

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,) No. ~~42405-3~~ II 42781-8
)
Respondent,) APPELLANT'S STATEMENT
) ADDITIONAL GROUNDS FOR
v.) REVIEW
)
YOVANY GOMEZ-HERNANDEZ,) RAP 10.10
)
Appellant.)

FILED
COURT OF APPEALS
DIVISION II
2012 JUN 28 PM 1:04
STATE OF WASHINGTON
BY
DEPUTY

A. IDENTITY OF MOVING PARTY

1. COMES NOW the Appellant, Yovany Gomez-Hernandez, pro se, and hereby submits the following additional grounds for review in addition to those presented by counsel in the Appellant's Brief.

B. ADDITIONAL GROUND ONE

2. The State Lessened It's Burden of Proof by Telling the Jury Dr. Godfrey Testified the Victim's Injury was Life Threatening. To prove the charged crime in this case, assault in the first degree in violation of RCW 9A.36.011(1)(c), the State was required to prove beyond a reasonable doubt that Gomez-Hernandez assaulted the victim and inflicted "great bodily harm." CP 20 (Jury Instruction 8). The jury was instructed that "great bodily harm"

means "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). Great bodily harm encompasses the most serious injuries short of death. State v. Stubbs, 170 Wn.2d 117, 128, 240 P.3d 143 (2010).

3. On the day of trial, the State moved to file a third amended information, in an attempt to change the elements it would have to prove at trial. The State argued:

MR. MEAGHER: State understands. I have to bring up one more mistake in my charging information. It wasn't until I sat down this morning and was actually listening to the Court read the charge that I realized that our intent all along was to charge 9A.36.011 A, deadly weapon, but my information reads 1 C, which is the great bodily harm prong. That was not the State's intent and that's not what I wish to proceed on today. I wish to be able to allow to amend my information to 9A.36.011 A, which is deadly weapon, which my evidence supports.

VRP, September 26, 2011, at 31.

4. The State's motion to amend the information a third time was denied by the trial court. *Id.* at 40. In denying the State's motion to amend the information for the third time, the court ruled:

THE COURT: So, basically, the State has charged the defendant with Assault in the First Degree by with intent to unflit great bodily harm, did in fact do that, and that's what the State has alleged and that's what I expect the State's evidence to establish.

VRP, September 26, 2011, at 40-41.

5. The evidence presented at trial was insufficient in showing that the victim injuries in this case wa life threatening or caused a probability of death. In it's closing argument the State told the jurors:

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.

VRP, September 27, 2011, pg. 105.

6. The problem with the State's admonishment to the jury is that Dr. Godfrey's testimony does not support it's construction of her testimony. Dr. Godfrey did not testify that the knife wound the victim of this case suffered was life threatening. To be sure, after establishing that the victim came

to the hospital's emergency department complaining of being stabbed in the back of her neck, taking radiology imaging of the wound and explaining what those images shown, the State asked Dr. Godfrey the following battery of questions:

Q. Is this type of injury life threatening?

A. Potentially, yes.

Q. With a reasonable degree of certainty, can a person die from this type of injury?

A. Yes.

VRP, 09/27, 2011, pg. 10, ln. 1 - 5.

Q. Were you concerned for the victim's life?

A. Yes.

VRP, 09/27/2011, pg. 10, ln. 23 - 24.

7. The state went on to inquire of Dr. Godfrey to explain to the jury why such an injury, such as the one suffered by the victim in this case, could be life threatening. VRP, 09/27/2011, pg. 11, ln. 11-12. Because this question called for speculation, counsel objected. Id. at ln. 22. The Court overruled the objection. Id. at ln. 23. Whereupon the witness was allowed to discribe a parade of horrors that would make the injury sustained by the victim life threatening "if" this or that would have happened. See, VRP, 09/27/2011, pg. 12 - 13.

8. Contrary to the State's admonishment to the jury that "this was a life threatening injury," VRP, 09/27/2011, pg. 105, Dr. Godfrey's testimony at trial does not support the State's admonishment during closing argument that the victim in [t]his case's actual injury was life threatening.

9. The parade of horribles, if [s] testified to by Dr. Godfrey upon direct examination of the State went as follows:

THE WITNESS: So this air that's going stright down also comes a little bit more to the front, and if it gets close to this structure at all, I mean it's 'potentially' life threatening. If you dissect your carotid artery, which is your biggest blood supply here, people bleed to death. It's a difficult place to go in and get repaired as well.. so that's why and then the base of the skull has a hole right here called a foramen magnum that the spinal cord comes from your brain and turns into your spinal cord through that hole and the spinal cord lays right in the middle of the spine, so if the neck - - I mean when I saw the patient I didn't know exactly where it tracked, that's the problem, so had the knife gone directly into the spinal cord and right at that center is your brain stem and your breathing center, so "potentially" very life threatening.

VRP, 09/27/2011, pg. 12.

10. Dr. Godfrey did not testify there was an "air" way obstruction in the victim's case. She did not testify that the victim's carotid artery was dissected. She did not testify that the knife that was used against this victim harmed the victim's spinal

cord. Dr. Godfrey did not testify that the wound suffered by the victim touched any of the victim's blood vessels. Therefore, Gomez-Hernandez moves that the Court should conclude when Dr. Godfrey testified that the victim could have died from the wound she suffered, VRP 09/27/2011, pg. 13, what Dr. Godfrey meant was if any of the horrors had occurred as referenced inset on page 5 of this Statement of Additional Grounds.

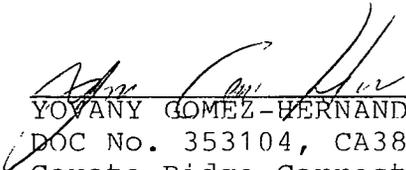
11. To be sure, on cross examination by defense counsel, Dr. Godfrey testified that no blood vessels were hit or damaged. VRP, 09/27/2011, pg. 17, no signs of vascular injury, nor neurological injury. Id. pg. 19. Dr Godfrey also testified that neither the victim's spinal cord nor nervous system was affected by her injury. Id pg. 19. Finally, Dr. Godfrey testified that the victim suffered no post-traumatic injury. Id. pg. 19. Although Dr. Godfrey did testify that the victim suffered from significant tenderness to the back of the neck and sustained some injury to the musculature in the back of the neck and the subcutaneous tissue. Id. pg. 19. Dr Godfrey testified that there was no need to suture and that he expected them to heal on their own. Id. pg. 19.

12. When the prosecutor told the jury during it's closing argument: "You heard Dr. Godfrey say that this was a life threatening injury, and that she could have died from that particular injury," the prosecutor committed misconduct and lessened the State's burden of proof at trial. VRP, 09/27/2011, pg. 105. Gomez-Hernandez submit's the misconduct of the prosecutor, taken together and by cumulative effect, rose to the level of manifest constitutional error, which is no[t] harmless beyond a reasonable doubt given the nature of the evidence at trial. Gomez-Hernandez's conviction of assault in the first degree, therefore, must be reversed and remanded for a new trial. There is no evidence in this case that the victim suffered a great bodily injury, within the meaning of RCW 9A.04.110(4)(c).

It Should be so Ordered.

DATED this 19th day of June, 2012.

Respectfully submitted,
BY THE APPELLANT:


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DECLARATION OF MAILING

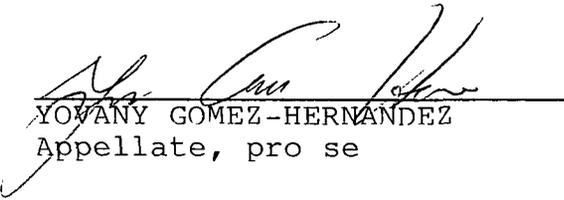
I, the undersigned, certify that on this the 19th day of June, 2012, I deposited in the U.S. Mail at the Coyote Ridge Corrections Center, a true and correct copy of "APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW," postage pre-paid and properly addressed to the following sources:

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