No. 93767-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

DAREN M. MORALES,

Respondent.

ANSWER TO PETITION FOR REVIEW

MICK WOYNAROWSKI
Attorney for Respondent

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Washington Constitutional Provisions

Federal Constitutional Provisions

Rules

Other Authorities

A. IDENTITY OF RESPONDENT AND RELIEF REQUESTED

Because the case does not meet any RAP 13.4(b) criteria, Daren Morales, respondent here and appellant below, asks this Court to deny the prosecution's request to review the Court of Appeals decision.

B. THE COURT OF APPEALS DECISION

In resolving this matter, a unanimous panel of Division One followed this Court's settled precedent holding that the constitutional right to a jury trial requires that a sentence be authorized by the jury's verdict. State v. Williams-Walker, 167 Wn.2d 889, 896, 225 P.3d 913 (2010).

The decision terminating review is at State v. Morales, __ Wn. App. __, 383 P.3d 539 (2016).

C. ISSUE PRESENTED

Division One's decision is in sync with State v. Rooth, 129 Wn. App. 761, 121 P.3d 755 (2005), where Division Two also concluded that CrR 7.8, a procedural rule for correcting clerical mistakes, does not apply to a inviolable jury verdict. The prosecution claims the decision is in conflict with State v. Imhoof, 78 Wn. App. 349, 352, 898 P.2d 852 (1995), but that case concerned a different legal question and different facts.

Where the Court of Appeals applied settled precedent and there is no conflict with other appellate opinions, did the State fail to show a basis for granting review under RAP 13.4(b)(2)?

This matter involves an unusual event which does not affect non-parties and is unlikely to be repeated again. Did the State fail to show a basis for granting review under RAP 13.4(b)(4)?

D. STATEMENT OF THE CASE

The jury's verdicts below declared Daren Morales not guilty of the crime of rape of a child in the first degree and guilty of the crime of child molestation in the second degree. CP 130-131; see also 11/21/14 RP 88; 11/24/14 RP 93 (showing jury deliberated on two different days). The jury was polled in open court. 11/24/14 RP 93-96. Once each juror confirmed these were their individual and collective verdicts, the jurors were thanked for their service and dismissed. 11/24/14 RP 97.

Mr. Morales had been charged with first degree child molestation and first degree child rape. CP 6. Mr. Morales had not been charged with child molestation in the second degree and the trial court had not instructed the jury on that degree of the offense.

However, the jury's verdict was on the second degree of the offense. CP 131.[1] When the jury returned its verdicts and was polled in open court about them, the State made no complaints. 11/24/14 RP 93-96. The State did not object to the jury being discharged either.

[1] The State's recitation of facts notes "the verdict form [] had been provided to the jury erroneously." PFR at 2. This was not a form submitted by the defense, but by the prosecution itself. CP 72-73 (defense proposed instructions).

One week later, Mr. Morales moved for a new trial. CP 132-36 (motion based on inconsistency between the verdict form and the jury instructions and parties' arguments). In response, the State asked the trial court change the jury verdict under CrR 7.8(a). CP 162-64.

The trial court granted the State's request, altered the jury verdict, and sentenced Mr. Morales to serve a prison sentence for the greater offense of child molestation in the first degree. CP 150, 165-166.

On appeal, the Court of Appeals agreed with Mr. Morales that "the constitutional right to jury trial requires that a sentence must be authorized by a jury's verdict." Op. at 1, citing State v. Williams-Walker. The unanimous Division One panel held the trial court "had no authority to make a material change to the jury's verdict" after discharging the jury and allowing the jury members to disperse. Op. at 2.

Following this Court's decision in State v. Goss, No. 92274-8, slip op. at 7 (Wash. August 18, 2016) and after oral argument, the parties were directed to answer whether there was sufficient evidence to convict Mr. Morales of child molestation in the second degree. (This came up because the complainant in the case was 11 years old during the charging period.)

In supplemental briefing, Mr. Morales agreed Goss held that the lower limit of the age range is not an essential element of child molestation. Accordingly, Mr. Morales agreed there was sufficient

evidence to convict and sentence him of child molestation in the second degree. In its own supplemental answer, the State concurred on this point.

The Court of Appeals reversed with instructions directing the trial court to enter judgment on the child molestation in the second degree, the offense supported by the jury's verdict. Op. at 20.

E. ARGUMENT

Review should be denied because there is no conflict and the one-off case does not present a question of substantial public interest.

Under the discretionary review provisions invoked here by the prosecution, this Court will accept review "only… if the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals… or… if the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(2) and (4). This case meets neither of these criteria.

1. The resolution of Daren Morales' appeal does not result in any conflict in appellate jurisprudence.

There is no conflict here and settled precedent binds the Court of Appeals decision. Further review is not warranted.

The Court of Appeals properly recognized the judicial error below occurred when the trial court imposed a sentence not supported by a jury verdict. Op. 7-10, 15-16. That result is dictated by the constitution and this

Court's precedent. "[U]nder both the Sixth Amendment to the United States Constitution and article I, sections 21 and 22 of the Washington Constitution, the jury trial right requires that a sentence be authorized by the jury's verdict." State v. Williams-Walker, 167 Wn.2d at 896 (striking judicially-imposed firearm sentencing enhancement not supported by a more general "deadly weapon" jury verdict); State v. Recuenco, 163 Wn.2d 428, 439–40, 180 P.3d 1276 (2008) (appellant had a constitutional right to have the jury, not the judge, determine beyond a reasonable doubt if he was guilty of the crime and sentencing enhancement charged).

The State's effort to describe the problem below as "an obvious clerical error on a verdict form," is not well-taken. Pet. at 1. Like in Williams-Walker and Recuenco, the error below was the imposition of a sentence for an offense not supported by a jury verdict. 163 Wn.2d at 442 ("The error in this case occurred when the trial judge imposed a sentence enhancement for something the State did not ask for and the jury did not find.").

In arguing for the existence of some "true" verdict other than the one the jury declared in open court, the State makes a forbidden attempt to impeach the verdict. State v. Goins, 151 Wn.2d 728, 735, 92 P.3d 181 (2004); United States v. Powell, 469 U.S. 57, 65, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984). The petition should be denied.

The State is not in the position to show the weight of authority behind Williams-Walker is incorrect, let alone incorrect and harmful. State v. Otton, 185 Wn.2d 673, 690, 374 P.3d 1108 (2016). "The doctrine [of stare decisis] requires a clear showing that an established rule is incorrect and harmful before it is abandoned." In re Rights of Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). And when a party asks this Court to reject its prior decision, it "is an invitation [the Court does] not take lightly" and one it should decline now. State v. Barber, 170 Wn.2d 854, 863, 248 P.3d 494 (2011).

After all, under the Washington State Constitution, the inviolate right of trial by jury "must remain the essential component of our legal system that it has always been." Davis v. Cox, 183 Wn.2d 269, 288-89, 351 P.3d 862 (2015).

Moreover, the Court of Appeals' decision in this case is consistent with Division Two's decision in State v. Rooth. See AOB at 17-20, ARB at 2, 4. Division One did well to recognize that Rooth correctly held that "erroneous jury instructions were not clerical errors." Op. at. 13-15. The Rooth court, like the Division One panel adjudicating Mr. Morales' appeal, refused to accept the State's suggestion to "go behind the verdicts." Op. at 14. Rooth did not explicitly rely on the constitutional right to a jury trial, but in that respect, the two decisions complement each

other. See Grisby v. Herzog, 190 Wn. App. 786, 807, 362 P.3d 763 (2015) ("The various panels of the Court of Appeals strive not to be in conflict with each other because, like all courts, [all the panels] respect the doctrine of stare decisis.")

On the other hand, the State's claim of conflict with State v. Imhoof is manufactured. First, Imhoof, which predates Williams-Walker and Recuenco, is no longer good law. Second, the legal analysis in Imhoof is limited to the "constitutional right to be informed of the charge" and contains no discussion of the constitutional right to a jury trial. Op. at 12. Because these decisions involve different legal issues, they are not "in conflict" for RAP 13.4(b)(2) purposes. Accord State v. Borboa, 157 Wn.2d 108, 116, 135 P.3d 469 (2006) (discretionary review granted under RAP 13.4(b)(2) when Division Two held that a trial court's finding of aggravating sentencing factors under RCW 9.94A.712 violated the sixth amendment, but "Division One… reached the opposite conclusion" as to the exact same legal question).

Third, Imhoof differs factually as well. The judicial change of the jury's verdict below worsened Mr. Morales' sentencing exposure but the defendant in Imhoof suffered no such prejudice. Op. at 12-13 (noting Imhoof was not prejudiced by the omission of the word "attempted" from the verdict form because he was ultimately sentenced for that inchoate

offense). This too is another reason why Mr. Morales' case does not create any conflict in terms of appellate jurisprudence.

Division One addressed Imhoof and explained why it is inapplicable to the case at bar. Certainly judges of the Court of Appeals know how to express disagreement with a previously issued decision. Grisby v. Herzog, 190 Wn. App. at 809–10 (noting that when a panel "concludes that a previous Court of Appeals decision used a faulty legal analysis or has been undermined by some new development in the law, the opinion will usually state simply that the panel 'disagrees with,' 'departs from,' or 'declines to follow' the other opinion.") No such notation appears in the decision below. Division One saw nothing to reconcile between Imhoof and Morales because there is no conflict to address.

Trial courts reading Division One's opinion in Mr. Morales' case, this Court's decisions in Williams-Walker and Recuenco, and Division Two's decision in Rooth, will have no trouble applying the law. Further review is not necessary.

2. The one-off case does not present a question of substantial public interest.

A case-specific factual issue is inappropriate for this Court's review and as the State recognized, "[t]he factual circumstances of this case are unusual." Pet. at 6; RAP 13.4(b)(4). Instead, review under RAP

13.4(b)(4) is limited to questions with far-reaching implications. This is not such a case.

This Court may grant review under RAP 13.4(b)(4) when a case is representative of claims simultaneously brought by many litigants. In re Flippo, 185 Wn.2d 1032, 380 P.3d 413 (2016) (commissioner's ruling granting review under RAP 13.4(b)(4) where petitioner's asserted claims regarding previously imposed legal financial obligations were representative of "numerous" other pending PRPs). This appeal, however, pertains to a unique and isolated event.

Unlike in Flippo, there is no reason to believe the facts and legal issues pertaining to this matter are similar to or representative of any other case, let alone cases.

Likewise, this Court may grant review under RAP 13.4(b)(4) when a single litigation affects non-parties. See State v. Watson, 155 Wn.2d 574, 577, 122 P.3d 903 (2005) ("case presents a prime example of an issue of substantial public interest" because it has "the potential to affect every [DOSA related] sentencing proceeding in Pierce County after November 26, 2001" and "the potential to chill [future] policy actions taken by both attorneys and judges.") The disposition of this matter, however, has no such impact.

Unlike in Watson, there is no reason to believe the outcome of this matter has any influence over any other case, let alone cases.

Last, what transpired is highly unlikely to happen again. As the Opinion makes clear, a "jury has the authority to correct its verdict until it is discharged." Op. at 8-9 (emphasis added). Below, the parties and the trial court all agreed to discharge the jury after the verdicts were returned and the jurors polled. But judges and lawyers know that "[u]ntil a verdict is received and filed for record, the trial court may send the jury back to consider and clarify or correct mistakes appearing on the face of the verdict." State v. Badda, 68 Wn.2d 50, 59-60, 411 P.2d 411 (1966); Beglinger v. Shield, 164 Wash. 147, 2 P.2d 681 (1931); Op. at 7-9 (explaining that a jury has the ability to correct its own verdict prior to discharge and but CrR 7.8 does not vest a judge with authority to do that in its place).

In directing the case be reversed with instructions to sentence Mr. Morales for the offense of child molestation in the second degree, the Court of Appeals properly applied Goss and reasonably brought the litigation to an end. Further review is not necessary.

If this Court does grant review, it should also review the constitutional right to present a defense issue.

The trial court limited Mr. Morales' expert's testimony and this ruling violated his constitutional right to present a defense. AOB at 26-39; Op. at 16-19.

An accused person has the constitutional right to present a defense. U.S. Const. Amend. VI; Holmes v. South Carolina, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). Washington defines the right to present witnesses as a right to present material and relevant testimony. Const. Art. I § 22; State v. Roberts, 80 Wn. App. 342, 350-51, 908 P.2d 892 (1996).

A trial court's discretion in admitting expert testimony must not deny the defense a meaningful opportunity to pursue its theory. Alcala v. Woodford, 334 F.3d 862, 880 (9th Cir. 2003). If evidence offered by the defense is relevant, the burden shifts to the State to prove "the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

Washington courts have recognized that young children's recollections of sexual abuse may be tainted by suggestive or coercive influences and their allegations may be unreliable. In re the Dependency of A.E.P., 135 Wn.2d 208, 230, 956 P.2d 297 (1998); State v. Willis, 151

Wn.2d 255, 87 P.3d 1164 (2004) (noting that expert witness testimony on child interview techniques and suggestibility is governed by ER 702 and requires a case by case inquiry).

Dr. Yuille was not allowed to explain the object or purpose of the statement analysis approach he uses or how the method was researched and field-tested. 2RP 45, 46, 65 (trial court sustaining State's objections); 2RP 50-51 (trial court declaring this information irrelevant). The trial court allowed him to enumerate the criteria that comprise statement analysis, but forbade him from testifying the lead detective's interview was done so badly as to make it impossible to determine whether what the child said had the features of a real memory. 2RP 53-55; 1RP 167-75 (trial court ruling limiting the defense testimony).

This testimony was relevant, would have been helpful to the fact-finder, and should have been admitted. In re Nikita W., 77 A.D.3d 1209, 1210-11, 910 N.Y.S.2d 202 (2010); State v. Mitchell, 102 Wn. App. 21, 28, 997 P.2d 373 (2000) (reversing because jury should have been allowed to draw own conclusion after hearing expert's testimony even though expert could not reach conclusive opinion); State v. Kirkman, 159 Wn.2d 918, 929, 155 P.3d 125 (2007) (State's expert allowed to testify that examination of suspected victim of rape was inconclusive).

The erroneous exclusion of defense testimony is presumed prejudicial. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

If this Court grants review on the State's petition, it should also review this significant constitutional law question. RAP 13.4(b)(3).

F. CONCLUSION

For the reasons set forth above, Mr. Morales respectfully requests that this Court deny review. In the alternative, the Court should grant review of the right to present a defense issue as well.

DATED this 19th day of December, 2016.

Respectfully submitted,

/s/ Mick Woynarowski

_____

Mick Woynarowski – WSBA 32801
Washington Appellate Project
Attorney for 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. 93767-2**, 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:

☒ petitioner James Whisman, DPA
[PAOAppellateUnitMail@kingcounty.gov]
[Jim.Whisman@kingcounty.gov]
King County Prosecutor's Office – Appellate Unit

☒ respondent

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: December 19, 2016

WASHINGTON APPELLATE PROJECT

December 19, 2016 - 4:03 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	93767-2
Appellate Court Case Title:	State of Washington v. Daren M. Morales

The following documents have been uploaded:

- 937672_20161219160223SC169480_1926_Answer_Reply.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was washapp.org_20161219_160015.pdf

A copy of the uploaded files will be sent to:

- paoappellateunitmail@kingcounty.gov
- Jim.Whisman@kingcounty.gov
- mick@washapp.org

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Mick Woynarowski - Email: mick@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 701
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20161219160223SC169480