SUPREME COURT NO. 100351-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

RANDY KARN,
Petitioner.

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS, DIVISION ONE

Court of Appeals No. 82532-1-I
Clark County No. 16-1-01154-3

PETITION FOR REVIEW

CATHERINE E. GLINSKI
Attorney for Petitioner

GLINSKI LAW FIRM PLLC
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Federal Cases

Statutes

Constitutional Provisions

Rules

Other Authorities

A. IDENTITY OF PETITIONER

Petitioner, RANDY KARN, by and through his attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Karn seeks review of the October 4, 2021, unpublished decision of Division One of the Court of Appeals affirming his convictions.

C. ISSUES PRESENTED FOR REVIEW

1. Where the record contains no evidence that Karn recklessly created a risk of great bodily harm or death or recklessly caused substantial bodily injury by withholding basic necessities of life from his children, must the convictions for second degree criminal mistreatment be dismissed?

2. Where the court relied on aggravating factors which inhered in the charged offenses and which were unsupported by the record, is remand for resentencing required?

D. STATEMENT OF THE CASE

The relevant facts are contained in the Brief of Appellant, pages 1-14, and are incorporated herein by reference.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Whether the Court of Appeals properly applied the State's burden of proof as to each of the separate charges of second degree criminal mistreatment presents significant constitutional question this Court should review.

The burden of proving the essential elements of a crime unequivocally rests on the prosecution. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Proof beyond a reasonable doubt of all essential elements is an "indispensable" threshold of evidence the State must establish to garner a conviction. *Winship*, 397 U.S. at 364. Therefore, as a matter of state and federal constitutional law, a reviewing court must reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. *State v. Hickman*, 135 Wn.2d

97, 103, 954 P.2d 900 (1998); *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); *State v. Chapin*, 118 Wn.2d 681, 826 P.2d 194 (1992); *State v. Green*, 94 Wn. 2d 216, 616 P.2d 628 (1980).

Karn was convicted of separate counts of second degree criminal mistreatment as to JK, RuK, and KK under Former RCW 9A.42.030(1), which provides that

> (1) A parent of a child … is guilty of criminal mistreatment in the second degree if he or she recklessly … either (a) creates an imminent and substantial risk of death or great bodily harm, or (b) causes substantial bodily harm by withholding any of the basic necessities of life.

Thus, to convict Karn, the State had to prove, as to each of these three children, that he recklessly (a) created an imminent and substantial risk of death or great bodily harm, or (b) caused substantial bodily harm, by withholding a basic necessity of life. RCW 9A.42.030(1)[1]; CP 61-66. Basic necessities include "food, water, shelter, clothing, and medically necessary health care,

[1] The criminal mistreatment statute was amended in 2017 to require a showing of criminal negligence rather than recklessness, but Karn was charged under the prior version of the statute.

including but not limited to health-related treatment or activities, hygiene, oxygen, and medication." RCW 9A.42.020(1). While the State presented evidence from which the jury could find Karn failed to provide his children with basic necessities, the evidence did not establish that by doing so he recklessly created an imminent and substantial risk of death or great bodily harm or that he recklessly caused substantial bodily harm to any of these three children.

The State's theory was that JK, RuK, and KK all sustained substantial bodily harm and were at risk of great bodily harm or death. RP 2303-04, 2307. As to KK, the State argued that the specific bodily harm he suffered was phimosis. RP 2306. The evidence showed that this condition, scarring to his foreskin which impaired his ability to urinate, was caused by lack of adequate hygiene. RP 1341-42, 1810. While KK's first foster mother testified that KK did not know how to wash himself at first, he was only 3 years old when he was removed from Karn's care in September 2014 and would not be expected to bathe

without supervision at that age. RP 1247-48. The foster parent with whom KK was placed in March 2016 testified that at some point she took KK to the doctor because he was having difficulty urinating. RP 1341-42. But there was no evidence of phimosis in the two years he spent in his first foster home. Nor did the pediatrician who saw KK regularly through May 2017 provide evidence of phimosis during that time. RP 1293-95. The evidence does not establish that KK developed phimosis as a result of anything Karn did, and it cannot support a conviction for criminal mistreatment.

The State presented no evidence of bodily injury to RuK. She was of normal height and weight when she was removed from the home, and her physical exam was normal. RP 1290-91. There was testimony that she did not know how to wash properly, and she still needed supervision at the time of trial, but there was no evidence that her hygiene inadequacies caused any physical pain, injury, illness, or impairment. RP 1248, 1341; RCW 9A.42.010(2).

There was evidence that RuK was diagnosed with PTSD, depressive disorder, and mood regulation disorder, which could have resulted from a lack of basic necessities. RP 1215, 1312. RuK also had persistent anxiety around eating. RP 1337-39. None of these mental health conditions constitute bodily injury, however. The statutory definition of bodily injury includes only physical illnesses, not mental illness. *State v. Van Woerden*, 93 Wn. App. 110, 117, 967 P.2d 14 (1998), *review denied*, 137 Wn.2d 139 (1999). Even though PTSD can have measurable neurobiologic or chemical effects on the brain, it does not meet the definition of bodily injury because it is foremost the impairment of a mental condition. *Id*. at 118-19. Under this authority, RuK's PTSD, depression, mood disorder, and anxiety do not meet the definition of bodily injury. Although they may have impact on her bodily functioning, they are impairments of a mental condition. Thus, this evidence does not establish substantial bodily injury.

The State also argued that both RuK and KK had developmental disabilities which constituted bodily harm. RP 2304-06. It relied on testimony from neuropsychologist Gerrard-Morris that NK's and RoK's intellectual disabilities were physical injuries, because the underlying physical function of the brain was impacted. RP 1619-20.

There was no evidence that RuK or KK were diagnosed with intellectual disabilities, however. While both children had some delays in achieving developmental milestones when they were first removed from the home, they both quickly caught up once they were in foster care. RP 1290-91, 1293-94, 1378. The State's attempt to equate these temporary developmental delays with the cognitive developmental disabilities diagnosed in NK and RoK is not supported by the evidence. Dr. Gerrard-Morris testified that intellectual disabilities are longstanding because they result from a change in the way the brain develops. RP 1613, 1619-20. There was no evidence either RuK or KK suffered longstanding impaired brain function.

Next, there was insufficient evidence that JK sustained substantial bodily harm as a result of the withholding of basic necessities. The evidence showed that JK has a genetic disorder which manifests in attention deficit, aggression, and impulsivity. RP 899. He also has PTSD, which could be the result of lack of nutrition and neglect. RP 895, 915. While there was evidence JK might have been farther along in managing his behavior with earlier intervention, he would always require specialized care due to his genetic disorder. RP 900-02, 915. JK's doctor could not say that his presentation was the result of past abuse as opposed to the expected outcome of his significant genetic anomaly. RP 912-13. The evidence was not sufficient to establish that Karn recklessly caused JK substantial bodily harm by withholding basic necessities.

The State also argued that these children were at imminent and substantial risk of great bodily harm or death. RP 2307. It argued that since withholding medical treatment resulted in refeeding syndrome in NK and severe scoliosis in TK, the other

children were at risk for serious health issues as well. RP 2308. This argument is purely speculative. The evidence showed that refeeding syndrome is rare and only occurs in people who are severely and chronically malnourished. RP 1787. There was no evidence that any of the other children were malnourished. In fact, medical exams showed that they were of normal height and weight when they were removed from the home. RP 1290-91, 1293-94. There was evidence that the children had issues around food, including gorging, hording, and anxiety. RP 1337-39, 1712. But there was no evidence connecting these issues to refeeding syndrome, nor was there evidence that eating disorders constitute bodily injury.

The trial court allowed evidence of eating issues based on its interpretation of *State v. Mitchell*, 169 Wn.2d 437, 237 P.3d 282 (2010). RP 1649, 1894, 1898-1900. In that case, a four year old child was removed from the home when he was found to be severely malnourished and underweight. Once he was in the hospital he hoarded food and tried to hide it from hospital staff.

Mitchell, 169 Wn.2d at 441-42. Because the defendant was not the child's parent, this Court addressed the question of whether a child with a disability could be a dependent person under the statute. *Id*. at 444. The Court noted that the child was disabled due to his physical and mental condition. *Id*. The *Mitchell* case did not address the question of whether an eating disorder is a bodily injury.

In *Van Woerden*, however, the court held that mental illness, or an impairment of a mental condition, even one that has physiological impacts, is not bodily injury and cannot be the basis of a conviction for criminal mistreatment. *Van Woerden*, 93 Wn. App. at 119. The State presented no evidence which would distinguish the eating issues the children had from PTSD in this respect.

Even if it could be inferred that a child with food issues or an eating disorder might be at risk of developing refeeding syndrome, the evidence here does not establish criminal mistreatment. Under the statute, the risk of great bodily harm

must be imminent and substantial, not theoretical or speculative. RCW 9A.42.030(1)(a). The evidence showed that NK ate less than the other children, often choosing to drink coffee instead of eat. RP 1786. His chronic malnourishment led to his refeeding syndrome. Unlike NK, these children were of normal height and weight. There was no evidence they were in imminent danger of similar bodily harm.

The State's argument that the children were at risk of great bodily harm due to the conditions of the home was equally speculative. There was evidence that injuries from glass or rusty nails could get infected if untreated. RP 1803-05. But the evidence showed that Karn treated his children's injuries, including taking them to a doctor if home remedies proved ineffective. RP 747, 754, 763, 1000, 1035-36. The evidence does not establish that the children were in imminent and substantial risk of great bodily harm or death due to the conditions of the home.

In affirming Karn's convictions, the Court of Appeals reasoned that

> there was extensive testimony provided by a number of doctors, psychologists, and psychiatrists regarding the risks associated with the conditions in which these children existed due to Karn's withholding of basic necessities. The children all testified similarly regarding the lack of food, medical care, basic hygiene, and appropriately safe living conditions. Further, it is telling that Karn does not challenge the numerous other counts related to his other biological children several of which resulted in specific findings of injuries sustained by those children. This, in and of itself, appears to logically provide that the conditions were such that J.K., Ru.K., and K.K. were at substantial risk of sustaining great bodily harm had they continued to reside in the home under those same conditions.

Opinion, at 7. The court declined to examine the evidence specific to these children and concluded that the evidence was sufficient to support the challenged convictions. Opinion, at 8.

The State has the burden of proving every element of every charged offense beyond a reasonable doubt, however. *Winship*, 397 U.S. at 364. The jury, and the reviewing court, must consider each charge separately, and unless there is evidence to support a specific charge, it must be dismissed.

Because there is no evidence that JK, RuK, or KK sustained substantial bodily harm or was in imminent and substantial risk of great bodily harm or death, the State did not meet its burden as to these three charges. RCW 9A.42.030(1). The Court of Appeals's failure to hold the State to its burden of proof presents a significant constitutional question, and this Court should grant review. RAP 13.4(b)(3).

2. Whether the aggravating factors relied on in imposing the exceptional sentence are inherent in the convictions is an issue of substantial public importance this Court should review.

An exceptional sentence is not justified if it is based on factors necessarily considered by the Legislature in establishing the standard sentence range. *State v. Law*, 154 Wn.2d 85, 95, 110 P.3d 717 (2005). "Exceptional sentences are intended to impose additional punishment where the particular offense at issue causes more damage than that contemplated by the statute defining the offense." *State v. Davis*, 182 Wn.2d 222, 229, 340 P.3d 820 (2014). The appellate court reviews the meaning and

applicability of a statutory aggravating factor as a matter of law. *Id*.

The trial court imposed exceptional sentences based on the following aggravating factors found by the jury: (1) deliberate cruelty; (2) domestic violence offenses which were part of an ongoing pattern of abuse of multiple victims in multiple incidents over a prolonged period of time; (3) use of a position of trust to commit the offense; (4) the offense involved a destructive and foreseeable impact on persons other that the victim; and as to JK, (5) the victim was particularly vulnerable. CP 196-207; RCW 9.94A.535(3)(a)(b)(h)(n)(r). Three of these aggravators do not support the exceptional sentence.

To support an exceptional sentence based on deliberate cruelty, the defendant's conduct must be of the type not usually associated with the commission of the offense in question. *State v. Rotko*, 116 Wn. App. 230, 244, 67 P.3d 1098 (2003). The State argued that Karn's conduct was deliberately cruel because he withheld food from his children, even though he had the means

to provide it. RP 2318. Karn was convicted of criminal mistreatment. By definition, criminal mistreatment involves the withholding of basic necessities of life by a parent from his or her child, when that withholding causes substantial or great bodily harm or creates the risk of great bodily harm or death. RCW 9A.42.020(1); RCW 9A.42.030(1). Thus the crime as defined by the Legislature necessarily includes the conduct relied on by the State to establish this factor. The record does not establish deliberate cruelty, and that factor does not justify an exceptional sentence.

Next, the position of trust aggravating factor cannot support the exceptional sentence because that factor inheres in the offense. Criminal mistreatment can be committed only by "[a] parent of a child, the person entrusted with the physical custody of a child or dependent person, a person who has assumed the responsibility to provide a dependent person the basic necessities of life, or a person employed to provide the child or dependent person the basic necessities of life." RCW

9A.42.020(1); RCW 9A.42.030(1). Such persons necessarily occupy a position of trust, and any person who commits criminal mistreatment necessarily abuses that trust. *See State v. Creekmore*, 55 Wn. App. 852, 783 P.2d 1068 (1989), *abrogated on other grounds by In re Personal Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002) (exceptional sentence based on abuse of trust following conviction for felony-murder based on assault and criminal mistreatment upheld as to predicate offense of assault only because criminal mistreatment "presumes a breach of parental or custodial trust."). Because criminal mistreatment can be committed only by a person who abuses a position of trust, that factor was necessarily considered by the Legislature when it established the standard sentence range for the offense. This factor cannot justify an exceptional sentence as a matter of law.

The court also relied on the jury's finding that the offense involved a destructive and foreseeable impact on persons other than the victim. For this factor to support an exceptional sentence

the impact on others must be of a destructive nature not normally associated with the offense in question. *State v. Jackson*, 150 Wn.2d 251, 274, 76 P.3d 217 (2003). Webster's dictionary defines "destructive" as "tending to impair, damage, or wreck." Webster's Third New International Dictionary 615 (2002). It defines "impact" in this context as meaning a "force producing change," and lists "shock" as a synonym. *Id*. at 1131. "From these definitions, the aggravating factor of a 'destructive impact' on persons other than the victim clearly involves some type of shock so forceful in nature that it causes a damaging impact on the life or lives of those individuals." *See State v. Kalac*, Cause No. 80643-2-I (April 13, 2020) (Unpublished opinion cited pursuant to GR 14.1).

This factor has been applied when violent crimes are committed in the presence of children. *See State v. Johnson,* 124 Wn.2d 57, 73-76, 873 P.2d 514 (1994) (drive-by shooting adjacent to elementary school in session); *State v. Cuevas–Diaz,* 61 Wn. App. 902, 905, 812 P.2d 883 (1991) (children in home

traumatized by attack on mother). Where the community impact is of the type expected with the type of offense, however, the aggravating factor does not apply. *See State v. Way,* 88 Wn. App. 830, 834, 946 P.2d 1209 (1997) (shooting on college campus which had psychological impact on witnesses not sufficiently set apart from other murder committed in public place to justify exceptional sentence).

There is simply no evidence in this case of a shock so forceful it caused damage to the lives of people other than the children. The State argued that because the children required foster care and long term support, Karn's actions had a destructive impact on society at large and the foster parents who took them in. RP 2322-23. But there was no evidence that the foster parents' lives were destroyed by their contact with these children. Moreover, foster care and other services would be the expected result when parents are convicted of criminal mistreatment. *See Jackson*, 150 Wn.2d at 275 (Use of false abduction story to cover murder did not establish aggravating

factor. When child goes missing and criminal activity is indicated, it is not unusual for resources to be expended in searching for missing person.) This factor does not support the imposition of an exceptional sentence.

The Court of Appeals determined that because Karn did not dispute the domestic violence aggravator, and because the sentencing court indicated it would impose the same sentence based on any one factor, it did not need to consider Karn's assignment of error. Opinion, at 9-10. As argued above, however, three of Karn's counts must be dismissed for insufficient evidence, which reduces the offender score on the remaining counts. This Court should review the validity of the challenged aggravating factors as a matter of substantial public importance, and so that the sentencing court can consider the appropriate sentence on remand. RAP 13.4(b)(4).

F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse three of Karn's convictions and remand for resentencing.

I certify that this petition contains 3260 words, as calculated by Microsoft Word.

DATED this 3rd day of November, 2021.

Respectfully submitted,

GLINSKI LAW FIRM PLLC

CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Petitioner

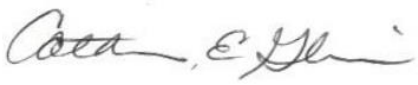
Certification of Service by Mail

Today I caused to be mailed a copy of the Petition for Review in *State v. Randy Karn,* Court of Appeals Cause No. 82532-1-I, as follows:

Randy Karn/DOC#417610

Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



_____
Catherine E. Glinski
Done in Manchester, WA
November 3, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RANDY SCOTT KARN, Appellant.	)	No. 82532-1-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, J. — Randy Karn was found guilty of two counts of criminal mistreatment in the first degree and four counts of criminal mistreatment in the second degree following a jury trial. Karn argues that his convictions for criminal mistreatment in the second degree in counts V, VI, and VII are unsupported by sufficient evidence and that several of the aggravators found by the jury are inherent within the elements of criminal mistreatment in the second degree, such that the exceptional sentence he received was improper. We conclude that sufficient evidence was presented to the jury to support the disputed counts and we need not reach his second issue in light of an unchallenged aggravator which independently supports the exceptional sentence. We affirm.

FACTS

Following a jury trial, Randy Karn was found guilty of two counts of criminal mistreatment in the first degree as to Na.K. and T.K., along with four counts of

criminal mistreatment in the second degree as to Ro.K, J.K., Ru.K., and K.K. Each of the named victims was a biological child of Karn and his wife, Mindie Karn.[1] The case arose from the general living conditions experienced by the Karns' biological children prior to intervention by the Department of Children, Youth and Families.[2]

At trial, A.K., Ro.K., T.K., Ni.K., and Na.K.[3] all testified generally as to the conditions in which Randy raised them. The testimony indicated a general lack of sufficient and consistently available food in the household. However, the siblings indicated that both Mindie and Karn often obtained food for themselves outside of the home and had locked personal food storage in the house, while leaving the children with strained access to adequate nutrition. They also indicated that though they were supposed to be homeschooled, such education occurred briefly and was sporadic in nature. Further, the testimony from the youths established that the residence lacked in appropriate hygiene, leaving them to exist in a home environment contaminated by insects, feces, and urine. There was testimony that described the property as littered with hazardous materials such as rusty nails, broken glass, and random boards. The siblings also discussed limited access to toys and clean clothing, and the fact that they did not receive medical care from professionals, despite later diagnoses of ailments that required treatment for several of them.

---

[1] Because they share the same last name, we refer to Mindie by her first name. No disrespect is intended.

[2] On July 1, 2018, the newly created Department of Children, Youth, and Families (DCYF) took over child welfare duties that were formerly the responsibility of the Department of Social and Health Services (DSHS). RCW 43.216.906. Accordingly, in this opinion, "Department" means DSHS before July 1, 2018, and DCYF on and after July 1, 2018.

[3] Some of the siblings were adults at the time of the investigation and trial. However, out of respect for the privacy interests of the minor children who were named victims in this case, we refer to all of the Karn siblings by initials only, regardless of age.

Numerous community members testified as to their interactions with the victims when they were allowed to begin attending a local church. These witnesses remarked that the children often appeared unclean and hungry and detailed attempts to provide the children with food when they visited the church. Additionally, the neighbor who had lived across the street from the Karns, and ultimately called authorities, testified as to her concerns about the living conditions when she saw the children in their yard.

Foster parents and various Department employees involved in the case recounted how the youths all arrived into their care with myriad, and quite drastic, behavioral issues. Numerous witnesses described the children as being "feral" and without much understanding of how to care for themselves or how things operated outside of the home, and severely lacking in communication skills.

Various medical professionals, all of whom had examined or treated at least one of the victims, testified to varying degrees about the health conditions they treated, as well as how the conditions of the Karns' lifestyle likely were a major cause of the harm and risk in which the children were placed generally. Dr. Megan Spohr, who evaluated N.K. and Ro.K., testified that the malnutrition they experienced generally leads to poor immunity which tends to place children at a higher risk for infection and potential death. Dr. Aimee Gerard-Morris, a pediatric neuropsychologist, testified about the manner by which maltreatment and lack of nutrients provide for potentially toxic stress and limit neurological development. When specifically asked if inadequate brain development was purely a mental or physical injury, or a combination thereof, she replied:

> So there certainly can be effects of emotional changes secondary to these effects of maltreatment, but there's also physical changes that may not be, you know, as identifiable as a bruise or, you know, some kind of physical indicator of injury, but at a neuronal level and a neurochemical level that, again, we can't see with the naked eye, you know, that would be considered an injury or an alteration to how an individual's brain was supposed to develop.

Dr. Cathleen Lang, a pediatrician with CARES (Child Abuse Responsive and Evaluation Services) Northwest who interacted with T.K., J.K., Ru.K., Ro.K., K.K., and Na.K. at the emergency room when they were initially admitted, opined as to the ways malnutrition places an individual at severe risk of potential death if refeeding syndrome develops. Na.K. was diagnosed with refeeding syndrome after removal from Karn's home. Lang also explained that medical neglect was what likely led to Na.K.'s severe health issues. She further indicated that a reasonable caregiver would have noticed multiple warning signs that should have signaled a need for medical care. Lang provided general testimony regarding how the lack of medical care and conditions of a home such as the Karns' would place the siblings at risk of infections and why child wellness checks are necessary to their general overall health. In all, over a dozen medical professionals testified at trial as to the various children, their individual medical diagnoses or the living conditions and child development generally.

The defense also called multiple witnesses, including family members. Additionally, Karn and Mindie testified during the presentation of the defense case. The description from these witnesses as to the environment of the Karns' home starkly contrasted the testimony presented by the State's witnesses.

At the close of trial, the jury returned a verdict of guilty on all counts. The jury further found by special verdict that the State had proven both alternative prongs of criminal mistreatment in the second degree and that all of the aggravating circumstances alleged by the State had been proven. The trial court imposed an exceptional sentence of 247 months in prison. Karn now appeals.

ANALYSIS

I. Sufficiency of the Evidence

Karn argues that the evidence presented by the State was insufficient to establish his guilt beyond a reasonable doubt for criminal mistreatment in the second degree in counts V, VI, and VII. Count V was for the mistreatment of J.K., count VI as to Ru.K., and count VII based on the mistreatment of K.K. Karn does not dispute that the evidence supports his convictions for the other remaining counts. In light of the extensive evidence adduced at trial, we conclude that there was sufficient evidence to support the convictions for the challenged counts.

In reviewing whether evidence is sufficient to sustain a conviction, "we view the evidence in the light most favorable to the prosecution and determine whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt." State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). "A challenge to the sufficiency of the evidence admits the truth of the State's evidence." State v. Mines, 163 Wn.2d 387, 391, 179 P.3d 835 (2008). "In determining whether the requisite quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but

only that substantial evidence supports the State's case." State v. Jones, 93 Wn. App. 166, 176, 968 P.2d 888 (1998).

Counts V, VI, and VII were independent charges of criminal mistreatment in the second degree for three separate victims. Criminal mistreatment in the second degree is codified by RCW 9A.42.030(1). The statute provides the following:

> (1) A parent of a child, the person entrusted with the physical custody of a child or dependent person, a person who has assumed the responsibility to provide to a dependent person the basic necessities of life, or a person employed to provide to the child or dependent person the basic necessities of life is guilty of criminal mistreatment in the second degree if he or she with criminal negligence, as defined in RCW 9A.08.010, either (a) creates an imminent and substantial risk of death or great bodily harm by withholding any of the basic necessities of life, or (b) causes substantial bodily harm by withholding any of the basic necessities of life.

RCW 9A.42.030 (emphasis added).

RCW 9A.42.030 provides for two alternative means of proving criminal mistreatment in the second degree. The State proceeded on both alternatives for all of those charges at trial. Further, based on special verdict forms provided to the jury as to each of the challenged counts, it is clear that the jury found both means of criminal mistreatment in the second degree were established beyond a reasonable doubt for counts IV through VII.[4] Karn claims that "[b]ecause there is no evidence that [J.K.], [Ru.K.,] or [K.K.] sustained substantial bodily harm or was in imminent and substantial risk of great bodily harm or death, the State did not meet its burden" with regard to counts V, VI and VII. However, Karn admits in briefing that "the State presented evidence from which the jury could find he failed to provide his children with basic necessities." Karn's argument is specific to the

[4] Again, Karn does not challenge his conviction as to count IV.

second element of criminal mistreatment; that the State failed to establish that this withholding, as it related to J.K., Ru.K., and K.K., created an imminent and substantial risk of death or great bodily harm, or that he recklessly caused substantial bodily harm to any of these three children. Karn's claim wholly ignores the totality of the evidence that the State presented at trial.

In reviewing the evidence presented by the State, there was extensive testimony provided by a number of doctors, psychologists, and psychiatrists regarding the risks associated with the conditions in which these children existed due to Karn's withholding of basic necessities. The children all testified similarly regarding the lack of food, medical care, basic hygiene, and appropriately safe living conditions. Further, it is telling that Karn does not challenge the numerous other counts related to his other biological children, several of which resulted in specific jury findings of injuries sustained by those children. This, in and of itself, appears to logically provide that the conditions were such that J.K., Ru.K., and K.K. were at substantial risk of sustaining great bodily harm had they continued to reside in the home under those same conditions. See State v. Kirkman, 159 Wn.2d 918, 938, 155 P.3d 125 (2007) ("Juries embody the 'commonsense judgment of the community'" (quoting Taylor v. Louisiana, 419 U.S. 522, 530, 95 S. Ct. 692 (1975))). Even assuming the jury did not utilize such logic, multiple medical professionals opined on the various ways that the conditions testified to by the children placed them at great risk and were the likely causes of the children's current health challenges.

We decline to weigh further the many specific ways that Karn's withholding of basic necessities, which he admits on appeal, placed these young children at imminent and substantial risk of death or great bodily harm. Sufficient evidence was produced at trial to support Karn's convictions under counts V, VI, and VII.[5]

II. Aggravating Factors

Karn next challenges the exceptional sentence that was imposed, arguing that three of the five aggravating factors that were found by the jury and used by the court as the basis for the exceptional sentence, are inherent within the convictions for criminal mistreatment in the second degree. However, we decline to specifically review each aggravator in light of the trial court's determination at sentencing and the fact that the domestic violence aggravator, which Karn does not challenge, independently supports his exceptional sentence.

RCW 9.94A.535 states "[t]he court may impose a sentence outside the standard range for an offense if it finds . . . that there are substantial and compelling reasons justifying an exceptional sentence." Unless the defendant waives their right to a jury or stipulates to aggravating factors, findings supporting an exceptional sentence must be determined by a jury beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 304–05, 124 S. Ct. 2531 (2004); RCW 9.94A.525; RCW 9.94A.537. "Exceptional sentences are intended to impose additional punishment where the particular offense at issue causes more damage than that contemplated by the statute defining the offense." State v. Davis, 182

[5] Though Karn's argument on appeal centers on whether various mental health conditions, including post-traumatic stress disorder, qualify as substantial bodily harm under RCW 9A.42.030, given the special verdict findings by the jury, we need not consider such argument.

Wn.2d 222, 229, 340 P.3d 820 (2014). RCW 9.94A.585(4), which directs the manner by which this court reviews an exceptional sentence, states:

> To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

In Karn's case, the sentencing court made clear in its findings of fact and conclusions of law for the exceptional sentence that it "would impose the same sentence if only one of the grounds listed in the preceding paragraph was valid." The specific findings that provided the required bases for the imposition of an exceptional sentence included:

> (a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victims. RCW 9.94A.535(3)(a)
>
> (b) The offense involved domestic violence, as defined in RCW 10.99.020, and the offenses were part of an ongoing pattern of psychological or physical [abuse] of a victim or multiple victims manifested by multiple incidents over a prolonged period of time under RCW 9.94A.535(3)(h)(i).
>
> (c) The jury found that the defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offenses. RCW 9.94A.535(3)(n).
>
> (d) The jury found that the offenses involved a destructive and foreseeable impact on persons other than the victims. RCW 9.94A.535(3)(r).
>
> (e) As to count five, the jury found that the defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance. RCW 9.94A.535(3)(b).

Karn only challenges aggravators (a), (c), and (d). In light of the sentencing court's indication that it would impose the same exceptional sentence based on any one

of these factors alone and the fact that Karn does not dispute the validity of (b) as a basis for the exceptional sentence, further consideration of this assignment of error is unnecessary. See RCW 9.94A.585(4).

Affirmed.

WE CONCUR:

GLINSKI LAW FIRM PLLC

November 03, 2021 - 12:08 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	82532-1
Appellate Court Case Title:	State of Washington, Respondent v. Randy S. Karn, Appellant
Superior Court Case Number:	16-1-01154-3

The following documents have been uploaded:

- 825321_Petition_for_Review_20211103120616D1961029_6084.pdf
  This File Contains:
  Petition for Review
  The Original File Name was 82532-1 State v Karn PETITION For Review_merged2.pdf

A copy of the uploaded files will be sent to:

- aaron.bartlett@clark.wa.gov
- cntypa.generaldelivery@clark.wa.gov

Comments:

Sender Name: Catherine Glinski - Email: glinskilaw@wavecable.com
Address:
PO BOX 761
MANCHESTER, WA, 98353-0761
Phone: 360-876-2736

Note: The Filing Id is 20211103120616D1961029