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NO. 89793-0

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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SERGIO GONZALEZ-GUZMAN,

Appellant.

ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION

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 ORIGINAL

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A. IDENTITY OF RESPONDENT

The State of Washington is the Respondent in this case.

B. COURT OF APPEALS DECISION

The Court of Appeals decision at issue is State v. Gonzalez-Guzman, No. 65576-1-I, filed December 16, 2013 (unpublished).

C. ISSUES PRESENTED FOR REVIEW

If this Court accepts review of this case, the State seeks cross-review of the following additional issues the State raised in the Court of Appeals, which were either not reached by the Court or were decided adversely to the State:

1. Did Gonzalez-Guzman fail to preserve for review on appeal the challenge to use of the term "wrongful act" in the jury instruction defining recklessness because he failed to establish that it was constitutional error with practical and identifiable consequences in this trial, where recklessness was not contested?

2. Was the first sentence of the jury instruction defining recklessness, which defined the term using the statutory language, a correct statement of the law?

3. Did the prosecutor in closing argument properly discuss Gonzalez-Guzman's motive for his marriage to the infant victim's mother days after the assault because the inference as to Gonzalez-Guzman's motive for that hasty marriage was a proper inference from the evidence?

4. The Court of Appeals concluded that remarks of the prosecutor in closing argument did not improperly shift the burden of proof. Even if this Court concludes that these remarks were improper, there was no objection to those remarks in the trial court, and any such error could have been cured by an instruction to the jury, so is that alleged error not grounds for reversal?

5. The Court of Appeals concluded that the no-contact order entered was justified based on the facts of this case. Was there no possible violation of a fundamental right to parent because there has been no finding that the victim is Gonzalez-Guzman's child?

D. STATEMENT OF THE CASE

The defendant, Sergio Gonzalez-Guzman, was convicted of assault of a child in the first degree, based on his assault on DG, an infant, occurring November 9-10, 2007. CP 1-9, 38-42. The relevant facts are set forth in the State's briefing before the Court of Appeals. Brief of Respondent at 2-7.

The Court of Appeals affirmed the conviction and sentence in a unanimous unpublished opinion. State v. Gonzalez-Guzman, No. 65576-1-I (Wash. Ct. App. Dec. 16, 2013).

E. ARGUMENT

The State's briefing at the Court of Appeals adequately responds to the issues raised by Gonzalez-Guzman that were previously raised in the Court of Appeals. If review is accepted, the State seeks cross-review of issues it raised in the Court of Appeals but that the Court's decision rejected or did not address. RAP 13.4(d). Those issues are summarized below and set forth more fully in the briefing in the Court of Appeals.

1. THE REFERENCE TO A WRONGFUL ACT IN THE INSTRUCTION DEFINING RECKLESSNESS WAS NOT ERROR, AND GONZALEZ-GUZMAN DID NOT PRESERVE A CHALLENGE TO THAT LANGUAGE.

The Court of Appeals properly concluded that any error in use of the term “wrongful act” in the first sentence of the instruction defining recklessness was harmless error, because there was no dispute about the degree of the crime, no assertion that Gonzalez-Guzman misunderstood the consequences of his actions, and the jury could not have misunderstood the link between recklessness and the harm caused. State v. Gonzalez-Guzman, slip op. at 17-18. If this Court grants review on this issue, the State cross-petitions for review of the holding of the Court of Appeals that this aspect of the instruction was manifest constitutional error.

Gonzalez-Guzman claims that the first sentence of Instruction 10, defining “recklessly,” relieved the State of its burden of proving an element of assault of a child in the first degree because the term “wrongful act” was not replaced with the term “great bodily harm.” CP 33. Gonzalez-Guzman did not propose an instruction defining “recklessly” or object to the instruction given by

the court. CP 10-17; 6/23RP 2-3.¹ Ordinarily, an appellate court will consider a constitutional claim for the first time on appeal only if the claim is truly constitutional, and manifest. State v. Davis, 41 Wn.2d 535, 250 P.2d 548 (1952); RAP 2.5(a)(3). At most, the error identified here is a failure to define a term with as much specificity as possible in light of the crime charged, which is not an error of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 105-07, 217 P.3d 756 (2009).

The claim also is substantively without merit because the jury was correctly instructed as to the elements of the crime: that the jury must find that the defendant “recklessly inflicted great bodily harm.” CP 34. The to-convict instruction, Instruction 11, included every element of the crime – that instruction has not been challenged in this appeal. CP 34. The instruction defining the crime also informed the jury that assault of a child in the first degree occurs when a person “intentionally assaults the child and recklessly inflicts great bodily harm.” CP 29 (Instruction 6). The use of the statutory term “wrongful act” in the definition of

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

"recklessly" did not relieve the State of the burden of proving that Gonzalez-Guzman recklessly inflicted great bodily harm.

The State's argument as to each of these issues is fully set out in its Supplemental Brief in the Court of Appeals.

2. THE PROSECUTOR'S ARGUMENT INFERRING THE DEFENDANT'S MOTIVE FOR HIS MARRIAGE DAYS AFTER THIS ASSAULT WAS PROPER AND BASED ON FACTS IN EVIDENCE.

The Court of Appeals concluded that the prosecutor erred in closing argument when he inferred the motive for Gonzalez-Guzman's hasty marriage. State v. Gonzalez-Guzman, slip op. at 12. There was no objection to that argument in the trial court, however, and the Court of Appeals properly concluded that such an error was not inflammatory and was not incurable, so it was not reversible error. Id. If this Court grants review on this issue, the State cross-petitions for review of the holding of the Court of Appeals that this argument was improper.

The challenged remarks were 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. 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). The State's argument as to this issue is set out in its opening brief in the Court of Appeals. Brief of Respondent at 25-29, 34-35.

3. IF THIS COURT CONCLUDES THAT ANY ARGUMENT BY THE PROSECUTOR RELATING TO THE BURDEN OF PROOF WAS IMPROPER, SUCH A MISSTATEMENT WAS CURABLE, AND NOT REVERSIBLE ERROR.

The Court of Appeals properly concluded that the prosecutor's closing argument did not improperly shift the burden of proof. State v. Gonzalez-Guzman, slip op. at 10-11. The Court thus did not reach the question of whether any such error would constitute reversible error. 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. State v. Emery, 174 Wn.2d 741, 762-64, 278 P.3d 653 (2012). If this Court grants review on this issue, the State cross-petitions to preserve its contention in the Court of Appeals that any

error was curable and not reversible. That alternative contention is set out in the State's opening brief in the Court of Appeals. Brief of Respondent at 25-29, 37-40.

4. 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.

The Court of Appeals properly concluded that the lifetime no-contact order with the victim was justified by the circumstances of this case, including the severity and longevity of DG's injuries, even where that Court assumed that the defendant was DG's parent. State v. Gonzalez-Guzman, slip op. at 20-22. If this Court grants review on this issue, the State cross-petitions for review of the holding of the Court of Appeals that testimony of DG's mother that Gonzalez-Guzman was his father was sufficient to establish parentage for purposes of this claim, where DG's parentage was not an issue in the case and Gonzalez-Guzman never asserted in the trial court that he was the infant's father, either at trial or at sentencing. The State's argument to that effect is set out in its opening brief in the Court of Appeals. Brief of Respondent at 42-44.

F. CONCLUSION

The State respectfully asks that the petition for review be denied. However, if review is granted the State seeks cross-review of the issues identified in Section C and E, supra.

DATED this 18TH day of February, 2014.

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 Answer to Petition for Review and Cross-Petition, in STATE V. SERGIO GONZALEZ GUZMAN, Cause No. 89793-0, in the Supreme Court 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
Done in Seattle, Washington

Date

02-18-14

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To: Wise, Donna
Subject: RE: State v. Gonzalez-Guzman, No. 89793-0, Answer to Petition for Review and Cross-Petition

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From: Wise, Donna [mailto:Donna.Wise@kingcounty.gov]
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Good morning:

Please accept for filing the attached document (Answer to Petition for Review and Cross-Petition) in State v. Sergio Gonzalez-Guzman, No. 89793-0

The certificate of service is attached to the document.

Thank you.

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