

NO. 62682-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

In re Personal Restraint Petition of

REYNALDO DELGADO,

Petitioner.

**STATE'S BRIEF IN RESPONSE TO PERSONAL RESTRAINT
PETITION**

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A. ISSUE PRESENTED

Whether this personal restraint petition should be dismissed where the petitioner has failed to establish constitutional error that resulted in actual and substantial prejudice where the only logical inference based on the instructions given, the evidence presented and the arguments made to the jury is that the jury found multiple acts of sexual intercourse.

B. STATEMENT OF THE CASE

Reynaldo Delgado was found guilty by jury trial of two counts of rape of a child in the third degree and one count of child molestation in the first degree. Appendix A.¹ He received an indeterminate sentence of 216 months to life of total confinement. Appendix A. He appealed. His convictions were affirmed on appeal and mandate issued May 21, 2008. Appendix B. Delgado filed this timely personal restraint petition in February, 2009.

The evidence presented at trial established that in 2003 and 2004, Delgado sexually abused his seven-year-old daughter, Z.D.,

¹ Appendices A-C, referenced herein, were attached to the State's Response to Personal Restraint Petition filed May 11, 2009.

multiple times. The evidence established that Delgado vaginally penetrated Z.D. at two different homes and in his van, and that he also had oral sexual contact with Z.D.

The evidence of multiple acts of sexual abuse was presented as follows: Z.D. first told her cousin Maria that her father would hurt her when he would "put his thing that he used to go to the bathroom with inside her part that she would use to go to the bathroom." RP 11/22/05 40. When Dr. Susan O'Brien examined Z.D. on August 28, 2004, Z.D. told to Dr. O'Brien that her father had taken off her clothes and climbed on her. RP 11/22/05 12-13. During the physical examination, Z.D. pointed to her private parts and said she had a hole down there that her father had made. RP 11/22/05 15. She told Dr. O'Brien that her father put the part that he pees from inside her. RP 11/22/05 15. Z.D. said, "It hurts. My father made that hole there." RP 11/22/05 15. Z.D. also described that her father used to take her into the bathroom and put the part that he peed from inside her. RP 11/22/05 15. She said, "I have a hole down there and my father made that hole" and "he'll put his mouth here and then he'll put his mouth here," pointing down to her private area. RP 11/22/05 16. Z.D. told Dr. O'Brien, "He chews on me." RP 11/22/05 16.

Dr. Rebecca Wiester examined Z.D. on August 30, 2004, at Harborview. RP 11/17/05 92. Z.D. described a number of incidents of abuse by Delgado. She began by describing that her father would climb on her and give her red marks on her neck. RP 11/21/05 96, 101. One day her father took her to the car and pulled his pants down and told her to get on him and made her move. RP 11/21/05 97. She said Delgado put the part where he goes to the bathroom into the part where she goes to the bathroom, and that it hurt. RP 11/21/05 97-98. This happened on more than one occasion. RP 11/21/05 98. On one such occasion, Delgado took her into a bathroom and made her bleed a lot, and she was scared. RP 11/21/05 98. She also explained that Delgado would touch her with his mouth where she goes to the bathroom. RP 11/21/05 100. Her father told her not to say anything about him touching her where she would go pee. RP 11/21/05 100-01. Z.D. told Dr. Wiester that her father told her to have a baby with him. RP 11/21/05 102.

Ashley Wilske, a child interview specialist with the King County Prosecutor's Office, interviewed Z.D. on September 24, 2004, and a DVD was produced of the interview. RP 11/21/05 65-66; RP 11/22/05 110-11. A Spanish interpreter was present, but

Z.D. spoke both English and Spanish and usually responded in English. RP 11/21/05 67-68. The DVD of the interview was admitted at trial.

Eight-year-old Z.D. testified at trial. RP 11/17/05 38. She described staying with her cousins Maria and Adrianna, and that her father would sometimes leave to work in Alaska. RP 11/17/05 42-45. She said that her father would take her out to his van when she was living at Maria's house and tell her to sit on his lap. RP 11/17/05 49. Once in the van, he took the place where he goes to the bathroom and put it where she goes to the bathroom. RP 11/17/05 56. She also described that her father would have her get on top of her sister, and he would take their clothes off. RP 11/17/05 51. When she was at Adrianna's house, he would wake her up, put her on his side, and take his pants off. RP 11/17/05 52. She did not want to talk about what he would then do. RP 11/17/05 52-53. She did describe that her father made red marks on her neck by sucking on her. RP 11/17/05 56. When Z.D. was asked if her father ever did anything with the place that he goes to the bathroom, she replied that he would put it where she goes to the bathroom and it hurt her. RP 11/17/05 54-55. She said this

occurred in Maria's house, and it also occurred at Adrianna's. RP 11/17/05 54. The first person she told was Adrianna. RP 11/17/05 56.

The two counts of rape of a child in the first degree, Counts I and II, involved the same charging period: August 1, 2002 to August 31, 2004. Appendix C, Instructions 13 and 14. The jury was instructed that rape of a child in the first degree requires sexual intercourse with a child younger than twelve. Appendix C, Instruction 9. The jury was instructed that sexual intercourse includes vaginal penetration and contact between the sexual organs of one person and the mouth of another. Appendix C, Instruction 11.

Instruction 7 read:

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

Appendix C. Instruction 8 read:

There are allegations that the defendant committed acts of sexual abuse of a child on multiple occasions. To convict the defendant, one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have

been proved beyond a reasonable doubt. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.

Appendix C.

In closing argument, the prosecutor detailed for the jury why there were only two charges of rape of a child in the first degree and one charge of child molestation in the first degree, despite the fact that the victim testified to many instances of abuse. The State explained:

You can really do it in a couple of different ways. You can break it down by types of abuses, and that's really what I've done here. But you can also break it down into places. We know that it happened at Maria's house. It happened at Arianna's house -- apartment. And it also happened in the defendant's van.

RP 11/28/05 73. In discussing the date element of the crimes, the

State explained:

So we know that this sex abuse happened during those time periods because Z. said that it happened at Maria's and it happened at Adrianna's and it happened in the van, again when they were over at Adriana's.

RP 11/28/05 75-76. The prosecutor then explained that Z.D. had described both vaginal penetration and oral contact with her sex organs. RP 11/28/05 76-77. Then, the prosecutor explicitly

outlined the basis of the two counts of rape and the additional count of child molestation:

And, really, because there's two counts and there's each type of rape kind of being committed, so we know that there are two counts of rape of a child that have been proven.

The other charge, child molestation in the first degree. . .

Well, again, we know that when the defendant made Z. and her little sister get up on top of each other, as she described it, and took her pants down and he licked her anus, well, this is sexual molestation. He's clearly doing it for his own sexual desires and it was clearly and intimate part of Z.

RP 11/28/05 77. On direct appeal, this Court rejected Delgado's claim that his right to a unanimous jury and his right to be free from double jeopardy was violated, finding that "the State clearly elected two separate acts of rape, vaginal and oral penetration, as the criminal acts associated with the two counts during its closing argument." Appendix B, at 7.

C. ARGUMENT

**PETITIONER HAS FAILED TO ESTABLISH
CONSTITUTIONAL ERROR THAT RESULTED IN ACTUAL
AND SUBSTANTIAL PREJUDICE.**

An appellate court will grant substantive review of a personal restraint petition only when the petitioner makes a threshold

showing of constitutional error from which he has suffered actual prejudice or nonconstitutional error that constitutes a fundamental defect that inherently resulted in a complete miscarriage of justice. In re Personal Restraint of Cook, 114 Wn. 2d 802, 813, 792 P.2d 506 (1990). In a personal restraint petition, petitioner bears the burden of showing prejudicial error. State v. Brune, 45 Wn. App. 354, 363, 725 P.2d 454 (1986). A petitioner must prove actual and substantial prejudice. In re Personal Restraint of Brett, 142 Wn.2d 868, 874, 16 P.3d 601 (2001). Possible prejudice is not sufficient. In re Personal Restraint of Hews, 99 Wn.2d 80, 93, 660 P.2d 263 (1983). An error that would be per se prejudicial on direct review is not per se prejudicial on collateral review. In re Personal Restraint of St. Pierre, 118 Wn.2d 321, 330-31, 823 P.2d 492 (1992).

In State v. Borsheim, 140 Wn. App. 357, 165 P.3d 417 (2007), a direct appeal, the defendant was charged and convicted of four counts of rape of a child in the first degree. 140 Wn. App. at 363. Each count involved the same victim and same time period. Id. at 364. Although the jury had been instructed with the standard pattern instruction that "a separate crime is charged in each count," and that "the verdict on one count should not control your verdict on any other count," this Court held that the instructions nonetheless

allowed the jury to convict Borsheim of multiple crimes for a single act, thus violating double jeopardy. Id. at 367. This Court found that the jury instructions were inadequate because they failed to inform the jury that each crime must be based on a "separate and distinct act." Id. at 368. This Court noted that the omission was compounded by the fact that all four counts were confusingly encompassed in a single instruction rather than set out in separate instructions. Id.² Subsequently, this Court held that when the instructions contain the flaw identified in Borsheim, the remedy is vacation of all but one of the identical convictions. State v. Berg, 147 Wn. App. 923, 937, 198 P.3d 529 (2009).

However, a previous case from Division II of this Court reached a different conclusion. In State v. Ellis, 71 Wn. App. 400, 859 P.2d 632 (1993), the defendant was charged with two counts of child molestation and two counts of rape of a child in the first degree. Counts III and IV, the rape of a child charges, involved the same victim and overlapping time periods: Count III alleged sexual intercourse between January 1987 and December 1988, and Count IV alleged sexual intercourse between January 1988 and

² In Delgado's case, each crime was set forth in a separate instruction.

December 1989. Id. at 402. There was no language in the "to convict" instructions that the factual basis for the two crimes had to be separate and distinct. Id. On appeal, Ellis alleged a double jeopardy violation, arguing that the jury "might have used a single rape as the factual basis for counts III and IV." Id. at 406. Division II rejected Ellis's double jeopardy claim, stating, "It is our view that the ordinary juror would understand that when two counts charge the very same type of crime, each count requires proof of a different act. Additionally, the trial court affirmatively instructed, in Instruction 4, that a separate crime was charged in each count and, in Instruction 5, that the jury was required to unanimously agree that at least one particular act had been proved for each count." Id.

Borsheim was direct appeal. As such, the defendant had no burden to prove actual and substantial prejudice. In order to receive relief on collateral review, Delgado must establish not only the possibility of a constitutional error, but actual and substantial prejudice.

Delgado cannot show that he was actually prejudiced by the jury instructions in this case. As this Court already determined on direct appeal, there was sufficient evidence to support two counts

of rape of a child in the first degree and "the State clearly elected two separate acts of rape, vaginal and oral penetration, as the criminal acts associated with the two counts during its closing argument." Appendix B, Opinion at 7. As Division II stated in Ellis, "The ordinary juror would understand that when two counts charge the very same type of crime, each count requires proof of a different act." 71 Wn. App. at 406. The jury instructions, read as a whole and in a commonsense manner, made it manifestly clear to the jury that they had to rely upon separate acts to support convictions on identically charged crimes.

Moreover, viewed in the context of the evidence presented and the arguments made to the jury, there is no reasonable possibility that this jury based the two convictions for rape of a child in the first degree on a single act. The victim clearly testified to at least two different kinds of sexual intercourse, vaginal penetration and oral contact. The prosecutor clearly delineated for the jury that the two counts of rape were based on the two different kinds of sexual intercourse. Delgado cannot establish constitutional error that resulted in actual and substantial prejudice on this record.

Finally, the State respectfully submits that this Court's decisions in Borsheim and Berg overstate the likelihood of a double jeopardy violation and understates the impact of the other jury instructions. In reviewing a challenge to jury instructions, the court reads the instructions in a straightforward, commonsense manner. State v. Pittman, 134 Wn. App. 376, 382, 166 P.3d 720 (2006). The trial court instructed that a separate crime was charged in each count and advised the jury that it must decide each count separately, and that its verdict on one count should not control its verdict on any other count. In light of these instructions, a juror would understand that when two counts charged the very same type of crime, each count requires proof of a different act. Ellis, 71 Wn. App. at 406.

In both Borsheim and Berg, this Court failed to consider the impact of the jury instructions as a whole and how a commonsense juror would understand them. Courts in other jurisdictions have rejected similar challenges to "to convict" instructions, frequently noting that the jury was instructed that a separate crime was charged in each count. See State v. Burch, 740 S.W.2d 293, 295-96 (Mo. Ct. App. 1987) (concluding that the double jeopardy challenge to identical jury instructions for two counts of sodomy

was "specious"); State v. Salazar, 139 N.M. 603, 610-11, 136 P.3d 1013 (N.M. Ct. App. 2006) (rejecting double jeopardy challenge to nine identical jury instructions for nine counts of criminal sexual penetration).

In light of the evidence, instructions and argument in this case, Delgado has failed to establish constitutional error that resulted in actual and substantial prejudice.

D. CONCLUSION

This petition should be dismissed.

DATED this 14~~th~~ day of September, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
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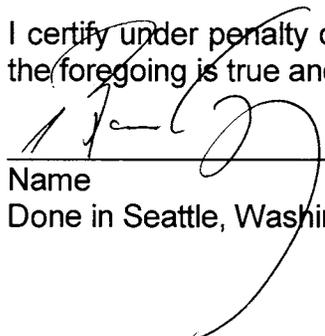
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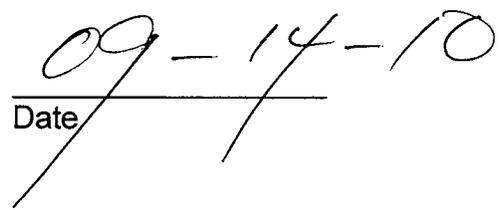
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the State's Brief in Response to Personal Restraint Petition, in IN RE PERSONAL RESTRAINT OF REYNALDO DELGADO, Cause No. 62682-5-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington



Date

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