

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

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

No. 62682-5-1
STATE'S
SUPPLEMENTAL
RESPONSE TO
PERSONAL RESTRAINT
PETITION

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STATE OF WASHINGTON
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A. SUPPLEMENTAL ISSUE PRESENTED.

Whether this personal restraint petition should be dismissed where the petitioner has failed to establish constitutional error that resulted in actual and substantial prejudice where the only logical inference based on the instructions given, the evidence presented and the arguments made to the jury is that the jury found multiple acts of sexual intercourse.

C. SUPPLEMENTAL 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.¹ 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. The evidence established that Delgado vaginally penetrated Z.D. at two different homes and in his van, and that he also had oral sexual contact with Z.D.

The evidence of multiple acts of sexual abuse was presented as follows: Z.D. first told her cousin 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. When Dr. Susan O'Brien examined Z.D. on August 28, 2004, Z.D. told 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.

¹ Appendix A-C, referenced herein, are attached to the State's Response to Personal Restraint Petition filed May 11, 2009.

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.

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.

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 cousins 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.

The two counts of rape of a child in the first degree, Counts I and II, involved the same charging period: August 1, 2002 to August 31, 2004. Appendix C, Instructions 13 and 14. The jury was instructed that rape of a child in the first degree requires sexual intercourse with a child younger than twelve. Appendix C, Instruction 9. The jury was instructed that sexual intercourse includes vaginal penetration and contact between the sexual organs of one person and the mouth of another. Appendix C, Instruction 11.

Instruction 7 read:

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.

Appendix C. Instruction 8 read:

There are allegations that the defendant committed acts of sexual abuse of a child on multiple occasions. To convict the defendant, one of 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.

Appendix C.

In closing argument, the prosecutor detailed for the jury why there were only two charges of rape of a child in the first degree and one charge of child molestation in the first degree, despite the fact that the victim testified to many instances of abuse. The State explained:

You can really do it in a couple of different ways. You can break it down by types of abuses, and that's really what I've done here. But you can also break it down into places. We know that it happened at Maria's house. It happened at Arianna's house -- apartment. And it also happened in the defendant's van.

9RP 73. In discussing the date element of the crimes, the State explained:

So we know that this sex abuse happened during those time periods because Z. said that it happened at Maria's and it happened at Adrianna's and it happened in the van, again when they were over at Adriana's.

9RP 75-76. The prosecutor then explained that Z.D. had described both vaginal penetration and oral contact with her sex organs. 9RP 76-77. Then, the prosecutor explicitly outlined the basis of the two counts of rape and the additional count of child molestation:

And, really, because there's two counts and there's each type of rape kind of being committed, so we know that

there are two counts of rape of a child that have been proven.

The other charge, child molestation in the first degree.

...

Well, again, we know that when the defendant made Z. and her little sister get up on top of each other, as she described it, and took her pants down and he licked her anus, well, this is sexual molestation. He's clearly doing it for his own sexual desires and it was clearly and intimate part of Z.

9RP 77. On direct appeal, this Court rejected Delgado's claim that his right to a unanimous jury was violated, finding that "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 argument." Appendix B, at 7.

D. ARGUMENT.

PETITIONER HAS FAILED TO ESTABLISH
CONSTITUTIONAL ERROR THAT RESULTED IN ACTUAL
AND SUBSTANTIAL PREJUDICE.

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 that 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). A petitioner must prove actual and substantial prejudice. In re Personal Restraint of Brett, 142 Wn.2d 868, 874, 16 P.3d 601 (2001). Possible prejudice is not sufficient. In re Personal Restraint of Hews, 99 Wn.2d 80, 93, 660 P.2d 263 (1982). An error that would be per se prejudicial on direct review is not per se prejudicial on collateral review. In re Personal Restraint of St. Pierre, 118 Wn.2d 321, 330-31, 823 P.2d 492 (1992); In re Personal Restraint of Wiatt, 151 Wn. App. 22, 39-40, 211 P.3d 1030 (2009).

In State v. Borsheim, 140 Wn. App. 357, 165 P.3d 417 (2007). a direct appeal, the defendant was charged and convicted of four counts of rape of a child in the first degree. 140 Wn. App. at 363. Each count involved the same victim and same time period. Id. at 364. Although the jury had been instructed with the standard pattern instruction that "a separate crime is charged in each count," and that "the verdict on one count should not control your verdict on any other count," this Court held that the instructions nonetheless allowed the jury to convict Borsheim of multiple crimes for a single act, thus violating double jeopardy. Id. at 367. This Court found that the jury instructions were inadequate because they failed to

inform the jury that each crime must be based on a "separate and distinct act." Id. at 368. This Court noted that the omission was compounded by the fact that all four counts were confusingly encompassed in a single instruction rather than set out in separate instructions. Id.²

A previous case from Division II of this Court reached a different conclusion. In State v. Ellis, 71 Wn. App. 400, 859 P.2d 632 (1993), the defendant was charged with two counts of child molestation and two counts of rape of a child in the first degree. Counts III and IV, the rape of a child charges, involved the same victim and overlapping time periods: Count III alleged sexual intercourse between January 1987 and December 1988, and Count IV alleged sexual intercourse between January 1988 and December 1989. Id. at 402. There was no language in the "to convict" instructions that the factual basis for the two crimes had to be separate and distinct. Id. On appeal, Ellis alleged a double jeopardy violation, arguing that the jury "might have used a single rape as the factual basis for counts III and IV." Id. at 406. Division II rejected Ellis's double jeopardy claim, stating, "It is our view that the ordinary juror would understand that when two counts charge

² In Delgado's case, each crime was set forth in a separate instruction.

the very same type of crime, each count requires proof of a different act. Additionally, the trial court affirmatively instructed, in Instruction 4, that a separate crime was charged in each count and, in Instruction 5, that the jury was required to unanimously agree that at least one particular act had been proved for each count." Id.

Borsheim was a direct appeal. As such, the defendant had no burden to prove actual and substantial prejudice. In order to receive relief on collateral review, Delgado must establish not only the possibility of a constitutional error, but actual and substantial prejudice.

Delgado cannot show that he was actually prejudiced by the jury instructions in this case. As this Court already determined on direct appeal, there was sufficient evidence to support two counts of rape of a child in the first degree and "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 argument." Appendix B, Opinion at 7. As Division II stated in Ellis, "The ordinary juror would understand that when two counts charge the very same type of crime, each count requires proof of a different act." 71 Wn. App. at 406. The jury instructions, read as a whole and in a commonsense manner, made it manifestly clear to

the jury that they had to rely upon separate acts to support convictions on identically charged crimes.

Moreover, viewed in the context of the evidence presented and the arguments made to the jury, there is no reasonable possibility that this jury based the two convictions for rape of a child in the first degree on a single act. The victim clearly testified to at least two different kinds of sexual intercourse, vaginal penetration and oral contact. The prosecutor clearly delineated for the jury that the two counts of rape were based on the two different kinds of sexual intercourse. Delgado cannot establish constitutional error that resulted in actual and substantial prejudice on this record.

Finally, the State respectfully submits that this Court's decision in Borsheim overstates the likelihood of a double jeopardy violation and understates the impact of the other jury instructions. In reviewing a challenge to jury instructions, the court reads the instructions in a straightforward, commonsense manner. State v. Pittman, 134 Wn. App. 376, 382, 166 P.3d 720 (2006). The trial court instructed that a separate crime was charged in each count and advised the jury that it must decide each count separately, and that its verdict on one count should not control its verdict on any other count. In light of these instructions, a juror would understand

that when two counts charged the very same type of crime, each count requires proof of a different act. Ellis, 71 Wn. App. at 406.

In Borsheim, this Court failed to consider the impact of the jury instructions as a whole and how a commonsense juror would understand them. Courts in other jurisdictions have rejected similar challenges to "to convict" instructions, frequently noting that the jury was instructed that a separate crime was charged in each count. See State v. Burch, 740 S.W.2d 293, 295-96 (Mo. Ct. App. 1987) (concluding that the double jeopardy challenge to identical jury instructions for two counts of sodomy was "specious"); State v. Salazar, 139 N.M. 603, 610-11, 136 P.3d 1013 (N.M. Ct. App. 2006) (rejecting double jeopardy challenge to nine identical jury instructions for nine counts of criminal sexual penetration).

In light of the evidence, instructions and argument in this case, Delgado has failed to establish constitutional error that resulted in actual and substantial prejudice.

D. CONCLUSION.

This petition should be dismissed.

DATED this 3rd day of February, 2010.

Respectfully Submitted,

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