NO. 43930-1-II **CONSOL WITH** 43950-6-II
Cowlitz Co. Cause NO. 11-1-00533-7/11-1-00534-5

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY ALLEN TREBILCOCK
REBECCA LYNN TREBILCOCK,

Appellant.

AMENDED COVER PAGE
BRIEF OF RESPONDENT

SUSAN I. BAUR
Prosecuting Attorney
JAMES SMITH/WSBA# 35537
Chief Deputy Prosecuting Attorney
Attorney for Respondent

Office and P. O. Address:
Hall of Justice
312 S. W. First Avenue
Kelso, WA 98626
Telephone: 360/577-3080

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I. PROCEDURAL HISTORY

The appellants were charged by amended information with thirteen counts of criminal mistreatment involving their five adopted children. CP 1. The appellants waived their right to have a jury decide their case, and proceeded to trial on July 16, 2012, before the Honorable Judge Michael Evans.

The trial proceeded for nine days, and was submitted to the court for deliberation on July 26, 2012. On July 31, 2012, the trial court found the appellants guilty of the most serious charge, criminal mistreatment in the first degree of their adopted son J.T., and guilty of and criminal mistreatment in the third degree for their adopted daughter A.T. The trial court also found the existence of two aggravating factors. The appellants were acquitted of the remaining charges.

On August 23rd, 2012, the appellants appeared for sentencing. The trial court sentenced R. Trebilcock to an exceptional sentence of 96 months in prison on the felony charge and six months consecutive for the misdemeanor offense. J. Trebilcock received a standard range sentence of 60 months for the felony offense, with six months consecutive for the misdemeanor. The instant appeal timely followed.

II. STATEMENT OF FACTS

The appellants, though already parents to four biological sons, began adopting more children in 2004. RP 2167. The appellants adopted J.T. and A.T., who were biological siblings, in 2004. RP 292-293. Subsequently, the appellants went on to adopt three more children from Haiti, T.T, N.T., and G.T.. RP 296, 626, 883-886. The appellants lived a secluded life in rural Cowlitz County, and homeschooled all of their adopted children. RP 301, 341, 665, 755-763, 914.

On March 1, 2011, R. Trebilcock took J.T. to a local pediatric clinic. Upon examination, the medical staff were horrified at J.T.'s condition, as he appeared to be starving (cachetic) and was extremely cold. Though J.T. was 13 years old, he weighed only 49 pounds and was only 50 inches tall. The pediatric staff immediately called an ambulance for J.T. and he was admitted to a local hospital in Longview, Washington. RP 149-183. Upon admission to the hospital, J.T.'s temperature was 88 degrees and he was suffering from hypothermia. RP 398-417. J.T. was transferred to a pediatric hospital at Oregon Health and Science University (OHSU), where he was found to have four fractured ribs. RP 422, 721-725. J.T. was also suffering from severe untreated eczema that had caused his skin to break down. This condition resolved with minor treatment in OHSU. RP 1147-1149.

J.T. was examined by a host of medical doctors, dieticians, and other medical personnel. None of the treating medical providers found there was any underlying medical cause for J.T.'s emaciation, short stature, or broken bones, but instead found the cause to be abuse and neglect. RP 1131-1139, 244-289, 561-585, 703-754. Prior to his hospitalization, J.T. was last seen by the families' pediatrician, Dr. Blaine Tolby, in 2008. 1313-1391. An examination of growth records by Dr. Tolby revealed that J.T. had grown normally until he was in appellants care, at which point he essentially stopped gaining any height or weight. RP 1320-1325. After J.T. was removed from the appellants' control, he rapidly gained weight and began growing again. RP 1357-1361.

J.T. testified to having endured nightmarish and Dickensian treatment at the hands of the appellants. J.T. was denied food as a punishment, exposed to the elements, and subjected to corporal punishment for complaining about his treatment. RP 293-398. J.T. was required to wear a diaper, and to wash his clothing outside in a bucket. 298-302. While the rest of the family ate their food from a plate, J.T., when he was fed, was required to eat from a plastic container the appellants called a "trough." RP 307-309. To prevent J.T. was "stealing food" from the refrigerator when hungry, the appellants set up a motion detector in the kitchen. RP 311-312. If J.T. was caught stealing food, or

eating dog food because he was hungry, the appellants would beat him. RP 470-472.

J.T.'s hospitalization in March of 2011 led to an investigation of the appellants by the police and Children's Protective Services (CPS). On March 10, 2011, the four adopted girls, A.T., T.T., N.T., and G.T., were removed from the appellants' care by court order. RP 230. Upon removal from the appellants, each of the four girls was also found to be very thin and of short stature. RP 860-881. As with J.T., the four adopted girls related a litany of abuse and neglect by the appellants. This included corporal punishment, exposure to the elements, and food deprivation. RP 461-530, 626-698, 884-909, 955-993. Each of the four girls gained significant amounts of weight and height once they were outside the appellants care. RP 1368-1375.

The appellants' theory of the case was that J.T.'s condition was actually due to Ricketts, vitamin-D deficiency, fetal alcohol syndrome, and preexisting psychological conditions. The appellants presented expert testimony from a physician, Dr. Steven Gabaeff, to support these claims. RP 1720-1817. The appellants also attempted to suggest the childrens' account of their abuse was suggested or planted by the State's investigators, and called a psychologist, Dr. Mark Whitehill, to support this theory. RP 2061-2134. The appellants also called a large number of

lay witnesses to testify that the appellants were good parents, and had never been observed starving or abusing their children. RP 1550-1662, 1941-2013, 2138-2164.

III. ISSUES PRESENTED

1. Did the appellants not receive a fair trial due to opinion testimony by one of the State's expert witnesses?

2. Did the trial court err by imposing an exceptional sentence for impermissible reasons?

3. Was the appellants' right to have a jury decide the aggravating factors violated?

4. Does the Washington State Constitution bar a defendant from waiving his or her right to a jury trial?

5. Were the appellants' convictions for criminal mistreatment in the third degree based on insufficient evidence?

6. Did the trial court err by imposing a condition of probation unrelated to the offense?

IV. SHORT ANSWERS

1. No.

2. No.

3. No.

4. No.

5. No.

6. Yes.

V. ARGUMENT

I. THE UNOBJECTED ADMISSION OF EXPERT OPINION TESTIMONY DID NOT VIOLATE THE APELLANTS' RIGH TO A FAIR TRIAL.

The appellant argues her rights to due process and a fair trial were violated by a State's witness, Dr. Blain Tolby, having allegedly testified that, in his opinion, the appellants were guilty. The appellant cites State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007), in support of this argument. However, the testimony at issue did not amount to an opinion as guilt, was not objected to at trial, and, even if improper, was harmless in the context of the entire trial. As such, this Court should reject this claim.

The central issue in the trial was a "battle of the experts" as to the cause and nature of the children's physical and psychological problems. In light of this, earlier in the proceedings the appellants' attorneys raised an initial objection to Dr. Tolby, along with other expert witnesses, offering opinion testimony on the issue of guilt. RP 1101. After hearing the arguments of counsel, the trial court noted that the appellants were free to raise any specific objections they desired, but that expert witnesses would generally be allowed to testify as to their opinions, even if it touched upon an ultimate issue in the case. The trial court noted that experts could not however, express an opinion on guilt. RP 1102-1107.

The appellants claim that trial counsel renewed an objection to Dr. Tolby providing opinion testimony on the issue of guilt immediately prior to his testimony. Brief of R. Trebilcock at 9, citing to RP 1313-1314. This claim is incorrect, as trial counsel actually renewed an objection to Dr. Tolby providing testimony on the issue of fetal alcohol syndrome, not opinions on guilty of innocence. RP 1313-1314.

During the State's redirect examination of Dr. Tolby, the following testimony was elicited:

> Q. How would -- how would you -- how would you characterize the severity of this case, Dr. Tolby?
>
> A. I would place the severity of this particular case,as being the worst case of chronic abuse and neglect of any that I've seen in my thirty-seven years -- uh -- being a physician, that has not resulted in death of the patient.

RP 1463-1464. The appellants did not object to this question, or move to strike this testimony. Id.

As regards expert testimony,

> [I]t has long been recognized that a qualified expert is competent to express an opinion on a proper subject, even though he thereby expresses an opinion on the ultimate fact to be found by the trier of fact. The mere fact that the opinion of an expert covers an issue which the jury has to pass upon does not call for automatic exclusion.

Kirkman, 159 Wn.2d at 929. Indeed, "the fact that an opinion encompassing ultimate factual issues *supports* the conclusion that the

defendant is guilty does not make the testimony an improper opinion of guilt." State v. Hayward, 152 Wn.App 632, 649, 217 P. 3d 354 (2009) (emphasize added); quoting City of Seattle v. Heatley, 70 Wn.App. 573, 579, 854 P2d 658 (1993).

In Hayward, the court held that a medical doctor did not express an opinion as to guilt by testifying that, in his opinion the victim had suffered substantial bodily harm as required for assault in the second degree. 152 Wn.App. at 650-651. The court noted that the physician's testimony was not an explicit opinion on the defendant's guilt because it did not include any discussion of the defendant or his role in causing the injury. 152 Wn.App. at 651. Similarly, in Kirkman, the Supreme Court found that a medical doctor did not offer direct opinions on the defendant's guilt in a child sex case by testifying that the victim's account was "clear and consistent" and was consistent with the medical findings. 159 Wn.2d 930-34.

In the instant case, the Dr. Tolby's testimony did not include any opinion on the appellants' guilt, but simply stated his opinion as to the severity of the abuse and neglect suffered by J.T. Dr. Tolby did not testify that he believed J.T.'s account or that he believed the appellants were guilty of abusing J.T. Though his testimony certainly touched on an

ultimate issue, the causation of J.T.'s condition, it did not amount to an opinion on guilt, as with the opinions in Hayward and Kirkman.

Moreover, the appellants failed to object to Dr. Tolby's testimony at trial, and thus did not preserve this error for appeal. RAP 2.5(a). The appellants argue that this issue is of constitutional magnitude, and is thus reviewable under RAP 2.5(a)(3) as a "manifest error." However, the Supreme Court has repeatedly stated "[t]he exception actually is a narrow one, affording review only of 'certain constitutional questions.'" Kirkman, 159 Wn.2d at 934-35, citing State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1998). Only an "explicit or almost explicit" opinion of the defendant's guilt can constitute manifest error. Kirkman, 159 Wn.2d at 935. In State v. Haq, 166 Wn.App. 221, 268 P.3d 997 (2012), the Court found that testimony by police officers in a multiple murder case that the defendant was "an active shooter who was hunting for people" and that a victim "had been executed" did not meet in this standard. Dr. Tolby's testimony falls far short of the testimony in Haq, which itself did not meet the Kirkman threshold for manifest error. Plainly Dr. Tolby's testimony does not qualify as an "explicit or almost explicit" opinion on the appellant's guilt, and the appellant is thus barred from raising this issue for the first time on appeal.

Finally, for the appellants to raise this issue for the first time on appeal as "manifest error" they must show actual prejudice, and that the error and practical and identifiable consequences in the trial of the case. State v. O'Hara, 167 Wn.2d 91, 99-100, 217 P3d 756 (2009), citing Kirkman, 159 Wn.2d at 935. In context of the entire trial, which the appellants concede included "voluminous and complex evidence" supporting the State's case, Brief of R. Trebilcock at 10, it cannot be shown that this passing comment by Dr. Tolby had practical and identifiable consequences. For these same reasons, this error, even if considered by the court, would be harmless. See State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996). The harmlessness of the alleged error is only increased by the fact the appellants' case was tried to the bench rather than a jury, diminishing any chance the finder of fact would be swept away by such a brief statement by one witness.

II. THE APPELLANTS' EXCEPTIONAL SENTENCE WAS NOT BASED ON IMPERMISSIBLE FACTORS.

The appellants argue the exceptional sentence imposed by the trial court was based on impermissible aggravating factors, and that the trial court violated due process by citing to scripture during the sentencing hearing. However, the aggravating factors used were permissible under the relevant case-law and the facts of this case, and the trial court did not base

its sentencing on religious beliefs. As such, this Court should uphold R. Trebilcock's exceptional sentence.[1]

a. THE "ABUSE OF TRUST" AGGRAVATING FACTOR IS APPLICABLE.

The appellant argues that the "abuse of trust" aggravating factor codified in RCW 9.94A.535(3)(n) does not apply to the appellants conviction because this factor is limited to "purposeful misconduct." The appellants cite to State v. Hylton, 154 Wn.App. 945, 226 P.3d 246 (2010) for this proposition. In Hylton, the defendant was convicted of rape of a child in the third degree under RCW 9A.44.079. The defendant argued the "abuse of trust" aggravating factor could not be used as a basis for an exceptional sentence for this offense, but the appellate court disagreed and affirmed his sentence. 154 Wn.App. at 946.

The appellants seize upon for this passage from Hylton for their argument:

> The codified abuse of trust factor is, however, slightly narrower in scope than its common law predecessor. See State v. Chadderton,119 Wash.2d 390, 398, 832 P.2d 481 (1992) (reckless abuse of trust may operate as an aggravating factor by analogy, rather than strictly under the statute, which by its literal language applies only to purposeful misconduct). Under the statutory language of the 2005 amendment, the factor applies only to purposeful misconduct. RCW 9.94A.535(n).

---

[1] The trial court did not impose an exceptional sentence from J. Trebilcock, thus the request for resentencing within the standard range does not apply to this appellant.

154 Wn.App at 953. On its face, this statement does not explain what the court means by "purposeful misconduct." The appellant construes this section to mean the aggravating factor only applies to crimes with a mens rea of intent, and because their convictions require a lesser mens rea the factor is inapplicable.

However, the appellant's interpretation is immediately undermined by the fact that the defendant in Hylton was convicted of rape of a child in the third degree, an offense for which there is no mens rea requirement. RCW 9A.44.079, WPIC 44.15. If the appellant's interpretation is correct, the Hylton court would not have applied the aggravator factor to this offense, but yet the court affirmed the exceptional sentence. Given this problem, the correct reading of Hylton is that this aggravating factor only applies if the defendant used the position of trust to facilitate the commission of the offense. At common law, there was no such requirement. Chadderton, 119 Wn.2d at 398; See also 11A WAPRAC WPIC 300.23 (comment recognizing this distinction). Indeed, RCW 9.94A.535 does not at any point limit the application of the enumerated aggravating factors to offenses with any particular mens rea or to "purposeful" crimes, whatever those may be. To the extent the Hylton opinion can be read as holding so, it is in error. The Court should reject this claim.

b. THE "ONGOING PATTERN OF DOMESIC VIOLENCE" AGGRAVATING FACTOR IS APPLICABLE.

The appellants next argue that the "ongoing pattern" aggravating factor does not apply to the instant offenses because criminal mistreatment in the first degree is not included in RCW 10.99.020's definition of "domestic violence." The appellant is correct that the "ongoing pattern" aggravating factor is limited to offenses involving domestic violence, as defined by RCW 10.99.020. However, the appellant's claim that "criminal mistreatment is not a crime of domestic violence under that statute" is totally incorrect. RCW 10.99.020 (5) states: "'Domestic violence' *includes but is not limited to* any of the following crimes when committed by one family or household member against another" and then includes a list of specific crimes. (Emphasis added). Contrary to the appellant's claim, the definition of "Domestic Violence" is not limited to the specifically enumerated crimes. State v. Goodman, 108 Wn.App. 355, 359, 30 P.3d 516 (2001) (Statute provides nonexclusive list of domestic violence crimes). This argument is without merit.

c. THE "ABUSE OF TRUST" FACTOR IS NOT INHERENT TO THE OFFENSE OF CRIMINAL MISTREATMENT IN THE FIRST DEGREE.

The appellant next argues that the aggravating factor for "abuse of trust" set forth in RCW 9.94A.535(3)(n) inheres in the crime of criminal mistreatment in the first degree, RCW 9A.42.020. The State agrees with the appellant that factors that are "inherent" to a particular offense cannot be used as a basis for an exceptional sentence. State v. Ferguson, 142 Wn.2d 631, 649, 15 P.3d 1271 (2001). The rationale behind this rule is the legislature has already accounted for inherent factors in computing the presumptive range for the offense. See State v. Norby, 106 Wn.2d 514, 723 P.2d 1117 (1986). For instance, the "invasion of privacy" aggravating factor, RCW 9.94A.535(3)(p), cannot be the basis for an exceptional sentence for a rape in the first degree that is predicated on unlawful entry into the victim's residence, as the invasion of privacy is inherent in the offense itself. State v. Post, 59 Wn.App. 389, 400-02, 797 P.2d 1160 (1990).

Here, the trial court found that the appellant had used her "position of trust, confidence, and/or fiduciary responsibility to facilitate the commission of the offenses" under RCW 9.94A.535(3)(n). Supp. CP,

conclusion of law no. 7. The appellant argues that abuse of trust is inherent in the crime of criminal mistreatment, as the statute for this offense requires a degree of trust already. However, what makes this case remarkable, and justifies the use of the "abuse of trust" aggravating factor is the fact that the appellants were not only J.T.'s parents but that the trial court additionally found they had also been specifically entrusted with his care by the State of Washington and the judicial system via their formal adoption of J.T. Supp CP, finding of fact no. 2. The abuse of an adopted child clearly is an unusual and exceptional feature of the instant offense, and is clearly not a standard or typical fact for the offense. Given this unique feature, the trial court correctly applied the "abuse of trust" aggravating factor to the appellant's sentence.

d. THE "ONGOING PATTERN OF DOMESTIC VIOLENCE" FACTOR IS NOT INHERENT TO THE OFFENSE OF CRIMINAL MISTREATMENT IN THE FIRST DEGREE.

The appellant also argues that the "ongoing pattern of domestic violence" aggravating factor, RCW 9.94A.535(3)(h)(i), is inherent in the crime. The appellant argues that criminal mistreatment in the first degree must necessarily be committed over a long period of time. However, this argument is plainly incorrect. A person could commit criminal mistreatment in the first degree by withholding water from a child for

three or four days, by withholding food for two weeks, by exposing a child to elements for only a few hours on a cold night, or by withholding necessary medical care for only a half an hour in the case of a medical emergency.

All of these acts would constitute criminal mistreatment in the first degree if great bodily harm resulted, but none of these scenarios would involve the withholding of food and medical care for seven years that the appellant inflicted on J.T. Supp CP, finding of fact no. 10. Nor does the crime of criminal mistreatment in the first degree necessarily involve the psychological abuse inflicted on J.T. for the same years long period. Supp CP, finding of fact no. 12. The trial court's finding regarding the length and extent of J.T.'s abuse plainly separate this case from a typical case of criminal mistreatment in the first degree, and the legislature did not contemplate a seven year period of prolonged abuse when it determined the standard range for this offense. This Court should hold this aggravating factor is not inherent in the crime, and was correctly used to aggravate the appellant's sentence.

Finally, the trial court expressly indicated in its findings of fact and conclusions of law for the exceptional sentence that would have imposed the same sentence even if only one factor was valid. State's Supp CP. If the sentencing court would have imposed the same sentence for even only

one factor, remand is not required even if another factor is found invalid. State v. Hooper, 100 Wn.App. 179, 997 P.2d 936 (2000).

e. THE TRIAL COURT DID NOT BASE ITS SENTENCE ON RELIGIOUS BELIEFS.

Finally, the appellant argues her right to due process at sentencing was violated by the trial court's brief reference to scripture at the sentencing hearing. The full context of the specific statement as at issue is:

> At trial, Mrs. Trebilcock testified about being biblically convicted about proper eating and diet. This may be familiar to some -- this phrasing -- and the reason I make mention of this is because I really think it's important to mention and underscore the importance of safeguarding and protecting children in our society and keeping them from harm and offense.
>
> This is the phrase that some of you may be familiar with: "Which one of you, if his son asks him for bread, will he give them a stone, or if he asks a fish, will he give him serpent?" Your children asked for bread and, for reasons which baffle, literally baffle the bulk of society, you gave them a stone.

RP 2730. Though the trial court did not expressly state this quotation was drawn from scripture, the appellants correctly identify this as a reference to Luke 11:11. The appellants cite to United States v. Bakker, 925 F.2d 728, 740 (4th Cir. 1991) for their argument that this passing reference to a bible verse violates due process and necessitates resentencing before a different judge. However, the appellants' arguments misapprehend the

scope and applicability of Bakker, and their clam is ultimately unpersuasive.

Bakker was the prosecution of the well-known televangelist James Bakker for fraud and conspiracy. At the sentencing hearing, the trial court stated the defendant "had no thought whatever about his victims and those of us who do have a religion are ridiculed as being saps from money-grubbing preachers or priests." 925 F.2d at 740. The Bakker court remanded for a new sentencing hearing, as it found that the trial court's comments revealed an "explicit intrusion of personal religious principles" which was "the basis" for the court's sentence. Id. However, the Bakker court noted that the "Constitution, of course, does not require a person to surrender his or her religious belief upon the assumption of judicial office." Id. The court further noted its "genuine reluctance" to vacate the sentence, and recognized that a trial court "on occasion will misspeak during sentencing and that every ill-advised word will not be the basis for reversible error." Id. at 741.

Though this issue appears to be one of first impression in Washington, other jurisdictions have addressed the concerns reluctantly raised by the Bakker court. In Gordon v. State, 639 A.2d 56 (R.I. 1994), the Supreme Court of Rhode Island rejected an argument that Bakker required resentencing where the trial court appeared to make a biblical

reference. In Gordon, the trial court stated that "no man takes more than he's willing to give" an apparent biblical reference, prior to stating "This young man took an awful lot. He's going to give an awful lot." 639 A.2d at 56. The Gordon court rejected the claim these statements amounted to religious bias by the trial court, distinguishing Bakker, as any biblical reference was minimal at best. Id. at 56-57.

Similarly, in State v. Arnett, 88 Ohio St. 3d 208, 724 N.E.2d 793 (2000), the Supreme Court of Ohio rejected an argument that resentencing was required under Bakker were the trial court partly based its decision on the length of the defendant's sentence for biblical reasons. In Arnett, the trial court explicitly cited to scripture in a child abuse case by stating "And that passage where I had the opportunity to look in Matthew 18:5,6. 'And whoso shall receive one such little child in my name receiveth me. But whoso shall offend one of these little ones which believe in me, it were better for him that a millstone were hanged about his neck, and that he were drowned in the depths of the sea.'" 88 Ohio St.3d at 211.

In a lengthy and reasoned opinion, the Supreme Court of Ohio found that Arnett was distinguishable from Bakker, as the biblical reference was not the sole basis for the sentence, but was only one of many factors considered by the trial court. Id. at 221-222. The Arnett court rejected an attempt to characterize Bakker as setting forth a "per se" rule

requiring resentencing anytime a judge alludes to religious beliefs. Id. [2] Other States have reached the same conclusion. See Poe v. State, 341 Md. 523, 533, 671 A.2d 501 (1996) (sentence upheld where the trial court expressed a believe in "old-fashioned law and order, the Bible" prior to sentencing); People v. Halm, 81 N.Y.2d 819, 595 N.Y.S. 2d 380, 611 N.E.2d 281 (1993) (sentence for sodomy upheld where trial court referred to "Biblical times" as basis for his opinion on the seriousness of the crime.)

Here, the appellants had themselves introduced the issue of religion and biblical authority into the proceedings. As noted by the trial court, Mrs. Trebilcock had testified that she instituted a limited and vegan diet for the children because she was "biblically convicted." RP 2348. At the sentencing hearing, the appellants presented statements by a number of persons that referenced religious beliefs. Mona Vick stated she had attended Mrs. Trebilcock's baptism, prayed for the appellants' acquittal, and attested to the appellants' regular attendance at bible study and church services. RP 2662-2668. Fred Moore III, a pastor, cited the appellants' moral character and church attendance in his plea for mercy, as did Terry

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[2] The Supreme Court of Ohio's distinguishing of Bakker was found reasonable by the Sixth Circuit Court of Appeals, which rejected a habeas corpus petition based on the bible reference at sentencing. Arnett v. Jackson, 393 F.3d 681 (6th Cir.) (2005).

Vick, an elder at the appellants' church. RP 2668-2672. Pam Jackson and Matthew Smith both stated they prayed for the appellants. RP 2672-2674.

Perhaps most remarkably, a letter was read from the appellants' son, Dillon Trebilcock, wherein he compared the appellants' prosecution to the torture and crucifixion of Jesus Christ. RP 2691-2692. The appellants' allocutions also contained religious references, with Mrs. Trebilcock stating she had been blessed by God and Mr. Trebilcock referencing a biblical command to "take care of widows and orphans." RP 2703-2705.

The trial court's remarks must thus be taken in the context of a sentencing hearing where the appellants deliberately and repetitively portrayed themselves as religious people who had been wrongfully oppressed. The trial court's pronouncement of the sentence was lengthy, and considered a number of factors: the bravery of the victims and their suffering, the victims' utter dependence upon the appellants for the necessities of life, and the relative culpability of the appellants individually. RP 2725-2732. Notably, the biblical reference that the appellants complain of was made in direct response to Mrs. Trebilcock's claim of "biblical conviction" and the trial court explicitly stated the reference was intended to "underscore the importance of safeguarding and protecting children in our society." RP 2729.

Thus, as in Arnett, the trial court did not solely base its decision on religious grounds, but included the religious reference in support of a commendable societal goal: the protection of children. Indeed, it is not at all apparent the trial court's reference was intended to express the court's personal religious beliefs. Given the context of the hearing and the appellants' claims to religious motivation, the remark is far more plausibly seen as a rebuke of the appellants' self-righteousness and an attempt to give them a "taste of their own medicine."[3] The remark that the appellants complain of is distinguishable from the situation in Bakker, and this Court should reject the request for resentencing.

III. THE EXCPETIONAL SENTENCE WAS NOT IMPOSED IN VIOLATION OF THE APPELLANTS RIGHT TO A JURY TRIAL ON THE AGGRAVATING FACTORS.

The appellants argues the trial court improperly found the existence of two aggravating factors, in violation of Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). The appellants' position is that the appellants waived their right to a jury trial for the crimes charged but not the aggravating factors accompanying these

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[3] Additionally, outside of its religious authority, the Bible is the source of large number of pithy quotes and concepts that have been integrated into our culture. In this respect, the Bible is no different than other works of deep cultural significance such as Shakespeare's plays, Homer's Odyssey, the Georgics of Virgil, or Beowulf. Were a court to liken an argument "to piling Ossa on Pelion" does this indicate the Court's belief in the Greek pantheon or a literary bent on the part of the author?

crimes. Brief of R. Trebilcock at 25. However, in light of the entirety of the record, this claim is disingenuous at best and should be rejected by this Court.

On June 15, 2012, the appellants appeared in court and indicated that they wished to waive their right to have a jury decide their case, instead proceeding with trial before the bench. The appellants indicated this decision had been "discussed over a period of months." RP 60. Each appellant executed a written waiver of jury trial, and engaged in a colloquy with the trial court. The appellants indicated both orally and in writing, that they were waiving the right to have a jury decide their "case" RP 61-62, 63-64, Supp. CP. Subsequently, the State filed an amended information on July 6, 2012, alleging aggravating factors in support of an exceptional sentence. Supp. CP. The appellants proceeded to trial on this amended information on July 16, 2012.

At numerous points throughout the trial, the appellants indicated their understanding that the trial court would be deciding both the issue of guilty on the charges and the existence of the aggravating factors. When addressing an evidentiary objection during the trial, R. Trebilcock acknowledged that certain evidence was admissible because the court would be deciding the aggravating factors also. RP 1107. In closing argument, J. Trebilcock argued that certain evidence had been admitted

solely for the court to determine the existence of an aggravating factor, but not for the purpose of establishing guilt. RP 2554. When the trial court announced its verdict, including its finding that two aggravating factors had been proved, neither appellant objected or indicated surprise that the court was deciding this issue rather than a jury. RP 2635-2636. At the sentencing hearing, Mrs. Trebilcock remarked on the board discretion the court had for sentencing, given its finding of the aggravating factors. The appellants did not object to the State's request for an exceptional sentence, or argue that only a jury could have made this finding. RP 2697-2698. Indeed, at sentencing J. Trebilcock lamented the pre-trial publicity the case had received, and claimed this had required the appellants to try the case to the bench rather than a jury. RP 2712-2713.

Thus, the appellants' current claim that they desired a bench trial on the underlying charges but a jury trial on the aggravating factors is absurd in light of their prior statements and conduct during the trial proceedings. The appellants provide no authority to support the idea that there can be a "hybrid waiver" of the right to jury trial where a criminal defendant allows some portion of his case to be tried to the court but reserves some other part for the jury to decide. The waiver that was actually executed by the appellants in this case contained no such reservations, even assuming this is possible, and instead waived the right

to a jury trial for the entire case. Supp. CP. Furthermore, the statute that sets forth the procedure for determining aggravating factors, RCW 9.94A.537(3), provides that if a jury has been waived, evidence shall be presented to the court. There is no legal authority to support the appellant's position, and the record of their actions at trial directly contradicts the current claim.

The fact that the aggravating factors were alleged after the appellants entered their waivers of jury for the entire case is irrelevant. The information was also amended in the midst of trial to add additional lesser offenses. CP 1. However, the appellant does not contend, and the law would not support, that this amendment required the appellants to again waive their right to a jury. The reason for this is clear, a waiver of jury trial applies to all issues before the fact finder, not only to the charges or aggravating factors alleged at the time of the waiver.[4] Thus, this argument is wholly without merit, and should be rejected by this Court.

Finally, if the Court does find potential error in the trial court's determination of the aggravating factors, the proper remedy would be to remand the case for a hearing on whether the appellants actually desired a

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[4] Perhaps a different rule would apply if the appellants had actually objected to the court deciding the aggravating factors or amended charges, or had attempted to expressly reserve the right to a jury on certain issues. However, that is the not the record before this Court, as the appellants did not object and actively affirmed that the Court would be deciding all these issues without a jury.

jury trial on the aggravating factors. Remand would be particularly appropriate as the appellants failed to object to the trial court deciding this issue. Indeed, under RAP 2.5(a), an appellate court "may refuse to review any claim of error which was not raised in the trial court." This rule enshrines the longstanding principle that "an issue, theory, or argument not presented at trial will not be considered on appeal." State v. Jamison, 25 Wn.App. 68, 75, 604 P.2d 1017 (1979), quoting Herberg v. Swartz, 89 Wn.2d 916, 578 P.2d 17 (1978). The purpose of this rule is to require defendants to bring purported errors to the trial court's attention, thus allowing the trial court to correct them, rather than staying silent in an attempt to "bank" the issue for appeal. See State v. Fagalde, 85 Wn.2d 730, 731, 539 P.2d 86 (1975). The application of this rule is required here, as the appellant is asserting a factual position on appeal that is contrary to the representations made to the trial court. If this Court is inclined to entertain the claim, remand is appropriate to determine which of their competing representations are accurate.

IV. THE APPELLANTS' CONVICTIONS DID NOT VIOLATE THE WASHINGTON STATE CONSTITUTION'S PROVISIONS FOR JURY TRIALS.

a. THE WASHINGTON STATE CONSTITUTION DOES NOT REQUIRE A JURY TRIAL IN A FELONY CASE.

The appellant argues at length that the Washington State Constitution, art. I, sec. 21 and 22, prohibits a criminal defendant from waiving their right to a jury trial in a felony case. This argument, though novel, fails in light of the controlling case-law. The Washington Supreme Court has repeatedly recognized that criminal defendants may waive their right to a jury trial. State v. Stegall, 124 Wn.2d 719, 723, 881 P.2d 979 (1994); State v. Forza, 70 Wn.2d 69, 70-71, 422 P.2d 475 (1966); State v. Lane, 40 Wn.2d 734, 737, 246 P.2d 474 (1952). Additionally, this Court has recently rejected this exact argument in State v. Benitez, 175 Wn.App. 116, 302 P.3d 877 (2013). The Benitez ruling definitively dismisses the theory that the Washington Constitution bars a criminal defendant from

waiving the right to a jury trial. 175 Wn.App. at 126-127. This Court should reject this argument once again.[5]

b. THE APPELLANTS PROPERLY WAIVED THEIR RIGHT TO A JURY TRIAL.

The appellants next argue that they did not validly waive the right to a jury trial because they were purportedly unaware of the right to have a fair and impartial jury and the right to the presumption of innocence. Brief of R. Trebilcock at 43. However, the appellants' argument is contradicted by the controlling case-law and the facts of this case, and should be denied by this Court.

On appeal, the record must adequately establish that a defendant's waiver of the right to a jury trial was made knowingly, intelligently, and voluntarily. State v. Pierce, 134 Wn.App. 763, 771, 142 P.3d 610 (2006). A written waiver is "strong evidence that the defendant validly waived the jury trial right." Pierce, 134 Wn.App. at 771; State v. Downs, 36 Wn.App. 143, 145, 672 P.2d 416 (1983). Additionally, an extensive colloquy is not required, simply "a personal expression of waiver from the defendant." Pierce, 134 Wn.App. at 771; Stegall, 124 Wn.2d at 725. Thus, the right to a jury trial may be waived more easily than other rights. Benitez, 175

[5] The appellate attorney's argument also attempts to usurp the authority of her client, who clearly did not wish to proceed to trial before a jury. The authority of an appellate attorney to attempt to override her client's decision is highly questionable, at best, and at worst raises serious ethical issues.

Wn.App. at 129; Pierce, 134 Wn.App. at 772; see also State v. Brand, 55 Wn.App. 780, 786, 780 P.2d 894 (1989).

Here, the appellants entered a written waiver of their right to a jury trial. Supp CP. Each appellant verified to the court that they desired to waive jury and proceed with a trial to the bench. RP 62-66. The appellants' argument that they must also have been apprised of the right to a fair and impartial juror and the right to the presumption of innocence fails, as these rights are inherent in all trials whether the finder of fact is a judge or jury. Benitez, 175 Wn.App. at 129; Pierce, 134 Wn.App. at 772; see also State v. Orange, 78 Wn.2d 571, 573, 479 P.2d 220 (1970). Furthermore, the waivers actually entered by the appellants in fact specify that they have the right to "an impartial jury" and that "in a jury trial, the State must convince all twelve citizens of my guilt beyond a reasonable doubt." CP 26. Therefore, the appellants' argument that their jury waivers were invalid is ill-taken, and should be rejected by this Court.[6]

V. THERE WAS SUFFICIENT EVIDENCE TO CONVICT THE APPELLANTS OF CRIMINAL MISTREATMENT IN THE THIRD DEGREE.

The appellants challenge the sufficiency of the evidence for their convictions for criminal mistreatment in the third degree, RCW 9A.42.035, against A.T. Specifically, the appellants argue that there was

[6] The appellants demand that Pierce be overruled is similarly without merit, and has also been decided by this Court already in Benitez, 175 Wn.App. at 127-129.

insufficient evidence to prove that A.T. suffered substantial bodily harm or was placed at imminent and substantial risk of substantial bodily harm. Brief of J. Trebilcock at 14-15. However, when the evidence is viewed in the light most favorable to the State, there was ample evidence to support the trial court's verdict and the convictions should stand.

When the sufficiency of the evidence is challenged, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the defendant was guilty beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-222, 616 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Partin, 88 Wn.2d 899, 906-907, 567 P.2d 1136 (1977). Moreover, a claim of insufficiency "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

At trial, the State presented testimony that A.T. had an extremely low body weight and height when removed from the appellant's home on March 11th of 2011. Upon medical examination, A.T. was found to weigh only 51 pounds and was only 51 inches tall, despite being eleven and half years old. RP 864-865. This placed A.T. well below the 3rd percentile for height, weight, and body mass index (BMI). RP 1371. Additionally, A.T.

was found to be suffering from dehydration on her initial examination. RP 1028. A.T. gained weight and height rapidly upon removal from the appellant's home, gaining 19 pounds and more than an inch in height in slightly over two months. RP 1035. Given her malnourished state while in the appellant's care, Dr. Tolby testified that she was at increased risk for infection or disease. RP 1371-1372.

In addition to the medical findings, A.T. and the other children testified to enduring a litany of abuse and neglect at the hands to the appellants. This included corporal punishment, exposure to the elements, and food deprivation. RP 293-398, 461-530, 626-698, 884-909, 955-993. A.T. testified the appellants would regularly deprive her of food because she had not finished her chores. RP 465-467. A.T. testified that she was regularly hungry at the appellants' home, but was refused food when she asked for it. RP 469. Despite her hunger, A.T. was too afraid of being hit to "steal" food, as J.T. was often beaten for taking food. RP 470-472.

This testimony, combined with the medical evidence, provides ample evidence to support the trial court's verdict. Malnourishment to the extent suffered by A.T. constitutes "substantial bodily harm" as it would be a temporary but substantial impairment of the function of A.T.'s body. See RCW 9A.04.110(4)(b). It is reasonable for the trial court to find that such malnourishment, rendering A.T. below the 3rd percentile for her age,

constituted substantial bodily harm by impairing the function of her body to grow and thrive.

Additionally, the medical evidence and the children's testimony as to their appalling treatment by the appellants' provides substantial evidence to support the trial court's finding that A.T. was additionally placed at risk of suffering substantial bodily harm. Dr. Tolby's testimony establishes this, but common sense also strongly urges the conclusion that a malnourished and dehydrated child, in the care of abusive parents, is at great risk of suffering a serious infection, disease, or hypothermic episode like the one that nearly overcame J.T. Given these facts, and the standard of review for this issue, this Court should find there was sufficient evidence to support the trial court's verdict on this count.

VI. THE TRIAL COURT ERRED BY IMPOSING A CONDITION OF PROBATION UNSUPPORTED BY THE EVIDENCE OR OFFENSE.

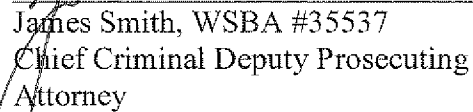
The State agrees with the appellant that the substance abuse treatment portion of his judgment and sentence was entered in error. CP 16. There is no indication in the record that the appellant has a substance abuse problem or that substance abuse was related to the instant offense. The inclusion of this requirement for his probation was most likely a scrivener's error. Remand is appropriate for the sole purpose of striking this sentencing provision.

VI. CONCLUSION

Based on the preceding argument, the State respectfully requests the Court to deny the instant appeal. The appellant has failed to show any error justifying relief. The State asks this Court to affirm the judgment and sentence in this cause.

Respectfully submitted this 2nd day of October, 2013.

Susan I. Baur
Prosecuting Attorney
Cowlitz County, Washington

By: 

James Smith, WSBA #35537
Chief Criminal Deputy Prosecuting Attorney

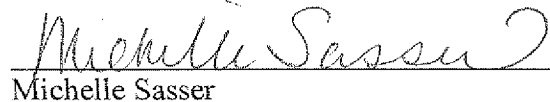
CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Lisa E. Tabbut
Attorney at Law
P.O. Box 1396
Longview, WA 98632
Lisa.tabbut@comcast.net

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on October 2nd, 2013.



Michelle Sasser

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Jodi R. Backlund
Attorney at Law
P.O. box 6490
Olympia, WA 98507
backlundmistry@gmail.com

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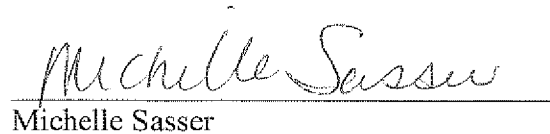

Michelle Sasser

COWLITZ COUNTY PROSECUTOR

October 02, 2013 - 2:37 PM

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