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JULY 14, 2015
Court of Appeals
Division III
State of Washington

31997-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALAN ROSS HACKNEY,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



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TABLE OF CONTENTS

	Page No.
I. <u>IDENTITY OF RESPONDENT</u>	1
II. <u>RELIEF REQUESTED</u>	1
III. <u>ISSUES</u>	1
IV. <u>STATEMENT OF THE CASE</u>	2
V. <u>ARGUMENT</u>	10
<u>Sufficient Evidence of Intent Supports the Conviction</u>	10
VI. <u>CONCLUSION</u>	14

TABLE OF AUTHORITIES

State Cases

Page No.

State v. Schelin, 147 Wn.2d 562, 55 P.2d 632 (2002) 11

State v. Thomas, 150 Wn. 2d 821, 83 P.3d 970 (2004) 10, 11

United States Supreme Court Cases

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781,
61 L.Ed.2d 560 (1979) 10, 11

I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUE

Was there sufficient evidence from which to infer the Defendant's intent to assault S.H. where the infant suffered petechiae/bruising on her neck, forehead, and arm consistent with the grip of fingers and inconsistent with coughing, where the two skull fractures and intercranial bleeding were unlikely to have resulted from a mere drop to the carpeted floor, where the Defendant's withholding of information suggested he was covering up more than an accident, where the Defendant testified that he put his own interests above those of S.H. and her mother, where the Defendant was aware that the S.H.'s skull had cracked and shifted such that he manipulated it and then went back to sleep without seeking any assistance for S.H.?

IV. STATEMENT OF THE CASE

The Defendant Alan Ross Hackney has been convicted by a jury of second degree assault of a child. CP 195-96, 209.

The victim S.H. was born on December 5, 2012. RP¹ 35. Her mother had just graduated high school. RP 38, 241-42. Her father, the Defendant, was just two years older than her mother and working at Shopko. RP 35-36, 38. He moved in with S.H.'s mother and her family. RP 37, 244.

In the first month, S.H. had recurrent thrush and then a fever related to a urinary tract infection (UTI). RP 39-40, 55, 246-49. The sick baby was grumpy and would sometimes wake screaming from pain. RP 40-41. On the night of January 3, 2013, the mother watched over her baby downstairs while the Defendant and S.H.'s grandmother slept upstairs. RP 41, 253. S.H. did not fall asleep until 2 or 3 in the morning. RP 41. At 5 or 5:30, the mother asked the Defendant to take over so she could get some sleep. RP 42-43.

The mother woke at 9 am to "a very different cry." RP 43. There was swelling on both sides of S.H.'s head extending from the front to the back. RP 44, 198. There were four bruises on the baby's forehead and dots (petechiae) on her chin and neck. RP 44, 77, 198. There was also a dark

¹ The transcript received by the State's attorney is a single document of all dates requested in the Statement of Arrangements and paginated 1-492.

purple bruise on the back of the baby's upper right arm. RP 44, 54, 198-99.

The mother decided to take S.H. to the hospital right away. RP 45.

The baby was in a lot of pain and when the doctor palpated the baby's head, it "set her off." RP 46. She had a fractured skull and had to be transferred to Spokane. RP 47, 51, 69-70.

The mother asked the Defendant if he had done anything. RP 52. He denied doing anything, leaving the mother to scour her memory for any explanation. RP 52, 66.

Dr. Katrina Dierks examined S.H. at Sacred Heart in Spokane. RP 63. She observed a bruise on the baby's forehead, a petechial rash and bruise around her neck, and another bruise on the arm. RP 65. Petechiae are red dots on the skin caused by the breakage of capillaries and can be the result of excess pressure, including swelling or coughing. RP 77, 80-81. The skull was fractured on both sides in the parietal region resulting in bleeding that needed to be surgically drained. RP 70, 76, 269.

Over the course of several days of treatment, the only explanation that the mother could provide Dr. Dierks was that S.H. had bumped her own head against a board on the changing table. RP 66, 82. The history did not make sense or explain the injuries. RP 79. A one month old baby cannot generate

enough force to fracture her own skull by knocking her head against a changing table. RP 71, 202-03. Nor would such a gesture have resulted in petechiae about the neck. RP 79, 203. Although an accidental drop can cause a fracture in an infant's skull, Dr. Dierks has only seen S.H.'s level of trauma in non-accidental infant cases. RP 72, 81.

Dr. McMurtry at Walla Walla General Hospital reported the matter to Child Protective Services (CPS) as a non-accidental skull fracture. RP 168-69. CPS investigator James Hatley noted that the marks around the baby's forehead appeared to be from an adult's fingers. RP 170. And the bruises around her neck and arm were also suspicious in an infant. RP 169-70.

For several days, the Defendant denied having any explanation for how the baby could have sustained the injuries. RP 170, 178, 266, 268-69, 272. Then he told the mother that he had dropped S.H. approximately one foot onto the carpeted floor. RP 47, 52, 170-71, 272-73. He left a voicemail with this explanation for the CPS investigator. RP 178, 272-73.

Detective Marcus Goodwater met with the Defendant to interview him. RP 87. The two were acquainted. RP 103. The detective had been a middle school resource officer teaching the DARE (drug abuse resistance education) and GREAT (gang resistance program) classes in the Defendant's

mother's classroom, and the Defendant had been one of his students. CP 79, 103-04, 115; RP 103. The detective had also seen S.H.'s parents at a wedding a few months before. RP 103-04. The detective testified that he does his best to keep an open mind, especially in cases involving an infant who cannot yet speak for itself. RP 102, 107.

The jurors watched the Defendant's videotaped interview in its entirety twice. CP 193; RP 91. Although the tape was not designated for appeal, the transcript of the interview is included in the Declaration of Defense Counsel. CP 56-119.

Initially, the Defendant told the detective that "the only time" anything had ever happened to S.H.'s head was when she bumped it herself while her mother was changing her and when he had dropped her "about a foot." CP 61. He said S.H. had wiggled out his arms as he was placing her on the carpet to swaddle her at one or two in the morning. CP 62. *But cf.* RP 171 (a fall from such a short distance does not explain the injuries). He characterized the skull fractures as "a blessing" because it led to the discovery of the UTI. CP 64.

The Defendant said the baby bruised her arm by hitting the side of a door. CP 67. *But cf.* RP 44, 54-55 (mother did not remember S.H. being

bruised on her arm after passing through doorway); RP 215 (expert explaining that the color of a bruise does not indicate the age of the bruise); CP 113 (Defendant admitting he caused the bruise to S.H.'s arm). He said the bruises on the forehead disappeared right away and the petechiae were caused by her vomiting. RP 67-68. *But cf.* RP 99-100 (forehead bruises still visible after interview with Defendant); RP 200 (expert opining that unusual petechia pattern was not caused by coughing or vomiting).

Confronted with the discrepancies of his story, the Defendant maintained for the first half hour of his interview that he could not remember what happened. RP 292. From there the story evolved. He acknowledged that S.H. could have fallen from a distance of three feet. CP 95-96. First he said he did not tell S.H.'s mother because he just did not remember it. CP 97. Then he acknowledged that he had remembered, but had been afraid to tell. CP 99. First he said, S.H. had caused him to drop her by wiggling. CP 62. Then he admitted she was not wiggling; he had dropped her because he had tripped. CP 101. He said when he tripped, he managed to catch himself, but let his infant daughter drop on her head. CP 107.

And it was not a gentle drop with the baby gently sliding from his arms. RP 107, 109. It was a "hard drop." RP 107. Then he noticed that a

plate in her forehead was moved, so he pushed on her forehead to reposition the plate, causing those forehead bruises. CP 104-05. He admitted he lied so that he would not be blamed for S.H.'s injuries. CP 112.

The detective asked S.H.'s doctor if the bruises on the forehead could have been caused by the Defendant's attempt to reposition S.H.'s skull. RP 96. Dr. Messer testified that the bruising around the forehead was caused by significant force. RP 220-21. It was "very frightening to [her] that somebody would entertain doing that, let alone actually do that to an infant." RP 221.

In cross-examination, the defense brought out that the detective's report stated that: "Alan lost control over his frustrations and threw [S.] hard to the floor." RP 107. Although the Defendant nodded in response to the detective's statement that he had become frustrated, lost control, and thrown the baby, defense argued the nod did not indicate agreement with the detective's statement. RP 111-12. *But cf.* RP 398.

The Defendant testified at trial that in the middle of the night, he woke to find S.H.'s mother downstairs asleep. RP 253. He took S.H. upstairs to change her diaper. RP 254-55. He was laying S.H. on the floor to swaddle her when he lost his balance. RP 257. He caught himself, allowing her to drop and hit the top of her head so she bounced off the carpet. RP 257,

260. When he picked her up, he noticed her skull move. RP 257. There was a protrusion, a little bit of a plate of her head sticking out a little bit. RP 259. He tried to fix it by pushing on it with “more force than I should have.” RP 257, 259.

The Defendant said his first thought was “what’s going to happen to me?” if “everybody is going to accuse me of actually hurting her on purpose.” RP 258-59, 295. Thinking about the CPS investigation and “this courtroom,” he opted not to wake S.H.’s mother. RP 262. Instead of taking the baby to a doctor, he “acted like I never actually did anything in the night.” RP 262. The Defendant “went back upstairs and I got into bed and then I fell asleep” until six in the morning when the mother woke him. RP 263.

Knowing that doctors needed to know how the injury was caused in order to treat S.H., the Defendant did not tell S.H.’s treating physicians what had happened to her. RP 266, 268-69, 295-96. Knowing that the mother was feeling guilty and upset that she may have contributed to the injuries that he himself had caused, the Defendant maintained that the only injury was caused by S.H. herself while her mother changed her. RP 293. He testified that he withheld information, because he was worried only about his own interests. RP 266, 293, 295.

Dr. Michelle Messer, who specializes in child abuse cases, examined S.H. on January 6, 2014. RP 191-98. She opined that the bruising patterns on the forehead and arm were fingerprints. RP 199, 219-20. Based on the pattern of the petechiae, she opined that it was unlikely to have been caused from coughing (which results in a more diffuse pattern on the face and chest). RP 200. She found it consistent with S.H. being grabbed around the neck. RP 200.

Dr. Messer testified that a baby dropped from a height could have a fractured skull, but this would not explain the bruising and petechiae or even the subdural hematoma (intercranial bleeding) that S.H. sustained. RP 204, 218. “[W]hen I see skull fractures and fingerprint bruising in more than one location, and petechiae in the neck and only in the neck folds, that paints a very different picture than a baby with two parietal skull fractures and nothing else.” RP 214.

The Defendant made repeated challenges to the sufficiency of the State’s evidence. CP 200-01; RP 226-27, 340-41. The State explained that the legal standards in a sufficiency claim are high, admitting the truth of the state’s evidence, interpreting all inferences most strongly against the defendant, and deferring to the jury on issues of conflicting testimony,

witness credibility, and persuasiveness of the evidence. CP 204. Recognizing the crux of the issue was intent (RP 228), the court denied each challenge after reviewing the legal standard and evidence. RP 230-37, 341-42, 364. The court reviewed that the jury had various medical evidence from which the jury could infer intent. RP 458-62. The jury could also infer from the Defendant's denials, made even at the crucial diagnostic moment, that he was withholding information because there was something more than an accident to cover up. *Id.*

By the time of trial, S.H. was nine months old and on schedule with her developmental milestones. RP 48-49. She is still being watched however for possible future complications. RP 465-66.

V. ARGUMENT

SUFFICIENT EVIDENCE OF INTENT SUPPORTS THE CONVICTION.

The Defendant challenges the sufficiency of the evidence for conviction. The standard for such a challenge is whether, after viewing evidence in the light most favorable to the state, any rational trier of fact could have found the facts beyond a reasonable doubt. *State v. Thomas*, 150 Wn. 2d 821, 874, 83 P.3d 970 (2004); *Jackson v. Virginia*, 443 U.S. 307,

319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). The standard admits the truth of the state's evidence *and* all inferences that can reasonably be drawn from this evidence in the state's favor and interpreted most strongly against the defendant. *State v. Schelin*, 147 Wn.2d 562, 573, 55 P.2d 632 (2002); *Jackson v. Virginia*, 443 U.S. at 319, 99 S.Ct. at 2789.

Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wash.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Cord*, 103 Wash.2d 361, 367, 693 P.2d 81 (1985).

State v. Thomas, 150 Wn. 2d at 874-75.

The Defendant argues that the only evidence of intent was the detective's "jaundiced interpretation" of the Defendant's statement. Brief of Appellant (BOA) at 7. But the State did not offer the detective's interpretation or opinion into evidence.² Nor did the other witnesses rely on the detective's interpretation. RP 425-26. It was the defense alone who brought out this information in cross-examination.

The State did address the defense argument in closing. RP 398. However, the State did not rely upon the detective's interpretation alone. The

State argued that intent could be inferred from the injuries themselves (RP 388-89, 391, 428), the expert opinions that the petechiae were not the result of coughing or vomiting (RP 394-95), Dr. Messer's opinion that the injuries were caused by abuse and not accident (RP 391-92), the Defendant's admission that he was frustrated and sleep deprived (RP 428), the Defendant's failure to admit the actual cause of the injury even as the mother was blaming herself and the doctors were struggling to treat S.H. (RP 390-91, 428), and the Defendant's reckless manipulation of S.H.'s broken skull to protect himself at the expense of his infant daughter's health (RP 395, 398-99, 428).

The State argued that the injury did not occur as the Defendant said. Rather, S.H. suffered a hard hit to the back of her skull, not the top, causing a bruise on the back of her head and the particular fractures. RP 399. The State argued that neck petechiae showed the Defendant grabbed the infant by the throat and forced the back of her head against something. RP 399. The State argued the injury occurred in the morning when the mother heard her baby cry out in a different way than she had before, not the middle of the night. RP 399. The State argued that when someone hurts another accidentally, the natural response is not to worry about others' recriminations

²No police report or probable cause affidavit was submitted into evidence. RP 415.

but to help the injured party. RP 396-98. On the other hand, when someone is in a hurry to cover up what has happened, the inference is that the action was intentionally wrong. RP 425.

As the lower court observed, there was a variety of evidence from which the jury could have inferred intent. RP 459-61.

The Defendant argues that the detective misinterpreted his nodding in response to the detective's statement that he believed the Defendant regretted his action even as he was throwing the baby to the ground. BOA at 7-8. It is the jury's job to assess the Defendant's credibility. The jury viewed the interview three times. The videotape is not designated for this Court to review. Under the correct standard, this determination is not reviewable.

By its verdict, the jury also credited Dr. Messer's opinion over Dr. Eisler's. Dr. Messer was the State's witness. Under the standard, the court on review accepts the truth of all the *State's* evidence. Therefore, her opinion is accepted as true.

Under the correct legal standard, there is sufficient evidence for the conviction.

VI. CONCLUSION

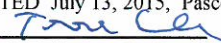
Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: July 13, 2015.

Respectfully submitted:



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<p>Kenneth H. Kato <khkato@comcast.net></p> <p>Alan Hackney 319 S. Mill Street Milton-Freewater, OR 97862</p>	<p>A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED July 13, 2015, Pasco, WA  Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p>
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