No. 92847-9
COA No. 71193-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CARRI WILLIAMS,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR SKAGIT COUNTY

The Honorable Susan K. Cook

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Carri Williams asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Carri Darlene Williams*, No. 71193-8-I (December 21, 2016). A copy of the decision is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. A trial court violates a defendant's right to present a defense when it bars the defendant from presenting witnesses on the defendant's behalf. The remedy for the late disclosure of a witness is to allow the other party the opportunity to interview this witness. Here, the defense admittedly committed a discovery violation in failing to timely disclose an expert witness, but the trial court excluded the witness as the remedy for the discovery violation. Is a significant question under the United States and Washington Constitutions presented where the trial court's order denied Ms. Williams her right to

present a defense thus necessitating reversal of her convictions and remand for a new trial?

2. A trial court must declare a mistrial where nothing short of a new trial could cure the prejudice suffered by the defendant. Based upon the State's misconduct involving its own witness, the trial court struck the witness's testimony. But, the prejudice suffered by Ms. Williams from this misconduct could not be cured by the court's elected remedy. Is an issue of substantial public interest that should be determined by this Court presented where the trial court erred in failing to declare a mistrial for the State's egregious misconduct?

3. A prosecutor commits misconduct during closing argument where he expresses a personal opinion. Here, the prosecutor twice expressed his personal opinion, and in both instances the court sustained the defense objection. Is a significant question of law under the United States and Washington Constitutions involved where the prosecutor engaged in improper argument after being warned?

4. A statutory term is unconstitutionally vague where it fails to provide ascertainable standards of guilt to protect against arbitrary enforcement. Here, the terms "torture" and "extreme indifference to human life" were unconstitutionally vague as applied to Ms. Williams

where her defense rested on parental discipline and where the trial court failed to define these terms despite a request to do so. Is a significant issue under the United States and Washington Constitutions involved where Ms. Williams' convictions rested on unconstitutionally vague terms?

5. The trial court must exclude expert testimony where the testimony would not be helpful to the jury. Where the term "torture" is a term of common understanding, did the trial court err in allowing expert testimony on torture, requiring reversal of Ms. Williams' convictions?

6. Due process requires the State to prove every essential element of an offense beyond a reasonable doubt. To prove homicide by abuse, the State must prove the victim was under the age of 16. The evidence at trial established H.W. could have been anywhere from 13 years to 19 years of age, but there was insufficient evidence presented that H.W. was under the age of 16. Is Ms. Williams entitled to reversal of her conviction for homicide by abuse with instructions to dismiss?

7. To prove first degree assault of a child, the State was required to prove I.W. suffered substantial bodily harm. The State unsuccessfully attempted to prove that Ms. Williams caused scars on

I.W.'s back despite evidence that I.W. had these scars before the Williams adopted him. Is Ms. Williams entitled to reversal of her conviction for first degree assault of a child with instructions to dismiss?

D. STATEMENT OF THE CASE

A statement of the facts can be found in the Brief of Appellant at pages 6-14, and the Court of Appeals decision at pages 2-6.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

1. **The exclusion of Dr. Bartelink's testimony infringed Ms. Williams' right to present a defense.**

A defendant has a constitutionally protected right to present a defense. U.S. Const. Amend. VI; *Holmes v. South Carolina,* 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006); *State v. Franklin,* 180 Wn.2d 371, 377, 325 P.3d 159 (2014). "[T]he Constitution prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote[.]" *Holmes*, 547 U.S. at 326.

A defendant's right to present relevant evidence may be limited by "the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the trial." *State v. Darden,* 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). "[T]he State's interest to exclude prejudicial

evidence must be balanced against the defendant's need for the information sought, and only if the State's interest outweighs the defendant's need can otherwise relevant information be withheld." *Darden,* 145 Wn.2d at 622. If the evidence is of high probative value, "it appears [that] no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22." *State v. Hudlow,* 99 Wn.2d 1, 16, 659 P.2d 514 (1983).

Finally, and most importantly here, the evidence sought to be admitted by the defendant need only be of "minimal relevance." *State v. Jones,* 168 Wn.2d 713, 720, 230 P.3d 576 (2010). "The threshold to admit relevant evidence is low, and even minimally relevant evidence is admissible." *State v. Gregory,* 158 Wn.2d 759, 835, 147 P.3d 1201 (2006). To be relevant, the evidence need provide only "a piece of the puzzle." *Bell v. State,* 147 Wn.2d 166, 182, 52 P.3d 503 (2002).

Evidence may be excluded when exclusion is the *only* effective remedy. *State v. Hutchinson,* 135 Wn.2d 863, 881-83, 959 P.2d 1061 (1998).

The Court of Appeals ruled that two of the *Hutchinson* factors supported exclusion of Dr. Bartelink, while two did not. Decision at 12.

The Court nevertheless ruled that the trial court's act of excluding Dr. Bartelink was proper. *Id.*

There were only two issues for the jury to determine at trial; what or who caused H.W.'s death, and whether H.W. was 16 years or younger at the time of her death. The trial court's exclusion of Dr. Bartelink deprived the defense of the only expert who could have testified with any degree of medical certainty that H.W. could not have been younger than 15 years of age, thus rebutting not merely Wondetsadik's testimony, which was the essence of the trial court's ruling, but also that of Dr. Roesler as well. This later fact is of great importance because the trial court ruled that Dr. Bartelink's testimony was only relevant to rebut Wondetsadik's testimony. This was simply wrong since it also rebutted the testimony of Roesler, who the State relied on heavily on appeal in arguing there was sufficient evidence for the jury to find H.W. was under 16 years of age.

Finally, the actions of the State led to the necessity of Dr. Bartelink's testimony. The State did not disclose that Dr. Roesler would testify until just days before the commencement of the trial. 8/13/2013RP 11. Thus, prior to the State announcing that Roesler

would testify, and the need to rebut Wondetsidik's testimony, did the need arise for Dr. Bartelink's testimony.

The trial court was correct in its initial ruling that the remedy was to give the State an opportunity to interview Dr. Bartelink. The court prevented Ms. Williams from presenting her defense when it subsequently barred Dr. Bartelink from testifying. This Court must grant review and reverse Ms. William's convictions for a violation of her constitutionally protected right to present a defense and remand for a new trial.

2. **The only remedy that could cleanse the taint from the State's conduct involving Wondetsidik was a mistrial.**

A mistrial should be granted when an irregularity in the trial proceedings, viewed in light of all of the evidence, is so prejudicial as to deprive the defendant of a fair trial. *State v. Post,* 118 Wn.2d 596, 620, 826 P.2d 172, 837 P.2d 599 (1992). Courts consider several factors in determining whether a trial court has erred in refusing to grant a motion for mistrial: (1) the seriousness of the irregularity, (2) whether the challenged evidence was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the evidence. *State v. Escalona,* 49 Wn.App. 251, 254, 742 P.2d 190 (1987), *citing State v. Weber,* 99 Wn.2d 158,

165-66, 659 P.2d 1102 (1983). The decision to grant or deny a motion for a mistrial is reviewed for abuse of discretion. *State v. Rodriguez,* 146 Wn.2d 260, 269, 45 P.3d 541 (2002). The Supreme Court has stated that abuse of discretion will be found for denial of a mistrial only when "'no reasonable judge would have reached the same conclusion.'" *State v. Emery,* 174 Wn.2d 741, 765, 278 P.3d 653 (2012), *quoting State v. Hopson,* 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). Courts will overturn a trial court's denial of a mistrial motion when there is a "'substantial likelihood'" that the error affected the jury's verdict. *Rodriguez,* 146 Wn.2d at 269-70 (internal quotation marks omitted), *quoting State v. Russell,* 125 Wn.2d 24, 85, 882 P.2d 747 (1994).

The Court of Appeals ruled the trial court did not err when it denied the motion for a mistrial. Decision at 13-14. But this ruling ignores the fact that Wondetsadik's testimony was very powerful and very emotional. He testified that he was present when H.W. was born, cataloging her birth in the family bible with other family members. 8/19/2013RP 135-36, 150. He also testified about H.W.'s early life, including being raised by her father after her mother abandoned the family. 8/19/2013RP 137-38. Finally he related about the tragedy of

H.W.'s father's death and her placement in an orphanage from where she was adopted. 8/19/2013RP 143. Given this powerful and emotional testimony it is beyond pale that the jury would be able to cleanse this testimony from its memory. *See State v. Suleski*, 67 Wn.2d 45, 51, 406 P.2d 613 (1965) ("However, where evidence is admitted which is inherently prejudicial and of such a nature as to be most likely to impress itself upon the minds of the jurors, a subsequent withdrawal of that evidence, even when accompanied by an instruction to disregard, cannot logically be said to remove the prejudicial impression created."); *Escalona,* 49 Wn.App. at 255 ("no instruction can 'remove the prejudicial impression created {by evidence that} is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.'" (*quoting State v. Miles,* 73 Wn.2d 67, 71, 436 P.2d 198 (1968)).

The trial court erred in failing to declare a mistrial in light of this extremely powerful evidence. Striking Wondetsidik's testimony was not a sufficient remedy given his emotionally charged testimony. Finally, the curative instruction was not sufficient to remove the prejudice in light of the testimony. This Court should grant review and reverse Ms. Williams' convictions and remand for a new trial.

3. The prosecutor's misconduct during closing argument violated Ms. Williams' right to a fair trial.

Initially, the Court of Appeals ruled that Ms. Williams did not object to the improper argument, thus she waived any argument unless she could show the misconduct was flagrant and ill-intentioned. Decision at 15. But this ruling ignores the fact, that although she failed to object during the argument, Ms. Williams joined Mr. Williams in moving for a mistrial. 9/4/2013RP 61. Contrary to the Court of Appeals conclusion, this was sufficient to preserve the issue for appellate review. *State v. Lindsay*, 180 Wn.2d 423, 431, 326 P.3d 125 (2014).

The United States Supreme Court has stated that a prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). Because "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence," appellate courts must exercise care to

insure that prosecutorial comments have not unfairly "exploited the Government's prestige in the eyes of the jury." *United States v. Young*, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). Because the average jury has confidence that the prosecuting attorney will faithfully observe his or her special obligations as the representative of a sovereign whose interest "is not that it shall win a case, but that justice shall be done," his or her improper suggestions "are apt to carry much weight against the accused when they should properly carry none." *Berger,* 295 U.S. at 88.

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution as well as article I, section 22 of the Washington State Constitution. *Estelle v. Williams,* 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *In re Personal Restraint of Glasmann,* 175 Wn.2d 696, 703, 286 P.3d 673 (2012). Prosecutors are more than mere advocates or partisans, rather, they represent the People and act in the interest of justice. *State v. Fisher,* 165 Wn.2d 727, 746, 202 P.3d 937 (2009).

Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport,* 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). To prevail on a claim of prosecutorial

misconduct, the defendant must show both improper conduct and resulting prejudice. *State v. Thorgerson,* 172 Wn.2d 438, 442, 258 P.3d 43 (2011). To show prejudice the defendant must show that there was a substantial likelihood that the misconduct affected the jury verdict. *Id.*

The ultimate inquiry is not whether the error was harmless or not harmless, but rather whether the impropriety violated the defendant's due process rights to a fair trial. *Davenport*, 100 Wn.2d at 762.

Comments made by a deputy prosecutor constitute misconduct and require reversal where they were improper and substantially likely to affect the verdict. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). If the statements were improper, and an objection was lodged, courts then consider whether there was a substantial likelihood that the statements affected the jury. *Reed,* 102 Wn.2d at 145.

A prosecutor's expressions of personal opinion about the defendant's guilt or the witnesses' credibility are improper. *State v. Dhaliwal,* 150 Wn.2d 559, 577-78, 79 P.3d 432 (2003). Here, the prosecutor twice expressed his personal opinion about the evidence, the second time after having a defense objection sustained and a curative instruction given, thus being placed on notice that this conduct was

improper. As a consequence, the prosecutor was on specific notice that his personal opinion was improper. In spite of this admonishment, the prosecutor again expressed his personal opinion about the evidence. In light of the prosecutor's failure to heed the admonishment, the court's continued use of the curative instruction became ineffective in attempting to cure the prejudice.

A defendant establishes sufficient prejudice to require reversal by showing a substantial likelihood the misconduct affected the verdict. *Glasmann,* 175 Wn.2d at 704. In determining whether the misconduct warrants reversal, courts consider its prejudicial nature and cumulative effect. *State v. Boehning,* 127 Wn.App. 511, 518, 111 P.3d 899 (2005).

This matter was tried in an emotionally charged courtroom in which the trial court admonished the spectators to hold their impassioned outbursts during the closing argument. The prosecutor's argument took this fervor to a higher level by adding his personal opinion to the evidence, further tainting the jury. Given the nature of this trial and the fact the victims were children, it seems clear there was a substantial likelihood that the prosecutor's misconduct affected the jury's verdict. Accordingly, Ms. Williams is entitled to a new trial.

4. **The term "torture" was void for vagueness as applied to Ms. Williams' actions.**

Under the Fourteenth Amendment, a statute is unconstitutionally void for vagueness if it (1) does not define the criminal offense with sufficient definiteness so that ordinary people can understand what conduct is proscribed, or (2) provide ascertainable standards of guilt to protect against arbitrary enforcement. *City of Spokane v. Douglass,* 115 Wn.2d 171, 178, 795 P.2d 693 (1990). The vagueness doctrine is aimed at preventing the delegation of "basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford,* 408 U.S. 104, 108-09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

A statute that lacks standards and allows law enforcement to subjectively decide what conduct is proscribed or what conduct will comply with a restriction in any given case is unconstitutionally vague. *State v. Maciolek,* 101 Wn.2d 259, 267, 676 P.2d 996 (1984). A statute is unconstitutionally vague on this ground if it "'contain[s] no standards and allow[s] police officers, judge, and jury to subjectively decide what conduct the statute proscribes or what conduct will comply with a statute in any given case.'" *Douglass,* 115 Wn.2d at 181, *quoting Maciolek*, 101 Wn.2d at 267. The statute must "provide 'minimal

guidelines ... to guide law enforcement.'" *Douglass,* 115 Wn.2d at 181, *quoting State v. Worrell,* 111 Wn.2d 537, 544, 761 P.2d 56 (1988).

The constitutionality of a statute is reviewed *de novo*. *City of Spokane v. Neff,* 152 Wn.2d 85, 88, 93 P.3d 158 (2004).

The offenses of first degree assault of a child and homicide by abuse utilize the term "torture" to attempt to define the conduct alleged to be a violation of those offenses. The term "extreme indifference to human life" is also utilized in the homicide by abuse statute. The Court of Appeals ruled the term torture was not void for vagueness, citing *State v. Russell*, 69 Wn.App. 237, 247, 848 P.2d 743 (1993), and *State v. Brown*, 60 Wn.App. 60, 802 P.2d 803 (1990), *review denied*, 116 Wn.2d 1025, 812 P.2d 103 (1991), *disapproved on other grounds, State v. Grewe*, 117 Wn.2d 211, 219-90, 813 P.2d 1238 (1991). The *Brown* court found the term "torture" not to be unconstitutionally vague because it is a term of common understanding. *Brown*, 60 Wn.App. at 64-65. The *Russell* Court the appellate court ruled that the term "torture" was not vague because, although the term did not provide ascertainable and adequate standards of guilt the terms "pattern or practice of assault" in RCW 9A.32.055, and finding ascertainable and adequate standards as to those terms. *Id.* at 247.

Russell and Brown are simply not helpful in this matter. Here, the conduct of Ms. Williams was nowhere near as severe the defendants in *Russell* and *Brown*. All of the actions of Ms. Williams were conducted as corporal punishment of one's child, which this State has specifically authorized. *See* RCW 9A.16.100 ("the physical discipline of a child is not unlawful when it is reasonable and moderate and is inflicted by a parent, teacher, or guardian for purposes of restraining or correcting the child."). Further, the examples of conduct of a parent specifically listed in RCW 9A.16.100, which is deemed not to be proper discipline of a child, is unlike any of the discipline meted out by Ms. Williams. *Id.* ("(1) Throwing, kicking, burning, or cutting a child; (2) striking a child with a closed fist; (3) shaking a child under age three; (4) interfering with a child's breathing; (5) threatening a child with a deadly weapon; or (6) doing any other act that is likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks."). Since none of the conduct alleged to have been committed by Ms. Williams is defined by either the homicide by abuse statute or the parental discipline statute, the jury was left to subjectively decide what conduct the statute proscribes or what conduct

will comply with the statutes, which is the definition of unconstitutionally vague statutes.

The terms were vague in a case involving the defense of reasonable parental discipline because they do not provide ascertainable standards to protect against arbitrary enforcement. This Court should grant review and reverse Ms. Williams' convictions.

5. **In light of Court of Appeals decision deeming the term "torture" to be a term of normal understanding, the court erred in allowing expert testimony regarding this element.**

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." ER 702. The expert testimony must be helpful to the trier of fact. *Id.; Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha,* 126 Wn.2d 50, 102, 882 P.2d 703, 891 P.2d 718 (1994). So whether the expert testimony is admissible turns on whether the witness qualifies as an expert, bases the opinions on legally appropriate information, and whether the expert opinion would be helpful to the trier of fact. *Queen City Farms,* 126 Wn.2d at 102. "Generally, expert evidence is helpful and appropriate when the testimony concerns

matters beyond the common knowledge of the average layperson, and does not mislead the jury to the prejudice of the opposing party." *State v. Farr–Lenzini,* 93 Wn.App. 453, 461, 970 P.2d 313 (1999), *quoting State v. Jones,* 59 Wn.App. 744, 750, 801 P.2d 263 (1990), *review denied,* 116 Wn.2d 1021 (1991).

In light of the Court of Appeals' conclusion that the term torture was not vague because it was term of common understanding, the expert's opinion was not helpful because it did not offer the jurors any insight that they would not otherwise have. *State v. Smissaert,* 41 Wn.App. 813, 815, 706 P.2d 647 (1985) ("If the issue involves a matter of common knowledge [like the effects of alcohol] about which inexperienced persons are capable of forming a correct judgment, there is no need for expert testimony."). Thus, given the fact the term "torture" is a term of common understanding, the trial court erred in allowing the expert testimony on this topic since it was not helpful to the jury.

6. **The State failed to prove Ms. Williams was guilty of homicide by abuse or first degree assault of a child.**

In a criminal prosecution, the State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const.

amend XIV; *Apprendi v. New Jersey,* 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is "[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Green*, 94 Wn.2d at 221. A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

a. *The State failed to prove H.W. was under the age of 16 years, an essential element of the offense of homicide by abuse.*

Viewing all of the evidence presented to the jury at trial on the issue of H.W.'s age, one comes away with the conclusion that no one had any idea how old she was and, most importantly here, that the State failed to prove H.W. was under the age of 16.

Under RCW 9A.32.055 (1), 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 . . . under sixteen years of age, and the person has previously engaged in a pattern or practice . . . of assault or torture of said child." *State v. Madarash*, 116 Wn.App. 500, 510, 66 P.3d 682 (2003).

The primary issue at Ms. Williams' trial was whether H.W. was under 16 years of age at the time of her death. The State realized this fact and moved to exhume H.W.s body approximately a year after the initial burial but prior to trial, in order to X-ray the body and extract two of her teeth, upon which tests were conducted and which all of the evidence from all of the experts emanated. The State sought to prove H.W.'s age using two methods: evaluation of the X-rays to determine H.W.'s "bone age," and examination of the teeth to determine H.W.'s maturity which is directly related to age. The medical examiner was not asked to, nor did he make, a determination of H.W.'s age during the autopsy.[1]

The Court of Appeals conceded that the jury heard conflicting testimony from the experts regarding H.W.'s age. Decision at 6-7. But, the Court found the testimony of Carolyn Roesler, a doctor of general

[1] Dr. Selove, the forensic pathologist who conducted the autopsy was told H.W. was 13 years of age and he noted that her body was consistent with that age. 7/30/2013RP 29.

medicine in Australia, alone to be sufficient to support the contested element. Decision at 7.

Dr. Roessler testified she volunteered in Ethiopia and met H.W. in 2007. 8/13/2013RP 77-81. Roesler last saw H.W in 2008 just before H.W. left for the United States. 8/13/2013RP 85-86. In her role as a doctor, Roesler spent time around H.W. and characterized her with the behavior of a 10 to 11 year old child. 8/13/2013RP 87. Roesler saw H.W. unclothed on occasions and did not observe any pubic hair, apparent breast development, or other visual signs of sexual development. 8/13/2013RP 95. Dr. Roessler's only "examination" of H.W. consisted of a removal of some eye lesions. 8/13/2013RP 89. In her professional opinion, Roesler testified H.W. was between 10 years of age and 11 years of age in 2008.[2] 8/13/2013RP 116.

But, Dr. Roessler's opinion was undercut by the State's other experts who found H.W. to be between 13 and 18 years of age. Further, Bell and Richards' opinions were based upon clinical analysis of X-ray teeth examination, where Roesler was based solely on visual

[2] H.W. died in 2011, thus, according to Roesler, H.W. would have been 13 or 14 years of age at the time of her death.

examination from afar; she never acted as a treating physician in her interactions with H.W. 8/13/2013RP 89.

Based on the inability of any witness to state definitively that H.W. was under the age of 16, the State failed to prove Ms. Williams was guilty of homicide by abuse.

b. *The State failed to prove I.W. suffered substantial bodily harm, an essential element of the offense of first degree assault of a child.*

The State's theory regarding the offense of first degree assault of child involving I.W. was that Ms. Williams caused the scars that were visible on I.W.'s back. In fact, the evidence established I.W. had these scars *before* he was adopted by the Williams, thus the State failed to prove Ms. Williams was guilty of first degree assault of a child.

RCW 9A.36.120(1)(b)(i) provides, "A person eighteen years of age or older is guilty of the crime of assault of a child in the first degree if the child is under the age of thirteen and the person . . . Causes substantial bodily harm, and the person has previously engaged in a pattern or practice either of (A) assaulting the child which has resulted in bodily harm that is greater than transient physical pain or minor temporary marks, or (B) causing the child physical pain or agony that is equivalent to that produced by torture."

The evidence failed to establish that Ms. Williams caused the scars to I.W. C.W. and S.W., Ms. Williams' daughters saw scars when I.W. first arrived. 8/5/2013RP 82, 125; 8/6/2013RP 79. Similarly, Ms. Williams' sons, Ja.W. and Jo. W. saw the scars when I.W. first came to live in the Williams' household. 8/15/2013RP 167; 8/16/2013RP 85. Carol Miller, Ms. Williams' sister, and Charlotte Miller, Ms. Williams' mother also agreed. 8/28/2013RP 48, 59. 8/28/2013RP 59. Finally, Mr. and Ms. Williams saw scars on I.W.'s face and back when they first saw him after he arrived from Ethiopia. 8/27/2013RP 120-21; 8/28/2013RP 96-100.

Dr. Clark, the children's doctor was the only witness to testify he never saw any marks or scars on I.W. during his examinations of I.W. 8/8/2013RP 110, 130. But, Dr. Clark had no independent knowledge regarding scars or marks on I.W., only that his records did not indicate any scars or marks. 8/8/2013RP 110. This was far different from the Williams' family who remembered when I.W. first came to their home. The family distinctly remembered seeing scars and marks on I.W.'s back.

In light of the State's failure to prove Ms. Williams caused the scars, the verdict is unsupported by the evidence.

F. CONCLUSION

For the reasons stated, Carri Williams asks this Court to grant review, reverse her convictions, and either remand for a new trial, or reverse with instructions to dismiss.

DATED this 19th day of January 2016.

Respectfully submitted,

s/Thomas M. Kummerow

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APPENDIX

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

STATE OF WASHINGTON, Respondent, v. CARRI DARLENE WILLIAMS, Appellant.	)	No. 71193-8-I UNPUBLISHED OPINION FILED: December 21, 2015

VERELLEN, A.C.J. — After a seven-week jury trial, Carri Williams was convicted of homicide by abuse for the death of her adopted daughter H.W. and first degree assault of a child as to her adopted son I.W.[1] H.W. died from hypothermia after the young girl spent approximately nine hours outside with inadequate clothing in rainy, cold weather.

Carri's assignments of error on appeal all lack merit. Sufficient evidence supports the element that H.W. was under 16 years of age when she died, and that I.W. suffered substantial bodily harm as a result of beatings by Carri; the exclusion of a late-disclosed defense expert's testimony on the age of H.W. and the admission of the State's experts' testimony on torture were within the trial court's discretion; it was within the trial court's discretion to strike testimony rather than grant a mistrial when the prosecutor failed to timely disclose amenities it had provided to a witness; prompt curative instructions adequately addressed any prosecutorial misconduct in closing

[1] Carri Williams and her husband Larry Williams were tried together. For ease of reference, we refer to them by their first names.

argument; the statutory elements of homicide by abuse and first degree assault of a child are not unconstitutionally vague; and the public trial right is not implicated by taking peremptory juror challenges on paper.

We affirm Carri's convictions for homicide by abuse and first degree assault of a child.

FACTS

Carri and Larry married in 1990. They have seven biological children. In August 2008, they adopted two children from Ethiopia, H.W. and I.W., who is deaf.

Larry worked swing shift at his job, leaving home at noon and returning around midnight. Larry cooked the children breakfast every morning before work. He was frequently home on weekends. Carri, fluent in sign language, raised and home schooled the children and made them do chores around the house. She also made the children do "boot camp," a form of punishment consisting of extra chores both inside and outside the house.[2]

When H.W. first arrived at the Williamses' home, she behaved and integrated well. After the first year, she occasionally disobeyed the Williamses, such as taking food without permission. As a result, H.W. was not allowed to participate in some holiday activities and family events. When I.W. first arrived at the Williamses' home, he acted out aggressively and also occasionally disobeyed the Williamses.

Both Carri and Larry disciplined their children. The Williamses punished I.W. and H.W. more than the other children, and their punishments increased in "severity" and

[2] Report of Proceedings (RP) (Aug. 5, 2013) at 55.

"frequency" over time.[3] Punishment included spankings with a belt, a wooden stick, or a glue stick and being hosed down with cold water outside. The Williamses spanked I.W. all over his body.

The Williamses used food deprivation as punishment. They served cold food and leftovers, frozen vegetables, and sandwiches soaked in water to I.W. and H.W. but not the other children. They forced H.W. and I.W. to eat some of their meals outside in "any kind of weather."[4] During the last six months of her life, H.W. ate breakfast and other meals outside "more times than not."[5] Sometimes, when H.W. was placed outside, she would not come back inside "even though she was allowed back inside."[6] The Williamses occasionally "didn't let her into the house to warm up."[7]

The Williamses used isolation as punishment. At times, the Williamses forced H.W. to stay and sleep alone in the barn outside without electricity and to take cold showers outside. Other times, the Williamses forced H.W. to stay and sleep alone in a shower room. H.W. would generally stay outside "for long periods of time."[8] Beginning in late 2010 and up until her death, the Williamses forced H.W. to stay and sleep alone in a closet at "night and during the day sometimes."[9] The closet measured "two foot by four foot three inches."[10] H.W. "wasn't able to stretch" or "change her position

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[3] RP (Aug. 27, 2013) at 32.

[4] RP (Aug. 1, 2013) at 26.

[5] RP (Aug. 27, 2013) at 103.

[6] Id. at 135.

[7] RP (Aug. 1, 2013) at 20.

[8] RP (Aug. 20, 2013) at 50.

[9] RP (Aug. 5, 2013) at 49.

[10] RP (Aug. 7, 2013) at 127.

significantly" inside it.[11] None of the other children were forced to sleep in the closet. The closet door was locked from the outside.

The Williamses used humiliation as punishment. When I.W. wet himself, the Williamses would hose him down with cold water and force him to sleep in the shower room. When he wet the bed, the Williamses would give him cold showers. H.W. had Hepatitis B. When she started menstruating, H.W. would smear "her menstrual blood on bathroom surfaces."[12] Concerned that their other children would contract Hepatitis B, the Williamses purchased a port-a-potty, placed it outside, and frequently forced H.W. to use it. Carri also shaved off H.W.'s hair multiple times.

In Ethiopia, H.W. was "a healthy size and stature" for her age.[13] "There was no evidence of malnutrition."[14] When she first arrived at the Williamses' home, H.W. "had fairly normal height and weight."[15] During the first two years, H.W.'s weight increased steadily and overall "she was generally healthy."[16] Her body weight was in the "90th percentile" of the body mass index chart (BMI), which is considered "overweight."[17] By 2011, H.W.'s weight dropped from 110 pounds to around 80 pounds. When H.W. died, her weight was in the "third percentile" of the BMI.[18]

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[11] RP (Aug. 2, 2013) at 28.

[12] RP (Aug. 28, 2013) at 131.

[13] RP (Aug. 13, 2013) at 87.

[14] Id. at 98.

[15] RP (July 29, 2013) at 70.

[16] Id.

[17] Id. at 130.

[18] Id. at 75.

On May 11, 2011, Larry left for work as usual around noon. Carri sent H.W. outside around 3:00 p.m. Initially, H.W. wore sweatpants and a long-sleeve shirt. The temperature was "in the mid- to upper fifties."[19] It started to rain later that evening, and the temperature became "cold."[20] Carri told H.W. to do exercises to keep warm. Carri told H.W. multiple times to come inside, but she refused. Carri told one of her daughters to check on H.W. every 10 or 15 minutes. Carri placed dry clothes outside for H.W. because the rain had soaked her clothes.

Around 8:30 p.m., Carri told H.W. to go to the port-a-potty. H.W. "took about ten or twenty steps, and she began throwing herself down" on her hands and knees.[21] H.W. repeated this behavior all the way to the port-a-potty. H.W. did the same thing on the way back to the house, hitting her forehead on the concrete patio several times. H.W. continued to "throw herself around" for "twenty or thirty minutes."[22] Carri observed that H.W. "had skinned up her knees and her elbows quite a bit" and "had a knot on her forehead."[23] Each time that one of Carri's daughters looked outside to check on H.W., H.W. had removed pieces of clothing until she was naked.[24]

Shortly before midnight, one of Carri's daughters saw H.W. lying naked face down in the grass. Carri went to check on H.W. She tried to carry H.W. inside, but H.W. was too heavy. Carri grabbed a sheet to cover H.W.'s naked body. Carri's sons

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[19] RP (Aug. 30, 2013) at 92.

[20] RP (Aug. 6, 2013) at 96.

[21] RP (Aug. 28, 2013) at 166.

[22] Id. at 167.

[23] Id. at 168.

[24] The false sensation of warmth and removal of clothing, called "paradoxical undressing," is common to hypothermia. RP (July 30, 2013) at 81.

helped carry H.W. inside. Carri did not feel a pulse. She performed cardiopulmonary resuscitation (CPR), called Larry, and then called 911. Larry arrived and helped perform CPR before medics arrived. H.W. died at the hospital at 1:30 a.m.

A jury convicted Carri of homicide by abuse, first degree manslaughter, and first degree assault of a child. At sentencing, the court vacated the manslaughter conviction on double jeopardy grounds.

Carri appeals.

ANALYSIS

Sufficiency of the Evidence

Carri challenges the sufficiency of the evidence for both of her convictions. Evidence is sufficient to support a conviction if any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt.[25] We view the evidence and all reasonable inferences from the evidence in the light most favorable to the State.[26]

Carri contends insufficient evidence supports that H.W. was under 16 years of age. A conviction for homicide by abuse, as charged here, requires that a person "causes the death of a child or person under sixteen years of age."[27] The jury heard conflicting testimony from many experts about H.W.'s age. For example, Dr. Gary Bell, a forensic dentist, testified that Hana was "at least 15 years old, but she could be

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[25] State v. Condon, 182 Wn.2d 307, 314, 343 P.3d 357 (2015) (quoting State v. Luvene, 127 Wn.2d 690, 712, 903 P.2d 960 (1995)).

[26] State v. Ozuna, 184 Wn.2d 238, 359 P.3d 739, 744 (2015).

[27] RCW 9A.32.055(1).

anywhere from 13 to 18."[28] Dr. David Sweet, a forensic dentist, testified that H.W. was "16.25 years of age, . . . plus or minus . . . 1.5 years."[29] Katherine Taylor, a forensic anthropologist, testified that H.W. was between "13 to 17 years of age" and "right around 15 years of age."[30] Dr. Jordan Haber, a radiologist, testified that H.W. was "between 15 and 17 years old."[31]

Dr. Carolyn Roesler, a general medical practitioner in Australia, met H.W. in December 2007 while volunteering in Ethiopia and last saw her in 2008. Dr. Roesler observed H.W. on several occasions. She diagnosed and treated H.W. for abdominal discomfort and an eye infection. Dr. Roesler also observed H.W. exiting the shower once and saw no signs of breast development or pubic hair. Based upon her observations, Dr. Roesler concluded H.W.'s "age was between ten and eleven years old" when she saw H.W. in 2008.[32] This would have made H.W. 13 or 14 years old at the time of her death. Dr. Roesler's testimony is sufficient evidence to support the element that H.W. was under 16 years of age at the time of her death.

Carri contends insufficient evidence supports that I.W. suffered substantial bodily harm. A conviction for first degree assault of a child, as charged here, requires that a person intentionally assaults a child and causes substantial bodily harm.[33] "Substantial bodily harm" means "bodily injury which involves a temporary but substantial

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[28] RP (Aug. 9, 2013) at 32.

[29] RP (Aug. 22, 2013) at 45, 46.

[30] RP (Aug. 23, 2013) at 54.

[31] RP (Aug. 29, 2013) at 24.

[32] RP (Aug. 13, 2013) at 116.

[33] RCW 9A.36.120(1)(b)(ii).

disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ."[34]

I.W. had a scar under his arm that he showed to the jury. He testified that he did not have any scars when he arrived at the Williamses' home and that Carri caused the scar under his arm. The family's physician Dr. Harold Clark testified that he never saw any marks or scars on I.W.'s body during his initial examinations in 2008. This testimony is sufficient evidence that the scar on I.W.'s body was caused by Carri and resulted in a temporary but substantial disfigurement.

We conclude sufficient evidence supports Carri's convictions for homicide by abuse and first degree assault of a child.

Exclusion of Dr. Eric Bartelink's Testimony

Carri contends the trial court abused its discretion when it excluded Dr. Eric Bartelink's testimony as a discovery sanction. We disagree.

We review a trial court's decision to exclude evidence for abuse of discretion.[35] A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or untenable reasons.[36]

CrR 4.7 governs discovery in criminal cases and "defines the discovery obligations of both the prosecution and defense."[37] A defendant has "a continuing obligation"[38] to promptly disclose the names and addresses of intended witnesses and

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[34] RCW 9A.04.110(4)(b).

[35] State v. Franklin, 180 Wn.2d 371, 377 n.2, 325 P.3d 159 (2014).

[36] State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001) (quoting State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)).

[37] State v. Linden, 89 Wn. App. 184, 190, 947 P.2d 1284 (1997).

[38] Id.

the substance of their testimony "no later than the omnibus hearing."[39] To enforce CrR 4.7, a trial court is given "wide discretion in ruling on discovery violations."[40] CrR 4.7(h)(7) lists sanctions for a party's failure to comply with any discovery rule. The trial court may "grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances."[41] Our Supreme Court in State v. Hutchinson interpreted CrR 4.7(h)(7) to permit "exclusion of defense witness testimony as a sanction for discovery violations."[42] But exclusion of evidence is "an extraordinary remedy" that "should be applied narrowly."[43]

The Hutchinson court identified four factors that a trial court should consider in determining whether to exclude evidence as a discovery sanction: "(1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the prosecution will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith."[44] Although the trial court here did not expressly apply the four factors in excluding Dr. Bartelink's testimony, the State and the defense briefed those factors at trial. The lack of express findings regarding the four factors does not preclude us from evaluating those factors based on the record developed at trial.[45]

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[39] CrR 4.7(b)(1).

[40] Linden, 89 Wn. App. at 189-90.

[41] CrR 4.7(h)(7)(i).

[42] 135 Wn.2d 863, 881, 959 P.2d 1061 (1998) (relying on the "deems just" language in CrR 4.7(h)(7)(i)).

[43] Id. at 882.

[44] Id. at 883.

[45] See State v. Venegas, 155 Wn. App. 507, 521-22, 228 P.3d 813 (2010).

Many months before trial, the parties knew that H.W.'s age was a contested issue. The parties discussed the potential for various tests to estimate H.W.'s age, including the use of radiocarbon dating of teeth. In January 2013, six months before trial, the trial court authorized Dr. Bartelink to assess H.W.'s teeth in order to estimate her age. It appears Larry listed Dr. Bartelink as a potential witness but then removed him from the witness list. Mid-trial, after the State disclosed that H.W.'s cousin would travel from Ethiopia to testify to H.W.'s birth date, Larry asked Dr. Bartelink to arrange for radiocarbon dating of H.W.'s teeth. When Larry received the results of those tests and Dr. Bartelink's report, he advised the State and asked the court to supplement the witness list.

The trial court initially permitted Dr. Bartelink to testify despite the late disclosure. The court focused upon the defense's reasonable need to respond to the cousin's testimony of a specific birth date and upon counsel's representation that Dr. Bartelink would conclude it was scientifically impossible for H.W. to be 13 or 14 years of age at the time of her death. But once the court struck the cousin's testimony, the court granted the State's motion to exclude Dr. Bartelink's testimony as a discovery sanction for late disclosure. The court determined that the defense no longer needed to rebut the cousin's testimony and that Dr. Bartelink's testimony would not exclude H.W. from being under 16 years of age.

The issue here is whether excluding Dr. Bartelink's testimony was the proper remedy under the circumstances.

Less severe sanctions. A party's failure to identify witnesses in a timely manner is "appropriately remedied by continuing trial to give the nonviolating party time to

interview a new witness or prepare to address new evidence."[46] The defense disclosed Dr. Bartelink as a witness mid-trial, but the State knew about Dr. Bartelink's testing methods as early as December 2012. The State objected that there was inadequate time to prepare to interview and cross-examine Dr. Bartelink on the technical area of radiocarbon dating of teeth. Although it is not clear from the record why a continuance was an inadequate remedy, the trial court is best situated to analyze the extent of the delay that would be required to adequately prepare to cross-examine Dr. Bartelink. At most, this factor mildly weighs against exclusion.

Impact of witness preclusion. The impact of precluding Dr. Bartelink's testimony that H.W. was 15 years of age or older was not significant and did not undermine Carri's defense. Dr. Bartelink alone used the radiocarbon testing method when he estimated with "95% confidence" H.W.'s "minimum age at death to be 15.6 years.[47] But his ultimate conclusion that H.W. was between 15 and 20 years of age is cumulative to the age ranges testified to by the other experts at trial. When the trial court excluded Dr. Bartelink's testimony, it had already struck H.W.'s cousin's testimony that H.W. was born on a specific date and had instructed the jury to disregard the cousin's testimony. The defense no longer needed to rebut that testimony. This factor weighs in favor of exclusion.

Surprise or prejudice. The State knew about the potential for radiocarbon testing in January 2013, six months before trial, when Dr. Bartelink received the teeth. The State did not know the results of the testing until mid-trial, but the State was able to

[46] Hutchinson, 135 Wn.2d at 881.

[47] Clerk's Papers (CP) at 265.

interview Dr. Bartelink shortly after receiving his report. Although the trial court is best situated to evaluate the level of surprise or prejudice from the late disclosure of a witness, the extent of any surprise to the State here was limited.

Willfulness and bad faith. Larry did not seek to conduct radiocarbon testing of H.W.'s teeth until several months after Dr. Bartelink received them. That delay was intentional and not inadvertent or the result of miscommunication. Carri did not disclose Dr. Bartelink as a potential witness until the August 13, 2013 hearing and never supplemented her witness list to include Dr. Bartelink. Her decision not to list Dr. Bartelink as a witness was also intentional conduct. This factor weighs in favor of exclusion.

On this record, with at most two factors supporting exclusion and two factors opposing exclusion, we conclude the trial court acted within its wide discretion in excluding Dr. Bartelink's testimony.

Denial of Defense Counsel's Motion for Mistrial

Carri contends the trial court abused its discretion in denying her motion for mistrial based on the State's misconduct involving H.W.'s cousin Tenassay Wondetsaddik. We disagree.

We review a trial court's denial of a motion for mistrial for abuse of discretion.[48] A trial court abuses its discretion in denying a motion for a mistrial only if its decision is manifestly unreasonable or based on untenable grounds.[49] To determine whether a trial irregularity warrants a new trial, we examine the seriousness of the irregularity, whether

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[48] State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002).

[49] State v. Allen, 159 Wn.2d 1, 10, 147 P.3d 581 (2006) (quoting Stenson, 132 Wn.2d at 701).

the testimony was cumulative, and whether the irregularity could be cured by a limiting instruction.[50]

Wondetsaddik testified that he was present at H.W.'s birth, lived with H.W. for five or six years, and recorded H.W.'s birth date in a family bible. But the strength of his testimony must be measured against the level of confusion and inconsistency revealed on cross-examination. For example, Wondetsaddik acknowledged that he incorrectly wrote H.W.'s birth date in the family bible, that he incorrectly wrote the date of H.W.'s baptism, and, contrary to his initial testimony, that he lived with H.W. for only one year. This cuts against the strength of his testimony.

After Wondetsaddik testified, he fled his motel and did not return to Ethiopia. Defense counsel later discovered that one of the prosecutors had given Wondetsaddik a chauffeur, meals, cash, and clothes during his trip. The prosecutor's conduct in providing Wondetsaddik such amenities without disclosure to the defense and without ensuring that Wondetsaddik remained available to testify about bias is serious. But the defense requested the trial court to either grant a mistrial or strike Wondetsaddik's testimony. We conclude it was within the trial court's broad discretion to strike the testimony and related exhibits and to instruct the jury to disregard such evidence.

Further, several factors distinguish this case from State v. Escalona,[51] relied upon by Carri. There, the State charged the defendant with second degree assault with a knife. During cross-examination, the State's witness volunteered that the defendant

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[50] State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012) (quoting State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)).

[51] 49 Wn. App. 251, 742 P.2d 190 (1987).

had a record and had previously stabbed someone.[52] The trial court instructed the jury to disregard the witness's statement.[53] The Escalona court characterized the unsolicited statement as "extremely serious" and "inherently prejudicial."[54] The court concluded the prejudice was not curable by an instruction.[55]

Unlike Escalona, where the irregularity involved the admission of improper character evidence, Wondetsaddik's testimony was relevant, admissible, and not inherently prejudicial. There was no "paucity of credible evidence" supporting Carri's convictions.[56] Wondetsaddik's testimony was also filled with inconsistencies and confusion. The trial court's instruction to disregard the testimony was an adequate remedy under these circumstances. The prosecutor's conduct did not taint the jury or the defendant such that the only remedy was a new trial.

Therefore, we conclude the trial court properly denied defense counsel's motion for new trial.

Prosecutorial Misconduct

Carri contends the prosecutor committed misconduct by improperly expressing his personal opinion on the evidence in closing. We disagree.

To establish prosecutorial misconduct, a defendant must show improper conduct and resulting prejudice.[57] The defendant must demonstrate there was a substantial

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[52] Id. at 253.

[53] Id.

[54] Id. at 255-56.

[55] Id. at 256.

[56] Id. at 255.

[57] State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (quoting State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)).

likelihood the prosecutor's misconduct "affected the jury's verdict."[58] We "review the statements in the context of the entire case."[59]

A prosecutor commits misconduct by expressing a personal opinion about either a witness's credibility or a defendant's guilt or innocence.[60] Defense counsel's failure to object to alleged prosecutorial misconduct fails to preserve the issue for appeal, unless the misconduct is "so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice."[61]

During closing at trial, the prosecutor twice expressed his personal belief about the evidence:

[PROSECUTOR]: [Larry] was the one who approved of this isolation, putting them out there . . . at the picnic table or at the kitchen table, I guess, at times. He said he never gave them bad food. The fact of the matter, I think the testimony is that he did give them leftovers. And what is his response? The response was that they stole. *And I do take offense at the words* --

[LARRY'S COUNSEL]: Objection.

. . . .

THE COURT: Ladies and gentlemen, you're instructed to disregard the statement about being offended. Go ahead.[62]

[PROSECUTOR]: And we sort of had a disagreement on the witness stand . . . talking about whether you could blow up things because you would hurt this atlas. *And I disagree*, and --

[LARRY'S COUNSEL]: Objection, Your Honor.

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[58] Id. at 443 (quoting Magers, 164 Wn.2d at 191).

[59] Id.

[60] State v. Dhaliwal, 150 Wn.2d 559, 577-78, 79 P.3d 432 (2003).

[61] Emery, 174 Wn.2d at 760-61.

[62] RP (Sept. 4, 2013) at 20 (emphasis added).

. . . .

THE COURT: Ladies and gentlemen, you're instructed to disregard the portion of the argument where [the prosecutor] comments on his disagreement.[63]

Larry immediately objected to both statements, but Carri did not.

Carri fails to demonstrate any prejudice that affected the jury's verdict. The trial court immediately gave an instruction to the jury to disregard the prosecutor's comments after each objection. Nothing in the record suggests the prosecutor's comments affected the verdict. This is not the type of misconduct that is so flagrant and ill-intentioned that a limiting instruction would not have cured any prejudice. Therefore, we conclude Carri's prosecutorial misconduct claim fails.

Void for Vagueness Challenge

Carri contends the terms "torture" and "extreme indifference to human life" as used in the homicide by abuse and first degree assault of a child statutes are unconstitutionally vague as applied to her. We disagree.

"We review constitutional issues de novo."[64] The party challenging a statute has the heavy burden of proving unconstitutionality beyond a reasonable doubt.[65] There is a "strong presumption in favor of the statute's validity."[66] A statute is void for vagueness if it "does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed," or it "does not provide ascertainable

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[63] Id. at 42-43 (emphasis added).

[64] State v. Enquist, 163 Wn. App. 41, 45, 256 P.3d 1277 (2011).

[65] Id.

[66] State v. Harrington, 181 Wn. App. 805, 824, 333 P.3d 410 (2014).

standards of guilt to protect against arbitrary enforcement."[67] Carri argues only that the statutes lack ascertainable standards of guilt.

"Due process requires criminal statutes to establish workable standards that ensure the law will be enforced in a nonarbitrary, nondiscriminatory manner."[68] A statute must contain ascertainable standards of guilt.[69] Statutes are unconstitutionally vague when they rely upon "inherently subjective terms" that are amenable to varying and arbitrary interpretations.[70]

The term "torture" is not defined by statute, but State v. Brown[71] and State v. Russell[72] are instructive. The Brown court held that the term "torture" as used in the second degree assault statute is not unconstitutionally vague.[73] The Russell court held that the phrase "pattern or practice of assault or torture" in the homicide by abuse statute is not unconstitutionally vague.[74] The Russell court concluded the homicide by abuse statute "sets ascertainable and adequate standards of guilt," and provides "adequate guidelines to prevent subjective enforcement."[75]

Carri cites no authority to support that the term "extreme indifference" is unconstitutionally vague. Although the homicide by abuse statute does not define

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[67] Id. at 823.

[68] State v. Evans, 177 Wn.2d 186, 207, 298 P.3d 724 (2013).

[69] In re Detention of Danforth, 173 Wn.2d 59, 73, 264 P.3d 783 (2011); City of Seattle v. Drew, 70 Wn.2d 405, 408, 423 P.2d 522 (1967).

[70] Evans, 177 Wn.2d at 207.

[71] 60 Wn. App. 60, 802 P.2d 803 (1990).

[72] 69 Wn. App. 237, 848 P.2d 743 (1993).

[73] Brown, 60 Wn. App. at 66.

[74] Russell, 69 Wn. App. at 248.

[75] Id. at 247-48.

"extreme indifference," nothing suggests that it is inherently subjective and subject to arbitrary enforcement. The term "extreme" means "existing in the highest or the greatest possible degree; very great; very intense."[76] The term "indifference" means "the quality or state of being indifferent."[77] The term "indifferent" means "looked upon as not mattering one way or another" or "regarded as being of no significant importance or value."[78] The plain meaning of "extreme indifference" provides adequate guidelines to prevent arbitrary enforcement by a jury, judges, prosecutors, or police officers.[79]

Therefore, we conclude the terms "extreme indifference" and "torture" provide an ascertainable standard of guilt and are not inherently subjective as applied to Carri's conduct.

Admission of the State's Experts' Testimony

Carri contends the trial court abused its discretion in admitting expert testimony on the meaning of "torture." We disagree.

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[76] WEBSTER'S THIRD NEW INT'L DICTIONARY 807 (3d ed. 2002); see also State v. Madarash, 116 Wn. App. 500, 512, 66 P.3d 682 (2003).

[77] WEBSTER'S THIRD NEW INT'L DICTIONARY 1151 (3d ed. 2002); see also Madarash, 116 Wn. App. at 512.

[78] WEBSTER'S THIRD NEW INT'L DICTIONARY 1151 (3d ed. 2002); see also Madarash, 116 Wn. App. at 512.

[79] We also reject Carri's contention that the vagueness issue was exacerbated when the trial court refused to give Carri's proposed definitional instruction on "extreme indifference." See CP at 234 ("'Extreme indifference to human life' means to not care whether the deceased lived or died."). The plain meaning of "extreme indifference" provided the jury adequate standards to determine the culpability of Carri's conduct as to H.W.

We review a trial court's decision to admit expert testimony for abuse of discretion.[80] The trial court has broad discretion to determine the admissibility of testimony.[81]

ER 702 governs the admissibility of expert testimony. Expert testimony is admissible "if the expert testimony would be helpful to the trier of fact"[82] and if it "is informed by specialized knowledge, experience, or training."[83] Expert testimony is helpful to the jury if it concerns matters beyond the common knowledge of the average layperson and it is not misleading.[84] "Courts generally 'interpret possible helpfulness to the trier of fact broadly and will favor admissibility in doubtful cases.'"[85] But expert testimony is unnecessary for issues involving matters of common knowledge.[86]

There may be some tension between concluding that the term "torture" provides an ascertainable standard of guilt, but the jury needs expert testimony on what constitutes torture. But these two positions are not inconsistent. Whereas the term "torture" as used in the homicide by abuse and first degree assault of a child statutes provides the prosecutor with ascertainable standards of guilt for charging decisions, a juror may still find it *helpful* for an expert to explain subtler forms of torture. The State's expert witnesses testified that the use of corporal punishment, humiliation, isolation,

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[80] State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

[81] City of Seattle v. Heatley, 70 Wn. App. 573, 579, 854 P.2d 658 (1993).

[82] Russell, 125 Wn.2d at 69.

[83] State v. Nelson, 152 Wn. App. 755, 767, 219 P.3d 100 (2009).

[84] State v. Thomas, 123 Wn. App. 771, 778, 98 P.3d 1258 (2004).

[85] Moore v. Hagge, 158 Wn. App. 137, 155, 241 P.3d 787 (2010) (quoting Miller v. Likins, 109 Wn. App. 140, 148, 34 P.3d 835 (2001)).

[86] State v. Smissaert, 41 Wn. App. 813, 815, 706 P.2d 647 (1985).

sensory deprivation, and denial of food constitute aspects of torture. The experts' specialized knowledge helped the jury understand that some of the conduct here was a subtle form of torture, extended over a period of time, and systematized.

Therefore, we conclude the trial court did not abuse its discretion in admitting expert testimony on the meaning of the term "torture."

Public Trial Right

Carri's public trial argument fails. In State v. Love, our Supreme Court approved sidebar conferences for the exercise of peremptory jury strikes on paper, concluding that this practice did not amount to a courtroom closure.[87]

Cumulative Error

We reject Carri's contention that the cumulative effect of the alleged errors at trial denied her a fair trial. She fails to demonstrate any single instance of error.

CONCLUSION

We affirm Carri's convictions for homicide by abuse and first degree assault of a child.

WE CONCUR:

[87] 183 Wn.2d 598, 606-08, 354 P.3d 841 (2015).

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 71193-8-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Erik Pedersen, DPA
Skagit County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: January 19, 2016

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Case Name: STATE V. CARRI WILLIAMS

Court of Appeals Case Number: 71193-8

Party Respresented: PETITIONER

Is this a Personal Restraint Petition? ◯ Yes ◉ No

Trial Court County: ____ - Superior Court # ____

The document being Filed is:

- ◯ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ◯ Statement of Arrangements
- ◯ Motion: ____
- ◯ Answer/Reply to Motion: ____
- ◯ Brief: ____
- ◯ Statement of Additional Authorities
- ◯ Affidavit of Attorney Fees
- ◯ Cost Bill
- ◯ Objection to Cost Bill
- ◯ Affidavit
- ◯ Letter
- ◯ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ◯ Personal Restraint Petition (PRP)
- ◯ Response to Personal Restraint Petition
- ◯ Reply to Response to Personal Restraint Petition
- ◉ Petition for Review (PRV)
- ◯ Other: _____

Comments:

No Comments were entered.

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