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Supreme Court No. 99526-5

SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,
Respondent,

v.

JUAN JOSE LUNA HUEZO,
Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

In seeking review, the petitioner raises no new issues and attempts to relitigate the same issues raised at the Court of Appeals without adequately addressing and explaining how the decision by the Court of Appeals conflicts with any binding decisions by the Supreme Court or Court of Appeals.

II. ISSUES PRESENTED FOR REVIEW BY PETITIONER

1. Does the Court of Appeals decision regarding the questioning of the defendant about his prior statement regarding the victim's truthfulness conflict with a decision of the Supreme Court or published Court of Appeals decision?
2. Does the Court of Appeals decision regarding the admissibility of testimony regarding the defendant's trait of sexual morality conflict with a decision of the Supreme Court or published Court of Appeals decision?
3. Does the Court of Appeals decision regarding the prosecutor's questioning and comments on the defendant's testimony conflict with a decision of the Supreme Court or published Court of Appeals decision?

4. Does the Court of Appeals decision regarding the defendant's allegation of burden shifting conflict with a decision of the Supreme Court or published Court of Appeals decision?
5. Does the Court of Appeals decision regarding the confrontation of witnesses and allowing a witness to write an answer to a question conflict with a decision of the Supreme Court or published Court of Appeals decision?
6. Does the Court of Appeals decision regarding the claim of ineffective assistance of counsel conflict with a decision of the Supreme Court or published Court of Appeals decision?
7. Does the Court of Appeals decision regarding the claim of cumulative error conflict with a decision of the Supreme Court or published Court of Appeals decision?

III. STATEMENT OF THE CASE

As adopted from the State's prior brief:

The prosecution case:

The case came to light when two classmates of T.O., who was then in the 5th grade, saw her crying alone. RP at 24-25, 35. After talking to T.O., they went to their teacher. RP at 25, 35. The teacher contacted the school counselor, who spoke with T.O. RP at 47. After speaking with her,

the counselor called the police about concerns with T.O. and her sister, B.O. RP at 48.

T.O., born April 5, 2005, testified that her stepfather, the defendant, had touched her sexually in several locales, including an apartment the family used to rent, her aunt's residence, their house, and a car. RP at 67, 249, 256-57, 267. The touching included putting his hand on her private part, putting his private part on her body, and putting his penis in her mouth. RP at 251, 254, 265.

T.O. stated that the defendant once duct-taped her hands when he got on top of her. RP at 257-58. She also said that the defendant used a condom he obtained from a backpack in the bedroom, and that he put oil on his penis. RP at 262, 265. The police confirmed that the backpack did contain condoms and duct tape. RP at 190, 278. The defendant also confirmed he uses condoms and oil when having intercourse. RP at 402.

T.O. did not respond when the deputy prosecutor asked her to describe the defendant's private part. RP at 263. The prosecutor then asked her to write the answer. *Id.* T.O. did— "it was long and tiny hair." RP at 264.

T.O. discussed the sexual contact with her sister, B.O. RP at 271. To T.O.'s surprise, B.O. said the defendant was doing the same thing to

her. *Id.* T.O. asked her stepfather if he was also touching B.O. and he admitted it. *Id.*

B.O., who is one year younger than T.O., with a birth date of July 31, 2006, testified but many of her answers were “I don’t remember,” “I don’t know,” or she simply did not respond. RP at 68, 223, 225, 236. The trial court noted that B.O. had extreme difficulty testifying. RP at 234. However, B.O. did state that the defendant on one occasion touched her private part. RP at 230, 235.

The deputy prosecutor asked B.O. why she not tell her mother. RP at 232. When B.O. did not respond, the deputy prosecutor asked her to write the answer. *Id.* She wrote that she thought her mother would not believe her. Ex. 55; RP at 235.

B.O. also testified that she saw the defendant touch T.O.’s private parts while T.O. was asleep in bed. RP at 236. She also saw the defendant take T.O. into his bedroom and then heard T.O. crying. RP at 237-38. The deputy prosecutor asked B.O. why she did not tell her mother about T.O. crying while alone with the defendant in his bedroom. RP at 240. B.O. said she was scared. *Id.* B.O. did not respond when asked why she was scared, and the prosecutor asked her to write out her response. Ex. 56; RP at 240-41.

The defendant's attempt to introduce character evidence of his sexual morality.

The defendant argues that the trial court erred by not allowing testimony from “four witnesses regarding his sexual morality or decency. The trial court excluded the testimony and most of the witnesses.” Br. of Appellant at 9. Actually, the defendant conceded that the testimony from his two sisters-in-law, Nancy Morales Enriquez and Niashia Morales Enriquez, did not establish a foundation for their knowledge of his sexual morality. RP at 305, 335. The defendant did not ask any questions of his daughter, Alexis Huezo, regarding her knowledge of his sexual morality. RP at 307-13. The defendant's ex-wife, Laura Martinez, moved to Arizona in 2009. RP at 282, 286. Her own experience with the defendant led her to the opinion that he was incapable of committing the offense. RP at 284, 287.

The trial court did not allow Ms. Martinez to testify regarding her observations of the defendant around B.O. and T.O. because she was in Arizona during the relevant times. RP at 293. Regarding Nancy Morales Enriquez, her knowledge of the defendant was limited to family get-togethers over the holidays and visiting her sister once every one or two weeks. RP at 301-02. The trial court held that her testimony about general observations was not relevant because she had not visited with the

defendant when he was alone with the children. RP at 306. But the trial court did allow Niashia Morales Enriquez and Alexis Huezo to testify about whether they observed defendant inappropriately touching anyone. RP at 354, 369.

The defendant was convicted by a jury on three counts and the jury found the presence of the aggravating circumstances. The defendant appealed and the Court of Appeals upheld those convictions.

IV. ARGUMENT

A. The defendant fails to identify a decision that prohibits the State from questioning him about a prior inconsistent statement made to law enforcement.

Prior to trial, the defendant provided a statement to law enforcement in which he told law enforcement that the victims would not lie about something serious. At trial, the defendant was then questioned about his prior statement to law enforcement regarding the veracity of the victims. The defendant's prior statement to law enforcement was obviously used as impeachment evidence. The defendant placed his credibility under scrutiny when he decided to testify and therefore a prior inconsistent statement would be admissible to fully weigh his veracity while on the stand. In a similar case, the Court of Appeals found that it was not error to allow a deputy sheriff to testify that the defendant had previously stated that he didn't believe his children would lie. *State v.*

Lopez, 95 Wn. App. 842, 856, 980 P.2d 224, 231 (1999). The defendant cites no case that prohibits this line of questioning. The Court of Appeals did not err when it found no error or prejudice based on the questions.

B. The defendant fails to identify a decision that allows witnesses to testify regarding the defendant's sexual moral character without first laying the proper and necessary foundation.

It is apparent that the defendant does not understand the concept of foundation as a requisite for admissible character testimony under ER 404(a)(1). It is also readily apparent that the defendant does not understand the holdings of *Woods* and *Griswold*. The defendant provides no authority other than those decisions that rejected the same evidence that he now claims was rejected in error by the Court of Appeals. It is the defendant and not the Court of Appeals who fails to comprehend the holdings of those prior cases.

C. The defendant fails to identify a decision that conflicts with the Court of Appeals decision regarding the prosecutor's questioning and comments on the defendant's testimony and his right to remain silent.

It is clear from the record that the defendant spoke to law enforcement during the investigation of the allegations against the defendant. During that conversation the defendant told law enforcement that the victims would not lie about something serious. When the defendant took the witness stand, he provided information that he had

never previously discussed. The Court of Appeals held that State's questions regarding this apparent new information was an indirect criticism of his right to remain silent but found that it was not prejudicial because of the overwhelming evidence of the defendant's guilt. The defendant does not cite any case that conflicts with the Court of Appeals decision finding that any misconduct by the prosecutor in this case was not flagrant or prejudicial.

D. The defendant fails to identify a decision that conflicts with the Court of Appeals decision regarding the defendant's allegation of burden shifting.

The defendant fails to cite a case that conflicts with the Court of Appeals holding that the State did not improperly shift the burden to the defendant. At trial, the prosecutor attacked the defendant's credibility by pointing out that his testimony was not corroborated by any other witness. As the Court of Appeals correctly held, the argument was appropriate under the facts and evidence presented at trial.

E. The defendant fails to identify a decision that conflicts with the Court of Appeals decision regarding the confrontation of witnesses and allowing a witness to write an answer to a question.

The defendant fails to adequately explain how the process of providing written answers to questions actually limits the scope of cross-examination and also fails to provide any decision that contradicts the

Court of Appeals decision below. The defendant cites to *State v. Garcia* but apparently fails to understand the precedential value of that decision. *State v. Garcia*, 179 Wn.2d 828, 844, 318 P.3d 266, 275 (2014). In that case the court found that the trial court committed error when it restricted the defense from cross-examining a witness about statements made by the defendant. The Court found that the excluded statements were being offered to show the defendant's state of mind and therefore should have been allowed. In the present case, the defendant fails to show that any restrictions were placed on the cross examination of the victims.

F. The defendant fails to identify a decision that conflicts with the Court of Appeals decision regarding the claim of ineffective assistance of counsel.

The defendant fails to identify a decision that conflicts with the Court of Appeals decision and simply makes the same arguments that were rejected by the Court of Appeals. The defendant does not cite to a decision in conflict because one does not exist. The defendant can point to nothing in the record to support his allegations of ineffective counsel other than trial strategies which courts view with great deference.

G. The defendant identifies no decision that conflicts with the Court of Appeals decision regarding the claim of cumulative error.

Again, the defendant simply does not agree with the decision of the Court of Appeals and recycles the prior argument without citing to a

decision that conflicts with the decision of the Court of Appeals. There were few if any errors and the cumulative error doctrine does not apply to the defendant's case.

V. CONCLUSION

The defendant fails to provide any binding decision that conflicts with the Court of Appeals decision and accordingly, the petitioner for review should be denied.

RESPECTFULLY SUBMITTED this May 26, 2021

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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U.S. Regular Mail, Postage
Prepaid

Signed at Kennewick, Washington on May 26, 2021.

Demetra Murphy
Appellate Secretary

BENTON COUNTY PROSECUTOR'S OFFICE

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