65576-1

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NO. 65576-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SERGIO GONZALEZ GUZMAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES CAYCE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the trial court properly denied the defendant's request to terminate his representation by counsel on the second day of trial, where the defendant stated that he wanted counsel who was fluent in Spanish, did not unequivocally request to represent himself and had no attorney available to represent him.

2. Whether the jury instruction defining "recklessly" was a correct statement of the law that did not create a mandatory presumption that the reckless infliction of great bodily harm must be found if any intentional act was found.

3. Whether the prosecutor did not commit misconduct of any kind in closing argument because: (1) remarks relating to the defendant's statement to police did not suggest an inference of guilt based on the defendant's failure to testify; (2) remarks concerning the defendant's marriage to the infant victim's mother days after the assault were proper inferences from the evidence; and (3) remarks concerning the comparison of the stories of the victim's mother and the defendant did not shift the burden of proof.

4. Whether the jury instruction defining reasonable doubt, which was the standard instruction mandated by the Supreme Court, was a proper statement of the law.

5. Whether the no-contact order entered does not violate a fundamental right to parent because there has been no finding that the victim is Gonzalez Guzman's child.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Sergio Gonzalez Guzman, was charged with assault of a child in the first degree relating to an assault on DG, a six-week-old infant, occurring between November 9 and November 10, 2007. CP 1-9. The Honorable James Cayce presided over a jury trial that began on June 11, 2009; the jury found Gonzalez Guzman guilty as charged. CP 18; 6/11RP 1-2; 6/23RP 41.[1] The court imposed a standard range sentence. CP 38-42.

2. SUBSTANTIVE FACTS

DG[2] was born on September 27, 2007. 6/22RP 33. On November 7, 2007, Crystal[3], DG's mother, took him to a

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[1] The record of proceedings is in eight volumes, including eight dates from June 11, 2009, to July 24, 2009. References to the record will identify the volume by month and day, for example, June 11, 2009, will be cited as 6/11RP.

[2] The victim is referred to by initials to attempt to maintain his privacy.

[3] The State refers to this witness by her first name to attempt to maintain the privacy of the victim.

pediatrician about a diaper rash and to confirm that he was properly gaining weight. 6/18RP 69, 73. The doctor, a pediatrician with more than 30 years of experience, examined DG head to toe and found nothing wrong with him except a very minor diaper rash. Id. at 68, 70-71. DG was not underweight. Id. at 71-72.

On November 10, 2007, Crystal brought DG to Highline Hospital. 6/22RP 53-55. He was seen by Dr. Thomas Ryan, who has been an emergency room physician since 1984. Id. at 4-7. DG came into the hospital at 5:15 p.m. and had abnormal color, respiration, and movement; a brain scan showed bleeding in his brain. Id. at 8-11. Ryan concluded that the pattern of bleeding was very consistent with shaken baby syndrome and concluded to a medical certainty that the injury was not accidental. Id. at 12, 28. DG was transferred by airlift to Harborview Medical Center (HMC) for more intensive care. Id. at 12-13; 6/17RP 82.

Dr. Rebecca Wiester examined DG the day after he arrived at HMC and a few days later, after he had been transferred to Seattle Children's Hospital (Children's). 6/17RP 91. His injuries had been evaluated more thoroughly and he was diagnosed with a large skull fracture, several broken ribs, and a displaced spiral fracture of his left tibia (lower leg bone). Id. at 86, 104. DG had

hemorrhages in the back of his eyes and brain bleeding, both inside his brain and between his brain and his skull. Id. at 86-87, 92. The injury could not have occurred long before he was brought to the hospital, certainly within less than 24 hours. Id. at 93-94.

Dr. Wiester is an expert on child abuse. 6/17RP 71-74, 106. She opined that the constellation of DG's injuries were highly consistent with inflicted trauma and very, very inconsistent and improbable with accidental trauma. Id. at 106-10. A spiral leg fracture is caused by a torqueing movement; the rib fractures could only be caused by squeezing and the ribs fractured would be very hard to break. Id. at 104-06, 112-13. The brain injury was a very serious injury that takes a serious amount of force to cause, and would not be caused by dropping a baby or if the baby fell out of a car seat onto the ground. Id. at 110.

Dr. Robert Oxford, a head and neck surgeon, also saw DG on November 11, 2007. 6/17RP 46. He described DG's brain injury as devastating and caused by a significant amount of force, like a car crash on an interstate highway at 50-60 miles per hour or more. Id. at 49-51. He would not expect to see multiple injuries on different parts of the body or massive brain hemorrhaging, both of

which DG suffered, if someone ran and fell with all their weight on DG. Id. at 60-61.

Dr. Lincoln Smith is a pediatric intensive care physician at Children's. 6/18RP 5. He evaluated DG when DG was transferred from HMC to Children's on November 13th. Id. at 7, 12. He observed that DG had very severe brain injury throughout all parts of his brain; these are very severe injuries that result in very profound disability. Id. at 8-9, 12. The combination of injuries DG suffered were, in Smith's opinion, shaken baby syndrome until proven otherwise. Id. at 10. Shaken baby syndrome occurs when a person holds a baby by the chest and shakes them hard. Id. at 9-10.

Dr. Jerry Zimmerman is the director of pediatric critical care services at Children's Hospital. 6/18RP 31. He evaluated DG over several days, starting on November 14, 2007. Id. at 33. DG had deep bleeding on both sides of his brain and around the outside of his brain, a very serious brain injury. Id. at 35-36. Zimmerman testified to his opinion that the injuries were inflicted and that shaken baby syndrome was an important possibility. Id. at 56-58.

The woman who was providing foster care for DG from November 26, 2007, until the time for trial, testified to DG's current

condition in June of 2009, at almost two years old. 6/22RP 114-16. DG suffered profound disability in motor movements (he could not yet even sit up, held his arms stiffly, and could not hold any object), in vocalizing (he made no sound except to cry out); he also had seizures and was blind. Id. at 114-22, 128-30.

Crystal testified that she and DG had lived with Gonzalez Guzman, who was DG's father, and her three other young children. 6/22RP 31-33. DG was a healthy baby. Id. at 34. Crystal had DG with her while visiting a friend on November 9, 2007, and brought him home about 5 p.m. to stay with Gonzalez Guzman, then returned to her friend's home. Id. at 37-40. She went home again about 10 p.m. then went out to a bowling alley where her brother works. Id. at 41-42. She returned home about 4 a.m. and went directly to bed but was awakened by the defendant telling her that she needed to take DG to the emergency room. Id. at 46-47, 52-53. Crystal could not wake up DG, then saw his eyes were rolling back and took him to the hospital. Id. at 53-54.

Crystal explained that she did not hear what happened until Gonzalez Guzman joined her at HMC the night of the 10th, when he told a social worker that he had picked up DG and started walking out of the bedroom when his foot got stuck in clothes on the floor

and he tripped and fell on top of the baby. Id. at 55-56. He said DG hit his head pretty hard on the floor. Id. at 58. He told Crystal he was willing to do time for hurting his son accidentally, saying he took responsibility. Id. at 60.

The next day, Gonzalez Guzman and Crystal were interviewed separately by Police Detective Mike Thomas. 6/22RP at 133-34. Both said that DG had not previously fallen or broken any bones. Id. at 138. Gonzalez Guzman told the detective that when he was carrying the baby from the bedroom to the living room he slipped on some clothing and fell down on top of DG. Id. at 135. Gonzalez Guzman was not injured and they did not hit any wall or door as they fell. Id. at 136. The next day when DG was very sleepy and uninterested in his bottle, he suggested Crystal take DG to the hospital. Id. at 138.

C. ARGUMENT

1. THE TRIAL COURT DID NOT VIOLATE THE DEFENDANT'S CONSTITUTIONAL RIGHT TO COUNSEL OR HIS RIGHT TO WAIVE COUNSEL.

Gonzalez Guzman claims that the trial judge erred by ignoring a request to proceed pro se and by refusing to inquire sufficiently about Gonzalez Guzman's request to obtain a defense

attorney who was fluent in Spanish. These arguments should be rejected. Gonzalez Guzman did not unequivocally invoke his right to self-representation—when the court asked him what he wanted, he said he wanted a lawyer who spoke Spanish. He did not claim that he was unable to communicate with counsel. The request to obtain new counsel was based on Gonzalez Guzman's desire for counsel who was fluent in Spanish, a request that does not implicate the constitutional right to effective assistance of counsel.

a. Relevant Facts.

Trial in this case began on June 11, 2009, with pretrial motions. 6/11RP 2. On the second day of trial, June 15th, defense counsel Ali Nakkour asked for time to consult with his client and a recess was taken. 6/15RP 2. After the recess, Nakkour stated that Gonzalez Guzman told him during their "most recent discussion" that Gonzalez Guzman wanted to terminate counsel's representation "today" because "[h]e feels as if he would have easier communication with someone who is a native Spanish speaker; he has found it difficult to communicate with me, even through the use of interpreters, and to be able to understand my

responses to him, even with the use of interpreters." 6/15RP 2, 4. Two court-certified Spanish interpreters were being used to translate the proceedings for Gonzalez Guzman. 6/15RP 3.

The following exchange then occurred:

Court:	So you want to represent yourself in trial?
Defendant:	I want to represent myself while we're in trial.
Court:	What do you propose that we do?
Defendant :	I would like to have a lawyer that speaks my same language.
Court:	Do you have one here? I don't see anyone in the courtroom.
Defendant:	To understand better.
Court:	Do you have anyone here? I don't see anyone in the courtroom that could do that.
Defendant:	No, I have no one here right now.
Court:	Who's the attorney that you're proposing is going to be prepared to try this case today for you?
Defendant:	Right now? I don't have him yet.
Court:	Well, we're in trial; and how long has this attorney been representing you?
Defendant:	I don't remember exactly.
Kim (DPA):	Since February 28th of 2008.
Court:	Since February of 2008?
Kim:	Yes, Your Honor.
Court:	And how many times have you asked the Court to appoint someone who speaks fluent Spanish?
Defendant:	I have never asked.
Court:	All right. And I don't know of any way, or of any right to have that. And you're ready to go to trial today, right?
Nakkour:	I am, Your Honor.

Court: Your motion is denied.
Defendant: Thank you.

6/15/09RP 4-6. There was no further reference to this matter.

b. The Defendant Did Not Invoke His Right To Self-Representation.

The Sixth Amendment guarantees a criminal defendant the right to assistance of counsel, and the right to waive the assistance of counsel. U.S. Const. amend. VI; Faretta v. California, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). A defendant who is competent to stand trial may waive the assistance of counsel if that waiver is knowing and intelligent. State v. Hahn, 106 Wn.2d 885, 893, 726 P.2d 25 (1986).

Courts are directed to apply a presumption against the waiver of counsel, but the improper rejection of the right to self-representation requires reversal. State v. Madsen, 168 Wn.2d 496, 503-04, 229 P.3d 714 (2010). A court is permitted to deny the right to self-representation if the request is equivocal or untimely. Id. at 504-05. The request for pro se status must be unequivocal in the context of the record as a whole. State v. Luvene, 127 Wn.2d 690, 698-99, 903 P.2d 960 (1995). Denial of a request for pro se status is reviewed for an abuse of discretion. Madsen, 168 Wn.2d at 504.

A defendant who expresses a desire not to be represented by a particular attorney is not making an unequivocal request for self-representation. State v. DeWeese, 117 Wn.2d 369, 375-76, 816 P.2d 1 (1991). A reference to self-representation that is made in the context of expressing dissatisfaction with appointed counsel may indicate that the request to proceed pro se is equivocal. State v. Woods, 143 Wn.2d 561, 586-87, 23 P.3d 1046 (2001); State v. Garcia, 92 Wn.2d 647, 655, 600 P.2d 1010 (1979). Cf. Madsen, 168 Wn.2d at 507 (an unequivocal request is valid even if combined with an alternative request for new counsel).

Gonzalez Guzman did not unequivocally request to represent himself. He cites no mention of a request to proceed pro se prior to the second day of trial. After consulting with Gonzalez Guzman, Nakkour described the request as a request to terminate Nakkour because Gonzalez Guzman "would have easier communication with someone who is a native Spanish speaker." 6/15RP 4. This does not suggest that Gonzalez Guzman wished to proceed acting as his own attorney.

The argument that Gonzalez Guzman invoked his right to self-representation is based on his first statement to the court, which cannot be isolated from its context. Gonzalez Guzman did

echo the court's first question to him, saying "I want to represent myself." 6/15RP 4. The court did not ignore that request, as Gonzalez Guzman asserts on appeal;[4] the court responded by asking what he was proposing to do. Id. The defendant's initial statement was immediately clarified when he answered, "I would like to have a lawyer that speaks my same language." Id.

The court's initial question was asked immediately after Nakkour stated that Gonzalez Guzman felt that he could communicate better with someone who was a native Spanish speaker. 6/15RP 4. Gonzalez Guzman apparently understood that the court was asking whether he wished to retain his own attorney because it is clear from his next answer that Gonzalez Guzman wished to be represented by a lawyer who was fluent in Spanish, not to represent himself.

The court continued by asking Gonzalez Guzman if he had such a lawyer; the defendant said he did not yet have one. 6/15RP 5. The court asked if Gonzalez Guzman had ever before asked the court to appoint a lawyer who spoke fluent Spanish, and the defendant said never. Id. During this discussion, Gonzalez Guzman did not say that he was even considering proceeding

[4] Appellant's Brief at 12-13.

without a lawyer. He did not ask the court to terminate Nakkour's representation even though there was no other lawyer to replace him.

This case is distinguishable from State v. Madsen, in which the Supreme Court held that the trial court improperly denied the right of self-representation, where Madsen made repeated explicit requests "to proceed pro se," citing the Washington Constitution, article I, section 22, and asserting, "I have the right to represent myself." 168 Wn.2d at 501-07. State v. Stenson is more instructive: in that case, when the court denied his motion for new counsel, the defendant said, "I would formally make a motion then that I be able to allow [sic] to represent myself. I do not want to do this but the court and the counsel that I currently have force me to do this." 132 Wn.2d 668, 739, 940 P.2d 1239 (1997). The court held that this motion, although explicit on its face, was an equivocal request given the context, a discussion of the defendant's wish for different counsel. Id. at 740-42. This holding was affirmed when Stenson raised the same issue in a habeas corpus petition. Stenson v. Lambert, 504 F.3d 873, 883-84 (9th Cir. 2007).

Based on the context of the statement made by the defendant in this case, the trial court properly concluded that

Gonzalez Guzman did not make an unequivocal request to represent himself.

c. The Court's Lack Of Inquiry Into Gonzalez Guzman's Desire For A Native Spanish Speaking Attorney Was Not An Abuse Of Discretion.

The constitutional right to effective assistance of counsel does not extend to a bilingual attorney. The purpose of providing assistance of counsel is to ensure that criminal defendants have a fair trial. Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). The essential aim of the Sixth Amendment is to guarantee an effective advocate for each defendant rather than a lawyer whom he prefers. Id. There is no right to a "meaningful relationship" with counsel. Morris v. Slappy, 461 U.S. 1, 13-14, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983). The right to counsel of a non-English-speaking defendant is protected by providing a competent interpreter. State v. Ramirez-Dominguez, 140 Wn. App. 233, 244-47, 165 P.3d 391 (2007).

Gonzalez Guzman was provided with interpreters at every stage of the proceedings in this case. 6/11RP 1-2, 4; 6/15RP 3; 6/16RP 2; 6/17RP 1; 6/18RP 1; 6/22RP 1; 6/23RP 5, 9; 7/24RP 2.

He has never suggested that any of the interpreters provided was not competent. This Court has held that there are negative effects of the use of interpreters that do not deprive the defendant of constitutionally effective assistance of counsel; for example, there is no constitutional right to an interpreter available to allow for immediate communication with counsel at every moment of the trial. State v. Gonzales-Morales, 91 Wn. App. 420, 958 P.2d 339 (1998), aff'd, 138 Wn.2d 374 (1999). The State will concede that it is easier to communicate with a person who shares the same native language but that is not a constitutional imperative. Gonzalez Guzman has cited no case that recognizes such a right.

The two cases on which Gonzalez Guzman relies to establish a right to a particular type of communication with counsel are inapposite. The quoted language[5] from Riggins v. Nevada[6] appears in a concurring opinion of a single justice; the case involved the involuntary administration of an antipsychotic drug with sedating effects that may have affected the defendant's capacity to consult with his lawyer. Wheat does not establish a right to a particular type of communication; it holds that a defendant does not

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[5] Appellant's Brief at 14.

[6] 504 U.S. 127, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992).

have the right to be represented by counsel who will jointly represent codefendants in a criminal conspiracy, even if the defendant would prefer to be represented by that attorney and waives any potential conflict of interest. 486 U.S. at 154-64.

Although on appeal Gonzalez Guzman asserts that he explained to the trial court that he was unable to effectively communicate with his lawyer,[7] he did not say that in the trial court. His attorney introduced the subject by saying that Gonzalez Guzman felt that he would communicate more easily with someone who was a native Spanish speaker, and that Gonzalez Guzman felt that it was difficult to communicate with his lawyer through an interpreter. 6/15RP 4. Gonzalez Guzman stated only that he wanted a lawyer who spoke Spanish so that he could understand better. 6/15RP 4-5.

When the "relationship between lawyer and client completely collapses," the refusal to substitute new counsel is a Sixth Amendment violation. State v. Cross, 156 Wn.2d 580, 606, 132 P.3d 80 (2006). However, the preference for a bilingual attorney does not suggest a complete breakdown of communication that would establish an irreconcilable conflict with counsel, as Gonzalez

[7] Appellant's Brief at 9, 18.

Guzman claims. Appellant's Brief at 14-15. The types of situations that constitute irreconcilable conflict are those involving serious disagreements between counsel and the defendant, not situations involving awkwardness in the use of language. E.g., United States v. Moore, 159 F.3d 1154 (9th Cir. 1998) (defendant threatened to sue attorney and drive him out of business, attorney felt physically threatened, no communication was occurring); Frazer v. United States, 18 F.3d 778 (9th Cir. 1994) (attorney assaulted defendant with racial epithets and threatened to provide substandard performance if he chose to take the case to trial); United States v. Williams, 594 F.2d 1258 (9th Cir. 1979) (attorney-client relationship included quarrels, bad language, threats and counter-threats). Because there was no suggestion of a complete breakdown of communication or an irreconcilable conflict between counsel and the defendant, no further inquiry was required.

2. THE JURY INSTRUCTION DEFINING RECKLESSNESS DID NOT CREATE AN IMPERMISSIBLE MANDATORY PRESUMPTION.

Gonzalez Guzman claims that Instruction 10, defining "recklessly," created an impermissible mandatory presumption that relieved the State of its burden of proving an element of assault of a

child in the first degree.[8] This argument is without merit. The holdings of the two most recent cases on point establish that, in combination with the to-convict instruction on assault of a child in the first degree, the definition used did not create a mandatory presumption.

a. Relevant Instructions.

The court's instructions to the jury included the following instructions, quoted in pertinent part.

Instruction 11 set out the elements of the crime:

> (1) That during a time intervening between November 9, 2007 and November 10, 2007, the defendant intentionally assaulted [DG] and recklessly inflicted great bodily harm;
>
> (2) That the defendant was eighteen years of age or older and [DG] was under the age of thirteen; and
>
> (3) 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. ....

CP 34; RCW 9A.36.120.

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[8] Gonzalez Guzman did not object to this instruction at trial, but if this Court concludes that this argument has merit, it may be raised for the first time on appeal. State v. Holzknecht, 157 Wn. App. 754, 762, 238 P.3d 1233 (2010).

Instruction 9 defined "intentionally":

> A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

CP 32.

Instruction 10 defined "recklessly":

> A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.
>
> When recklessness is required to establish an element of a crime, the element is also established if a person acts intentionally.

CP 33.

b. The Definition Of "Recklessly" Did Not Relieve The State Of Its Burden Of Proving An Element Of The Crime.

Instruction 10 correctly set out the statutory definition of "recklessly," which includes a presumption of recklessness based on a finding of intentional action. CP 33; RCW 9A.08.010(2).[9] It did not relieve the State of its burden of proving the elements of assault of a child in the first degree, which were correctly described

[9] RCW 9A.08.010(2) provides in pertinent part: "When recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly."

in the to-convict instruction. RCW 9A.36.120(1)(b)(i); CP 34, Instruction 11.

A mandatory presumption requires the jury to find a presumed fact from a proven fact. State v. Deal, 128 Wn.2d 693, 699, 911 P.2d 996 (1996). Such a presumption violates a defendant's right to due process of law only if it relieves the State of its burden of proving an element of a crime. State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004).

Division Two of the Court of Appeals has issued conflicting decisions as to whether the definition of "recklessly" in the former version of WPIC 10.03 created an impermissible mandatory presumption as to the crime of assault in the second degree based on infliction of substantial bodily harm. State v. Keend, 140 Wn. App. 858, 862, 166 P.3d 1268 (2007) (not an impermissible presumption); State v. Hayward, 152 Wn. App. 632, 646, 217 P.3d 354 (2009) (was an impermissible presumption). That former instruction set out the presumption simply: "Recklessness also is established if a person acts intentionally." WPIC 10.03 (1994).

This Court has concluded that even that simple statement of the presumption did not impermissibly relieve the State of its burden of proving the element of reckless infliction of substantial

bodily harm in a second-degree assault case. Holzknecht, 157 Wn. App. at 766. Holzknecht concluded that the instructions given correctly informed the jury of the applicable law concerning proof of mental states. Id. at 766. Following the reasoning of Keend, supra, this Court concluded that the instructions "made clear that a different mental state must be determined for each element: intent as to assault, and recklessness as to infliction of substantial bodily harm." Holzknecht, 157 Wn. App. at 766. The requirement to find a separate mental state for each of these elements was not compromised by the definition of "recklessness."[10] Id.

Moreover, in the case at bar, the trial court used the "recklessness" definition of the 2008 version of WPIC 10.03, which specifically limits the inference of recklessness to "the element," when "recklessness is required to establish an element of a crime," making it even more clear that the jury must find each element of the crime separately. CP 33. Gonzalez Guzman claims that the earlier (Hayward) version and not the 2008 version of WPIC 10.03

[10] Appellant challenges Holzknecht's reliance on the plurality in State v. Sibert, 168 Wn.2d 306, 230 P.3d 142 (2010). However, Sibert did uphold the instruction challenged here in the face of a claim that it created a mandatory presumption. Id. at 315-17. Because Sibert did not involve a charge of assault of a child in the first degree, it does not resolve the issue presented in the case at bar.

was used in this case,[11] but that is inaccurate. CP 33. Under Holzknecht, this definition of "recklessness" did not relieve the State of its burden of proof as to any element of the crime.

Moreover, Division Two has approved the 2008 version of WPIC 10.03, distinguishing it from the version used in Hayward, in State v. McKague, 159 Wn. App. 489, 506-10, 246 P.3d 558, aff'd on other grounds, 172 Wn.2d 802 (2011). That court concluded that the insertion of references to "an element" and "the element" makes clear that a finding of intent as to the act of assault could not support a finding of recklessness as to the infliction of substantial bodily harm. McKague, 159 Wn. App. at 509-10. Therefore, the instruction did not create an impermissible mandatory presumption. Id. at 510.

The analysis of these cases that address the definition of "recklessly" in the context of assault in the second degree is directly applicable to the charge here, assault of a child in the first degree, which also sets out a mental state with respect to the act, "intentionally assaulted," and a mental state as to the result, "recklessly inflicted great bodily harm." CP 34. The instruction defining "recklessly" would not lead a reasonable juror to believe

[11] Appellant's Brief at 23-24.

that if the juror concluded that an intentional assault occurred, the juror need not consider whether the defendant recklessly inflicted great bodily harm.

Finally, any error in the instruction is harmless error in this case. There is a special harmless error test that applies to instructions that include impermissible mandatory presumptions. Yates v. Evatt, 500 U.S. 391, 403-06, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991); State v. Atkins, 156 Wn. App. 799, 813, 236 P.3d 897 (2010).

The reviewing court first will "identify the evidence the jury reasonably considered under the instructions given by the court on the pertinent issue." Atkins, 156 Wn. App. at 813-14. When there are alternatives other than the presumption in the pertinent definition, as in the case at bar, the jury was not limited to considering the presumption. Id. at 814. In this case, the jury would have considered all of the evidence, as the evidence of reckless infliction of substantial bodily harm is the same evidence that establishes the intentional assault – the injuries suffered by DG in the context of the explanations of the cause of the injuries – is the evidence relevant to both issues. Additionally, as in Atkins, the court instructed the jury:

> In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

CP 22. Based on that instruction, the court in Atkins inferred that the jury considered all the evidence relevant to the pertinent issue. Atkins, 156 Wn. App. at 815.

The second step of the Yates test is to weigh the evidence considered against the probative force of the presumption alone – if the evidence is so overwhelming there is no reasonable doubt as to the verdict, the error is harmless. Atkins, 156 Wn. App. at 815-16. Here, the unrebutted and uncontested evidence of the devastating extent of DG's brain injury is overwhelming evidence that the person who assaulted him and caused the injury did recklessly inflict great bodily harm.

The prosecutor noted the State's burden of proving the element that the defendant recklessly inflicted bodily harm but then argued that it was not one of the contested issues in the case, just as the issues of the age of the defendant and DG were not contested. 6/23RP 6. The prosecutor was correct – this element was not contested in the defense closing argument, which challenged only the proof of the identity of the person who caused

DG great bodily harm, asserting that person was the baby's mother. 6/23RP 18-31. Gonzalez Guzman explicitly stated that the issues were: "Was it intentional? And if it was, who caused it?" 6/23RP 19. The defense attorney never referred to the recklessness element. The alleged instructional error was harmless.

3. THE PROSECUTOR'S CLOSING ARGUMENT DID NOT CONSTITUTE PROSECUTORIAL MISCONDUCT.

Gonzalez Guzman contends that three aspects of the prosecutor's comments in closing argument constitute misconduct and warrant reversal. None of the comments were improper.

A defendant who claims on appeal that prosecutorial misconduct deprived him of a fair trial generally bears the burden of establishing that the conduct was both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 756-59, 764 n.14, 278 P.3d 653 (2012); State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). If misconduct is proven, it is grounds for reversal if the defendant establishes a substantial likelihood that the improper conduct affected the jury's verdict. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

A defendant who does not make a timely objection at trial waives any claim on appeal unless the misconduct in question is "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice" that could not have been neutralized by a curative instruction to the jury. Fisher, 165 Wn.2d at 747 (quoting State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)).

The Supreme Court recognizes that the absence of an objection by defense counsel "*strongly suggests* to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of trial." McKenzie, at 53 n.2 (emphasis in original) (quoting State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)). That Court has stated, "Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the misconduct as a life preserver ... on appeal." State v. Russell, 125 Wn.2d 24, 93, 882 P.2d 747 (1994) (citing Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960)).

A prosecutor is afforded wide latitude in closing argument to draw reasonable inferences from the evidence for the jury. Stenson, at 727. The prosecutor's remarks must not be viewed in isolation, but "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the

jury." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), aff'd on other grounds, Uttecht v. Brown, 551 U.S. 1 (2007).

a. The Court's Instructions Regarding The Weight To Be Given To The Lawyers' Arguments.

The trial court's initial oral instruction to the jury venire in this case included the following information about the trial process:

> [It] will be your duty to determine the facts of the case from the evidence that is produced in court. It will be 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 defendant in every criminal case is presumed innocent, and this presumption continues throughout the entire trial unless the jury finds during its deliberations that it has been overcome by the evidence beyond a reasonable doubt. The State has the burden of proving each element of the crime beyond a reasonable doubt. And all jurors must be unanimous. The defendant has no burden of proving that a reasonable doubt exists. Further a defendant is not compelled to testify, and the fact that a defendant does not testify cannot be used to infer guilt or prejudice him in any way.

6/16RP 32.

After the jury panel was selected and sworn, the court again orally advised the jurors that the lawyers' remarks, statements, and arguments are not evidence and "you should disregard any remark, statement or argument which [is] not supported by the evidence or

by the law, as I will instruct you." 6/16RP 98-99. The court informed the jurors: "The evidence you are to consider consists of the testimony of the witnesses and the exhibits admitted in evidence." Id. at 99.

The court's first written instruction again informed the jury that the lawyers' statements and arguments were not evidence and did not constitute the law to be applied, as follows:

> The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP 23.

In its second written instruction, the court informed the jury of the burden of proof, in pertinent part as follows:

> The State is the plaintiff and 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 as to these elements.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial

unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

CP 25.[12]

b. Argument Based On Gonzalez Guzman's Statement To Police Was Not A Comment On His Failure To Testify.

It is improper for a prosecutor to comment on a defendant's failure to testify at trial. State v. Ramirez, 49 Wn. App. 332, 336, 742 P.2d 726 (1987). The test used to determine whether a defendant's Fifth Amendment rights have been violated is whether the statement was such that the jury would "naturally and necessarily accept it as a comment on the defendant's failure to testify." Id. (quoting State v. Crawford, 21 Wn. App. 146, 152, 584 P.2d 442 (1978)). The jury in this case was twice instructed that the defendant is not compelled to testify, and the fact that a defendant does not testify cannot be used to infer guilt or prejudice him in any way. CP 27; 6/16RP 32.

Gonzalez Guzman's argument that the prosecutor commented on Gonzalez Guzman's failure to testify is premised on the prosecutor's references to the testimony of DG's mother that

[12] The definition of reasonable doubt, which is in the final paragraph of the instruction, is not included in this quotation. The defendant's objection to that definition is discussed in the next section of this brief. See section C.4., infra.

she did not inflict the injuries and to the story that Gonzalez Guzman told the police the day after the assault about how he did inflict DG's injuries. 6/23RP 9-12. These arguments were proper references to the evidence presented at trial. The prosecutor did not suggest in any way that the jury should infer guilt based on the defendant's failure to testify at trial.

The only statement by the prosecutor that Gonzalez Guzman identifies as an explicit reference to his failure to testify is a phrase truncated from the remainder of the sentence to completely reverse its meaning. Gonzalez Guzman asserts that the prosecutor argued "we didn't have the Defendant's story." Appellant's Brief at 35. The prosecutor's argument was this:

> And, folks, that is enough, because, by [Crystal] denying that on the stand, you have established exclusive control, you have established who had exclusive control on that night. That is enough. Even if we didn't have the Defendant's story or supposed story –

6/23RP 9. The defense objected at this point and at a sidebar, claimed it was a comment on the defendant's failure to testify. Id. at 9, 39. The trial judge disagreed. Id. at 39. The point of the argument was that the jury did have the defendant's story, not that the jury did not have the defendant's story, as the portion quoted by

Gonzalez Guzman implies. The prosecutor's point is quite clear, because moments before he told the jury, "So, at best, in a case like this, you're going to get medicals and you're going to get two sides to a story, and that's what you got." Id. at 8-9. The State is not prohibited from mentioning that the defendant made a statement to police because to do so might remind the jury that he did not testify at trial.

The next sentence in Gonzalez Guzman's argument also misrepresents the prosecutor's statements. After claiming that the prosecutor said the jurors did not have the defendant's story, the argument continues:

> He echoed this argument again, after the sidebar in which Gonzalez Guzman objected, by reminding the jury that, as he had 'just mentioned,' the only statement from Gonzalez Guzman was his statement to the detective. Id. at 10.

Appellant's Brief at 35. The prosecutor's argument after the sidebar was this:

> Do you believe Crystal? Because, if you do, she's established exclusive control.
>
> THE INTERPRETER: I did not hear the last words.
>
> MR. KIM: If you do, she's established exclusive control, that he was the guy that had [DG], and he's the one and under his supervision this all occurred.

> Let me ask you this way: Do you have any reason not to believe Crystal? Is there anything that she says that makes you wonder, well, I think she did it? Anything at all? That's all you need, folks.
>
> But you have more. You have the statement that the Defendant gave you, like I mentioned earlier. You have his statement to Detective Thomas, and the only thing we can do is analyze that statement at this point.
>
> Why don't we go ahead and analyze what he actually said, what he said in terms of what happened on the night of November 9th. ....

6/23RP 9-10. The prosecutor did not say that the statement to the detective was Gonzalez Guzman's only statement.

The prosecutor would not have tried to suggest that the only statement that the defendant made was to the detective, as the evidence at trial was that the defendant provided his version of events on other occasions. Gonzalez Guzman had made a statement to a social worker at the hospital the night DG was brought to the hospital; he claimed that he picked up the baby and then tripped and fell on top of the baby, who hit his head hard on the floor. 6/22RP 55-59. The next day, Gonzalez Guzman told Crystal he was willing to go to jail for hurting DG by accident. 6/22RP 60, 88. Defense counsel elicited from Crystal that Gonzalez Guzman had repeated the same exact version of events consistently since the day DG was taken to the hospital "until now."

6/22RP 96. Defense counsel had her repeat the defendant's version of events in detail again. 6/22RP 96-99.

Nothing in the prosecutor's argument would be understood by a juror as a comment on the defendant's failure to testify, nor as a suggestion that his guilt could be inferred because of that choice. Referring to Crystal's testimony and describing it as being under oath was not a constitutional violation; these were facts that the jury observed.

The prosecutor's challenge to the credibility of Gonzalez Guzman's version of events also was not a constitutional violation. The prosecutor did not mock him for giving a statement early in the investigation, as claimed on appeal. The prosecutor pointed out that because Gonzalez Guzman provided this version of events before he was aware of the extent of the injuries, it did not account for the spiral fracture to DG's tibia and the severe brain damage. 6/23RP 12. Far from inferring guilt based on a failure to testify, or "encouraging the jury to use his failure to offer further timely statements about the incident against him,"[13] the force of the prosecutor's argument was that Gonzalez Guzman's statement at that time was probative of his guilt.

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[13] Appellant's Brief at 34.

c. Argument Inferring The Defendant's Motive For His Marriage Days After This Assault Was Proper And Based On Facts In Evidence.

Gonzalez Guzman claims that the prosecutor committed misconduct in closing by arguing facts not in evidence. This argument should be rejected. The argument was an inference by the prosecutor that the marriage of Gonzalez Guzman and Crystal on November 12, 2007, two days after DG was hospitalized, occurred because Gonzalez Guzman felt guilty about injuring DG and tried to make up for it by marrying Crystal. 6/23RP 18, 37. The remarks, which drew no objection, were a fair inference from the evidence. If the remark was improper, any prejudice could have been cured by a simple instruction, and any error was waived by failure to request one.

A prosecutor is permitted reasonable latitude in drawing inferences from the evidence presented at trial. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). When, as here, the defendant does not object to the argument at trial, the claim of error has been waived unless the defendant establishes that the misconduct was so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. Stenson, 132 Wn.2d at 719.

Gonzalez Guzman asserts that this argument was improper because it made him look like a "bad guy," suggesting that the jury would conclude he was bad because he was an unmarried father to four children. Appellant's Brief at 37-38. That Gonzalez Guzman lived with Crystal and four children and they were not married until two days after DG's hospitalization was a fact presented to the jury, the prosecutor did not err by repeating it. 6/22RP 31-32, 65. The inference that the motivating factor was Gonzalez Guzman's guilt feelings about injuring DG was based on the evidence and was not unfair. In any event, a simple objection and curative instruction would have obviated any potential prejudice.

In analyzing potential prejudice, improper comments are not viewed in isolation, but in the context of the total argument, the issues, the evidence, and the instructions given to the jury. State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008). The oral instruction given to the jury at the beginning of the trial included an instruction that the remarks made by the attorneys are not evidence. 6/16RP 98-99. The written instructions here also properly stated that the statements of the attorneys are not evidence. CP 23. The jury was instructed to "disregard any

remark, statement, or argument that is not supported by the evidence or the law in [the] instructions." CP 23.

The jury was properly instructed and is presumed to have followed its instructions. Warren, 165 Wn.2d at 28. No reasonable juror would consider the challenged remarks, in context, an exhortation to convict Gonzalez Guzman because he had not been married to a woman with whom he shared a home and children.

Russell has made it clear that an isolated statement generally can be cured by an instruction to the jury. In that case, Russell was tried for three murders, and the prosecutor stated in closing that "[t]he killing stopped with these three women and it should go no further." 125 Wn.2d at 88. The court found that even if the statement was improper as a statement based on facts not in evidence, the prejudicial effect could have been cured if the defendant had objected. Id. The effectiveness of an instruction is even more apparent here, where the prosecutor clearly was drawing an inference from the evidence presented at trial, and did not claim to be aware of any other information.

d. The Argument Did Not Shift The Burden Of Proof.

The trial court instructed the jury three times that the State had the burden of proving the elements of the charge beyond a reasonable doubt. CP 25, 34; 6/16RP 32. In his initial closing argument, the deputy prosecutor also reminded the jury of the court's instruction that the State's burden of proof was to prove the elements of the crimes beyond a reasonable doubt. 6/23RP 5-6.

Gonzalez Guzman selects three separate remarks of the prosecutor, strings them together and claims that they effectively shifted the burden of proof by positing "that the jury must presume that [Crystal] was telling the truth, and only if there was evidence to doubt her" could they find Gonzalez Guzman not guilty. Appellant's Brief at 39. However, the prosecutor's remarks must not be viewed in isolation, but "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." Brown, 132 Wn.2d at 561.

These are the statements cited by the defendant, in context, with the portions quoted by the defendant underlined:

> [A]t best, in a case like this, <u>you're going to get</u> medicals and you're going to get <u>two sides to a story, and that's what you got. And now all we have to do is analyze it and figure out who did this to [DG]</u>.

> Let's start with Crystal. She got up here on the stand, under oath, told you, looked you in the eyes, or looked me in the eyes when I asked her: Have you ever assaulted your kid? Have you ever abused your kid?
>
> Was she lying to you when she said no? She was absolutely clear under oath, no, never, will not, have not. There you have it. You have undisputed evidence from her that it wasn't her.
>
> And, folks, that is enough, because, by her denying that on the stand, you have established exclusive control, you have established who had exclusive control on that night. That is enough. Even if we didn't have the Defendant's story or supposed story --
>
> [Objection and sidebar.]
>
> MR. KIM: Do you believe Crystal? Because, if you do, she's established exclusive control.
>
> THE INTERPRETER: I did not hear the last words.
>
> MR. KIM: If you do, she's established exclusive control, that he was the guy that had [DG], and he's the one and under his supervision this all occurred.
>
> Let me ask you this way: Do you have any reason not to believe Crystal? Is there anything that she says that makes you wonder, well, I think she did it? Anything at all? That's all you need, folks.
>
> But you have more. You have the statement that the Defendant gave you, like I mentioned earlier. ....

6/23RP 9-10.

The context of these remarks demonstrates that the prosecutor was arguing that Crystal's testimony was credible and that, if the jury believed her, it established that Gonzalez Guzman had exclusive control of DG when the assault and injuries occurred.

A prosecutor properly may argue the credibility of a witness based on her demeanor and the content of her testimony. Warren, 165 Wn.2d at 30.

A prosecutor misstates the burden of proof if he argues that in order to acquit, the jury must believe that the State's witnesses are lying. State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996). No such argument was made in this case. Nor did the prosecutor argue that the jury must articulate a specific doubt in order to acquit, as prohibited by Emery. 174 Wn.2d at 759-60.

Moreover, because there was no objection to these remarks in the trial court on the basis that they shifted the burden of proof, they are not reversible error unless they were not curable. Id. at 762-63. The court in Emery observed that a remark that could confuse the jury about the burden of proof did not have an inflammatory effect. Id. at 763. The court stated that if there had been an objection, the trial court could have properly explained the jury's role and the State's burden of proof, and such an instruction "would have eliminated any possible confusion and cured any potential prejudice" from the improper remarks. Id. at 764. On that basis alone, the Court concluded that the claim of error failed. Id.

Likewise, in this case the trial court could have provided a curative instruction as to the burden of proof. The prosecutor's remarks were not inflammatory and any possibility of prejudice would have been eliminated.

4. THE REASONABLE DOUBT INSTRUCTION WAS THE INSTRUCTION MANDATED BY THE SUPREME COURT AND WAS PROPER.

Gonzalez Guzman contends that the trial court erred by including in the last paragraph of the instruction defining reasonable doubt, the last sentence of WPIC instruction 4.01, as follows:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and 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 as to these elements.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find 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. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 25.

The Supreme Court has directed trial courts to use this specific standard instruction defining reasonable doubt. State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). Although the court did not specifically address the last sentence, it noted that the instruction is sometimes referred to as the "abiding belief" instruction. Id. at 308.

Gonzalez Guzman is incorrect in stating that the court considered the "abiding belief" sentence in State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995). Pirtle challenged an additional sentence added by the trial judge, which provided that if the jury did not have an abiding belief in the truth of the charge, they were not satisfied beyond a reasonable doubt. Id. at 656. The court held that the additional sentence did not diminish the definition of proof beyond a reasonable doubt; it did not raise any question as to the sentence challenged in the case at bar, noting that the United States Supreme Court already had approved reference to "abiding belief" in a reasonable doubt instruction. Id. at 657-58.

Gonzalez Guzman argues that Emery, supra, compels a different result, because Emery disapproved a prosecutor's argument that the jury's role was to search for the truth. However, Emery disapproved a prosecutor's exhortation that the jury "speak

the truth," because the jury's job is not to determine the truth but to determine whether the State has proved the charge beyond a reasonable doubt. Emery, 174 Wn.2d at 751, 760. The instruction, by contrast, tells the jury that they are satisfied beyond a reasonable doubt, if after fully, fairly, and carefully considering all of the evidence or lack of evidence, they have an abiding belief in the truth of the charge. The reference to belief in the charge, along with the instruction that the conclusion must be based on the evidence presented, makes the sentence an accurate statement of the law in the context of the entire instruction. A recent court of appeals decision concluded that the phrase, repeated by the prosecutor, was not only accurate but emphasized the State's burden of proof. State v. Larios-Lopez, 156 Wn. App. 257, 233 P.3d 899 (2010).

5. THERE HAS BEEN NO FINDING IN THE RECORD THAT DG IS GONZALEZ GUZMAN'S SON, SO THERE IS NO RIGHT TO PARENT AFFECTED BY THE NO-CONTACT ORDER.

Gonzalez Guzman contends that the trial court abused its discretion in granting a lifetime no-contact order with DG. However,

Gonzalez Guzman did not assert in the trial court that DG was his son, so no fundamental right to parent is implicated.

The court had the authority to impose a no contact order as a crime-related prohibition for a term of life. RCW 9.94A.505(8); State v. Armendariz, 160 Wn.2d 106, 118-19, 156 P.3d 201 (2007). The trial court's imposition of a crime-related prohibition is reviewed for abuse of discretion. Warren, 165 Wn.2d at 32.

A sentencing court must narrowly tailor an order limiting contact of a defendant with the defendant's child, in light of the fundamental right to parent. State v. Rainey, 168 Wn.2d 367, 377, 229 P.3d 686 (2010). The order must be limited in scope and length of term to restrictions reasonably necessary to accomplish compelling state interests, including protection of the child. Id. at 377-78.

Gonzalez Guzman has not established that he is DG's parent, however, so no fundamental right is affected by the no-contact order. Gonzalez Guzman did not assert at sentencing that he was DG's parent (or that he had any interest in contact with DG) and he was not married to Crystal when the child was born. 6/22RP 31-32; 7/24RP 3-5. The elements of the crime did not include any familial relationship between Gonzalez Guzman and DG,

so the guilty verdict did not establish that fact. See CP 34; RCW 9A.36.120.

Although Crystal testified that Gonzalez Guzman was DG's father, that fact was not an issue in the case and that testimony does not legally establish the relationship. Interestingly, the no-contact order designated to this Court by Gonzalez Guzman, CP 50, identified DG with the defendant's last name, but that order was recalled on August 24, 2009, and it was replaced with a no-contact order identifying DG with a different name. CP 51-52. While there may be a variety of reasons for that modification, it certainly does not support an inference of parenthood.

The defendant should not be permitted to argue that his fundamental right to parent has been infringed until he has established that he is the child's parent.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Gonzalez Guzman's conviction and sentence.

DATED this 1ST day of March, 2013.

Respectfully submitted,

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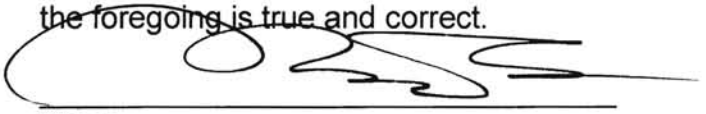
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. SERGIO GONZALEZ GUZMAN, Cause No. 65576-1-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

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Date

Done in Seattle, Washington