NO. 90764-1
COA NO. 43432-6-II
Cowlitz Co. Cause NO. 10-1-00557-6/11-1-01263-5

SUPREME COURT OF STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JUAN CARLOS PARRA-INTERIAN,

Appellant/Petitioner.

RESPONSE TO PETITION FOR REVIEW

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

A. IDENTITY OF RESPONDENT

The respondent is the State of Washington, represented by Lacey L. Skalisky, Deputy Prosecuting Attorney for Susan I. Baur, Cowlitz County Prosecuting Attorney.

B. ISSUES PRESENTED FOR REVIEW

1. Is the decision of the Court of Appeals in conflict with a previous decision of the Supreme Court?

2. Is the decision of the Court of Appeals in conflict with a previous decision of the Court of Appeals?

3. Does the decision of the Court of Appeals involve a significant question of law under the Constitution of the State of Washington or of the Constitution of the United States?

4. Does the petition involve an issue of substantial public interest that should be determined by the Supreme Court?

C. STATEMENT OF THE CASE

For the purposes of the answer to the petition for discretionary review by the Supreme Court of Washington, the State generally concurs with the Statement of the Case set forth by Appellant's counsel. However, the State would also incorporate the Brief of Respondent by reference as well. Parra-Interrian now asks this court to accept review of the Court of

Appeals decision affirming the convictions for Rape in the second degree, burglary in the first degree with sexual motivation, solicitation to commit murder in the first degree and conspiracy to commit murder in the first degree.

D. ARGUMENT WHY REVIEW SHOULD BE DENIED

A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals, or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined

1. The decision of the Court of Appeals is not in conflict with a decision of the Supreme Court.

A trial court's decision regarding severance of offenses will be reversed only upon a showing of a manifest abuse of discretion. *State v. Watkins*, 53 Wn.App. 264, 766 P.2d 484 (1989); *State v. Brythow*, 114 Wn.2d 713, 790 P.2d 154 (1990). To determine whether severance is necessary, the courts look to four factors: (1) the strength of the State's

evidence on each count; (2) the clarity of the defenses as to each count; (3) whether the trial court properly instructed the jury to consider each count separately; and (4) the cross-admissibility of the evidence. *Watkins*, 53 Wn.App. at 269, 766 P.2d 484.[1]

Charges are properly joined for trial where they are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan. CrR 4.3(a)(2). Thus, the defendant bears the burden of demonstrating that a joint trial would be so manifestly prejudicial as to outweigh the concern of judicial economy. *State v. Thompson*, 74 Wn.2d 774, 775, 446 P.2d 571 (1968); *Brythow*, 114 Wn.2d at 718. The courts have noted that this burden is difficult to meet. *State v. Alsup*, 75 Wn.App. 128, 131, 876 P.2d 935 (1994), *citing State v. Grisby*, 97 Wn.2d 493, 647 P.2d 6 (1982). Here, Parra-Interian argues the Court of Appeals decision is in conflict with a Supreme Court decisions in *State v. Russell* and *State v. Sutherby*. *State v. Russell,* 125 Wn.2d 24, 882 P.2d 747 (1994); *State v. Sutherby*, 165 Wn. 2d 870, 204 P.3d 916 (2009).

[1] However, the lack of cross-admissibility does not require severance as a matter of law. See *State v. Kalakosky,* 121 Wn.2d 525, 825 P.2d 1064 (1993).

In *Russell*, this Court analyzed, in addition to the other factors, the impact of competing defenses. *Russell*, 125 Wn.2d at 65. Parra-Interian argues his defense on each count was different as he admitting to committing a crime to prevent SA from testifying in the rape and burglary charges, however, he fails to recognize he did not admit to the crimes charged, thus his offense was effectively denial, thus not bringing it in to the realm anticipated by the *Russell* court. In *Russell*, the defenses were all denial, but with one count being portrayed as a domestic homicide. *Id.* Russell argues he would have testified as to that count, but not the others. *Id.* The court found no basis for this as no offer of proof was ever made concerning it. *Id.* Presently, this situation did not exist as Parra-Interian testified about each of the charges. Thus, "the likelihood that joinder will cause a jury to be confused as to the accused's defenses is very small where the defense is identical on each." *Russell*, 125 Wn.2d at 64 (quoting *Hernandez*, 58 Wn.App. at 799).

In *Sutherby,* this Court determined whether or not counsel was ineffective for failing to raise the issue of severance. *State v. Sutherby*, 165 Wn.2d 870, 204 P.3d 916. Here, the court focused on the cross-admissibility of the conduct for each of the charges and determined there

was little cross-admissibility between the child rape and molestation and possession of child pornography as it mainly goes to show a suspect's predisposition toward molestation, thus would be excluded under ER 404(b). *Id* at 924-925. In the present case, the evidence was likely cross-admissible, even if the cases had been severed as the details of the rape and burglary charges would have not been subject to exclusion as they directly relate to the motive for the solicitation and conspiracy charges. As there is no conflict between current Supreme Court case law and the decision of the Court of Appeals, Division II, the Court should not grant review on this basis.

2. The decision of the Court of Appeals is not in conflict with another decision of the Court of Appeals.

As previously stated, a trial court's decision regarding severance of offenses will be reversed only upon a showing of a manifest abuse of discretion. *State v. Watkins*, 53 Wn.App. 264, 766 P.2d 484; *State v. Brythow*, 114 Wn.2d 713, 790 P.2d 154. To determine whether severance is necessary, the courts look to four factors: (1) the strength of the State's evidence on each count; (2) the clarity of the defenses as to each count; (3) whether the trial court properly instructed the jury to consider each count

separately; and (4) the cross-admissibility of the evidence. *Watkins*, 53 Wn.App. at 269, 766 P.2d 484.[2]

Charges are properly joined for trial where they are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan. CrR 4.3(a)(2). Thus, the defendant bears the burden of demonstrating that a joint trial would be so manifestly prejudicial as to outweigh the concern of judicial economy. *State v. Thompson*, 74 Wn.2d at 775, 446 P.2d 571; *Brythow*, 114 Wn.2d at 718. The courts have noted that this burden is difficult to meet. *State v. Alsup*, 75 Wn.App. at 131, 876 P.2d 935, *citing State v. Grisby*, 97 Wn.2d 493, 647 P.2d 6. Parra-Interian argues the decision of the Court of Appeals is in conflict with *State v. Hernandez* as the State's evidence was not uniformly strong on each count. *State v. Hernandez*, 58 Wn.App. 793, 794 P.2d 1327 (1990). *Hernandez* involved three counts of first degree robbery in which there were varying degrees of identification of the suspect for each count as well as a lack of a unique or distinct methodology employed for each robbery as compared to robberies in general. *Id.* Division II of the Court of Appeals

[2] However, the lack of cross-admissibility does not require severance as a matter of law. See *State v. Kalakosky*, 121 Wn.2d 525, 825 P.2d 1064 (1993).

disagreed with the State's argument concerning cross-admissibility of evidence because of the lack of uniqueness. *Id.* at 799. Furthermore, the court considered the State's evidence significantly stronger in one count as compared to the other two. *Id.* at 800. Based on these factors being present Division II concluded there was a manifest abuse of the trial court's discretion in denying a motion for severance. *Id.*

Here, the trial court and the Court of Appeals engaged in the required analysis just as it did in *Hernandez*, however, after the courts reviewed the evidence for each factor, the conclusions were different. The Court of Appeals considered some of the evidence to be cross-admissible between the rape and burglary charges and the conspiracy and solicitation charges. The court also recognized the evidence for each case was strong, even if the conspiracy and solicitation charges were based on direct evidence and the rape and burglary charges were based on circumstantial evidence. Therefore, the Court should not grant review upon this basis.

3. The decision of the Court of Appeals does not involve a significant question of law under the Constitution of the State of Washington or the Constitution of the United States.

Parra-Interian does not argue a significant question of law under the United States or Washington State constitution is at issue in this appeal. Therefore, review should not be granted on this basis.

4. The decision of the Court of Appeals does not involve an issue of substantial public interest that should be determined by the Supreme Court.

Parra-Interian argues his petition involves an issue of substantial public interest that should be determined by the Supreme Court as whether or not there was sufficient evidence to support the conviction for Rape in the Second Degree.

The standard of review for a claim of insufficient evidence is after viewing the evidence in the light most favorable to the prosecution, whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Zamora,* 63 Wn.App. 220, 223, 817 P.2d 880 (1991). Additionally, the Court should afford the State all reasonable inferences. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410

(2004); *State v. Saunders*, 132 Wn.App. 592, 600, 132 P.3d 743 (2006). In such review, "circumstantial evidence is no less reliable than direct evidence [and] specific criminal intent may be inferred from circumstances as a matter of logical probability." *Id.* Lastly, the reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *See Price*, 127 Wn.App. at 202, 110 P.3d 1171; *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d. 533 (1992); *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (appellate court will not review credibility determinations).

At specific issue in the present case is RCW 9A.44.050(1)(b) which states in pertinent part, "[a] person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person...when the victim is incapable of consent by reason of being physically helpless or mentally incapacitated." "Sexual intercourse" is defined as having

> its ordinary meaning and occurs upon any penetration, however slight, and...means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and... [a]lso means any act of sexual contact between persons involving the sex organs of one

> person and the mouth or anus of another whether such persons are of the same or opposite sex.

RCW 9A.44.010(1). The statute further defines "sexual contact" to mean "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2). A person who is "physically helpless" is one "who is unconscious or for any other reason is physically unable to communicate unwillingness to an act." RCW 9A.44.010(5). It has been held that "[t]he state of sleep appears to be universally understood as unconsciousness or physical inability to communicate unwillingness." *State v. Puapuaga*, 54 Wn.App. 857, 861, 776 P.2d 170 (1989).

At trial, S.A. testified during direct examination as follows:

> Q....Now, after you fell asleep, ma'am, did there come a point when you felt something in your sleep?
> A. Yes.
> Q. Could you describe that?
> A. I felt somebody touching my inner thighs and my pelvic area.
> Q. Now, when you first felt the touching, what was your, I guess, level of consciousness?
> A. I wasn't all the way awake at all.
> Q. Okay. How – maybe, if ten is all the way awake, and one is completely asleep, where would you be in there?
> A. Probably a four.
> Q. What did [the touching] feel like, at first?
> A. At first, it just felt like they were running their fingers up my leg and touching my pelvic area.

Q. ...[W]hen you say pelvic area, are you referring to a particular part of your body?

A. My vagina.

Q. Okay. Was the touching inside or outside your body at that point?

A. At that point, a little bit of both.

2A Report of Proceedings 240-241. As S.A.'s testimony continues she indicates the penetration by the assailant's fingers became more forceful as time passed. 2A RP 241-242. S.A. states that she was probably mostly asleep, but more alert as it went on. 2A RP 242. Eventually, she realizes it is not McGowan, her significant other, when her birth control patch is removed, she sees a person squatting at the foot of the bed and has to wake McGowan up from a sound sleep. 2A RP 245-246.

This is consistent with what she told Officer Kirk Wiper on the night of the incident. During direct examination, Office Wiper testified that S.A. "explained she had been asleep in bed when she realized that she was being penetrated vaginally." 2B RP 316. Officer Wiper then went on to explain S.A. stated she was initially penetrated by fingers. 2B RP 317. Additionally, S.A. told Sarah Reid, that she had been digitally penetrated. 2B RP 304.

This evidence shows S.A. was sleeping until Parra-Interian began to wake her up by digitally penetrating her. S.A.'s testimony indicates she became more conscious as time passed and fully awake when her birth control patch was ripped off her body alerting her to the fact that it was not McGowan penetrating her, but someone else. The jury is allowed to believe this testimony, which is sufficient to establish the required sexual intercourse as it can be penetration by an object.

Parra-Interian argues SA was not "physically unable to communicate unwillingness to an act" because she was partially awake by the touching that preceded the intercourse. Courts have distinguished a victim who was sleeping from a victim with physical limitations, but able to communicate and a victim who was "profoundly mentally retarded." *See State v. Mohamed*, 175 Wn.App. 45, 61, 301 P.3d 504 (2013) *citing State v. Bucknell*, 144 Wn.App. 524, 530, 183 P.3d 1078 (2008); *People v. Huurre*, 193 A.D.2d 305, 306, 603 N.Y.S.2d 179 (1993). Sleep renders an individual "physically helpless." *Mohamed*, 175 Wn.App. at 60, 301 P.3d 504. Here, S.A.'s testimony indicated the penetrating of her vagina as well as touching of her inner thighs partially woke her up. Thus, it can be determined she was unconscious when Parra-Interian first started

penetrating her vagina. Thus, there is sufficient evidence for the jury to find Parra-Interian guilty of rape in the second degree under the standards currently in place under the laws of this State. The ruling of the Court of Appeals does not expand the current definition in any substantial way. Thus, review should not be granted on this basis.

E. CONCLUSION

For the above reasons, review should not be granted in this case.

Respectfully submitted this 10th day of October, 2014.

SUSAN I. BAUR
Prosecuting Attorney
By:

LACEY L. SKALISKY/WSBA # 41295
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

Michelle Sasser, certifies the Response to Petitioner for Review was served electronically via e-mail to the following:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on October 10th, 2014.

Michelle Sasser

Michelle Sasser

OFFICE RECEPTIONIST, CLERK

To: Sasser, Michelle; Cathy Glinski (cathyglinski@wavecable.com)
Subject: RE: PAs Office Scanned Item Juan C. Parra-Interian, 90764-1 Response to Petition for Review

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Attached, please find the Response to Petition for Review regarding the above-named defendant.

If you have any questions, please contact this office.

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