NO. 319652

SUPREME COURT
OF THE STATE OF WASHINGTON

92812-6

STATE OF WASHINGTON,

Plaintiff,

v.

ANAUM GUZMAN,

Defendant.

PETITION FOR DISCRETIONARY REVIEW

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A. Identity of moving party.

Mr. Guzman by and through his attorney, Kraig Gardner petitions the court for review of the Court of Appeals Division III decision dated January 26, 2016 in case #319652 terminating review and that same court's April 15, 2016 decision denying Mr. Guzman's motion for reconsideration.

B. Relief requested

Mr. Guzman requests that this court review the decision of the court of appeals regarding the following issues.

C. Issues Presented for review/ assignment of error

1. Whether the jury unanimity instruction properly instructed the jury that it must unanimously find that Mr. Guzman committed at least one act supporting a finding of guilt for each count charged.
2. Whether trial counsel effectively represented Mr. Guzman. Hearsay statements of the alleged victim's older sister, who had made separate allegations against Mr. Guzman in his first trial, were allowed into evidence in opening, closing and by two witnesses. Counsel

objected to the statements in the testimony of one of the witnesses but not in the other contexts. Counsel also failed to object to the violation of the court's motion in limine prohibiting mention of the allegations that the older sister made against Mr. Guzman. Counsel also failed to call law enforcement witnesses who had testified in the first trial for the purpose of impeaching the victim with prior inconsistent statements.

D. Statement of the Case

Mr. Guzman, Appellant/Defendant, was originally tried on these charges in February of 2012. That trial also involved an additional charge alleging an assault with a sexual motivation against the older sister of the alleged victim. That trial resulted in an acquittal on the charge concerning the older sister, and a hung jury on the charges that Mr. Guzman was eventually retried for.

In this case, the State alleged that between July 26, 2001 and July 25, 2007, Mr. Guzman engaged in acts constituting sexual intercourse with the victim. The victim's 12th birthday formed the demarcation between count 1 and count 2. At trial the victim testified that acts constituting sexual intercourse occurred on

several occasions for each count. At trial Mr. Guzman testified that these events never occurred.

In the first trial in February of 2012, the two alleged victims were younger sisters of Mr. Guzman's wife. The jury found Mr. Guzman not guilty on the charge concerning the older sister, and was deadlocked on the counts concerning the younger. CR75. A mistrial was declared, and The State proceeded to retry Mr. Guzman on the charges concerning the younger girl.

A central part of the State's case involved how the subject of molestation had initially been brought to the attention of the girls' parents. In the first trial, the older sister, D.T., testified that she had a conversation with her younger sister shortly after Christmas 2010 in which both girls disclosed to each other for the first time that they had been abused by Mr. Guzman. Transcript of 2012 trial at 319-321. D.T. testified that shortly thereafter she had a conversation with her father where the topic of the conversation was molestation, but there was no mention that either of the girls had been abused, or by whom. Trans. 2012, 322-25.

The girls' mother also testified about that conversation. Trans. 2012, 372-73. The father did as well. Trans. 2012, 393-95. All of the testimony concerning this conversation was that there were no

specific allegations concerning abuse. The narrative was that after the daughters had disclosed abuse to each other, that the older sister had a conversation with her parents concerning the general topic of abuse, but not any specific allegations concerning either the girls, or Mr. Guzman.

At the second trial, D.T. did not testify, but other witnesses testified concerning the conversation described above, and it was also featured in the State's opening statement. The problem with how this information was presented in the second trial is evident from the State's opening statement.

> You're going to hear that either that night or the next day, D.T. approached her parents and said, what if you knew someone was being molested? What do you do? And the parents said, well, you would tell somebody, you would tell somebody, you would notify the authorities.
>
> You're going to hear that a day or two later, Mr. T. and the defendant, who worked together, who were good friends, worked together, worked together doing construction, had been working on some kitchen cabinets for the defendant's home. And it had been a good day, they had gotten some work done, and Mr. T suggested, let's go to Golden Corral, a restaurant that used to be in Moses Lake, that was kind of an all-you-can-eat buffet restaurant. .....
>
> So they were on their way to Golden Corral when Mr. T says to the defendant, you know it's

> hard being a parent, it's really hard being a parent. D.T. came to us last night, she wanted to talk about, you know, what if you knew somebody was being molested, what would you do. ... Mr. T will tell you that when he relayed this conversation to the defendant, the defendant got very quiet, got to the restaurant, the defendant was very quiet, which was out of character for him, insisted that he pay for lunch.
>
> Trans.2013 62-64.

Counsel for Mr. Guzman did not object in opening. Id.

This narrative, comprises three of the six pages of the transcript of the State's opening. The defense had moved in Limine to exclude mention of D.T.'s allegations against the defendant. CR 82-84.

This narrative was reinforced by the testimony that was offered during the trial. During direct examination of Mrs. T., trial counsel objected on hearsay grounds to Mrs. T.'s testimony concerning what D.T. had told her during the conversation, but was overruled by the court. Trans. 2013 at 82. During Mr. T.'s testimony, the State elicited testimony concerning his interaction with Mr. Guzman when he mentioned that D.T. had asked him about molestation and Mr. Guzman's reaction to that information, Trans. 2013, 114-118. Finally, the State argued using these events in closing argument. Trans.2013, 321-22.

As stated above counsel, only objected to Mrs. T.'s reference to this conversation.

During Mrs.T's direct testimony she told the jury about the initial conversation that she had with both girls present in which the scope of the allegations were disclosed to her. Her answers violated the aforementioned motion in limine regarding D.T.'s allegations against Mr. Guzman. Her responses included the following:

A: It was apparent that they had something – go ahead.

A: It was apparent that they had something very important to say to us. And so it was revealed that –

A: I asked them questions to determine the extent of the molestation, and –

A: I started reassuring them that they – that there was hope, that we – that they weren't bad girls, that – that they were worth

– that they were worthy.

These answers strongly imply that D.T. made allegations alongside R.T. her younger sister, in violation of the court's ruling in limine.

In the first trial, after the State rested, trial counsel had called law enforcement witnesses to impeach R.T.'s testimony with prior

inconsistent statements. Officer Joshua Buescher, and retired officer Dan Bohnet. Trans.2012, 388, 421-450.

In that trial, counsel was able to elicit the following:

Office Buescher did the initial interview with R.T. on December 30th 2010. Trans.2012, 423. R.T. told him that Mr. Guzman had touched her over her clothes between the ages of 8 and 14, and that Mr. Guzman had attempted to put his penis into her vagina, and that had occurred in March of 2010, 423-24.

Sergeant Dan Bohnet interviewed R.T. later, and responded to a question regarding threats by Mr. Guzman answered that "no he doesn't." (make threats) Trans.2012, 429. R.T. responded yes when asked if Mr. Guzman had ever touched her with his penis, but when asked if there was any pain replied "No because he never had the chance to go in." Trans.2012, 430. She later said "No he hasn't threatened me at all," and when asked directly if penile penetration had ever occurred she responded "no." Trans.2012, 431.

In the second trial, Counsel for Mr. Guzman had subpoenaed Officer Beuscher but he was never called as a witness. CR 89. Officer Bohnet was not called as a witness or

subpoenaed. Instead counsel attempted to cross examine R.T. by refreshing her recollection from the written reports of the officers.

At the close of the trial the court instructed the court as follows on jury unanimity:

> The State alleges that, on more than one occasion, the defendant committed acts which could be found by the jury an element of a crime charged.
>
> To convict the defendant of rape of a child in the first degree, as charged in Count 1, at least one particular act of sexual intercourse must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that all the alleged acts have been proved.
>
> To convict the defendant of rape of a child in the second degree, as charged in Count 2, at least one particular act of sexual intercourse must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that all the alleged acts have been proved.

E. Argument for review.

1. Jury unanimity.

Criminal defendants in Washington have a right to a unanimous jury verdict. Wash. Const. art. 1, § 21. This right includes the right to an expressly unanimous verdict. Wash. Const. art. 1, § 21. *State v. Lobe*, 140 Wn.App. 897, 903, (Div. 2 2007).

Division III recognized the problem that Mr. Guzman identified in the unanimity instruction that was given in his case. "The instruction would have been clearer had the instruction stated, "To convict the defendant of rape of a child in the first degree as charged in Count 1, at least one particular act of sexual intercourse *taking place between July 26, 2001 and July 25, 2005*, must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved."" Jan. 26, 2016 decision at 7. (hereinafter "Decision"). The court recognized that the italicized language would have addressed the issue if similar changes were made for the *Petrich* instruction for each count. Id. However, the court rejected Mr. Guzman's argument, finding that the language created only a "theoretical" possibility of error because "read in the context of all of the jury instructions, there was no possibility of confusion. Decision at 8.

This language was recently analyzed by the Washington Supreme Court in *State v. Carson*, 357 P.3d 1064, 184 Wn.2d 207 (Wash. 2015). In that case, the State had proposed a *Petrich* instruction in a three count child molestation case. Defense Counsel objected, and Carson claimed on appeal that he had received ineffective assistance as a result. *Carson* at 210. The

primary differences between this case and that case for purposes of analysis are that the proposed instruction would not have been given for each count, as occurred in this case, and that the State elected in closing arguments, which specific acts it relied upon for each count. *Id.*

The heart of the *Carson* court's analysis clearly and strongly applies here. The court focused on the "at least on particular act" language as a potential cause for confusion.

> The proposed instruction that the State offered was a word-for-word copy of the model Petrich instruction that appears in the Washington Pattern Jury Instructions. As defense counsel noted, that instruction's statement that " one particular act ... must be proved beyond a reasonable doubt" made little sense in Carson's case because Carson was charged with three separate counts of child molestation. *The confusion was exacerbated by the final sentence of the instruction, which would have informed the jury that it " need not unanimously agree that the defendant committed all the acts of Child Molestation in the First Degree.*" As defense counsel argued, " If you read that instruction, it confuses the jury into thinking, well, if you agree that one act happened, then you must agree that all of them happened." *At best, then, the instruction would have been confusing and it would have failed to ensure that the jury relied on a separate act for each count. At worst, the instruction would have been highly prejudicial to Carson. The record firmly demonstrates that these concerns were the animating force behind defense counsel's objection to a Petrich instruction.*

Carson at 218-19, emphasis added.

This analysis applies here. Not only did the instruction explicitly state that the jury must agree on "at least one" act, it also explicitly told them they need not unanimously agree that "all" of the alleged acts occurred.

Further, *Carson* explained that "[t]he WPICs do not provide an example of a multicount variation on the Petrich instruction. As previously noted, the WPIC note on use for the Petrich instruction advises courts to " [u]se this instruction ... when the evidence indicates that several distinct criminal acts have been committed, but the defendant is charged with only one count of criminal conduct." WPIC 4.25 note on use at 110. A sentence in the comment on the pattern instruction states that " ***[i]f the instruction is being modified for multiple counts, then the instruction needs to clearly require unanimity for one particular act for each count charged.***" Id. cmt. at 113 (citing *State v. Watkins*, 136 Wn.App. 240, 148 P.3d 1112 (2006)). The comment does not, however, provide an example of a suitable instruction." *Carson* at 224, bold italics added.

This portion of the Carson decision is in direct conflict with the decision of the court of appeals. The entirety of the Carson decision clearly raises questions about the decision below finding

that all of the instructions read as a whole correct this constitutional error. *Carson* speaks of the confusion the language would cause in a multi count case, and specifically notes the need "to clearly require unanimity for one particular act for each count charged."

Jury instructions should be interpreted and explained consistently regardless of context. Not on a case by case basis. If the language at issue in this case was found to be confusing in *Carson*, then it should be interpreted in the same manner here.

Because jury deliberations are not on the record, any argument regarding possible interpretation of the instructions in any case will always be "theoretical." We can not know if a particular juror attempted to persuade others that the very language at issue here would allow them to conclude deliberations with a verdict on both counts even though they were unanimous as to one act only.

Finally it is crucial to note that this issue would have arisen after the jury had concluded unanimously that at least one act had been established. The decision about how to determine if Mr. Guzman was guilty on the second counts based on their unanimous agreement on one act necessarily would have occurred after that one act of child rape had been agreed upon by all the

members of the jury. An explanation of how this would be prejudicial seems unnecessary.

RAP 13.4 sets forth the considerations for acceptance of review by this court. Mr. Guzman asserts that the decision below is in conflict with the *Carson* decision (RAP 13.4(b)(1)); is a significant question of law under the Constitution of the State of Washington or of the United States (RAP 13.4(b)(3)); and/or is an issue of substantial public interest that should be determined by the Supreme Court. (RAP 13.4(b)(4)).

As the Carson court points out there is not much authority on the application of *Petrich* to multicount cases, and in this case where multiple acts were alleged in support of each count, and the State did not elect which acts it was relying upon. Acceptance of this case would settle those issues by providing guidance from the Supreme Court.

2. Ineffective assistance claims.
    a. The "consciousness of guilt" from D.T.'s conversation with her parents.

Boiling this issue down to its barest essence, Mr. Guzman would point out the court of appeals conclusion that:

[T]he principal relevance of this line of questioning, and the reason that this evidence was offered by the State, was to point to Mr. Guzman's reaction to the report that D. had made the inquiry. The reaction, which the State had argued reflected guilty knowledge, was relevant regardless of the circumstances or state of mind that prompted D. to make the inquiry.

Decision at 14.

Mr. Guzman strongly disagrees that this evidence was relevant "regardless."

The State's argument in opening and closing, and the testimony of both parents taken at face value was that Mr. Guzman acted upset or distraught or however it might be characterized. Mr. Guzman exhibited this reaction when he was told by his father in law that his young sister in law had asked her father about what to do if someone had been molested.

This begs the question of how Mr. Guzman was supposed to react regardless of his guilt or innocence. How would an innocent brother in law act in response to this news? Might the reaction not be the exact conduct described by the State and the witnesses?

This question demonstrates the impropriety of this featured portion of the State's case. Any relevance of this information under ER 401 is clearly outweighed by its potential for prejudice. ER 403.

In this case, the matter is made worse by the fact that D.T. had made separate allegations against Mr. Guzman. The State offered it as proof of Mr. Guzman's guilty knowledge of his molestation of R.T., without telling the jury that D.T. had alleged misconduct as well. Even if Mr. Guzman's reaction demonstrated guilty knowledge, the question remains. Guilty knowledge of what? Was he guilty about what he had done to R.T. or D.T. or both, or neither? He had just been told that it was likely that his young sister in law had likely been abused. This news came from his friend and father in law. Claiming that there is a way to tell in his response to this news would be different depending on whether he had abused both girls, just one, or neither is not possible. It was bad news regardless of his guilt or innocence and should never have been admitted.

Counsel had moved in limine to keep the allegations made by D.T. from the jury. Having done that, and demonstrating that he knew it shouldn't come in when he objected to Mrs. T.'s testimony, it is not reasonable to conclude that there was a strategic reason for counsel's actions. The emphasis that the State placed upon this piece of their case demonstrates the prejudice it caused Mr. Guzman.

This issue should be accepted by the court pursuant to RAP 13.4 (b)(3), and (4). The ineffective assistance of counsel issue is constitutional in nature. More compelling may be guidance to the courts of this State regarding the proper analysis on admitting evidence under the "consciousness of guilt" rubric without fully conducting an ER 403 analysis. The State will always be offering this kind of evidence as proof of guilt. When we are talking about someone's "consciousness," the risk of misinterpretation, and assumption are great. ER 403 should be vigorously applied to this sort of evidence. It was not in this case.

b. Violation of motion in limine.

Focusing on what had been said above, if trial counsel had been running a defense that D.T. had fabricated allegations against Mr. Guzman and later convinced R.T. to join in, then an argument that not objecting was strategic might obtain. Obviously any mention of D.T.'s allegations would be other bad acts testimony regardless of a motion in limine. The point here, is that having made the motion to exclude, "leakage" of the other allegations into this trial should have been at the front of counsel's mind. Counsel's performance allowed key parts of the other allegations that were

not to be spoken of to be used, out of context, as proof to the second jury that Mr. Guzman was guilty. Counsel also failed to object, or to move for a mistrial when Mrs. T.'s testimony all but stated that D.T. had accused Mr. Guzman of wrongdoing as well.

c. Impeachment.

Very briefly, the court found that trial counsel's decision to impeach R.T. from a piece of paper was a strategic choice. Decision at 20-21. Every law student is taught Justice Oliver Wendell Holmes Jr.'s adage that "The life of the law has not been logic; it has been experience." *The Common Law* (1881), p. 1. Every criminal defense attorney has experienced the special considerations regarding impact and credibility of law enforcement witnesses on juries and judges. Not calling law enforcement to testify concerning prior inconsistent statements is acting contrary to both logic and experience. Absent compelling reasons, it falls below any standard for effective assistance. Cross examination is the heart of the factfinding function in our criminal justice system. Effective cross examination requires a plan. Dismissing this as simply a strategic decision may not seem to violate a legal

principle, but a strategy should have an apparent purpose, or at least a potential purpose, and proceeding in this manner did not.

This issue should be accepted for review either as part of an ineffective assistance claim, or as part of a cumulative error claim. Both of which were raised in the court of appeals.

F. Conclusion

For these reasons Mr. Guzman respectfully requests review of the January 26, 2016 decision and the April 15, 2016 denial of the motion for reconsideration. .

August 8, 2016.

Respectfully submitted,

Kraig Gardner WSBA # 31935

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kraig gardner