

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
— Feb 26, 2014, 3:42 pm —
BY RONALD R. CARPENTER
CLERK

E CPF
RECEIVED BY E-MAIL

Supreme Court No. 89793-0
(COA No. 65576-1-1)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent/Cross-Petitioner,

v.

SERGIO GONZALEZ GUZMAN,

Petitioner/Cross-Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

ANSWER TO CROSS-PETITION FOR REVIEW

NANCY P. COLLINS
Attorney for Petitioner/Cross-Respondent

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

 ORIGINAL

TABLE OF CONTENTS

A. ARGUMENT IN REPLY TO ISSUES RAISED IN STATE’S CROSS-PETITION 1

The State’s cross-petition ignores the criteria of RAP 13.4(b) and offers no legal discussion of why review should be granted on its identified issues..... 1

1. The State’s cross-petition does not address the criteria upon which review may be granted..... 1

2. The definition of “recklessness” is a critical component defining the State’s burden of proof and an incorrect instruction dilutes the State’s fundamental burden of proof 2

3. This Court should deny the State’s request that it be permitted to predicate its closing argument on facts not in evidence..... 3

4. The State’s ambiguous reference to its burden of proof is not an issue meriting review..... 5

5. The State’s illogical claim that undisputed testimony of Gonzalez Guzman’s paternity should be ignored when assessing the legality of his sentence does not merit review..... 6

B. CONCLUSION..... 7

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

In re Pers. Restraint of Rainey, 168 Wn.2d 367, 229 P.3d 686 (2010).. 7

State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988) 4

State v. Collins, 121 Wn.2d 168, 847 P.2d 919 (1993) 1

State v. Hunley, 175 Wn.2d 901, 287 P.3d 584 (2012) 7

State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995)..... 3

Washington Court of Appeals Decisions

State v. Peters, 163 Wn.App. 836, 261 P.3d 199 (2011)..... 3

Court Rules

RAP 2.5 3

RAP 13.4 1, 2, 7

A. ARGUMENT IN REPLY TO ISSUES RAISED IN STATE'S CROSS-PETITION.

The State's cross-petition ignores the criteria of RAP 13.4(b) and offers no legal discussion of why review should be granted on its identified issues.

1. *The State's cross-petition does not address the criteria upon which review may be granted.*

An issue is properly placed before this Court only when the issue is stated with specificity in the petition for review. RAP 13.4(c)(5); *State v. Collins*, 121 Wn.2d 168, 178, 847 P.2d 919 (1993). RAP 13.4(b) lists the criteria this Court considers when deciding whether to grant review. For all of the issues raised in the cross-petition, the prosecution does not identify any conflict between the Court of Appeals ruling and other rulings of this Court or the Court of Appeals. RAP 13.4(b)(2), (3). It does not claim that the issues involve a significant question of constitutional law or an issue of substantial public interest. RAP 13.4(b)(3), (4). It merely states its disagreement with the analysis of the Court of Appeals. Having failed to identify any reason for granting review, these issues do not merit review of any of the arguments put forward in the State's petition.

2. *The definition of “recklessness” is a critical component defining the State’s burden of proof and an incorrect instruction dilutes the State’s fundamental burden of proof.*

The prosecution opaquely contends that the Court of Appeals should not have treated the error in the “first sentence of the instruction defining recklessness” as an error of constitutional dimension reviewable on appeal. Cross-Petition at 4-5. The State has opted not to identify the issue for which it seeks review with “specificity,” contrary to the requirements of RAP 13.4(c)(5), as demonstrated by the cross-petition’s vague reference to the “first sentence” of Instruction 10.¹

The prosecution’s ambiguous argument offers only two boilerplate case citations for the general proposition that unobjected-to errors must implicate constitutional rights that are manifest in the record. But the prosecution does not address the numerous cases cited in Gonzalez Guzman’s petition for review that have discussed this same instructional error incorrectly defining recklessness as a fundamental constitutional error involving an essential element of the charge. *See* Petition for Review, at 6-8. For example, it does not mention *State v.*

¹ The first sentence of the instruction stated:
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.

Peters, 163 Wn.App. 836, 847, 261 P.3d 199 (2011), in which the Court of Appeals analyzed the same instructional error and held, “Peters may challenge the jury instruction defining reckless for the first time on appeal. RAP 2.5(a)(3).” As explained in *Peters*, [i]t is reversible error to ‘instruct the jury in a manner’ that would relieve the State of the burden of proof.” *Id.* (quoting *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995)). This same instructional error occurred in Gonzalez Guzman’s case. The prosecution has not identified an issue meriting review by its cursory and summary discussion that disregards relevant case law.

3. *This Court should deny the State’s request that it be permitted to predicate its closing argument on facts not in evidence.*

The State seeks review of the portion of the Court of Appeals opinion that chastised the prosecution for using facts not in evidence during closing argument. The Court of Appeals found this error harmless, and Gonzalez Guzman has raised the flawed harmless error analysis as an issue meriting review in his petition for review. Unlike

the analysis of the error in Gonzalez-Guzman's petition for review, the legal principle contested by the prosecution does not merit review.

It is well-established that a prosecutor may not make arguments based on facts not in evidence. *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). During both its initial and rebuttal closing argument, the State concocted a scenario that Gonzalez-Guzman's guilt should be inferred from his marriage to Crystal shortly after the incident, positing that marriage was what Crystal always wanted and Sergio finally agreed because his was guilty of assault. 6/23/09RP 18, 35. The Court of Appeals agreed that this argument was not based on facts in evidence. The prosecution does not contest this finding. It never offered or tried to elicit evidence about the reason Crystal and Sergio married after the incident or why they had not married sooner. Instead, the prosecution invented a reason and repeated it during closing argument, insisting that Sergio had rebuffed Crystal over the years, had thus treated her badly throughout their relationship, and only married her after their son was injured because he was guilty. 6/23/09RP 18, 35.

The State's cross-petition claims free reign to posit speculative scenarios damning the accused based on facts not in evidence. It is not a novel legal doctrine that the prosecution must only argue about the

evidence it offered. It may not create scenarios painting the accused in a bad light for reasons that go far beyond the charged incident and beyond the elicited evidence. The State's request that this Court grant review of whether a prosecutor may make arguments based on facts not in evidence should be rejected.

4. *The State's ambiguous reference to its burden of proof is not an issue meriting review.*

The prosecution asks the Court to review whether an argument that shifts the burden of proof is grounds for reversal if deemed an error. Cross-Petition at 7-8. The State does not specify what remarks it is concerned with, although it cites two pages of the Court of Appeals opinion that include analysis of whether the prosecutor improperly emphasized Gonzalez Guzman's failure to testify and compared it to Crystal who testified under oath for the prosecution. The State miscasts the issue as one raised without objection below, as Gonzalez Guzman objected. 6/23/09RP 9, 39. Furthermore, the State's failure to specify the issue for which it seeks review or posit a conflicting decision or constitutional error at stake should result in denying the State's cross-petition for review.

5. *The State's illogical claim that undisputed testimony of Gonzalez Guzman's paternity should be ignored when assessing the legality of his sentence does not merit review*

Without identifying any conflicting case law or constitutional principles, the prosecution insists that testimony from its own witness about Gonzalez Guzman's paternity should be ignored and he should have to prove his paternity at sentencing. At trial, the prosecutor asked Danny's mother Crystal the following questions:

- Q. Talk about Danny.
When was he born?
A. September 27, 2007.
Q. And who is his father?
A. Sergio.
Q. The defendant?
A. Yes.
Q. And obviously you're his mother?
A. Yes.

6/22/13RP 34.

The State now disavows the testimony it elicited describing Gonzalez Guzman as the father of the injured child. It disregards the evidence that Gonzalez Guzman was not only the child's father, but was an active care giver to all of the children. *See* 6/22/09RP 65, 71, 76. Instead, it presents an entirely novel claim that the accused himself must "assert[] in the trial court that he was the infant's father" in order for the court to consider his parental rights at sentencing. Cross-Petition

at 8. This novel claim does not merit review. It is not supported by any legal authority and is contrary to the evidence that it presented at trial. When the State seeks to impose permanent restrictions on a parent's right to have a relationship with his child, the State bears the burden of establishing its basis for such a restriction. *See In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 377, 229 P.3d 686 (2010); *see also State v. Hunley*, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012) (describing State's due process obligation at sentencing). The State's cross-petition should be rejected and review should be granted only on the issues presented in Gonzalez Guzman's petition for review.

B. CONCLUSION.

Based on the foregoing, Petitioner and Cross-Respondent Sergio Gonzalez Guzman respectfully requests that the prosecution's cross-petition for review be denied.

DATED this 26th day of February 2014.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Petitioner/Cross-Respondent

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 89793-0**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- Donna Wise, DPA
respondent/cross-petitioner King County Prosecuting Attorney-
Appellate Unit
[PAOAppellateUnitMail@kingcounty.gov]
- petitioner/cross-respondent
- Attorney for other party


MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: February 26, 2014

OFFICE RECEPTIONIST, CLERK

From: Maria Riley <maria@washapp.org>
Sent: Wednesday, February 26, 2014 3:41 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: paoappellateunitmail@kingcounty.gov; Nancy Collins
Subject: 897930-GONZALEZ-GUZMAN-ANSWER
Attachments: administrator@washapp.org_20140226_154514.pdf

Please accept the attached document for filing in the above-subject case:

Answer to Cross-Petition for Review

Nancy P. Collins - WSBA #28806
Attorney for Petitioner/Cross-respondent
Phone: (206) 587-2711
E-mail: nancy@washapp.org

By

Maria Arranza Riley

Staff Paralegal
Washington Appellate Project
Phone: (206) 587-2711
Fax: (206) 587-2710
E-mail: maria@washapp.org
Website: www.washapp.org

CONFIDENTIALITY NOTICE: This email, including any attachments, may contain confidential, privileged and/or proprietary information which is solely for the use of the intended recipient(s). Any review, use, disclosure, or retention by others is strictly prohibited. If you are not an intended recipient, please contact the sender and delete this email, any attachments and all copies.