

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 MAY 11 PM 4:13

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

In re Personal Restraint)
Petition of)
)
)
)
)
)
REYNALDO DELGADO,)
Petitioner.)
_____)

No. 62682-5-1

STATE'S RESPONSE TO
PERSONAL RESTRAINT
PETITION

A. AUTHORITY FOR RESTRAINT OF PETITIONER.

Reynaldo Delgado is restrained pursuant to judgment and sentence in King County Superior Court No. 04-1-13920-8 KNT. Appendix A.

B. ISSUES PRESENTED.

1. Whether this petition should be dismissed where the court had venue and jurisdiction.
2. Whether this petition should be dismissed where petitioner has failed to establish any violation of his right to confront witnesses.

3. Whether this petition should be dismissed where the petitioner has failed to establish that the court abused its discretion in finding the child victim competent and her hearsay statements admissible.

4. Whether this personal restraint petition should be dismissed where petitioner attempts to relitigate his jury unanimity claim.

5. Whether this personal restraint petition should be dismissed where petitioner has failed to establish ineffective assistance of counsel.

6. Whether this personal restraint petition should be dismissed where petitioner has failed to establish that the interpreter was not competent.

7. Whether this personal restraint petition should be dismissed where substantial evidence supports the convictions.

8. Whether this personal restraint petition should be dismissed where no custodial statements were offered and thus no prejudicial Miranda violation can be established.

C. 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. 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.

The evidence presented at trial established that in 2003 and 2004, Delgado sexually abused his seven-year-old daughter, Z.D., multiple times. At the time of the crimes, Delgado and his children were living with his nieces, Maria and Adrianna Coronilla-Delgado, in Federal Way.

Delgado and his two children, Z.D. and G.D., moved into Maria Coronilla-Delgado's Federal Way apartment in 2003. 8RP 36.¹ Delgado shared a living room with his two young daughters, Z.D. and G.D., and Maria and her family occupied the two apartment bedrooms. 8RP 37. Delgado stayed a couple of months, and then left his children with Maria while he worked in

¹ There are 11 volumes of the verbatim report of proceedings, as follows: 1RP—Nov. 8, 2005; 2RP—Nov. 9, 2005; 3RP—Nov. 14, 2005; 4RP—Nov. 15, 2005; 5RP—Nov. 16, 2005; 6RP—Nov. 17, 2005; 7RP—Nov. 21, 2005; 8RP—Nov. 22, 2005; 9RP—Nov. 28, 2005; 10RP—Jan. 6, 2006; 11RP—Feb. 17, 2006.

Alaska for two or three months. 8RP 38. Delgado returned to live with Maria for a couple of months, and then moved to the apartment of his other niece, Adrianna, also in Federal Way. 8RP 38, 71. Again, Delgado stayed for a few weeks, and then left for Alaska for three months while Adrianna took care of his girls. 8RP 72-73.

Around March, 2004, Delgado returned from Alaska and took Z.D with him to Mexico. 8RP 74. He married a woman named Erica in Mexico. 8RP 74. When he returned, Delgado, Erica, and Z.D. moved back in with Adrianna for a few more weeks. 8RP 74-75. Adrianna and her family occupied the two bedrooms of the apartment, and Delgado and his daughters would sleep on the floor and on a couch in the living room. 8RP 76.

During the months that Reynaldo Delgado and his children stayed with Maria Coronilla-Delgado before he left for Alaska, Maria became concerned because Delgado just wanted to spend time with Z.D. 8RP 39. Also, she noticed red marks on Z.D.'s neck. 8RP 39. When she asked Z.D. about it, Z.D. said that her father had "sucked her" and she was afraid of telling on him. 8RP 39. Z.D. said that Delgado told her to say that her sister G.D. had bitten her, but that was not true. 8RP 39. Maria then asked Delgado

what had happened to Z.D. and he said G.D. had bitten Z.D.

8RP 39-40. G.D. said that was not true. 8RP 39-40.

Z.D. also told Maria that her father would hurt her, that 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." 8RP 40. This disclosure occurred when Delgado was in Alaska. 8RP 40. Z.D. had been afraid to say anything for fear that Delgado would do something to her for telling what he had done. 8RP 40.

Adrianna Coronilla-Delgado also noticed unusual behavior relating to Delgado and Z.D. during the time Delgado and his family stayed with her. She also noticed red marks on Z.D.'s neck, first when Z.D. was living with her sister Maria. 8RP 101, 105. Once, when Delgado was in Alaska, Adrianna called him to ask about taking Z.D. to the hospital because she was complaining of abdominal pain, and burning and scratching in the vaginal area. 8RP 94. Delgado told Adrianna that Z.D. would sometimes "become irritated" and to wait and see if it would go away before taking her to a doctor. 8RP 94.

Z.D. also exhibited unusual behavior at school, and school personnel noticed red marks on Z.D.'s neck as well. 8RP 101.

When the school contacted Adrianna, she confirmed that they were also worried about the marks on Z.D. 8RP 101.

After Z.D. disclosed the sexual abuse, Maria and Adrianna took Z.D. to Highline Hospital. 8RP 50, 94. They also contacted CPS after speaking with a school counselor. 8RP 48, 51. Once the abuse was disclosed, Z.D. lived with Maria for about two weeks, and then the children were put in a foster home. 8RP 51.

Dr. Susan O'Brien examined Z.D. on August 28, 2004, at Highline Community Hospital. 8RP 9. Z.D. had suffered abdominal pain and vaginal discharges intermittently for three months, and her aunts were concerned about Delgado abusing her. 8RP 10-11. Z.D. disclosed to Dr. O'Brien that her father had taken off her clothes and climbed on her. 8RP 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. 8RP 15. She told Dr. O'Brien that her father put the part that he pees from inside her. 8RP 15. Z.D. said, "It hurts. My father made that hole there." 8RP 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. 8RP 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. 8RP 16. Z.D. told Dr. O'Brien, "He chews on me." 8RP 16. Z.D. made the statements spontaneously and not in response to any questioning by Dr. O'Brien. 8RP 15.

The physical examination by Dr. O'Brien revealed a suspicious scar, which appeared to be an old tear that was consistent with sexual exposure for a child as young as Z.D. 8RP 17. The scar was consistent with penetrating trauma. 8RP 18. Due to the suspicious nature of her findings, Dr. O'Brien referred the case to the sexual assault clinic at Harborview. 8RP 23.

Dr. Rebecca Wiester examined Z.D. on August 30, 2004, at Harborview. 6RP 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. 7RP 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. 7RP 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. 7RP 97-98. This happened on more than one occasion. 7RP 98. On one such occasion, Delgado took her into a bathroom and made her bleed a

lot, and she was scared. 7RP 98. She also explained that Delgado would touch her with his mouth where she goes to the bathroom. 7RP 100. Her father told her not to say anything about him touching her where she would go pee. 7RP 100-01. Z.D. told Dr. Wiester that her father told her to have a baby with him. 7RP 102.

Dr. Wiester's examination of Z.D. showed that her hymen was abnormal. 7RP 104-05. There was tissue that was missing, and the tissue that was present was irregular. 7RP 107. This was consistent with healed vaginal penetrating trauma, which could have come from a penis. 7RP 107-08.

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. 7RP 65-66; 8RP 110-11. A Spanish interpreter was present, but Z.D. spoke both English and Spanish and usually responded in English. 7RP 67-68. The DVD of the interview was admitted at trial.

Eight-year-old Z.D. testified at trial. 6RP 38. She described staying with her aunts Maria and Adrianna, and that her father would sometimes leave to work in Alaska. 6RP 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. 6RP 49. Once in the van, he took the place where he goes to the bathroom and put it where she goes to the bathroom. 6RP 56. She also described that her father would have her get on top of her sister, and he would take their clothes off. 6RP 51. When she was at Adrianna's house, he would wake her up, put her on his side, and take his pants off. 6RP 52. She did not want to talk about what he would then do. 6RP 52-53. She did describe that her father made red marks on her neck by sucking on her. 6RP 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. 6RP 54-55. She said this occurred in Maria's house, and it also occurred at Adrianna's. 6RP 54. The first person she told was Adrianna. 6RP 56.

D. ARGUMENT.

1. THE COURT HAD VENUE AND JURISDICTION.

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 which 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).

Delgado alleges that the court lacked venue or jurisdiction. This claim is not supported by any authority or references to the record and should be summarily dismissed.

Criminal defendants are guaranteed under the Washington Constitution the right to a speedy public trial by an impartial jury from the county where the offense is charged to have been committed. Wash. Const. art. 1, sec. 22. CrR 5.1(a) provides that all criminal actions must be commenced in the county where the offense was alleged to have been committed or in any county where an element of the offense was committed. If there is a reasonable doubt whether the offense was committed in one of two or more counties, the action may be brought in any of those counties. CrR 5.1(b). The evidence presented a trial established that the acts occurred at Maria's and Adrianna's apartments in Federal Way. The trial properly occurred in King County.

A court has subject matter jurisdiction where the court has the authority to adjudicate the type of controversy in the action. State v. Moen, 129 Wn.2d 535, 545, 919 P.2d 69 (1996). The superior court has original jurisdiction in all criminal cases amounting to felonies pursuant to RCW 2.08.010. Thus, the court which sentenced the defendant had subject matter jurisdiction. Personal jurisdiction arises when the defendant is present in court on the date of the arraignment. State v. Day, 46 Wn. App. 882, 896, 734 P.2d 491 (1987). The superior court had jurisdiction in this matter.

2. PETITIONER HAS FAILED TO ESTABLISH A VIOLATION OF HIS RIGHT TO CONFRONT WITNESSES.

Delgado appears to allege that out-of-court statements of his wife, Erica Albarado, were admitted for the truth of the matter asserted without affording Delgado the right to confront the witness. Delgado does not specify what these statements were, but provides a few citations to the record. However, none of the record cites contain any hearsay statements. For example, at "7RP 93" Dr. Weister testified that she had a chance to talk to Erica, but did not testify regarding any statements made by Erica. Delgado's citation to "4RP18-25" refers to pretrial testimony of Dr. Weister that was

not before the jury. Moreover, those pages contain no hearsay statements made by Erica Albarado. Delgado has failed to establish that his right to confront witnesses was violated.

3. DELGADO HAS FAILED TO ESTABLISH THAT THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING CHILD HEARSAY AND FINDING THE VICTIM COMPETENT.

Delgado alleges that the trial court erred in admitting child hearsay statements made by Z.D. because Z.D. was not competent to testify. However, the trial court conducted a competency hearing and ruled that she was competent, and that most, although not all, of her hearsay statements would be admissible. 3RP 6-52; 5RP 2-3; 6RP 66-80. Z.D. testified and was subject to cross-examination. 6RP 37-64. A trial court's admission of child hearsay statements under RCW 9A.44.120 is reviewed for abuse of discretion. State v. Woods, 154 Wn.2d 613, 623, 114 P.3d 1174 (2005). A trial court's determination of child competency is also reviewed for abuse of discretion. State v. C.J., 148 Wn.2d 672, 682, 63 P.3d 765 (2003). Delgado has failed to establish that the trial court abused its discretion.

4. DELGADO MAY NOT RELITIGATE HIS JURY UNANIMITY CLAIM.

A personal restraint petition is not meant to serve as a forum for relitigation of issues already considered on direct appeal. In re Personal Restraint of Lord, 123 Wn.2d 296, 329, 868 P.2d 835 (1994); In re Personal Restraint of Pirtle, 136 Wn.2d 467, 491, 965 P.2d 593 (1998). Simply revising a previously rejected legal argument neither creates a new claim nor constitutes good cause to reconsider the original claim. In re Personal Restraint of Jeffries, 114 Wn.2d 485, 488, 789 P.2d 731 (1990).

Delgado argued on direct appeal that the jury instructions violated his right to a unanimous jury and his right to be free from double jeopardy. This Court rejected this claim. Appendix B, 5-7. Delgado may not relitigate that claim in this petition.²

² Delgado has not cited to State v. Borsheim, 140 Wn. App. 357, 165 P.3d 417 (2007), in which instructions similar to the ones given here were held to violate double jeopardy. See Appendix C. However, Delgado cannot show that such an error in this case resulted in actual prejudice where, as this Court found on direct appeal, 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 arguments."

5. DELGADO HAS FAILED TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL.

Delgado claims that trial counsel was ineffective in failing to adequately investigate potential witnesses, and in failing to obtain work records. This claim is without merit.

The petitioner has the burden of establishing ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 682, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Strickland, 466 U.S. at 687. To prevail on a claim of ineffective assistance of counsel the defendant must meet both prongs of a two-part standard: (1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances (the performance prong); and (2) the defendant was prejudiced, meaning there is a reasonable probability that the result of the proceeding would have been different (the prejudice prong). Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the court decides that either prong has not been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244 (1990).

The inquiry in determining whether counsel's performance was constitutionally deficient is whether counsel's assistance was

reasonable considering all the circumstances. Strickland, 466 U.S. at 688. In judging the performance of trial counsel, courts must engage in a strong presumption of competence. Strickland, 466 U.S. at 689. This presumption of competence includes a presumption that challenged actions were the result of reasonable trial strategy. Strickland, 466 U.S. at 689-90. Legitimate trial strategy or tactics cannot be the basis of a claim of ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Counsel is not required to conduct an exhaustive investigation or to call all possible witnesses. In re Benn, 134 Wn.2d 868, 900, 952 P.2d 116 (1998).

In addition to overcoming the strong presumption of competence and showing deficient performance, the petitioner must affirmatively show prejudice. Strickland, 466 U.S. at 693. Petitioner must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694.

When an ineffective assistance claim is based on counsel's failure to call a witness, prejudice generally cannot be established without an affidavit from the witness indicating what the witness would say if called to testify. See State v. Neidigh, 78 Wn. App. 71,

81, 895 P.2d 423 (1995); State v. Sherwood, 71 Wn. App. 481, 484, 860 P.2d 407 (1993).

Delgado has provided no affidavits from witnesses that would have provided exculpatory evidence. Similarly, the work records he has provided are not exculpatory. The charging period was August 1, 2002, to August 31, 2004. The work records provided by Delgado show large blocks of time during this period in which Delgado was not working in Alaska: from April 20, 2001 to June 4, 2001, from September 10, 2001 to January 12, 2002, from August 25, 2002 to January 18, 2003, from March 19, 2003 to June 9, 2003, from September 1, 2003 to January 5, 2004, from March 30, 2004 to June 6, 2004, and from August 29, 2004 to November 24, 2004. This is consistent with Maria and Adrianna Coronilla-Delgado's testimony that Delgado would stay with them for several months and then go to work in Alaska for several months. 8RP 37-38, 73-74. Delgado has failed to show that the work records are exculpatory, and that counsel was therefore ineffective in failing to present them. Delgado has failed to establish ineffective assistance of counsel.

6. DELGADO HAS FAILED TO ESTABLISH THAT THE INTERPRETER WAS NOT COMPETENT.

Delgado appears to challenge the competency of the interpreter that was provided at trial. The right of a non-English-speaking person to an interpreter is based on the Sixth Amendment, as well as statute, RCW 2.43.010. State v. Teshome, 122 Wn. App. 705, 709, 94 P.3d 1004 (2004). A defendant who claims that he was denied a competent interpreter must be able to establish on the record that there were substantial problems with the interpretation. State v. Ramirez-Dominquez, 140 Wn. App. 233, 247, 165 P.3d 391 (2007); State v. Serrano, 95 Wn. App. 700, 704, 977 P.2d 47 (1999).

In the present case, an interpreter was provided to Delgado at trial. 1RP 1. Interpreters were also provided for the Spanish-speaking witnesses. 1RP 18, 39; 8RP 31, 68. Delgado has identified nothing in the record that would suggest there were any problems with the interpreters. His claim must be rejected.

7. SUBSTANTIAL EVIDENCE SUPPORTS THE CONVICTIONS.

Delgado contends that his convictions are not supported by sufficient evidence. In reviewing a challenge to the sufficiency of the evidence, the appellate court must view the evidence in the light

most favorable to the State, and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence, and all reasonable inferences must be drawn in favor of the State. State v. Paine, 69 Wn. App. 873, 850 P.2d 1369 (1993). Therefore, a conviction will not be overturned unless there is no substantial evidence to support it. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303 (1992). The trier of fact may rely on circumstantial evidence alone, even though it is also consistent with innocence. State v. Kovac, 50 Wn. App. 117, 119, 747 P.2d 484 (1987). Drawing all reasonable inferences in the favor of the State, a trier of fact could conclude beyond a reasonable doubt based on the testimony of Z.D. and her out-of-court statements, as well as the medical testimony, that Delgado was guilty of rape in the first degree and child molestation in the first degree.

8. DEFENDANT'S MIRANDA RIGHTS WERE NOT VIOLATED BECAUSE NO CUSTODIAL STATEMENTS WERE ADMITTED INTO EVIDENCE.

Delgado contends that he was not advised on his Miranda rights when he was arrested. The Fifth Amendment right against compelled self-incrimination requires police to inform a suspect of

his Miranda rights before a custodial interrogation. State v. Cunningham, 116 Wn. App. 219, 227, 65 P.3d 325 (2003).

Statements obtained during a custodial interrogation without first advising the defendant of his constitutional rights are inadmissible pursuant to Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). State v. Kolesnik, 146 Wn. App. 790, 810, 192 P.3d 937 (2008). The State did not offer any statements that Delgado made to police, and no police witnesses testified.

Delgado's claim is thus without merit.

E. CONCLUSION.

This petition should be dismissed.

DATED this 8th day of May, 2009.

Respectfully Submitted,

DAN SATTERBERG
King County Prosecuting
Attorney

by 
ANN SUMMERS, #21509
Senior Deputy Prosecuting
Attorney
Attorneys for Respondent
Office ID #91002

W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104
(206) 296-9650

APPENDIX A

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SUPERIOR COURT CLERK
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PRESENTING STATEMENT & INFORMATION ATTACHED
FEB 17 2006
CERTIFIED COPY TO COUNTY JAIL

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
Plaintiff,	)	No. 04-1-13920-8 KNT
)	
Vs.	)	JUDGMENT AND SENTENCE
	)	FELONY
REYNALDO DELGADO)	
)	
Defendant,)	

I. HEARING

I.1 The defendant, the defendant's lawyer, TONY SAVAGE, and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: _____

II. FINDINGS

There being no reason why judgment should not be pronounced, the court finds:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 11/29/2005 by jury verdict of:

Count No.: I Crime: RAPE OF A CHILD IN THE FIRST DEGREE - DOMESTIC VIOLENCE
 RCW 9A.44.073 Crime Code: 01065
 Date of Crime: 08/01/2002 - 08/31/2004 Incident No. _____

Count No.: II Crime: RAPE OF A CHILD IN THE FIRST DEGREE - DOMESTIC VIOLENCE
 RCW 9A.44.073 Crime Code: 01065
 Date of Crime: 08/01/2002 - 08/31/2004 Incident No. _____

Count No.: III Crime: CHILD MOLESTATION IN THE FIRST DEGREE - DOMESTIC VIOLENCE
 RCW 9A.44.083 Crime Code: 01071
 Date of Crime: 08/01/2002 - 08/31/2004 Incident No. _____

Count No.: _____ Crime: _____
 RCW _____ Crime Code: _____
 Date of Crime: _____ Incident No. _____

[] Additional current offenses are attached in Appendix A

SPECIAL VERDICT or FINDING(S):

- (a) While armed with a **firearm** in count(s) _____ RCW 9.94A.510(3).
- (b) While armed with a **deadly weapon** other than a firearm in count(s) _____ RCW 9.94A.510(4).
- (c) With a **sexual motivation** in count(s) _____ RCW 9.94A.835.
- (d) A V.U.C.S.A. offense committed in a **protected zone** in count(s) _____ RCW 69.50.435.
- (e) **Vehicular homicide** Violent traffic offense DUI Reckless Disregard.
- (f) **Vehicular homicide** by DUI with _____ prior conviction(s) for offense(s) defined in RCW 41.61.5055, RCW 9.94A.510(7).
- (g) **Non-parental kidnapping** or unlawful imprisonment with a minor victim. RCW 9A.44.130.
- (h) **Domestic violence** offense as defined in RCW 10.99.020 for count(s) _____.
- (i) Current offenses encompassing the same criminal conduct in this cause are count(s) _____ RCW 9.94A.589(1)(a).

2.2 **OTHER CURRENT CONVICTION(S):** Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): _____

2.3 **CRIMINAL HISTORY:** Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.525):
 Criminal history is attached in **Appendix B**.
 One point added for offense(s) committed while under community placement for count(s) _____

2.4 SENTENCING DATA:

Sentencing Data	Offender Score	Seriousness Level	Standard Range	Enhancement	Total Standard Range	Maximum Term
Count I	6	XII			162 TO 216 MONTHS	LIFE AND/OR \$50,000
Count II	6	XII			162 TO 216 MONTHS	LIFE AND/OR \$50,000
Count III	6	X			98 TO 130 MONTHS	LIFE AND/OR \$50,000
Count						

Additional current offense sentencing data is attached in **Appendix C**.

2.5 **EXCEPTIONAL SENTENCE (RCW 9.94A.535):**
 Substantial and compelling reasons exist which justify a sentence above/below the standard range for Count(s) _____. Findings of Fact and Conclusions of Law are attached in **Appendix D**. The State did did not recommend a similar sentence.

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and **Appendix A**.
 The Court **DISMISSES** Count(s) _____

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

4.1 RESTITUTION AND VICTIM ASSESSMENT:

- Defendant shall pay restitution to the Clerk of this Court as set forth in attached Appendix E.
- Defendant shall not pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant to RCW 9.94A.753(2), sets forth those circumstances in attached Appendix E.
- Restitution to be determined at future restitution hearing on (Date) _____ at _____ m.
- Date to be set.
- Defendant waives presence at future restitution hearing(s).
- Restitution is not ordered.

✓ Defendant shall pay Victim Penalty Assessment pursuant to RCW 7.68.035 in the amount of \$500.

4.2 OTHER FINANCIAL OBLIGATIONS: Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability to pay them. Defendant shall pay the following to the Clerk of this Court:

- (a) \$ _____, Court costs; Court costs are waived; (RCW 9.94A.030, 10.01.160)
- (b) \$100 DNA collection fee; DNA fee waived (RCW 43.43:754)(crimes committed after 7/1/02);
- (c) \$ _____, Recoupment for attorney's fees to King County Public Defense Programs; Recoupment is waived (RCW 9.94A.030);
- (d) \$ _____, Fine; \$1,000, Fine for VUCSA; \$2,000, Fine for subsequent VUCSA; VUCSA fine waived (RCW 69.50.430);
- (e) \$ _____, King County Interlocal Drug Fund; Drug Fund payment is waived; (RCW 9.94A.030)
- (f) \$ _____, State Crime Laboratory Fee; Laboratory fee waived (RCW 43.43.690);
- (g) \$ _____, Incarceration costs; Incarceration costs waived (RCW 9.94A.760(2));
- (h) \$ _____, Other costs for: _____

4.3 PAYMENT SCHEDULE: Defendant's TOTAL FINANCIAL OBLIGATION is: \$ 500 + restitution of any. The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms: Not less than \$ _____ per month; On a schedule established by the defendant's Community Corrections Officer or Department of Judicial Administration (DJA) Collections Officer. Financial obligations shall bear interest pursuant to RCW 10.82.090. The Defendant shall remain under the Court's jurisdiction to assure payment of financial obligations: for crimes committed before 7/1/2000, for up to ten years from the date of sentence or release from total confinement, whichever is later; for crimes committed on or after 7/1/2000, until the obligation is completely satisfied. Pursuant to RCW 9.94A.7602, if the defendant is more than 30 days past due in payments, a notice of payroll deduction may be issued without further notice to the offender. Pursuant to RCW 9.94A.760(7)(b), the defendant shall report as directed by DJA and provide financial information as requested.

- Court Clerk's trust fees are waived.
- Interest is waived except with respect to restitution.

4.4 The defendant, having been convicted of a FELONY SEX OFFENSE, is sentenced to the following:

(a) **DETERMINATE SENTENCE** : Defendant is sentenced to a term of confinement in the custody of the
 King County Jail King County *Work/Education Release* (subject to conditions of conduct ordered
this date) *Department of Corrections*, as follows, commencing: immediately;
 Date: _____ by _____ a.m. / p.m.

_____ months/days on count _____; _____ months/days on count _____; _____ months/days on count _____;

_____ months/days on count _____; _____ months/days on count _____; _____ months/days on count _____;

_____ months/days on count _____; _____ months/days on count _____; _____ months/days on count _____.

ALTERNATIVE CONVERSION - RCW 9.94A.680 (LESS THAN ONE YEAR ONLY):

_____ days of total confinement are hereby converted to:

_____ days of partial confinement to be served subject to the requirements of the King County Jail.

_____ days/hours community service under the supervision of the Department of Corrections to be
completed as follows: on a schedule established by the defendant's Community Corrections Officer;

Alternative conversion was not used because: Defendant's criminal history, Defendant's
failure to appear, Other: _____

CONFINEMENT LESS THAN ONE YEAR : COMMUNITY **SUPERVISION**, for crimes
committed before 7-1-2000, **CUSTODY**, for crimes committed on or after 7-1-2000, is ordered
pursuant to RCW 9.94A.545 for a period of 12 months. The defendant shall report to the Department of
Corrections within 72 hours of this date or of his/her release if now in custody; shall comply with all the
rules, regulations and conditions of the Department for supervision of offenders (RCW 9.94A.720); shall
comply with all affirmative acts required to monitor compliance; and shall otherwise comply with terms set
forth in this sentence.

APPENDIX _____: Additional Conditions are attached and incorporated herein.

COMMUNITY PLACEMENT / CONFINEMENT OVER ONE YEAR: pursuant to RCW
9.94A.700, for qualifying crimes committed before 6-6-1996, is ordered for _____ months or for
the period of earned early release awarded pursuant to RCW 9.94A.728, whichever is longer. [24 months for
any serious violent offense, vehicular homicide, vehicular assault, or sex offense prior to 6-6-96; 12
months for any assault 2°, assault of a child 2°, felony violation of RCW 69.50/52, any crime against
person defined in RCW 9.94A.440 not otherwise described above.]

APPENDIX H: Community Placement conditions are attached and incorporated herein.

COMMUNITY CUSTODY / CONFINEMENT OVER ONE YEAR: pursuant to RCW 9.94A.710
for any **SEX OFFENSE** committed after 6-6-96 but before 7-1-2000, is ordered for a period of 36
months or for the period of earned early release awarded under RCW 9.94A.728 whichever is longer.

APPENDIX H: Community Custody conditions are attached and incorporated herein.

COMMUNITY CUSTODY / CONFINEMENT OVER ONE YEAR: pursuant to RCW 9.94A.715
for qualifying crimes (non RCW 9.94A.712 offenses) committed after 6-30-2000 is ordered for the
following established range:

Sex Offense, RCW 9.94A.030(38) - 36 to 48 months

Serious Violent Offense, RCW 9.94A.030(37) - 24 to 48 months

Violent Offense, RCW 9.94A.030(45) - 18 to 36 months

Crime Against Person, RCW 9.94A.411 - 9 to 18 months

Felony Violation of RCW 69.50/52 - 9 to 12 months

or for the entire period of earned early release awarded under RCW 9.94A.728, whichever is longer.

Sanctions and punishments for non-compliance will be imposed by the Department of Corrections pursuant
to RCW 9.94A.737.

APPENDIX H: Community Custody conditions are attached and incorporated herein.

(b) **INDETERMINATE SENTENCE – QUALIFYING SEX OFFENSES occurring after 9/1/01:**
The Court having found that the defendant is subject to sentencing under RCW 9.94A.712, the defendant is sentenced to a term of total confinement in the custody of the Department of Corrections as follows, commencing: immediately; [] (Date): _____ by _____ m.

Count I : Minimum Term: 216 months/days; Maximum Term: life years/life;

Count II : Minimum Term: 216 months/days; Maximum Term: life years/life;

Count III : Minimum Term: 130 months/days; Maximum Term: life years/life;

Count _____ : Minimum Term: _____ months/days; Maximum Term: _____ years/life.

COMMUNITY CUSTODY – pursuant to RCW 9.94A.712 for qualifying **SEX OFFENSES** committed on or after September 1, 2001, is ordered for any period of time the defendant is released from total confinement before the expiration of the maximum sentence as set forth above. Sanctions and punishments for non-compliance will be imposed by the Department of Corrections pursuant to RCW 9.94A.713, 9.94A.737.

APPENDIX H: Community Custody conditions are attached and incorporated herein.

4.5 **ADDITIONAL CONDITIONS OF SENTENCE**

The above terms for counts I, II, III are consecutive concurrent.

The above terms shall run [] CONSECUTIVE [] CONCURRENT to cause No.(s) _____

The above terms shall run [] CONSECUTIVE [] CONCURRENT to any previously imposed sentence not referred to in this order.

[] In addition to the above term(s) the court imposes the following mandatory terms of confinement for any special **WEAPON** finding(s) in section 2.1: _____

which term(s) shall run consecutive with each other and with all base term(s) above and terms in any other cause. (Use this section only for crimes committed after 6-10-98.)

[] The enhancement term(s) for any special **WEAPON** findings in section 2.1 is/are included within the term(s) imposed above. (Use this section when appropriate, but for crimes before 6-11-98 only, per In Re Charles)

The **TOTAL** of all terms imposed in this cause is 216 months.

Credit is given for 420 days served [] days as determined by the King County Jail, solely for confinement under this cause number pursuant to RCW 9.94A505(6). [] Jail term is satisfied – defendant shall be released under this cause.

4.4 4.6 **NO CONTACT:** For the maximum term of life years, defendant shall have no contact, direct or indirect, in person, in writing, by telephone, or through third parties with: Z.P.G.D. Maria Cornejo - Delgado, Adriano Cornejo - Delgado

Any minors without supervision of a responsible adult who has knowledge of this conviction.

✓ 4.7 **DNA TESTING:** The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing, as ordered in **APPENDIX G.**

✓ [X] **HIV TESTING:** For sex offense, prostitution offense, drug offense associated with the use of hypodermic needles, the defendant shall submit to HIV testing as ordered in **APPENDIX G.**

✓ 4.8 **SEX OFFENDER REGISTRATION:**
The defendant shall register as a sex offender as ordered in **APPENDIX J.**

4.9 [] **ARMED CRIME COMPLIANCE, RCW 9.94A.475, .480.** The State's plea/sentencing agreement is [] attached [] as follows:

The defendant shall report to an assigned Community Corrections Officer upon release from confinement for monitoring of the remaining terms of this sentence.

Date: February 17, 2006

Paris K. Kallas
JUDGE
Print Name: **JUDGE PARIS K. KALLAS**

Presented by:
Paul B. John 10223
Deputy Prosecuting Attorney, WSBA#
Print Name: _____

Approved as to form:
Anthony Savage
Attorney for Defendant, WSBA# 2208
Print Name: ANTHONY SAVAGE

FINGERPRINTS

BEST IMAGE POSSIBLE



Right Hand
Fingerprints of:

Reynaldo Delgado

Defendant's Signature: Reynaldo Delgado
Defendant's Address: 210 Department of
Corrections, Olympia, Wa.

Dated: 2-17-06

Paris K. Kallas
JUDGE, KING COUNTY SUPERIOR COURT
PARIS K. KALLAS

Attested by: Barbara Miner, Superior Court Clerk
By: [Signature]
Deputy Clerk

CERTIFICATE

I, _____,
Clerk of this Court, certify that the
above is a true copy of the Judgment
and Sentence in this action on record
in my office.

DATED: _____

CLERK

By: _____
Deputy Clerk

OFFENDER IDENTIFICATION

S.I.D. No. _____

Date of Birth: 5/7/61

Sex: M

Race: H

FINGERPRINTS

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

REYNALDO DELGADO

Defendant,

No. 04-1-13920-8 KNT

APPENDIX G
ORDER FOR BIOLOGICAL TESTING
AND COUNSELING

(1) DNA IDENTIFICATION (RCW 43.43.754):

The Court orders the defendant to cooperate with the King County Department of Adult Detention, King County Sheriff's Office, and/or the State Department of Corrections in providing a biological sample for DNA identification analysis. The defendant, if out of custody, shall promptly call the King County Jail at 296-1226 between 8:00 a.m. and 1:00 p.m., to make arrangements for the test to be conducted within 15 days.

(2) HIV TESTING AND COUNSELING (RCW 70.24.340):

(Required for defendant convicted of sexual offense, drug offense associated with the use of hypodermic needles, or prostitution related offense.)

The Court orders the defendant contact the Seattle-King County Health Department and participate in human immunodeficiency virus (HIV) testing and counseling in accordance with Chapter 70.24 RCW. The defendant, if out of custody, shall promptly call Seattle-King County Health Department at 205-7837 to make arrangements for the test to be conducted within 30 days.

If (2) is checked, two independent biological samples shall be taken.

Date: February 17, 2006

Mavis K-Koll
JUDGE, King County Superior Court

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
Plaintiff,)	
	)	No. 04-1-13920-8 KNT
v.)	
	)	APPENDIX H
	)	COMMUNITY CUSTODY
DELGADO, Reynaldo)	
Defendant,)	
)	

The Court having found the defendant guilty of offense(s) qualifying for community custody, it is further ordered as set forth below.

4.5 Community Custody: Defendant additionally is sentenced on convictions herein, for each sex offense and serious violent offense committed on or after 1 July 1990 to community custody for three years or up to the period of earned release awarded pursuant to RCW 9.94A.150(1) and (2) whichever is longer and on conviction herein for an offense categorized as a sex offense or a serious violent offense committed after July 1, 1988, but before July 1, 1990, assault in the second degree, any crime against a person where it is determined in accordance with RCW 9.94A.125 that the defendant or an accomplice was armed with a deadly weapon at the time of commission, or any felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 1988, to a one-year term of community custody.

Community Custody is to begin either upon completion of the term of confinement or at such time as the defendant is transferred to community custody in lieu of early release.

(a) Defendant shall comply with the following conditions during the term of community custody:

- (1) Report to and be available for contact with the assigned community corrections officer as directed;
- (2) Work at Department of Corrections-approved education, employment, and/or community service;
- (3) Not consume controlled substances except pursuant to lawfully issued prescriptions;
- (4) While in community custody not unlawfully possess controlled substances;
- (5) Pay community custody fees as determined by the Department of Corrections;
- (6) Receive prior approval for living arrangements and residence location; and
- (7) Do not own, use or possess firearms or ammunitions.

The following conditions listed under 4.5(a) are hereby waived by the court: _____

(b) Defendant shall comply with the following other conditions during the term of community custody:

- (8) Do not have direct or indirect contact with Zuley Delgado and Genevive Delgado.
- (9) Within 30 days of being placed on supervision, complete a sexual deviancy evaluation with a therapist approved by your Community Corrections Officer and follow all treatment recommendations.
- (10) Do not initiate or prolong physical contact with children for any reason.
- (11) Avoid places where minors are known to congregate without the specific permission of the Community Corrections Officer.
- (12) Inform the Community Corrections Officer of any romantic relationships to verify there are no victim-age children involved, and that the adult is aware of your conviction history and conditions of supervision.
- (13) Have no contact with the victim or any minor-age children without the prior approval of your Community Corrections Officer.
- (14) Hold no position of authority or trust involving children.
- (15) Do not possess or peruse pornographic materials unless given prior approval by your sexual deviancy treatment specialist and/or Community Corrections Officer. Pornographic materials are to be defined by the therapist and/or Community Corrections Officer.
- (16) Do not attend X-rated movies, peep shows or adult bookstores without the prior approval of your sexual deviancy treatment specialist or Community Corrections Officer.

- (17) If directed by your sexual deviancy treatment specialist or Community Corrections Officer, obtain a mental health evaluation from a qualified provider and complete all treatment recommendations.
- (18) If directed by your sexual deviancy treatment specialist or Community Corrections Officer, undergo an evaluation regarding substance abuse at your expense and follow any recommended treatment as a result of that evaluation.
- (19) Do not use or possess illegal or controlled substances without the written prescription of a licensed physician and to verify compliance, submit to testing and reasonable searches of your person, residence and vehicle.
- (20) Do not purchase, possess, or use alcohol (beverage or medicinal), and submit to testing and reasonable searches of your person, residence, property and vehicle by the Community Corrections Officer to monitor compliance.
- (21) Do not change residence without the prior approval of your Community Corrections Officer.
- (22) Obey all laws.
- (23) Maintain Community Corrections Officer approved employment and notify your employer regarding your history of sexual deviancy and rules and regulations regarding children and legal status.
- (24) Pay for counseling costs for victims and their families.
- (25) Within 30 days of sentencing, submit to DNA and HIV testing as required by law.
- (26) Do not change therapist without prior approval of your Community Corrections Officer and treatment therapist.
- (27) Do not access the Internet without the prior approval of your supervising Community Corrections Officer and sex offender treatment provider.
- (28) Abide by any additional conditions imposed by the Washington State Department of Corrections.

Date:

Feb 17, 2006

Ponick-Kelly

JUDGE, KING COUNTY SUPERIOR COURT

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)
Plaintiff,)
vs.)
Reynaldo Delgado)
Defendant,)

No. *04-1-13920-8 KWT*
APPENDIX J
JUDGMENT AND SENTENCE
SEX OFFENDER NOTICE OF
REGISTRATION REQUIREMENTS

SEX AND KIDNAPPING OFFENDER REGISTRATION. RCW 9A.44.130, 10.01.200. Because this crime involves a sex offense or kidnapping offense (e.g., kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW where the victim is a minor and you are not the minor's parent), you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.

If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within 30 days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry out a vocation in Washington, or attend school in Washington, you must register within 30 days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections.

If you change your residence within a county, you must send written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving, register with the sheriff within 24 hours of moving and you must give written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move, work, carry on a vocation, or attend school out of Washington State, you must send written notice within 10 days of establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state, to the county sheriff with whom you last registered in Washington State.

If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier.

Even if you lack a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody or within 48 hours, excluding weekends and holidays, after ceasing to have a fixed residence. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report in person to the sheriff of the county where you registered on a weekly basis. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. The county sheriff may require the person to list the locations where the person has stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

Copy Received:
Reynaldo Delgado
Defendant _____ Date _____

Monica K. Kollig

JUDGE

APPENDIX J
Rev. 11/03 Distribution:
Original/White - Clerk
Yellow - Defendant
Pink - King County Jail

APPENDIX B

FILED

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

2008 MAY 23 PM 1:39

STATE OF WASHINGTON,)	No. 57859-6-I	COURT CLERK SEATTLE, WA.
)		
Respondent,	)	MANDATE
)		
v.	)	King County
)		
REYNALDO DELGADO,	)	Superior Court No. 04-1-13920-8.KNT
)		
Appellant.)		
)		

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for King County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I, filed on July 23, 2007, became the decision terminating review of this court in the above entitled case on May 21, 2008. An order denying a petition for review was entered in the Supreme Court on April 30, 2008. This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the decision.

Pursuant to RAP 14.4 costs in the amount of \$4,796.59 are to be taxed against judgment debtor REYNALDO DELGADO as follows: costs in the amount of \$4,639.05 are awarded in favor of judgment creditor WASHINGTON OFFICE OF PUBLIC DEFENSE, INDIGENT DEFENSE FUND and costs in the amount of \$157.54 are awarded in favor of judgment creditor KING COUNTY PROSECUTOR'S OFFICE.

c: Nancy Collins
Lee Yates
Hon. Paris Kallas
Indeterminate Sentencing Review Board



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 21st day of May, 2008.



RICHARD D. JOHNSON
Court Administrator/Clerk of the Court of Appeals,
State of Washington, Division I.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
	)	No. 57859-6-I
Respondent,)	
	)	DIVISION ONE
v.)	
)	
REYNALDO DELGADO,	)	UNPUBLISHED OPINION
)	
Appellant.	)	FILED: July 23, 2007

PER CURIAM – Reynaldo Delgado challenges his conviction on the ground that the court failed to instruct the jury that each count was to be based on a different criminal act and thus violated his right to a unanimous verdict. He also challenges the constitutionality of RCW 43.43.754, arguing that it violates his rights under the Fourth Amendment and article I, section 7 of the Washington State Constitution. When read as a whole, the jury instructions in this case correctly directed the jury that it must unanimously agree on the criminal act that constituted the charged crime and that its verdict on one count should not control any other count. And in State v. Surge,¹ the Washington Supreme Court recently rejected Delgado’s arguments about the constitutionality of RCW 43.43.754. We affirm.

¹ 160 Wn.2d 65, 156 P.3d 208 (2007).

FACTS

Reynaldo Delgado was found guilty of two counts of rape of a child in the first degree and one count of child molestation in the first degree based on acts that involved Delgado's young daughter Z.D., whom he sexually abused between August 2002 and August 2004. Z.D. was born on August 1, 1997; she was eight years old when she testified at her father's trial in November 2005.

At trial, Z.D. testified about several incidents of sexual abuse by her father at the homes of Adrianna Coronilla-Delgado and Maria Coronilla-Delgado, Delgado's nieces, and in Delgado's van. She testified that her father would tell her that he wanted to have a baby with her, and she described having intercourse and oral sex with him on many occasions. She said her father made her and her sister, G.D., remove their clothes and get on top of each other, and that he made red marks on her neck by sucking on her.

Maria testified that she noticed red marks on Z.D.'s neck. She said that Z.D. told her that Delgado had sucked on her neck and told her to say that her sister had bitten her. Z.D. told Maria it was not true, but she was afraid to tell on him. When Maria asked Delgado what happened, Delgado told her that G.D. had bitten Z.D. G.D. also told Maria this was not true. Adrianna said she also saw red marks that looked like hickeys on Z.D.'s neck while Z.D. was living with Maria and later when Delgado was living with her. When Delgado was in Alaska, Adrianna called him to discuss taking Z.D. to the hospital. She was complaining of abdominal pain and burning and scratching in her vaginal area. Delgado told her that Z.D. would sometimes become irritated and to wait and see if it went away before taking her to the doctor. School authorities contacted Adrianna about Z.D.'s unusual behavior and hickeys that they

noticed on Z.D.'s body. Z.D. disclosed the sexual abuse to Maria and Adrianna, and they took her to Highline Hospital. Both Z.D. and G.D. were later placed in foster care.

Dr. Susan O'Brien examined Z.D. at Highline Hospital on August 28, 2004. Dr. O'Brien testified that Z.D. told her Delgado took off his clothes and climbed on top of her. Z.D. said, "I have a hole down there" which her father made and pointed to her private area. She also told Dr. O'Brien that Delgado bit her in that area. Dr. O'Brien said that Z.D. made these statements spontaneously and not in response to questioning. During her examination of Z.D., Dr. O'Brien noted scarring consistent with penetrating trauma and sexual intercourse. She reported her findings to the sexual assault clinic at Harborview Hospital.

On August 30, 2004, Dr. Rebecca Wiester examined Z.D. at Harborview Hospital. Z.D. told Dr. Wiester that her father climbed on top of her, gave her red marks on her neck, and described having sexual intercourse with him. Z.D. said this would sometimes take place in Delgado's car, and Delgado told her he wanted to have a baby with her. Z.D. said her father told her not to tell anyone that he touched her where she "went pee." Dr. Wiester's examination found that Z.D. had an abnormal hymen that was consistent with healed vaginal penetrating trauma which could have come from a penis.

Ashley Wilske, a child interview specialist with the King County Prosecutor's Office, interviewed Z.D. on September 24, 2004. A DVD of this interview was admitted at trial, played in court, and submitted to the jury. In it, Z.D. described numerous incidents of oral and vaginal intercourse with Delgado and occasions when her father had made her and her sister remove their clothes and get on top of one another. Z.D.

also said that Delgado took her to his van to have sex with her and made red marks on her neck by sucking on her.

Discussions between counsel about the jury instructions were conducted off the record. On the record, the court stated that Delgado's only exception to the instructions was a different reasonable doubt instruction and that neither party believed knowledge needed to be defined for the jury. When the court asked Delgado's counsel whether there were any exceptions to the instructions, Delgado's counsel said no. The court gave these instructions:

No. 7

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.

No. 8

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.

....

No. 13

To convict the defendant of the crime of rape of a child in the first degree, as charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That during a period of time intervening between August 1, 2002 and August 31, 2004, the defendant had sexual intercourse with Z.D.;
- (2) That Z.D. was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;
- (3) That the defendant was at least twenty-four months older than Z.D.; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count I.

On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count I.

No. 14

To convict the defendant of the crime of rape of a child in the first degree, as charged in count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That during a period of time intervening between August 1, 2002 and August 31, 2004, the defendant had sexual intercourse with Z.D.;

(2) That Z.D. was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;

(3) That the defendant was at least twenty-four months older than Z.D.; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count II.

On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count II.

The jury found Delgado guilty as charged.

DISCUSSION

I. Jury Unanimity

Delgado challenges his conviction on the ground that the jury instructions violated his right to a unanimous verdict and to be free from double jeopardy because they did not explain the unanimity requirement or direct the jury to base a conviction on each count on a different criminal act. Because the jury heard about numerous incidents of alleged sexual contact between Z.D. and her father from August 1, 2002 through August 31, 2004, Delgado contends that the jury could have disagreed upon which instances were proven beyond a reasonable doubt and based its verdict upon the

same single act for each count. While the prosecutor highlighted certain events during closing argument, he argues this does not cure the problem because the jury must base its verdict on all of the evidence produced at trial and is instructed not to rely on closing arguments as evidence or a statement of the law.

The State asserts that the jury instructions, when read as a whole, correctly instructed the jury about the unanimity requirement and Instruction 8 is a correct statement of the law under State v. Petrich.² It also argues that Delgado's double jeopardy claim fails because the prosecutor told the jury during closing arguments that each count was distinct, one based on rape by vaginal penetration and the other based on oral penetration. The prosecutor asked the jury to return a guilty verdict based on each of these two forms of intercourse.

Jury instructions are reviewed de novo and construed as a whole.³ They are sufficient if they allow the parties to argue their theories of the case and, when taken as a whole, do not mislead the jury and properly inform it of the law to be applied.⁴ In Washington, a defendant may be convicted only when a unanimous jury concludes that he has committed the criminal act charged in the information.⁵ In cases where the evidence could support more than one criminal act which could form the basis for conviction on a single count, either the State must tell the jury which acts to rely on in its

² 101 Wn.2d 566, 683 P.2d 173 (1984).

³ State v. Hunt, 128 Wn. App. 535, 538, 116 P.3d 450 (2005) (citing State v. Woods, 143 Wn.2d 561, 590, 23 P.3d 1046, cert. denied, 534 U.S. 964 (2001)), review denied, 160 Wn.2d 1001 (2007).

⁴ Hue v. Farmboy Spray Co., 127 Wn.2d 67, 92, 896 P.2d 682 (1995) (citing Adcox v. Children's Orthopedic Hosp. & Med. Ctr., 123 Wn.2d 15, 36, 864 P.2d 921 (1993); Farm Crop Energy, Inc. v. Old Nat'l Bank, 109 Wn.2d 923, 933, 750 P.2d 231 (1988)).

⁵ State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980)).

deliberations or the court must give a Petrich instruction explaining that the jury must unanimously agree on a specific criminal act to find guilt.⁶ Both were done here.

Here, Instructions 7 and 8 told the jury that it must “unanimously agree as to which act or acts have been proved beyond a reasonable doubt” and correctly told the jury that its “verdict on one count should not control [the] verdict on any other count.” These instructions protected Delgado’s right to jury unanimity and instructed the jury to decide each count separately. The court could properly instruct the jury to consider the criminal acts that took place between August 2002 and August 2004 for both rape counts, rather than identify a specific act that occurred during that period without violating Delgado’s right to be free from double jeopardy because its Petrich instruction told the jury it had to unanimously agree on specific acts to support each count. In addition, 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 arguments. The trial court did not violate Delgado’s right to a fair trial or to be free from double jeopardy.⁷

II. DNA Evidence

Delgado challenges the constitutionality of RCW 43.43.754, arguing that the collection and analysis of DNA (deoxyribonucleic acid) samples constitutes an unreasonable search subject to the warrant requirement of the Fourth Amendment and violates article I, section 7 of the Washington State Constitution. Delgado’s argument on this issue fails because the Washington State Supreme Court upheld the statute in

⁶ Id. (citing Petrich, 101 Wn.2d at 573; citing State v. Workman, 66 Wash. 292, 294-95, 119 P. 751 (1911)).

⁷ See State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003).

State v. Surge, holding that it did not violate article I, section 7 of the Washington Constitution or the Fourth Amendment.⁸

CONCLUSION

We affirm.

For the Court:

Aljd, J.

Becker, J.

Edington, J.

⁸ 160 Wn.2d 65 (2007).

APPENDIX C

FILED
KING COUNTY, WASHINGTON
NOV 29 2005
SUPERIOR COURT CLERK
BY KEI U C. NORTHRUP
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON,)

Plaintiff,)

v.)

REYNALDO DELGADO,)

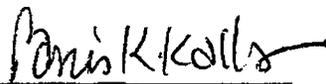
Defendant.)

NO. 04-1-13920-8 KNT

ORIGINAL

COURT'S INSTRUCTIONS TO THE JURY

November 28, 2005



Judge Paris K. Kallas

No. 1

It is your duty to determine which facts have been proved in this case from the evidence produced in court. It also is your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

A charge has been made by the prosecuting attorney by filing a document, called an information, informing the defendant of the charge. You are not to consider the filing of the information or its contents as proof of the matters charged.

The only evidence you are to consider consists of the testimony of witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence that either was not admitted or that was stricken by the court. You will not be provided with a written copy of testimony during your deliberations. Any exhibits

admitted into evidence will go to the jury room with you during your deliberations.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness's memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.

The attorneys have the right and the duty to make any objections that they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by the attorneys.

The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful.

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence your verdict.

No. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

No. 3

The defendant has entered a plea of not guilty, which puts in issue every element of the crime charged. The State, as plaintiff, has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless you find during your deliberations that it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. A reasonable doubt is a doubt that would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence.

No. 4

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

No. 5

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

No. 6

The defendant is not compelled to testify, and the fact that the defendant has not testified cannot be used to infer guilt or prejudice him in any way.

No. 7

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.

No. 8

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.

No. 9

A person commits the crime of rape of a child in the first degree when that person has sexual intercourse with another person who is less than twelve years old and who is not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.

No. 10

A person commits the crime of child molestation in the first degree when that person has sexual contact with another person who is less than twelve years old and who is not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

No. 11

Sexual intercourse means:

1. That the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight; or

2. 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.

No. 12

Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party or a third party.

No. 13

To convict the defendant of the crime of rape of a child in the first degree, as charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That during a period of time intervening between August 1, 2002 and August 31, 2004, the defendant had sexual intercourse with Z.D.;

(2) That Z.D. was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;

(3) That the defendant was at least twenty-four months older than Z.D.; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count I.

On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count I.

No. 14

To convict the defendant of the crime of rape of a child in the first degree, as charged in count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That during a period of time intervening between August 1, 2002 and August 31, 2004, the defendant had sexual intercourse with Z.D.;

(2) That Z.D. was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;

(3) That the defendant was at least twenty-four months older than Z.D.; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count II.

On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count II.

No. 15

To convict the defendant of the crime of child molestation in the first degree as charged in count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That during a period of time intervening between August 1, 2002 and August 31, 2004, the defendant had sexual contact with Z.D.;

(2) That Z.D. was less than twelve years old at the time of the sexual contact and was not married to the defendant;

(3) That the defendant was at least thirty-six months older than Z.D.; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count III.

On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count III.

No. 16

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a foreperson. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted into evidence, these instructions, and a verdict form.

You must fill in the blank provided in the verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form to express your decision. The foreperson will sign it and notify the bailiff, who will conduct you into court to declare your verdict.

