

CORRECTED COA#

42781-8

No. 42405-3-II

IN THE
COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

YOVANY GOMEZ HERNANDEZ,
Appellant.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

The State Failed to Prove the Charged Assault When It Did Not Establish Mr. Gomez Hernandez Inflicted Great Bodily Harm and This Court Should Reverse

The State failed to prove assault in the first degree as charged in this case. It is undisputed the State was required to prove Mr. Gomez Hernandez inflicted "great bodily harm." See Respondent's Brief at 4-5. That term was defined as "bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ." CP 19 (Jury Instruction No. 7); RCW 9A.04.110(4)(c).¹

The State now concedes the evidence was insufficient to prove either the first or third prongs of this definition, that the victim suffered an injury creating a probability of death or causing significant

1. Notably, prior to trial, the State moved to amend the information to remove the requirement it prove "great bodily harm" because it did not believe it had sufficient evidence: "Quite frankly my evidence does not support the great bodily harm, because fortunately the victim survived." TRP 31.

permanent loss or impairment of a bodily part or organ. Respondent's Brief at 5. The State argues instead it proved the victim suffered a bodily injury that caused "significant serious permanent disfigurement." *Id.* at 5-6. However, the State cites no cases in which a scar of similar size or location was held to be "significant serious permanent disfigurement." See *id.* at 4-8.

To start, whether the State proved great bodily harm must be assessed according to the Legislature's intent. No greater harm than "great bodily harm" is capable of being inflicted short of death: "the legislature has not defined a level of harm greater than 'great bodily harm.'" State v. Stubbs, 170 Wn.2d 117, 128, 240 P.3d 143 (2010). The three levels of harm, in ascending order of seriousness, are "bodily harm," "substantial bodily harm," and "great bodily harm." Stubbs, 170 Wn.2d 117, 128 n.8, *citing*, RCW 9A.04.110(4). Thus, "great bodily harm" includes only the most serious types of injury.

Further, the cases finding great bodily harm cited in Appellant's Brief are critical as comparisons in

determining whether great bodily harm existed in this case. See Appellant's Brief at 11-13. As the Court held in Stubbs, the Legislature intended that all cases of "great bodily harm" share a qualitative similarity:

One case of "great bodily harm," then, is not qualitatively different than another case. Such a leap is best understood as the jump from "bodily harm" to "substantial bodily harm," or from "substantial bodily harm" to "great bodily harm."

Stubbs, 170 Wn.2d 117, 130 (holding no level of harm short of death can "substantially exceed" great bodily harm; agreeing loss of a finger or toe would also qualify as great bodily harm). Thus, the question here is whether the scar in this case is qualitatively similar to the injuries suffered in other "great bodily harm" cases. Those types of injuries included, for example, permanent paralysis, permanent brain damage, multiple facial fractures and permanent nerve damage, and organ loss. Appellant's Brief at 11-13. The State failed to prove a qualitative similarity between those injuries and the small permanent scar in this case.

Indeed, although on appeal the State argues it proved "significant serious permanent disfigurement,"

at trial it offered no evidence the scar in this case fit that description. While the State established Ms. Campuzano suffered a one-centimeter wound requiring two stitches, 2TRP 9 & 18-19, the evidence about the scar itself was scant. Other than allowing the jury to view the scar, the State did not introduce any evidence as to its size, color, or appearance. Ms. Campuzano provided no testimony about the scar or whether it troubled her. See TRP 42-68. Although the State now speculates the scar "could certainly cause considerable distress, anxiety or inconvenience," Respondent's Brief at 7, it offered no evidence at trial that it did.

Most damaging to the State's argument, the examining doctor herself testified the scar, while permanent, "should be pretty minimal." 2TRP 28. This testimony alone takes the scar out of the realm of "great bodily harm." A "pretty minimal" scar, by definition, cannot amount to "significant serious permanent disfigurement."

Moreover, the location of the scar prevents it from rising to the level of "significant serious

permanent disfigurement." While even a small scar on a person's face might cause minor disfigurement or more, depending on its appearance and location, this scar is virtually hidden. It is on the back of the neck, just to the left of the midline of the body, just below where the skull stops. 2TRP 9. Given this location, the scar would usually not be visible. See TRP 56-57 (victim had to lift up her pony tail and point to the scar to show it to jury). Under these circumstances, the State failed to prove "significant serious permanent disfigurement."

Nor did the jury's verdict establish the State proved the scar amounted to "significant serious permanent disfigurement," as the State now argues. Respondent's Brief at 7-8. To the contrary, the State argued for conviction at trial solely on the ground that the injury created a probability of death, not that it was "significant serious permanent disfigurement":

"Great bodily harm means great bodily injury that creates a probability of death." It doesn't mean it creates death. . . . What we have is a probability of death. You heard Dr.

Godfrey say that this was a life threatening injury, that she could have died from that particular injury, that the knife wound went in about three-inches into her neck, all those blood vessels and nerves and things that could have been hit back there, and that when she came in they mobilized their whole trauma department to ascertain what the problem was. It creates a probability of death. That could be any kind of probability, 10 percent, 50 percent. The doctors don't quantify, but if there's a probability of death involved, then, we have great bodily harm.

TRP 104-05; see also TRP 106 ("great bodily harm means an injury that creates a probability of death"); 107 ("the doctor told you the wound itself was a life threatening injury and that she could have died from that injury and that meets the definition of great bodily harm"); TRP 111 ("the fact that it could have produced death or it was a life threatening injury that was great bodily harm"); TRP 125 ("Stabbing someone like that won't cause them a probability of death? Well, that's not life threatening?").

When the only type of "great bodily harm" argued for at trial was based on an injury that created the probability of death, the jury must have voted "guilty" because it mistakenly believed the State proved the

injury created a probability of death. Of course, the State now concedes it proved no such thing. Respondent's Brief at 5. Accordingly, the "guilty" verdict was not equivalent to a factual determination the scar amounted to "significant serious permanent disfigurement." Instead, the State failed to prove such disfigurement and this Court should reverse Mr. Gomez Hernandez's conviction.

For these reasons and the reasons set forth in Appellant's Brief at 10-15, the State failed to prove the scar amounted to "great bodily harm" and this Court should reverse Mr. Gomez Hernandez's conviction.

* * * * *

Mr. Gomez Hernandez relies on Appellant's Brief for the remainder of his arguments.

II. CONCLUSION

For all of these reasons and the reasons set forth in Appellant's Brief, Yovany Gomez Hernandez respectfully requests this Court to reverse his conviction.

Dated this 28th day of August, 2012.

Respectfully submitted,

/s/ Carol Elewski
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Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on this 28th day of August, 2012, I caused a true and correct copy of Appellant's Brief to be served, by e-filing, on:

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/s/ Carol Elewski
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August 28, 2012 - 11:37 AM

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