NO. 92812-6

Court of Appeals No. 31965-2-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANAUM DIAZ GUZMAN. PETITIONER

STATE'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW

GARTH DANO
Grant County Prosecuting Attorney

KATHARINE W. MATHEWS
Deputy Prosecuting Attorney
WSBA No. 20805
Attorneys for Respondent

P.O. Box 37
Ephrata, Washington 98823
PH: (509) 794-2011

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Cases

Statutes and Court Rules

I. IDENTITY OF RESPONDING PARTY.

The responding party is the State of Washington, by and through the Grant County Prosecuting Attorney's Office.

II. STATEMENT OF RELIEF SOUGHT

The State respectfully requests that this Court find there are no grounds for discretionary review and enter a ruling denying review.

III. FACTS RELEVANT TO THE PETITION.[1]

A. Jury Unanimity (Petrich[2]) Instruction

1. Proceedings in Superior Court

Anaum Diaz Guzman went to trial on a single count of rape of a child in the first degree (count one), and a single count of rape of a child in the second degree (count two), both with the same victim, R.[3] Clerk's Papers (CP) at 92–93. The State alleged count one occurred between July 26, 2001 and July 25, 2005, when the victim was less than twelve years old. CP at 92. Count two was alleged to have occurred between July 26, 2005 and July 25, 2007, when the victim was at least twelve but less than

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[1] The verbatim report of trial proceedings filed in this appeal is a single document containing transcripts from the February 23–28, 2012 trial which ended in mistrial and the March 13–15, 2103 trial from which this appeal is taken. The State cites only to the record in the second trial, and for brevity designates that record 2RP ___.

[2] *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), *overruled in part on other grounds by State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988), *abrogated in part on other grounds by In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 316 P.3d 1007 (2014).

[3] The State follows the Court of Appeals, referring to the victim by the initial R, her sister by the initial D, and their parents by the fictitious surname Theroux.

fourteen years old. CP at 93. During opening statement, the State told the jury:

> The difference between the two charges is that the rape of a child in the first degree happened between July 26th, 2001 and July 25th, 2005. And that's while [R.] was under the age of 12. The second count, rape of a child in the second degree, was when she was over the age of 12, but under the age of 14.

2 Report of Proceedings (RP) 62.

R. testified generally to years of abuse by Mr. Diaz Guzman, and to six specific acts of penetration, two of which occurred after she turned 14. R. testified she was 10 or 11, fishing with Mr. Diaz Guzman in his boat, when he rubbed her "private spot" with his fingers then "started sticking his fingers inside of [her]." 2RP 167–68. She testified she was the same age when he did it again on another fishing trip about a month later. 2RP 169–70. Both these incidents happened on Lake Lenore. 2RP 232. R. testified to a third boat incident from "about the same time," this time at Blue Lake, where he rubbed her legs, touched her private parts, and put his fingers inside her. 2RP 232. She did not testify to any other specific acts of penetration occurring when she was under the age of 12, but said Mr. Diaz Guzman abused her about every other time he took her fishing and she finally stopped going fishing with him when she was 13 or 14. 2RP 233.

R. testified to only one specific act of penetration occurring when

she was 12 or 13 years old. She testified when she was that age, in middle school, she stayed at Mr. Diaz Guzman's house once a week after school because her oldest sister took care of her. 2RP 172–73. On one occasion, she stayed overnight. 2RP 175. Mr. Diaz Guzman took advantage of the opportunity and came into her bedroom, stroked her legs, kissed her stomach and chest, pulled down her underwear, and told her he loved her as he digitally penetrated her. 2RP 175–76.

R. thought she was 14 when Mr. Diaz Guzman again accosted her at his house, first getting on his knees and kissing her "private spots" before pushing her to her knees and putting his penis in her mouth. 2RP 176–77. She testified to another incident of oral-digital penetration and attempted penile penetration that happened when she was 15. 2RP 179–80. The State did not charge third degree rape of a child. CP at 92–93.

The jury was given instruction 7, the *Petrich* instruction, and four related instructions. The first paragraph of instruction 3, Charges and Burden of Proof, stated:

> The defendant is charged with rape of a child in the first degree in Count 1, and with rape of a child in the second degree in Count 2. *You must decide each charge separately, as if it were a separate trial. Your verdict on one count should not control your verdict on the other count.*

2RP 305; CP at 148 (emphasis added). Instruction 4, entitled Rape of a Child, defined rape of a child generally, then stated:

> The age of the younger person and the difference in the parties' ages determines different degrees of rape of a child. When the younger person is less than 12 years old, and the older person is at least twenty-four months older, the crime occurs in the first degree. When the younger person is at least twelve and less than 14 years old, and the older person is at least 36 months older, the crime occurs in the second degree.

CP at 149. The first two elements of instruction 5, the "to convict" instruction for first degree rape of a child, required the state to prove the defendant had sexual intercourse with R. on or between July 26, 2001 and July 25, 2005, when R. was less than 12 years old. CP at 150. The first two elements of instruction 6, the "to convict" instruction for second degree rape of a child, required the State to prove the defendant had sexual intercourse with R. on or between July 26, 2005 and July 25, 2007 when R. was at least 12 years old but less than 14 years old. CP 151. Instruction 7, the *Petrich* instruction, was entitled "Jury Unanimity" and stated:

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

> To convict the defendant of rape of a child in the second degree, as charged in Count 2, at least one particular act of sexual intercourse must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that all the alleged acts have been proved.

RP 309-310; CP at 152. In closing, the State did not elect a specific act of penetration upon which it relied for either count. 2RP 311–23

2. Decision of the Court of Appeals

The Court of Appeals found "implausible" Mr. Diaz Guzman's argument that the jury, exercising common sense, would consider all these instructions together and conclude "a unanimous finding of an act of rape in one charging period would support a guilty verdict on a count involving a different charging period." *State v. Guzman*, No. 31965-2-III, 2016 Wash. App. LEXIS 113, at *9 (Ct. App. Jan. 26, 2016). "The court's instructions made clear the difference between the two crimes charged, and the fact that they involved mutually exclusive age ranges for R. and mutually exclusive charging periods." *Id.*

B. Ineffective Assistance of Counsel

The state accepts and adopts the procedural and substantive facts recited in the Petition. RAP 10.3(b).

IV. ARGUMENT

Mr. Diaz Guzman's Petition for Review (Petition) does not meet the considerations governing acceptance of review. A petition for review will be accepted 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 by the Supreme Court.

RAP 13.4(b).

A. The decision of the Court of Appeals does not conflict with this Court's decision in Carson because the State charged only a single count of each crime and the unanimity (Petrich) instruction specifying each count separately, read together with the remaining jury instructions, clearly required unanimity for one particular act for each crime charged.

Mr. Diaz Guzman's assertion that the decision in this case conflicts with this Court's recent decision in *State v. Carson*, 184 Wn.2d 207, 357 P.3d 1064 (2015), is entirely without merit.

A reviewing court assesses jury instructions in the context of all the instructions given. *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). In this case, the Court of Appeals found: "In the context of the

other jury instructions, no reasonable juror would have read the *Petrich* instruction in the manner suggested by Mr. Diaz Guzman." *Guzman*, No. 31965-2-III, 2016 Wash. App. LEXIS 113, at *13. Mr. Diaz Guzman asserts the decision conflicts with this Court's recent decision in *Carson, supra.* It does not.

The defendant in *Carson* was charged with three counts of child molestation in the first degree, all alleged to have occurred in the same time period. 187 Wn.2d at 212. The very young victim had reported and described three separate incidents—and only three incidents—in some detail. *Id.* at 211. At trial eighteen months later, he was unable to remember and testify to most of the details he initially reported. *Id.* at 212. It was difficult to determine whether the incidents to which the victim testified at trial were the same incidents he recounted in the original interview. *Id.* at n.2. The jury viewed a video recording of the victim's initial interview. *Id.* at 212. In closing, the State focused entirely on the three incidents described in the videotaped interview. *Id.* at 213.

The question in *Carson* was whether the defendant was denied effective assistance of counsel when his lawyer objected to a *Petrich* instruction. Counsel had argued the instruction was unnecessary because the evidence pointed to three separate and distinct incidents. *Id.* at 214. He also argued the instruction could confuse the jury because three specific

incidents were alleged to support three charged acts of the same crime within the same charging period and the jury could be confused into thinking if it found only one act occurred, it must convict on all three. *Id.* Agreeing with the defense, this Court found the

> statement that "*one particular act . . . must be proved beyond a reasonable doubt*" made little sense in Carson's case because Carson was charged with *three* separate counts of child molestation [in the first degree]. The confusion was exacerbated by the final sentence of the instruction, which would have informed the jury that it "need not unanimously agree that the defendant committed all the acts of Child Molestation in the First Degree."

Id. at 218–19 (emphasis in original). This Court held "the specific language of the *Petrich* instruction was designed for single-count cases and is confusing when read in a multicount case." *Id.* at 219.

Mr. Diaz Guzman's case is not a multicount case. Mr. Diaz Guzman was charged with a single count of rape of a child in the first degree and a single count of rape of a child in the second degree. These crimes are not the same, nor is one a lesser included offense of the other. The age parameters for each are mutually exclusive. The date ranges necessary to support a conviction in each are mutually exclusive.

R. testified to three distinct rapes occurring when she was 10 or 11 years old, one when she was 12 or 13, and two when she was 14 or older. The jury was instructed it had to unanimously agree as to which acts

supported a single count of first degree rape of a child and a single count of second degree rape of a child. The jury would have had to completely disregard both the instruction distinguishing first degree rape of a child from second degree rape and the first two elements of each "to convict" instruction before it could have become sufficiently confused to convict Mr. Diaz Guzman of an incident occurring outside the specific age and date parameters of each crime.

The decision of the Court of Appeals upholding the *Petrich* instruction given in this case is entirely consistent with this Court's prior decisions concerning unanimity instructions, including its decision in *Carson*. The issue does not warrant this Court's review.

B. Mr. Diaz Guzman's personal disagreement with the lower court's decision finding he was not denied effective assistance of counsel is insufficient to warrant review.

None of Mr. Diaz Guzman's remaining issues for review satisfy the requirements of RAP 13.3(b). He fails to identify any case law with which these three individual findings conflict and does not argue the decisions involve a significant question of constitutional law or substantial public interest. Counsel merely argues that the "effective assistance of counsel is constitutional in nature." Petition at 16. If that, alone, were sufficient this Court would be flooded with petitions to review every failed ineffective assistance claim.

Concerning the assertion that counsel was ineffective for failing to object to testimony about Mr. Diaz Guzman's reaction to learning R.'s older sister, D., had asked her parents what to do if she knew someone was being molested, the Court of Appeals held: "Mr. Diaz Guzman is unable to demonstrate that an objection under ER 401 or 403 would have been sustained; accordingly he has not shown that his trial lawyer's failure to object was deficient performance." *Guzman*, 2016 Wash. App. LEXIS 113 at 18. Mr. Diaz Guzman's reaction to learning one of his little sisters-in-law indicated she knew that an unidentified person was being molested went to his consciousness of guilt, and "evidence of consciousness of guilt is generally admissible if relevant. *Id.* at 17 (citing *State v. Allen*, 57 Wn. App. 134, 143, 788 P.2d 1084 (1990) (where the court found that giving an officer a false name indicated guilty knowledge and was therefore relevant evidence)). Mr. Diaz Guzman "strongly disagrees" with this conclusion, argues the appellate court got it wrong and reasserts his argument below. Petition at 14. Mr. Diaz Guzman's disagreement here is insufficient to warrant review.

Mr. Diaz Guzman asserts the Court of Appeals also got it wrong by concluding he failed to show he was prejudiced by testimony from the girls' mother referring to "they" and "them." Noting that most of the references implied only that Mrs. Theroux was speaking with both

daughters at the same time, the Court of Appeals identified two problematic statements. *Guzman*, 2016 Wash. App. LEXIS 113 at 20. This testimony consisted of two statements from a 348 page transcript in a trial in which all other evidence and argument referred only to R. *Id.* at 21. The court concluded "the jurors would reasonably have assumed—if they heeded the 'thems' and 'theys' at all—that she was not implying that D. had been molested." *Id.* "While the testimony in isolation admits of the inference that both R. and D. disclosed allegations of sexual abuse, that would not be a reasonable inference in the context of the entire trial." *Id.* The Court of Appeals correctly concluded Mr. Diaz Guzman failed to show prejudice and failed to establish the trial court would have granted a mistrial. *Id.* at 21–22. Here again, Mr. Diaz Guzman fails to establish why his personal disagreement with this decision warrants review.

Finally, Mr. Diaz Guzman simply disagrees with the court's conclusion that trial counsel's election "to handle impeachment in a different but generally accepted fashion in the second trial can be explained as reasonable trial strategy." *Id.* at 25. Instead of identifying legitimate grounds for discretionary review—which he cannot—Diaz Guzman doubles down on his argument below, claiming counsel's failure to use the same impeachment method in both trials "is acting contrary to both logic and experience." Petition at 17.

Because Mr. Diaz Guzman fails to establish any grounds under which this Court should accept discretionary review, he also fails to establish cumulative error.

V. CONCLUSION

Mr. Diaz Guzman fails to demonstrate any of his asserted grounds support discretionary review. This Court should enter a ruling denying review.

Respectfully submitted this 22nd day of September, 2016.

GARTH DANO
Grant County Prosecuting Attorney

KATHARINE W. MATHEWS
Deputy Prosecuting Attorney
WSBA No. 20805
Attorneys for Respondent
kwmathews@grantcountywa.gov

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ANAUM DIAZ GUZMAN, Petitioner.	)	No. 92812-6 DECLARATION OF SERVICE

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the State's Answer to Petition for Discretionary Review in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Mr. Kraig Gardner
kraiggardner@yahoo.com

Dated: September 22, 2016.

Kaye Burns

OFFICE RECEPTIONIST, CLERK

From: Kaye Burns <kburns@grantcountywa.gov>
Sent: Thursday, September 22, 2016 1:22 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: kraiggardner@yahoo.com
Subject: State of Washington v. Anaum Diaz Guzman - Supreme Court No. 928126
Attachments: State's Answer to Petition for Review.pdf

Attached is the State's Answer to Petition for Discretionary Review in the above matter. Thank you.

Kaye Burns
Administrative Assistant
Grant County Prosecutor's Office
PO Box 37
Ephrata WA 98823
(509)754-2011, ext. 3905
(509)754-6574
e-mail – kburns@grantcountywa.gov

Please note my new phone extension and e-mail address.