P.3d 715 (2012) (citing State v. Brett, 126 Wn.2d 136, 171, 892 P.2d 29 (1995)). An appellate court will review the instructions from the perspective of a reasonable juror. State v. Hanna, 123 Wn.2d 704, 719, 871 P.2d 135 (1994). Where the to-convict instruction clearly includes a required element, there is no reason that it must be repeated in each related definition of a term. Gonzalez Guzman has not

challenged the adequacy of the to-convict instruction in conveying every required element.

There are two recent cases upon which Gonzalez Guzman relies, but neither should control the result in this case. The first is the decision from Division 2 of the Court of Appeals reversing a conviction of assault of a child in the first degree. State v. Harris, 164 Wn. App. 377, 263 P.3d 1276 (2011). The court in Harris correctly concluded that the Supreme Court in Gamble established that the relevant wrongful act for purposes of the recklessness instruction depends on the specific crime charged. Id. at 386. However, the court suggested that this Court's decision in Peters held that a recklessness instruction must specify the wrongful act that relates to the crime charged,[3] a reading that does not take into account the failure of any of the instructions in Peters to specify the relevant wrongful act that the State was required to prove.

Critical to the holding that the instructions in Harris were deficient was that Harris requested that "great bodily harm" be specified in the recklessness definition but the court refused, and when Harris tried to argue in closing that he was not aware of the risk of harm posed by shaking a baby, the State objected and that

[3] Id. at 387.

objection was sustained. Harris, 164 Wn. App. at 385, 387. The court concluded that Harris was expressly precluded from arguing his theory of the case by the failure to define the wrongful act as great bodily harm.[4] Id. at 387. In contrast, the failure to specify the wrongful act in the recklessness instruction had no effect in this case because the wrongful act was specified in the to-convict instruction and Gonzalez Guzman was not precluded from arguing his theory of the case by that manner of instruction.

The second case upon which Gonzalez Guzman relies is a decision from Division 1 of the Court of Appeals affirming a conviction of assault in the second degree, but holding that the recklessness instruction given was error because it did not specify that the wrongful act at issue was substantial bodily harm.[5] State v. Johnson, 172 Wn. App. 112, 297 P.3d 710 (2012). The court in Johnson also relied on Peters for the proposition that a recklessness instruction must specify the wrongful act that relates to the crime charged, at least as to manslaughter, and dismissed as irrelevant the failure of any of the instructions in Peters to specify

[4] The to-convict instruction in Harris did specify that the State must prove that the defendant recklessly inflicted great bodily harm and it is not clear upon what basis the trial court refused the defense proposed instruction and sustained the State's objection to the defense argument. Id. at 384-85.

[5] A petition for review of the Johnson decision has been filed.

the relevant wrongful act that the State was required to prove. Id. at 133-34. The trial in this case occurred in 2009, before the decisions in Peters, Harris, or Johnson. 6/23RP 1.

The court in Johnson stated that it was agreeing with the principle that was extended to assault in Harris, that a trial court should use statutory language in the instructions, where that language controls. Id. at 132. It did not explain why the use of the statutory language defining the elements in the to-convict would be inadequate. The court indicated that it was extending the principle of Gamble. Id. The principle being referred to is not clear, as the wording of jury instructions was not at issue in that case. Gamble, 154 Wn.2d at 462-69.

The Johnson opinion mentioned the comments accompanying the definition of recklessness in the Washington pattern jury instructions, upon which Gonzalez Guzman also relies. 172 Wn. App. at 131-32. That comment indicates that Gamble requires that in a manslaughter case the term "death" be substituted for "wrongful act." 11Wash. Practice: WPIC 10.03, Comment. The comment must be analyzed in the context of the to-convict instruction for manslaughter in the first degree. The WPIC to-convict instruction for that crime, WPIC 28.02, still does not

specify the statutory element that the defendant recklessly caused a death; if the WPI Committee acted on the assumption that the pattern to-convict would be used, the missing element would have to be included in the recklessness definition. To the extent that the comment suggests that Gamble established a rule regarding the definition, and that rule might be expanded to other crimes, it was in error. The committee, although learned, does not establish the law and is sometimes in error. E.g. State v. Kyllo, 166 Wn.2d 856, 215 P.3d 177 (2009) (WPIC 17.04); State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000) (WPIC 10.51); State v. LeFaber, 128 Wn.2d 896, 913 P.2d 369 (1996) (WPIC 16.02), overruled on other grounds by State v. O'Hara, 167 Wn.2d 91, 105, 217 P.3d 756 (2009).

The definition of recklessness in this case adequately conveyed the applicable law. The to-convict instruction made clear the wrongful act at issue by specifying that the State must prove that the defendant recklessly inflicted great bodily harm. CP 34.

3. ANY ERROR IN FAILING TO FURTHER DEFINE RECKLESSNESS WAS HARMLESS – THE ELEMENT WAS UNDISPUTED.

Even if this Court concludes that the failure to specify the wrongful act at issue in the recklessness instruction was error, it

was harmless in this case, because the element of reckless infliction of great bodily harm was undisputed. If the instruction might generate confusion in some cases, it could not have done so in this case. Even if an instruction relieves the State of its burden of proving an element of the crime, it is harmless if the court concludes beyond a reasonable doubt that the verdict would have been the same absent the error. Peters, 163 Wn. App. at 850.

The day that DG was taken to the hospital, Gonzalez Guzman told a social worker at Harborview Medical Center that he was walking out of the bedroom, tripped and fell on top of the baby. 6/22RP 55-56. He told Crystal,[6] DG's mother, that he was willing to do time for hurting DG accidentally, saying he took responsibility. Id. at 60. The next day, Gonzalez Guzman told Detective Thomas that when he was carrying the baby from the bedroom to the living room he slipped on some clothing and fell down on top of DG. 6/22RP 135. Gonzalez Guzman was not injured and he said that they did not hit any wall or door as they fell. Id. at 136.

In this supplemental brief, Gonzalez Guzman argues that the recklessness definition went to the crux of the defense case because the defense theory was that Gonzalez Guzman fell and

[6] The State refers to this witness by her first name to attempt to maintain the privacy of the victim.

had no intent to injure DG. Appellant Supp. Brief at 6. If that had been the defense theory of the case, the recklessness definition would be irrelevant because the element at issue would have been whether there was an intentional assault. This is illustrated by contrast with Harris, supra, in which recklessness was at issue because the defendant admitted that he intentionally assaulted the child (by shaking) but claimed that he was not aware that shaking a child could cause injury. Harris, 164 Wn. App. at 387.

But the defense theory in this case was not accident. That explanation was not plausible because of the multiple injuries suffered by DG, including leg, rib, and skull fractures and massive brain injuries. Contrary to Gonzalez Guzman's claim, there was overwhelming evidence that DG's injuries were inflicted and not caused by the type of common household accident described by Gonzalez Guzman at the hospital.[7]

On November 7, 2007, a pediatrician with 30 years of experience examined DG head to toe and found nothing wrong with him except minor diaper rash. 6/18RP 68, 70-71. Both Gonzalez

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[7] Contrary to Gonzalez Guzman's suggestion in his brief, the prosecutor did not argue that it was unclear and did not matter if the injuries were inflicted accidentally, but made the remarks quoted in the context of arguing it did not matter exactly how the assault occurred, whether by shaking DG and banging his head or by swinging DG by his leg and hitting his head, then shaking him. 6/23RP 15-17.

Guzman and DG's mother agree that DG had not fallen or broken any bones before this incident. 6/22RP 138.

When Crystal brought DG to Highline Hospital on November 10, he was seen by Dr. Ryan, an experienced emergency room physician. 6/22RP 4-7, 53-55. Dr. Ryan concluded that the pattern of bleeding in the brain shown on a brain scan of DG was very consistent with shaken baby syndrome; he concluded to a medical certainty that the injury was not accidental. Id. at 8-12, 28.

Dr. Wiester, an expert on child abuse, examined DG after he arrived at Harborview the next day, and a few days later, after he had been transferred to Seattle Children's Hospital (Children's). 6/17RP 71-74, 91, 106. DG was diagnosed with a large skull fracture, several broken ribs, and a displaced spiral fracture of his left tibia (lower leg bone). Id. at 86, 104. DG had hemorrhages in the back of his eyes and brain bleeding, both inside his brain and between his brain and his skull. Id. at 86-87, 92.

Dr. Wiester opined that the constellation of DG's injuries were highly consistent with inflicted trauma and very, very inconsistent and improbable with accidental trauma. 6/17RP 106-10. A spiral leg fracture is caused by a torqueing movement; the rib fractures could only be caused by squeezing and the ribs fractured

would be very hard to break. Id. at 104-06, 112-13. The brain injury was a very serious injury that takes a significant amount of force to cause, and would not be caused by dropping a baby or if the baby fell out of a car seat onto the ground. Id. at 110.

Dr. Oxford, a head and neck surgeon, also saw DG on November 11. 6/17RP 46. He described DG's brain injury as devastating and caused by a significant amount of force, like a car crash at 50-60 miles per hour or more. Id. at 49-51. He would not expect to see multiple injuries on different parts of the body or massive brain hemorrhaging, both of which DG suffered, if someone ran and fell with all their weight on DG. Id. at 60-61.

Dr. Smith, a pediatric intensive care physician at Children's, evaluated DG on November 13. 6/18RP 5, 7, 12. He observed that DG had very severe brain injury throughout all parts of his brain, which would result in very profound disability. Id. at 8-9, 12. The combination of injuries DG suffered were, in Smith's opinion, shaken baby syndrome until proven otherwise. Id. at 10. Shaken baby syndrome occurs when a person holds a baby by the chest and shakes them hard. Id. at 9-10.

Dr. Zimmerman, the director of pediatric critical care services at Children's, evaluated DG over several days, starting on

November 14. 6/18RP 31, 33. DG had deep bleeding on both sides of his brain and around the outside of his brain, a very serious brain injury. Id. at 35-36. Dr. Zimmerman opined that the injuries were inflicted and that shaken baby syndrome was an important possibility. Id. at 56-58.

This overwhelming medical evidence that DG's injuries were intentionally inflicted and not accidental was not contradicted, and Gonzalez Guzman's theory of the case was not that the injuries were caused by accident. Gonzalez Guzman argued in closing that DG's mother inflicted the serious injuries. He began by describing the facts as heinous, then stated that the key questions in the case were whether there was an intentional assault and if so, who did it? 23RP 18-19. However, he never argued that DG's massive injuries were caused unintentionally.

Gonzalez Guzman argued only one theory – that DG's mother caused the injury: "my client didn't commit this atrocious, violent act against [DG]," 23RP 20; "Crystal's the one who ... has an anger problem," 23RP 21; Crystal shook the baby and caused the injuries, 23RP 22; Crystal had the motive and opportunity, 23RP 24; the acts were heinous, 23RP 24; Crystal may have been drinking, 23RP 25; Crystal shook her child and had a scapegoat, so

she testified to protect herself—did you expect she would say she "shook [her] child so hard that [she] caused his brain injury?", 23RP 26; it was evidence of guilty conscience that Crystal attended few of DG's therapy sessions after this injury, 23RP 27-28; it "eats [Crystal] up" to see what she has done to DG, 23RP 28; the injuries were not caused by Gonzalez Guzman's fall with the baby, but were caused by Crystal shaking the baby, 23RP 28-29. He stated in conclusion that a review of the evidence "is going to tell you who actually hurt this child. It wasn't my client; it was Crystal." 23RP 30-31.

Gonzalez Guzman never mentioned the term "recklessly" and never suggested that he intentionally assaulted the baby but was unaware of the risk of injury that such an assault would involve. 23RP 18-31. The prosecutor had reviewed the elements of the crime in his initial closing argument, and stated that the State was required to prove the defendant intentionally assaulted DG and "recklessly inflicted great bodily harm." 23RP 6. The prosecutor argued that only two questions really were in dispute: was it an intentional assault and who did it. 23RP 6. The prosecutor predicted that given the unanimity of the doctors' opinions that the injuries were the result of abuse, the defense would not argue that

the injuries were the result of an accident, an unintentional act. 23RP 7-8. The prosecutor was correct.

The definition of recklessness was not at issue in this case because the defense theory was that another person intentionally assaulted DG and inflicted the devastating injuries. The lack of specificity as to the wrongful act referred to in that instruction was harmless beyond a reasonable doubt.

D. CONCLUSION

The State respectfully asks this Court to affirm Gonzalez Guzman's conviction and sentence.

DATED this 8th day of July, 2013.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Supplemental Brief of Respondent, in STATE V. SERGIO GONZALEZ GUZMAN, Cause No. 65576-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

07-08-13
Date

Done in Seattle, Washington