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No. 42405-3-II

IN THE
COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

YOVANY GOMEZ HERNANDEZ,
Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION/SUMMARY OF THE ARGUMENT

The defendant-appellant in this case, Yovany Gomez Hernandez, stabbed his wife with a small knife in the back of her neck out of anger over her determination to leave him. Fortunately, the knife missed all critical structures in the neck, only piercing muscle and subcutaneous tissue. The wound was treated with two stitches. According to the ER doctor, the victim will have a "pretty minimal" scar and no permanent, or even temporary, disabilities.

Mr. Gomez Hernandez was convicted after trial of assault in the first degree committed with the intent to inflict great bodily harm and the actual infliction of such harm, in violation of RCW 9A.36.011(1)(c). On appeal, he argues the State failed to prove the infliction of great bodily harm when that type of harm "encompasses the most serious injuries short of death." State v. Stubbs, 170 Wn.2d 117, 128, 240 P. 3d 143 (2010). Alternatively, he also argues the trial court imposed a sentence of community custody unauthorized by law.

II. ASSIGNMENT OF ERROR

A. Assignment of Error

1. The superior court erred in allowing the issue of Mr. Gomez Hernandez's guilt to go to the jury when the evidence was insufficient to convict as a matter of law.

2. The trial court imposed a sentence of community custody that exceeded the statutorily-authorized term.

B. Issues Pertaining to Assignment of Error

1. Mr. Gomez Hernandez stabbed his wife in the back of her neck with a knife, piercing muscle and subcutaneous tissue. The wound required two stitches and resulted in a "pretty minimal" scar but no other lasting physical damage. Under these circumstances, did the State fail to prove assault in the first degree as charged when it failed to prove Mr. Gomez Hernandez inflicted "bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent

loss or impairment of the function of any bodily part or organ”?

2. If the Court affirms Mr. Gomez Hernandez’s conviction, did the trial court impose an unlawful sentence when it sentenced him to community custody for 24 to 48 months when serious violent offenses are to include a 36-month term of community custody under RCW 9.94A.701(1)(b)?

III. STATEMENT OF THE CASE

A. Procedural History

Through a Second Amended Information, the State charged Mr. Gomez Hernandez with Assault in the First Degree, allegedly committed on May 5, 2011, by assaulting Ana Lilia Garcia Gampuzano [sic]¹ with the intent to inflict great bodily harm and the actual infliction of such harm, in violation of RCW 9A 36.011(1)(c). The information further charged Mr. Gomez

1. The victim’s name is spelled in various ways in the record. Verbatim Reports of Proceedings for September 26, 2011, 43 (victim apparently spelled her last name with a “C,” court reporter transcribed her first two names as “Anna Lila”); e.g., CP 36 (Garcia-Campuzano). In this brief, counsel refers to her as Campuzano.

Hernandez with committing the crime against a family or household member in violation of RCW 10.99.020, and alleged Mr. Gomez Hernandez was armed with a deadly weapon other than a firearm at the time of the offense in violation of RCW 9.94A.602. Clerk's Papers (CP) 7-8.²

On the day of trial, the State moved to file a third amended information, in an attempt to change the elements it would have to prove at trial. Instead of proving Mr. Gomez Hernandez "inflict[ed] great bodily harm," as required by RCW 9A.36.011(1)(c), the State had intended to charge that he used "a firearm or any deadly weapon or . . . any force or means likely to produce great bodily harm or death" under RCW 9A.36.011(1)(a). Verbatim Reports of Proceedings for

2. The reference in the information to RCW 9.94A.602 appears incorrect; however, the State also explicitly specified the increased time that could be added to Mr. Gomez Hernandez's sentence if he were found to have been armed with a deadly weapon other than a firearm. CP 8. "Error in a numerical statutory citation is not reversible error unless it prejudiced the accused." State v. Vangerpen, 125 Wn.2d 782, 787-88, 888 P.2d 1177 (1995), *citing*, CrR 2.1(a)(1).

September 26, 2011, at 31. The court denied the request. *Id.* at 40.

Mr. Gomez Hernandez was convicted after a jury trial held on September 26-27, 2011, the Honorable Richard L. Brosey presiding. Verbatim Reports of Proceedings for September 26 & 27, 2011 (1TRP, 2TRP, respectively); CP 33. The jury further found Mr. Gomez Hernandez committed the crime while armed with a deadly weapon, CP 35, and he and Ms. Campuzano were members of the same family or household. CP 36.

A first-time offender, Mr. Gomez Hernandez's standard sentence range was 93 to 147 months. Verbatim Report of Proceedings for Sentencing held October 10, 2011 (SRP) 3. The trial court sentenced Mr. Gomez Hernandez to 108 months for the underlying crime plus 24 months for the deadly weapon sentence enhancement. SRP 8; CP 40. It imposed a ten-year no-contact order regarding the victim and community custody for 24 to 48 months, plus costs, fees and penalties. SRP 8-9; CP 47-48; CP 40.

Mr. Gomez Hernandez filed a timely pro se notice of appeal on October 31, 2011. CP 49. A second notice of appeal was filed on December 21, 2011. CP 51.

B. Substantive Facts

Ana Lila Garcia Campuzano had been married to Mr. Gomez Hernandez since 2006; she had three children. 1TRP 42-44. On May 5, 2011, Campuzano decided to leave Mr. Gomez Hernandez because they had had a fight the day before. 1TRP 44-45. Her brother picked her and her children up around midday, while her husband was at work, and took them to his apartment in Centralia. 1TRP 46, 71.

Mr. Gomez Hernandez arrived at the brother's apartment between seven and eight that night. Campuzano initially hid from him in the bathroom, but ultimately let him in to speak to her. Mr. Gomez Hernandez said he wanted her to come home, but became angry when she refused, and hit her in the eye. 1TRP 46-48, 67, 72-74 (the brother testified Mr. Gomez Hernandez entered his apartment forcibly).

Campuzano left the bathroom and went to her brother's bedroom, where Mr. Gomez Hernandez followed her, insisting she go home with him. Campuzano then left the bedroom, entered the hallway, where the kitchen is, with Mr. Gomez Hernandez behind her. 1TRP 48, 75-76. He grabbed her by her hands, pulling a little, she resisted. She saw him look toward the place where her brother keeps the knives. 1TRP 50-51.

Campuzano tried to put herself in front of the knives, then ran toward the bathroom. Mr. Gomez Hernandez grabbed her ponytail; she fell into the bathroom and remembered nothing until she woke up and saw Mr. Gomez Hernandez standing in front of the toilet. 1TRP 51-52. Mr. Gomez Hernandez had stabbed Ms. Campuzano in the back of the neck with a small knife. 1TRP 76, 88 (the brother saw Mr. Gomez Hernandez grab a knife, grab Campuzano's hair and make a stabbing motion); see 2TRP 9 (knife left one centimeter laceration; 3.5-inch-long air pocket).

Upon waking a few seconds later, Campuzano saw the knife next to Mr. Gomez Hernandez in the sink but did

not see any blood. 1TRP 52, 65. Not realizing she was injured, Campuzano returned to her brother's bedroom and sat talking with Mr. Gomez Hernandez on the sofa for a while. At some point, she put her hand to her neck and it came away with blood on it. 1TRP 54, 65-66. Her brother took her and the children to the emergency room where Campuzano was treated. 1TRP 55.

The emergency room (ER) doctor described the injury as a one-centimeter stab wound on the back of the neck, just to the left of the midline, just below where the skull stops. The air pocket created by the knife was about 3.5 inches long. 2TRP 9. "This type of injury" is "potentially" life threatening. 2TRP 10.

When Campuzano arrived, the hospital activated a full trauma team and considered it to be an urgency level II emergency, the second highest level. Hospital personnel were concerned for Campuzano's life due to the anatomically complex nature of the neck, which contains vascular structures, muscles and nerves. 2TRP 10-11. Indeed, had the knife deviated much from its course, the injury could have been life threatening.

2TRP 12. Campuzano could have died from "this type of injury." 2TRP 13.

In Ms. Campuzano's specific case, however, the knife merely pierced muscle and subcutaneous tissue. 2TRP 17-18. The ER doctor did not suture the muscle since it heals on its own; the one-centimeter surface laceration required two stitches. 2TRP 18-19. Indeed, Campuzano suffered no damage to any critical structure: no damage to vascular structures, 2TRP 17-18; no neurological injuries, no spinal injury risk factors; no intracranial bleeding risk factors, no pulmonary injuries. 2TRP 19-20. Further, Campuzano experienced no motor, sensory, cerebral, speech or memory deficits. Her gait, blood pressure, heart rate and blood count were all normal. 2TRP 21-22.

In fact, despite the general risks of a stab wound to the neck, in this case the ER doctor documented a "simple repair of a neck laceration" and discharged Ms. Campuzano within four hours of her arrival at the ER. 2TRP 23. In all, the doctor had spent about 35 minutes in critical care with Campuzano. Critical care consists

of time with the patient, talking to consultants, reviewing medical records, reviewing imaging studies, taking care of the patient, talking to family, and talking to other personnel. 2TRP 16.

Ms. Campuzano will always have a scar but, as the ER doctor explained, "it should be pretty minimal." 2TRP 28.

IV. ARGUMENT

POINT I: The State Failed to Prove the Charged Assault When the Evidence did not Show Mr. Gomez Hernandez Inflicted Great Bodily Harm and This Court Should Reverse His Conviction

The evidence at trial was insufficient as a matter of law to prove Mr. Gomez Hernandez guilty of assault in the first degree as charged. A challenge to the sufficiency of the evidence requires the Court to view the evidence in the light most favorable to the State. The relevant question is whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In claiming insufficient evidence, the defendant admits the truth

of the State's evidence and all reasonable inferences that can be drawn from it: "All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Hosier, 157 Wn.2d at 8; Salinas, 119 Wn.2d at 201.

To prove the charged crime in this case, the State was required to prove beyond a reasonable doubt that Mr. Gomez Hernandez assaulted his wife and inflicted great bodily harm. As charged to the jury, the elements of the crime included: an assault on Campuzano, with intent to inflict great bodily harm, and the infliction of great bodily harm. CP 20 (Jury Instruction No. 8); RCW 9A.36.011(1)(c). The court instructed the jury that "[g]reat bodily harm" means "bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ." CP 19 (Jury Instruction No. 7); RCW 9A.04.110(4)(c).

The State failed to prove great bodily harm. "Great bodily harm . . . encompasses the most serious

injuries short of death.” State v. Stubbs, 170 Wn.2d 117, 128, 240 P. 3d 143 (2010). For example, a stab wound to the neck that severed the spinal chord, caused permanent paralysis, confined the victim to a wheelchair and shortened her life expectancy by 17 years is great bodily harm. Stubbs, 170 Wn.2d 117, 120, 128 & 128 n.17 (holding no exceptional sentence possible for injuries exceeding great bodily harm because, short of death, no injuries can exceed great bodily harm). So is a severe brain injury that left the victim with little control over one side of her body, unable to eat or bathe unassisted and barely able to talk. State v. Pappas, 164 Wn. App. 917, 922, 265 P.3d 948 (2011) (holding exceptional sentence for severity of injuries available when defendant was convicted of inflicting substantial bodily harm but injuries amounted to great bodily harm).

The degree of severity of injuries necessary to find great bodily harm was also found in a victim who suffered at least eight facial fractures, with some of the bones of his face shattered; a fractured rib that

punctured his lung; a fracture to the base of his skull; and permanent nerve damage. State v. Duncalf, 164 Wn. App. 900, 903, 267 P.3d 414 (2011) (reconciling jury verdicts to hold jury found great bodily harm inflicted but not intended). Finally, great bodily harm was inflicted when a shooting victim would have died without emergency treatment and lost his spleen, half his pancreas and required a colostomy. State v. Bourgeois, 72 Wn. App. 650, 652, 662, 866 P.2d 43 (1994) (holding no exceptional sentence for severity of injuries available).

Here, by contrast, the State failed to prove “the most serious injuries short of death.” Stubbs, 170 Wn.2d 117, 128. When the knife wound in this case missed all critical structures and required only a two-stitch suture, the State certainly did not prove “bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part

or organ." CP 19 (Jury Instruction No. 7); RCW 9A.04.110(4)(c).

First, while the "type of injury" Campuzano suffered was "potentially" life threatening, 2TRP 10, her actual injury did not cause "a probability of death" as required to meet the great bodily harm definition. Nothing other than muscle and subcutaneous tissue was injured and that injury required only two stitches. 2TRP 17-19. Indeed, the ER doctor documented a "simple repair of a neck laceration" and discharged Ms. Campuzano within four hours of her arrival at the ER. 2TRP 23. Accordingly, the evidence did not show the injury created "a probability of death."

Nor did the injury "cause significant serious permanent disfigurement," as alternatively required by the definition of great bodily harm. The two stitches will leave a permanent scar but, as the ER doctor explained, the scar "should be pretty minimal." 2TRP 28.

Finally, the injury also did not cause "a significant permanent loss or impairment of the

function of any bodily part or organ." In this case Campuzano did not even suffer a temporary, let alone a permanent loss or impairment, of any bodily function. She sustained no damage to vascular structures, 2TRP 17-18; no neurological injuries, no spinal injury risk factors; no intracranial bleeding risk factors, and no pulmonary injuries. 2TRP 19-20. Similarly, Campuzano experienced no motor, sensory, cerebral, speech or memory deficits. Her gait, blood pressure, heart rate and blood count were all normal. 2TRP 21-22. Under these circumstances, the State also failed to prove "a significant permanent loss or impairment of the function of any bodily part or organ."

For all these reasons, the State failed to prove the charged assault and this Court should reverse Mr. Gomez Hernandez's conviction.

POINT II: The Trial Court Imposed an Illegal Sentence of 24 to 48 Months' Community Custody When Only 36 Months are Authorized by Statute

If the Court upholds Mr. Gomez Hernandez's conviction, it should remand for resentencing. The trial court imposed an illegal sentence when it

sentenced Mr. Gomez Hernandez to 24 to 48 months of community custody. Community custody may only be imposed when specifically provided for by statute. See State v. Kisor, 68 Wn. App. 610, 618-19, 844 P.2d 1038 (1993) (under prior version of statute, holding community custody may not be imposed unless specifically authorized by statute). Under the applicable statute in this case, 36 months should have been imposed. RCW 9.94A.701.

To start, RCW 9.94A.505 governs the imposition of sentence. Under that provision, community custody is imposed pursuant to RCW 9.94A.701 and 9.94A.702. RCW 9.94A.701 applies to Mr. Gomez Hernandez because he was remanded to the custody of the Department of Corrections. Under RCW 9.94A.701, "an offender . . . sentenced to the custody of the department" who committed a "serious violent offense" shall be sentenced "to community custody for three years." RCW 9.94A.701(1)(b). Assault in the first degree is a serious violent offense, RCW 9.94A.030(45)(v); thus,

the trial court should have imposed 36 months' community custody.

Although raised for the first time on appeal, this issue should be heard. See RAP 2.5(a). "In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal." State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (collecting cases). Indeed, a sentence not authorized by statute can always be heard as it may affect an individual's due process rights. See In re Moore, 116 Wn.2d 30, 33, 803 P.2d 300 (1991) (addressing sentencing issue raised for first time in Personal Restraint Petition); see also State v. Armstrong, 91 Wn. App. 635, 638, 959 P.2d 1128 (1998) (holding defendant could raise objections to special conditions of community placement for the first time on appeal). Accordingly, this Court may resolve this issue even though the issue was not raised in the trial court.

For all these reasons, the sentence of community custody imposed was unlawful and this Court should remand for resentencing.

V. CONCLUSION

For all of these reasons, Yovany Gomez Hernandez respectfully requests this Court to reverse his conviction or, in the alternative, remand his case for resentencing for the imposition of a correct term of community custody.

Dated this 2nd day of May, 2012.

Respectfully submitted,

/s/ Carol Elewski
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Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on this 2nd day of May, 2012, I caused a true and correct copy of Appellant's Brief to be served, by e-filing, on:

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