No. 45586-2-II

Pierce County 11-1-02357-7

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

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STATE OF WASHINGTON,

Respondent,

v.

MELISSA McMILLEN,

Appellant.

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ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

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The Honorable Frank Cuthbertson, Judge
(bench trial)

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# *APPELLANT'S OPENING BRIEF*

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to support the conviction for second-degree felony murder based upon the predicate crime of second-degree abandonment.

2. Appellant Melissa McMillen was deprived of her Article 1, § 22, and Sixth Amendment rights to effective assistance of counsel.

3. The trial court abused its discretion in admitting and relying on testimony from an expert who was not qualified to testify about the matters on which she gave her opinion.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To prove its case, the prosecution had to show that McMillen recklessly abandoned her child and the death occurred in the course or furtherance of or in immediate flight from that abandonment. Did the prosecution fail to meet its burden of proof when it failed to show that the death occurred because of the abandonment or that McMillen acted recklessly instead of with criminal negligence?

2. Was counsel prejudicially ineffective in failing to move for dismissal based on the corpus delicti rule when that dismissal would likely have been granted and would have ended the proceedings against her client?

3. The prosecution's case depended upon its portrayal of McMillen's demeanor and acts as evidence that she was a cold, calculating person who had abandoned her child to die just because she did not want it. At trial, counsel made no effort to present evidence that McMillen suffered from "Neonaticide Syndrome," which would have explained her demeanor and acts. After the conviction, counsel had her client evaluated and presented that diagnosis and information about the syndrome to the court in a sentencing memo. Was counsel prejudicially ineffective in failing to even attempt to introduce this highly exculpatory evidence which would have rebutted a crucial part of the state's case?

4. By her own admission, counsel repeatedly failed to prepare to adequately cross-examine the state's crucial expert witnesses. She made other missteps showing that she was not really prepared to provide adequate assistance to her client. Is this further evidence of counsel's ineffectiveness?

5. Did the trial court abuse its discretion in admitting and relying on expert testimony from a doctor who specializes in child abuse, has not delivered a baby for 10 years, has delivered less than 50 babies in her 25+ year career, has no training or experience in forensics or pathology and was nevertheless giving an opinion on whether an injury found post-mortem was caused by a common birth trauma?

## C. STATEMENT OF THE CASE

### 1. Procedural Facts

Appellant Melissa McMillen was charged by amended information with second-degree felony murder, with alternate underlying crimes of attempted first-degree criminal mistreatment, second-degree criminal mistreatment or first- or second-degree abandonment of a dependent person. CP 50-51; RCW 9A.32.050(1)(b). Aggravating circumstances of "deliberate cruelty" and that the victim was "particularly vulnerable" were also alleged. CP 50-51; RCW 9.94A.535(3)(a), RCW 9.94A.525(3)(b).

Pretrial proceedings were held before the Honorable Commissioners Diana Kiesel and Garold Johnson on June 10 and July 11, 2011, the Honorable Judge Beverly Grant on August 2 and December 9, 2011, May 12 and July 27, 2012, the Honorable Judge Rosanne Buckner on October 12, 2012, and the Honorable Judge Brian Tollefson, also on October 12, 2012.[1]

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[1]The volumes of the verbatim report of proceedings will be referred to as follows:
June 10, 2011, as "1RP;"
July 11, 2011, as "2RP;"
the volume containing August 2 and 9, 2011, May 11 and July 27, 2012, as "3RP;"
October 12, 2012, as "4RP;"
October 12, 2012, as "5RP;"
January 11, 2013, as "6RP;"
January 14, 2013, as "7RP;"
January 16, 2013, as "8RP;"
the chronologically paginated proceedings of August 5, 8, 12-15, 20 and 22, and September 3, 2013, as "9RP;"

Further pretrial proceedings were held before the Honorable Frank Cuthbertson on January 11, 14 and 16, after which a bench trial was held before Judge Cuthbertson on August 5, 8, 12-15, 20 and 22, September 3 and 5, 2013. Judge Cuthbertson found McMillen guilty of second-degree felony murder with second-degree abandonment as the predicate offense and that the victim was "particularly vulnerable." CP 396. He did not find "deliberate cruelty." CP 396.

After sentencing proceedings on November 15 and December 13, 2013, Judge Cuthbertson ordered a sentence at the very bottom of the standard range. CP 374-87; 12RP 22-24. Ms. McMillen appealed and this pleading follows. See CP 388.

2. Testimony at trial

On Saturday, June 4, 2011, 20-year old Melissa McMillen gave birth in the basement of her father's house, where she and Zach Beale, her boyfriend of two years, were living. 9RP 311-14. The night before, they had dinner with McMillen's dad and grandparents and Beale and his sister both noted that McMillen seemed to be in pain. 9RP 318, 322, 611-13. Beale asked if anything was wrong and McMillen said to just give her a minute, so he left her alone. 9RP 318-19.

Later, after they had gone downstairs to bed, he woke up and she was not there. 9RP 319. He looked around and saw blood stains on the floor by the door. 9RP 319. Nervous, Beale got up to look for McMillen,

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September 5, 2013, as "10RP;"
November 15, 2013, as "11RP;"
December 13, 2013, as "12RP."

finding her on the stairs. 9RP 320. He was not sure what she was doing there and asked if she was "all right." 9RP 320. When she said "yes," he went back to bed. 9RP 320.

Later that morning, after he got up, he asked her about it and, eventually, she told him she had a stillbirth. 9RP 321. He asked what that meant and she said she had given birth to a dead child. 9RP 322.

At the later trial, Beale would say he had "no understandings of pregnancy at all" and had just known that McMillen *might* be pregnant. 9RP 338-38. When they had first started dating they had used birth control but they had stopped at some point. 9RP 313-14. Beale remembered McMillen telling him once that she thought she had missed her period. 9RP 313-14. He did not really know when she said that and, although Beale said he had "[a] few" conversations with McMillen about whether she might be pregnant after that, he could not remember them. 9RP 314-15.

Beale and McMillen did not talk "a lot" about options of what they should do if she was pregnant. 9RP 315. Beale himself never brought up the subject. 9RP 315-16, 336. He said, "[a]t times it seemed like she didn't want to talk about it." 9RP 315. Conversations really "never got anywhere," although they came up some names at one point. 9RP 337. Beale also recalled something about her not being able to get an abortion at some point because she was too "far along." 9RP 316-17. Beale never did any research into it or called anyone or a clinic himself, although he speculated with his mom about whether McMillen might be pregnant. 9RP 317-33, 370.

Beale and McMillen never talked about getting prenatal care or anything like that. 9RP 337. Beale, who was unemployed, had no health insurance and no idea if McMillen, his girlfriend of two years did, either. 9RP 337-38.

To Beale, McMillen did not really ever look pregnant. 9RP 318. Some of her coworkers at a local Montessori school agreed, although everyone had noticed her gaining weight from the fall of 2010 and into the spring of 2011. 9RP 22-23, 113-14, 100-101, 342-44. Lynne Combs, the school's assistant director, said that McMillen's weight gain appeared to be all over McMillen's body. 9RP 134. In fact, Combs admitted, everyone working at the school had gained quite a bit of weight at the time so they were all trying as a team to "get healthier," even starting a diet program together. 9RP 113-14, 126.

Owner of the school, Kate Nohavec, noticed the weight gain but said McMillen was not dressing any different and her demeanor did not change. 9RP 100-101. When asked if McMillen appeared pregnant to her, Nohavec said "[s]he appeared that she had gained weight." 9RP 102-103. Mary Winters and Lisa Wall, coworkers, thought McMillen was getting "larger" mostly in the abdomen. 9RP 23-24, 342-44. McMillen's mom Tenly Schell, however, said McMillen did not ever appear pregnant during the relevant time. 9RP 603. McMillen never told her mom she was pregnant, either. 9RP 601-602. Schell did not recall telling police that she had been asking McMillen "for some time" whether she was pregnant and that McMillen had denied it and said she had started her period. 9RP 605, 776-77.

After McMillen told him what had happened, Beale said, he was confused and did not know what to do. 9RP 322. According to Beale, McMillen said her mom was on the way over to help her take care of everything. 9RP 322. He usually went to a friend's house to watch "fights" on weekends, sometimes staying more than a day. 9RP 323-24. His friend was already on the way over to pick Beale up anyway, so Beale decided to go. 9RP 323-24.

Beale could not remember how long he was there with McMillen before he left, and did not recall helping her clean up or anything like that. 9RP 332-35. At first, Beale said he did not see the remains before leaving. 9RP 322. Later, he admitted that he "took a glance." 9RP 334.

At his friend's house, Beale ended up calling his mom in Alaska to tell her McMillen had a stillborn the night before. 9RP 324-28. Mary Beale-Kuhlman testified at trial that she had been aware that there was a possibility that McMillen was pregnant. 9RP 370. After talking to her son, Beale-Kuhlman phoned McMillen and told her she should go get checked out by a doctor because there could be "things that can medically go wrong when you have a baby." 9RP 370. McMillen said she was going to call her mom and would take care of it. 9RP 370.

McMillen never said she saw the baby move, or heard it cry or felt the heartbeat or anything like that. 9RP 372-73. At some point in their phone call, though, Beale-Kuhlman thought McMillan said, "[w]hat if the baby wasn't dead when it was born?" 9RP 371. Beale's mom responded that if that was the case she would need to get some help and call 9-1-1. 9RP 371-72.

McMillen was supposed to volunteer at the school that day, a Saturday. 9RP 27. When she did not arrive, a coworker "texted" to see if McMillen was okay and McMillen responded that she was having a "really heavy" period which was making her weak. 9RP 27-31. Combs called McMillen and McMillen said she was sick and throwing up. 9RP 127-31. Combs told her to feel better and said she would see her at work on Monday. 9RP 129. The next day, however, McMillen called Combs at home and told her she had miscarried. 9RP 127-29. Combs asked if McMillen needed anything and McMillen, who was crying very hard, said, "[n]o." 9RP 129.

Beale was not home that day and did not return until Tuesday, when McMillen's sister was graduating from high school. 9RP 329. That night, he and McMillen were in the basement watching a movie and Beale asked if everything got "taken care of" and if she had gone to a doctor. 9RP 329. At trial, Beale could not remember McMillen's response, but she told him the remains were still there and she had not seen a doctor so he called police seeking some help. 9RP 329, 335.

When police arrived at about 11 p.m., Beale was outside. 9RP 137, 296, 298. He approached Tacoma Police officers Ben Logan and Yuliya Popkov. 9RP 137, 296-98. Logan said Beale told the officers that his girlfriend had given birth to a baby a few days before, it was dead, it was still in the house and "he didn't know what to do." 9RP 139-40. Both officers said McMillen seemed to be a little upset with Beale when she saw him with them. 9RP 140, 300. Beale then told them that she did not know he had called police. 9RP 140-41, 330.

Logan asked McMillen what had happened and she said a couple days earlier she had been "feeling uncomfortable" and constipated, gone to use the bathroom, sat on it trying to "go" and then given birth to a "stillborn." 9RP 143. Logan also testified that McMillen said "the child was left where it was birthed," that she went and took a shower and that she came back about an hour and a half later, when she "put the body away." 9RP 143. Popkov said McMillen told them she had a stillborn, "freaked out" and put it away in a bag in the laundry room. 9RP 143.

When Logan asked McMillen if the baby moved at all or made any noises after it was born, she answered, "[n]o." 9RP 145. She said it appeared to be dead. 9RP 147. It also appeared purple. 9RP 147.

The officer asked McMillen why she had not called 9-1-1 or told anybody when it happened. 9RP 146. McMillen explained that she was scared, did not know what to do and did not want to call an ambulance because "she couldn't afford it and she didn't have medical insurance." 9RP 146. The officer asked McMillen if she knew she was pregnant and McMillen responded that she did not know for sure but "suspected that she may be," although she also said her birth control kept her from getting a period. 9RP 146-47.

Inside the house, officers noted suspected blood on the floor and bath mats in front of the toilet and sink upstairs and also on the carpeting in the bedroom, several stairs and on the toilet, sink, washing machine and several places on the floor in the laundry room. 9RP 265-66, 275-76, 282-83. In the messy laundry room, officers located clothing, bedding, towels, a bottle of bleach and a garbage can with bloody towels, papers and

clothes in it. 9RP 274, 443-44. McMillen told the officers she had put the remains into a bag in the laundry room and officers found a grey cloth-type bag with hearts on it. 9RP 301-305. A fire department lieutenant opened the bag and saw what appeared to be some towels "heavily covered in blood and matter." 9RP 177, 307. He also found a plastic bag which had what appeared to be the remains of an infant inside. 9RP 178-84.

Both McMillen and Beale were taken to police headquarters to be interviewed that night. 9RP 188-93. Detective Daniel Davis first spoke to McMillen "a bit off tape for awhile" and then recorded a statement. 9RP 384-85. After they gave statements, McMillen and Beale were released and taken to Beale's grandparents' home. 9RP 387-88.

McMillen was picked up again the next day, however, for further interrogation. 9RP 388-92. In her second statement, McMillen said she had been stressed out to think she might be pregnant but had not been really going out of her way to either avoid it or deal with it. 9RP 398. McMillen said she had planned to check at Planned Parenthood but then after months went by and she was not having symptoms, she thought she was not pregnant. 9RP 398. She was also telling herself that it could have been other things causing her to miss her period, like stress. 9RP 399. After she looked online, though, she was not so sure, because it seemed like the kind of stress you had to have for your period to stop was pretty extreme, like when you had cancer. 9RP 399-400.

Davis asked McMillen if she thought about calling an "adoption place" to inquire about those services and she said she did not know there were places like that. 9RP 406. She also said it was hard to do things like

talk to strangers about something like this. 9RP 407. McMillen was young, unmarried and did not know what was going on but knew how people would view her. 9RP 407.

McMillen also knew, however, that her grandparents would not have abandoned or disowned her even though they were from a different era. 9RP 401-403. She still felt like her having a baby without being married would nevertheless have "changed their perception" about her and that was hard. 9RP 401-403.

Detective Davis asked McMillen what she was going to do when she suddenly had a baby after she had denied being pregnant. 9RP 412. McMillen said she would have told people she was pregnant if she had wanted to and it was her body and her life, a personal thing. 9RP 412. She said there were people she knew who were now "kicking themselves" and saying they should have gone out and bought her a pregnancy test or something but McMillen thought it was a personal issue. 9RP 414.

McMillen admitted to the officer that she never really thought about the "bigger picture" and was just kind of waiting until the moment things happened or the last minute. 9RP 415. McMillen also said she did not think that she and Beale were really fit to be parents. 9RP 414.

Regarding the birth, McMillen did not think her water had broken but did not know what it would have felt like and had several times where she "just leaked everywhere." 9RP 412. After the baby was born dead, McMillen was not quite sure what to do and so she wrapped everything in a towel. 9RP 419. She then passed out on the ground and when she woke, she ultimately ended up putting the remains in a garbage bag and then in a

school book bag. 9RP 419. McMillen first said that she had not wanted a garbage bag sitting down there and was trying to keep it hidden from "[e]verybody." 9RP 419. A moment later, however, she noted that her dad did not go down into that room much and Beale already knew what was going on, so having it in a bag other than a garbage bag was more for herself because it made her uneasy to have it in a garbage bag as if it was garbage. 9RP 420.

At that point, McMillen said, she went and took a shower. 9RP 417. She then went back down and tried to clean up the blood on the floor and on the toilet. 9RP 417. Usually she would use bleach when cleaning the toilet because Beale was "not really big on flushing" and she did not think she used Pine-Sol, which they also had, because the smell was too strong. 9RP 418. For the floor, McMillen thought she just used wet towels and paper towels. 9RP 418.

In the second interview, the detective asked if there was blood on the baby and McMillen said she did not think so but that she was bleeding a lot. 9RP 422. She also said there was not "a substantial amount of blood" in the toilet and that she had not really started bleeding "too much" until the placenta came out. 9RP 422.

At trial, the officer first testified that this was not "consistent" with what McMillen had said in the first interview, which he thought was that there was "not much bleeding at all." 9RP 423. When confronted with his pretrial interview, however, Detective Davis admitted that he had said there were actually no changes in the "main points" of McMillen's statements. 9RP 436-40.

In fact, the detective admitted at trial, he had taken a break from the interview to reread his reports before answering the question of whether there were any inconsistencies. 9RP 440. He then answered it by saying there were no "changes in the main points." 9RP 440.

McMillen was nevertheless arrested after the second interview, in part because of what Davis said were "inconsistencies in the statement that I just didn't feel were, you know, consistent." 9RP 423, 424.

Police had by then spoken with some of McMillen's coworkers about whether McMillen had confided in them that she might be pregnant. Wall admitted she did not really socialize with McMillen, had never met McMillen's longtime boyfriend and never discussed her own personal issues with McMillen. 9RP 24-37. Wall nevertheless decided to ask McMillen one day at work, "[a]re you sure you're not pregnant?" 9RP 24-37. Two other coworkers who were there when McMillen was asked if she was pregnant[2] said McMillen got angry and ultimately cried. 9RP 125-27, 344-45. One testified that McMillen said she had gotten tested at a Planned Parenthood and was not pregnant but was gaining weight due to stress. 9RP 344-45.

Combs testified that Mc Millen never really discussed personal issues at work. 9RP 119-22. Combs had known McMillen for some time. 9RP 110-18. McMillen had been working at the school since she was about 16 years old, having started by earning credit as part of a high school class before getting hired. 9RP 96. In her work, McMillen was solely

[2]It is unclear if this was the same day.

responsible for a group of 5-12 year-olds and sometimes preschoolers but the school had no infants younger than 12 months. 9RP 92-93. Those who worked with her said she was great with the kids, loved them and was loved by them, herself. 9RP 132-33, 35, 345. McMillen's plan was to become a teacher and she was already doing some "job shadowing" to that end. 9RP 133-34.

At some point in October of 2010, McMillen had gone to a work-related conference with Nohavec and Combs and they had shared a room. 9RP 99-100. McMillen seemed to be sick and did not eat much but others in the school had the flu at the same time. 9RP 100, 124-26, 131. McMillen was fine shortly after that and did not miss any work because of being ill. 9RP 132. In the interview with Davis, McMillen said something about it maybe being morning sickness but then she felt fine shortly after that so she did not really know. 9RP 394-97.

A parent at the school testified that she had noticed McMillen gaining weight and had asked if McMillen was pregnant but McMillen said she was not. 9RP 211-18. The woman persisted and McMillen got very upset. 9RP 219. According to the parent, McMillen said she had been to Planned Parenthood and they said she was not pregnant. 9RP 219.

The parent admitted that she brought the subject up in the entrance to the school where there was a big open space and lots of people such as kids and other teachers. 9RP 219-222. She also admitted that she was confrontational with McMillen, going "at her" with "a lot of concern" and getting "pretty aggressive." 9RP 220-22. The parent conceded that she had no social relationship with McMillen and they had never discussed personal

things at all before. 9RP 223-24. But the parent described herself as just a "really compassionate, caring person" who worried about people, which was why she had confronted McMillen. 9RP 223-24.

A person who worked as a "floater" at the school in April of 2011 said McMillen had a little "belly" and she asked McMillen one day when she was "due." 9RP 288-89. McMillen laughed and said she was not pregnant but was just a "stress eater." 9RP 288-89.

McMillen told officers she could have told people about what was going on but she felt it was personal. 9RP 412-14.

McMillen's mom took her to an emergency room on June 8th, where Dr. Christina Hitchcock was asked to consult on whether McMillen had a tear on her cervix. 9RP 452-54. Hitchcock determined that the cervix was not torn, just healing, but McMillen had a significant tear between her vagina and rectum and her uterus still enlarged. 9RP 454-55. The tear already looked infected and was not healing. 9RP 456. The tear was cleaned out and repaired with three layers of sutures. 9RP 456-57.

McMillen told Hitchcock she thought her last period had been in October of 2010. 9RP 45859. McMillen described the delivery and said that the blood was all red, not dark brown. 9RP 460. She did not describe a "substantial amount of blood loss," instead just saying it was kind of like a period. 9RP 474. Hitchcock admitted that she did not ask McMillen anything about "labor, contractions, bleeding" and just recalled McMillen saying "when she sat on the toilet is where she delivered the baby." 9RP 475. McMillen told Hitchcock that the baby was a "still birth." 9RP 454.

Questioned by Hitchcock, McMillen did not know how far along

she was in the pregnancy, could not say how big the baby was and, when asked if the baby was like a "five pound bag of sugar or like a ten pound bag of potatoes," kind of laughed. 9RP 457. Hitchcock noted the laugh in her report because, the doctor said, it "appeared abnormal to me." 9RP 462. Hitchcock said McMillen denied depression or feeling tearful and that she always referred to the baby as "it." 9RP 462.

Hitchcock was not the only state's witness asked to talk about McMillen's "demeanor," usually over defense objection. Logan testified that the night police were called McMillen appeared "calm, normal," and "[d]idn't appear to be upset[.]" 9RP 147-48. Davis testified that she was "calm" and "just sitting there" - as compared to a "more excited" Beale. 9RP 375-81. The firefighter there that night said she seemed "[s]lightly on edge," nervous and didn't appear comfortable. 9RP 173. Detective Chittick said that in the first interview McMillen was "very stoic" throughout, did not show a lot of emotion, was not "upset, agitated or anything like that" and seemed like she was having "not a lot of feeling and just answering the questions." 9RP 196. Davis described her in the same interview as "pretty calm and, you know, maybe a little detached from the gravity of the situation. 9RP 387. And for the second interview, Davis was allowed to say McMillen's demeanor was "pretty much the same as the night before." 9RP 423. He also gave his opinion that it was "a pretty calm interview," that "it seemed like she was a little bit - like I said, I guess, detached some, distance maybe." 9RP 423.

Hitchcock ran some tests, including for clotting disorders that are always tested when there is a stillbirth. 9RP 463. They were normal. 9RP

463-64. What was not normal, however, was McMillen's blood volume, which was very low. 9RP 470. She was also anemic, which could have made her light-headed and dizzy. 9RP 470. In fact, Hitchcock offered McMillen a blood transfusion but she declined. 9RP 473-74. Hitchcock said she could not tell whether the low blood levels were a big change for McMillen because they had no "baseline." 9RP 473. The doctor admitted, however, that if McMillen's normal blood level was even 10 points higher then the 21% she was at now the doctor would describe it "technically, as a postpartum hemorrhage." 9RP 473.

For the first time at trial, Hitchcock claimed that McMillen had told the doctor that, after she gave birth, she left the baby in the toilet for about 90 minutes and took a shower. 9RP 475. Hitchcock testified that McMillen said that when it was born, the baby looked "purple" so she just "kind of left it there." 9RP 475. When confronted with her report, the doctor admitted that it contained no such statement. 9RP 475-76. Prior to her testimony, Hitchcock had told counsel some things she had remembered that were not in her report. 9RP 476. The "90 minute" claim was not among them. 9RP 476. Hitchcock claimed, however, to "distinctly remember that" being said. 9RP 476.

McMillen's mother, Tenley Schell, was in the room for the entire examination that day. 9RP 603. She did not hear the comments Hitchcock said were made. 9RP 603. Schell also did not recall telling police later that she had asked McMillen "for some time" whether she was pregnant but McMillen had constantly denied it and said she started her period. 9RP 605. A detective later testified about that conversation. 9RP 605, 776-77.

Dr. Thomas Clark, the Pierce County Medical Examiner, conducted the autopsy and could not find any clear cause of death from the physical evidence. 9RP 538. Instead, he based his conclusion that the death was from hypothermia or drowning with blood loss as a contributor based solely on the circumstances of what he had been told had happened and was capable of causing death. 9RP 538. There was no external evidence of any injury to the infant and "nothing in the autopsy to support drowning or hypothermia as a cause of death." 9RP 538, 545. Frankly, he admitted, the "cause of death" was "circumstantial" based on the fact that he believed the baby had been born alive and that these "factors" seemed most likely to have potentially caused the death. 9RP 538.

Clark first said the infant appeared to be "full-term with early decomposition and desiccation[.]" 9RP 492-93. Clark admitted, however, that the infant weighed a little less than one would expect in a full-term. 9RP 519. Clark opined that the baby was born alive in part because a portion of the x-ray appeared to show that the lungs were "aerated," which Clark said meant "they had inflated and had air in them." 9RP 496. Clark also said there was air in "the initial portion of the GI track, the stomach and duodenum." 9RP 496. Clark explained that, when an infant is born, its lungs are not inflated and there is no air in the GI track, so as birth occurs, the first breath is taken and it inflates the lungs over the course of a few breaths. 9RP 496. He also said that infants can swallow air, which is then processed through the duodenum and bowel. 9RP 497.

When the scalp was opened up, Clark found a "large hematoma," which is "a collection of blood and blood clot in between the scalp and the

skull." 9RP 501. There was a large amount of blood sitting on the interior of the scalp which should not be there and which, Clark said, could not have been there if the infant had died in the uterus, because it could not occur without blood pressure. 9RP 503. There was a "subdural hematoma" too, which he said almost always was caused by trauma but did not have to be severe to cause the damage he saw. 9RP 507. It was possible the subdural hemorrhage was caused at the same time as the hemorrhage observed on the outside of the skull. 9RP 507. If a baby was born in the toilet and struck its head on that, it could be consistent with these hematomas. 9RP 533.

Clark admitted that some part or "even possibly all" of that subdural hemorrhage could have been caused by the birth, itself. 9RP 507. He also thought that the parietal hematoma could have been caused by birth or external trauma. 9RP 532-33. He said "[y]ou can get a thin layer of subdural blood from birth trauma," so that he could not really ascribe the bleeding to trauma other than that from birth. 9RP 509.

Clark talked about the autopsy and described in detail taking sections from the lungs and putting them in liquid and noting that they floated, which he said was "indicating that they have gas in the alveolar "spaces." 9RP 514-15. He said that lungs that did not have air in the air spaces "don't float" and lungs with air in the air spaces, do. 9RP 515. He said that typically "lung tissue does not float in a stillborn that never breathed." 9RP 515-16.

Clark relied heavily on the "floating lung" test, saying that an infant who died in utero "would not have expanded lungs, the lungs would not

float" and "there would be no air in the GI tract on an x-ray." 9RP 517.

Clark admitted that the compression or motion of just picking up a newborn and moving it could cause some air to be present in the lungs but thought the infant's lungs in this case were uniformly and completely expanded. 9RP 576. He also admitted that part of the autopsy put potentially negative pressure in the lungs and stomach and that could pull in air, but he noted the X-Ray had been taken before then. 9RP 576-77.

Clark concluded that the infant was born alive, "based on the aerated lungs, air in the stomach, and the large scalp hematoma." 9RP 526. The cause of death was "not so clear," Clark admitted, although he opined that it was likely a combination of drowning and hypothermia, maybe also with blood loss contributing to the death. 9RP 527. Clark admitted that "there isn't any one thing that is absolutely clear" about the cause of death, because drowning and hypothermia do not usually show physical signs in an autopsy. 9RP 527. Drowning "would not necessarily leave any specific evidence," Clark said, because most people who drown have a spasm in their throat so that water does not get into the lungs. 9RP 527. As a result, the fact that the infant's lungs were clear in this case - or any other - would not exclude the possibility of drowning, according to Clark 9RP 527. Clark also thought death could have happened because the child "could have lost enough heat to die" but again there was nothing in the autopsy to show that and it was based on what he had been told about what happened. 9RP 527.

Dr. Clifford Nelson, a forensic pathologist and deputy state medical examiner for the state of Oregon, disagreed with Clark's conclusions. 9RP

642-43. Nelson, who had special training for child death investigation, reviewed the evidence and found no proof of live birth, as he defined it. 9RP 678-79. He noted there was nothing in the autopsy which showed any evidence of drowning and the allegation was that the baby had its head out of water. 9RP 723-24. There was also no external evidence of any injury to the child at all. 9RP 705-706.

Indeed, on this evidence, Dr. Nelson said, he could not say with any reasonable degree of medical certainty that this was a live birth. 9RP 727-28. He did not believe anyone could. 9RP 727-28.

Nelson said that, in most situations, the only way to know for sure you have a live birth was to find some food or colostrum in the child's stomach or have some injury which could only have happened after birth. 9RP 679. For "inconclusive" findings, he said, there are findings you can see in live births and still births, as well, so they really do not support a finding that either occurred. 9RP 679. For example, he had seen patchy aeration in kids that he knew were born alive so he could not use that to "make the call." 9RP 758.

Nelson talked about the "float test" which people used to use and upon which Clark's opinion relied. 9RP 680. He said there were a lot of reasons you can get gas in the lungs and that would cause them to float, but that was not proof of a live birth. 9RP 680. During the birthing process, for example, the chest was squeezed down and then released, and that negative pressure would draw some air into the lungs. Also, Nelson noted, moving a body at all, including putting it on an X-ray table, can cause "an exchange of air and get the air into both lungs and stomach and even

potentially the duodenum," as seen in this case. 9RP 681. Nelson said there can be gas based on decomposition of a newborn and then showed the court what gas looked like - big holes that are "really rounded" - which he saw in the example slides and in baby McMillen. 9RP 682. He also showed a textbook talking about how post-mortem handling had also been found to cause entry of air into fetal lungs. 9RP 683.

In fact, Nelson showed sections of a lung taken from a baby who died in the uterus which looked "aerated" even though it was impossible, given that death was known to have occurred before birth. 9RP 684-85. Nelson concluded that post-mortem handling could account for what appears to be air in the X-rays of the lungs and the stomach. 9RP 685.

Regarding Clark's apparent heavy reliance on the "float" test, Nelson quoted a textbook in the field saying that there were too many "controlled" tests showing that stillborn lungs may float and the lungs from an infant known to be born live could sink for that to be used as evidence of live birth in criminal trials anymore. 9RP 688-89. He said he would probably make note of it but it was "useless" as a determinate of whether a baby was born alive or not. 9RP 690.

Nelson looked at the lung tissue slides taken by Clark and said that the lungs seemed mostly "pretty solid," which would not be the case if they were "normal aerated lungs." 9RP 694. He said there appeared to be round circles typical of the appearance of gas-formed cysts. 9RP 694-95.

Regarding the subgaleal bleeding, Nelson testified that he would expect to see bleeding in certain vessels in the subcutaneous fat if the bleeding was due to blunt force trauma or impact, but none was there. 9RP

703-707. Nelson thought instead that it was due to a caput succedaneum. 9RP 704. A caput is something that happens as the baby's head is traveling through the birth canal from being coned down and pushed and narrowed, and there can be some bleeding. 9RP 707-708.

In rebuttal, the prosecutor called Yolande Duralde, medical director of the Child Abuse Intervention Department at Mary Bridge Hospital, who specialized in child abuse.[3] Duralde disagreed that the parietal hematoma on the front of the head was a caput succedaneum. 9RP 794. Instead, she offered her opinion that the injury occurred after the baby was delivered, by hitting something hard like "the toilet on the way out." 9RP 797. She based this on the description McMillen gave of the birth being like she had to "poop" and a baby coming out, which Duralde opined showed no difficulty in the child coming through the birth canal such as that which would cause a caput. 9RP 798.

Duralde admitted that there was no medical evidence to show that the injury was not caused during the birthing process. 9RP 800-801. Instead, she said, she was relying just on the description of the delivery to reach her conclusion. 9RP 801.

Duralde also conceded that she had previously said it was possible that the injury was a caput but it just did not sound like one. 9RP 803, 809.

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[3]The court's decision to admit this evidence over defense objection is discussed in more detail in the argument section, *infra*.

D. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO PROVE ALL THE ESSENTIAL ELEMENTS OF THE CRIME

Both the state and federal constitutions guarantee the accused due process, which requires the prosecution to prove every element of a charged crime, beyond a reasonable doubt. U.S. Const. amend. 14; Wa. Const. Art. 1, § 3; In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Evidence is sufficient to support a criminal conviction only where, taken in the light most favorable to the prosecution, a rational trier of fact could have found all of the elements charged beyond a reasonable doubt. Green, 94 Wash.2d at 221; see, Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979). Where there is not such evidence, reversal and dismissal is required. Green, 94 Wn.2d at 221.

In this case, this Court should reverse and dismiss the conviction because the prosecution failed to meet its burden of proof for the essential elements of the offense.

McMillen was accused of second-degree felony murder with a number of crimes listed as the predicate offense. CP 50-51.

> A person is guilty of murder in the second degree when. . .he or she commits or attempts to commit any felony, including assault, other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants[.]

RCW 9A.32.050(1)(b). McMillen was convicted of the crime with second-degree abandonment of a dependent person as the underlying offense. CP 396. To prove that crime, the prosecution had to show that McMillen

committed second-degree abandonment and, "in the course of and in furtherance thereof" or 'immediate flight therefrom," the death occurred. See RCW 9A.32.050(1)(b).

Abandonment of a dependent person in the second-degree is defined in RCW 9A.42.070, which provides, in relevant part:

> (1) . . . [A] person is guilty of the crime of abandonment of a dependent person in the second degree if:
>
> (a) The person is the parent of a child, a person entrusted with the physical custody or a child or other dependent person. . .; and
>
> (b) The person recklessly abandons the child or other dependent person; and:
>
> (i) As a result of being abandoned, the child or other dependent person suffers substantial bodily harm; or
>
> (ii) Abandoning the child or other dependent person creates an imminent and substantial risk that the child or other dependent person will die or suffer great bodily harm.

Here, the relevant harm was death, so it appears that subsection (ii) applies. Thus, the prosecution had to prove that McMillen recklessly abandoned the infant, creating an imminent and substantial risk of death, and death resulted from the commission, in furtherance of or in direct flight from that abandonment.

The prosecution failed to meet that burden of proof, in several ways. First, there was insufficient evidence that the death occurred in the commission, in furtherance of or in direct flight from the abandonment. There was no testimony from any of the experts that the infant would have lived had it not been in the water. All of the testimony was that it was

*assumed* that hypothermia or drowning *likely* caused the death and loss of blood *likely* contributed, simply because no real cause of death could be found based on the physical evidence. 9RP 527, 538, 723-24, 798, 801. But the description McMillen gave was of a head above water. Further, no one testified that the infant would have lived if McMillen had done anything different. Nor was there any evidence to that effect. Absent any supporting testimony at all, it was speculation only that supported the assumption that the death occurred in the commission, in furtherance of or direct flight from the abandonment.

Further, there was insufficient evidence to prove the required mental state. The predicate felony is an element of the felony murder crime and substitutes for the mental state the prosecution is otherwise required to prove. See State v. Kosewicz, 174 Wn.2d 683, 691-92, 278 P.3d 184, cert. denied, __ U.S. __, 133 S. Ct. 485, 184 L. Ed. 2d 305 (2012). The mental state the prosecution had to prove here was recklessness, which required proof that the a defendant 1) failed to act while knowing of and disregarding a substantial risk that a wrongful act might occur as a result and 2) disregarding that risk grossly deviated from conduct "a reasonable person would exercise in the same situation." State v. R.H.S., 94 Wn. App. 844, 847, 974 P.2d 1253 (1999). Thus, there are both objective and subjective parts of the analysis, because recklessness is determined by not only looking at what a reasonable person would do but also the defendant's subjective belief at the time of the offense. Id.

Here, the weight of the evidence shows that McMillen's subjective belief was that the baby was dead. She told everyone it was stillborn or that

she had miscarried. See 9RP 127-29, 143, 321, 370, 419. She said it did not make noise. It did not move. It was purple. Only with Beale's mom did McMillen wonder aloud "what if" it had been born alive. 9RP 371.

Given that, there was insufficient evidence that McMillan knew of and disregarded a substantial risk of death and thus committed abandonment. Thinking the baby was dead, there would be no risk in leaving it where it was while washing off yourself. Failing to be aware of the risk that the baby might be alive is criminal negligence; it is not recklessness. See, e.g., State v. Koch, 157 Wn. App. 20, 36, 237 P.3d 287 (2010), review denied, 170 Wn.2d 1022 (2011) (criminal negligence is failure to be aware of a substantial risk and that failure was a gross deviation from the standard of care of a reasonable person). Even taken in the light most favorable to the state, at best the evidence supported a conviction for second-degree manslaughter. See, e.g., RCW 9A.32.070(2). Because there was insufficient evidence to prove all the essential elements of the crime, this Court should reverse.

2. McMILLEN WAS DEPRIVED OF HER SIXTH AMENDMENT AND ARTICLE 1, SECTION 22 RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL

Under both the state and federal constitutions, the accused in a criminal case is entitled to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); Sixth Amend.; Art. I, § 22. Further, a defendant can be deprived of the due process guarantee of a fair trial when

counsel fails to live up to minimum standards, because counsel serves the important function of balancing against the weight of the state and taking steps to ensure the trial is "fair." See State v. Pryor, 67 Wash. 216, 121 P. 56 (1912); State v. Webbe, 122 Wn. App. 683, 694, 94 P.3d 994 (2004). In this case, reversal is required, because counsel was prejudicially ineffective and, as a result, McMillen was deprived of both her rights to effective assistance and to a fair trial.

a. Ineffectiveness in failing to raise a *corpus delicti* challenge below

First, counsel was prejudicially ineffective in failing to raise a challenge based on the corpus delicti rule below. Under that rule, there must be sufficient evidence - independent of the defendant's statements - that a crime was committed. See State v. Ray, 130 Wn.2d 673, 679, 926 P.2d 904 (1996). The prosecution bears the burden of production, which means that it "need only produce evidence sufficient to support a finding that someone committed a crime." State v. Pineda, 99 Wn. App. 65, 77, 992 P.2d 525 (2000). Where a death is involved, this means evidence sufficient to support "a logical and reasonable inference that the death was caused by a criminal act." 99 Wn. App. at 77 (quotations omitted). Put simply, there must be more than a body - there must be some proof, independent of the defendant's statements - that the death was the result of a crime. See id.; see also, State v. Aten, 130 Wn.2d 640, 663, 927 P.2d 210 (1996).

The corpus delicti rule is both a question of sufficiency of the evidence to admit a statement and sufficiency of the evidence to convict,

but it not constitutional. See State v. Dow, 168 Wn.2d 243, 249, 227 P.3d 1278 (2010). As such, it is not an issue which can be raised for the first time on direct appeal, except in the context of counsel's ineffectiveness. See, State v. Page, 147 Wn. App. 849, 855, 199 P.3d 437 (2008). When it is raised below, on appeal this Court applies de novo review, taking the evidence in the light most favorable to the state. See, e.g., State v. Brockob, 159 Wn.2d 311, 328, 150 P.3d 59 (2006).

Here, the issue was not raised below, but counsel was prejudicially ineffective in that failure. Failure to make a motion at trial will amount to deficient performance if the defendant can show that the motion has merit and would likely have been granted. See Page, 147 Wn. App. at 855. Further, that deficiency is shown to have prejudiced the defendant if there is a reasonable probability that, had the motion been made and granted, the outcome of the proceeding would have been different. Id.

Those standards are all met in this case. First, had the motion been made, it would have been granted, because there was not sufficient independent evidence to provide "prima facie corroboration" of the crime described in the defendant's statements. To meet that standard, the independent evidence must support a "reasonable inference" of the facts the state needs to prove. See State v. Vangerpen, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995). That independent evidence may be direct or circumstantial. See Aten, 130 Wn.2d at 655. Any circumstantial evidence used, however, must be "consistent with guilt and inconsistent with innocence." 130 Wn.2d at 660.

In this case, there was insufficient evidence independent of

McMillen's statements, to prove that the death was the result of a criminal act. This Court's decision in Pineda, supra, is instructive. In that case, a 9-day old infant just pronounced healthy by a doctor the day before was found dead on a futon with its sleeping mom. The mom was dressed, with makeup and neatly arranged hair. The baby was pronounced dead at the hospital and her body did not show signs of foul play. The mom did not "manifest emotion," and when interviewed by police even laughed or giggled at times, which struck the officers as odd. Pineda, 99 Wn. App. at 67-68. The mom maintained that what had happened must have been accidental and said she did not remember what had occurred. Id.

Just like in this case, there was no sign of external injury or bruising and nothing in the autopsy that provided evidence of cause of death. 99 Wn. App. at 72. Instead, the cause of death was determined based on the mom's statements of what she thought occurred. 99 Wn. App. at 74.

The mom was charged with second-degree manslaughter for having, "with criminal negligence," caused the death of another. 99 Wn. App. at 74. A diagnosis of suffocation was made but an expert testified that the evidence was more consistent with "SIDS" than with suffocation and that he would not make a diagnosis of suffocating "[b]ecause there are no autopsy findings that would suggest it." 99 Wn. App. at 75-76.

In upholding the trial court's dismissal for insufficient evidence based on the corpus delicti rule, this Court rejected the idea that the diagnosis of "suffocation" supported the finding that a crime had occurred. The Court noted that the autopsy finding that the cause of death was suffocation or smothering was based solely upon the statements of what the

defendant said had occurred, not on any physical findings from the autopsy. Id. The Court pointed out that the expert's opinion was thus not "independent" of the defendant's statements. Further, this Court rejected the idea that the evidence was sufficient to support a "logical and reasonable inference that anyone committed a crime" just because a 9-day old seemingly healthy child was dead, the medical examiner found no actual cause of death in the autopsy, the mom was fully dressed and there at the time of death and she failed to show emotion about what happened. Pineda, 99 Wn. App. at 80-81.

Here, even taking the evidence in the light most favorable to the state, on de novo review, reversal would have been required. Without McMillen's statements, there is simply insufficient evidence that the death was due to any criminal agency. None of the experts found any physical evidence showing a cause of death. By his own admission, the medical examiner's determination that drowning or hypothermia were likely causes of death was based solely upon what McMillen said occurred. 9RP 538, 545. So was Duralde's testimony dismissing the possibility of a caput-type birth injury being the cause of the hematoma. See 9RP 798-901. Thus, none of those "facts" is "independent" of McMillen's statements and they cannot be considered in determining whether the corpus delicti rule has been met. See Pineda, 99 Wn. App. at 79-80.

The remaining, independent evidence does not prove the death was the result of any criminal agency. The autopsy itself did not show a cause of death. The findings of hypothermia or drowning were based not on evidence but on assumption based on McMillen's statements. There was no

outward sign of traumas or bruising. And again, Duralde's opinion that the injury was not caused by the birth but rather blunt force trauma was not based on evidence but on what McMillen had said had occurred.

There was insufficient evidence to support the conviction under the corpus delicti rule. Had counsel made the motion below, it would likely have been granted. Had it been granted, McMillen would never have been convicted. Had the trial court failed to grant the motion, it would have been error, and this Court would have applied de novo review and so held.

It is hard to conceive of an outcome more favorable to the defendant than dismissal of the charge, which should have occurred here. There could be no strategic reason to fail to make such a motion. Counsel's failure to move to dismiss below amounted to ineffective assistance of counsel. This Court should so hold and should reverse.

b. Ineffectiveness in failing to rebut the prosecution's case regarding McMillen's behavior and demeanor as evidence of her guilt and credibility

Before trial, it was clear that the prosecution was going to focus on McMillen's behavior and demeanor as evidence of guilt and credibility. The prosecutor argued that the evidence such as that McMillen did not seek prenatal care, did not take a pregnancy test, at one point looked into an abortion and denied being pregnant to others was all relevant to McMillen's "knowledge that she was pregnant." 9RP 56. The prosecutor also argued that the evidence was relevant to McMillen's "intent," because her action - and inaction - during the pregnancy showed she did not want the child and everything she did before the birth was "consistent with what she does after having the baby, which is nothing." 9RP 56-57. The court said it would

consider the evidence "for a limited purpose to understand her credibility." 9RP 58.

Counsel's efforts to exclude the evidence as irrelevant were rebuffed. See, e.g., 9RP 340. The prosecution was also allowed to introduce diaries they said showed that McMillen had made no preparations at all for the arrival of a baby. 9RP 260-62.

Before trial, counsel announced her intent to introduce testimony from Judy Snow, the mental health manager at the jail who had seen McMillen when she was booked into custody. 9RP 47-48. Counsel wanted Snow to talk about how McMillen's "affect" and "demeanor" after the arrest seemed inappropriate and "detached from reality." 9RP 47. Counsel went on:

> it is important to the defense here, this detachment and the lack of contact with reality that Ms. McMillen had at the time that she continued to exhibit, not just during the pregnancy, not just at birth, but afterwards, even after she was arrested for murdering a child.

9RP 48. The court thought the evidence was "a bit attenuated" because of the timing but mentioned it might be relevant if there was a claim of "diminished capacity." 9RP 48-49. Later, there was a vigorous discussion of whether Snow would testify, with a prosecutor from the civil division arguing on behalf of the sheriff's office to try to keep Snow from court. 9RP 70-74. For her part, counsel said the prosecution was going to introduce "demeanor" testimony for June 8 and she wanted to "follow up" with information about the same thing on June 9th. 9RP 75.

Counsel also told the court that the reason she wanted to admit the evidence from Snow was because it showed that McMillen "couldn't

acknowledge reality to herself." 9RP 58.

Later, however, when the court was ready to rule on whether Snow would be allowed to testify, without explanation, counsel said, "I'm withdrawing her as a witness," apologizing, "I should have apprised the Court of that earlier." 9RP 445.

In opening argument, the prosecutor focused on how McMillen had denied the pregnancy, told different things to different people and ultimately, "instead of protecting her child, let her baby girl die in a dark, cold basement and then put her in a bag like a piece of trash." 9RP 87, 88, 89, 90. The prosecution invoked that same theme again in closing, focusing on the theory that McMillen's motive was she "never wanted to be pregnant. She didn't want to be a mother. She never intended to be a mother." 9RP 816. Again and again, the prosecutor portrayed McMillen as someone who denied her pregnancy but knew she was pregnant, who was callous and did not get an abortion because it was "inconvenient" for her. 9RP 819-20.

The prosecutor also focused the court's attention repeatedly on what it portrayed as McMillen's inappropriate, detached and "cold" behavior in not being emotional, laughing inappropriately and dealing with the pregnancy and birth. 9RP 827-30. In rebuttal closing argument, the prosecutor used this behavior as proof of guilt, saying "the way she conducted herself throughout this pregnancy is completely consistent with the end of this pregnancy." 9RP 842-43. The prosecution portrayed McMillen's "denial of symptoms" of pregnancy as "sinister" and more than just denial but rather proof that she did not want the baby and was likely

guilty of abandoning the baby die as a result. 9RP 844-45.

In fact, the prosecutor declared everything McMillen had done as "calculated, cold and considered." 9RP 845-46.

In her closing argument, counsel tried to deal with the behavior, describing it as "denial" but also admitting that no one would say McMillen's conduct and attitude made any sense. 9RP 837-38.

In the written findings on guilt, the court specifically noted McMillen's denial of the pregnancy and not getting prenatal care. CP 391.

Later, at sentencing, the judge would confess that one of the things that had struck him at trial was McMillen's "conduct and her affect," not only in relation to the pregnancy and birth but also during the trial proceedings. 12RP 12-13. He candidly admitted that he had not understood it at all. 12RP 22.

At sentencing, however, the judge had a much different view of McMillen and what had occurred. 1RP 21-22. By then, counsel had filed a memo which included a psychological evaluation of McMillen done after the trial. See CP 299-71. The evaluation showed that McMillan was suffering from "neonaticide syndrome." 11RP 4-5. The syndrome usually affects young women in their first pregnancy, in their teens or early 20s, unmarried and often passive, who deny their pregnancy and avoid making decisions about it and who ultimately cause the death of the infant through action or inaction. CP 305; see United States v. Deegan, 605 F.3d 625 (8th Cir. 2010), cert. denied, __ U.S. __, 131 S. Ct. 2094, 179 L. Ed. 2d 896 (2011) (Bright, J., dissenting). Counsel noted that the syndrome explained McMillen's denial of the pregnancy, failure to take any steps to figure out if

she was pregnant or not and other actions - even McMillen's claim that giving birth did not hurt that much. 11RP 10-11.

These materials had an impact on the judge. 12RP 12. In reaching his decision at sentencing, he noted that "[o]ne of the things that came out at trial" and which he had observed as abnormal was McMillen's "conduct and her affect." 12RP 22. The judge also said that until the verdict was handed down, it appeared to him that McMillen was not aware of how serious the case was that she was facing. 12RP 22. The judge admitted he had not understood her "affect and her conduct." 12RP 22.

Before sentencing, however, the judge had read some of the articles cited by the defense and he now understood that this was a "classic case of neonaticide." 12RP 23. The judge also noted that it was "real important" in understanding the case, which otherwise "makes no sense." 12RP 23. After reading what counsel had now provided, the judge said he was starting to understand. 12RP 24. The judge went on to say that, "while this neonaticide is not a complete defense . . .while I don't think it creates the kind of compulsion or coercion that would warrant an exceptional sentence downward and while I don't question that Ms. McMillen had the capacity to appreciate her conduct and the capacity to conform her conduct," the judge believed a low-end range sentence was proper. 12RP 24-25.

Counsel was prejudicially ineffective in failing to even attempt to admit the crucial evidence regarding neonaticide at trial. First, counsel's failure was deficient performance. It was abundantly clear that McMillen's out-of-the ordinary behavior and affect was going to need to be explained at trial as something other than a reflection of the heartless, cold person the

prosecution sought to portray.

Indeed, the entire case against McMillen was based on that portrayal. See 9RP 87-90, 827-30. There was no physical evidence of any cause of death. There were no external injuries. There was no evidence to prove drowning or hypothermia. The prosecutor's focus on what it portrayed as McMillen's inappropriate, detached and "cold" behavior was integral to its theory of guilt. 9RP 842-43. The prosecution used all of this evidence to prove McMillen was "calculated, cold and considered" and convince the court that McMillen had simply callously left a baby she did not want in the toilet to die and thus was guilty of the felony murder. 9RP 845-46.

It was clear that, to defend her, McMillen's behavior and affect were going to need to be explained as something other than a reflection of the heartless, cold person the prosecution sought to portray. Indeed, in her closing argument, counsel tried to address it, describing it as "denial" but also admitting that no one would say McMillen's behavior made any sense. 9RP 837-38.

But in fact, once counsel had McMillen evaluated after the conviction, it became clear that McMillen's behavior *did* make some kind of sense, from the perspective of someone suffering, as she was, from neonaticide syndrome. See CP 299-305, 327-30. Neonaticide - the killing of a child within 24 hours of its birth - is uncommon in the United States but when it occurs, the fact pattern is "consistent to the point of being archetypal." Margaret Ryznar, *A Crime of Its Own? A Proposal for Achieving Greater Sentencing Consistency in Neonaticide and Infanticide*

*Cases,* 47 U.S.F.L. REV. 459, at 459 (2013). The pattern involves a young woman (teen or early 20s), having a first pregnancy, unmarried, who denies her pregnancy until she finds herself in labor, after which, mentally and otherwise unprepared for the child, she abandons the baby or commits some other action leading to the baby's death. Id.

In fact, virtually every "fact" upon which the prosecution relied in its theory of McMillen's callousness, duplicity and guilt is answered by the syndrome with which she suffered. For example, the denial of pregnancy which the prosecution relied on as evidence of deceit and calculation is, in fact, a "key element of neonaticide syndrome." See Beth E. Bookwalter, *Throwing the Bath Water Out with the Baby: Wrongful Exclusion of Expert Testimony on Neonaticide Syndrome*, 78 B. U. L. REV. 1185, 1191 (1998). In fact, young women suffering from this syndrome may suffer such a state of pathological denial that they may convince themselves that they are not actually pregnant - as here. Id. The syndrome involves extreme denial to the point of disassociation, so that they may even ignore their own physical symptoms.

Further, seemingly callous behavior is explained by the syndrome, such as returning to a prom after the birth or throwing out the remains. Id. And the "unusual passivity" of neonaticide offenders manifests in failing to take steps to terminate a pregnancy or take action relating to the situation. 78 B. U. L. REV. at 1193.

At sentencing, the judge was very clear: at trial, he had not understood McMillen's demeanor or any of the things she did during the pregnancy and birth. 12RP 12, 22. It was only after counsel presented

McMillen's diagnosis and the information on neonaticide syndrome that the judge came to understand why McMillen had done what she had done - or not done. 12RP 12-24. Indeed, the judge declared McMillen's case a classic example of someone with the syndrome. 12RP 23.

This information came too late for trial, however, because counsel apparently abandoned the idea of even trying to present anything to rebut the prosecution's portrayal of her client below. While counsel objected to the prosecutor's use of the evidence on "relevancy" grounds, she also dropped the only witness she had who would have talked about demeanor before the court could even rule on that witness. See 9RP 445. Aside from declaring that her client was obviously in "denial," counsel did not present any witnesses or testimony to show that McMillen's behavior was, in fact, explicable, given her mental state. As a result, counsel left the court with only the prosecution's view of McMillen as a cold, heartless, immature girl.

Below, counsel seemed to think that, because McMillen's mental condition was not a complete defense, it was only relevant for sentencing. 12RP 11, 14. In fact, however, the evidence was also extremely relevant to whether McMillen was guilty at all. The determination of cause of death was based on the version of events McMillen gave about what occurred. 6RP 527. And McMillen's description of the ease of the birth is the only evidence Duralde relied on in disputing that the injury was a caput and in concluding it was caused by the infant's head striking the toilet as it came out.

But that description of events and the declared "ease" of the birth came from someone suffering from a syndrome in which they are so

disassociated from the pregnancy they may suppress their own physical symptoms - including those during birth. See CP 299-306; Bookwalter, 78 B.U.L. REV. at 1191.

Indeed, counsel herself noted how important the diagnosis was to the defense, arguing in her sentencing memo that it was "critical to understanding [McMillen's] disassociated, dazed, desperate response to the birth." CP 322.

Counsel's failure to try to present the information and diagnosis to the court at trial instead of waiting until sentencing was ineffective assistance. To show counsel was ineffective, McMillen must first show that, even with a strong presumption of effectiveness, counsel's performance fell below an objective standard of reasonableness. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Second, McMillen must show that counsel's unprofessional errors prejudiced her client. Id. That standard is met when there is a reasonable probability that, but for counsel's deficient performance, the result would have been different. This does not require proof that, absent counsel's error, the defendant would be convicted; instead, it requires only a probability "sufficient to undermine confidence in the outcome." See State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

There is more than such a probability here. All of the negative facts - the failure to get prenatal care, the failure to take a pregnancy test, the denial of the pregnancy, the failure to prepare, her demeanor and everything else - were based upon the court seeing only the prosecution's view that someone who acted that way was simply cold and callous enough to leave

her own infant to die. Evidence that McMillen suffered from neonaticide syndrome would have rebutted all of that negative evidence by showing that these things form a recognizable pattern and are symptoms of the extreme disassociation inherent in the syndrome.

Further, even if counsel did not think the court would necessarily admit the evidence as a "complete defense," she still should have tried to introduce it. See State v. Dawkins, 71 Wn. App. 902, 863 P.2d 124 (1994) (where counsel mistakenly thought the court would deny a motion to exclude harmful evidence, still had a duty to make the effort because the admission of evidence is a matter of much discretion). In fact, where evidence is of high probative value to the defense, its exclusion may violate the defendant's constitutional right to present a defense even if there is an evidentiary rule of practice which justified that exclusion. See State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

It is important to note that "[a] reasonable belief that the defendant did not act with the statutorily required culpability constitutes a legitimate defense theory of the case." Koch, 157 Wn. App. at 36. Not only that, the defense of insanity is unusually effective as a defense in infanticide cases, succeeding about one-third of the time versus the "less than one percent" in all felony cases overall. Ryznar, 47 U.S.F.L. REV. at 472.

Further, there was no downside to trying to admit this evidence below. In a bench trial, a judge sits as both arbiter of law and finder of fact. See State v. Read, 147 Wn.2d 238, 244, 53 P.3d 26 (2002). Even if the judge decided not to admit or rely on all of the evidence regarding McMillen's condition, the very fact that such evidence existed would at

least have indicated that the prosecution's view of McMillen's acts and demeanor were not the only explanation for what occurred.

Counsel was again prejudicially ineffective on behalf of her client. There could be no reasonable tactical decision which would support keeping this crucial information out of trial. This Court should so hold and should reverse based on counsel's ineffectiveness.

c. Personal issues and failure to prepare

A few days before the scheduled trial date in January of 2014, counsel told the court she had just learned what Dr. Duralde was expected to say at trial and counsel needed a continuance to get an expert of her own to rebut it. 6RP 4-5. Counsel had been trying to set up a witness interview with Duralde since "even before October," but had not known what Duralde was going to say, because, counsel said, Duralde "did not write a report, and I asked for a copy of her CV, and I could not see any connection with her background and current experiences." 6RP 5. Duralde had been very busy and the interview had only been completed on Christmas Eve. 6RP 5.

At that point, counsel said, she started trying to "find an expert but that wasn't a lot of time." 6RP 5. She had met with someone just the day before but "he's not available, so that didn't work out." 6RP 5. Counsel continued:

> I'm now in a position where the State's expert - - and I just, several weeks ago, learned what she was going to say, and it's significant, if she's allowed to testify. . . I think they plan to have her testify on [an] . . .ultimate issue to form an opinion. And I think that the defense will be severely prejudiced and Ms. McMillen will if we're not allowed to bring an expert in to rebut the testimony of Dr. Duralde, and I think we can. I've tried. I just didn't have time with

the holidays and with the short time frame before trial.

6RP 5-6. The prosecutor noted that Duralde had been on the state's witness list since 2011. 6RP 7. Counsel again repeated that she had not known what Duralde was going to say until recently but ultimately admitted, "[i]deally. . .we would have had an interview a year-and-a-half ago, absolutely[.]" 6RP 7-8. Counsel argued, however, that McMillen should not be prejudiced by counsel's failure to conduct the interview earlier "in such a serious case when the expert witness is being offered on the issue of the case." 6RP 8. The court was not inclined to grant the continuance but set over the question for the expected trial the following week. 6RP 8-10.

A month or so before the original trial date, counsel's "second chair" was not able to continue on the case for "personal reasons" and counsel had to try to find someone to replace her. 6RP 10. The person she thought she had found, Adrien Pimentel, never ended up appearing on the case. See 6RP 10.

Shortly after that, trial had to be continued after counsel told the court that her office mate was "currently in the hospital and they've just done a do not resuscitate, and he's expected to live for hours or days." 7RP 2-3. Counsel asked for time because she needed to help "take care of things," including her officer mate's practice. 7RP 2-3. Because of the schedules of all of the parties, the trial was continued nearly eight months, to August. 8RP 2-4.

Just as trial was starting, counsel notified the court that her expert, Nelson, had suffered a medical emergency and now would not be able to meet her right away to help her get "up to speed to cross-examine" the

prosecution's expert, Clark. 9RP 76. Counsel said her client was now "at a disadvantage" but she did not ask for a mistrial. 9RP 77. Instead, she asked the prosecution to proceed with the other witnesses first. 9RP 77-78. She wanted to let the court know that when Clark's testimony was coming up, she would "not be able to effectively represent Ms. McMillen" unless she had a chance to meet with Nelson. 9RP 77-78. It was agreed that there would be flexibility. 9RP 77-78.

A little later, however, the prosecutor told the court that Clark wanted to testify the next day because of his schedule. 9RP 359-60. Counsel objected that she would not have had an opportunity "to have reviewed things with her expert by then." 9RP 359-60. She reminded the court that she had to meet with her expert that weekend in order to be prepared, as they had previously discussed. 9RP 360-61. Counsel declared that, if Clark testified the next day, "[t]he defense is not going to be prepared to effectively cross-examine him." 9RP 361. She also said, "[f]or me to attempt to cross-examine an expert in his area of expertise and without proper preparation - - and the way I'm going to get that is education through my expert - - would be completely ineffective." 9RP 360-61.

The judge then noted that it was now 2013 and counsel had been in possession of Clark's report since December of 2011. 9RP 361-62. In addition, the judge felt that Nelson's criticisms of Clark's report were clear. 9RP 362. The judge declared, "we can't hold up Dr. Clark until there's another run through practice with Dr. Nelson[.]" 9RP 362.

Counsel repeated that she would not be "effectively prepared" for her client if Clark testified early:

> I am not a medical physician. I have no medical training. It's not at all unusual for a defense attorney, in my 27 years of experience, to meet with the experts just on the eve of trial so the information is not stale, so it's fresh, so an attorney is prepared to do the one thing that is most important to the defendant in this trial.

9RP 362-63. Counsel reminded the court that everyone was clear that the two medical examiners were "the two most significant witnesses." 9RP 363. She then said "[t]he court is asking me, without having the assistance of a medical expert, to cross-examine the State's primary witness in this case, and I will not be effective. It will be ineffective assistance of counsel." 9RP 363.

At that point, the prosecutor again noted that counsel had been in possession of Clark's report since 2011 and had interviewed Clark in June of 2012, that the case had been set for trial in January of 2013 and continued about eight months and that, in short, "counsel has had years to prepare for this cross-examination[.]" 9RP 364.

Just before Clark took the stand, counsel renewed her objection and restated her concern. 9RP 451. The court thanked counsel for making the record, then said, "I would, again, just state that you've had years to prepare this examination." 9RP 451.

Later, when her own expert was appearing, Woods started the day by telling the court she had inadvertently left some important materials at her office and would need a brief recess later to get them. 9RP 618. A crucial part of her expert's testimony was his PowerPoint presentation, which he used to illustrate his opinion as to why Clark's conclusions about the case were wrong. See 9RP 683-87. In the afternoon, however, counsel could not get the presentation to work because she had run her computer

until it was "out of battery." 9RP 699-701. Counsel did not say anything about why she had not brought the plug as a backup, given the importance of the presentation. 9RP 699-701. Nor did she ask for a brief recess to go get a plug. 9RP 699-701.

After initially telling the court she was going to ask her expert to continue without the visual support, counsel ultimately ended up using a printout of the PowerPoint, putting it on the "overhead" at the relevant times. 9RP 702, 708. The pictures were so bad as to be almost useless. 9RP 708-10.

After the court had found McMillen guilty, counsel moved for a mistrial. 10RP 10. She told the court she had just learned two weeks earlier that her husband had stage four lung cancer that had metastasized to the bone. 10RP 10. He had only 6 to 12 months to live. 10RP 10.

Counsel said she had decided to try to push through the case but now moved for a mistrial because she did not think she had effectively represented her client. 10RP 10. She said there were things she should have and would have done differently. 10RP 10. The court summarily denied the motion and the prosecutor then mentioned that he had known about the situation and offered to ask for time in the case but counsel had declined. 10RP 10-11

All of this is further evidence of counsel's ineffectiveness in this case. A defendant is deprived of his right to counsel if counsel is not given a "reasonable" time to prepare. See State v. Hartwig, 36 Wn.2d 598, 601, 219 P.2d 564 (1950). The logical corollary is that counsel has a duty to *take* such time and *get* prepared. Indeed, counsel must "make a full and

complete investigation" of both the facts and the law in order to "prepare adequately and efficiently to present any defense." Id; State v. Burri, 87 Wn.2d 175, 180-81, 550 P.2d 507 (1976). The requirement of "reasonable investigation" ensures that counsel is able "to make informed decisions about how to best represent" her client. In re Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

Further, cross-examination is "the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). And McMillen had a state and federal right to confrontation which included the right to meaningful cross-examination and impeachment. State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002); 6th Amend.; Art. 1, § 22.

By her own admission, in this trial, counsel was unprepared to effectively cross-examine the two most significant of the state's witnesses - the experts. Some of these failures, standing alone, might not compel reversal. But trial counsel's ineffectiveness is evaluated based upon the record as a whole. State v. Townsend, 142 Wn.2d 838, 843, 15 P.3d 145 (2001); State v. Bonisisio, 92 Wn. App. 783, 798, 964 P.2d 1222 (1998), review denied, 137 Wn.2d 1024 (1999).

It is clear that counsel was suffering not only the stress and difficulty of a challenging murder trial but serious, upsetting personal turmoil. Her failures were thus understandable. But they were failures nonetheless, and they prejudiced her client. Because McMillen was deprived of effective assistance at the trial, reversal is required.

### 3. THE COURT ABUSED ITS DISCRETION IN ADMITTING AND RELYING ON TESTIMONY FROM AN EXPERT WHO WAS NOT QUALIFIED TO GIVE HER OPINION ON THE RELEVANT MATTERS

In addition, the trial court abused its discretion in admitting and relying on Duralde's testimony in finding guilt. Expert testimony is admissible under ER 702 if a) the testimony is about methods or theories which are generally accepted in the relevant scientific community, b) the expert qualifies as an expert and c) the expert's testimony would be helpful to the trier of fact. See State v. Copeland, 130 Wn.2d 244, 256, 922 P.2d 1304 (1996).

In this case, the court abused its discretion in finding that Duralde qualified as an expert and her testimony would be "helpful" to the trier of fact. Before trial, counsel repeatedly argued that Duralde was not qualified to give an opinion about what the autopsy showed or whether the hematomas might have been caused before or after birth, because Duralde was an expert in child abuse, not an obstetrician or pathologist. See CP 70-161; RP 766-67, 772-73. Prior to Duralde's testimony, the trial court heard about Duralde's qualifications as medical director of the Child Abuse Intervention Department at Mary Bridge Hospital. 9RP 779. Duralde, who had worked in the child abuse field for 24 years, admitted that, while she was board certified in family practice, she had not delivered a baby in about ten years and before that, since the 1980s. 9RP 780, 788. In total, she thought she had delivered about 42 babies during her whole career. 9RP 781-82.

Duralde held no board certifications for obstetrics, nor had she ever

worked as an OB/GYN. 9RP 785. She had no certifications in forensic pathology and had never held a job in that field. 9RP 785. She had neither written nor published on labor and delivery. 9RP 786. When asked what formal training she had "regarding evaluating infant deaths," she said, "just as it regards to child abuse issues and evaluating the patho-physiology of those concerns." 9RP 786.

The court nevertheless let Duralde testify as an "expert in pediatric injuries, including trauma to newborns." 9RP 791. And it relied on her testimony in finding guilt. See CP 389-96.

There is no question that Duralde was qualified to testify about child abuse. But she was not qualified to testify about the matters at issue in this trial. Where an expert is qualified in one area that does not automatically mean they are qualified to testify about anything. See, e.g., Hill v. Billups, 92 Ark. App. 259, 212 S. Ct. 3d 53 (2005) (even applying abuse of discretion standard, doctor who treats pregnant moms and their babies *in utero* and has emergency room experience but who does not work on neonates or examine them not qualified to testify about the condition of a neonate).

Reversal is required. In bench trials, it is usually presumed that the trial judge did not consider inadmissible evidence in rendering the verdict. See Read, 147 Wn.2d at 244. But bench trials place "unique demands" on a judge, requiring her to sit both as the arbiter of law and the finder of fact. 147 Wn.2d at 245.

As a result, the presumption that a judge did not rely on improperly admitted evidence is rebuttable. Id. If the evidence is insufficient absent

the inadmissible evidence or if it affirmatively appears that the improper evidence induced the trial judge to make an essential finding it would not have otherwise made, the presumption is rebutted. 147 Wn.2d at 245-46.

Here, it is clear that Duralde's improperly admitted opinion played a crucial role in the trial court's determination of guilt. The court's finding VIII specifically relied on Duralde's opinion that the amount of blood in the parietal hematoma and subgaleal injury was "not consistent with a caput secundum or birth canal injury." CP 395. Further, as noted, *infra*, there was insufficient evidence to prove all the essential part of the state's case. The trial court abused its discretion in admitting and relying on Duralde's testimony, and this Court should so hold.

## E. CONCLUSION

The tragedy in this case has only been compounded by the proceedings below. There was insufficient evidence to prove the crime and dismissal should have occurred under the corpus delicti rule. The court's decision was made without full knowledge and understanding of McMillen's mental state and what actually occurred. Counsel's unfortunate personal turmoil clearly interfered with her ability to adequately represent her client. Further, the trial court relied on "expert" testimony from someone unqualified to provide it. This Court should reverse Melissa McMillen's conviction for second-degree felony murder.

DATED this 3rd day of October, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel via this court's portal upload at Pierce County Prosecutor's Office, pcpatcecf@co.pierce.wa.us, and appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows: Melissa McMillen, DOC 370439, WCCW, 9601 Bujacich Rd. N.W., Gig Harbor, WA. 98332-8300.

DATED this 3rd day of October, 2014.

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# RUSSELL SELK LAW OFFICES

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