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NO. 65576-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

SERGIO GONZALEZ GUZMAN,

Appellant.

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

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# APPELLANT'S OPENING BRIEF

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## A. SUMMARY OF ARGUMENT.

Before his trial, Sergio Gonzalez Guzman told the court he wanted to represent himself, but the court simply ignored the request and asked no follow-up questions. Gonzalez Guzman also explained that he was unable to communicate with his lawyer due to a language barrier but the court disregarded the complaint without asking if this problem affected the attorney-client relationship.

At his trial, the court instructed the jury it should presume that if Gonzalez Guzman intentionally touched or struck his son in this first degree assault case, then he necessarily had the separate *mens rea* required to prove the infliction of great bodily harm. Over Gonzalez Guzman's objection, the court also instructed the jury that proof beyond a reasonable doubt means they should believe "in the truth" of the charge, even though our Supreme Court has ruled that the jury's job is not to search for the truth. These errors and others discussed herein denied Gonzalez Guzman his right to a fair trial by jury as well as his right to self-representation and the corollary right to effective assistance of counsel with whom one can communicate.

B. ASSIGNMENTS OF ERROR.

1. The court denied Gonzalez Guzman his right to represent himself under the Sixth Amendment and Article I, section 22.

2. The court denied Gonzalez Guzman his right to an attorney with whom he can communicate as required by the Sixth Amendment and Article I, section 22.

3. Instruction 10 relieved the State of its burden to prove every element of the offense beyond a reasonable doubt and violated Gonzalez Guzman's right to due process under the Fourteenth Amendment, as well as his inviolate right to a jury trial under Article I, sections 21 and 22.

4. Gonzalez Guzman was denied a fair trial when the prosecution's closing argument encouraged the jury to use Gonzalez Guzman's failure to testify at trial against him, shifted the burden of proof, and castigated Gonzalez Guzman's character based on facts not in evidence.

5. Instruction 2 misstated the definition of proof beyond a reasonable doubt and confused the State's burden of proof.

6. The court's entry of an order prohibiting any contact between Gonzalez Guzman and his biological son without any evidence from the

State that it had a compelling need for a complete bar on contact between parent and child violated Gonzalez Guzman's right to parent and due process of law.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The right to self-representation is constitutionally guaranteed and, when requested, the court may not deny it without undertaking the necessary inquiry on the record. Gonzalez Guzman told the court he wanted to represent himself, but the court asked no further questions, ignored the request, and denied the motion. Did the court's disregard of Gonzalez Guzman's clearly expressed request to represent himself violate his right to represent himself?

2. When an accused person informs the court of a substantial impairment in his relationship with his counsel, the court must consider whether there is an irreconcilable conflict after conducting a private and in-depth inquiry. Gonzalez Guzman informed the court that he was unable to effectively communicate with his lawyer due to a language barrier, but the court asked no further questions other than ascertaining from counsel whether he was ready for trial. Did the court improperly deny Gonzalez Guzman's request for a lawyer with whom he could effectively communicate when it conducted no inquiry after learning

that the language barrier was precluding attorney-client communication?

3. Where a jury is instructed that proof of one element conclusively establishes another, the State is relieved of its burden to prove each element of the offenses. Assault of a child in the first degree requires proof that the accused person 91) intentionally assaulted another, and (2) recklessly caused great bodily injury. Was the State relieved of its burden of proof when the jury was instructed that if it found the accused acted intentionally, he necessarily acted recklessly, without explaining that the intent must apply to the infliction of the required great bodily harm?

4. The right to remain silent is a fundamental tenet of our criminal law jurisprudence and the prosecution may not ask the jury to draw a negative inference from an accused person's failure to proclaim his innocence. The prosecution also may not tell the jury that the accused has the burden of disproving the credibility of its witnesses or inject facts not in evidence so the jury will think the defendant is a bad person. The prosecution emphasized that Gonzalez Guzman did not take the stand and give his story, did not offer reasons why his wife should be disbelieved, and concocted the argument that he only married

his wife because he felt guilty for never proposing to her before the alleged crime occurred. Is reversal required where the prosecution's efforts to use Gonzalez Guzman's right to remain silent against him as well as related misconduct affected the jury and the State cannot prove that the violation of his right to remain silent was harmless beyond a reasonable doubt?

5. The role of the jury is to decide whether the prosecution met its burden of proof and it misleads the jury to encourage them to search for the truth. Over Gonzalez Guzman's objection, the court instructed the jury that it could find the State met its burden of proof if it had an abiding "belief in the truth of the charge." When it is not the jury's job to determine the truth, did the court misstate the burden of proof by focusing the jury on whether they believed the charge was true?

6. A parent's fundamental right to have a relationship with his biological child may not be terminated without due process of law. The court ordered that Gonzalez Guzman may not have any contact whatsoever with his child for the rest of his life. By entering a blanket lifetime no-contact order without any determination that the order was reasonably necessary to serve a compelling state interest, did the court impermissibly prohibit all contact between a father and his son?

D. STATEMENT OF THE CASE.

In the afternoon of November 10, 2007, Sergio Gonzalez Guzman had trouble awaking his infant son Danny and getting him to eat. 6/22/09RP 52. Sergio woke up the child's mother, Crystal Gonzalez, who was still sleeping in the afternoon because she had been out late bowling the night before. Id.[1] Crystal first told Sergio not to worry about Danny, but when she saw that his eyes seem to be rolling inside his head, she got up and took him to the hospital. Id. at 52-53, 84. Because Sergio did not speak English and they needed someone to watch their three other children, Sergio stayed behind and met them at the hospital later. Id. at 53, 85.

Doctors who examined Danny found bleeding in his brain consistent with him striking his head. 6/17/09RP 48. He had a fracture in the back of his 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; bleeding from his retina caused blindness and the bleeding in his brain stunted the growth of his skull. 6/17/09RP 142; 6/18/09RP 39.

[1] 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.

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 caused by abuse rather than accident); Id. at 106-07 (Dr. Rebecca Weister opining "constellation of injuries" is "highly consistent with inflicted trauma").

At the hospital, Detective Mike Thomas interviewed Crystal and Sergio. 6/22/09RP 133. Sergio said that while carrying Danny the evening before, he tripped and fell on top of him with all of his weight. 6/22/09RP 135. The child seemed uninjured after the fall, so Sergio gave him a bottle and put him to bed. Id. at 144. He was not a fussy baby. Id. at 135. The children and their parents shared a single bedroom and no one noticed anything out of the ordinary until Sergio became concerned the next day when the child would not wake up or eat. Id. at 105, 107.

Crystal denied having any involvement in harming Danny and said she had been at a friend's house with the children, then dropped the

children off with Sergio while she went bowling. 6/22/09RP 38-42. At the hospital, Crystal said Sergio told her he accidentally tripped and he was scared. Id. at 58-59. After they learned that the authorities suspected the child's injuries were Sergio's fault, Crystal said he told her was "willing to go to jail" for hurting his son but it was an accident. 6/22/09RP 88. Crystal told Sergio she was afraid she would lose the children. Id. Crystal also said that she had never seen Sergio lose his temper in front of the children or otherwise taken out frustration on her or the children. 6/22/09RP 77, 79. She agreed that Sergio was actively involved in caring for their children and was "really good" with them. Id. at 65, 71, 76.

Gonzalez Guzman was charged with one count of assault of a child in the first degree. CP 1. He was convicted after a jury trial and sentenced to 123 months. CP 41. The court also imposed a lifetime no contact order with Danny. CP 41.

Pertinent facts are addressed in further detail in the relevant argument sections below.

E. ARGUMENT.

1. **The court impermissibly ignored Gonzalez Guzman's request to represent himself or have a lawyer with whom he could communicate.**

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;[1] U.S. Const. amend. 14;[2] Wash. Const. art. I, § 22;[3] 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).

Gonzalez Guzman asked to represent himself, but the court ignored his request. Gonzalez Guzman also requested a different lawyer, explaining he was unable to effectively communicate with

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[1] The Sixth Amendment provides in part,

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

[2] The Fourteenth Amendment says in part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law."

[3] Article I, section 22 provides in pertinent part:

current counsel due to their language barrier. The court summarily disregarded both requests without conducting the required inquiry, which violated Gonzalez Guzman's right to represent himself as well as his right to counsel.

a. The court is not free to ignore a request for self-representation.

The right to self-representation is implicitly guaranteed by the Sixth Amendment and explicitly guaranteed by article I, section 22. Madsen, 168 Wn.2d at 503. This right is "so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice." Id. "The unjustified denial of this [pro se] right requires reversal." Id. (quoting State v. Stenson, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997) (emphasis added in Madsen)).

Anytime an accused person requests to represent himself, "the trial court must determine whether the request is unequivocal and timely." Madsen, 168 Wn.2d at 504 (emphasis added). Then, unless the court finds the request is equivocal or untimely, "the court must

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In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, . . .[and] to have a speedy

determine if the request is voluntary, knowing, and intelligent, usually by colloquy." Id. (emphasis added).

The "only bases" to deny a request for self-representation is that the court finds the request is equivocal, untimely, involuntary, or made without understanding its consequences. Id. Any such finding by the court "must be based on some identifiable fact," not merely on speculation by the trial court or the reviewing court. Id. at 505. The court cannot "stack the deck" against the accused by failing to conduct the proper inquiry. Id. at 506. When a court fails to follow up an unequivocal request to proceed pro se, "the only permissible conclusion is that [the accused's] request was voluntary, knowing, and intelligent." Id.

A request for self-representation "is valid even if combined with an alternative request for new counsel." Id. at 507. The fact that an accused person also asks for another lawyer at the same time is "irrelevant" to whether the pro se request is equivocal. Id.

A request is not untimely because it is made as trial is about to commence. Before trial is underway, the timeliness of the request "depends on the facts of the particular case with a measure of discretion

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public trial by an impartial jury."

reposing in the trial court in the matter." Id. at 508. Even a request to proceed pro se made during trial must be fully considered by the court, although at this late stage the trial court has more authority to deny the request based on its "informed discretion." Id. (quoting State v. Barker, 75 Wn.App. 236, 241, 881 P.2d 1051 (1994).

b. The court ignored Gonzalez Guzman's request to represent himself.

Gonzalez Guzman unequivocally informed the court that he wanted to represent himself. He said, "I want to represent myself while we're in trial." 6/15/09RP 4. He made this statement at the same time that he explained to the court that he was having difficulty communicating with his lawyer and would like a lawyer that speaks his language. Id. He made this request at the start of the day in which his trial was set to commence but before trial was underway. Id.

The court ignored Gonzalez Guzman's request to represent himself. Instead of following up on Gonzalez Guzman's demand, the court asked him whether he had another attorney in the courtroom. 6/15/09RP 5. When Gonzalez Guzman answered that he did not have another attorney "here right now" the court asked if he had asked for a different attorney fluent in Spanish on other occasions. Id. Gonzalez

Guzman said he had not asked before and the court denied his motion. Id. at 5-6.

The court did not inquire into Gonzalez Guzman's request for self-representation even though it was unambiguous. It did not ask clarifying questions about his understanding of the charges or his ability to proceed to trial immediately. Instead, the court ignored the request.

The court's failure to inquire into Gonzalez Guzman's request, or identify the facts that made the request untimely, unintelligent, or involuntary, constitutes an abuse of discretion. Madsen, 168 Wn.2d at 505-06. The fact that he also said he wanted another lawyer is "irrelevant" and does not render equivocal his statement that "I want to represent myself while we're in trial." Id. at 507.

When the court fails to ask further questions about the voluntariness of a request to proceed pro se or the accused's ability to timely proceed to trial, and the record does not disprove the validity of the request, it violates the right to self-representation to deny self-representation to the accused. Id. at 504. Such a violation occurred here.

c. The court summarily dismissed Gonzalez Guzman's complaints about his ability to communicate with his lawyer

A criminal defendant must be able to communicate with his lawyer during key phases of trial preparation, 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). "[A] defendant's right to the effective assistance of counsel is impaired when he cannot cooperate in an active manner with his lawyer." Id. While accused persons are not guaranteed the best rapport with their attorneys, they 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).

A trial court may not permit a criminal defendant to be represented by an attorney with whom there is an irreconcilable conflict of interest. In Re Pers. Restraint of Stenson, 142 Wn.2d 710, 724, 16 P.3d 1 (2001) (court must adequately inquire into extent of conflict); 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.'").

To determine whether there is an irreconcilable conflict between attorney and client requiring substitution of counsel, the Washington Supreme Court applies a three-part test. Stenson, 142 Wn.2d at 724 (adopting the test set forth in United States v. Moore, 159 F.3d 1154, 1158-59 (9th Cir. 1998)). The factors include "(1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion." Id.

A court errs by focusing on the attorney's competence when an accused person complains about the attorney-client relationship. Nguyen, 262 F.3d at 1003 ("Even if present counsel is competent, a serious breakdown in communications can result in an inadequate defense."). Instead, the court must inquire into the nature of the problem between the lawyer and client. Id. at 1002.

In Nguyen, the defendant complained at the start of trial that his attorney was rude and almost never talked to him. Id. at 1001. The defense attorney responded by telling the court he met with the defendant several times and he was prepared for trial. Id. The trial court did not further inquire into the defendant's complaints. Id. During trial,

defense counsel told the court that his client would no longer speak with him. Id. The court informed the defendant that his lawyer was representing him adequately and it would not provide him with a different attorney. Id.

The Nguyen Court found the trial court abused its discretion and deprived Mr. Nguyen of his right to counsel on two grounds: denying his request for more time to obtain a new attorney and refusing to substitute counsel. Id. at 1002. Even though the defendant did not ask for new counsel until the start of trial, the trial court erred by failing to determine the length of possible delay that would result from new counsel. Id. at 1004. The timeliness inquiry balances "the resulting inconvenience and delay against the defendant's important constitutional right to counsel of his choice." Moore, 159 F.3d at 1161 (internal citation omitted). "The mere fact that the jury pool was ready for selection or even that the jury was ready for trial does not automatically outweigh Nguyen's Sixth Amendment right." Nguyen, 262 F.3d at 1004.

Additionally, the court inadequately inquired into the defendant's complaints. Id. at 1003. The court should have asked about the nature of the problem with the present attorney by questioning the

defendant and attorney "privately and in depth." Id. at 1004; see also United States v. Adelzo-Gonzalez, 268 F.3d 772, 777-78 (9th Cir. 2002) ("in most circumstances a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions."). By limiting its inquiry into whether the attorney and client had met to discuss the case and whether the attorney was prepared to proceed, the court did not sufficiently seek information about the nature of the problem. Nguyen, 262 F.3d at 1005; see also Adelzo-Gonzalez, 268 F.3d at 778 (trial court must "probe more deeply into the nature of the relationship" between defendant and counsel beyond assessing attorney's preparedness); Moore, 159 F.3d at 1160 (giving "both parties a chance to speak and ma[king] limited inquires to clarify" does not mean court adequately understood "the extent of the breakdown.").

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 did not simply complain that he disliked his lawyer but rather he said that 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. Riggens, 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. Similarly, the improper refusal to permit self-representation is *per se* structural error. Madsen, 168 Wn.2d at 503. Both errors occurred in the case at bar due to the court's deliberate disregard for Gonzalez Guzman's plainly expressed desire to "represent myself," and its cursory refusal to consider the nature of Gonzalez Guzman's complaints about his attorney. The deprivation of the right to self-representation and the right to conflict free counsel require reversal.

2. **The court's instructions created a mandatory presumption in the issue of recklessness that relieved the prosecution of its burden of proving the essential elements of first degree assault and deprived Gonzalez Guzman of his right to due process**

a. A jury instruction which creates a mandatory presumption violates the Due Process Clause of the Fourteenth Amendment.

A criminal defendant has the right to a jury trial and may only be convicted if the government proves every element of the crime beyond a reasonable doubt. Blakely v. Washington, 542 US. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The constitutional rights to due process and a jury trial "indisputably entitle a criminal defendant to 'a jury determination that he is guilty of every element of the crime beyond a reasonable doubt.'" Apprendi, 530 U.S. at 476-77; U.S. Const. amends. 6 & 14.

In Washington, the right to trial by jury is more strongly protected than under the federal constitution. It violates the right to trial by jury for the court to impose punishment based on a factual question that the jury did not fully and accurately consider and determine. See

State v. Williams-Walker, 167 Wn.2d 889, 899-900, 225 P.3d 913 (2010); U.S. Const. amend. 6; Const. art. I, §§ 21, 22.

To convict Gonzalez Guzman of first degree assault of a child, the State was required to prove he intentionally assaulted Danny and "thereby recklessly inflict[ed] great bodily harm." RCW 9A.36.120(1)(b)(ii).

Jury Instruction 10 created a mandatory presumption, providing that if the jury found Gonzalez Guzman intentionally assaulted Danny, he necessarily "recklessly inflict[ed] great bodily harm" upon him. That presumption improperly relieved the State of its obligation to prove the second element of this crime in violation of Gonzalez Guzman's right to due process and to a fair trial by jury.

A mandatory presumption is a presumption, created by jury instructions, that requires the jury "to find a presumed fact from a proven fact." State v. Hayward, 152 Wn.App. 632, 642, 126 P.3d 354 (2009) (citing State v. Deal, 128 Wn.2d 693, 699, 911 P.2d 966 (1996)). A mandatory presumption exists if a reasonable juror would interpret the presumption to be mandatory. Sandstrom v. Montana, 442 U.S. 510, 514, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979); Hayward, 152 Wn.App. at 642.

Such presumptions violate a defendant's right to due process because they relieve the State of its obligation to prove every element of a charged crime. Sandstrom, 442 U.S. at 522 (citing Morissette v. United States, 342 U.S. 246, 274-75, 72 S. Ct. 240, 96 L. Ed.2d 288 (1952)) (impermissible presumption in jury instructions conflicts with presumption of innocence for each element of charged crime)); Hayward, 152 Wn.App. at 642 (citing State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004)); Deal, 128 Wn.2d at 699. A reviewing court must examine the jury instructions as a whole to determine if the mandatory presumption unconstitutionally relieves the State's obligation. Deal, 128 Wn.2d at 701; State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

b. Instruction 10 created an improper mandatory presumption.

The court's "to convict" instruction accurately defined the elements of assault of a child in the first degree as:

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

CP 34 (Instruction 11), compare RCW 9A.36.120. The court further instructed the jury: "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) (Instruction 10).

A reasonable juror who found that Gonzalez Guzman intentionally assaulted Danny (element one) would understand Instruction 10 to mean that recklessness (element two) was also automatically established, because Gonzalez Guzman had "act[ed] intentionally." See Jury Instruction 10. This confusion would naturally arise because Jury Instruction 10 does not inform the jury that the 'intentional act' must be specifically related to the second element of recklessness. Moreover, Jury Instruction 11, the to-convict, treated the intentional assault and the reckless causing of injury as a single element, thereby collapsing the distinction between these two aspects of second degree assault. CP 34. Jury Instruction 10 thus created a mandatory presumption. Sandstrom, 442 U.S. at 514; Hayward, 152 Wn.App. at 642 (citing Deal, 128 Wn.2d at 701).

This conclusion is precisely the result this Court reached in Hayward. Similarly to the present case, the first two elements in the "to-convict" instruction in Hayward provided:

> (1) That on or about the 25th day of March, 2007, the Defendant intentionally assaulted [the victim];
>
> (2) That the Defendant thereby recklessly inflicted substantial bodily harm on [the victim].

152 Wn.App. at 640. The instructions stated further "Recklessness also is established if a person acts intentionally." Id. This Court found the instructions created a mandatory presumption that

> conflated the intent the jury had to find regarding Hayward's assault against [the victim] with a [sic] intent to cause substantial bodily harm required by the recklessness mental state into a single element and relieved the State of its burden of proving [the defendant] recklessly inflicted substantial bodily harm.

Id, at 645 (internal citations omitted). The Court concluded

> Without language limiting the substituted mental states (here, intentionally) to the specific element at issue (here, infliction of substantial bodily harm), as required by RCW 9A.08.010(2) and revised WPIC 10.03 (2008), [the jury instructions] violated [the defendant's] constitutional right to due process by creating a mandatory presumption and relieved the State of its burden to prove [the defendant] recklessly (or intentionally) inflicted substantial bodily harm."

Id.. at 646.

The instructions in Hayward are similar to those in the present case. Both instructions state that recklessness is "established if a person acts intentionally." And neither instruction specifies that the "intent"

must be tied to the element at issue. Just as in Hayward, Instruction 10 collapsed the offense into one with a single mental state, that could be satisfied by finding either recklessness or intentionality, rather than the required two mental states corresponding to two discrete acts. 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).

The pattern jury instruction was amended in 2008 in an effort to guard against the jury conflating the *mens rea* for different elements. Hayward, at 152 Wn.App. at 644-46; see McKague, 159 Wn.App. at 509-10. The revised jury instruction states in pertinent part:

> [When recklessness [as to a particular [result] [fact]] is required to establish an element of a crime, the element is also established if a person acts [intentionally] [or] [knowingly] [as to that [result] [fact].]

11 Washington Practice: Washington Pattern Jury Instructions: Criminal 10.03 at 209 (3d ed. 2008) (WPIC). This revision emphasizes that when recklessness is required for a certain element, it may be proven if a person acts intentionally or knowingly in committing the particular element at issue.

However, in both Hayward and Gonzalez-Guzman's trials, the court did not use the updated version of the pattern instruction. Instead,

the instruction treated the assault and injury as a single element, explained in a single prong of the to-convict instruction, and the *mens rea* required was explained as a single mental state.

This Court reached a contrary result in State v. Holzknecht, 157 Wn.App. 754, 765, 238 P.3d 1233 (2010), rev. denied, 170 Wn.2d 1029 (2011), "respectfully disagreeing" with Hayward. But the decision in Holzknecht is only minimally useful as a comparison because the opinion contains only snippets of the instructions, making it difficult to discern whether the instructions were set forth for the jury in a way that highlighted the separate facts and elements at stake or in a way that conflated them. For example, some courts separate the intent to assault from the reckless infliction of harm in the to-convict instructions, which could sufficiently explain to the jury that each element requires a separate mental state. See McKague, 159 Wn.App. at 508. No such separation occurred in Gonzalez Guzman's case.

Additionally, the Holzknecht Court relied in part on a plurality decision in State v. Sibert, 168 Wn.2d 306, 316, 230 P.3d 142 (2010), a drug possession case, which found that defining knowledge to include acting intentionally did not create an improper presumption. Sibert is inapposite to the issue in the case at bar. The only *mens rea* required for

drug possession is knowledge of the possession of the drug and the Court found no possibility that the jury misunderstood this single *mens rea* element when the to-convict instructions did not mention any other *mens rea*. 168 Wn.2d at 316.

On the other hand, assault of a child in the first degree contains and requires the *mens rea* of intent and recklessness. CP 34. The Hayward Court correctly analyzed the confusion resulting from the jury being told that proof of intent necessarily proves recklessness.

Because the conclusive presumption required the jury to find the second element was established whenever the first was, the State was relieved of its obligation to prove all elements of assault of a child in the first degree. This error violated Gonzalez Guzman's right to due process as well as his right to have a jury determine whether the State proved every element of the offense. U.S. Const. amend 14; Sandstrom, 442 U.S. at 520 (citing In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) ); Deal, 128 Wn.2d at 699; Hayward, 152 Wn.App. at 642.

c. Directing the jury that the State does not need to prove all elements of a crime is presumptively prejudicial.

A constitutional error is presumed prejudicial unless the government can show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Neder v. United States, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). Applied to instructions which create a mandatory presumption, this standard requires reversal unless the error was "unimportant in relation to everything else the jury considered on the issue in question." Yates v. Evatt, 500 U.S. 391, 403, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991), overruled in part on other grounds, Estelle v. McGuire, 502 U.S. 62, 73 n.4, 12 S. Ct. 475, 116 L. Ed. 2d 385 (1991). To make this determination, a court must engage in two-step analysis.

> First, it must ask what evidence the jury actually considered in reaching its verdict. . . [I]t must then weigh the probative force of that evidence as against the probative force of the presumption standing alone. To satisfy Chapman's reasonable-doubt standard, it will not be enough that the jury considered evidence from which it could have come to the verdict without reliance on the presumption. Rather, the issue under Chapman is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption. Since that enquiry cannot be a subjective one into the jurors' minds,

> a court must approach it by asking whether the force of the evidence presumably considered by the jury in accordance with the instructions is so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the presumption. It is only when the effect of the presumption is comparatively minimal to this degree that it can be said, in Chapman's words, that the presumption did not contribute to the verdict rendered

Yates, 500 U.S. at 404-05. Thus, a reviewing court evaluating prejudice cannot rely on evidence drawn from the entire record "because the terms of some presumptions so narrow the jury's focus as to leave it questionable that a reasonable juror would look to anything but the evidence establishing the predicate fact in order to infer the fact presumed." Id, at 405-06.

Here, the effect of the presumption was not "comparatively minimal." The presumption narrowed the jury's focus so that a reasonable juror would look to only to the evidence establishing the predicate fact in order to infer the fact presumed. Id. at 405-06. Instruction 10 told the jury that if Gonzalez Guzman intentionally committed assault, meaning he touched or struck the child offensively, he necessarily caused the injury with the required recklessness. CP 33; see CP 30 (defining assault as "an intentional touching or striking of

another person that is harmful or offensive."). Instruction 10 did not limit the acts to which the *mens rea* applied; i.e., jurors could presume guilt from proof of *any* intentional act. CP 33. A straightforward application of the instruction would require jurors to conclude that if Gonzalez Guzman had intentionally assaulted Danny and Danny was injured, Gonzalez Guzman necessarily caused the injury recklessly.

The prosecutor exacerbated the instructional flaw regarding what *mens rea* applies in his closing argument. He emphasized that the "only" issue was whether Gonzalez Guzman acted intentionally, if he was the perpetrator. 6/23/09RP 6-7. He told the jury that their "choice" was merely whether the incident was an accident or "inflicted trauma." Id. at 7. If it was "inflicted trauma" by Gonzalez Guzman, then he was guilty. Id. at 7-8. The prosecutor never explained how the injury was recklessly inflicted, and instead conflated the elements into a single question of inflicted trauma or accident.

Yet "inflicted trauma" is the neither equivalent of intent nor recklessness. The fact that a person caused Danny's injuries does not mean that person did so intentionally, just as it does not mean the person knowingly and unreasonably disregarded the substantial risk that great bodily harm would occur as required to prove recklessness. CP

33. The mandatory presumption contained in Instruction 10 was compounded by the prosecution's insistence that if the injuries were "inflicted" and not accidental, it had proven the essential elements of the case.

By not limiting which intentional act the jury could rely upon to find recklessness, it is impossible to know what act the jury relied upon, much less whether that act was independent of the predicate for presumption. Jurors could have focused on evidence of *any* intentional act, and disregarded all other evidence on the question. Under Yates and Chapman, the State cannot show the presumption was harmless beyond a reasonable doubt; i.e., that it did not contribute the verdict obtained in this case. Reversal is required.

3. **By commenting on Gonzalez Guzman's failure to testify at trial, injecting facts not in evidence designed to demonize Gonzalez Guzman, and shifting the burden to the defense of disproving credibility of the State's witness, the prosecution denied Gonzalez Guzman a fair trial.**

    a. A prosecutor may not use improper tactics to gain a conviction.

Trial proceedings must not only be fair, they must "appear fair to all who observe them." Wheat, 486 U.S. at 160. 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; Wash. Const. art. I, §§ 3, 21, 22.

Prosecutors play a central and influential role in protecting the fundamental fairness of the criminal justice system. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); see also In re Pers. Restraint of Glasmann, __ Wn.2d __, 286 P.3d 673, 679 (2012). A prosecutor is a quasi-judicial officer and has a duty to act impartially, relying upon information in the record. Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935).

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

An accused person's right to remain silent is a bedrock principle of our criminal justice system. Griffin v. California, 380 U.S. 609, 614-15, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); U.S. Const. amend. 5; Const. art. I, § 9.[4] The Fifth Amendment "forbids" any "comment by the prosecution on the accused's silence." Griffin, 380 U.S. at 615.

[4] The Fifth Amendment provides that no person "shall ... be compelled in any criminal case to be a witness against himself." Article I, section 9 similarly provides, "[n]o person shall be compelled in any criminal case to give evidence against himself."

"It is constitutional error also for the State to inject the defendant's silence into its closing argument. And, more generally, it is constitutional error for the State to rely on the defendant's silence as substantive evidence of guilt." State v. Romero, 113 Wn.App. 779, 790, 54 P.3d 1255 (2002) (internal citations omitted); see State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996) ("the State may not elicit comments from witnesses or make closing arguments relating to a defendant's silence to infer guilt from such silence"). A direct comment on the accused's right to remain silent is constitutional error that requires reversal unless the prosecution proves it was harmless beyond a reasonable doubt. Romero, 113 Wn.App. at 790. A constitutional error is harmless beyond a reasonable doubt only if the evidence is so overwhelming that any rational trier of fact would necessarily have found the defendant guilty. State v. Fuller, 169 Wn.App. 797, 813-14, 282 P.3d 126 (2012).

Gonzalez Guzman did not testify at trial. The prosecution introduced into evidence a statement he made to a police officer while he was at the hospital. 6/23/09P 133. He was not told he had the right to remain silent before he gave this statement. Defense counsel conceded

Miranda warnings were not required when Gonzalez Guzman gave those statements to the police. 6/11/09RP 5.

During the prosecutor's closing argument, he described the case as one where you have "two sides to a story," one by Crystal and the other by Sergio. 6/23/09RP 9. "Now we have to analyze it and figure out who did this." Id. The prosecution told the jury they had "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 objected. Id. After an unrecorded side bar, the court did not make any on-the-record ruling or comment in regard to Gonzalez Guzman's objection. 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 prosecutor continued his argument and said "You have the statement that the Defendant gave you, like I mentioned earlier." Id. at 10. Gonzalez Guzman made a statement to the detective and "the only thing we can do is analyze that statement at this point." Id.

As a point of contrast, the prosecutor reminded the jury multiple times that Crystal Gonzalez had testified in court "under oath."

6/23/09RP 9. "She got up here on the stand, under oath, [and] looked you in the eyes." Id. "She was absolutely clear under oath" when she testified "on the stand" "that it wasn't her. And folks, that's enough.". "Crystal did not do it, as she testified." 6/23/09RP 33.

The prosecutor also reminded the jury that Gonzalez Guzman's sole explanation of events from was "a little too early" and "premature" because at that time, he had limited information about the injuries. 6/23/09RP 12. He belittled Gonzalez Guzman for only giving a statement when it was "early" in the investigation of the injuries. Id. This argument reminded the jury that Gonzalez Guzman had not testified and encouraged the jury to use his failure to offer further timely statements about the incident against him.

On numerous occasions, courts have held that it is forbidden for a prosecution to "make closing arguments relating to a defendant's silence to infer guilt from such silence." Easter, 130 Wn.2d 228, 236; Fuller, 169 Wn.App. at 814; State v. Sloane, 133 Wn.App. 120, 126–27, 134 P.3d 1217 (2006). The right to not have one's silence used against him includes an accused person's partial silence, when he gives some statements voluntarily but exercises his right to remain silent on other occasions. Fuller, 169 Wn.App. at 814-15.

By presenting the case as one where the jury had to weigh two stories, and emphasizing that only Gonzalez Guzman's wife testified, the prosecutor reminded the jury of Gonzalez Guzman's failure to do so. This implicit reference to Gonzalez Guzman's silent was made explicit in the prosecutor's closely related argument that "we didn't have the Defendant's story." 6/23/09RP 9. He echoed this argument again, after the sidebar in which Gonzalez Guzman objected, by reminding the jury that, as he had "just mentioned," the only statement from Gonzalez Guzman was his statement to the detective. Id. at 10. A prosecutor may not use the defendant's exercise of his right to remain silent to his advantage. State v. Thomas, 142 Wn.App. 589. 595, 174 P.3d 1264 (2008).

It was not improper for the prosecutor to refer to Gonzalez Guzman's statement to the detective or to argue why that explanation of events was unreasonable, but it was forbidden for the prosecution to imply that Gonzalez Guzman's failure to offer testimony at trial or to further explain his actions to the detective could be used against him to infer his guilt. These arguments, made despite Gonzalez Guzman's objection, violated his constitutional right to remain silent.

c. The prosecution's argument must be based on facts in evidence, not speculation designed to demonize the accused.

"[A] prosecutor must 'seek convictions based only on probative evidence and sound reason.'" Glasmann, 286 P.3d at 677 (quoting State v. Castenada-Perez, 61 Wn.App. 354, 363, 810 P.2d 74 (1981)). Furthermore, "[t]he prosecution should not use arguments calculated to inflame the passions or prejudices of the jury." Id. (quoting American Bar Association, Standards for Criminal Justice std. 3-5.8(c) (2d. ed. 1980)); see also 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.").

Crystal Guzman testified that she married Gonzalez Guzman on November 12, 2007. 6/22/09RP 31. She gave no further explanation of why they were married two days after Danny's injury. There was no testimony about whether the marriage was planned to occur on November 12, 2007, who proposed the idea of marriage, or whether the decision to get married was in any way related to the child's injury.

But during his closing argument, the prosecutor speculated that Sergio married Crystal because he had been refusing or neglecting to marry her for many years and felt guilty. The prosecutor said,

> they are married now. November 12th of 2007, the day after they were interviewed about this traumatic tragedy, they got married. Hmm. I wonder why. Because a man usually proposes to a woman, he's probably giving her what she's always wanted, probably to make up for what he did.
> He feels guilty about this because he is guilty.

6/23/09RP 18. This argument was entirely concocted.

Even though defense counsel did not mention this topic in his closing argument, the prosecutor again asked the jury to hold the manner in which the two were married against Gonzalez Guzman in his rebuttal. This argument is again sheer speculation:

> A day after he's interviewed about probably the most traumatic thing that could happen to any child, he proposes to Crystal to get married. Think about it. Why did he do that. They've had a relationship for a long time. She probably wanted to get married. He probably never proposed.
> He probably felt guilty. He probably gave her something that she wanted, to make her happy, to make up for what he did wrong, to make up for what he did to Danny.

6/23/0RP 35.

There was no evidence that Gonzalez Guzman "proposed" to his wife only after the incident or that the marriage occurred to placate Crystal, as if she had been spurned in her years of desiring to get married. This argument served no permissible purpose and simply made Gonzalez Guzman look like a bad guy for reasons not in the record.

Without any evidence that the decision to get married was made after this incident or occurred after years of refusal to marry on Gonzalez Guzman's part, the prosecution should not have used innuendo to encourage the jury to disbelieve and dislike Gonzalez Guzman and paint him as an unmarried father to four children who only married the mother of his children because he was guilty of the crime. Although Gonzalez Guzman did not object, it has been a long-standing rule that a prosecutor may not inject facts not in evidence or appeal to the jury's passions for reasons unrelated to the testimony.

d. The prosecution misrepresented its burden of proof and emphasized the defendant's failure to present evidence.

The prosecution may not subtly or expressly shift the burden of proof to the defendant. Suggesting that the jury needs to articulate a reason to find the defendant not guilty constitutes impermissible burden-shifting. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). The defendant bears no burden and "the jury need not do anything to find the defendant not guilty." Id.

It is misconduct to present "the jurors with a false choice" that their role involves deciding which of two stories to believe. Miles, 139 Wn.App. at 890. It is also improper to tell the jury that it must find that

its witness is lying in order to find the State has not proved its case. State v. Boehning, 127 Wn.App. 511, 517, 523, 111 P.3d 899 (2005).

In this case, the prosecutor told the jury that "you're going to get two sides to a story and that's what you got. And now all we have to do is analyze it and figure out who did this to Danny Gonzalez." 6/23/09RP 9. Then the prosecutor explained that because Crystal Gonzalez testified she was not the person who harmed Danny, "[y]ou have undisputed evidence from her that it wasn't her. And folks, that is enough." 6/23/09RP 9. The prosecution asked the jury, "[d]o you have any reason not to believe Crystal?" 6/23/09RP 10. And if not, that is all they needed to convict Gonzalez Guzman. Id.

This argument effectively shifted the burden of proof and minimized the State's obligation. It posited that the jury must presume Crystal Gonzalez was telling the truth, and only if there was evidence to doubt her could the jury find Gonzalez Guzman not guilty. The prosecution presented the jury with "a false choice." Miles, 139 Wn.App. at 890.

e. The improper arguments the prosecution used to convict Gonzalez Guzman denied him a fair trial.

The danger of prosecutorial misconduct is that it "may deprive the defendant of a fair trial. And only a fair trial is a constitutional trial." State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978) (citing State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956)). When the prosecution improperly injects the defendant's exercise of his right to remain silent into its closing argument, this constitutional error requires reversal unless the prosecution proves beyond a reasonable doubt that the improper argument is harmless. Emery, 174 Wn.2d at 757. For other impermissible arguments, such as minimizing the State's burden of proof, the defendant must prove "the prosecutor's conduct was both improper and prejudicial." Id. at 756.

It has long been held that it violates the right to remain silent, and dilutes the State's burden of proof, for the prosecutor to argue that the defense's failure to present evidence contradicting the allegations may be used as evidence favoring conviction. State v. Reed, 25 Wn.App. 46, 49, 604 P.2d 1330 (1979) (comment that "nobody" testified the incident did not occur is "a direct reference to the accused's failure to testify"). The Reed Court pronounced this argument "flagrant

error" because "[s]ilence is not evidence, and neither it nor an inference therefrom can be used to supply evidence of guilt." Id.

The improper arguments made in this case were decidedly prejudicial based on the lack of evidence of how Danny was injured. There was simply no evidence showing the mechanism of the injury and the prosecution acknowledged this lack of evidence in its closing argument, encouraging the jury to simply spin out numerous possible scenarios. 6/23/09RP 15.

Even if the jury could deduce that Gonzalez Guzman was the person present when Danny was injured and Danny was too young to injure himself, there was no evidence from the apartment that indicated how he became injured. 6/22/09RP 161. The jury was left to infer that the injuries could not have occurred without intent, absent any evidence indicating how they were inflicted. In the absence of evidence showing how Gonzalez Guzman caused the injuries, the State relied on innuendo to make Gonzalez Guzman look dislikeable. It emphasized Gonzalez Guzman's failure to testify or offer evidence on his own behalf. It complained that Gonzalez Guzman must be a manipulative or uncaring partner because he never offered to marry Crystal even though Crystal wanted to get married. It told the jury to convict Gonzalez Guzman

because Crystal had looked them in the eye and denied responsibility, while Gonzalez Guzman offered no explanation for why she was lying. In a case without clear evidence of how the injury occurred, the arguments shifting the burden of proof, speculating as to the defendant's bad character, and commenting on his failure to testify effected the jury's deliberations and denied Gonzalez Guzman a fair trial.

### 4. The court improperly equated the State's burden of proof with a search for the truth

A jury's role is not to search for the truth. Emery, 174 Wn.2d 741, 760; see also State v. Berube, __ Wn.2d __, 286 P.3d 402, 411 (2012) ("truth is not the jury's job. And 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"). Instead, the job of the jury "is to determine whether the State has proved the charged offenses beyond a reasonable doubt." Emery, 174 Wn.2d at 760.

"[A] a jury instruction misstating the reasonable doubt standard is subject to automatic reversal without any showing of prejudice. Id. at 757 (quoting Sullivan v. Louisiana, 508 U.S. 275, 281–82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)).

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 (Instruction 11); 6/23/09RP 2. Echoing 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 confused the critical role of the jury. The "belief in the truth" language encourages the jury to undertake an impermissible search for the truth and invites the error identified in Emery.

The presumption of innocence may be diluted or even "washed away" by confusing jury instructions. State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). It is the court's obligation to vigilantly protect the presumption of innocence. Id.

In Bennett, the Supreme Court found the reasonable doubt instruction derived from State v. Castle, 86 Wn.App. 48, 53, 935 P.2d 656 (1997), was "problematic" as it was inaccurate and misleading. 161 Wn.2d at 317-18. Exercising its "inherent supervisory powers," the

Supreme Court directed trial courts to use WPIC 4.01 in all future cases. Id. at 318.

The pattern instruction reads:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. [If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt].

11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01, at 85 (3rd ed. 2008) ("WPIC").

The Bennett Court did not comment on the bracketed "belief in the truth" language. However, recent cases show the problematic nature of such language. In Emery, the prosecution told the jury that "your verdict should speak the truth," and "the truth of the matter is, the truth of these charges, are that" the defendants are guilty. 174 Wn.2d at 751. These remarks misstated the jury's role, but because they were not part

of the court's instructions, and the evidence was overwhelming, the error was harmless. Id. at 764 n.14.

In Pirtle, the court held that the "abiding belief" language did not "diminish" the pattern instruction defining reasonable doubt. 127 Wn.2d at 657-58. The court ruled that "[a]ddition of the last sentence [regarding having an abiding belief in the truth] was unnecessary but was not an error." Id. at 658. The Pirtle Court did not focus its attention on whether this language encouraged the jury to view its role as a search for the truth aspect. Id. at 657-58. Instead, it was addressing whether the phrase abiding belief was different from proof beyond a reasonable doubt. Id.

Pirtle concluded that this language was unnecessary but not erroneous, which is far from an endorsement of the language. Yet Emery demonstrates the danger of injecting a search for the truth into the definition of the State's burden of proof. This language invites the jury to be confused about its role and serves as a platform for improper arguments about the jury's role in looking for the truth, as explained in Emery. 174 Wn.2d at 760.

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 prosecution 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.

Improperly instructing the jury on the meaning of proof beyond a reasonable doubt is structural error. Sullivan, 508 U.S. at 281-82. Furthermore, this Court has a supervisory role in ensuring the jury's instructions fairly and accurately convey the law. Bennett, 161 Wn.2d at 318. This Court should find that 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 state and federal constitutions. U.S. amends. 6, 14; Const. art. I, §§ 21, 22.

5. **The court ordered a lifetime no-contact order between Gonzalez Guzman and his son in violation of his fundamental right to have a relationship with his son.**

A parent has a fundamental liberty and privacy interest in the care, custody and enjoyment 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). Instead, the court must consider whether the order barring all contact is "reasonably necessary in scope and duration to prevent harm to the child." Alternatives such as indirect contact or supervised contact may not be prohibited unless there is a compelling State interest in barring contact. See State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008) (no-contact order with defendant's children lawful only where no reasonable alternative way to achieve State's interest); Ancira, 107 Wn.App. at 655 (blanket no-contact order "extreme and unreasonable given the fundamental rights involved," where less stringent limitations on contact would successfully realize the State's interest in protecting the children").

The court imposed a complete prohibition on Gonzalez Guzman's contact with his son without any discussion of the necessity of such an order. The sentencing order declared, "For the maximum

term of life years [sic], defendant shall have no contact with D.G. (9-27-07). CP 41. A separate no contact order barred him from "any contact, directly or indirectly, in person, in writing or by telephone, personally or through any other person" with Danny until July 25, 2099. Supp. CP _, sub. no. 114.

The court did not find that the no-contact order is reasonably necessary to realize a compelling state interest. Rainey, 168 Wn.2d at 381-82. Moreover, although the State has a compelling interest in protecting children from harm, it did not demonstrate how prohibiting all contact between Gonzalez Guzman and his son is reasonably necessary in order to effectuate that interest. Because the sentencing condition implicates Gonzalez Guzman's fundamental constitutional right to parent his children, the State must show that no less restrictive alternative would prevent harm to those children. Id. Any limitations must be narrowly drawn. Id.

The order barring all contact between Gonzalez Guzman and his son should be stricken and, at a new sentencing hearing, the court should consider the reasonable alternatives if the prosecution offers a compelling reason to restrict contact between Gonzalez Guzman and his son in the event his conviction is not reversed.

F. CONCLUSION.

For the reasons stated above, Mr. Gonzalez Guzman respectfully asks this Court to reverse his conviction and remand the case for further proceedings.

DATED this 30th day of November 2012.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**
**DIVISION ONE**

| | | |
|---|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>SERGIO GONZALEZ GUZMAN,<br><br>Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | NO. 65576-1-I |

## DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF NOVEMBER, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

| | | |
|---|---|---|
| [X] KING COUNTY PROSECUTING ATTORNEY<br>APPELLATE UNIT<br>KING COUNTY COURTHOUSE<br>516 THIRD AVENUE, W-554<br>SEATTLE, WA 98104 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [X] SERGIO GONZALEZ GUZMAN<br>333758<br>COYOTE RIDGE CORRECTIONS CENTER<br>PO BOX 769<br>CONNELL, WA 99326 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 30TH DAY OF NOVEMBER, 2012.

X_____

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