On Point

by the Wisconsin State Public Defender

State v. Esteban M. Gonzalez, 2011 WI 63

by admin on July 10, 2011

in '10-11 Term,Ch. 948,Defense Win,Elements,instructions,Wis SCt Opinions

supreme court decision, *reversing*, 2010 WI App 104; for Gonzalez: Frank J. Schiro, Kristin Anne Hodorowski; case activity

Jury Instructions – Elements, Exposing Child to Harmful Materials, § 948.11(2)(a)

Gonzalez has shown a reasonable likelihood that the jury instructions relived the State of its burden to prove the element that he *knowingly* exhibited harmful material to a child.

The facts are essentially undisputed: Gonzalez watched pornography while care-taking his 3-year-old daughter, who happened to see the material. The issue in dispute is whether she wandered into the room without his knowledge, or whether he continued to watch the video knowing that she'd come into the room. The trial court used the pattern instruction, Wis JI——Criminal 2142, but it misled the jury under the particular facts. The instruction given to the jury described four elements: 1) defendant exhibited or played harmful material to the child; 2) defendant knew the (sexually explicit, etc.) character of the material; 3) the child was under 18; 4) "the defendant had face-to-face contact before or during the exhibition or the playing of he material." The court reaches unanimous, if narrow, agreement that the instructions reduced the State's burden of proof.

Lead opinion (3 votes)."Under the facts of the present case, the circuit court used the incorrect instruction for the fourth element of the crime," ¶28. The instruction misled in several respects with respect to the State's burden of proving that Gonzalez knowingly exhibited harmful material to the child, ¶¶36-89. Crucial conclusion: The "face-to-face contact" instruction wasn't appropriate to the facts of the case; *of course* he had had contact with his daughter *before* the material was played, so giving this instruction didn't require that the jury find he had intentionally played it to her.

Concurrence 1 (2). The case raises a new issue of mens rea, given the facts (playing a pornographic video when the child is supposed to be in bed), ¶104. The state-of-mind requirement relates to "volition or knowledge. … Is an accidental viewing subject to prosecution?," ¶109. The concurrence wouldn't "try to resolve the issue here of mens rea embedded in the first element"; instead, it "would ground a new trial solely on the misleading fourth element employed by the circuit court," ¶114.

Concurrence 2 (2). The instruction, though a correct statement of law, nonetheless relieved the State of of the burden of proving that Gonzalez exhibited or played harmful material to a child, ¶116. "As the lead opinion explains, and I do not dispute, the circuit court erred when it instructed the jury on the fourth element and applied the incorrect alternative under the statute," ¶119. (Also, ¶134: "That is, if the jury found that Gonzalez had face-to-face contact with A.G. *before*, but not during, the exhibition or playing of the harmful material, then it is reasonably likely that the jury did not believe that Gonzalez exhibited or played the harmful material *to A.G.*")

There is, then, unanimous agreement that the "face-to-face contact" instruction was misleading, given the present facts – the result is therefore somewhat fact-specific. Why the three separate opinions? The lead opinion would go a bit farther than the other 4 Justices appear willing to go, with respect to explicating the first element. The lead opinion would require proof "that the defendant knowingly, as opposed to accidentally exhibited the harmful material to the child," ¶36. Concurrence 1 reserves that issue, ¶114; concurrence 2 rejects the idea that "knowingly" is a requisite of the first element," ¶125.

The court of appeals upheld a number of different trial court rulings, largely of an evidentiary nature (see post, here). The supreme court doesn't reach any issue other than the defective instruction, ¶2 n. 3, with two exceptions: "First, the circuit court erroneously failed to allow the defendant to present testimony bolstering his character. … Second, the circuit court erroneously refused to allow the defendant to make an offer of proof that the defendant offered to take a polygraph examination prior to being represented, believing that the polygraph results would be admissible." Id. These quotes are from the (3-vote) lead opinion. Neither concurrence addresses these matters, so it may be fair to assume unanimous agreement on the points, with the court of appeals therefore reversed on these as well as the instructional issue. Certainly, failure to address other matters has the effect of leaving as precedent the court of appeals' holdings on them.

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