24957-3-III
consolidated with

NO. 24958-1-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

JON GABRIEL DEVON,

Defendant/Appellant.

APPELLANT'S BRIEF

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2. There was insufficient evidence to establish each and every element of the offense of homicide by abuse as defined in RCW 9A.32.055.

3. Failure to object to improper prejudicial testimony constituted ineffective assistance of counsel.

4. Judge Allan's refusal to recuse herself violated the appearance of fairness doctrine.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

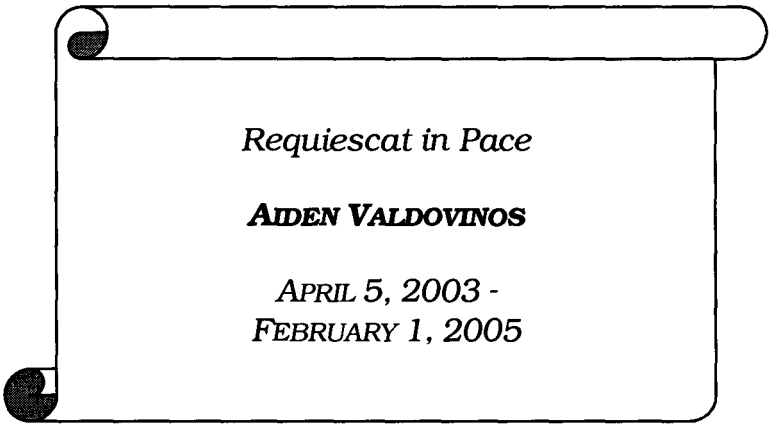
1. Is Mr. DeVon entitled to a new trial due to the violation of his constitutional right to a public trial under the Sixth Amendment to the United States Constitution and Const. art. I, §§ 10 and 22?

2. Did the State establish each and every element of the offense of homicide by abuse as defined in RCW 9A.32.055?

3. Was Mr. DeVon denied effective assistance of counsel when his attorney failed to object to improper prejudicial testimony?

4. Should Judge Allan have recused herself under the appearance of fairness doctrine?

STATEMENT OF THE CASE



(Trial RP 456, ll. 13-14; RP 1080, ll. 2-3)

Prior to October 31, 2004 Aiden lived with his mother, Yolanda Valdovinos. Her sisters, Rosa Gonzales and Wendy Crese, also lived with them. Bari Ikawa lived there part-time. Mr. DeVon moved in some time around Halloween of 2004. (Trial RP 193, l. 15 to RP 194, l. 11; RP 532, l. 10; RP 671, ll. 9-18)

Mr. DeVon and Yolanda were married on January 22, 2005. Aiden stayed with his maternal grandmother, Debra Garrison, from January 21 until the evening of January 25, 2005. (Trial RP 455, ll. 8-12; RP 459, ll. 6-7; RP 462, ll. 9-12)

Between January 25 and January 31 at 3:00 a.m. Aiden was seen by Ms. Garrison (bruising on face, burn on right cheek and scratches on January 30); Ms. Gonzales (no bite marks or injuries seen on January 27; bruises on forehead and side of face on January 29; saw swelling and bruising on forehead on January 30; burn mark and scrape on face and scratches on hands); Kenneth Roberts (no injuries seen on January 30); Joshua Corum (no injuries seen on January 25); Shad Cook; Craig Cook (injuries to hands, face and forehead after Aiden goes head first into a wood pile; observes same markings on forehead and cheeks on January 30); and Shane McDougall (does not notice any bruising on Aiden's face on January 29, but sees a bump and bruise on forehead). (Trial RP 225, ll. 16-21; RP 440, ll. 5-21; RP 463, l. 20 to RP 464, ll. 18-21; RP 534, l. 14 to RP 535, l. 7; RP 536, ll. 8-22; RP 542, ll. 1-8; RP 544, ll. 15-17; RP 545, ll. 2-3; RP 839, l. 14 to RP 840, l. 9; RP 840, ll. 13-14; RP 846, ll. 4-13; RP 945, ll. 1-4; RP 946, ll. 14-22; RP 950, ll. 3-5; ll. 18-20).

Ms. DeVon worked at the hospital on January 28, 29 and 30. Mr. DeVon and Ms. DeVon's sisters were caring for Aiden on these dates. (Trial RP 1503, ll. 4-6; ll. 15-17; RP 1515, l. 22 to RP 1516, l. 2; RP 1618, ll. 8-16; RP 1625, ll. 1-4; RP 1634, l. 23 to RP 1636, l. 8)

While at work on January 29 Ms. DeVon made the comment "if you [saw] Aiden, you would think we beat him up." It was an off-hand comment referring to a bruise on Aiden's face. (Trial RP 237, ll. 14-19; RP 238, ll. 4-9; RP 590, l. 13 to RP 591, l. 4)

Ms. DeVon also made a statement to Ms. Ikawa about Aiden having a bad accident on January 28 when he was with Mr. DeVon. (Trial RP 676, ll. 13-21)

Ms. DeVon was late for work on January 30. She told her co-workers that Aiden had been vomiting. She went home twice during the day to take medicine and burn cream for Aiden. (Trial RP 167, ll. 11-18; RP 234, ll. 6-7; ll. 15-17; RP 234, l. 22 to RP 235, l. 1; RP 235, l. 22 to RP 236, l. 21; RP 792, ll. 4-10; RP 813, ll. 5-15; RP 1511, ll. 2-7; RP 1516, ll. 5-7; ll. 15-17; RP 1516, l. 21 to RP 1517, l. 8)

It was flu season and many of the children at the hospital were vomiting in their rooms and the hallways. (Trial RP 240, l. 20 to RP 241, l. 3; 1514, ll. 1-5)

Ms. Gonzales was also sick and vomiting during this time period. (Trial RP 1515, ll. 1-6)

Mr. and Mrs. DeVon rushed Aiden to North Valley Hospital on January 31, 2005. Upon arrival at the emergency room (ER) Aiden was limp in Ms. DeVon's arms. He appeared to be in full cardiac arrest due to his coloring, the fact that his eyes were fixed and dry, he was cold to the touch and there was dried mucous in his mouth. (Trial RP 710, ll. 3-19;

RP 712, ll. 13-22; RP 713, ll. 14-17; RP 977, ll. 13-21; RP 1529, ll. 8-9; ll. 12-21)

Information provided to the hospital staff at North Valley Hospital, and later at Sacred Heart Hospital, established that Aiden had either fallen from a wood pile or fallen into a wood pile and/or both. He had been vomiting the day before. There was some indication that he had burned himself on a stove. Ms. DeVon also believed Aiden may have swallowed something. (Trial RP 276, ll. 18-20; RP 714, ll. 3-22; RP 1007, ll. 5-14; RP 1008, ll. 13-17; RP 1008, l. 20)

Dr. Welton was the on-call ER physician at North Valley Hospital on January 31. His initial impression upon seeing Aiden was that he was dead. (Trial RP 755, ll. 2-8; RP 759, ll. 10-15)

Dr. Welton observed a cluster of bruises on Aiden's forehead (stacked on top of each other). He saw strange burns or skin injuries on Aiden's face running from the corner of the mouth back across each cheek. There were burns on his thighs. (Trial RP 760, ll. 9-22; RP 761, ll. 1-3; ll. 5-7)

Jaime Dahlquist, the clinical nurse manager at North Valley Hospital, was called into the ER. She said Aiden looked as if he had fallen down a flight of concrete stairs or been ejected in a motor vehicle accident. (Trial RP 249, ll. 12-16; RP 259, ll. 11-20; RP 260, ll. 16-22)

Medical personnel had the opportunity to see both Mr. and Mrs. DeVon. They were described as distraught, upset, crying, and trying to

comfort one another. (Trial RP 295, ll. 10-19; RP 509, ll. 2-3; RP 767, ll. 1-2; RP 980, ll. 10-11; RP 984, ll. 8-19)

After Aiden was transported to Sacred Heart Hospital he was seen by Dr. Hendrickson and Dr. Shea. They were called in as consultants. Dr. Hendrickson is a pediatrician specializing in pediatric child abuse/neglect. Dr. Shea is a pediatric ophthalmologist. (Trial RP 323, ll. 2-3; RP 324, ll. 16-18; RP 332, ll. 16-18; RP 333, l. 8; RP 396, ll. 21-22; RP 401, ll. 2-11)

Dr. Hendrickson described his examination of Aiden as limited in nature. This was due to what he believed to be a terminal condition. His findings included: severe retinal hemorrhages in Aiden's eyes; severe bruising, scrapes, burns and bite marks; and a subdural hematoma per a CT scan. There was bruising all over Aiden's body. (Trial RP 334, ll. 9-14; RP 336, ll. 1-11; ll. 13-18; RP 339, ll. 17-22; RP 340, ll. 1-10; RP 339, ll. 12-14)

It was Dr. Hendrickson's opinion that the brain injury was fatal. The other injuries were not life-threatening. The burn marks were superficial. (Trial RP 351, l. 19 to RP 352, l. 17)

Dr. Shea observed bruising around Aiden's forehead. His eyelids were partially open and the corneas somewhat dried. She saw diffuse and extensive retinal hemorrhages of different types. There were too many to count. (Trial RP 404, ll. 2-9; ll. 12-13)

Dr. Shea indicated that the only time she had previously seen that degree of retinal hemorrhaging was in non-accidental trauma. She stated

she could not tell if the retinal hemorrhaging was from a single incident; but it was at least one (1) day old. (Trial RP 411, ll. 12-14; RP 414, ll. 3-5; RP 420, l. 6 to RP 421, l. 15)

Dr. MacDonald, a pediatric neurologist at Sacred Heart Hospital, examined Aiden on January 31. He viewed the CT scan of the subdural hematoma and observed swelling of the brain. He described a focal injury to the right side of the brain in the area of the brain stem. (Trial RP 607, ll. 10-11; RP 611, ll. 20-22; RP 618, ll. 8-10; ll. 14-17; RP 619, l. 22; RP 622, l. 7 to RP 623, l. 11)

X-rays were taken in addition to the CT scan. No fractures were found. (Trial RP 627, ll. 4-7)

It was Dr. MacDonald's opinion that the bruising on Aiden's face occurred at different times. The head injury would have resulted in immediate unconsciousness. There was no chance of Aiden regaining consciousness. (Trial RP 630, ll. 2-6; RP 641, ll. 8-12)

On cross-examination Dr. MacDonald conceded that a closed head injury may cause vomiting and breathing problems. It would be difficult to diagnose without a radiographic examination. A closed head injury can get progressively worse. (Trial RP 647, l. 2 to RP 648, l. 12)

Dr. Ross, a deputy medical examiner for Spokane County, conducted Aiden's autopsy on February 2. (Trial RP 1071, l. 15; RP 1075, ll. 14-16; RP 1080, l. 11)

The autopsy revealed the following:

1. Ten (10) to fifteen (15) contusions/bruises scattered across the forehead, scalp and upper eyelids;

2. Seven (7) abrasions approximately in the same area;

3. Contusions, scrapes and a bruise on the right cheek;

4. Contusions, scrapes, bruises and either a burn mark or deep fingernail gouge to the left cheek;

5. Mottled bruise on the back of the head;

6. Bruising on the chest on the outside of the nipples;

7. Bruising on the left groin area;

8. Bruises on each side of the hipbones;

9. A burn and bruising on the left leg and right thigh similar in shape/size to those on his face;

10. Bite mark on left calf;

11. Scrapes and bruising on hands, arms and elbows;

12. One (1) bite mark on the left arm;

13. Bruising on the back and buttocks;

14. A hematoma of the mesentery of the small intestine at the approximate level of the belly button;

15. A hematoma near the kidneys where the rib cage ends;

16. Bruises on the left lung;

17. Subarachnoid hemorrhages at the right rear of the brain;

18. Diffuse swelling of the brain;

19. Hemorrhaging of the nerve sheath around the optic nerve and of the retina; and

20. Stress-related involution of the thymus gland.

(Trial RP 1087, ll. 6-21; RP 1088, ll. 10-15; RP 1088, l. 18 to RP 1089, l. 12; RP 1089, ll. 15-21; RP 1090, ll. 7-22; RP 1091, ll. 8-9; ll. 13-15; RP 1091, l. 19 to RP 1092, l. 7; RP 1092, l. 14 to RP 1093, l. 8; RP 1094, ll. 3-6; RP 1084, l. 18 to RP 1095, l. 19; RP 1095, l. 21 to RP 1096, l. 22; RP 1098, l. 7-14; RP 1099, ll. 1-8; RP 1104, ll. 5-7; ll. 13-14; RP 1105, ll. 7-17; RP 1106, l. 2; RP 1111, l. 17 to RP 1112, l. 11; RP 1113, ll. 17-21; RP 1133, ll. 2-22; RP 1142, l. 8 to RP 1143, l. 21)

Dr. Ross indicated that the brain injury was due to blunt force trauma to the head. An iron stain test on the subdural hematoma was negative. This means the injury was less than seventy-two (72) hours old. The seventy-two (72) hours would be back-dated as of February 2. (Trial RP 1122, ll. 9-12; RP 1125, l. 10 to RP 1126, l. 2; RP 1127, ll. 2-10)

Dr. Ross' conclusion was death by homicide due to blunt force trauma to the head. (RP 1148, l. 8 to RP 1149, l. 4)

Aiden's medical records indicate no prior history of any type of abuse. (Trial RP 772, ll. 12-16; RP 773, ll. 3-7; RP 780, ll. 12-16)

In addition to the examining physicians, consulting physicians, and Dr. Ross, Aiden's medical records were submitted to Dr. Plunkett, an infant head injury consultant; as well as Dr. Griest, a forensic pathologist

and consultant. (Trial RP 1208, ll. 17-19; RP 1209, l. 8 to RP 1211, l. 8; RP 1343, ll. 1-22)

Drs. Plunkett and Griest both concluded that Aiden was a battered child. However, they opined that his head injury could have been accidental. (Trial RP 1220, ll. 2-9; RP 1222, ll. 6-10; RP 1259, l. 17 to RP 1260, l. 3; RP 1260, l. 6 to RP 1261, l. 1; RP 1261, l. 12 to RP 1262, l. 3; RP 1293, ll. 7-14; RP 1308, l. 22 to RP 1309, l. 9; RP 1357, ll. 1-9; ll. 14-15; RP 1371, l. 15 to RP 1372, l. 5; RP 1401, ll. 9-12)

Mr. and Mrs. DeVon were arrested on February 25, 2005. (Trial RP 1423, ll. 7-12)

Mr. and Mrs. DeVon were originally charged by separate Informations. A motion to join the cases for trial was granted on April 19, 2005. (CP 650; 04/19/05 RP 27, ll. 21-22)

An Amended Information was filed on August 18, 2005 charging the DeVons with first degree murder by extreme indifference; or alternatively, homicide by abuse. Both principal and accomplice liability were included as part of the charging language. (CP 638)

Numerous motions were argued on November 15, 2005. A motion to dismiss first degree murder by extreme indifference was granted. The motion to dismiss homicide by abuse was denied. The State's motion to amend the Information to add a count of premeditated first degree murder was taken under advisement. It was later denied on December 19, 2005.

(11/15/05 RP 7, l. 2 to RP 9, l. 20; RP 22, ll. 11-12; RP 23, l. 18 to RP 24, l. 22; RP 56, ll. 2-4; RP 57, ll. 1-2; RP 73, l. 1; 12/19/05 RP 15, ll. 14-16)

Judge Allan declined to recuse herself. She had presided at the shelter care hearing involving the DeVons daughter. Judge Allan had seen photographs of Aiden. She had entered Findings of Fact and Conclusions of Law addressing Aiden's injuries. (11/15/05 RP 13, ll. 1-10; ll. 19-21; RP 14, ll. 17-22)

Judge Allan declined to dismiss the homicide by abuse charge when the DeVons challenged the constitutionality of RCW 9A.32.055. (01/05/06 RP 18, ll. 1-2; 01/12/06 RP 80, ll. 2-8; RP 81, ll. 7-21)

Jury *voir dire* commenced the morning of January 10, 2006 and continued throughout the day on January 11. Initially the *voir dire* was of individual jurors in chambers. The judge, the court reporter, the court clerk, defense counsel and the DeVons were present. After individual *voir dire* was concluded the Court reconvened in the courtroom to complete the *voir dire* process. (01/10/06 RP 1 *et seq.*; 01/11/06 RP 1, *et seq.*)

Testimony established that:

(1). Mr. DeVon and Aiden appeared to have a good relationship. Mr. DeVon took good care of him. (Trial RP 448, ll. 20-22; RP 449, ll. 1-9)

(2). Mr. DeVon and Aiden were inseparable. (Trial RP 433, ll. 14-20)

(3). Aiden always wanted to be with Mr. DeVon when he left the house. He often would not eat his meals until Mr. DeVon returned home. (Trial RP 548, ll. 19-22; RP 549, ll. 16-20)

(4). The relationship between Mr. DeVon and Aiden was described as loving. (Trial RP 501, ll. 11-18; RP 656, ll. 20-21)

(5). The interaction between Mr. DeVon and Aiden was awesome. When Mr. DeVon came home no one else mattered to Aiden. (Trial RP 685, ll. 18-21; RP 686, ll. 6-16)

Defense counsel failed to object to Dr. MacDonald's testimony that it was his opinion that there was "no good story" to explain Aiden's injuries. (Trial RP 642, l. 18)

Defense counsel failed to object when Detective Sloan, who is the prosecuting attorney's brother, described when the DeVons left their residence in early February as moving the "smoking gun." (Trial RP 1025, ll. 10-13; RP 1027, ll. 10-15; RP 1035, l. 20 to RP 1036, l. 5; RP 1036, ll. 7-10)

Defense counsel failed to object during the prosecuting attorney's cross-examination of Dr. Plunkett when an inquiry was made about his review of the investigative reports. The question related to concern expressed in the reports by other individuals that Aiden's death was wrongful. (Trial RP 1278, ll. 3-21)

The jury found Mr. DeVon guilty of homicide by abuse. (CP 359)

Judgment and Sentence was entered on February 16, 2006. Mr. DeVon filed his Notice of Appeal the same day. (CP 328; CP 329)

SUMMARY OF ARGUMENT

Mr. DeVon's right to a public trial under the Sixth Amendment to the United States Constitution and Const. art. I, §§ 10 and 22 was violated when the trial court allowed individual jury *voir dire* in chambers.

Failure of defense counsel to object to the closure proceedings does not constitute a waiver of Mr. DeVon's constitutional rights.

The evidence was insufficient to establish a "pattern" or "practice" of abuse which is a requisite element of homicide by abuse.

Defense counsel's failure to object to highly prejudicial testimony (1) allowed improper innuendo and rumor to be introduced, (2) implied that evidence was destroyed by Mr. DeVon, and (3) placed an imprimatur of expert opinion on pure speculation.

A judge sitting on both a criminal trial and a dependency/shelter care proceeding should be disqualified from either or both cases under the appearance of fairness doctrine.

ARGUMENT

A. *VOIR DIRE*

The Sixth Amendment to the United States Constitution states, in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ...."

Const. art. I, § 10 provides: "Justice in all cases shall be administered openly, and without unnecessary delay."

Const. art. I, § 22 states, in part: "In criminal prosecutions the accused shall have the right ... to have a speedy public trial ...."

Mr. DeVon's constitutional right to a public trial was violated when the trial court allowed individual *voir dire* of potential jurors in chambers. The presence of the judge, the court clerk, a court reporter, Mr. and Mrs. DeVon, the prosecuting attorney, and the defense attorneys does not constitute a public and open proceeding. *See: In re Personal Restraint of Orange,* 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004); *State v. Brightman,* 155 Wn.2d 506, 517, 122 P.3d 150 (2005); *State v. Easterling,* 157 Wn.2d 167, 179-82, 137 P.2d 825 (2006).

Initial mention that *voir dire* might be conducted in chambers occurred at a pre-trial hearing on December 19, 2005. Ms. Devon's attorney raised the issue. The Court then discussed weeding out those jurors who might have opinions about the case prior to conducting *voir dire* of the entire panel. (12/19/05 RP 27, l. 16 to RP 29, l. 3)

The next mention of *voir dire* occurred at a status conference on January 5, 2006. (01/05/06 RP 162, ll. 20-22)

When Court convened on January 10 the record indicates that individual juror questioning immediately commenced with juror number one. It proceeded the rest of the day. The individual questioning of all members of the jury venire was completed on January 11.

> ... [T]o protect a defendant's article I, section 22 constitutional right to a public trial, a trial court faced with a closure request must apply the "strict, well-defined standard" previously prescribed to protect the public's article I, section 10 right to open proceedings. [*State v. Bone-Club,* 121 Wn.2d 254, 258, 906 P.2d 325 (1995)]; WASH. CONST. art. I, § 10 (providing that "[j]ustice in all cases shall be administered openly"); *See Federated Publ'ns, Inc. v. Kurtz,* 94 Wn.2d 51, 62-64, 615 P.2d 440 (1980), (balancing defendant's and public's competing constitutional interest by applying five "workable guidelines" drawn from "principles suggested" in *Gannett Co. v. DePasquale,* 443 U.S. 368, 400-03, 99 S. Ct. 2898, 61 L. Ed.2d 608 (1979) (Powell, J., concurring)); ....

Personal Restraint of Orange, supra, 805.

The trial court did not comply with the constitutional mandate that Mr. DeVon's trial be a public trial. The trial court did not engage in the five (5) step process required to effect closure of a trial to the public. The five (5) steps are:

> "1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a

> right other than an accused's right to a fair trial, the proponent must show a 'serious and imminent threat' to that right.
>
> 2. Anyone present when the closure motion is made must be given the opportunity to object to the closure.
>
> 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
>
> 4. The court must weigh the competing interests of the proponent of closure and the public.
>
> 5. The order must be no broader in its application or duration than necessary to serve its purpose."

State v. Brightman, supra, 515, *citing State v. Bone-Club, supra,* at 256.

The trial court appeared to be concerned with pre-trial publicity and potential contamination of the jury panel if any individual juror inadvertently blurted out a prejudicial opinion and/or information. No other concern is discernible.

> Whether a criminal accused's constitutional public trial right has been violated is a question of law, subject to de novo review on direct appeal.

State v. Easterling, supra, 173-74, *citing State v. Bone-Club,* 128 Wn.2d at 256.

In discussing the right to public trial in a *de novo* context the *Easterling* Court went on to say at 174-75:

> This court has **strictly** watched over the accused's and the public's right to open public criminal proceedings. As we plainly stated in *Bone-Club,* "[a]lthough the public trial right may not be absolute, protection of

> this basic constitutional right clearly calls for a trial court to *resist a closure motion except under the most unusual circumstances.*" ...

(Emphasis supplied.)

The trial court did not analyze the closure factors. The trial court did not resist closure.

Mr. DeVon asserts that there was no compelling interest to exclude the public during *voir dire.* "[T]he right to a public trial ... extends to jury selection." *State v. Brightman, supra,* 515, *citing In re Personal Restraint of Orange,* 152 Wn.2d at 804. The *Orange* Court, citing *Waller v. Georgia,* 467 U.S. 39, 45-47, 104 S. Ct. 2210, 81 L. Ed.2d 31 (1984) stated at 806:

> "'The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. **The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.'"** *Waller,* 467 U.S. at 45 (quoting *Press-Enter. Co. v. Superior Court of Cal.,* 464 U.S. 501, 510, 104 S. Ct. 819, 78 L. Ed.2d 629 (1984)).

The trial court did not enter findings with regard to closing *voir dire.* The absence of the required specific findings precludes effective review by the appellate court.

Nevertheless, Mr. DeVon asserts that the trial court's non-compliance provides more than a sufficient basis for reversing his

conviction and remanding the case for a new trial. *See: State v. Brightman, supra,* 518.

As the *Brightman* Court stated at 515-16:

> ... [A] closed jury selection process harms the defendant by preventing his or her family from contributing their knowledge or insight to jury selection and by preventing the venire from seeing the interested individuals. *Orange,* 152 Wn.2d at 812. Thus, in order to support full courtroom closure during jury selection, a trial court **must** engage in the *Bone-Club* analysis; failure to do so results in a violation of the defendant's public trial rights.

(Emphasis supplied.)

The appellate court must look to the transcript in order to determine whether or not the closure order is valid. *See: In re Personal Restraint of Orange, supra,* 807-08.

The State has the burden of overcoming the presumption that the courtroom was closed to the public. *See: State v. Brightman, supra,* 516.

Mr. DeVon's failure to lodge a contemporaneous objection to the trial court's closure of individual *voir dire* does not constitute a waiver of his rights under the Sixth Amendment, or Const. art. I, §§ 10 and 22. *See: State v. Brightman, supra,* 517.

Moreover, the third factor does not appear to have even been considered by the trial court. Mr. DeVon asserts that the least restrictive means of conducting the *voir dire* would have been to bring the individual jurors into open court from another room.

Finally, Mr. DeVon points out the similarity of the time frame in his case and the *Orange* case. As the *Orange* Court stated at 808:

> For that period of time, which amounted to more than half of the total time spent on voir dire, no friends or family members, no reporters, and no other spectators were in the courtroom. In sum, by the plain language of its ruling, the court ordered a *permanent,* full closure of voir dire, and that ruling effected, at a minimum, a *temporary,* full closure, the precise type of closure to which the *Bone-Club* court applied the five, well-settled guidelines.

Mr. DeVon urges the court to reverse his conviction and remand his case for a new trial.

B. RCW 9A.32.055

RCW 9A.32.055(1) defines homicide by abuse as follows:

> A person is guilty of homicide by abuse if, under circumstances manifesting an extreme indifference to human life, the person causes the death of a child or person under sixteen years of age ... **and** the person **has previously engaged in a pattern or practice of assault or torture of said child ....**

(Emphasis supplied.)

The Legislature has not seen fit to define the words "pattern" or "practice". It has not defined the words "assault" or "torture".

Caselaw has supplied the missing definitions.

> ... "[T]orture" means "to cause intense suffering to: inflict anguish on: subject to severe pain." WEBSTER'S ....

> The word "pattern" is defined as "'a regular, mainly unvarying way of acting or doing [behavior patterns],' and 'practice' is defined as 'a frequent or usual action; habit; usage.'" ... WEBSTER'S ....

State v. Madarash, 116 Wn. App. 500, 514, 66 P.3d 682 (2003).

The word "assault" is given its common law definition. *State v. Krup,* 36 Wn. App. 454, 676 P.2d 507 (1984).

ER 406 provides, in part:

> Evidence of the habit of a person ... whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person ... on a particular occasion was in conformity with the habit or ... practice.

The State tried to establish that Mr. DeVon was in the habit or practice of abusing Aiden. No person ever saw Mr. DeVon abuse Aiden.

Ms. DeVon indicated that she never saw Mr. DeVon mistreat Aiden. (Trial RP 1571, ll. 9-15)

The issue for jury consideration was whether or not Aiden was intentionally or accidentally injured.

Some of Aiden's injuries were necessarily attributable to his trip and fall into the wood pile. This was seen by Craig Cook and corroborated Mr. DeVon's testimony.

The fall from the wood pile was corroborated by the testimony of multiple witnesses who described Aiden as an active child who would run and jump off furniture and other objects.

Mr. DeVon asserts that the medical testimony was misinterpreted both by the prosecuting attorney and the jury. When viewed carefully there is no doubt that Aiden's fatal injury occurred between January 30 at midnight and January 31 at 3:00 a.m.

Dr. Ross specifically indicated that Aiden's injuries were less than seventy-two (72) hours old from the date of cardiac death on February 2. (Trial RP 1125, l. 10 to RP 1126, l. 2; RP 1127, ll. 2-10)

"The homicide by abuse statute's reference to a 'pattern or practice' requires proof of a series of assaultive acts – a continuing course of conduct – not a single incident." *State v. Russell,* 69 Wn. App. 237, 249, 848 P.2d 743 (1993).

The cases that have previously considered the homicide by abuse statute differ significantly from Mr. DeVon's case.

In *State v. Berube,* 150 Wn.2d 498, 79 P.3d 1144 (2003), numerous witnesses described abusive behavior which they personally observed over an extended period of time.

Witnesses described seeing multiple incidents of abusive behavior toward a child for a period of five (5) years in *State v. Madarash, supra.*

In *State v. Russell, supra,* medical records were introduced to establish a history of abuse. The child had been removed by CPS on one occasion.

Mr. DeVon asserts that the statutory language is clear. The statutory language is in the conjunctive. There must be evidence both of

current abuse **and** a previous history of abuse in order to meet the "pattern or practice" element of the offense. It is completely absent in his case.

The blunt impact to the head causing the subdural hematoma was the immediate cause of Aiden's death. Dr. Hendrickson specifically stated that this type of injury would cause symptoms immediately or within hours as opposed to days. (Trial RP 361, l. 9 to RP 362, l. 10)

Dr. Shea was adamant that the injury occurred at least twenty-four (24) hours prior to her seeing Aiden. (Trial RP 420, l. 6 to RP 421, l. 15)

Dr. MacDonald clearly was of the opinion that the head injury would cause immediate unconsciousness. (Trial RP 641, ll. 8-123)

These combined medical opinions reflect a blunt force injury occurring in a twenty-four (24) hour time period. This injury does not fit the parameters of RCW 9A.32.055.

C. INEFFECTIVE ASSISTANCE

Defense counsel failed to object at critical stages of the testimony. Mr. DeVon asserts that a timely objection would have been sustained. It could then have been stricken from the testimony with a cautionary instruction to the jury to disregard it.

The objectionable testimony occurred through various witnesses as indicated below:

Dr. MacDonald (direct) -

A. Very much so. The child presented with severe brain injury. **No good story to explain it. ...**

(Trial RP 642, ll. 17-18)

Detective Sloan (direct) -

... And so our feeling at the time was that they started moving things so shortly after that if there's anything -- **a smoking gun** to use an example, was probably moved ....

(Trial RP 1036, ll. 7-10) (Emphasis supplied.)

Dr. Plunkett (cross-examination by prosecutor) -

Q. Now I -- also indicates concern expressed by others of the child's death is a wrongful death.

A. Yes. I agree with that.

...

Q. And you indicated that you had read the reports in this case --

A. -- that I had not read --

Q. -- that you had read the reports -- the police reports.

A. Yes.

Q. And so you were aware of concern about the delay in bringing this child to the hospital?

A. Yes.

Q. **You were aware also of numerous witnesses who indicated they had concerns about his death being death by abuse or beating?**

A. **Yes.**

(Trial RP 1278, ll. 3-5; ll. 9-21) (Emphasis supplied.)

> To prove that failure to object rendered counsel ineffective, Petitioner must show that not objecting fell below prevailing professional norms, that the proposed objection would likely have been sustained, and that the result of the trial would have been different if the evidence had not been admitted. To prevail on this issue, Petitioner must rebut the presumption that counsel's failure to object "can be characterized as *legitimate* trial strategy or tactics." Although deliberate tactical choices may constitute ineffective assistance of counsel if they fall outside the wide range of professsional competent assistance, "exceptional deference must be given when evaluating counsel's strategic decisions."

Personal Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004) *citing State v. McNeal,* 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (Emphasis added).

Dr. Plunkett's testimony resulted in the introduction of rumor and innuendo from the community as contained in the police reports. A jury, hearing that other members of the public (who are not witnesses) have concerns that Aiden's death was not accidental, would obviously be influenced when reviewing Mr. DeVon's testimony.

Detective Sloan's testimony concerning a "smoking gun" implied that Mr. DeVon or someone else had concealed potential evidence.

Dr. MacDonald's testimony that there was "no good story" to explain the injuries was an expert opinion on guilt. *See: In re Detention of Aqui,* 84 Wn. App. 88, 929 P.2d 436 (1996) (testimony that a defendant meets the statutory definition of sexually violent predator was error, though harmless); *State v. Florczak,* 76 Wn. App. 55, 882 P.2d 199 (1994) (testimony that a child exhibiting post-traumatic stress syndrome is consistent with a child who suffered sexual abuse inadmissible and a comment upon guilt); *State v. Black,* 109 Wn.2d 336, 745 P.2d 12 (1987) (testimony that victim suffered rape trauma syndrome objectionable as an opinion upon guilt).

Mr. DeVon argues that taken independently the particular testimony may not have impacted a juror's thought process. However, taken together, the testimony painted Mr. DeVon as fabricating a story and hiding evidence, while letting rumor and innuendo do their devious work.

D. RECUSAL OF JUDGE

Judge Allan should have recused herself when the motion was made.

> Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned. MODEL CODE OF JUDICIAL CONDUCT Canon 3(D)(1) (1999). The party moving for recusal must demonstrate prejudice on the judge's part. *In re Marriage of Farr,* 87 Wn. App. 177, 188, 940 P.2d 679 (1997). Recusal is within the sound discretion of the trial court. *Wolfkill Feed & Fertilizer Corp. v. Martin,* 103 Wn. App. 836, 840, 14 P.3d 877 (2000).

Parentage of J.H., 112 Wn. App. 486, 496, 49 P.3d 154 (2002).

Mr. DeVon urges the Court to rule on this issue so that it does not reoccur when his case is remanded for a new trial.

Mr. DeVon asserts that Judge Allan's impartiality can be reasonably questioned since she was sitting contemporaneously on a dependency/shelter care proceeding involving Mr. DeVon's daughter. She was privy to information from the criminal proceedings as well as the dependency proceedings.

Even though there is no substantial record concerning what evidence was introduced at the dependency proceedings, Judge Allan had seen photographs of Aiden and had ruled that Mr. DeVon's daughter be placed in shelter care. He was denied access to her. (02/16/06 RP 49, ll. 4-8)

"A purpose of the appearance of fairness doctrine is to prevent a person who is potentially interested or biased from participating in the decision-making process." *City of Hoquiam v. Public Employment Relations Comm'n,* 97 Wn.2d 481, 488, 646 P.2d 129 (1982).

Judge Allan's exposure to information in the dependency/shelter care proceeding had the potential of influencing her decision-making process in the criminal proceedings.

When this case is remanded for a new trial Judge Allan should be directed to recuse herself.

CONCLUSION

Mr. DeVon's constitutional right to a public trial was denied. The violation of the Sixth Amendment and Const. art. I, §§ 10 and 22 requires a reversal of his conviction and remand for a new trial.

The trial court's failure to conduct the *Bone-Club* analysis precludes effective appellate review. The constitutional violation is obvious and prejudicial.

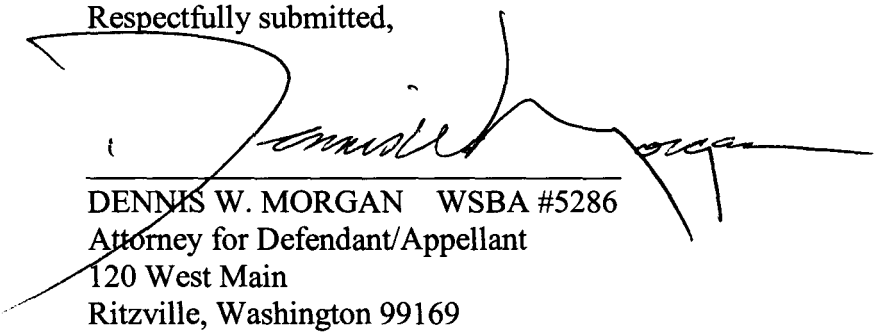
The evidence presented concerning homicide by abuse was insufficient to support the element that Mr. DeVon had "previously engaged in a pattern or practice" of physically abusing Aiden.

Defense counsel was ineffective when he failed to object to critical testimony which was highly prejudicial to Mr. DeVon's case.

Judge Allan should be directed to recuse herself upon reversal and remand of this case.

DATED this 29th day of November, 2006.

Respectfully submitted,



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