91144-4

Supreme Court No. (to be set)
Court of Appeals No. 43930-1-II
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
Rebecca Trebilcock
Appellant/Petitioner

Cowlitz County Superior Court Cause No. 11-1-00534-5
The Honorable Judge Michael H. Evans

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Rebecca Trebilcock, the appellant in the court below, asks for review.

II. COURT OF APPEALS DECISION

Rebecca Trebilcock seeks review of the Court of Appeals opinion entered on November 25, 2014. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

ISSUE 1: Is the "abuse of trust" aggravating factor inapplicable to offenses involving recklessness?

ISSUE 2: Are the aggravating factors that require proof of "domestic violence" inapplicable to offenses not listed in RCW 10.99.020?

ISSUE 3: Are the "abuse of trust" and "ongoing pattern of abuse" aggravating factors inapplicable to first-degree criminal mistreatment because they inhere in that offense and thus were considered by the legislature in setting the standard range?

ISSUE 4: Does a sentencing judge violate an offender's right to due process by considering his or her own religious beliefs in setting the length of an exceptional sentence?

ISSUE 5: Does a sentencing judge violate an accused person's right to a jury trial where the person's jury waiver was received before any aggravating factors were alleged by the prosecution?

IV. STATEMENT OF THE CASE

Rebecca Trebilcock and her husband Jeffrey were charged with 13 counts of Criminal Mistreatment involving their five adopted children. CP 1. Following a bench trial, the couple was acquitted of 11 of the 13 charges. RP 2630-2635. The trial judge also rejected two of the four alleged aggravating

factors. RP 2635. Mrs. Trebilcock was sentenced to an exceptional sentence of 96 months in prison, and she appealed. CP 14.

Rebecca and Jeffrey Trebilcock had four biological children, and also served as foster parents. They decided to adopt more children. RP 2167. They first adopted two foster children who were brother and sister. RP 2174, 2345. J.T. and A.T. were born in 1997 and 1999 respectively, and were adopted by the Trebilcocks in 2004. RP 292-3; CP 1-3. Later, the Trebilcocks adopted two siblings from Haiti, T.T. and N.T. (born in 1999 and 2001, respectively). RP 296, 626. They later adopted a third Haitian girl, G.T. RP 883-886, 2345.

The family lived on a large property in rural Cowlitz County. The grounds included a big garden, an orchard, farm animals, and a sizable home. Each child had chores, from feeding the goats or chickens to sweeping the porch or cleaning the bathroom. RP 301, 364, 463, 528, 560, 631, 958, 1061-1062. All the children were homeschooled by the parents and a tutor who worked with them weekly. RP 341, 665, 755-763, 914.

The Trebilcocks attended church as a family, went camping often, and took trips together. RP 332-333, 339, 342-343, 385-386, 663-664, 1955. The family had a large circle of supportive friends and family. RP 530-531, 790-791, 989, 1571-1687, 2660-2691.

In March of 2011, J.T. was 13. The entire family had recently suffered from the flu, and J.T. was particularly unwell. RP 182, 371, 2376. He

was quite weak and couldn't walk without stumbling. RP 2376. Rebecca Trebilcock took him to their local pediatric clinic. RP 149, 2376-2380. J.T. was so cold his temperature could not be taken, and he was described as thin, frail, trembling, malnourished, and weak. RP 162, 177-179, 409, 412. He was admitted to the hospital, stabilized, and transferred to a children's intensive care unit for a number of weeks. RP 185, 422.

By the end of March, DSHS had placed all of the Trebilcocks' adopted children in foster care. RP 230. The state charged both parents with criminal mistreatment one, and four counts of criminal mistreatment two. Each adopted child was the subject of one count. CP 1-3. The original Information did not allege any aggravating factors. CP 1-3.

In June of 2011, Mr. and Mrs. Trebilcock signed a form entitled "Waiver of Jury Trial." CP 4. The court reviewed the document:

> JUDGE EVANS: Mrs. Trebilcock, your attorney, Mr. Debray, has handed me this document, it's called a waiver of a jury trial. Did -- did you talk about this document with Mr. Debray?
> MRS. TREBILCOCK: Yes.
> JUDGE EVANS: Did you read over it?
> MRS. TREBILCOCK: Yes.
> JUDGE EVANS: Okay. So, do you understand that you have the right to have any -- your case heard by twelve of your peers, and that by signing this document and agreeing to this document, you're saying that that's not going to happen, that it'll be a single person, a judge, hearing the case, making a decision? Do you understand that?
> MRS. TREBILCOCK: Yes.
> JUDGE EVANS: Also with regard to the jury selection process, you would be able to be involved in that process. As questions are being asked, you could give your input to your attorney and determine which jurors you

feel would be most favorable to your case, and by -- by waiving your right to a jury trial, you're giving up that right.
MRS. TREBILCOCK: Yes.
JUDGE EVANS: Okay. And do you have any questions about that waiver of the jury trial?
MRS. TREBILCOCK: No.
JUDGE EVANS: And is that something -- is that what you want to do?
MRS. TREBILCOCK: Yes.
RP 61-62.

The court accepted her waiver. RP 62. Neither the written waiver nor the court's colloquy addressed Mrs. Trebilcock's right to a jury determination of any aggravating factors. RP 61-62; CP 4.

In July 2011, the state notified Mrs. Trebilcock of its intent to seek an exceptional sentence, and added 4 aggravating factors to each felony. Specifically, the Amended Information added the following:

. . .and furthermore the state gives notice pursuant to RCW 9.94A.537 of its intent to seek an exceptional sentence above the standard range for the charged offense, and any lesser included offenses, based upon the following aggravating factors: (1) the victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense, as provided by RCW 9.94A.535(3)(y); (2) the defendant used his position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense, as provided by CW9.94A.535(3)(n); (3) the current offense involves domestic violence, as defined in RCW 10.99.020, and one or more of the following was present (a) the offenders conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim, as provided by RCW 9.94A.535(3)(h); (b) the offense was part of an ongoing pattern of psychological or physical abuse of the victim manifested by multiple incidents over a prolonged period of time.
CP 5-8.

Nothing in the record suggests that Mrs. Trebilcock understood she had a right to a jury determination of aggravating factors. She did not execute a

waiver of that right, and no further discussions took place regarding her right to a jury trial. Clerk's Minutes 7/6/11, Supp. CP[1]; RP 62-145.

A bench trial was held in July of 2012.[2] The state presented complex voluminous evidence to support its theory that the Trebilcocks were negligent parents at best, and at worst purposefully or recklessly failed to appropriately care for their adopted children. RP 146-1546, 2526-2543, 2597-2611. In the end, the trial judge rejected the vast majority of this evidence, dispensing with 11 of the 13 charges by acquitting both defendants of any alleged criminal mistreatment of T.T., N.T. and G.T., and rejecting the felony mistreatment charge relating to A.T. RP 2631.

In his oral ruling, Judge Evans noted that the parents, who had been foster parents for 14 years, provided a "noble service" to the community. RP 2629. He remarked on the challenges of running a large house-hold:

> the Trebilcocks ran an orderly home and that they had a large family and you need to have order when you have a large family. You need to have some pretty fairly stringent rules.
> RP 2617.

> [T]he Trebilcocks love their children. I don't there's any question about that. I do think, and I think it's not uncommon, that there tends to be maybe some children that are – are easier to love and don't require as much effort. ... And I think [J.T.] was more of a challenge....
> RP 2618-2619.

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[1] This document was sent to the Court of Appeals but not indexed by the clerk.

[2] Midway through the three-week trial, the state again amended the charges. The Third Amended Information added four counts of Criminal Mistreatment in the Third Degree and four counts of Criminal Mistreatment in the Fourth Degree. CP 1.

Judge Evans found that food was the most problematic issue in the household. Mrs. Trebilcock had traveled to Mexico for bariatric surgery, and had expressed her desire that the children not suffer the same problems with weight that had plagued her for much of her life. RP 2621. The judge alluded to the parents' struggle with food issues:

> [T]his is my sense...like many Americans, the Trebilcocks had struggled with their weight. And I think when it becomes -- I think it's really easy to get a warped view of food. I think it's really easy to do. And I think you have to really work on it to be tempered. My sense was that the view of food became distorted and obscured somehow and because is that -- is a temptation, yet it sustains and it's a really tricky combination.
> RP 2620.

He noted the consequences of these issues:

> And food in our society is -- is a really complex issue. And I think food was used as a carrot and also used as a -- as a punishment. For example, with chores. If the chores are undone, then you don't eat, or if they are, then you do eat.
> RP 2619.

> Yet, I don't think so when you've got six or so trained medical professionals exercising their own independent medical judgments
> and they say that food is being withheld and that malnourishment is -- is taking place and that is the reason for the lack of growth.
> RP 2628.

Based on these food-related problems, Judge Evans found the Trebilcocks guilty of only two charges: criminal mistreatment one (regarding J.T.), and criminal mistreatment two (regarding A.T.) RP 2631-2634. The court rejected two aggravating factors, declining to find that J.T.'s injuries substantially exceeded the level of harm necessary to prove the offense, and

rejecting the suggestion that the Trebilcocks were guilty of domestic violence involving deliberate cruelty toward J.T. RP 2635.

The court endorsed the remaining two aggravating factors on the single felony conviction. Specifically, the court found that both parents abused their position of trust to facilitate the offense against J.T. The court also found that both parents committed a domestic violence offense involving an ongoing pattern of physical abuse manifested by multiple incidents over a prolonged period of time. RP 2635.

At sentencing, the court imposed an exceptional sentence of 96 months.[3] Judge Evans quoted scripture prior to pronouncing his sentence:

> 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 2729-2730.

Rebecca Trebilcock timely appealed. CP 23.

V. ARGUMENT WHY THE SUPREME COURT SHOULD ACCEPT REVIEW AND REVERSE MRS. TREBILCOCK'S EXCEPTIONAL SENTENCE.

The legal justifications for an exceptional sentence are reviewed *de novo*. *State v. Stubbs*, 170 Wn.2d 117, 124, 240 P.3d 143 (2010). A challenge to an unlawful sentence may be made for the first time on appeal. *State v.*

Sims, 171 Wn.2d 436, 444, fn. 3, 256 P.3d 285 (2011). RCW 9.94A.535(3) sets forth "an exclusive list of factors that can support a sentence above the standard range." In interpreting a statute, the court's duty is to "discern and implement the legislature's intent." *State v. Williams*, 171 Wn.2d 474, 477, 251 P.3d 877 (2011). The court's inquiry "always begins with the plain language of the statute." *State v. Christensen,* 153 Wn.2d 186, 194, 102 P.3d 789 (2004). Absent evidence of a contrary intent, words in a statute must be given their plain and ordinary meaning. *State v. Lilyblad,* 163 Wn.2d 1, 6, 177 P.3d 686 (2008). The meaning of an undefined word or phrase may be derived from a dictionary. *Lindeman v. Kelso Sch. Dist. No. 458,* 162 Wn.2d 196, 202, 172 P.3d 329 (2007). Courts must read statutory provisions in their entirety, examining them as a whole, rather than piecemeal. *Estate of Bunch v. McGraw Residential Ctr.*, 174 Wn.2d 425, 439-40, 275 P.3d 1119 (2012).

Where the language of a statute is clear, the statute alone provides the legislative intent. *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009)[4]. A court "will not engage in judicial interpretation of an unambiguous statute." *State v. Davis*, 160 Wn. App. 471, 477, 248 P.3d 121 (2011). Nor may a reviewing court "add words or clauses to an unambiguous statute when the

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[3] The court based the length of this sentence in part on a finding that the three adopted daughters (T.T., N.T., and G.T.) had suffered at the hands of their parents (even though he'd acquitted the Trebilcocks of wrongdoing with respect to these three children). RP 2726.

[4] *See also State v. Punsalan*, 156 Wn.2d 875, 879, 133 P.3d 934 (2006) ("Plain language does not require construction.").

legislature has chosen not to include that language." *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). A statute should not be interpreted in a way that renders some language superfluous. *State v. Johnson*, 179 Wn.2d 534, 546-47, 315 P.3d 1090 (2014).

A. The "abuse of trust" aggravating factor does not apply to crimes requiring only proof of reckless conduct.

An exceptional sentence may be imposed if "[t]he defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense." RCW 9.94A.535(3)(n). Under the statute, "the factor applies only to purposeful misconduct." *State v. Hylton*, 154 Wn. App. 945, 953, 226 P.3d 246 (2010).[5] It does not apply to conduct that is merely reckless. *Id.*

Mrs. Trebilcock was convicted of a crime involving reckless conduct. The "abuse of trust" aggravating factor could not lawfully be applied to her. *Id.* Because RCW 9.94A.535(3) sets forth an exclusive list, the sentencing court should not have found that Mrs. Trebilcock abused a position of trust to facilitate commission of the crime. Nor should the court have relied on the "abuse of trust" aggravating factor to enhance her sentence. *Id.* The Court of Appeals declined to reach the issue. Opinion, p. 13. The Supreme Court should accept review and hold that the trial court erred by finding an abuse of

[5] Prior to the "*Blakely* fix" legislation (Laws of 2005, ch. 68), a nonexclusive list of aggravating factors permitted imposition of an exceptional sentence for reckless conduct by analogy to the codified aggravating factor. *Hylton*, 154 Wn. App. at 953 (citing *State v. Chadderton*, 119 Wn.2d 390, 398, 832 P.2d 481 (1992)).

trust and by imposing an exceptional sentence on the basis of that finding. This case presents an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4).

B. The "ongoing pattern" aggravating factor is limited to crimes of domestic violence defined in RCW 10.99.020.

One of the aggravating factors relied upon by the court is set forth in RCW 9.94A.535(h). That provision requires proof that

> The current offense involved domestic violence, as defined in RCW 10.99.020, and...[t]he offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time.

RCW 9.94A.535(h). By its plain terms, the "ongoing pattern" aggravating factor applies only to "domestic violence, as defined in RCW 10.99.020." That statute sets forth a list of crimes that qualify as domestic violence when committed by one family or household member against another. RCW 10.99.020(5). First-degree criminal mistreatment is not included on the list. RCW 10.99.020(5).

Although domestic violence "includes *but is not limited to* any of the [listed] crimes," the language does not, through its own operation, create other (nonlisted) domestic violence crime. RCW 10.99.020(5) (emphasis added). Instead, the plain words of the statute merely leave open the possibility that other crimes *may* qualify as domestic violence (perhaps through operation of another statute, a local ordinance, agency regulations, court rule, or even (possibly) the common law. *See* RCW 9A.04.060.

The Court of Appeals' contrary interpretation of the statute renders the entire list superfluous. Opinion, p. 14; *Johnson*, 179 Wn.2d at 546-47. Had the legislature intended the definition to apply to "*any crime* when committed by one family or household member against another," it could have said so explicitly. Instead, it chose to provide a list, while leaving open the possibility that the definition could be expanded through other statutes, ordinances, regulations, rules, or the common law.

The Supreme Court should accept review and hold that the "ongoing pattern" aggravating factor applies only to those domestic violence offenses defined by RCW 10.99.020. This case presents an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4).

C. The "abuse of trust" and "ongoing pattern" aggravating factors inhere in first-degree criminal mistreatment and cannot form the basis for an exceptional sentence.

A sentencing court may impose an exceptional sentence above the standard range if there are "substantial and compelling reasons" justifying the sentence. RCW 9.94A.535. The court exceeds its authority when it imposes an exceptional sentence for reasons that are not substantial or compelling. *State v. Ferguson*, 142 Wn.2d 631, 649, 15 P.3d 1271 (2001). Any facto nec-

essarily considered by the legislature in establishing the standard range can not justify an exceptional sentence. *Id., at* 647-648.[6]

1. Abuse of trust inheres in the crime of first-degree criminal mistreatment.

First-degree criminal mistreatment may only be committed 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 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." RCW 9A.42.020. Such persons necessarily occupy a position of trust. Accordingly, all persons who may be convicted of criminal mistreatment have abused the trust placed in them.[7] Because of this, the legislature necessarily considered "abuse of trust" in setting the standard range for the offense. *Ferguson,* 142 Wn.2d at 648-649. The aggravator cannot be used to justify an exceptional sentence in this case. *Id.*

2. The "ongoing pattern" aggravating factor inheres in first-degree criminal mistreatment.

First-degree criminal mistreatment requires proof, *inter alia,* that

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[6] *See also Stubbs*, 170 Wn.2d at 127-149 (severity of injury already considered by legislature in setting the standard range for first-degree assault); *State v. E.A.J.*, 116 Wn. App. 777, 789, 67 P.3d 518 (2003) (injuries caused by choking inhere in second-degree assault and cannot support manifest injustice disposition.).

[7] As noted above, however, RCW 9.94A.535(3)(n) applies only to purposeful misconduct, and cannot aggravate a crime committed with the mental state of recklessness. *Hylton,* 154 Wn. App. at 953.

the accused person caused great bodily harm by withholding basic necessities. RCW 9A.42.020. Great bodily harm "means bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." Great bodily harm "encompasses the most serious injuries short of death. No injury can exceed this level of harm..." *Stubbs*, 170 Wn.2d at 128.

To achieve this level of injury, criminal mistreatment committed by means of withholding food will often require an ongoing pattern, manifested by multiple "incidents" over a prolonged period of time. Withholding food for a very short period will not result in great bodily harm; the only exceptions would arise when the victim is particularly vulnerable.

Although the length of time needed to inflict great bodily harm varies depending on the degree of malnourishment, the legislature necessarily considered the range of possibilities in setting the punishment. *See Stubbs,* 170 Wn.2d at 127-149. Thus the standard range is presumed to inflict the appropriate punishment on those who cause great bodily harm, including those who provide inadequate nutrition over a longer period. *Id.* The legislature necessarily considered the "ongoing pattern" scenario in setting the standard range for first-degree criminal mistreatment. RCW 9.94A.535(3) cannot support the exceptional sentence in this case.

The Court of Appeals erroneously reached a contrary result by applying the wrong legal standard. According to the court, first-degree criminal mistreatment "does not inherently imply an ongoing pattern," because the offense "'can occur over a few days.'" Opinion, p. 14 (quoting *State v. Rotko*, 116 Wn. App. 230, 245, 67 P. 3d 1098 (2003)).

This is an incorrect test. The Court of Appeals should have determined what the legislature "necessarily considered" to set the standard range, instead of determining whether or not *all* violations of the statute involve a prolonged period of time. *Stubbs,* 170 Wn.2d at 127-149. Malnutrition sufficient to cause great bodily harm will almost always occur over a prolonged period of time. Thus, the legislature *must* have considered this effect when it included "food" in its definition of the basic necessities of life. RCW 9A.42.010.

The Court of Appeals' logic would permit an exceptional sentence in *every* case of first-degree criminal mistreatment. Only a particularly vulnerable victim will suffer great bodily harm when food is withheld for anything less than a prolonged period. An offense against a victim known to be particularly vulnerable will qualify for an exceptional sentence. RCW 9.94A.535(b). Thus, first-degree criminal mistreatment resulting from withholding food will be inevitably qualify for a sentence above the standard

range, either because it occurred over a prolonged period of time or because it involved a particularly vulnerable victim.[8]

D. The trial judge violated Mrs. Trebilcock's Fourteenth Amendment right to due process by considering his own religious beliefs in setting the length of Mrs. Trebilcock's exceptional sentence.

The sentencing process must satisfy the requirements of the due process clause. *Gardner v. Florida,* 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). A sentence may not be based on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant..." *Zant v. Stephens*, 462 U.S. 862, 885, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). A similar principle applies "when a judge impermissibly takes his own religious characteristics into account in sentencing." *United States v. Bakker*, 925 F.2d 728, 740 (4th Cir. 1991).

In *Bakker,* the court vacated a 45-year sentenced imposed upon televangelist James Bakker because of the sentencing judge's comment that Bakker "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*

[8] Similarly, most criminal mistreatment cases will involve "domestic violence" as understood by the Court of Appeals in this case. By definition, a charge of criminal mistreatment involves "[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..." RCW 9A.42.020. Thus most offenders will be "family or household members," defined to include "persons who have a biological or legal parent-child relationship." RCW 10.99.020.

or priests." *Id., at* 740 (emphasis in original). The appellate court explained the impropriety of this comment:

> Our Constitution, of course, does not require a person to surrender his or her religious beliefs upon the assumption of judicial office. Courts, however, cannot sanction sentencing procedures that create the perception of the bench as a pulpit from which judges announce their personal sense of religiosity and simultaneously punish defendants for offending it. Whether or not the trial judge has a religion is irrelevant for purposes of sentencing. Regrettably, we are left with the apprehension that the imposition of a lengthy prison term here may have reflected the fact that the court's own sense of religious propriety had somehow been betrayed... [T]his case involves the explicit intrusion of personal religious principles as the basis of a sentencing decision...

Id., at 740-41.

Here, the sentencing judge quoted scripture just before imposing sentence, and applied the quoted passage to Mrs. Trebilcock. RP 2730.[9] By injecting his own person religious beliefs into the proceeding, the sentencing judge violated Mrs. Trebilcock's right to due process. *Bakker,* 925 F.2d at 740-741. Accordingly, the sentence must be vacated and the case remanded for a new sentencing hearing before a different judge. *Id.*

E. The exceptional sentence infringed Mrs. Trebilcock's Sixth and Fourteenth amendment right to a jury determination of aggravating factors.

Any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §§ 21, 22;

[9] The reference is to Luke 11:11.

Apprendi v. New Jersey, 530 U.S. 466, 476, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Blakely v. Washington,* 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Imposition of an enhanced sentence without a proper jury finding on the underlying facts violates an accused person's right to due process and to a jury trial.[10] *Blakely,* 542 U.S. at 303.

In Washington, failure to submit such facts to the jury is not subject to harmless error analysis. *State v. Recuenco*, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) (citing art. I, § 21).

A defendant may waive the right to a jury determination of aggravating factors beyond a reasonable doubt; however, to be valid, the waiver must be "voluntary, knowing, and intelligent." *State v. Hos*, 154 Wn. App. 238, 250, 225 P.3d 389 (2010). Courts indulge every reasonable presumption against waiver of fundamental rights. *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Waiver of a constitutional right must clearly consist of "an intentional relinquishment or abandonment of a known right or privilege." *Zerbst,* 304 U.S. at 464. The "heavy burden" of proving a valid waiver of constitutional rights rests with the government. *Matter of James*, 96 Wn.2d 847, 851, 640 P.2d 18 (1982).

Mrs. Trebilcock did not waive her right to a jury trial on any aggravating factors. Although she waived her jury trial right on the underlying of-

[10] Deprivation of the right to a jury trial can be raised for the first time on review. *State v. O'Connell*, 137 Wn. App. 81, 89, 152 P.3d 349 (2007); RAP 2.5(a)(3).

fense, this occurred *before* she had been notified of the prosecution's intent to seek an exceptional sentence. Her waiver was signed and accepted in June; the aggravators were not alleged until July. CP 4-8. The waiver did not show that she understood her right to a jury determination of aggravating factors, and the colloquy did not mention aggravating factors. CP 4; RP 61-62.[11] Nothing in the record shows that she was even aware of her Sixth Amendment rights under *Apprendi* and *Blakely.* RP 59-89.

Based on this record, the prosecution cannot meet its "heavy burden" of proving a valid waiver of the Sixth Amendment right to a jury determination of any aggravating factors. *James,* 96 Wn.2d at 851. The exceptional sentence must be vacated, and the case remanded for sentencing within the standard range. *Id.*

F. The Supreme Court should accept review under RAP 13.4(b)(3) and (4).

The Supreme Court should accept review and vacate Mrs. Trebilcock's exceptional sentence. Mrs. Trebilcock's arguments raise issues that are appropriate for review under RAP 13.4(b). The case involves purely legal issues that have the potential to arise in a large number of criminal

[11] The written waiver refers to her "case," her "trial," and her "right to be tried by a jury." It makes no reference to aggravating factors, sentencing, or the basis for an exceptional sentence. CP 4. Similarly, in her brief colloquy with the judge, the court referenced her "case" and made sure she understood that a judge rather than a jury would be making "a decision." RP 61-62. The judge did not discuss trial of the aggravating factors, and made no reference to sentencing. This is not surprising, given that the prosecution had not alleged any aggravators at the time the waiver was entered.

prosecutions. Trial attorneys, judges, defendants, and the general public would benefit from a decision by the Supreme Court.

First, the court should determine whether the "abuse of trust" and "ongoing pattern" aggravating factors can lawfully apply to a charge of first-degree criminal mistreatment. The court should hold that they cannot. This issue is of substantial public interest and should be resolved by the Supreme Court under RAP 13.4(b)(4).

Second, the court should determine whether a sentencing court's recitation of biblical language prior to pronouncing sentence violates the Fourteenth Amendment right to due process. The court should hold that the trial court violated Mrs. Trebilcock's due process right by considering his own religious beliefs in setting the length of her exceptional sentence. This significant constitutional issue holds substantial public importance and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

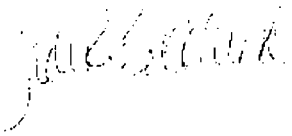
Third, the court should determine whether an accused person's jury waiver can be extended to apply to aggravating factors that were not alleged at the time the waiver was entered. The court should hold that such a waiver cannot be extended to cover the aggravating factors. This significant constitutional issue is of substantial public importance and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

VI. CONCLUSION

This case raises significant constitutional issues of substantial public interest. The Supreme Court should accept review. RAP 13.4(b)(3) and (4).

Respectfully submitted December 23, 2014.

BACKLUND AND MISTRY



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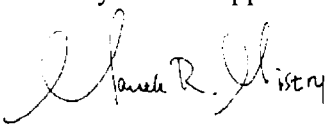

Manek R. Mistry, No. 22922
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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Rebecca Trebilcock, DOC #361389
Washington Corrections Center for Women
9601 Bujacich Rd. NW
Gig Harbor, WA 98332-8300

With the permission of the recipient(s), I delivered an electronic version of the petition, using the court's filing portal, to:

Cowlitz County Prosecuting Attorney
baurs@co.cowlitz.wa.us

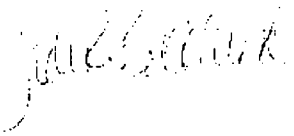
and:

Lisa Tabbut, attorney for co-defendant
Lisa.tabbut@comcast.net

In addition, I electronically filed the original with the Court of Appeals.

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

Signed at Olympia, Washington on December 23, 2014.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JEFFREY ALLEN TREBILCOCK, Appellant.	No. 43930-1-II Consolidated with
STATE OF WASHINGTON, Respondent, v. REBECCA TREBILCOCK, Appellant.	No. 43950-6-II PUBLISHED IN PART OPINION

MELNICK, J. — Jeffrey and Rebecca Trebilcock appeal their bench trial convictions and sentences for criminal mistreatment in the first degree of J.T. and criminal mistreatment in the third degree of A.T. We reject Rebecca's[1] arguments that her sentence violates due process because the trial judge relied on his own personal religious preferences when sentencing her, her exceptional sentence violates her Sixth and Fourteenth Amendment rights to a jury determination of aggravating factors, and her exceptional sentence improperly relies on impermissible factors. In the unpublished portion of this opinion, we reject the Trebilcocks' other arguments except for Jeffrey's individual argument that the trial court improperly imposed substance abuse treatment

[1] To avoid confusion, we refer to Jeffrey and Rebecca Trebilcock by their first names and intend no disrespect.

as part of his sentence. We remand for the trial court to strike the substance abuse treatment from Jeffrey's sentence. We otherwise affirm the Trebilcocks' convictions and sentences.

FACTS

The Trebilcocks lived in rural Cowlitz County. They have four biological sons and in 2004, began adopting children. The Trebilcocks first adopted two biological siblings: J.T., born in 1997, and A.T., born in 1999. Subsequently, the Trebilcocks adopted three more children: N.T., born in 1999, T.T., born in 2001, and G.T., born in 2002.

J.T., N.T., and A.T. experienced severe neglect and abuse while living with the Trebilcocks. The children were not allowed to try different foods. The Trebilcocks would make J.T. and occasionally A.T. eat from a "pig trough." 3B Report of Proceedings (RP) at 646. J.T. and A.T. would also be forced to eat outdoors in the cold. The children would be denied food altogether if they did not complete their chores or schoolwork. On occasion, they would have to steal food to survive, from bread and fruit to dog food, goat food, and toothpaste. The Trebilcocks put an alarm in the kitchen to prevent the children from stealing food. When the Trebilcocks caught the children stealing food, they would spank the children with a wooden paddle.

J.T. in particular spent a great deal of time outside doing chores barefoot. In order to ensure that he did not get the carpet dirty, he had to have his feet checked before he entered the house. At times J.T. would stand outside in the cold for hours, waiting for someone to check his feet so he could go back inside. The Trebilcocks made J.T. wash his clothes outside in a bucket and hang them to dry. Sometimes his clothes would not dry and he had to wear wet clothing. J.T. also had to wash his bed sheets in the bucket outside, and if the sheets did not dry, he had to sleep without sheets. He was frequently cold at night.

The Trebilcocks' actions gravely affected J.T.'s health and development. Between the ages of six and thirteen, J.T. lost weight, going from a "slightly above average" weight to less than the third percentile. 6B RP at 1358. As early as 2008, medical professionals recognized that J.T. "did not have anything close to normal growth for his age." 6B RP at 1321. In March 2011, J.T. was brought to a pediatric clinic in a "nearly dead" state. 6B RP at 1368. J.T. could not walk without stumbling. He was trembling and had significant hypothermia. He had a heart rate equivalent to one of an unconscious child's. He weighed 49 pounds, stood 50 inches tall, had a concave stomach, and looked malnourished. His muscles were wasting and his bones were visible. He suffered from untreated eczema which had bacterial overgrowth. Two different doctors agreed that J.T. appeared very thin and small for his age—although he was then 13 years old, J.T. looked closer to 6 to 7 years old. Dr. Danielle Parrot determined that J.T. was in critical condition and sent him to the emergency room of the local hospital. There, the medical staff stabilized J.T. and then transferred him to the pediatric intensive care unit (ICU) at Doernbecher Children's Hospital.

At the ICU, Dr. Thomas Valvano, a pediatrician and the medical director of the Suspected Child Abuse and Neglect Program, examined J.T. and found him to be "cachectic, just very malnourished, no subcutaneous fat, very thin." 6A RP at 1125. Dr. Valvano found J.T.'s case unusual and troubling because ordinarily, J.T. would be expected to remain in the same percentile range for his entire life. Yet after he moved in with the Trebilcocks, J.T.'s weight and height dropped from the fiftieth percentile to the third percentile in comparison to other boys his age. Dr. Valvano discovered no medical reasons for J.T.'s cachectic state and believed malnourishment caused J.T.'s condition. Dr. Valvano bolstered his medical analysis with the fact that J.T. gained weight and thrived after he ate a normal diet in the hospital over a period of

eight days. Based on Dr. Valvano's review of J.T.'s records, his examination of J.T., and J.T.'s progress and improvement at the hospital, Dr. Valvano opined to a reasonable medical certainty that improper exposure to cold weather caused J.T.'s hypothermic state and that not being given enough food to eat caused J.T.'s malnourishment.

The day after J.T.'s hospitalization, Child Protective Services (CPS) opened an investigation into the Trebilcocks. The Trebilcocks' four adopted daughters appeared frightened and very thin when CPS visited. According to Jeffrey, the girls were on a special vegan diet and were not allowed to have any sweets. Rebecca refused CPS's request to have the four adopted girls see a doctor.

CPS soon placed J.T. and the four girls into their custody. When CPS supervisor Stephanie Frost picked the girls up, they were very withdrawn and would not talk. Frost found this unusual based on her eight years of experience. CPS barred the Trebilcocks from visiting J.T. at the hospital.

J.T. began a dramatic recovery once CPS removed him from the Trebilcocks' care. In the 16 months after he moved out of the Trebilcocks' home, J.T. grew seven and a half inches and more than doubled his weight, gaining 64 pounds. Dr. Blaine Tolby opined that J.T.'s living conditions at the Trebilcocks' had caused his poor growth. Dr. Tolby testified J.T. suffered incredible harm and that he "would place the severity of this particular case, as being the worst case of chronic abuse and neglect" that he had seen in his 37 years of being a physician. 7A RP at 1463.

Similarly, A.T. suffered a precipitous loss of weight while in the Trebilcocks' care, and began to recover once CPS removed her from the Trebilcocks' care. Before she lived with the Trebilcocks, A.T. was slightly heavier than average. Yet at the time she was removed from the

Trebilcocks' care, the twelve-year-old A.T. appeared thin and weighed only 51 pounds, 12 ounces and stood 51 inches tall. That put her body mass index (BMI) at 14, below the third percentile. She also "lost some relative height." 6B RP at 1370. Andrea Street, a registered dietician, testified that A.T. remained underweight even three weeks after being removed from the Trebilcocks' care. 5 RP at 1021.

In less than three months of foster care, A.T. grew to 70.4 pounds and 52.25 inches, at the tenth percentile for weight and height. Dr. Kenneth Wu opined that A.T.'s low intake of food likely caused her low weight and BMI.

PROCEDURAL HISTORY

On May 24, 2011, the State charged the Trebilcocks with five counts of criminal mistreatment against their five adopted children. On June 15, Jeffrey and Rebecca waived their right to jury trials. Both signed written waivers and the trial court conducted a colloquy with both to ensure they each understood their rights and were voluntarily waiving their right to jury trials. Jeffrey's trial attorney stated that the Trebilcocks' decision to waive a jury trial had been discussed over a period of several months. The State twice amended the information, charging the Trebilcocks on July 23 with 13 counts of domestic violence criminal mistreatment against their five adopted children with four aggravating factors.

After a bench trial, the trial court found Jeffrey and Rebecca guilty of criminal mistreatment in the first degree with domestic violence of J.T. (count 1) and criminal mistreatment in the third degree with domestic violence of A.T (count 3) and acquitted Jeffrey and Rebecca of the remaining counts. The court also found two aggravating factors pertaining to count 1: first, the crime involved domestic violence that was part of an ongoing pattern of psychological and physical abuse, and second, the Trebilcocks used their position of trust,

confidence, or fiduciary responsibility to commit the crime. At the sentencing hearing, the trial court commented on Rebecca's testimony about her biblical convictions on diet and contrasted Rebecca's conduct with "the importance of safeguarding and protecting children in our society and keeping them from harm and offense." 11 RP at 2729-30. The court then referenced a biblical quote:

> 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 [sic] 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.

11 RP at 2730.

The trial court sentenced Jeffrey to a standard range sentence of 60 months on count 1 and 364 days on count 3, to be served consecutively. The trial court also ordered Jeffrey to undergo treatment and evaluation for substance abuse as a condition of his misdemeanor criminal mistreatment in the third degree conviction. Based on the two aggravating factors, the trial court sentenced Rebecca to an exceptional sentence above the standard range and found that the grounds for the aggravating circumstances "taken together or considered individually, constitute sufficient cause to impose the exceptional sentence" of 96 months on count 1 and 364 days on count 3, to be served consecutively. CP (filed at COA Oct. 9, 2013) at 10. Both Jeffrey and Rebecca appeal.

ANALYSIS

I. SENTENCE NOT BASED ON THE TRIAL COURT'S RELIGIOUS BELIEFS

Rebecca first argues the trial judge violated her Fourteenth Amendment[2] right to due process by considering his own religious beliefs in setting the length of her sentence, and thus

[2] "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

her sentence must be vacated and her case remanded for resentencing before a different judge. This is an issue of first impression in Washington State. Because the trial judge did not inject his own personal religious beliefs into sentencing or sentence Rebecca based solely on those beliefs, we hold no constitutional violation occurred and we affirm Rebecca's sentence.

The sentencing process must satisfy the requirements of due process. *Gardner v. Florida*, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977). We review constitutional challenges de novo. *State v. Vance*, 168 Wn.2d 754, 759, 230 P.3d 1055 (2010).

Federal case law prohibits a judge from making his own "personal religious principles" the explicit basis of a sentencing decision. *United States v. Bakker,* 925 F.2d 728, 741 (4th Cir. 1991). In *Bakker*, when sentencing a well-known televangelist for mail and wire fraud, the district court said, "He 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 (emphasis added). The court held that this statement was error because a judge's religious beliefs are irrelevant for sentencing purposes, and therefore due process is violated when a judge "impermissibly takes his own religious characteristics into account in sentencing." 925 F.2d at 740.

On the other hand, numerous federal courts agree that it is not reversible error for a court to use religious language to express a secular concept. In *Gordon v. Vose*, 879 F. Supp. 179, 184 (D.R.I. 1995), the state sentencing court referred to a biblical verse: "no man should take more than he is willing to give." The district court affirmed because the sentencing court did not express a personal religious preference or bias, but merely articulated a secular principle: "that if one commits a serious crime, he must expect to receive a severe punishment." *Gordon*, 879 F. Supp. at 185.

In *United States v. Traxler*, 477 F.3d 1243, 1248 (10th Cir. 2007), the court explicitly referred to the biblical letters of Paul, stating, "[G]ood things can come from jail. A guy named Paul was put in jail a couple thousand years ago and wrote a bunch of letters from jail . . . and people are still reading those letters and being encouraged by them and finding hope in them thousands of years later." The court rejected the defendant's due process challenge, concluding the judge's comments in no way suggested Traxler needed a longer sentence to "pay religious penance." *Traxler*, 477 F.3d. at 1249. Instead, the religious reference was meant to convey a secular message: "that something good can come from difficult circumstances, even jail." *Traxler*, 477 F.3d at 1249.

In *Arnett v. Jackson*, 393 F.3d 681, 683 (6th Cir. 2005), the Sixth Circuit similarly affirmed where the trial court merely referenced religion in order to convey a secular principle. There, the trial court quoted two verses from the Bible when sentencing the defendant on numerous counts of rape of a minor. The Sixth Circuit held that the trial court's comments did not violate Arnett's due process rights because the sentencing judge made no reference to her own religious beliefs; instead, one plausible interpretation of the Biblical quotation was that it underscored "that our society has a long history of sternly punishing those people who hurt young children." *Arnett*, 393 F.3d at 687. The Sixth Circuit held that although reasonable minds could question the sentencing court's mentioning the Bible, the sentencing court properly considered numerous aggravating and mitigating factors. *Arnett*, 393 F.3d at 687.

Similarly, numerous state supreme courts have affirmed sentences where the judge's religious comments merely acknowledge generally accepted principles rather than basing sentences on highly personal religious beliefs. *See, e.g.*, *State v. Arnett*, 88 Ohio St. 3d 208, 221-22, 724 N.E.2d 793 (Ohio 2000) (upholding sentence because biblical reference was not the sole

basis for the sentences, but was one of many factors the trial judge considered); *Poe v. State*, 341 Md. 523, 533, 671 A.2d 501 (Md. 1996) (upholding sentence when sentencing judge said, "I still believe in good old-fashioned law and order, the Bible, and a lot of things that people say I shouldn't believe anymore" prior to sentencing); *Gordon v. State*, 639 A.2d 56, 56 (R.I. 1994) (upholding sentence when sentencing judge referred to the Bible by saying that "no man takes more than he's willing to give"); *People v. Halm*, 81 N.Y.2d 819, 820, 611 N.E.2d 281 (1993) (upholding sentence for sodomy when sentencing judge referred to "Biblical times" and expressed his opinion about the seriousness of the crime).

Here, during sentencing, the trial judge referenced a biblical quote when he stated:

> 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.

11 RP at 2729-30. Like the biblical references in *Gordon v. Vose* and *Traxler*, this reference merely underscores a secular principle: "safeguarding and protecting children in our society." 11 RP at 2729. And as in *Arnett v. Jackson* and *State v. Arnett*, the biblical reference constituted only one of many factors the sentencing judge considered in imposing Rebecca's sentence.

Here, the trial court relied on the fact that the children were left "damaged, sick, and, in the case of [J.T.], nearly dead." 11 RP at 2728. The trial court relied on the length of the ongoing abuse. The trial court relied on evidence at trial that the children only gained "seven pounds in seven years" and that "[t]here was rationing, there was withholding, there was even

the dramatic step of setting up motion alarms to prevent the children from eating." 11 RP at 2729. The trial court relied on the fact that Rebecca had ample opportunity to observe the condition of the children and should have noticed that J.T. was in distress "from five broken ribs." 11 RP at 2731. The record makes it amply clear that the trial court based its sentence on the totality of the facts and the severity of the Trebilcocks' "woefully derelict and shamefully deficient" caretaking. 11 RP at 2729.

Further, the trial court made the biblical reference in response to the Trebilcocks introducing the issue of religion and biblical authority into the proceedings. Specifically, Rebecca testified that she felt "biblically convicted" to follow a limited and vegan diet for herself and the children. 10A RP at 2348. We hold that the trial court did not inject his own personal religious beliefs into the sentencing hearing and that the court did not violate Rebecca's due process rights.

II. REBECCA'S SENTENCE DID NOT VIOLATE SIXTH AND FOURTEENTH AMENDMENT RIGHTS

Rebecca also argues that her exceptional sentence violated her Sixth and Fourteenth Amendment rights to a jury determination of aggravating factors. Specifically, Rebecca argues that because she waived her jury trial right before the State amended the information to add the aggravating factors, her waiver applied only to a finding of guilt on the charges and not to a determination of the aggravating factors. We disagree. Because Rebecca validly waived her right to a jury trial,[3] acquiesced to the trial court determining the aggravating factors, and never attempted to revoke her waiver, we affirm her exceptional sentence.

A criminal defendant has the right to have a jury decide any aggravating factor that supports an exceptional sentence. *Blakely v. Washington*, 542 U.S. 296, 302, 124 S. Ct. 2531,

[3] Rebecca's jury trial waiver is discussed in more detail in the unpublished portion of this opinion.

159 L. Ed. 2d 403 (2004). A criminal defendant, however, may waive that right. *State v. Hughes*, 154 Wn.2d 118, 133-34, 110 P.3d 192 (2005) (citing *Blakely*, 542 U.S. at 310), *abrogated on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). The filing of an amended information, standing alone, does not render a defendant's waiver of a right ineffective. *See State v. Modica*, 136 Wn. App. 434, 445-46, 149 P.3d 446 (2006) (upholding waiver of counsel that occurred prior to amended information being filed). Instead, we look to the specific facts of the case. "[A] record sufficiently demonstrates a waiver of the right to trial by jury if the record includes either a written waiver signed by the defendant, a personal expression by the defendant of an intent to waive, or an informed acquiescence." *State v. Cham*, 165 Wn. App. 438, 448, 267 P.3d 528 (2011) (citing *State v. Stegall*, 124 Wn.2d 719, 729, 881 P.2d 979 (1994); *State v. Wicke*, 91 Wn.2d 638, 641-42, 591 P.2d 452 (1979)). The State bears the burden of establishing a valid waiver, and absent a record to the contrary, we indulge every reasonable presumption against waiver. *Cham*, 165 Wn. App. at 447. We review de novo the sufficiency of the record to establish a valid waiver. *Cham*, 165 Wn. App. at 447.

The record here amply demonstrates that Rebecca wanted to waive a jury for all purposes, including determining the aggravating factors alleged, even though her waiver occurred before the information was amended to add the aggravating factors. Defense counsel stated at the beginning of trial (prior to the amended information) that the decision to waive a jury had been discussed over a period of months between the parties. Rebecca indicated on the record that she understood she had the right "to have any . . . case heard by twelve of [her] peers" and that she was opting instead to have "a single person, a judge, hearing the case, making a decision." 1 RP at 61. Rebecca never moved to rescind her jury waiver or request a jury, even

when the State amended the information to add the aggravating factors. Instead, multiple times during trial, counsel stated that Rebecca understood and agreed that the trial judge would be deciding the aggravating factors. Specifically, when addressing an evidentiary objection, counsel admitted that certain evidence was admissible and would be considered by the trial court when considering the aggravating factors. In closing, counsel stated that certain evidence might go to the trial court's determination of the aggravating factors. All of these facts demonstrate a knowing, intelligent, and voluntary waiver of the jury to determine guilt and aggravating factors. They also establish Rebecca's informed acquiescence. *See Cham*, 165 Wn. App. at 449.

When the trial court found that two of the four alleged aggravating factors had been proven, Rebecca did not object to the trial court deciding the aggravating factors. At sentencing, defense counsel commented on the trial court's broad discretion for sentencing because of the aggravating factors the court found. Counsel also commented on the significant community interest and pretrial publicity in the Trebilcocks' case as a primary reason for waiving the jury. In other words, Rebecca's decision to waive a jury was a counseled, knowing, and voluntary strategic decision that Rebecca agreed to even after the State amended the information.

Rebecca's valid jury waiver at the beginning of the trial, as well as her informed acquiescence to her counsel's unchallenged statements, overcame any presumption that Rebecca did not make a knowing, intelligent, and voluntary waiver. Rebecca knew the role of the jury, made a strategic decision to waive the jury, and stood by her decision throughout proceedings. As such, she waived her right to have a jury determine whether the State proved aggravating factors beyond a reasonable doubt. We hold Rebecca's exceptional sentence does not violate her Sixth and Fourteenth Amendment rights to a jury determination of aggravating factors, and we affirm her exceptional sentence.

III. REBECCA'S EXCEPTIONAL SENTENCE BASED ON PERMISSIBLE FACTORS

Rebecca next argues the trial court erred when it found the two aggravating factors and based an exceptional sentence on those factors. First, Rebecca argues that the abuse of trust aggravator does not apply because it applies only to crimes of intentional conduct, and because abuse of trust is inherently a part of the underlying crime of criminal mistreatment in the first degree. Second, Rebecca argues that the ongoing pattern aggravating factor does not apply because it applies only to domestic violence crimes, and because the ongoing pattern factor is inherently a part of the underlying crime of criminal mistreatment in the first degree. We hold the trial court properly found the ongoing pattern aggravating factor. Because the trial court found that *either* aggravating factor alone would have been sufficient grounds to impose the sentence, we affirm Rebecca's exceptional sentence without reaching her abuse of trust argument.

The State charged Rebecca with the aggravating factor which requires that the "current offense involved domestic violence, as defined in RCW 10.99.020, . . . and . . . [t]he offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time."[4] Under RCW 10.99.020, domestic violence "includes but *is not limited to*" a list of specific offenses "when committed by one family or household member against another." (Emphasis added.). Rebecca argues that because the statute does not specifically list criminal mistreatment, criminal mistreatment is not domestic violence and therefore the aggravator does not apply to the crime of criminal mistreatment in the first degree. We reject her argument because the statute plainly indicates that the list is "not limited to" the enumerated crimes. In addition, the unchallenged

[4] RCW 9.94A.535(3)(h)(i)

findings of fact are that Rebecca committed a crime against J.T., a family member, and caused him harm. Accordingly, the trial court properly concluded that the criminal mistreatment in the first degree involved domestic violence.

Rebecca next argues that the "ongoing pattern" of abuse aggravating factor inheres in criminal mistreatment in the first degree. Appellant's (Rebecca) Br. at 21. We disagree. To be guilty of criminal mistreatment in the first degree, "[a] parent of a child" must "cause[ ] great bodily harm to a child . . . by withholding any of the basic necessities of life." RCW 9A.42.020. To find the ongoing pattern aggravating factor, the fact finder must find that the abuse occurred over a "prolonged period of time." RCW 9.94A.535(3)(h)(i). Rebecca argues that the offense of criminal mistreatment in the first degree necessarily "requires an ongoing pattern, manifested by multiple 'incidents' over a prolonged period of time" and thus the ongoing pattern is already part of the criminal mistreatment in the first degree conviction. Appellant's (Rebecca) Br. at 21. We disagree. "Criminal mistreatment can occur over a few days or . . . over a much longer period of time." *State v. Rotko*, 116 Wn. App. 230, 245, 67 P.3d 1098 (2003). Criminal mistreatment in the first degree does not inherently imply an ongoing pattern, and thus we hold the trial court did not err when relying on the ongoing pattern aggravating factor when giving an exceptional sentence.

Rebecca also challenges the abuse of trust aggravating factor, but we do not reach that challenge. The trial court stated in its findings of fact and conclusions of law for an exceptional sentence that the aggravating factors, "taken together or considered individually, constitute sufficient cause to impose the exceptional sentence," and that it would "impose the same sentence if only one of the grounds listed in the preceding paragraph is valid." CP (filed Oct. 9, 2013) at 10. Because the "ongoing pattern of abuse" aggravating factor was established, the trial

court would have imposed the same sentence whether or not the abuse of trust aggravating factor applied. As a matter of law, the trial court did not rely on impermissible factors when imposing an exceptional sentence.

We hold that the trial court did not interject his personal religious beliefs into the sentencing hearing, that Rebecca's sentence did not violate her Sixth and Fourteenth Amendment rights to a jury determination of aggravating factors, and that permissible factors exist to uphold Rebecca's exceptional sentence. We address the Trebilcocks' remaining arguments in the unpublished portion of this opinion.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

In this section, we reject the Trebilcocks' joint arguments that their convictions violate their constitutional right to an independent determination of the facts because their convictions were based in part on impermissible opinion testimony; that their jury trial waivers were invalid; and that their criminal mistreatment in the third degree conviction should be reversed for insufficient evidence. We also decide Jeffrey's individual argument that the trial court improperly imposed substance abuse treatment as part of his sentence.

I. OPINION TESTIMONY PROPERLY ADMITTED

The Trebilcocks both argue that their convictions were based on an impermissible expert opinion on their guilt, which violated their constitutional right to a jury trial. The State argues the Trebilcocks failed to object to the challenged testimony at trial and thus did not preserve this issue for appeal. Although Jeffrey and Rebecca objected generally to expert testimony giving an opinion on abuse, they did not specifically object to the statement they now challenge. Because

the challenged testimony did not provide an improper opinion on guilt, the Trebilcocks do not raise a manifest constitutional error and we will not review this issue.

We will not review an argument raised for the first time on appeal unless the challenging party demonstrates a manifest constitutional error. RAP 2.5(a)(3). To satisfy RAP 2.5(a)(3), an appellant first must identify a constitutional error and then demonstrate how the alleged error affected his rights at trial. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). An error is manifest if it is so obvious on the record that the error requires appellate review. *O'Hara*, 167 Wn.2d at 99-100. The defendant must show actual prejudice, meaning the alleged error had practical and identifiable consequences at trial. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011).

Under ER 704, an expert may not testify about a defendant's guilt, either directly or by inference. *State v. Olmedo*, 112 Wn. App. 525, 530, 49 P.3d 960 (2002). "Such an improper opinion undermines a jury's independent determination of the facts, and may invade the defendant's constitutional right to a trial by jury." *Olmedo*, 112 Wn. App. at 530-31.[5] An expert's opinion, however, is not objectionable "simply because it embraces an ultimate issue the trier of fact must decide." *State v. Hayward*, 152 Wn. App. 632, 649, 217 P.3d 354 (2009); *see also* ER 704. "'[T]hat an opinion encompassing ultimate factual issues *supports* the conclusion that the defendant is guilty does not make the testimony an improper opinion of guilt.'" *Hayward,* 152 Wn. App. at 649 (quoting *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993)). A trial court's decision to admit expert testimony is reviewed for abuse of discretion. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

[5] Although the Trebilcocks had a bench trial, "the constitutional guaranty of an impartial trial *does not* distinguish between jury and bench trials." *State v. Read*, 147 Wn.2d 238, 249, 53 P.3d 26 (2002) (emphasis in original).

Here, Dr. Tolby, one of the State's expert medical witnesses, testified that that he "would place the severity of this particular case, as being the worst case of chronic abuse and neglect" that he had seen in his 37 years of being a physician. 7A RP at 1463. Although Dr. Tolby's testimony touched on an ultimate legal issue, the cause of J.T.'s condition, Dr. Tolby's testimony did not include any opinion regarding Jeffrey's and Rebecca's guilt, but rather simply stated his medical opinion that J.T.'s condition occurred because of abuse and neglect.

Additionally, "'in the absence of evidence to the contrary, we presume the judge in a bench trial does not consider inadmissible evidence in rendering a verdict.'" *State v. Gower*, 179 Wn.2d 851, 855, 321 P.3d 1178 (2014) (quoting *State v. Read*, 147 Wn.2d 238, 242, 53 P.3d 26 (2002)). This "presumption arises because of the 'unique demands' bench trials place on judges, 'requiring them to sit as both arbiters of law and as finders of fact.'" *Gower*, 179 Wn.2d at 855 (quoting *Read*, Wn.2d at 242). Indeed, the trial court's findings of fact do not reference Dr. Tolby's testimony except to note that the "growth charts and medical findings related to the expected growth" were credible. CP (filed May 28, 2013) at 29.

Dr. Tolby's expert testimony did not amount to an opinion on Jeffrey's and Rebecca's guilt; therefore, Dr. Tolby's testimony did not constitute manifest constitutional error.

II. DEFENDANTS CAN WAIVE A JURY TRIAL

The Trebilcocks next argue that under article I, section 21 of the Washington State Constitution,[6] a criminal defendant may never waive a jury trial for a felony charge. The

[6] Article I, section 21 provides:

> The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Trebilcocks argue that the six *Gunwall* factors "suggest[ ] that all felony cases in Washington must be tried to a jury, regardless of the parties' wishes." Appellant's (Rebecca) Br. at 27.

The Trebilcocks' argument is inconsistent with our decision in *State v. Benitez*, 175 Wn. App. 116, 126, 302 P.3d 877 (2013). Because *Gunwall* "addresses 'the extent of a right and not how the right in question may be waived,'" *Gunwall* is inapplicable. *Benitez*, 175 Wn. App. at 126-27 (quoting *State v. Pierce*, 134 Wn. App. 763, 773, 142 P.3d 610 (2006)). We further held in *Benitez* that "Washington law allows a defendant to waive a jury trial." *Benitez*, 175 Wn. App. at 127 (citing *Stegall*, 124 Wn.2d at 723. We reject the Trebilcocks' argument.

III. THE TREBILCOCKS KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY WAIVED THEIR RIGHT TO A JURY TRIAL

The Trebilcocks next argue that even if the right to a jury trial may be waived, their jury trial waivers were invalid. The Trebilcocks contend that because the Washington State constitutional right to a jury trial is broader than the federal right, a *Gunwall* analysis must be used to determine whether more extensive protections are required to waive the right. The Trebilcocks recognize that we rejected the same argument in *Pierce*, 134 Wn. App. 763, but argue that *Pierce* was wrongly decided and that we should overturn it here. We rejected this same argument in *Benitez* and do so again. Further, because Jeffrey and Rebecca knowingly, intelligently, and voluntarily waived their rights to a jury trial, we hold their waivers were valid.

We review a jury trial waiver de novo. *State v. Ramirez-Dominguez*, 140 Wn. App. 233, 239, 165 P.3d 391 (2007). The sufficiency of the record to satisfy the constitutional requirements for waiver of the fundamental right to a jury trial may be raised for the first time on appeal. *State v. Wicke*, 91 Wn.2d 638, 644, 591 P.2d 452 (1979). The record must adequately establish that the defendant waived his right knowingly, intelligently, and voluntarily. *Pierce*, 134 Wn. App. at 771. A written waiver "is strong evidence that the defendant validly waived the

jury trial right." *Pierce*, 134 Wn. App. at 771. An attorney's representation that the defendant's waiver is knowing, intelligent, and voluntary is also relevant. *Pierce*, 134 Wn. App. at 771 (citing *State v. Woo Won Choi*, 55 Wn. App. 895, 904, 781 P.2d 505 (1989)). Washington law does not require an extensive colloquy on the record; instead "only a personal expression of waiver from the defendant" is required. *Pierce*, 134 Wn. App. at 771 (citing *Stegall*, 124 Wn.2d at 725). As a result, the right to a jury trial is easier to waive than other constitutional rights. *Pierce*, 134 Wn. App. at 772 (citing *State v. Brand*, 55 Wn. App. 780, 786, 780 P.2d 894 (1989)).

Here, Jeffrey and Rebecca were informed that they had the right to have their case heard by an impartial jury, that they could take part in the jury selection process, and that in a jury trial the State would have to convince twelve citizens of their guilt beyond a reasonable doubt, whereas in a bench trial the State had to convince only the judge of their guilt beyond a reasonable doubt. Both Jeffrey and Rebecca signed written jury waivers stating that they understood the rights they were giving up, that they had consulted with an attorney regarding their decisions, and that they were voluntarily giving up their right to be tried by a jury. In a colloquy with the trial court, Jeffrey and Rebecca also confirmed that they wished to waive their right to a jury trial. Jeffrey's attorney also stated that Jeffrey and Rebecca "signed the waiver of a jury trial. It was, after being discussed over a period of months now, been decided that this is how both Parties want to proceed." 1 RP at 60.

The Trebilcocks argue that they were insufficiently apprised of their rights because their written waiver did not make clear that they understood they were entitled to a fair and impartial jury or that the jury would be instructed on the presumption of innocence. But Washington courts have "not required that a defendant be apprised of every aspect of the jury trial right in

order for the defendant's waiver to be valid." *Benitez*, 175 Wn. App. at 129 (citing *Pierce*, 134 Wn. App. at 773). Further, the Trebilcocks were "not required to be informed of '[their] right to be presumed innocent until proven guilty beyond a reasonable doubt or [their] right to an impartial trier of fact because these rights are inherent in all trials' and are not waived by waiving the right to a jury trial." *Benitez*, 175 Wn. App at 129 (quoting *Pierce*, 134 Wn. App. at 772). Accordingly, we hold that both Rebecca and Jeffrey made knowing, intelligent, and voluntary waivers of their right to a trial by jury.

IV. SUFFICIENT EVIDENCE SUPPORTS THE TREBILCOCKS' THIRD DEGREE CRIMINAL MISTREATMENT CONVICTION

The Trebilcocks next argue that the evidence is insufficient to support their convictions for criminal mistreatment in the third degree of A.T because there was insufficient evidence of substantial bodily harm. We disagree and hold there is sufficient evidence that Jeffrey and Rebecca caused A.T. substantial bodily harm and affirm Jeffrey's and Rebecca's criminal mistreatment in the third degree convictions.

To determine whether sufficient evidence supports 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 elements of the crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). Specifically, following a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law. *Homan*, 181 Wn.2d at 105-06. "Substantial evidence" is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise. *Homan*, 181 Wn.2d at 106. We treat unchallenged findings of facts and findings of fact supported by substantial evidence as verities on appeal. *Homan*, 181 Wn.2d at 106. We review challenges to a trial court's conclusions of law de novo. *Homan*, 181 Wn.2d at 106.

A. Findings of Fact

Here, the Trebilcocks only challenge finding of fact 34 that states:

> For a period of approximately seven years, the defendants also withheld food, a necessity of life, from A.T. The defendants used food as a punishment and reward for A.T., and would intentionally withhold food from her if she was disobedient. As a result of this withholding, A.T. suffered substantial bodily injury, to include very low body weight and growth stunting, and she was also placed at imminent and substantial risk of substantial bodily harm.

CP (filed May 28, 2013) at 31. Because this finding of fact is supported by substantial evidence, we reject their argument.

The evidence at trial supported a finding that the Trebilcocks withheld food from A.T. in order to punish her. A.T. testified that both Jeffrey and Rebecca withheld food if she had not completed her chores or schoolwork, that she was frequently hungry even after eating, and that the Trebilcocks rarely gave her more food if she asked for more. A.T. testified that sometimes the Trebilcocks made her eat outside and that she was cold because she did not have a coat on.

Furthermore, the evidence at trial supported a finding that as a result of this withholding, A.T. suffered substantial bodily injury and was put at imminent and substantial risk of substantial bodily harm. Substantial bodily harm means "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.04.110(4)(b). The State's medical evidence demonstrated that A.T. was below the third percentile for height and weight when she was removed from the Trebilcocks' home and that her condition put her at a greater risk for infection and disease. Specifically, for a child as malnourished as A.T. was, a routine "minor gastroenterology issue . . . may result in [ ] death." 6B RP at 1372. This evidence was sufficient to persuade a fair-minded person that the Trebilcocks' withholding of food put A.T. at severe risk and impaired her ability to grow and

live a normal life. We hold that finding of fact 34 is supported by substantial evidence and is thus binding on appeal.

B. Conclusions of Law

The Trebilcocks challenge conclusion of law 5, which states that the elements of criminal mistreatment in the third degree were proved beyond a reasonable doubt. We disagree and affirm the trial court.

> A person is guilty of criminal mistreatment in the third degree
>
> if the person is the parent of a child . . . and either: (a) With criminal negligence, creates an imminent and substantial risk of substantial bodily harm to a child or dependent person by withholding any of the basic necessities of life; or (b) With criminal negligence, causes substantial bodily harm to a child or dependent person by withholding any of the basic necessities of life.

RCW 9A.42.035. A person "acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation." RCW 9A.08.010(1)(d). We hold that the findings of fact support a conclusion that the Trebilcocks were guilty of criminal mistreatment in the third degree.

Unchallenged findings of fact 28 and 29 show that the Trebilcocks were A.T.'s parents. Unchallenged finding of fact 35 establishes that the Trebilcocks acted with criminal negligence. Finding of fact 34, which is supported by substantial evidence, establishes that the Trebilcocks caused substantial bodily harm to A.T. and put her at imminent and substantial risk of substantial bodily harm by withholding basic necessities of life. Accordingly, we hold that the findings of fact support conclusion of law 5 and we affirm.

V. ERROR TO IMPOSE SUBSTANCE ABUSE TREATMENT AS PART OF JEFFREY'S PROBATION

Jeffrey further argues the trial court erred by imposing substance abuse treatment as a condition of his probation for his criminal mistreatment in the third degree conviction. The State concedes this argument and agrees the court imposed the condition in error; it was "most likely a scrivener's error." Resp't's Br. at 32. We accept the State's concession and remand for the trial court to strike the substance abuse treatment from Jeffrey's sentence.

While the trial court has broad discretion to impose probationary conditions on misdemeanors and gross misdemeanors, those conditions must be reasonably related to the crime. *State v. Hall,* 35 Wn. App. 302, 308, 666 P.2d 930 (1983). Here, the record fails to indicate that Jeffrey abused any substance or that substance abuse was related to the charges. We hold that the State's concession is proper and we remand for a correction of Jeffrey's judgment and sentence.

VI. SAG ISSUES

Jeffrey raises several issues in his statement of additional grounds (SAG). Although a defendant is not required to cite to the record or authority in his SAG, he must still "inform the court of the nature and occurrence of [the] alleged errors," and we are not required to search the record to find support for the defendant's claims. RAP 10.10(c). Because Jeffrey does not provide support for his alleged errors, we do not reach his claims.

A. Delays

Jeffrey argues that his case was delayed for two years. However, the record does not show that Jeffrey asserted his right to a speedy trial prior to trial, and thus Jeffrey is not entitled to relief.

B. Lack of Time with Lawyer

Jeffrey argues that his lawyer did not spend enough time on his case. The record does not indicate how much time Jeffrey's lawyer spent working on his case. Matters outside of the record must be raised in a personal restraint petition. *See State v. McFarland*, 127 Wn.2d 322, 335, 338 n.5, 899 P.2d 1251 (1995).

C. Outside-of-Court Conduct

Jeffrey argues that his lawyer had casual social contact with the judge and the prosecuting attorney. This information is not a part of the record and must be raised in a personal restraint petition. *See McFarland*, 127 Wn.2d at 338 n.5.

Jeffrey also complains of CPS's conduct outside of court, such as getting him fired from his job. Similarly, Jeffrey complains that the media released his personal information and that he received death threats from unidentified persons. Jeffrey complains that as a result of the media coverage of his case, he was refused service in a store. Jeffrey complains that the detectives told his family and friends that they would "put[ ] [the Trebilcocks] away for a long time." SAG at 5. Jeffrey complains that a person named Sue Barr "said a lot of un true [sic] stuff" on television. SAG at 3. This information is not a part of the record, and even if it were, we cannot provide a remedy for the actions of third parties outside of court.

D. Credibility Arguments

Jeffrey argues that Dr. Tolby, Dr. Wu, and unspecified persons who were "involved with these too [sic] children when they were tooking [sic] from the blood mother" were biased and gave false testimony. SAG at 3. Jeffrey further argues that the children's case worker, Tina Day, lied. But we do not review weight or credibility issues on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

E. Bifurcated Trial

Jeffrey argues that he wanted to be tried alone, rather than jointly with his wife. The record does not indicate that Jeffrey ever moved for a separate trial, and thus Jeffrey is not entitled to relief.

F. Jury Trial

Jeffrey argues that he wanted a trial by jury. We have already addressed and rejected this argument above.

We remand for the trial court to strike the substance abuse treatment from Jeffrey's sentence. We otherwise affirm the Trebilcocks' convictions and sentences.

Melnick, J.

Melnick, J.

We concur:

Johanson, C.J.

Johanson, C.J.

Maxa, J.

Maxa, J.