No. 24957-3-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

YOLANDA ELEUTERIA DEVON,

Defendant/Appellant.

APPEAL FROM THE OKANOGAN COUNTY SUPERIOR COURT
HONORABLE LESLEY ALLAN, VISITING JUDGE

APPELLANT'S OPENING BRIEF

SUSAN MARIE GASCH
WSBA No. 16485
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in excluding the public from jury voir dire, thus violating appellant's constitutional right to a public trial.

2. The trial court erred in giving legally deficient jury instructions on accomplice liability and second degree manslaughter.

3. The trial court erred in finding sufficient evidence to support the conviction of second degree manslaughter.

Issues Pertaining to Assignments of Error

1. Where the trial court did not analyze the Bone-Club[1] factors before conducting the private jury voir dire, did the trial court violate appellant's constitutional public trial right by excluding the public from jury voir dire?

2. Where the jury instructions as a whole permitted the jury to find guilt on an incorrect legal basis, was the State impermissibly relieved of its burden to prove each element of the crime of second degree manslaughter beyond a reasonable doubt?

3. Was the evidence insufficient for any rational trier of fact to find the essential elements of the crime of second-degree manslaughter?

B. STATEMENT OF THE CASE

Yolanda DeVon was charged by amended information with first-degree premeditated murder or in the alternative, with homicide by abuse. (CP 246-47) Following trial, 21-year old Yolanda was convicted of second-degree manslaughter and her 27-year old husband, Jon DeVon, was convicted of homicide by abuse. (Vol. 8 RP 1487-88, 1607; Vol. 10

[1] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

RP 1959-60)[2] The charges arose out of the death of 21-month old Aiden V. [hereinafter "A.V."],[3] their son and step-son respectively, resulting from injuries allegedly incurred while in their care. (Vol.. 1-10 RP 1-1968)

At a pretrial motion hearing held December 19, 2005, Yolanda's trial counsel mentioned he "was thinking there was quite a bit of publicity about this case so we may have to voir dire some of the jurors individually in chambers ... ." (12/19/05 RP 27) The trial judge suggested the parties be prepared to talk about it at the next hearing, saying:

> If there are some greater number than usual for general questions that the Court would ask, maybe you could have your proposals in that regard because we might be able to then identify folks that need to be questioned individually through some general questions that the Court might ask and I've actually done cases that are higher profile where we do some very limited things at the beginning and then actually do the individual questioning and have sometimes weeded out people that way who know about the case or have opinions about the case and then come back for the rest of the voir dire of the whole group and then we also thereby avoid maybe having those people who have obtained things about the cases, convey those to the other jurors and you know, perhaps bias those other jurors. So we can think about that and talk about that on [January 5, 2006].

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[2] The bulk of the trial, including general voir dire, was recorded. It was then transcribed by Ms. Dori Batson as Vol.umes 1 through 10. Citation to these transcripts will be "Vol.. 1 RP ___." The pre-trial hearings and sentencing will be referred to by their dates, e.g. "12/19/05 RP ___." The individual jury questioning on January 10-11, 2006, was court reported by Ms. Loraine Hohnstein, Visiting Judge Lesley Allan's own court reporter from Wenatchee. (Vol.. 1 RP 15) Citations to Ms. Hohnstein's transcripts will also be referred to by their dates, e.g. "1/10/06 RP ___."

[3] A.V. was born April 5, 2003. (Vol. 3 RP 456; Vol. 8 RP 1489) He died on February 1, 2005. (Vol.. 6 RP 1080)

(12/19/05 RP 28-29)

At the status conference held January 5, 2006, the court suggested,

> [W]e are going to probably call the jury to come in [next] Tuesday [January 10, 2006] and do what I call the sort of introductory stuff that we do with juries. Put them under oath as jurors and provide them with a questionnaire in whatever form it ends up taking to complete, have them complete the questionnaires, and leave, ... and then we would have the jurors come back on Wednesday morning to begin with the voir dire. ...

(1/5/06 RP 162) The court recessed for the day, keeping trial counsel present a few minutes afterward to talk about what time the jurors would be brought in on Tuesday and to cover a few things off the record. (1/5/06 RP 165, 179)

On Tuesday, prospective jurors were given questionnaires as planned and after completion, the judge reconvened court and scheduled groups for individual questioning. (Supplemental 1/10/06 RP 1-end) Thereafter, individual questioning began, in the presence of Judge Lesley Allan, of Juror No. 1 by Mr. Sloan, Mr. Maxey and Mr. Hammett. Proceedings were recessed at 6:05 p.m. after questioning of Juror No. 25. (1/10/06 RP 4, 135) On Wednesday morning, January 11, 2006, the prospective jurors were told:

> What's going to happen this morning is that the attorneys and their clients are back here in Judge's chambers and we've been individually questioning jurors and so we're taking people in numerical order so we're going to be starting with Juror No. 26

> ...Ms. Horner will be bringing you through this door here and we brought a chair back for you and the attorneys will each ask you some questions and then we'll either tell you to come back at two thirty or you'll be excused.
>
> While you're here waiting, feel free to wait around the courtroom. ... I appreciate your patience as we work through this individual questioning.

(Vol.. 1 RP 11) Individual questioning continued. (1/11/06 RP 141-413) After verification among those present of the 40 jurors remaining in the panel, the proceedings were moved into the courtroom. (1/11/06 RP 413)

General voir dire followed, and a jury was selected and sworn in. (Vol.. 1 RP 16-63) Trial commenced on January 12, 2006, and the following pertinent evidence was presented.

A.V. was born to Yolanda DeVon in April 2003, and they lived with her mother, Debra Garrison, in the Tonasket area. (Vol. 3 RP 455; Vol. 8 RP 1488-90) Yolanda, who did not marry or receive child support from the father, provided for her child. (Vol. 8 RP 1490) Yolanda began working as a ward clerk at North Valley Hospital (hereinafter "Hospital") in 2002 while in high school. (Vol. 8 RP 1489) She worked there after graduation, and continued classes begun in high school at Wenatchee Valley College, in Omak. (Vol. 8 RP 1491-92) Yolanda intended to get a Medical Lab Technician certification, and the Hospital worked around her school schedule. (Vol. 8 RP 1491)

Yolanda and A.V. moved from her mother's house into a rented house in Tonasket, sharing it with two of her sisters, Rosa (23) and Wendy (27). (Vol. 3 RP 455; Vol. 8 RP 1492) A.V. did not go to daycare, but was bathed and cared for by the sisters when Yolanda was working or attending school. (Vol. 8 RP 1492-93) On the days she worked, Yolanda began in the morning and got done around 7:45 – 8:00 p.m. (Vol. 8 RP 1493) The house was about one block from the Hospital. (Vol. 3 RP 456; Vol. 8 RP 1530, 1569-70)

Jon DeVon, whom she'd known for six years, moved in with Yolanda, A.V. and her sisters in October 2004. (Vol. 8 RP 1493) Rosa lived there full-time, while Wendy did not. (Vol. 8 RP 1494) Bari Ikawa, a co-worker from the Hospital, stayed at the house probably 2 nights a week when she was on call. (Vol. 8 RP 1494) When Jon moved in, Yolanda continued working at the Hospital and attending classes. (Vol. 8 RP 1494-95) Yolanda's mother or sisters would bring A.V. to the Hospital while she was working, twice or more a week. (Vol. 2 RP 252-53; Vol. 4 RP 587, 600; Vol. 8 RP 1499)

Around the beginning of December 2004, Yolanda and Jon decided to get married. (Vol. 8 RP 1495) They were married on [Saturday] January 22, 2005, and honeymooned in Spokane. (Vol. 8 RP 1496-97)

Yolanda's mother, Debra Garrison, also worked at the Hospital, as a registered nurse. (Vol. 3 RP 454-55) Debra took care of A.V. from January 21 through Tuesday, January 25, 2005. (Vol. 3 RP 462; Vol. 8 RP 1497-99) She saw no bruises or bite marks on A.V. (Vol. 3 RP 461-62, 468) Yolanda and Jon picked A.V. up from her mother on January 24, at approximately 10:00 p.m. (Vol. 8 RP 1498)

Wednesday, January 26, Yolanda did not work and was at school. (Vol. 8 RP 1499) Afterwards, she tried to locate Jon, who had A.V., and found out they were at Ken Roberts'. (Vol. 8 RP 1500) She was upset at Jon about his not returning home with A.V. until "maybe earlier" than 10:00 p.m. (Vol. 8 RP 1500-01)

Thursday, January 27, Yolanda was also at school and did not work. (Vol. 8 RP 1501) After getting home, Yolanda, Wendy and A.V., who had stayed with her sisters, drove up to Oroville and met up about 5:00 p.m. with Jon and Shane McDougal at the Chevron. (Vol. 8 RP 1501) After Jon dropped Shane off at his shop,[4] they went home. (Vol. 8 RP 1502)

Friday, January 28, Jon cared for A.V. while Yolanda worked from 7:00 a.m. to 2:00 p.m., then went to school. (Vol. 8 RP 1502-03) She

[4] Shane lived with his parents in Oroville, and there was a 'shop' near the house. (Vol. 5 RP 936-37)

wasn't positive if Jon was home when she returned. (Vol. 8 RP 1503) Sometime Friday or Saturday Jon told Yolanda that A.V. had fallen off a wood pile on Friday while he was with Jon getting wood, and that Shane McDougal,[5] Craig Cook[6] and Shad Cook[7] were present. (Vol. 8 RP 1505, 1538-39) Jon said he didn't want to take A.V. with him up there to work, because he did get hurt. (Vol. 8 RP 1507, 1551) When A.V. was home Friday, he didn't seem hurt or act unwell. (Vol. 8 RP 1551) While she was working, Yolanda's sister was responsible for bathing A.V. during this period of Friday, Saturday and Sunday. (Vol. 8 RP 1503-04) As A.V. was not potty trained, Jon or her sisters would change his diapers. (Vol. 8 RP 1504) Friday was the first time Yolanda had heard about anything happening to A.V. (Vol.. 8 RP 1576)

Saturday, January 29, Jon and her sisters cared for A.V. while Yolanda began work at 7:00 a.m. (Vol. 8 RP 1503) Sometimes A.V. would be up before she went to work. (Vol. 8 RP 1503) On Saturday, Yolanda noticed some bruises on A.V., but they didn't appear serious or out of the ordinary from other bruises he'd had, and she had no reason to

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[5] Shane thought they cut wood on Thursday; his statement to police said it was Wednesday. (Vol. 5 RP 940, 945) He said A.V. was not with them while cutting wood. (Vol. 5 RP 941)

[6] Craig Cook said he didn't recall what day, but that A.V. was not there when they were cutting wood. (Vol. 5 RP 834-37)

[7] Shad Cook said he did not cut wood with Jon on Friday. (Vol. 5 RP 823)

think they were caused from something other than the fall off a wood pile. (Vol. 8 RP 1505-08) Sometime later, Yolanda had been told that on Saturday or perhaps Friday A.V. had tripped over a step at Shane's house and scraped his nose and cheek. (Vol. 5 RP 942-43; Vol. 8 RP 1506, 1539-40, 1551)

Yolanda may have told some people at work about the bruises. (Vol. 8 RP 1508) She said A.V. did not vomit on Saturday. (Vol. 8 RP 1543) When she got off work around 8:00 p.m. and returned home, Jon and A.V. were not there. (Vol. 8 RP 1504, 1508-09) She would normally go to bed at 9 or 9:30 p.m. when working the next day, and was already in bed when they got home. (Vol. 8 RP 1504, 1509) Yolanda didn't change A.V.'s diaper that night. (Vol. 8 RP 1509) Although A.V. had his own lowered twin bed in their bedroom, Jon brought him into their bed when they got home. (Vol. 8 RP 1509)

About 3:00 a.m. Sunday morning [January 30], A.V. woke up vomiting. (Vol. 8 RP 1511-12) Yolanda didn't take him to the Hospital because she thought he merely had the flu as did her sister Rosa, and her co-workers had been complaining about people that weekend bringing their kids in with flu and exposing others. (Vol. 2 240; Vol. 3 RP 470, 538, 567; Vol. 8 RP 1514-15) Yolanda noticed burn marks to A.V.'s

cheeks. (Vol. 8 RP 1516-17) Leaving A.V. home with Jon and Rosa, Yolanda arrived late to work, at 8 or 8:30 a.m. (Vol. 8 RP 1511, 1515-16, 1548-49)

Dr. Welton was nearby while Yolanda discussed A.V.'s symptoms and what she could do with the nurses. (Vol. 8 RP 1515) Yolanda went home twice, at 9:30 or 10:00 a.m. and again around noon, to take Tylenol and some burn cream to A.V. (Vol. 8 RP 1516, 1519) A.V. was dressed in sweat pants and a shirt. (Vol. 8 RP 1517) Yolanda gave him the medication and put cream on his cheeks. (Vol. 8 RP 1517-18)

Sometime Sunday Yolanda's mother wanted to take A.V. home with her, but Yolanda didn't want her to because she didn't want to have to drive to Crumbacher to pick A.V. up after work. (Vol. 8 RP 1573-74)

Sunday afternoon Jon called Yolanda at work to tell her he was going up to Oroville to his Uncle Dale's place. (Vol. 8 RP 1520) He told her he would not be gone long; she thought maybe an hour. (Vol. 8 RP 1520) Although she didn't tell Jon, Yolanda wasn't happy with the idea because A.V. was sick. (Vol. 8 RP 1521) Jon switched cars with her, leaving his at the Hospital. (Vol. 8 RP 1523) After work, about 8:00 p.m., a co-worker took Yolanda home to get the truck keys. (Vol. 4 RP 678; Vol. 8 RP 1524) Yolanda got back home about 8:30 p.m. (Vol. 8 RP

1525) Yolanda showered and got to bed about 9:30 p.m. (Vol. 8 RP 1525) Jon returned home before midnight, and put A.V., who was sleeping, in his bed. (Vol. 8 RP 1525, 1549-50) Yolanda was awake, but didn't check on A.V. (Vol. 8 RP 1549)

About 3:00 a.m. [Monday, January 31, 2006], Yolanda woke up to hear A.V. breathing kind of funny, sounding raspy. (Vol. 8 RP 1526) Leaving him sleeping, she turned on the living room lights to grab the phone and returned to her son's side while calling the Hospital. (Vol. 8 RP 1526-27, 1574) As she didn't believe something serious was going on, Yolanda asked to talk to a specific nurse who'd worked at the hospital for years. (Vol. 8 RP 1527-29) Because that person was not working, Yolanda asked the on-call nurse to listen to A.V.'s breathing over the phone. (Vol. 8 RP 1528) The nurse passed the call on to Carol May, who listened and suggested trying steam or outside cold air. (Vol. 6 RP 974-75; Vol. 8 RP 1528) Sensing that the mother would rather just come in, Carol invited her to do so. (Vol. 6 RP 975; Vol. 8 RP 1528)

Because it was cold outside, Yolanda went out to start her truck. (Vol. 8 RP 1528-29) When she came back in, A.V. was not breathing. (Vol. 8 RP 1529) Yolanda had some CPR training that she'd never used, and was too scared to try it. (Vol. 8 RP 1530) She and Jon rushed to the

Hospital ER, where Yolanda entered her employee code to get the door open. (Vol. 8 RP 1529)

Because of his breathing, Yolanda told the nurses she thought maybe A.V. had swallowed something. (Vol. 8 RP 1531) At the Hospital, Yolanda thought A.V.'s condition was a lot worse than what she'd seen earlier Sunday or Saturday; the bruising she'd seen just on his forehead was now seen all over. (Vol. 8 RP 1532-33) Yolanda called her mother and a co-worker from the Hospital, asking them to come help A.V. (Vol. 2 RP 259; Vol. 3 RP 471; Vol. 8 RP 1573)

Dr. Richard Welton tended to A.V. in the Hospital ER. (Vol. 5 RP 755, 757, 761) When A.V. arrived, he was not breathing and had no pulse; his pupils were fixed and he basically appeared dead. (Vol. 5 RP 759) CPR was performed. (Vol. 5 RP 762) A normal heart rate was restored in 26 minutes, but a ventilator was used because A.V. did not resume breathing. ((Vol. 4 RP 614; Vol. 5 RP 762, 764-65) Noting multiple forehead bruises, and what looked like burns across each cheek and both thighs, Dr. Welton believed A.V.'s condition was due to injury, not illness. (Vol. 5 RP 760-61, 766) He concluded A.V. had cardiac arrest due to traumatic brain injury which he attributed to child abuse. (Vol. 5 RP 771) The Hospital made plans to send A.V. to Sacred Heart

Children's Hospital in Spokane [hereinafter "Sacred Heart"] for the more complicated treatment he might need. (Vol. 5 RP 765) A.V. was transferred there about 6:10 a.m. (Vol. 2 RP 2990-91)

Yolanda, her mother, Jon and others drove to Spokane. (Vol. 3 RP 474, 476, 563, 576; Vol. 4 RP 592; (Vol. 5 RP 955; Vol. 8 RP 1533-34, 1600) Yolanda first noticed burn marks on A.V.'s legs at Sacred Heart. (Vol. 8 RP 1518)

At Sacred Heart, Dr. Alan Hendrickson, a non-certified 'pediatric child abuse neglect' specialist, was called in to do a suspected abuse consultation. (Vol.. 2 RP 323-24,328-30, 332-33) In his opinion, the closed head brain injury that caused A.V.'s death was clearly inflicted, not accidental. (Vol. 2 RP 359-61, 374) While it is subject to professional debate, this degree of brain injury would almost immediately or within the hour show signs that something was wrong. (Vol. 2 RP 361-62) Dr Hendrickson saw extensive head bruising, extensive retinal hemorrhages, bruising on an ear, some scrape or burn marks on the face, burn marks on the thighs, several bite marks on the legs, bruises on the back, bruises to the abdomen, bruising in the genital area, bruises on top of one foot, bruises on the ribs and buttock area. (Vol. 2 RP 336, 339-40, 345, 347, 349) These "other" injuries on A.V.'s body were not life-threatening.

(Vol. 2 RP 352, 374) Any one of the bruises present could have been produced naturally from normal play. (Vol. 2 RP 342)

Dr. Caroline Shea, pediatric ophthalmologist, examined A.V. at Sacred Heart. (Vol. 3 RP 397, 401) In her opinion, the quality and quantity of retinal hemorrhages she observed was due to inflicted non-accidental trauma to the head, caused by repeated blows or by shaking. (Vol. 3 RP 405-06, 411-12, 417, 425)

Dr. Gregory MacDonald, pediatric neurologist at Sacred Heart, was asked to evaluate the child while in the intensive unit for evidence of severe brain dysfunction. (Vol. 4 RP 607, 610, 612) Reviewing a CT scan of the brain/skull, he noted both a subdural hematoma (bleeding) and brain swelling on the right sight of the head, suggesting a focal rather than generalized trauma. (Vol. 4 RP 617-19, 620-622) The CT scan of the chest/abdomen and x-rays were normal, showing no signs of fracture. (Vol. 4 RP 626-27) He saw old/new bruising and swelling on A.V.'s head, as well as a bite mark on one cheek. (Vol. 4 RP 628-29) He testified that a blow to the head/face sufficient to leave a bruise mark would be adequate trauma to produce a small subdural hematoma within the skull. (Vol. 4 RP 630) He noted similar bruising to the body as did Dr. Hendrickson, characterizing them variously as relatively recent or from

a longer time ago, perhaps a week. (Vol. 4 RP 631-32, 638) Based on his examination and his observations that the child was comatose, not responsive to sensory input, on a ventilator unable to breathe on his own, with old and fresh bleeding in his eyes, and with a non-functioning brain stem, Dr. MacDonald concluded A.V. was brain dead. (Vol. 4 RP 632-38)

Some of A.V.'s body organs were donated at Yolanda's request. (Vol. 8 RP 1534) Later that day, Dr. Marco Rossi, deputy medical examiner for Spokane County, performed the autopsy. (Vol. 6 RP 1080) The brain injuries and bruising to the body were estimated to have occurred 1-3 days prior to February 2, 2005, the date of cardiac arrest. (Vol. 6 RP 1112, 1126, 1138) Dr. Rossi concluded the cause of death was "a subdural hemorrhage with cerebral edema or swelling of the brain and herniation due to a blunt force impact to the head." (Vol. 6 RP 1147) He did not feel the other injuries were a significant contributory factor. (Vol. 6 RP 1156) He classified the manner of death as "homicide." (Vol. 6 RP 1148) He believed his findings "are consistent with the fact that this child was abused and ultimately died as a result of these abusive injuries." (Vol. 6 RP 1149)

Defense experts Dr. John Plunkett and Dr. Karen Griest testified A.V. was a battered child; however the fatal head injury could have

occurred from an accidental fall. (Vol. 7 RP 1305, 1309, 1357-58, 1371-72) They did not think it unreasonable to characterize the manner of death as homicide. (Vol. 7 RP 1220, 1331, 1373)

Yolanda had bitten A.V. only once, gently on his arm leaving no marks, a week prior to taking him to the Hospital. (Vol. 3 RP 518; Vol. 6 RP 1010-11; Vol. 8 RP 1512-13) She'd discussed A.V.'s biting problem with co-workers, and some had suggested biting back as a way to discourage it. (Vol. 1 RP 173-74; Vol. 3 RP 518; Vol. 8 RP 1513) Her mother, Jon and Wendy had also bitten A.V. (Vol. 2 RP 442-43; Vol. 3 RP 528; Vol. 8 RP 1513, 1546) Yolanda had been told that A.V. had smashed his fingers in the truck door, and believed the injuries to both of his hands came from that incident. (Vol. 8 RP 1547)

A.V. was a typical two-year old, described variously as very active, liked to climb, inquisitive, running around, playing with others, a dare-devil, a happy child, etc. (Vol. 1 RP 206, 222; Vol. 2 RP 253; Vol. 3 RP 434, 500-01, 517, 550, 572, 580; Vol. 4 RP 674; Vol. 5 RP 957; Vol. 8 RP 1496-97, 1598) Yolanda and others believed A.V. bruised easily. (Vol. 3 RP 516; Vol. 8 RP 1507) At this time, he was saying words, but not sentences. (Vol. 8 RP 1509)

Yolanda had taken A.V. regularly to Dr. Henzey doctor for check-ups, shots, vaccinations, diarrhea and an ear infection. (Vol. 3 RP 561; Vol. 8 RP 1496, 1543) He'd had pneumonia in June 2004, but no other abnormal illnesses or serious injuries. (Vol. 8 RP 1497) Witnesses agreed that Yolanda was a good mother. (Vol. 1 RP 183, 230; Vol. 2 RP 241; Vol. 3 RP 500, 514-15, 547, 582-83; Vol. 4 RP 684; Vol. 5 RP 958)

Yolanda had seen no changes in A.V. when Jon had moved in, or in December 2004 or January 2005. (Vol. 8 RP 1496) Yolanda had never seen Jon treat A.V. physically or be mean to him, and others thought his relationship to A.V. was very good. (Vol. 4 RP 685-86; Vol. 5 RP 956-57; Vol. 8 RP 1571)

At the close of testimony the jury was instructed in pertinent part as follows:

> Instruction No. 3: A separate crime is charged against each defendant. The charges have been joined for trial. You must consider and decide the case of each defendant separately. Your verdict as to one defendant should not control your verdict as to any other defendant.
>
> All of the instructions apply to each defendant, unless a specific instruction states that it applies only to a specific defendant.

(CP 56)

Instruction No. 10: A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of a crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

(CP 63)

Instruction No. 23: To convict the defendant of the crime of manslaughter in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 31st day of January 2005, the defendant, or an accomplice, inflicted trauma resulting in injury and subdural hemorrhage;

(2) That the conduct of the defendant or accomplice was criminal negligence;

(3) That [Aiden V.] died as a result of the acts of defendant or accomplice; and

(4) That the acts occurred in the State of Washington.

...

(CP 76)

Instruction No. 24: A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and the 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.

(CP 77)

In closing, the State argued in pertinent part as follows:

> Let's talk about Yolanda DeVon. As you were instructed, the defendant or accomplice is guilty of the crime. It simply meets the elements. An accomplice is defined for you as a person who acknowledges and would promote and facilitate the commission of a crime either to be, number one, solicits, demands, encourages or requests another person to commit a crime, or aids or agrees to aid another person in planning or committing a crime. ... [I]t's further defined as all assistance whether given by words, acts, encouragements, or presence. A person present at the scene and ready to assist by his or her presence is aiding in the commission of a crime. It's got to be more than a mere presence, and acknowledge the activity. ...
>
> In this case, why do we have an accomplice? Because Yoland DeVon was also involved. That basically although Jon had [A.V.] for the lion's share of the time in the days leading up to his death, he and Yolanda were with him some parts of the time, including the most critical time, when he was killed – which would be early Monday morning. How do we know that Yolanda even knew that? That she didn't know about it or described – because we had testimony about her interactions with her co-workers, her statements to co-workers, her statements to police through the interviews that she gave and her phone call.
>
> We know that on several occasions to different co-workers, she mentioned the accident. Ultimately, well gee, you'd think we were beating him. Yeah, if somebody had been able to see his body, they would have thought that too because that's what was going on. That she was afraid to bring him in because of what people would think. That when they called or she called Monday morning, rather than bringing him in – can you listen to him on the phone? Not panicked. Not an emergency.
>
> Now defense may argue that we don't know what happened during these times where it was just the defendant or the defendants (inaudible) but we do. We know that injuries were inflicted when the child was leading up to that Sunday night, Monday morning with Jon. The only injury really observable, fall, was the trip and fall (inaudible). ...

> Now we do know that Yolanda was aware of the burns because she testified about the burn cream and she was telling people about the bruises, about the accidents. they were getting progressively worse. She said she didn't see the burn until Sunday, long after any interaction with ... any of those guys at the shop were the burns could have been arguably inflicted by accident. We know that she ... considered reporting the bruising – reporting injuries of [A.V.], against concern about it being abuse or resulting in her getting in trouble with Jon. ...
>
> Because when that child dies, there was no more making ... excuses and that's what happened. At that point they were panicked, they were scared, they were traumatized because they killed this kid and that was what happened after that. They rushed to the E-R and it is way too late.
>
> The time for Yolanda to take action would have been when she first started noticing, is not when he was dead. She is an accomplice to this. This happened in her and Jon's care. These injuries and the fatal injuries specifically. ...

(Vol.. 9 RP 1818-23)

In rebuttal closing, the State further argued in pertinent part as follows:

> Counsel has asked or made the claim about somehow trying to attribute specific medical expertise or a higher level of knowledge from Ms. Yolanda DeVon to, I guess, explain why she did or did not act, but I don't think anybody's trying to put specific knowledge to her other than normal what we would expect parenting skills, normal awareness, normal caring for a child, which was clearly not exhibited in this case. Yolanda showed a complete void or lack of parental instincts on the last couple days of this child's life.

(Vol.. 10 RP 1932)

> Now let's talk about some other things. Reasonable or unreasonable actions by Yolanda DeVon. The argument is that she acted somehow appropriate and concerned in calling the

> emergency room finally on Monday, but if you recall her testimony, [A.V.'s] breathing funny. She wakes up. She doesn't go to the child. She doesn't check on the child. She doesn't move the child. She doesn't turn the light on. She then goes out in the hall and talks about having them listen to him breathing on the phone. Then goes out and starts the truck before coming back, realizing the child's not breathing. Again, that's ridiculous. It's absolutely ridiculous in the context of normal parenting. The child's breathing funny, what do you do? You go check on him. You determine if there's really a problem or not. You don't leave him and go make a phone call, go outside, before you even touch the child. It makes no sense.

(Vol.. 10 RP 1936-37)

C. ARGUMENT

1. Since the trial court did not analyze the Bone-Club[8] factors before conducting the private jury voir dire, it violated appellant's constitutional public trial right by excluding the public from jury voir dire.

A criminal defendant has a right to a public trial, including during the jury selection process. Under both the Washington and United States Constitutions, a defendant has a constitutional right to a speedy and public trial. WA Const. art 1, § 22; U.S. Const. amend. VI. Additionally, the public and press have an implicit First Amendment right to a public trial. U.S. Const. amend. I; WA Const. art 1, § 10; Waller v. Georgia, 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984); State v. Easterling, 157 Wn.2d 167, 179, 137 P.3d 825 (2006). Even when only a part of jury voir

[8] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

dire is improperly closed to the public, it can violate a defendant's constitutional public trial right.

> Article I, section 22 of the Washington State Constitution guarantees that '[i]n criminal prosecutions the accused shall have the right ... to have a speedy public trial.' See also U.S. Const. amend. VI (providing that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial'). The guaranty of open criminal proceedings extends to 'the process of juror selection,' which 'is itself a matter of importance, not simply to the adversaries but to the criminal justice system.' Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). As this court has stated, '[a]lthough the public trial right may not be absolute, protection of this basic constitutional right clearly calls for a trial court to resist a closure motion *except under the most unusual circumstances*.' State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995) (emphasis added)

In re Personal Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004).

"Moreover, the defendant's failure to lodge a contemporaneous objection at trial [does] not effect a waiver of the public trial right." State v. Brightman, 155 Wn.2d 506, 517, 122 P.3d 150 (2005). And, "[p]rejudice is presumed where a violation of the public trial right occurs." Bone-Club, 128 Wn.2d at 261-62 (*citing* State v. Marsh, 126 Wash. 142, 146-47, 217 P. 705 (1923)).

" 'The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve

higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.' " Orange, 152 Wn.2d at 806 (*quoting* Waller, 467 U.S. at 45, 104 S.Ct. 2210).

The Washington Supreme Court requires compliance with five standards before the court can properly close any part of a trial to the public:

> 1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a 'serious and imminent threat' to that right.
> 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
> 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
> 4. The court must weigh the competing interests of the proponent of closure and the public.
> 5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-89. When the record "lacks any hint that the trial court considered [the defendant's] public trial right as required by Bone-Club, [the court on appeal] cannot determine whether the closure was warranted." Brightman, 155 Wn.2d at 518.

In Brightman, the trial court *sua sponte* told counsel that for reasons of security, "we can't have any observers while we are selecting

the jury." Brightman, 155 Wn.2d at 511. The Supreme Court ruled that where jury selection or a part of the jury selection is closed, the closure is not *de minimis* or trivial. Id. at 517. The trial court had failed to analyze the five Bone-Club factors. Unable to determine from the record below whether the closure was warranted, the Court remanded for a new trial. Id. at 518.

In Orange, the trial court closed the courtroom during more than half of the time spent on jury voir dire, because of limited courtroom space and for security reasons. Orange, 152 Wn.2d at 808-10. The Orange Court held the trial court's failure to analyze the five Bone-Club factors before ordering the courtroom closed violated Orange's right to a public trial. Orange, 152 Wn.2d at 812. The Orange Court also held the constitutional violation was presumptively prejudicial and would have resulted in a new trial had the issue been raised in Orange's direct appeal. Id.

Even if it were proper for this Court to independently analyze the Bone-Club factors, the analysis shows the jury voir dire closure violated Yolanda's right to a public trial. The scant record suggests there was pre-trial publicity and some concern that the remainder of the venire panel might be tainted by answers given by any individual prospective juror who

knew something about the case. The record shows that neither the court nor the State identified a compelling interest that posed a serious and imminent threat to Yolanda's right to a fair trial. There is nothing in the record to show anyone present was given the opportunity to object when the decision was made to conduct a portion of jury voir dire in the judge's chambers, outside the presence of the public. There is nothing in the record to show the private jury voir dire was the least restrictive means available for protecting any perceived threatened interests,[9] or was no broader in its application or duration than necessary to serve its [undisclosed] purpose.

Nor does the record disclose any weighing of the competing interests of private proceedings and the public. The constitutional public trial right is the right to have a trial open to the public. Orange, 152 Wn.2d at 804-05. "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions ... ." Bone-Club, 128 Wn.2d at 259 (*citing* In re Oliver,

[9] For example, the court could have protected the threatened interest to an impartial jury by holding the prospective jury pool at a location outside the public courtroom and bringing prospective jurors into the courtroom for voir dire one at a time.

333 U.S. 257, 270 n.25, 68 S.Ct. 499, 506 n.25, 92 L.Ed. 682 (1948) (*quoting* Thomas M. Cooley, Constitutional Limitations 647 (8th ed. 1927)). Herein, the public, interested spectators and Mr. and Mrs. DeVon's friends and family were not present at the sessions in the judge's chambers, to see that the defendants were dealt with fairly.

Because the trial court failed to analyze the Bone-Club factors before excluding the public from a significant portion of the jury voir dire, under the rule in Orange and Brightman, Yolanda's constitutional right to a public trial was violated. Moreover, on this record an analysis of the Bone-Club factors also leads to the same conclusion. The remedy is reversal and a new trial.

2. The jury instructions as a whole permitted the jury to find Yolanda guilty of second degree manslaughter on an incorrect legal basis, and were therefore legally deficient.

Jury instructions are reviewed *de novo*. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996). Jury instructions should be read as a whole in the context of the other instructions given. State v. Brown, 132 Wn.2d 529, 605, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998). Jury instructions are sufficient when, read as a whole, they accurately state the law, do not mislead the jury, and

permit each party to argue its theory of the case. State v. Teal, 152 Wn.2d 333, 339, 96 P.3d 974 (2004).

A person is guilty of manslaughter in the second degree when, with criminal negligence, he [or she] causes the death of another person. RCW 9A.32.070. Herein, the jury was instructed that, "A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and the 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. (Instruction No. 24 at CP 77) Thus, a person whose failure to know something causes the death of another person may be guilty of second degree manslaughter.

Herein, the jury was also instructed as to accomplice liability. *See* Instruction No. 10, set forth above in the Statement of Facts section.[10] However, accomplice liability does not attach to a person's failure or omission to come to the aid of another person who is being assaulted or abused. State v. Jackson, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999). In this case, then, Yolanda could not be found guilty of second degree

[10] The accomplice liability instruction misstates the law, by referring to "*a* crime" in the second sentence, rather than to "*the* crime." State v. Brown, 147 Wn.2d330, 338, 58 P.3d 889 (2002).

manslaughter under an accomplice theory. She could only be found guilty if acting as a principal.

The jury was given a "to convict" instruction which introduced confusing references to acts of a principal *or an accomplice*:

> To convict the defendant of the crime of manslaughter in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 31st day of January 2005, the defendant, *or an accomplice*, inflicted trauma resulting in injury and subdural hemorrhage;
>
> (2) That the conduct of the defendant *or accomplice* was criminal negligence;
>
> (3) That [Aiden V.] died as a result of the acts of defendant *or accomplice*; and
>
> (4) That the acts occurred in the State of Washington.
>
> ...(emphasis added)

(Instruction No. 23 at CP 76) Based on the given instructions and facts of this case, the effect of including references to "an accomplice" in three elements of the crime permitted the jury to attribute fault for second degree manslaughter *not* solely based on the acts of Yolanda as principal, but in part on the acts of Mr. DeVon.

The jury did not find Yolanda guilty of homicide by abuse either as a principal or an accomplice. By implication, the jury therefore determined that Yolanda did not "inflict trauma resulting in injury and subdural hemorrhage" and that Yolanda's acts did not cause A.V.'s death. For purposes of elements 1 and 3 of the instruction at issue here, then, the

jury must have concluded that the infliction of "trauma resulting in injury and subdural hemorrhage" and the resulting death were the acts of Mr. DeVon. However, he could not have been acting as Yolanda's accomplice for purposes of second degree manslaughter because he was found guilty as principal of homicide by abuse. And, under Jackson, Yolanda could only be found guilty of second degree manslaughter if she acted as principal as to all of the elements. Since there is no way to determine whether the jurors were unanimous in finding Yolanda guilty as principal as to each element, she was deprived of her constitutional right to a unanimous verdict. State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994) (explaining that by allowing verdicts of nine or more only in civil cases, Wash. Const. article I, § 21 "implicitly recognizes unanimous verdicts are required in criminal cases").

The instructions herein, when read as a whole, did not accurately state the law and misled the jury into finding Yolanda guilty. The State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld. State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000). A conviction cannot stand if the jury was instructed in a manner that would relieve the State of this burden. Id. "The State must prove every essential element of a crime beyond a reasonable doubt for a

conviction to be upheld. It is reversible error to instruct the jury in a manner that would relieve the State of this burden." State v. Jackson, 137 Wn.2d at 727, 976 P.2d 1229. Yolanda's conviction must be reversed.

3. The evidence was insufficient for any rational trier of fact to find essential elements of the crime of second-degree manslaughter.

a. Applicable law. In determining the sufficiency of the evidence, 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 essential elements of the crime beyond a reasonable doubt." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)(citing State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Salinas, 119 Wn.2d at 201, 829 P.2d 1068 (citing State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, 119 Wn.2d at 201, 829 P.2d 1068 (citing State v. Theroff, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

While circumstantial evidence is no less reliable than direct evidence, State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487, 491, 670 P.2d 646 (1983). Furthermore, there must be substantial evidence, i. e., that quantum of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved. State v. Cleman, 18 Wn.App. 495, 498, 568 P.2d 832 (1977)(*citing* State v. Randecker, 79 Wn.2d 512, 487 P.2d 1295 (1971)).

> It is well established that the existence of a fact cannot rest in guess, speculation, or conjecture. Home Ins. Co. of New York v. Northern Pac. Ry., 18 W.2d 798, 140 P.2d 507 (1943). This rule is even more essential in criminal cases where the evidence is entirely circumstantial. See State v. Weaver, 60 Wn.2d 87, 88, 371 P.2d 1006 (1962), where we said, 'while a conviction may be sustained solely on circumstantial evidence, the circumstances proved must be unequivocal and inconsistent with innocence.'

State v. Golladay, 78 Wn.2d 121, 130, 470 P.2d 191(1970).

b. Argument. In order to find Yolanda guilty of second degree manslaughter as a principal, the jury had to find beyond a reasonable doubt that on or about January 31, 2005, she inflicted trauma resulting in injury and subdural hemorrhage; that her conduct was criminally negligent, and that A.V. died as a result of her acts. Even when viewed in a light most favorable to the State, the evidence does not support the conviction.

The sole evidence of potential injury to A.V. by Yolanda was her admission that she gently bit his arm a week before he died. The record contains no evidence that this bite resulted in injury to A.V., or testimony that a bite on the arm resulted in bleeding of the brain.

Biting a child in the hopes of demonstrating why the child should not bite others is not a healthy practice. However, the sole bite was done gently, leaving no marks or bruising, and created no substantial risk of injury. Yolanda did discuss A.V.'s biting stage with others, and there was some evidence that others may have resorted to this reaction when faced with the problem. As such, her action could not reasonably be viewed as a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

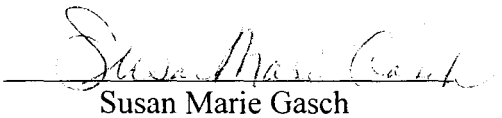
And, A.V. did not die due to a gentle bite on his arm. The experts agreed that A.V. died as a result of blows or shaking to his head. Even if the bite could be viewed as serious and causing bruising, the bite did not proximately cause A.V.'s death.

Therefore, the evidence in this case is insufficient to support the Yolanda's conviction of second-degree manslaughter. Because the evidence is insufficient to support the conviction, the conviction must be reversed.

D. CONCLUSION

For the reasons stated, the conviction for second-degree manslaughter must be reversed.

Respectfully submitted November 30, 2006.



Susan Marie Gasch
Attorney for Appellant