NO. 45586-2-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MELISSA CATHRYN McMILLEN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank Cuthbertson

No. 11-1-02357-7

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the State adduce sufficient evidence at defendant's bench trial to affirm her conviction for the second degree murder of her own child when the unchallenged findings of fact establishing each element of the offense are substantially supported verities in this appeal?

2. Has defendant failed to prove she received ineffective assistance of counsel since the decisions she claims to be deficient are easily explained as legitimate trial tactics or strategy pursued in the course of competent representation which never fell below the objective standard of reasonable performance?

3. Has defendant further failed to prove the trial court abused its discretion in finding Dr. Duralde was qualified to render an expert opinion regarding the cause of the infant victim's head trauma since she was a board certified physician who regularly treated infants with similar injuries?

B. STATEMENT OF THE CASE.

1. Procedure

On June 10, 2011, the Pierce County Prosecuting Attorney (State) charged Melissa McMillen, herein after "defendant," with one count of second degree murder predicated on criminal mistreatment or abandonment of a dependent person for causing the death of her newborn daughter by leaving her submerged in a toilet for approximately ninety minutes immediately after her birth. CP 1-2, 50-51; 10RP 142-43. [1] The State alleged the victim was particularly vulnerable and that defendant's conduct manifested deliberate cruelty. CP 50-51.

The case proceeded to a bench trial before the Honorable Frank Cuthbertson on August 12, 2013. 9RP 86. Defendant's theory of the case

[1] The State will refer to the verbatim report of proceedings as follows:
June 6, 2011 as "1RP," July 11, 2011 as "2RP,"
August 2, 2011, September 9, 2011, May 11, 2012, and July 27, 2012 as "3RP,"
October 12, 2012 as "4RP," January 11, 2013 as "5RP," January 14, 2013 as "6RP,"
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August 15, 2013 as "13RP," August 20, 2013 as "14RP,"August 22, 2013 as "15RP,"
September 3, 2013 as "16RP," September 5, 2013 as "17RP," November 15, 2013 as
"18RP," December 13, 2013 as "19RP,"

was that the child was stillborn, therefore no murder occurred. CP 243-64; 12RP 370; 13RP 455; 15RP 725, 757; 16RP 800-02, 806-07; 831-40. The State called sixteen witnesses in its case in chief in addition to playing a recording of the statements defendant voluntarily made to the police. 10RP 91, 119, 135, 169, 188, 202, 211; 11RP 235, 285, 236, 311, 341; 12RP 364, 375, 452, 482; 12RP 384-87;[2] CP 390-91. Defendant called three witnesses, one of which was forensic pathologist Dr. Clifford Nelson, who testified about the victim's head trauma. 14RP 597, 610; 15RP 642, 722-57. The State subsequently called Dr. Yolanda Duralde over the defense objection to her qualifications for the purpose of rebutting Dr. Nelson's testimony. RP 772-74, 778. Defendant assigns error to the court's decision to allow Dr. Duralde's testimony on appeal. App.Br. at 2. Approximately 282 exhibits were admitted. CP Supp. 406-427.

The court found defendant guilty of second degree murder predicated on second degree abandonment. 17RP 3-7; CP 376, 395. Defense counsel immediately moved for a mistrial, claiming personal issues caused her to be ineffective. 17RP 9-10. Counsel had refrained from requesting a mistrial based on those concerns prior to the verdict being pronounced, nor had she followed up on the State's offer to accommodate

any unexpected demands in her schedule. 17RP 11. She further did not identify any specific deficiencies in her performance, but rather vaguely claimed there were things she would have done differently. 17RP 10. The court denied defense counsel's motion. 17RP 10. Defendant does not assign error to the trial court's rejection of counsel's claim of ineffective assistance resulting from personal decisions, yet raises those same distractions as the basis of one of her several ineffective assistance claims on appeal. App.Br. at 1-2, 41-46.

Defense counsel argued for an exceptional sentence downward at sentencing based on a new theory that defendant caused the death, defended at trial as a stillborn birth, because of her alleged affliction with neonaticide syndrome. 18RP 9-14; CP 299-326. While counsel did not successfully persuade the court to grant a downward deviation from the standard range the court did impose a low end sentence of 123 months confinement, citing counsel's point regarding neonaticide syndrome while recognizing that it did not excuse defendant's crime. 18RP 24-25; CP 380. Defendant nevertheless claims on appeal that counsel was ineffective for advancing a theory of innocence instead of pursuing a psychological excuse defense which has not been recognized in the State of Washington. 18RP 10; App.Br. at 35. Her notice of appeal was timely filed. CP 388.

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[2] The interview was later transcribed and the transcript was also admitted as Exhibit 388.

2. Facts

Defendant became pregnant in the fall of 2010 after discontinuing her birth control medication. 11RP 313-14; Exh. 388, pg. 3. She informed her boyfriend, Zach Beale, that she was pregnant in October of 2010 but refused his repeated attempts to discuss the matter with her. Exh. 388, pg. 3; 11RP 314-15, 336. She eventually informed Beale she could not obtain the abortion she desired because the pregnancy was too far along. 11RP 316. Beale was concerned for the child's welfare and reached out to family members for help despite defendant's resistance to discuss the pregnancy. 11RP 332-33, 336.

Defendant continuously denied being pregnant to her friends and coworkers during the Spring of 2011. 10RP 127; 11RP 288-89; CP 391. In May of 2011, a parent of one defendant's students asked if defendant was pregnant because she was concerned about defendant's health. 10RP 218. Defendant became extremely upset, adamantly denied being pregnant despite the obviousness of her condition, and claimed she had gone to Planned Parenthood to confirm that she was not pregnant. 10RP 218-19; CP 391. Defendant further stated that "she wouldn't be stupid enough to do that," meaning to get pregnant. 10RP 216.

On June 3, 2011, defendant had dinner with Beale, her father, and her grandparents. 11RP 318; Exh. 388, pg 5. Over the course of dinner defendant began experiencing abdominal pain. 11RP 318; Exh. 388, pg. 5. Beale asked defendant if anything was wrong but defendant just responded that she needed a minute. 11RP 318. Defendant and Beale went to bed later that evening. 11RP 319; Exh. 388, pg. 5. Sometime during the early hours of June 4, 2011, defendant delivered a baby girl in the bathroom toilet in her father's basement. Exh. 388, pg. 6; CP 391. She described the birth as quick and similar to a bowel movement. Exh. 388, pg. 6. Defendant left the child in the toilet for approximately ninety minutes while she took a shower. 13RP 475. She then cleaned up the toilet and surrounding area with bleach. 12RP 417-18. Defendant subsequently removed the baby from the toilet, wrapped her with a towel, and placed her in a garbage bag. 12RP 418-19; Exh. 47, 48, 52, 54, 286. She then put the garbage bag into an old school bag and left the bag in the basement laundry room. 12RP 419; Exh. 388, pg. 7; Exh. 286.

Beale awoke to find blood stains on their bedroom floor. 11RP 319; Exh. 82. Defendant initially told him it was her menstrual blood, but eventually claimed she had delivered a stillborn child when Beale

continued to press her in disbelief. 11RP 320-22. Beale's mother, Mary,[3] called defendant after learning about the alleged stillbirth. 12RP 369-70. During the course of their conversation, defendant asked Mary "what if the baby wasn't dead when it was born?" to which Mary replied that defendant needed to call 911 immediately. 12RP 371.

Beale returned to defendant's residence on June 7, 2011. 11RP 328. When questioned about the alleged stillbirth defendant admitted to Beale that the baby's corpse was still in the laundry room. 11RP 329; Exh. 388, pg. 7. Beale was so upset he called the police without defendant's knowledge. 11RP 329-30; Exh. 388, pg. 8.

Several police officers and firefighters responded to the residence. 10RP 136, 172, 191, 205-06, 238, 298. Officers observed that defendant was upset at Beale when she discovered that he called the police. 10RP 140. Defendant informed the officers that she had given birth to a child, left her where she was birthed, took a shower, and returned approximately an hour and a half later. 10RP 142-43, 145. She admitted to putting the baby's body away in a bag in the basement, claiming the baby was stillborn. 10RP 143, 145. Officers discovered defendant's dead child in the basement. 10RP 144; 11RP 302. The baby had been wrapped in a plastic

[3] The State will refer to Mary Beale-Kuhlman by her first name to avoid confusion. No disrespect is intended.

garbage bag covered by several bloody towels inside of a book bag placed underneath a cork board in the basement laundry room. 10RP 177-78; 11RP 307.

Defendant was taken down to the police station and gave a voluntary statement to detectives. 10RP 193; Exh. 388. Detectives described defendant's demeanor throughout the interview as "stoic" and "detached from the gravity of the situation." 10RP 196; 12RP 387. Defendant claimed the birth was so quick she almost did not realized it had happened until she saw the child. Exh. 388, pg. 6. She stated that she believed the baby was stillborn because she could not hear it breathing or crying, then left the child in the toilet because she was exhausted. Exh. 388, pg. 6. At the time of the incident, defendant had received over thirty hours of continuing education regarding child care, first aid, and CPR to perform her work as teacher at North Tacoma Montessori Center. 10RP 93. Defendant initially stated that she did not tell anyone about the pregnancy because she was ashamed, but later claimed that she was not obligated to tell anyone because it was "[her] body and [her] life." 12RP 401-02, 413. She concluded by stating that she did not believe Beale and her were fit to be parents. 12RP 414.

Defendant went to urgent care following her interview with detectives. 13RP 453-54. Dr. Hitchcock examined her and tended to her

injuries. 13RP 454. Defendant told Dr. Hitchcock that she had delivered a stillborn child. 13RP 455. Dr. Hitchcock asked defendant if the bleeding she experienced immediately after the birth was red or brown in color. 13RP 460. Defendant replied that it was red. 13RP 460. Dr. Hitchcock explained that red blood is consistent with a typical birth while a blood darker in color is consistent with a stillborn child. 13RP 460-61; CP 393. Dr. Hitchcock further asked defendant if the umbilical cord was wrapped around the baby in an unusual way. 13RP 461. Defendant replied that it was not wrapped around anything. 13RP 461.

Dr. Hitchcock tested defendant's blood for several clotting disorders that commonly accompany stillbirths. 13RP 462-63. The results did not indicate that there were any irregularities in defendant's blood. 13RP 463-64. Dr. Hitchcock noted that defendant's behavior was abnormal to that of someone who had recently had a stillbirth. 13RP 462. She noted that defendant denied having any depression, always referred to the baby as "it," and laughed when the doctor asked her questions about the child's size and weight. 13RP 457, 462.

Pierce County Medical Examiner Dr. Thomas Clark performed the autopsy of the baby and testified at trial. 13RP 483, 490. Dr. Clark noted that the baby was born as a full term female with no apparent congenital defect. 13RP 492; CP 391. He stated that the baby had air in her lungs and

gastrointestinal tract, which indicate that she was born alive. 13RP 496, 500; CP 392. Dr. Clark explained that because the baby's lungs were fully expanded the infant had to have taken enough breaths to completely open up the lungs. 13RP 498. A lung float test performed by Dr. Clark revealed the lung tissue floated in liquid, which would not have occurred if the infant had been stillborn as defendant claimed. 13RP 515. Dr. Clark also discovered a hematoma between the dead infant's scalp and skull as well as a second subdural hematoma of the infant's skull, both of which were indicative of a live birth. 13RP 501, 503, 507, 509-10; CP 392. The doctor opined that these injuries were likely the result of external trauma during the birth. 13RP 511.

Dr. Clark determined that based on the circumstances of the birth and the events thereafter, the baby was born alive and likely died as a result of a combination of drowning and hypothermia. 13RP 526-27; CP 392. He noted that drowning does not necessarily leave evidence, as many people who drown undergo a spasm in the back of their throats which prevents water from entering the lungs. 13RP 527. He further noted that water can take away an infant's heat very rapidly, which in turn can cause death by hypothermia. 13RP 527. The doctor explained that because infants do not have a lot of muscle mass when they are born it is difficult for them to maintain and regulate body heat, which is necessary for life. 13RP 528.

The doctor further stated that it is possible the baby died from blood loss, as the umbilical cord was cut but not clamped, which in turn can cause significant blood loss in newborns. 13RP 527-28, 549.

Defendant called forensic pathologist Clifford Nelson to testify. 15RP 642. Dr. Nelson's medical experience focuses primarily on pathology; he had never delivered a child nor had any background in obstetrics, family medicine, or pediatrics. 15RP 642; 16RP 772-73. Dr. Nelson testified, among other things, that the head injury the baby sustained could have been caused by a caput succedaneum, which is an injury that babies often sustain while traveling through the birth canal. 15RP 663, 704, 707, 712. Dr. Nelson concluded that it was equally possible that the baby in this case could have been either stillborn or born alive. 15RP 757.

The State subsequently called Dr. Yolanda Duralde to rebut Dr. Nelson's claims regarding the caput succedaneum. 16RP 791. Dr. Duralde was a board certified physician who had been practicing in the area of child abuse for the past twenty four years. 16RP 780. She served as the medical director at the child abuse intervention department of Mary Bridge Hospital for the past twenty years. 16RP 779. She had delivered approximately forty two babies throughout her career. 16RP 781. In addition to receiving annual continuing education, she also treated

multiple infant head trauma patients per year. 16RP 781-83. Dr. Duralde testified that a caput succedaneum is common in situations where there is prolonged labor that puts a strain on the baby's head. 16RP 794-97. Dr. Duralde opined that based on the circumstances of the birth as described by defendant it is unlikely that a caput succedaneum occurred in this case as defendant described the birth as very quick. 16RP 797; CP 393. Nothing in defendant's description of the birth indicated a difficult labor or a lot of pushing that could cause a caput succedaneum. 16RP 797; CP 393. Rather, Dr. Duralde concluded that the injury the infant sustained was a result of her hitting her head on something hard, like the toilet, while being born. 16RP 797; CP 393. Dr. Duralde further stated that the amount of bruising the infant sustained indicated the child was alive and that her blood was flowing when the injury occurred. 16RP 795-96.

C. ARGUMENT.

1. THE STATE ADDUCED SUFFICIENT EVIDENCE AT DEFENDANT'S BENCH TRIAL TO AFFIRM HER CONVICTION FOR THE SECOND DEGREE MURDER OF HER OWN CHILD WHEN THE UNCHALLENGED FINDINGS OF FACT ESTABLISHING EACH ELEMENT OF THE OFFENSE ARE SUBSTANTIALLY SUPPORTED VERITIES IN THIS APPEAL.

The State bears the burden of proving each and every element of a criminal offense beyond a reasonable doubt. ***State v. Bennett***, 161 Wn.2d

303, 307, 165 P.3d 1241 (2007). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ***State v. Joy***, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. ***State v. Goodman***, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. ***State v. Thomas***, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). In considering this evidence, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Appellate courts "must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." ***State v. Paulson***, 131 Wn. App. 579, 586, 128 P.3d 133 (2006).

a. The court's unchallenged findings of fact are verities on appeal that fully support the court's conclusion that defendant committed the predicate crime of second degree abandonment underlying her second degree murder conviction when she caused her newborn infant's death by leaving the infant submerged in a toilet for ninety minutes.

Unchallenged findings of fact are verities on appeal. ***State v. Rodgers***, 146 Wn.2d 55, 61, 43 P.3d 1 (2002); ***State v. Hill***, 123 Wn.2d 641, 644, 870 P.2d 313 (1994); ***State v. Neeley***, 113 Wn. App. 100, 105, 52 P.3d 539 (2002); *see also* RAP 10.3(g). Defendant does not challenge any of the findings of fact entered by the trial court. Therefore all of the findings are verities.

Here, the court found that defendant murdered her baby while committing the felony of second degree abandonment of a dependant person. CP 395; 17RP 7. Abandonment of a dependant person is defined as follows:

> ...[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...and
> (b) The person recklessly abandons the child or other dependant 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.

RCW 9A.42.070.

Finding of fact number one establishes that defendant was the parent of the deceased child, thus satisfying the first element. CP 391. The second element is supported by findings of fact nine and ten, which state that defendant acted recklessly and that she abandoned her child. CP 394. Findings of fact two, three, four, five, six, seven, and eight establish that the infant died outside of the womb and as a result of defendant's abandonment. CP 392-94.

All of the elements of second degree abandonment of a dependant person are adequately supported by the court's findings of fact. CP 389-396. Because defendant does not challenge any of the court's findings, they are deemed verities on appeal. As such, the evidence is sufficient to support the fact that defendant committed the felony of second degree abandonment of a dependant person.

b. The court's unchallenged findings of fact further support defendant's conviction of second degree felony murder.

A person commits second degree felony murder when "[h]e 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 the participants.... RCW 9A.32.050(1)(b).

In the present case, the court found that defendant committed the felony of second degree abandonment of a dependant person. CP 395; 17RP 7. As discussed above, this conclusion is based upon the court's findings of fact numbers one through ten. CP 391-94.

The court further found that defendant's abandonment caused the death of her child. CP 395. The court based this decision on the findings that the child was born alive and did not die in the birth canal. CP 392. The State's expert witness, Dr. Clark, explained that the child likely died as a result of drowning or hypothermia from being left in a toilet for approximately ninety minutes. 13RP 526-27. The court ultimately found Dr. Clark more persuasive than defendant's expert witness and accepted his conclusions regarding the child's cause of death. CP 394.

The child died in the course and furtherance of defendant's commission of second degree abandonment. CP 395. The court's multiple findings, which are now verities, support this conclusion. CP 391-95. Thus, the evidence is sufficient to support defendant's conviction of second degree felony murder.

c. Defendant's conviction should be affirmed even if this Court construes defendant's assignment of error as articulating a reviewable challenge to the trial court's findings of fact since they are substantially supported by the evidence adduced at trial.

Here, defendant has not challenged any of the court's findings of fact. Thus, they are verities and this Court should decline to review this issue on appeal. *See* ***State v. Rodgers***, 146 Wn.2d 55, 61, 43 P.3d 1 (2002). However, if this Court decides to address this issue, defendant's claim still fails because there was substantial evidence adduced at trial to support every element of the offense.

The State adduced sufficient evidence at trial to prove defendant committed the predicate felony of second degree abandonment of a dependant person. A person commits the crime of second degree abandonment where the person is the parent of a child; the person recklessly abandons the child; and the abandonment creates and imminent and substantial risk the child will die or suffer great bodily harm. RCW 9A.42.070.

Defendant admitted to Beale, detectives, and the emergency room physician that she gave birth to the child. 10RP 142-43, 145; 11RP 320-22; 13RP 455; Exh. 388, pg. 6. She recklessly abandoned her child when she left the newborn in the toilet for approximately ninety minutes while

she took a shower and cleaned up. 13RP 475; Exh. 388, pg. 6. A person acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation. RCW 9A.08.010(1)(c). A reasonable person would clearly know that leaving a newborn child in a toilet for over an hour poses a substantial risk to the child's safety. The abandonment resulted in the child's death, as it was determined the child was born alive and the cause of death was either drowning or hypothermia as the result of being left in the toilet for approximately ninety minutes immediately after the birth. 13RP 496, 500, 501, 503, 507, 509-11, 526-28, 515. Thus, the evidence was sufficient to prove defendant committed the crime of abandonment of a dependant person in the second degree.

The evidence was further sufficient to prove defendant committed second degree felony murder. A person is guilty of felony murder when, in the commission of any felony and in furtherance of such a crime, he causes the death of another person. RCW 9A.32.050(1)(b). As discussed above, the evidence was sufficient to prove defendant committed the felony of second degree abandonment of a dependant person. Pierce County Medical Examiner, Dr. Clark, and medical expert in child abuse cases, Dr. Duralde, both concluded that the child was born alive and

subsequently died as a result of being left in the toilet for an extend period of time. 13RP 483, 490, 496, 500, 501, 503, 507, 509-11, 526-28, 515; 16RP 779, 795-97. Thus, defendant's abandonment of the infant was the direct cause of the infant's death. 13RP 483, 490, 496, 500, 501, 503, 507, 509-11, 526-28, 515; 16RP 779, 795-97. Substantial evidence in the record supports defendant's conviction for second degree felony murder.

2. DEFENDANT HAS FAILED TO PROVE SHE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL SINCE THE DECISIONS SHE CLAIMS TO BE DEFICIENT ARE EASILY EXPLAINED AS LEGITIMATE TRIAL TACTICS OR STRATEGY PURSUED IN THE COURSE OF COMPETENT REPRESENTATION WHICH NEVER FELL BELOW THE OBJECTIVE STANDARD OF REASONABLE PERFORMANCE.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); ***State v. Thomas***, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Under ***Strickland***, ineffective assistance is a two-pronged inquiry:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth

> Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction...resulted from a breakdown in the adversary process that renders the result unreliable.

State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (*quoting* ***Strickland,*** 466 U.S. at 687); *see also* ***State v. Cienfuegos,*** 144 Wn.2d 222, 226, 25 P.3d 1011 (2011) ("Washington has adopted the ***Strickland*** test to determine whether a defendant had constitutionally sufficient representation.").

Under this standard, performance is deficient if it falls "below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 688. "The threshold for the deficient performance prong is high, given the deference afforded to the decisions of defense counsel in the course of representation." ***State v. Grier,*** 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." ***State v. Kyllo***, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

"When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." ***State v. Kyllo***, 166 Wn.2d at 863; ***State v. Garrett***, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

Appellate courts will not find ineffective assistance of counsel if "the actions of counsel complained of go to the theory of the case or to trial tactics." ***State v. Renfro***, 96 Wn.2d 902, 909, 639 P.2d 737 (1982). A defendant can only rebut the strong presumption of reasonable performance if she can demonstrate "there is no conceivable legitimate tactic explaining counsel's performance." ***State v. Reichenbach,*** 153 Wn.2d 126, 130, 101 P.3d 80 (2004); ***State v. Aho***, 137 Wn.2d 736, 745-76, 975 P.2d 512 (1999).

To satisfy the prejudice prong of the ***Strickland*** test, the defendant must establish that "there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." ***State v. Kyllo***, 166 Wn.2d at 862. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694; ***State v. Thomas***, 109 Wn.2d at 226; ***State v. Garrett***, 124 Wn.2d at 519. In assessing prejudice, "a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiently, that the judge or jury acted according to the law" and must "exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like." ***Strickland***, 466 U.S. at 694-95.

Ineffective assistance of counsel is a fact-based determination that is "generally not amenable to per se rules." ***State v. Cienfuegos***, 144

Wn.2d at 229. "Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." ***Strickland***, 466 U.S. at 696.

Finally, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Strickland***, 466 U.S. at 689.

a. Counsel's decision to refrain from making a corpus delicti motion was legitimate trial tactic where such a motion was not likely to succeed as all of the elements of corpus delicti were satisfied.

"Defense counsel...has no duty to pursue strategies that reasonable appear unlikely to succeed." ***State v. Brown***, 159 Wn. App. 366, 371, 245 P.3d 776 (2011) (*citing* ***In re Personal Restraint of Davis***, 152 Wn.2d 647, 744, 101 P.3d 1 (2004); ***State v. McFarland***, 127 Wn.2d 322, 344 n. 2, 899 P.2d 1251 (1995)). Counsel's failure to raise novel legal theories or arguments is insufficient to support an ineffective assistance of counsel

claim. ***State v. Brown***, 159 Wn. App. at 371 (*citing* ***Anderson v. United States***, 393 F.3d 749, 754 (8th Cir.) *cert. denied*, 546 U.S. 882, 126 S. Ct. 221, 163 L. Ed. 2d 185 (2005)).

The corpus delicti rule prohibits admission of a defendant's confession absent independent prima facie evidence that the crime was committed. ***State v. Aten,*** 130 Wn.2d 640, 656, 927 P.2d 210 (1996). It is well established law in Washington State that only two elements are necessary to establish the corpus delicti in a homicide case: 1) the fact of death; and 2) a casual connection between the death and a criminal act. ***State v. Hummel***, 165 Wn. App. 749, 758, 266 P.3d 269 (2012); ***State v. Aten***, 130 Wn.2d 640, 655, 927 P.2d 210 (1996); ***State v. Lung***, 70 Wn.2d 365, 370, 371, 423 P.2d 72 (1967); ***State v. Little***, 57 Wn.2d 516, 521, 358 P.2d 120 (1961). Corpus delicti does not require proof of a causal relation between the death and the accused. ***State v. Lung***, 70 Wn.2d at 371 (*citing* ***State v. Meyer***, 37 Wn.2d 759, 763, 226 P.2d 204 (1951)).

The independent evidence establishing corpus delicti may be either direct or circumstantial and need not be of such character as would establish the corpus delicti beyond a reasonable doubt or even by a preponderance of the evidence. ***State v. Aten***, 130 Wn.2d at 656. It is sufficient if it prima facie establishes the corpus delicti. *Id.* "Prima facie" in the context of the corpus delicti rule means evidence of sufficient

circumstances which would support a logical and reasonable inference of the facts sought to be proved. *Id.* In assessing the sufficiency of the State's corpus delicti evidence, appellate courts view the independent evidence and all reasonable inferences from it in the light most favorable to the State. *Id.* at 658.

Here, counsel was not ineffective as bringing forth a corpus delicti motion was a legitimate trial strategy where such a motion was unlikely to succeed. In the instant case, both elements necessary to establish corpus delicti were satisfied. There was copious evidence in the record to prove the child was born alive, which consequently means that a death occurred. 13RP 483, 490, 496, 500, 501, 503, 507, 509-11, 526-28, 515; 16RP 779, 795-97. Medical Examiner, Dr. Clark, noted that the baby had air in her lungs and gastrointestinal tract, which indicate that she was born alive. 13RP 496, 500; CP 392. The doctor further explained that the child's lungs were completely expanded, indicating that she had to have taken enough breaths to fully open up the lungs. 13RP 498. A lung float test and formation of a hematoma on the baby's scalp were further indicators of a live birth. 13RP 501, 503, 507, 509-10, 515; CP 392. Dr. Duralde additionally concluded that the amount of bruising the infant sustained indicated the child was alive and that her blood was flowing when the injury occurred. 16RP 795-96.

The independent circumstances surrounding the death are enough to establish a casual connection between the death and a criminal act. The once living infant was found wrapped in a garbage bag placed inside of a book bag in the basement. 12RP 419; Exh. 388, pg. 7; Exh. 47, 48, 50, 51, 52, 53, 54, 286, 291. This is not a condition the infant would find herself in unless intentionally placed there by another. This action was by itself capable of causing the death of the child by depriving her of oxygen or the necessary warmth needed to survive. *See* 13RP 526-27; CP 392. Additionally, defendant's attempt to conceal the child's corpse further raises a reasonable inference that a crime had occurred *See* Exh. 388, pg. 6-7.

Contrary to defendant's argument, defendant's statements regarding the precise location of the birth are not necessary to infer that a crime was committed. The child need not have died in the toilet in order for corpus delicti to be established. The court could have easily found that the death occurred after the child was placed in the sealed book bag. As Dr. Clark noted, it was possible for the child to have died from blood loss resulting from the cut but not clamped umbilical cord. 13RP 527-28, 549.

Given the location and condition in which the child was discovered the evidence was sufficient to support a logical and reasonable inference that the child's death was caused by a criminal agency and not by natural

causes. Had defense counsel raised this issue below the court would have undoubtedly denied defendant's motion. Thus, counsel's failure to raise this issue below was not ineffective assistance but was rather a legitimate trial strategy. Because this motion would have ultimately been denied even if raised below, defendant suffered no prejudice.

b. Counsel was further not ineffective where counsel had no duty to raise a frivolous and legally meritless defense.

Defendant further fails to show that trial counsel was ineffective for failing to introduce evidence regarding neonaticide syndrome at trial. App.Br. at 35. Defendant's claim fails both prongs of the ***Strickland*** test, as an attorney's legitimate trial strategy or tactics cannot constitute ineffective assistance. ***State v. Kyllo***, 166 Wn.2d at 863.

Washington has adopted the *Frye* test for determining if evidence based on novel scientific procedures is admissible. ***State v. Baity***, 140 Wn.2d 1, 10, 991 P.2d 1151 (2000). The test allows evidence deriving from a scientific theory or principle to be admissible only if that theory or principal has achieved general acceptance in the relevant scientific community. *Id.* As trial counsel aptly pointed out during sentencing, neonaticide syndrome has not passed the *Frye* test and as such would not have been admissible at trial. *See* ***Anderson v. Akzo Nobel Coatings, Inc.***, 172 Wn.2d 593, 600, 260 P.3d 857 (2011) ("Unreliable evidence is not

helpful to the jury....); 18RP 10. Furthermore, there is no legal authority or case law whatsoever in support of counsel's theory of neonaticide. Counsel had no duty to raise frivolous claims or issues which she knew were not based in existing law. *See* ***State v. Brown***, 159 Wn. App. at 371; RPC 3.1.[4] Defense counsel relied exclusively on various law review and journal articles to support her assertion at sentencing that this alleged condition impacted defendant and altered her mental state. CP 299-326. Had counsel attempted to introduce this evidence at trial the court surely would have denied its admission given that there was no credible basis to admit it.

Furthermore, counsel's decision to introduce this evidence at sentencing and not at trial was strategic, as the notion of neonaticide syndrome was in direct contradiction with defendant's theory throughout trial: that the child was stillborn. CP 243-64; 12RP 370; 13RP 455; 15RP 725, 757; 16RP 800-02, 806-07; 831-40. In order to effectively argue that defendant was suffering from neonaticide syndrome counsel would have had to concede all of the elements of the underlying crime. This would mean admitting that the child was born alive, that defendant recklessly

[4] Meritorious Claims and Contentions. "A lawyer shall not bring or defend a proceeding, or assert or controvert and issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law...."

abandoned her, and that the abandonment resulted in the child's death. RCW 9A.42.070; 9A.32.050(1)(b). Surely presenting such a defense predicated upon unreliable evidence, even if the court were to allow it, posed a greater risk of a conviction for defendant than alleging that the child was stillborn. Counsel's decision to present a case based on the theory that the child was stillborn instead of arguing that defendant suffered from neonaticide syndrome was strategic and thus not ineffective assistance. *See also* ***State v. Mannering***, 150 Wn.2d 277, 286, 75 P.3d 961 (2003) (failure to pursue defense of duress was strategic and not ineffective assistance of counsel where such a defense would require defendant admit to all of the elements of the underlying crimes).

In addition, the court itself noted during sentencing that neonaticide syndrome is not available as a defense under Washington law and that it was not persuaded that the syndrome affected defendant's capacity. 18RP 24. The court explicitly stated that it did not doubt defendant had the capacity to appreciate her actions and conform her conduct. 18RP 24. It further noted that while neonaticide syndrome may be a mitigating factor in other countries, the Washington legislature was clear in its intent to charge cases such as this as murder. 18RP 24. Nevertheless the court did cite to counsel's argument regarding neonaticide in its decision to impose a low end standard range sentence.

18RP 24. Given the court's reasoning it cannot be said that a defense based on neonaticide syndrome, even if permitted by the court, would have been successful or resulted in a different outcome. As such, defendant additionally fails to show prejudice.

c. Counsel was not ineffective where she continuously and effectively advocated on behalf of defendant throughout trial and where any personal issues endured by counsel toward the end of trial did not cause counsel to fall below an objective and reasonable standard of performance.

Contrary to defendant's claim now, counsel effectively advocated on behalf of her client throughout trial. During pre-trial motions counsel addressed the court and specifically argued that she did not want defendant's lack of prenatal care to be potentially raised as a prior bad act. 9RP 42. She further informed the court that she was concerned the State's witnesses might testify that defendant lied about being pregnant. 9RP 42. Counsel was very clear in ensuring that no witness would be allowed to comment on defendant's credibility. 9RP 42.

Counsel continued to vehemently advocate on behalf of defendant by cross-examining all seventeen of the State's witnesses and presenting three defense witnesses including a forensic pathologist. 10RP 111, 130, 151, 159, 180, 210, 221; 11RP 277, 290, 331, 345; 12RP 372, 425; 13RP

464, 473, 475, 480, 533, 579, 583; 14RP 597, 610; 15RP 642; 16RP 800, 809. Counsel also regularly objected throughout the State's case in chief to ensure defendant's rights were protected. 10RP 94, 98-99, 101, 107; 11RP 254, 255, 325, 344; 12RP 367, 368, 371, 387, 395, 416; 13RP 461, 528, 572; 16RP 777, 843.

i. Counsel was not ineffective for failing to introduce testimony that would have been damaging to defendant.

Defendant alleges that counsel was ineffective for failing to introduce testimony from jail mental health manager Judy Snow. App.Br. at 32. Generally, a decision to call or not to call a witness is a matter of legitimate trial tactics and will not support a claim of ineffective assistance of counsel. ***State v. Thomas***, 109 Wn.2d at 230. Additionally, it is difficult to see how Ms. Snow's testimony would have been beneficial to defendant. Ms. Snow had met with defendant after defendant was arrested and booked into jail. 9RP 47. She had apparently noted that defendant appeared to be detached from reality and reacted inappropriately for someone who had miscarried a child. 9RP 47. If anything, her testimony would have done more damage to defendant's credibility than anything else. It is unclear how Ms. Snow's testimony would have aided counsel in rebutting the State's assertion that defendant acted in an inappropriate and

cold manner following the death of her child. Thus, counsel made an appropriate choice when she declined to call Ms. Snow as a witness.

ii. Defendant fails to show counsel's representation fell below the objective standard of reasonable performance where counsel effectively cross examined the State's medical expert and presented a medical expert of her own whose medical conclusions supported defendant's theory of the case.

Defendant argues that counsel was ineffective for failing to interview her expert medical witness prior to cross examining the State's medical expert. App.Br. at 46. Prior to trial, defense counsel informed the court that her medical expert, Dr. Nelson, has suffered a medical emergency and as a result would not be able to meet with counsel as originally planned to prepare counsel for cross examining the State's expert. 10RP 76-77. Counsel asked the court to proceeded with the State's lay witnesses first and present the expert witness last so counsel could get an opportunity to prepare with Dr. Nelson in the meantime. 10RP 77. The State agreed in accommodating counsel and did not object to this request. 10RP 78. The court granted defense counsel's request, but noted:

> If we need to recess to accommodate Dr. Nelson's health conditions, that's okay. I did look at his report, however,

> and his opinions are absolutely clear, and it seems like his disagreements with Dr. Clark are very specific. You know, he criticizes the fact that there was no metabolic screen, that toxicology wasn't performed. He disagrees about how the umbilical cord was detached or when it became detached. He believes there's only two diagnostic findings which would allow a forensic pathologist to know that an infant was delivered alive....So he's....really clear, in terms of his disagreement. So I don't know how much work has to go into getting prepared for Dr. Clark.

10RP 79.

After trial began, the State informed the court that the State's medical expert, Dr. Clark, preferred to testify the following day due to scheduling conflicts. 12RP 359. Counsel objected, stating that she would not be prepared to meet with her expert by then. 12RP 360-61. The court noted that Dr. Nelson had prepared his report regarding his opinions on Dr. Clark's findings back in 2011, nearly two years prior, giving counsel ample opportunity to prepare her cross-examination. 12RP 361; Exh. 303, 361. The court further clarified that Dr. Nelson's opinions and the basis thereof were very specific and clearly articulated in his report. 12RP 361; Exh. 303, 361. Thus, the court concluded, counsel would not be disadvantaged by not meeting with Dr. Nelson immediately prior to cross examining Dr. Clark. 12RP 362.

During Dr. Clark's testimony counsel effectively cross examined the doctor regarding the basis of the cause of death, the doctor's

experience in stillbirths, and the types of tests he used to reach his conclusions. 13RP 534-69. Counsel was further able to examine her own medical expert regarding his opinion on the injuries the infant sustained and the cause of death, which were contrary to Dr. Clark's. 15RP 642-64, 760-62.

Defendant fails to prove counsel's inability to meet with Dr. Nelson immediately before cross examining Dr. Clark had any bearing on counsel's cross examination of him. Counsel was able to effectively cross examine Dr. Clark and question his methods and conclusions based on Dr. Nelson's detailed report. 12RP 361.

iii. Defendant further fails to show counsel's personal issues encountered during the end of trial deprived defendant of effective representation.

Defendant argues that counsel was ineffective due to personal problems that counsel claims impacted her representation. App.Br. at 45. In the instant case, defense counsel moved for a mistrial immediately after the guilty verdict was announced. 17RP 9-10. Counsel informed the court that she had learned two weeks prior that her husband had advanced lung cancer and was expected to live for only another six to twelve months. 17RP 9-10. Counsel claimed she was "distracted" as a result of this

prognosis and in retrospect would have "done things differently." 17RP 10. However, in order to prove ineffective assistance of counsel defendant must show that performance of counsel was so deficient it fell below and objective standard of reasonableness and that the deficient performance prejudiced the defendant. ***State v. McFarland,*** 127 Wn.2d at 334-35. "A failure to make either showing terminates review of the claim." ***State v. Brown***, 159 Wn. App. 366, 370-71, 245 P.3d 776 (2011).

Here, defendant has failed to show how counsel's personal difficulties, while undoubtedly tragic, have negatively affected counsel's performance. Counsel adequately represented defendant throughout the entirety of trial. The fact that counsel moved for a mistrial based on ineffective assistance of counsel only after the verdict was delivered indicates that this was a tactical decision rather than a true crisis of the conscience. 17RP 9-10.

Furthermore, by the time counsel discovered her husband's prognosis the majority of the trial had been completed.[5] Thus, defendant fails to show how counsel's personal issues significantly impacted her representation as a whole. Moreover, the State attempted to accommodate defense counsel once it learned of her personal difficulties by offering to

[5] Counsel informed the court on 9/5/13 that she had learned of her husband's diagnosis the "week before last." 17RP 9. This date was approximately the week of 8/19/13. The last witness of the State's case in chief testified on 8/15/13. 13RP 580.

join a motion for additional time to prepare for closing arguments. 17RP 11. Counsel's representation did not fall below the objective standard of reasonableness and defendant was not prejudiced.[6]

3. DEFENDANT FURTHER FAILS TO PROVE THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING DR. DURALDE WAS QUALIFIED TO RENDER AN EXPERT OPINION REGARDING THE CAUSE OF THE INFANT VICTIM'S HEAD TRAUMA WHEN DR. DURALDE WAS A BOARD CERTIFIED PHYSICIAN WHO REGULARLY TREATED INFANTS WITH SIMILAR INJURIES.

"The decision to admit expert testimony is within the discretion of the trial court." ***State v. Ortiz***, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992) (*citing* ***State v. Swan***, 114 Wn.2d 613, 655, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 111 S. Ct. 752, 112 L. Ed. 2d 772 (1991)). A trial court abuses its discretion when its exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. ***State v. McPherson,*** 111 Wn. App. 747, 761, 46 P.3d 284 (2002).

[6] Defendant also raises ineffective assistance based on several other minor issues counsel encountered during trial. Specifically, defendant points out that counsel requested a continuance before the original trial date of January 2014 to obtain an expert witness and because her office mate was sick, that counsel planned to have a second chair for the trial that ultimately never appeared, and that counsel had to present a power point presentation on printed slides instead of on her laptop. App.Br. at 41-45. Defendant fails to show how these issues amount to ineffective assistance when counsel was granted the requested continuance and none of these issues were material to defendant's overall representation. 5RP 13; 7RP 4; CP 165.

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise." ER 702. Expert testimony will be admitted when: (1) the witness qualifies as an expert; (2) the opinion is based upon an explanatory theory generally accepted in the scientific community; and (3) the expert testimony would be helpful to the trier of fact. ***State v. Ortiz***, 119 Wn.2d at 310.

In the instant case, the trial court did not abuse its discretion in finding that Dr. Duralde was qualified to render an expert opinion regarding the cause of the infant's head trauma because Dr. Duralde's testimony satisfied both of ER 702's requirements for admissibility. "Practical experience is sufficient to qualify a witness as an expert. ***State v. Ortiz***, 119 Wn.2d at 310. Dr. Duralde was a board certified physician who had been practicing in the area of child abuse for the past twenty-four years. 16P 780. She was the medical director at the child abuse intervention department of Mary Bridge Hospital. 16RP 779. In addition to receiving annual continuing education she also treated multiple infant head trauma patients per year. 16RP 781-83.

Defendant argues in part that Dr. Duralde was not qualified as an expert because she never practiced as an OBGYN and had only delivered

approximately forty two babies throughout her career. App.Br. at 47. However, Dr. Duralde was clearly more qualified as an expert than defense's expert, Dr. Nelson, who was a forensic pathologist, had never delivered a baby, and had no background in obstetrics, family medicine, or pediatrics. 16RP 772-73.

Dr. Duralde's testimony was also helpful. Testimony is helpful if it concerns matters beyond the common knowledge of the average layperson and does not mislead the jury to prejudice the opposing party. ***State v. Guillot,*** 106 Wn. App. 355, 363, 22 P.3d 1266 (2001). The State called Dr. Duralde to rebut defense witness Dr. Nelson's claim that the injury the infant sustained was a caput succedaneum caused during birth. 16RP 772. Dr. Duralde was able to explain to the court why the baby's injuries were not consistent with a caput succedaneum but were rather the result of an injury sustained after a live birth. 16RP 795-97. As such, the trial court did not base its decision on untenable grounds or reasons when it found that Dr. Duralde was qualified as an expert.

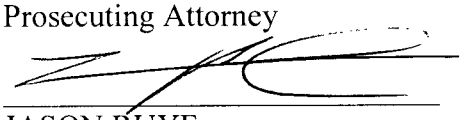
D. CONCLUSION.

The State adduced sufficient evidence at defendant's bench trial to affirm her conviction for the second degree murder of her own child when the unchallenged findings of fact establishing each element of the offense

are substantially supported verities in this appeal. Defendant has failed to prove she received ineffective assistance of counsel since the decisions she claims to be deficient are easily explained as legitimate trial tactics or strategy pursued in the course of competent representation which never fell below the objective standard of reasonable performance. Defendant further fails to prove that the trial court abused its discretion in finding Dr. Duralde was qualified to render an expert opinion regarding the cause of the infant victim's head trauma when she was a board certified physician who regularly treated infants with similar injuries. For the foregoing reasons the State respectfully requests this Court affirm defendant's conviction and sentence.

DATED: JANUARY 14, 2015

MARK LINDQUIST
Pierce County
Prosecuting Attorney



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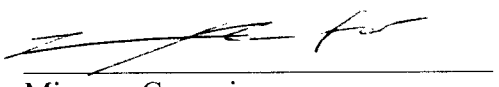

Miryana Gerassimova
Rule 9

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