NO. 24958-1 &
24957-3

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

RESPONDENT,

V.

JON DEVON and YOLANDA DEVON
APPELLANTS.

SECOND AMENDED BRIEF OF RESPONDENT

KARL F. SLOAN
PROSECUTING ATTORNEY
OKANOGAN COUNTY

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A. ASSIGNMENTS OF ERROR

1. Whether the appellants' right to public trial was violated.

2. Whether the trial court gave a deficient jury instruction for accomplice liability.

3. Whether there was sufficient evidence for a rational trier of fact to find guilt.

4. Whether Jon Devon was denied effective assistance of counsel.

5. Whether the trial judge properly denied a motion to recuse.

B. ISSUES PERTAINING TO ASSIGMENT OF ERROR

1. Were appellants denied their right to public trial when individual juror questioning was conducted in response to appellants' concerns about publicity on potential jurors?

2. Was the accomplice instruction deficient, when only one crime was before the jury and could not have relieved the State of its burden of proof?

3. Was there sufficient evidence to find guilt for the crime of homicide by abuse and manslaughter second degree as principal or accomplice?

4. Was Jon Devon denied effective assistance of counsel where his trial counsel had to make tactical decisions regarding objections to testimony?

5. Was there a basis for the trial judge to recuse herself based on appellants' motion that she was biased due to sitting as judge on a shelter care hearing?

C. STATEMENT OF THE CASE

Defendants were charged by an information alleging First Degree Murder by Extreme Indifference, or in the alternative, Homicide by Abuse, as a principal or accomplice. Clerks Papers for Yolanda Devon, hereinafter "CP-Y", CP 313; Clerks Papers for Jon Devon, hereinafter "CP-D" 668.

The charges stem from the death of Aden Valdovinos, who was approximately 22 months old at the time of his death. Id. The defendants' cases were joined for trial. CP-D 650.

Defendants moved to recuse visiting Chelan County Superior Court Judge Lesley Allen. Defense initially believed Judge Allen had presided over a two day CPS fact finding. 11/15/05 RP 5, 12. Judge Allen corrected counsel, indicating that visiting Chelan County Judge Chip Small had presided over the fact finding. Judge Allen had only heard one shelter care hearing that lasted approximately three hours that dealt solely with requested changes to Jon and Yolanda Devon's visitation schedule with their infant child, who was born after Aden's death. 11/15/05 RP 12-13.

In ruling on the defendants' motion to recuse, Judge Allen indicated she did not have personal knowledge of matters as contemplated in the Cannon of Judicial Conduct 3(D). 11/15/05 RP 16. Similarly, Judge Allen did not have a per se bias or prejudice as a result of making an adverse ruling in the shelter care hearing.

Her ruling left in place the existing visitation conditions. Judge Allen denied the defendants' motion to recuse. 11/15/05 RP 17-22.

Prior to trial, Judge Allen granted the defendants' motion to dismiss the alternative count of First Degree Murder by Extreme Indifference. Judge Allen also denied the State's motion to amend the information to include a count of First Degree Premeditated Murder. 12/19/05 RP. The case proceeded to trial on one count of Homicide by Abuse.

At a pretrial hearing on December 19, 2005, Yolanda Devon's attorney expressed concern about the level of pre-trial publicity and suggested the need for conducting individual voir dire in chambers.

> *MR. HAMMETT: I don't believe so but I was--would the Court--I guess we could take this up later at the motion hearing but I 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 but I'm not sure.*
>
> *THE COURT: Okay.*
>
> *MR. HAMMETT: --extend the time.*
>
> *THE COURT: Well we may. We may. I've certainly had cases where we've done that before and I mean we can do that I guess, yeah, and I guess part of your submission's on the fifth or for the fifth. I would ask that--so those are to come in by the twenty-ninth. 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 the fifth.

12/10/05 RP 27.

Defendants' continued to be concerned about the impact of trial publicity, and Jon Devon's attorney filed a motion to sequester the jury. CP-D 509-530. Yolanda Devon's attorney joined that motion. 1/05/06 RP 22.

MR. MAXEY: Again, I think that if we try (inaudible) and set out argument in the memorandum the best we can 'cause I don't want to labor the point. Clearly, this is a matter that has been in the discretion of the Court. Our concern is that there has been (inaudible) surrounding this case previously and usually once there's some form of hearing that generates some true publicity. Based on the nature of the publicity and the nature of the case, we feel that it's important in order to assure that we have a pool of jurors ultimately that are not tainted, poisoned, influenced in any way by the publicity, I think they should be sequestered. Given the Court on--in the memorandum and download some samples of the nature of the publicity that has been generated surrounding the case and unfortunately, I think in the allegations and the statements made by witnesses previously, exists reports and other things that have been referred to and filed (inaudible), these types of things have been repeated over and over again. They are very explanatory type comments. This is a small community. It may be spread out a bit but there aren't that many individuals in the county compared to many. It's not a big metropolitan area and so forth and you know, I'm not up here on a regular basis but the jury selections I've had, I mean generally we're getting people from small areas--kind of pockets of people who live in small communities that come in to make up these juries. Tonasket, Oroville, Okanogan, and I think this is the kind of case that does generate conversation and that people are going home over this too, and we're going to have witness lists--I think that's going to require probably two to three weeks--and we're going to be here doing this--that the potential for people discussing the case on a regular basis is greater and greater despite the fact that the Court gives instruction and we try to believe that you know, people want to follow the Court's instruction. And so we're asking the Court

to sequester the jury based on legal authority and Criminal Rule 6.7A, to exercise its discretion in this particular case--to keep the jury, I guess sanitized away from any other influences in this particular case--we--I (inaudible) refer to it in the briefing, your Honor. Quotes are going out in the newspaper about this is the worst case of child abuse they've ever seen and talking about the nature of the injuries, quoting doctors as saying that, you know, it's repetitive, sadistic, and evil, and things of that nature. You know, it's difficult enough to try and get a jury pool and then it potentially would be impossible to get one that isn't influenced or subjected to any outside influences, so the briefing is there your Honor. I won't go on and on. Thank you for your time and we'd ask the Court to consider our motion.

THE COURT: Okay. Thank you. Mr. Maxey. Mr. Hammett, did you--

MR. HAMMETT: --Well on behalf of Yolanda Devon, I can join in Mr. Maxey's motion to sequester.

1/05/06 RP 19-22.

Defendants also proposed a supplemental jury questionnaire due to the nature of the charges and publicity surrounding the case. 1/05/06 RP 8, 161, 162.

The court denied the motion to sequester without prejudice and invited defense to raise the issue again during voir dire, depending on the responses from prospective jurors.

Jury selection began on January 10, 2006. 1/10/06 RP 1. In open court, jurors were given the supplemental questionnaire and then general questioning commenced. 1/10 RP 8-15. In response to the question "...is there anyone who has hear of this case?" forty- two jurors indicated they had. After the initial instructions and questions, the jurors were provided time to complete the supplemental questionnaire. They were advised that the information provided was

to be used only by the Court and lawyers, that it would not be further disseminated, and that they should answer fully and openly. 1/10/06 RP 23.

Voir dire reconvened in the afternoon at which point, the Court advised the jurors, in open court, that individual questioning would be conducted by the attorneys and defendants in chambers. 1/10/06 RP 24-25. After individual questioning was completed, general questioning of the jurors resumed in open court on January 11. RP 1.

During the trial the State called twenty six witnesses. RP 4-10.

The Devons' neighbors, Monica and Josh Corum, described an observable change in Aden's demeanor and his reaction to Mr. Corum after Jon Devon had moved in with Yolanda and Aden. RP 195-198, 218, 221-227.

Jon and Yolanda's residence was located near the North Valley Hospital. The Hospital's main entrance was visible from their bedroom window. RP 1065.

Jon and Yolanda Devon were married on January 22, 2006 and at that time Yolanda was pregnant. Aden stayed with Yolanda's mother, Debra Garrison, from Friday, January 21st until Tuesday, January 25th. RP 462. Ms. Garrison also worked at North Valley Hospital.

Ms. Garrison stated Aden had some bruising on his legs, arms, and cheek when he came to stay with her, but she did not see any bite marks. RP 464, 468. Ms. Garrison reported that both Jon and Yolanda had admitted to biting Aden on

the arm as a form of discipline. RP 518, 525, 528-529. Aden was returned to Jon and Yolanda's care on January 25.

Craig Cook testified that Jon had gone with him, his wife, Shane McDougal, and a few others to cut wood later that week. Craig Cook rode with Jon to cut wood. Aden did not go with them to cut wood. RP 835-837, 868. Craig Cook saw Jon and Aden the next day at the shop of Shane McDougal. Craig Cook did see Aden trip and fall near a wood pile. He indicated Aden fell with his hands out in front of him. He said Aden had some slivers in his hand and a few small red marks on his face, but that Aden did not cry and resumed normal play afterwards. RP 840-841, 869. Craig Cook said that an hour or more after Aden tripped, the marks on Aden were still small red marks that looked like "bee stings". RP 842, 870.

Craig Cook saw Jon and Aden again on Sunday. He said at that time he saw more substantial injury to Aden's face. RP 845, 871. Craig Cook was later told by Jon Devon that Aden had "also" fallen off a wood pile. RP 846-847.

Shane McDougal testified that he believed they had all gone to cut wood on Thursday (January 27), but agreed that Aden was not present. RP 940-941. Mr. McDougal stated that later in the day after they had cut wood, Yolanda and Aden drove to his shop, but that Aden never got out of the truck that day. RP 941.

Mr. McDougal recalled Jon and Aden coming to his house the next day after cutting wood. He saw Aden trip on a step near his porch onto his hands and

knees, but that he did not hit his head and he got right back up. RP 942-943. In his statement to police, Mr. McDougal stated they had gone wood cutting on Wednesday (January 26); that Aden's trip on the porch occurred on Thursday (January 27); and that he did not see Jon and Aden again until Saturday (January 29), because Mr. McDougal had gone to his grandmother's on Friday (January 28). RP 1427-1428.

Mr. McDougal recalled Jon telling him Aden had a burn, and thought Jon told him the burn was on Aden's arm. Mr. McDougal did not see any burns on Aden, nor did he see Aden burn himself at his shop. RP 943-944. Mr. McDougal stated he saw Jon and Aden again late Saturday evening and did not really notice injury to Aden's face and that Aden had shown him a sliver in his finger. RP 945-946. He later testified that he did see some bruising on the very top of Aden's forehead near the hairline that Jon had pointed out to him. Jon told Mr. McDougal that the injury had happened on Friday. RP 950-951, 956. In his statement to police, Mr. McDougal stated it was his understanding that Aden had tripped over a woodpile, not that he had fallen from one. RP 1426-1427.

Ken Roberts saw Aden and Jon Devon together twice Sunday evening (January 30), sometime after 6:30 pm. Mr. Roberts observed injury to Aden's face. RP 437-441. Aden was in Jon's vehicle in a car seat and wearing a hood and winter clothing. RP 450.

A few days prior to that, Jon had disclosed to Mr. Roberts that he had bitten Aden's face. Mr. Roberts did not recall seeing injury. RP 441-444.

The morning of January 31, when Aden was taken to the North Valley Hospital emergency room, Jon left the hospital and went to Mr. McDougal's residence. Jon told Mr. McDougal Aden had been sick all week, describing it "as little sniffles and wheezy". Jon told him that he wanted to take Aden to the doctor or hospital, but Yolanda and her mom checked him out and that was good enough for him. RP 953.

Jon also told Mr. McDougal that he had stayed up with Aden all that night and the early morning hours (January 30 to January 31) because Aden was wheezing. RP 953. Jon told Mr. McDougal that the hospital had listened to Aden's breathing over the phone and told them to bring him down immediately, and that between their home and the hospital Aden stopped breathing. RP 954. Jon said he noticed the swelling and injury to Aden only after Aden stopped breathing. RP 955.

Mr. McDougal returned with Jon to North Valley Hospital and later traveled to Spokane. When he saw Aden, he stated he couldn't recognize him because his head was so swollen. Mr. McDougal had not seen that extent of injury to Aden during his previous contacts with Jon and Aden. RP 955-956.

Debra Garrison testified she saw Aden on Sunday afternoon (January 30) at Yolanda and Jon's home. She stated that earlier in the day Yolanda had told

her Aden was sick. RP 468-469. When she went to see Aden at the Devon residence, Aden was wearing a long sleeve shirt and jeans or sweat pants. Ms. Garrison said the shades were drawn and the house was kept dark. RP 464, 466. Ms. Garrison saw that Aden had bruising on his face, scratches on his cheek, and an abrasion or burn on his face, that were not present when she had seen him on Tuesday. RP 464-465. She stated Jon told her the mark on Aden's face was a burn from a wood stove at Shane's (McDougal) shop. RP 465, 467. Ms. Garrison was told the other injuries were from Aden falling off a wood pile on Friday. RP 465.

Yolanda's sister, Rosa Gonzales, lived with Jon and Yolanda, and stated she saw Aden on Saturday, that she saw bruising on Aden's forehead and face, and that the injuries were attributed to the wood pile. She said Aden was otherwise acting "perfectly fine". RP 532, 537. Ms. Gonzales said she saw Aden on Sunday. She said Aden and Jon were in the bedroom and Yolanda came home around noon. RP 537-540. Ms. Gonzales stated she was not at the Devons' home when Aden was taken to the hospital, as she had gone to stay at her mother's (Debora Garrison) on Sunday (January 30). RP 566.

Prior to the Aden's death, his mother Yolanda Devon would bring him for medical treatment for "every little thing". RP 166. On Saturday (January 29), Yolanda told co-worker Amy Appel that Aden was sick and vomiting. RP 165-167. She did not tell Ms. Appel anything about Aden falling. RP 167. On Sunday,

Yolanda told Ms. Appel that Aden had a fever and she was giving him Tylenol. Ms. Appel did not see Aden until Tuesday (February 1) at Sacred Heart Hospital. Ms. Appel, an emergency room RN, described the numerous injuries she observed, including: bruising and swelling on his forehead, abrasions or buns to his face, and a bite mark to his face and calf. RP 171-175. Yolanda had disclosed to Ms. Appel that she had bit Aden, but did not say where.

Yolanda's supervisor, charge nurse Shirley Ann Keith, stated she worked with Yolanda on Saturday and Sunday (January 29 and 30). RP 233-234. On Saturday, Yolanda told Ms. Keith "If you had seen Aden, you would think we beat him." Yolanda told Ms. Keith that Aden had a bruise on his face, but did not elaborate. Yolanda told Ms. Keith Aden had fallen from a wood pile while cutting wood with Jon. RP 237-238.

Yolanda was late to work on Sunday, explaining that Aden had been vomiting and that it had started the previous night. RP 233-235. On Sunday, Yolanda left work at least twice to go home. She told Ms. Keith later that Aden was better and that Jon had plans to take Aden to Oroville later that day. RP 236-237.

Rebecca Silverthorne, an RN at North Valley Hospital, saw Aden the week before his death and that he seemed okay. RP 590. She felt Aden had become more withdrawn since the time Jon had moved in with Yolanda. RP 589.

Ms. Silverthorne was at work on Saturday (January 29) and was told by Yolanda that Jon had taken Aden wood cutting and that Aden had been tripping over logs and that he had quite a few bruises on his face and that he looked pretty bad. RP 590-591. Yolanda stated Aden had bruises to his face and head and looked bad. Yolanda did not indicate Aden was sick or throwing up. RP 591-592. Ms. Silverthorne testified that initially she was told Aden was injured while cutting wood, when he tripped over logs. She testified that the story about falling from a wood pile did not come about until later when she went to Spokane. She initially was told the wood pile story from Debra Garrison. RP 603-604.

Ms. Silverthorne saw Aden at Sacred Heart on Tuesday (February 1) and observed the numerous injuries he had suffered. She indicated that she was told the burns to Aden's thighs and his face were from a wood stove. Ms. Silverthorne had treated person for wood stove burns. She felt that because of the way the burns to Aden wrapped around, they did not look to be from a wood stove. RP 594, 599.

Jamie Dahlquist, a clinical nurse manager, knew Yolanda for approximately two years prior to Aden's death. At North Valley Hospital, Ms. Dahlquist shared an office with Yolanda's mother, Debra Garrison. Ms. Dahlquist had known Aden since the time he was born. RP 250-253. She stated she also noticed a change in Aden over the weeks leading up to his death. RP 253-254.

Ms. Dahlquist testified that she was called to the hospital early in the morning on January 31. RP 259-260. When she first saw Aden, she thought he had been in a traumatic accident, due to the extent of his visible injuries. RP 260, 282.

Bari Ikawa, a lab technician, was a part-time roommate of the Devons until she moved out in January 2005. RP 670-671. Ms. Ikawa was working at North Valley Hospital on Sunday (January 30), when Yolanda came to work. Yolanda told her Aden had been throwing up all night and that she had been up with him all night. Later that day, Yolanda told Ms. Ikawa that there had been a bad accident with Aden on Friday when Aden was at work with Jon. Yolanda said Aden had bruises, but did not elaborate on any other injuries or burns. RP 676-677. Yolanda told Ms. Ikawa that she did not intend to take Aden to the doctor; that she was afraid to bring him in because of what people might think. RP 693.

Ms. Ikawa also spoke to Debra Garrison on Sunday (January 30) between noon and 2:00 pm, while they were at work. RP 681,683. She said Ms. Garrison came into the lab and said she had just seen Yolanda and had pissed her off and made her cry and that she didn't give a shit. Ms. Ikawa asked Ms. Garrison why she made Yolanda cry. Ms. Garrison said she hadn't seen Aden in a week and that she didn't understand why he was being kept from her. Ms. Garrison told Ms. Ikawa that when she would go to the house, they would take Aden into the back room, or he wouldn't be there, or that she wouldn't be allowed to see him. RP 682.

Peggy Murray was at work at the North Valley Hospital admitting desk on Sunday (January 30) when Yolanda clocked in. Yolanda told Ms. Murray she was late because Aden had thrown up in their bed and that Jon had gotten in the habit of taking Aden to bed with them. Yolanda said Jon couldn't take Aden to work anymore because he had so many bruises. RP 813. Yolanda did not say anything about a specific incident or a fall. RP 815.

On Monday morning (January 31), RN Jack Smith was working at North Valley Hospital in the ER. He was working with Alice Kamanie and Carol May. RP 698-699. Around 3:10 am, Yolanda called the hospital and spoke with Ms. Kamanie. Mr. Smith listened to the conversation. Yolanda asked for Jan Hawkins, but was told Ms. Hawkins was not working at that time. Yolanda asked who else was working and was told who else was there by Ms. Kamanie. Yolanda then asked to speak with Carol May. Ms. Kamanie told Yolanda that Ms. May was not available. There was a long pause and then Yolanda said her child wasn't breathing right and asked that if she put the phone up to the child, could they listen to his breathing over the phone. RP 702-705, 716. Ms. Kamanie told Yolanda they could not listen to the child over the phone, and she could bring him to the hospital. RP 706. Yolanda was hesitant and seemed reluctant to bring the child in.

Shortly thereafter, Ms. May came in and got on the phone with Yolanda. Yolanda told Ms. May that Aden was having trouble breathing. Ms. May asked

Yolanda if she had taken him to the bathroom and turned on the steam, or taken him outside in the cold, to help facilitate breathing. Yolanda said she had not and hesitated. Ms. May asked "you want to bring him don't you?" Yolanda said yes. RP 706-707, 974-975.

Ms. May said Yolanda did not sound panicked on the phone. RP 975-976. Yolanda did not say anything about the child having injury to his head or throwing up. Mr. Smith and Ms. May testified that based on the phone conversation of Yolanda, they did not believe there was an emergency or a critical situation. RP 708-709, 977.

However, within a few minutes, Mr. Smith observed a pick up truck pull up near the door and saw Yolanda jump out holding a limp child. RP 710. Yolanda told Mr. Smith the child was not breathing. Mr. Smith found Aden was in full cardiac arrest and appeared to have been so for some time. Upon arrival, Aden was grayish in color, he was absolutely cold to the touch, his eyes were fixed and dilate and dry, and his mouth was dry and caked with mucus. RP 712-713, 759, 977. ER Dr. Richard Welton summed it up by saying "He basically appeared dead". RP 759.

When Mr. Smith was first trying to ventilate Aden, Yolanda told him she thought Aden was choking on something. RP 714, 978-979. Mr. Smith used a technique to clear the airway, but found there was nothing obstructing Aden's

airway. All that came up were thick tracheal secretions, which build up as a person dies. RP 714-715.

Among the numerous injuries observed to Aden were: bruises on his forehead, "one on top of the other"; a visible subconjunctival hemorrhage; apparent burns to both sides of his face; and burns to both of his thighs. RP 760-761, 768-769, 798. During resuscitation efforts, ER providers had a difficult time finding a vein to start an IV due to Aden's low body temperature. Aden's head was too swollen and bruised to attempt inserting an IV into his head. RP 722-723, 721, 735-736. After ½ hour of being treated in the ER, Aden's body temperature was still only 95 degrees. RP 769-770, 789-790. Aden injuries were also photographed approximately ½ hour after his arrival at North Valley Hospital. RP 307.

Aden did not regain consciousness, or the ability to breath on his own. RP 765. He was flown to Sacred Heart Hospital in Spokane. RP 283-291.

Pediatrician Dr. Alan Hendrickson was called to consult on Aden after his arrival at Sacred Heart. RP 322-23, 332. Dr. Hendrickson is called to consult by medical providers when there is serious injury suspected to be the result of abuse. RP 328-329.

Dr. Hendrickson observed that Aden had extensive and multiple retinal hemorrhages, extensive bruising to his head, scrapes, burns, and bite marks. RP 336, 359. Dr. Hendrickson testified he could only recall one or two case he had seen that had the type of extensive injuries Aden had suffered. RP 337. Dr.

Hendrickson testified about the injuries he documented on Aden. He indicated Aden had "...obvious bruises and scrape marks and scratches pretty much everywhere". RP 339. Aden had extensive injury, including injury all around his head; bruising on his ear, scrape or burn marks on his face; burn marks on his legs; pattern bruising and bites on his legs and arms; bruising to his back; bruising to his genital area; bruising to his rib area and abdomen; bruising to his buttocks; scratches and bruising to his hands; bruising to his feet and toes. The bruising appeared to be of differing ages RP 339-351. The burns to Aden's legs appeared to be similar in nature, size, and age as the burns on Aden's face. RP 356.

Dr. Hendrickson testified that the bruising to both sides of Aden's head was not consistent with any kind of simple fall. Dr. Hendrickson described that the location, nature, and shape of many of the injuries indicated they were clearly inflicted injury and not accidental. He testified that the type of retinal hemorrhages and brain injury Aden suffered could not have resulted from a direct or accidental blow to the head. RP 341-347, 361, 377-378, 389.

Dr. Caroline Shea, a pediatric othomalogist, testified that she evaluated Aden on January 31st, at Sacred Heart Hospital. RP 398, 401. Aden's pupils were fixed and dilated, indicative of significant brain injury. RP 403. Aden had retinal hemorrhages too numerous to count, of varying types, and were indicative of significant force or trauma. RP 404-405. Hemorrhages were present in different layers of the Aden's retinas. Dr. Shea testified she has only seen such dramatic

hemorrhages in all the different layers in cases of non-accidental, inflicted injury. RP 411, 412-413. Dr. Shea testified some of the hemorrhages had fibrin in them, indicating they were older than the hemorrhages without fibrin. RP 408, 414. The hemorrhages with fibrin would have had to have occurred at least 24 hours or more before Dr. Shea's evaluation on January 31. RP 421. The hemorrhages were not consistent with a short fall of a couple of feet. RP 416. The hemorrhages sustained by Aden were more numerous than even cases where someone was ejected from a motor vehicle or fell from a building. RP 417. Dr. Shea testified the quantity of hemorrhages Aden suffered would have resulted from prolonged, repetitive injury. RP 417. The retinal hemorrhages that were present would not have been caused by intracranial pressure or subdural hematoma, and could not have been from an alleged fall from a wood pile. RP 421, 425, 426. The only other cases Dr. Shea had seen with similar quantities of hemorrhages were from admitted shaking cases.

Dr. Gregory McDonald, a pediatric neurologist, also evaluated Aden on January 31st. Dr. McDonald testified that Aden's CT scan revealed subdural hematoma primarily in the right side of the brain, indicating a focal injury to his brain. RP 612, 623, 664. From his external exam, he noted numerous injuries, including: a bite mark on Aden's right check; bruising and swelling on his forehead; bruising to the side of his head; and bruises on his face that appeared to be of different ages; burn marks that he estimated to be approximately a week old; bite

marks on his calf; multiple bruises on his arms and legs of differing ages; scratch marks and scrapes to both hands; and a small circular burn mark to his upper left chest. RP 629-632.

Aden was comatose, had lost all brain stem reflexes, and was brain dead. RP 638. Dr. McDonald indicated Aden suffered multiple types of trauma occurring both relatively recently and from a longer time ago. RP 638-639. At the time Aden received the brain injury he would have likely been rendered unconscious and would not have had a lucid interval. RP 659. Dr. McDonald was asked about the level of injury observed on Aden compared to what one would expect to see as a result of a short fall from a wood pile:

> *Q. Now the injury in this case, that you observed with Aden, would that have been consistent with an accidental injury you would expect to see in an accidental fall of a height or limited height?*
>
> *A. No. I don't think so.*
>
> *Q. And why is that?*
>
> *A. I think that, you know, the degree of injury to this child's brain is more than you could--would expect to see or could reasonably attribute to a minor fall or a minor injury, unless your wood pile's here and much taller than ours in Spokane, I can't imagine how high a wood pile would produce this degree of right hemisphere brain injury.*
>
> *Q. Now is it--is that also a factor when making that determination or that statement, are you also taking into account the other observations you made about Aden as far as other injuries and so forth?*
>
> *A. Very much so. The child presented with severe brain injury. No good story to explain it. On examination he has clear evidence of recent and past physical harm that was inflicted upon him and so I--it's*

unavoidable to use that in the formulation that this occurred as a result of trauma to his head. In my own mind, I would say most likely non-accidental trauma or child abuse.

RP 642-643. Dr. McDonald indicated Aden's level of abusive injuries was the most severe he had ever seen. RP 643. Moreover, the amount of retinal hemorrhages indicted significant force was applied to Aden's head either by shaking or repeated blows. RP 663.

Dr. Marco Ross, Spokane County Deputy Medical Examiner, performed the autopsy on Aden. He cataloged numerous injuries to all areas of Aden's body during the external exam. See RP 1083 through 1102. From the internal exam, and from the transplant surgeon's reports, Dr. Ross learned that Aden had also suffered abdominal injury involving his small intestine, kidney, stomach, and lungs. RP 1102-1107. Such injury would have required significant blunt force trauma. RP 1144-1145.

Examination of Aden's skull and brain revealed deep scalp hemorrhages, and subdural hemorrhage. RP 1107-1110. The focal injury causing the brain hemorrhage was estimated to be no more than one to three days from the date of Aden's cardiac death on February 2, 2005 (when he was taken off life support). See RP 1102. Dr. Ross determined the manner of Aden's death was traumatic brain injury and the cause of his death to be homicide. Aden was abused and

ultimately died as a result of the abusive injuries. RP 1148-1149. Aden would not have had any significant period of lucidity following the brain injury. RP 1184.

Detective Mike Worden testified about the statement he received from Yolanda Devon at Sacred Heart. She stated: Aden had scraped his nose and cheek from falling off a pile while wood cutting when they were loading trucks. RP 1008. She said she noticed bruises on Aden's face on Saturday (January 29). She guessed the marks on Aden came form his running into walls and a couple of falls. RP 1010. She did not think the bruises were serious or any big deal. RP 1012. She said she bit Aden on the arm, but not on the leg. RP 1010. She said the big bruise to Aden's forehead really started to show at the hospital. RP 1011-1012.

Detective Kreg Sloan obtained another statement from Yolanda on February 4, 2005. She stated she was told Aden had fallen from a wood pile when they were up in the woods on Friday or Saturday. RP 1431-1432. She indicated he rolled off the pile and in seeing him afterward, he seemed normal. RP 1432. She stated she first saw injuries around December 28th (Friday) but they weren't that bad. She noticed burns on Sunday morning. RP 1434. She didn't see the burns earlier when Aden was throwing up because she left the lights off. RP 1438. She claimed not to have seen any bite marks or significant bruising until Aden was taken to the hospital. RP 1436. When she had called the hospital, she asked for different people because she wanted to find someone she was comfortable with or

knew. RP 1439. She said when Aden came home Sunday night (with Jon) she didn't notice any difficulty with his breathing. RP 1441. Aden wasn't potty trained and he did not get up and get out of bed at nighttime. RP 1442. When asked why she never reported the injuries she was seeing, she said she thought people would think she was beating her child. RP 1735.

Detective Sloan also testified about the process and timing of obtaining search warrants during the investigation.

> *A. Okay. The--Detective Worden got a search warrant issued by the Court in Okanogan County and then the first place that we went with the search warrant was on March 1 and that was the shop at 99 Sawtell Road, which was the McDougall residence. And during that, we took photographs and measurements and assessed items for evidentiary value.*
>
> *Q. And following that was there another location searched?*
>
> *A. The next one we did was on the following day, which I believe was March 2. We executed a search warrant at the Debra Garrison residence at 51 Oakes in the Crumbacher area.*
>
> *Q. And was there another location also?*
>
> *A. And the last location, physical location with a search warrant--we went to--excuse me, I went to the residence in Tonasket, the 208-A Tonasket Avenue in Tonasket, and served a search warrant there and I believe that was on the third and I went back on the fourth and finished it.*
>
> *Q. Of?*
>
> *A. March.*
>
> *Q. Okay now is that the residence of Jon and Yolanda Devon at the time this incident occurred?*
>
> *A. Yes it was.*

Q. Why--why was that done in March and not at an earlier point?

A. Well there's a couple reasons. Number one, when we initially--when I initially started helping Sergeant Worden on this, our first priority was to contact people--witnesses, potential witnesses, and gather all that we could as soon as after the fact. That was our primary emphasis in the beginning. Through the investigation, that first week, I think it was on Friday the fourth of February, I had received information from a neighbor in the area that told me that the two prior nights, which would have been the second and third of February, Wednesday and Thursday night, during the evening hours, people downstairs in the Devon apartment or house, had been moving things out during the night. And at that point, we were still developing witnesses, contacting witnesses, and obtaining statements. And so our feeling at the time was that they started moving things so shortly after that if there's anything--a smoking gun to use an example, was probably moved and so we proceeded to do the search warrant as soon as we could get to it in our investigation.

Q. And in fact, were--was that confirmed then that they had vacated the—

A. --yes. When I served the search warrant there in March, the house had been vacated.

RP 1034-1036. Detectives did not find anything on the woodstoves, during the search of Shane McDougal's shop, that matched the burn pattern on the sides of Aden's face and his thighs. RP 1052-1054. The search of the vacated Devon residence also failed to turn up any heater, stove, or heat source consistent with the burns on Aden. RP 1063.

On January 26, 2006, the jury found Jon Devon guilty of Homicide by Abuse. The jury found Yolanda Devon guilty of the lesser included offense of Manslaughter 2nd Degree. The jury did not find Yolanda "not guilty" of Homicide by

Abuse or Manslaughter 1st Degree, but instead left verdict forms A and B blank. RP 1959.

D. ARGUMENT

1. Violation of Right to Public Trial

a. Defendants' right to a public trial was unharmed

The public trial guarantee is one created specifically for the benefit of the defendant. Gannett Co. v. DePasquale, 443 U.S. 368, 380, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979); see also, In re Orange, 152 Wn.2d 795, 805, 100 P.3d 291 (2004) (recognizing that Article 1, section 22, guarantee of public trial right for criminal defendant mirrors the public's right, under Article 1, section 10, to open judicial proceedings). A defendant benefits from the right to public trial in a number of specific, recognized ways. As the U.S. Supreme Court has noted:

> "[T]he public may see (that the accused) is fairly dealt with and not unjustly condemned, and... the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions."

In re Oliver, 333 U.S. 257, 270 n.25, 68 S. Ct. 499, 92 L. Ed. 682 (1948) (citation omitted). The publicity of an open trial may also encourage key witnesses who are unknown to the parties to come forward and provide testimony, and discourage perjury due to the enhanced risk of popular opprobrium. Waller v. Georgia, 467 U.S. 39, 46 104 S. Ct. 2210, 81 L. Ed. 2d (1984).

Essentially, the guarantee is a "safeguard against any attempt to employ... courts as instruments of persecution". Oliver, 333 U.S. at 270; see also State v. Rivera, 108 Wn. App. 645, 652, 32 P.3d 292 (2001) (noting that the "central aim of the public trial guarantee is to ensure that a defendant is treated fairly by allowing the public to observe the defendant's treatment firsthand."). Thus, the right to a public trial reaches beyond the evidentiary stage of the trial itself to pre-trial suppression hearings, the empanelment of the jury, and instructions and arguments to the jury. See Waller, 467 U.S. at 46-47 (observing that suppression hearings can often be as important as the trial itself); United States v. Abuhamra, 389 F.3d 309, 323-24 (2nd Cir. 2004) (noting that any stage at which evidentiary issues are contested are matters of public concern, and that openness encourages unknown witnesses to step forward); People v. Teitlebaum, 163 Cal. App. 2d 184, 329 P.2d 157, 172 (Cal. Dist. Ct. App. 1958) (recognizing that empanelment and argument directly relate to matters "advanced for consideration of the triers of fact.").

It bears remembering the benefits that the public trial right is meant to guarantee -- ensuring a fair trial for the defendant, reminding the prosecutor and judge of their responsibilities in the defendant's trial, encouraging witnesses to come forward, and discouraging perjury. E.g., State v. Rivera, 108 Wn. App. 645, 653, 32 P.3d 292 (2001), review denied 146 Wn.2d 1006 (2002).

The public trial right should not be so broadly interpreted or applied as to hinder or impair the defendant's *individual* right to a fair trial and impartial jury. The right to a fair and public trial is not ensured by requiring every instance of a proceeding be open to the public to the detriment of a fair trial, as in this case, especially when it does not pertain to any contested or evidentiary matter.

It is well established that sidebars, bench conferences, and chambers hearings may be closed to both the defendant and the public without running afoul of either's right to be present. In other words, the right to a public trial is not absolute in all respects with regard to all phases of judicial proceedings. It would be a mistake to presume that the public's exclusion from every proceeding in the course of a prosecution amounts to a deprivation of a defendant's right to a public trial. To do so would be to fall victim to the trap identified by Justice Cardozo, in Snyder v. Massachusetts:

> A fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts of (a constitutional amendment), a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed into the rule because it is fitted to the words, through related faintly, if at all, to the reasons that brought the rule into existence.

Snyder, 291 U.S. at 114.

This Court must consider whether the trial court's actions in any way affected the protections that the public trial right was meant to guarantee for the defendants.

b. There was no violation of the right to public trial where the court conducted limited individual questioning. Alternatively, the Bone-Club factors were satisfied.

Defendants argue that their right to a public trial was violated under Article I, §22 of the Washington Constitution. That provision is entitled "Rights of the Accused". In very limited part, it says: "In criminal prosecutions the accused shall have the right ... to have a speedy public trial by an impartial jury . . . ." Jury selection is part of the public trial. In re Orange, 152 Wn.2d at 804.

Both the Sixth Amendment of the U.S. Constitution and Article 1, section 22, of the Washington Constitution protect a criminal defendant's right to a public trial. Before a court may close a hearing that could implicate a defendant's public trial right, it must engage in a multi-factor analysis, considering the interests justifying the potential closure, the tailoring of means to protect those interests, and alternatives to excluding the public. See Waller, 467 U.S. at 48; State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

However, a defendant is free to waive any of the rights guaranteed by the constitutions. For instance, an accused can waive the right to counsel and represent himself. Faretta v. California, 422 U.S. 806, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975). "A waiver is the intentional relinquishment of a known right or

privilege." State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978), quoting Johnson v. Zerbst, 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938).

In the present case, the defendants proposed a supplemental jury questionnaire based on concerns about pre-trial publicity and the nature of the charges. Defendants also brought a motion to sequester the jury for those same reasons. The defendant's were both present for the individual questioning of the jurors about their responses to the questionnaires. The individual questioning was suggested by, and for the benefit of, the defendants in order to select a fair, unbiased, and impartial jury to hear the case.[1]

Juror questionnaires are typically considered private documents. Indeed, GR 31(j) indicates that access to juror information, other than the juror's name, can only be done by petitioning the court upon a showing of good cause. If the answers in such questionnaires are private, there can be no public right to watch the parties inquire into these private matters. Defendants have resented no authority suggesting that inquiry into delicate matters is a part of the public trial that must be conducted in the open.

The defendants' argument amounts to a challenge to conducting in-chambers discussion with jurors. However, there is no authority for such a broad rule. It is clear that there is no right of public access to matters that are only

[1] See State v. Jackson, 111 Wn.App. 660, 672-73, 46 P.3d 257 (2002)(individual voir dire of all jurors to ascertain bias

ministerial in nature. E.g., State v. Rivera, 108 Wn. App. 645, 652-653 (2002) (holding no right to public access of chambers conference dealing juror's complaint). Further inquiry into private matters likewise should be considered ministerial and non-public.

Even if the in chambers questioning is considered "public", there is a sufficient record to justify what amounts to a limited or partial "closure" of the courtroom.

Courts apply a five factor test, borrowed from Seattle Times v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982), and Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 848 P.2d 1258 (1993), to determine the propriety of closing a courtroom despite the guarantee of Article I, §22. State v. Bone-Club, 128 Wn.2d 254, 258-259, 906 P.2d 325 (1995). The five factors to be considered are:

> 1. The proponent of the 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 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.

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and prejudice was tenable exercise of discretion).

5. The order must be no broader in its application or duration than necessary to serve its purpose.

Id.

Application of these standards in the present case shows the trial court was justified in a partial or limited "closure" of the courtroom for the individual voir dire.

The first factor, the purpose of the closure, was for the defendants' benefit in picking a fair jury. The defendants raised the issue of individual questioning and moved to sequester jurors out of concern that jurors may be tainted. Due to the defendant's concerns about being able to select a fair jury, the first factor heavily favored closure of the courtroom. Individual questioning was necessitated by defendants' motion and questionnaire, in order to avoid the risk of tainting the entire jury panel in open court.

The second factor, permitting anyone present when the closure is made an opportunity to object, was met. The initial questioning of the jury panel was conducted in open court. There was no closure of the courtroom and it was open to any member of the public. See 1/10/06 RP. The trial judge stated in open court on the record that there would be individual questioning of jurors conducted. 1/10/06 RP 25. Jurors completed their questionnaires in court and the judge reconvened court again before beginning individual questioning. 1/10/06 RP, p. 19, 23-26. There was no objection by anyone to the proposed individual questioning, despite ample opportunity to do so. 1/10/06 RP, p. 25-30; See also

RP Individual Jury Questioning, Vol. I and II. At the conclusion of individual questioning, questioning of the entire panel again resumed in open court. See 1/10/06 RP; RP 1.

The Bone-Club court cited to Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982), for the proposition that "an *opportunity* to object holds no practical meaning unless the court informs potential objectors of the nature of the asserted interest (emphasis added). Bone-Club at 261 (citing Ishikawa at 39). The cases require an opportunity to object, not an invitation. In Ishikawa, the court stated:

> Anyone present when the closure [and/or sealing] motion is made must be given an opportunity to object to the suggested restriction. For this opportunity to have meaning, the proponent must have stated the grounds for the motion with reasonable specificity, consistent with the protection of the right sought to be protected. *At a minimum, potential objectors should have sufficient information to be able to appreciate the damages which would result from free access to the proceeding and/or records*. This knowledge would enable the potential objector to better evaluate whether or not to object and on what grounds to base its opposition. (Emphasis added; internal citations omitted.)

Ishikawa at 38. The record in the present case included repeated warnings to the jury to avoid discussing the case, exposure to media, etc. It also included a discussion with a juror who responded to the judge's question about following the law and the presumption of innocence. 1/10/06 RP, p. 17-18. The juror began to disclose what he read and was stopped by the judge, who advised that some of the questions on the questionnaire would ask jurors if they had impressions of the

case and that they would be able to express those impressions in the questionnaire. 1/10/06 RP, p. 17-18.

The judge also explained that the questionnaires would be used for limited purpose of selecting the jury and used only by the court and attorneys. 1/10/06 RP, p. 23. The jurors were then advised that individual questioning would be conducted based on the questionnaires. 1/10/06 RP, p. 25. The judge also invited and responded to questions about the individual questioning schedule. 1/10/06 RP, p. 26-29.

During jury selection, the judge also asked if there were any jurors who were told or overheard information from another juror who was excused, as to why they were excused. RP 15. One juror responded in the affirmative, and a second session of individual questioning of that juror followed. RP 15, 56.

The record was sufficient to demonstrate that potential objectors present were provided with the opportunity, and with sufficient information, to object to the limited restriction of individual questioning. There is a sufficient record to support the Respondent's argument regarding the second Bone-Club factor.

The third factor is whether the court uses the least restrictive means of achieving its goals. That was done in the present case. There was no way to question potential jurors with regard to their written answers except for making individual inquiry. Individual questioning was necessary to avoid tainting the entire panel in light of the change of venue motion. The physical layout of the Okanogan

County Superior Court and courthouse does not permit, for example, holding large groups of jurors in another location and bringing jurors who are subject to individual questioning into the open courtroom.[2] Moreover, in this case, general questions were conducted in open court, both before and after the individual questioning.

The fourth factor, the weighing of the interests, clearly favored "closure". The defendants' were the proponents of closure to ensure selection of a fair jury. In this case, the defendants' right to a fair trial was substantially greater than the right to have the public present for a limited portion of individual questioning. The need of defendants to obtain a fair jury by discerning individual jurors' exposure to publicity and their potential prejudices related to the nature of the crime, would substantially conflict with the right to have *all* questioning done in open court. The

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[2] There is no available nearby physical space hold the large jury panel outside of the courtroom for the number of days necessary to complete jury selection. The record reflects that during the questioning, jurors had to remain in the courtroom despite tight seating. 1/10/06 RP, p. 25-26, 29; RP 11, 14. More importantly, the parties do not have the ability to conduct side bars, make and discuss challenges, etc. in the open court room and at the same time create a sufficient digital recorded record. To do so would require clearing the courtroom each time. See State v. Clinkenbeard, 130 Wn. App. 552, 571, 123 P.3d 872 (2005). The record in the present case contains reference to the limitations of the electronic recording system, and that sidebars and objections could not be recorded with the jury present. See e.g., RP 15, 59, 188, 208, 999-1000.

defendants' right to have a fair trial certainly outweighed the public's minimal interest in the jurors' individual private responses.

The fifth factor was also satisfied, in that the questioning of each juror was brief and limited. The entire panel was subject to questioning in open court before and after the individual questioning. The limited closure was not more broad or extensive than was necessary.

The five-factor test clearly favored the limited or partial closing of the courtroom. The court did not err in permitting individual voir dire outside of the public eye.

To find that the use of limited individual questioning is a violation of the right to a public trial (in a case involving heinous allegations and a documented concern about pre trial publicity tainting jurors) would create a Hobson's choice for the court. The court risked either: jeopardizing defendants' right to receive a fair trial if the entire panel were tainted and/or additional damaging publicity were created by conducting the questioning in public; or it risked violating the right to a public trial by acceding to the defendants' desire to question individual jurors in chambers.

c. The issue of a violation of public trial was invited error where defendants were the proponents of the limited closure.

A defendant does not waive his right to appeal the closure of the courtroom by failing to lodge a contemporaneous objection. State v. Bone-Club, 128 Wn.2d

at 257 (citing State v. Marsh, 126 Wash. 142, 146-47, 217 P. 705 (1923). As discussed above, however, a defendant can still waive this constitutional right.

Additionally, the doctrine of invited error "prohibits a party from setting up an error at trial and then complaining of it on appeal." State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), overruled on other grounds; State v. Olson, 126 Wn.2d 315, 893 P.2d 629 (1995). The doctrine of invited error is applicable to cases involving claims of improper closure.

Defendants and their counsel should not be entitled to permit a potential structural error to occur, and then proceed through trial, comforted by the fact that their tacit consent to closure of the courtroom will not be held against them should they be convicted, when they seek automatic reversal on appeal. As Justice Frankfurter observed, in Levine v. United States, 362 U.S. 610, 619-20, 80 S. Ct. 1038, 4 L. Ed. 2d 989 (1960), a case involving the closure of a criminal contempt proceeding where there were no signs whatsoever that the court abused the closure to the defendant's disadvantage:

> Due regard generally for the public nature of the judicial process does not require disregard of the solid demands of the fair administration of justice in favor of a party who, at the appropriate time and acting under advice of counsel, saw no disregard of a right, but raises an abstract claim only as an afterthought on appeal.

In the present case, there was invited error. Similarly, the defendants' subsequent claim of violation of public trial should be deemed to have been waived. A valid waiver does not require an explicit statement of waiver by the

defendant. North Carolina v. Butler, 441 U.S. 369, 373-76, 99 S. Ct. 1755, 1757-59, 60 L. Ed. 2d 286 (1979); State v. Thomas, 128 Wn.2d 553, 558-561, 910 P.2d 475 (1996) (waiver of right to testify at trial). Rather, the waiver can be inferred from conduct. State v. Thomas, supra at 559.

Appellate courts have found arguments to be waived for appeal by the apparent conscious decision not to pursue an obvious issue in the trial court. For instance, in State v. Valladares, 99 Wn.2d 663, 664 P.2d 508 (1983), the defense had filed a pre-trial motion to suppress evidence, but then withdrew the motion. When defendant tried to raise the issue on appeal, the court declined to hear the motion as it was "waived or abandoned". Id. at 672. In State v. Walton, 76 Wn. App. 364, 884 P.2d 1348 (1994), review denied 126 Wn.2d 1024 (1995), defendant failed to challenge at trial the admission of a videotaped deposition even though his counsel had stated at the time of the deposition that the defense might object to its use at trial. Division One declined to hear the constitutional challenge on appeal, concluding that it was not appropriate to hear the issue under RAP 2.5(a)(3) because the defense "consciously decided not to raise" the issue at trial. Id. at 370. "A conscious decision not to raise a constitutional issue at trial effectively serves as an affirmative waiver . . . ." Id.

In the instant case, defendants were aware of their right to public trial. Defendants participated in the individual questioning as it was clearly in their best interest. The defendant's have failed to demonstrate any prejudice flowing from

questioning of jurors individually. The trial court sought to address defendants' expressed concerns of potentially tainted jurors in the particular venue by allowing a supplemental questionnaire and the limited individual questioning. The process was essential to preserve the higher values of providing defendants with a fair trial.

The defendants should be deemed to have waived any subsequent challenge to the process that was intended to safeguard their right to a fair trial.

2. The jury instruction for manslaughter and accomplice liability accurately stated the law and did not mislead the jury or relieve the State of its burden.

a. The accomplice instruction given did not impose a duty to act.

Appellant Yolanda Devon claims the accomplice jury instructions permitted the jury to find her guilty based on an improper legal basis, i.e. that as an accomplice she had a duty to act.

Jury instructions are properly given if they are supported by evidence sufficient to permit a rational trier of fact to convict the defendant. See State v. Munden, 81 Wn. App. 192, 195, 913 P.2d 421 (1996) (stating, "It is error to submit . . . a theory for which there is insufficient evidence.") (citing State v. Benn, 120 Wn.2d 631, 654, 845 P.2d 289, cert. denied, 510 U.S. 944, 126 L. Ed. 2d 331, 114 S. Ct. 382 (1993) (requiring that instructions be supported by the evidence)). To

survive a challenge to its sufficiency, evidence need only be sufficient to permit conviction; no more can be required to permit the giving of an instruction.

The appellant Yolanda Devon cites to State v. Jackson 137 Wn.2d 712, 976 P.2d 1229 (1999) for the proposition that accomplice liability does not attach to a person's failure to act. The same argument was raised in State v. Berube, 150 Wn.2d 498 (2003). The defendant makes the same error in her argument as the defendant in Berube.

In Jackson, a couple was charged with murdering their foster child. The trial court instructed the jury that "[u]nless there is a legal duty to act, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice; *a legal duty exists for a parent to come to the aid of their small children if physically capable of doing so*." (emphasis added). Jackson, 137 Wn.2d at 719. Because the Legislature deliberately declined to adopt language, extending accomplice liability to a failure to act, our Supreme Court held that *accomplice* liability in Washington did not attach if a party simply failed to act. Jackson, 137 Wn.2d at 723-24.

The instruction given in Jackson incorrectly defined accomplice liability. Unlike the accomplice liability instruction in Jackson, that stated there *was* a legal duty to act, the accomplice instruction in this case did not. CP-D 371.

Proximate cause, on the other hand, is an element of homicide by abuse or manslaughter. It is *not* an element of accomplice liability and does not pertain to

accomplice liability. One can be an accomplice without having proximately caused any injury. Conversely, one can proximately cause the death of a child without being an accomplice to homicide by abuse.

The accomplice liability instruction in this case, like in Berube, defined accomplice liability solely in affirmative terms; it does not allow a jury to impose liability for a defendant's failure to act. The last sentence of the accomplice liability instruction expressly absolves either defendant from accomplice liability if he or she simply failed act: "...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-D 370-71.

The accomplice instruction in this case did not allow finding guilt on an improper legal basis.

b. Any error in the accomplice instruction was harmless and could not have relieved the State of its burden

Appellant Yolanda Devon claims that the accomplice instruction given was erroneous when it referred to "a crime" rather than "the crime". General knowledge of "the crime" is sufficient for conviction under the accomplice liability statute; knowledge by the accomplice that the principal intends to commit "a crime" does not impose strict liability for any and all offenses that follow. See State v. Roberts, 142 Wn.2d 471, 509-13, 14 P.3d 713 (2000); see also, State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000) (the fact that a purported accomplice knows that the

principal intends to commit "'a crime'" does not necessarily mean that accomplice liability attaches for any and all offenses ultimately committed by the principal). However, if the accomplice jury instruction was erroneous, it was a harmless error.

In State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002), an identical accomplice liability jury instruction was given. The court found that although it was a misstatement of the law to instruct a jury that a person is an accomplice if he or she acts with knowledge that his or her actions will promote any crime, not every omission or misstatement in a jury instruction relieves the State of its burden so as to require reversal. Id. at 339.

An instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. Brown, 147 Wn.2d at 340 (citing Neder v. United States, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999))

Under the test for harmless error adopted in Brown, it must appear beyond a reasonable doubt that the error did not contribute to the ultimate verdict. Brown, 147 Wn.2d at 341. When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence. Id.

The error can also be held harmless if accomplice liability was considered by the jury only in terms of the charged crimes. Berube, 150 Wn.2d at 506 (citing State v. Borrero, 147 Wn.2d 353, 365, 58 P.3d 245 (2002)). If the record supports

a finding that the jury verdict would be the same absent the error, harmless error may be found. Id.

In the present case, both defendants were charged with homicide by abuse for the death of Aden. Jon Devon was convicted of that offense. There were no other uncharged crimes or offenses at issue for the jury to consider. The accomplice jury instruction therefore could not have relieved the State of its burden. Any error was harmless.

3. There was sufficient evidence to establish guilt beyond a reasonable doubt

a. Substantial evidence of abuse inflicted upon Aden established guilt beyond a reasonable doubt for both defendants

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. E.g., State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

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. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn there from. Salinas, 119 Wn.2d at 201.

The reviewing court is not required to determine whether the evidence at trial established guilt beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Whether there is evidence legally sufficient to go to the jury is a question of law for the courts; but, when there is substantial evidence, and when that evidence is conflicting or is of such a character that reasonable minds may differ, it is the function and province of the jury to weigh the evidence, to determine the credibility of the witnesses, and to decide the disputed questions of fact. State v. Hagler, 74 Wn.App. 232, 235, 872 P.2d 85 (1994), (citing State v. Theroff, 25 Wn.App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980). Credibility determinations are for the trier of fact and cannot be reviewed on appeal. E.g., State v. Romero, 113 Wn. App. 779, 798 (2002). Additionally, the reviewing court considers circumstantial evidence to be as equally reliable as direct evidence. Id.

Contrary to this standard of review, appellants are largely re-arguing their trial theory that they argued to the jury. That view, of course, was rejected by the jury and is irrelevant here. The question is whether the jury could do what it did – find the appellants guilty – rather than whether it should have done what it did.

The evidence in this case easily supported the jury's determination. The numerous medical witnesses and medical experts established the death was a homicide resulting from inflicted traumatic brain injury and that Aden was a

battered child, suffering abuse over a period of time. That was all the jury needed to draw the same conclusion.

The fact that the no one but the defendants witnessed the final, fatal blows does not change that conclusion. Appellants erroneously argue that the pattern or practice of assault or torture needs to be the mechanism of death. The elements of the crime of homicide by abuse clearly set out that "The defendant, or an accomplice, *previously* engaged in a pattern or practice of assault or torture..." CP-D 376 (Jury Instruction #15). The *previous* abuse is a separate element and is by definition not the final mechanism of death.

In the present case, there was extensive medical evidence showing a huge number of inflicted injuries, pattern injuries, observed changes in the child's demeanor, injuries observed by witnesses more than a week before the death, and statements made by both defendants admitting that they engaged in biting and swatting Aden.

Appellants have provided no authority to support their claim that there must be a fixed time period of days, weeks, months, or years necessary to constitute a "pattern or practice" of assault or torture. Additionally, there is no requirement that a witness observe the assaultive acts that can be proven with other overwhelming evidence. See, State v. Berube, 150 Wn.2d 498, 507-508; 79 P.3d 1144 (2003) (several significant injuries were not witnessed when inflicted, but the record indicated co-defendants were the only persons who had access); State v.

Edwards, 92 Wn.App 156, 159-160, 961 P.2d 969 (1998) (previous abuse and fatal injury not witnessed).

Moreover, many homicide prosecutions occur where the body of the victim was never recovered at all, let alone a specific mechanism of death medically determined. E.g., State v. Lung, 70 Wn.2d 365, 422 P.2d 72 (1967); State v. Neslund, 50 Wn. App. 531, 546, 749 P.2d 725, review denied 110 Wn.2d 1025 (1988); State v. Quillin, 49 Wn. App. 155, 741 P.2d 589 (1987), review denied 109 Wn.2d 1027 (1988).

b. There was also sufficient evidence to convict Yolanda Devon as an accomplice

In addition to being able to convict Yolanda Devon as a principal of manslaughter second, there was also sufficient evidence to convict her as an accomplice. To be convicted as an accomplice, the defendant must have solicited, commanded, encouraged, or requested the co-defendant to commit the crime charged, or she must have aided or agreed to aid him in planning or committing it, knowing that her acts would either promote or facilitate the crime. See, Berube 150 Wn.App at 511.

An accomplice need neither participate in each element of the crime, have specific knowledge of every element, nor share the same mental state as the

principal. State v. Sweet, 138 Wn.2d 466, 479, 980 P.2d 1223 (1999); State v. Hoffman, 116 Wn.2d 51, 104, 804 P.2d 577 (1991).

A defendant's status as principal or accomplice is irrelevant; a jury need only decide that a defendant participated in the crime to convict him or her as an accomplice. See, Hoffman at 104-05 (stating jury need not identify principal or accomplice); State v. Boot, 89 Wn. App. 780, 793, 950 P.2d 964 (noting identity of shooter irrelevant to question of accomplice liability), review denied, 135 Wn.2d 1015, 960 P.2d 939 (1998).

Even if we could assume Yolanda was not the primary perpetrator of Aden's fatal injuries, Yolanda Devon was aware of Aden's mounting and severe physical injuries, and like Berube, she put Aden into positions where he was being assaulted. Yolanda did not need to be aware of the elements of the crime of homicide by abuse. It is enough that she knew her actions would promote and facilitate the abuse. At a minimum, her actions promoted and/or facilitated the abuse and injuries suffered by Aden and that eventually led to his death. Yet, in addition to refusing to take Aden for medical treatment, limiting access of others to Aden, and being his custodian when the final fatal head injuries were inflicted; Yolanda admitted to biting and swatting Aden. At the time of his death, Aden was found to have injuries consistent with such acts.

4. Appellant Jon Devon was not denied effective assistance of counsel where trial counsel had to make tactical decisions based on the evidence.

Our courts strongly presume that trial counsel's representation was effective. State vs. McFarland, 127 W.2d 322, 899 P.2d 1251 (1995). The burden is on the Defendant to overcome the strong presumption of competency and to show deficient representation. McFarland at 335. The presumption of effective assistance cannot be rebutted if trial counsel's conduct can be characterized as legitimate trial strategy or tactic. State v. Mak, 105 Wash.2d 692, 731, 718 P.2d 407 (1986), cert. denied, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986); State v. Lord, 117 Wash.2d 829, 885, 822 P.2d 177 (1991).

The defendant must show that (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different." McFarland, 127 Wn.2d at 334-35; Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct.2052, 80 L.Ed.2d 674, reh'g denied, 467 U.S. 1267, 104 S.Ct.3562, 82 L.Ed2d 864 (1984).

The first prong requires a showing of errors so serious that counsel was not functioning as "counsel" guaranteed by the Sixth Amendment. The second prong requires a showing that counsel's errors were so serious as to deprive the

defendant of a trial whose result is reliable. Strickland 466 U.S. at 694; State v. Jeffries, 105 Wn.2d 398, 417-18, 717 P.2d 722, cert denied, 479 U.S. 922, 107 S.Ct. 328, 93 L.Ed.2d 301 (1986).

In determining whether defense counsel was deficient, the court must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. Strickland 466 U.S. at 689, see also, State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995).

Courts are hesitant to find ineffective assistance of counsel based solely on questionable trial tactics and strategies that fail to gain acquittal. In re Richardson, 100 Wn.2d 669, 675, 675 P.2d 209 (1983); State v. Sardinia, 42 Wn.App. 533, 713 P.2d 122 (1986) (counsel not ineffective for failure to call witness that may have implicated defendant in crime); State v. Woo Won Choi, 55 Wn.App. 895, 781 P.2d 505 (1989) (counsel was not ineffective for not raising diminished capacity defense due to intoxication where the defendant explained explicit and detailed recollection of the event and where the defendant's explanation of what his intent was would contradict the defense that he was too drunk to form any intent).

Defense counsel's decision not to object to testimony can be characterized as legitimate trial strategy or tactics. Counsel may legitimately decide not to risk emphasizing particular testimony with an objection. See e.g., In re Pers. Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004) ("Even assuming the testimony

...constituted objectionable...evidence, defense counsel's decision not to object can be characterized as legitimate trial strategy or tactics."); State v. Donald, 68 Wn. App. 543, 551, 844 P.2d 447 (1993) ("Trial counsel decided not to ask for a limiting instruction as a trial tactic so as not to reemphasize this very damaging evidence.").

In State v. Sardinia, Division Two of the Washington State Court of Appeals discussed the Strickland test in the context of prior Washington State authority regarding ineffective assistance claims. Sardinia, 42 Wash.App. 533, 713 P.2d 122 (1986).

In Sardinia, the defendant alleged that trial counsel was ineffective because he failed to call several witnesses. See Id. The Sardinia court quoted Strickland for the principle that no particular set of rules can satisfactorily take account of the variety of circumstances faced by trial counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Id. at 539 (citing Strickland, supra). The court noted that the Sixth amendment is more protective of the right to counsel than the Washington State Constitution and held that the Strickland test should be applied retroactively in Washington. Id. at 540.

Regardless, the court found that Sardinia was provided with effective assistance of counsel. Id. at 543. The court noted that trial counsel's decision not to call the witnesses at issue was a strategic decision. Id. The court again cited Strickland for the principle that "such decisions, though perhaps viewed as wrong

by others, do not amount to ineffective assistance of counsel." Id. at 542 (citing Strickland, 466 U.S. at 689). The court reviewed the testimony of the uncalled witnesses in light of the "wide latitude" defense counsel has in making tactical decisions and found that the defendant had not been prejudiced by counsel's decision. Id.

Likewise, in State v. Adams, 91 Wash. 2d 86, 586 P.2d 1168 (1978), the Washington State Supreme Court found that defendant's conviction would not be reversed where the trial tactics at issue constituted an exercise of judgment. In Adams, the court declined to adopt a "more objective" standard for a Sixth Amendment ineffective assistance challenge because trial counsel was effective under either standard. Id. at 89. Adams argued that counsel was ineffective, inter alia, for failing to move to suppress photo and lineup identifications based on the witnesses' lack of certainty and that the lineups were impermissibly suggestive. Id. at 91.

A defendant is not denied effective assistance of counsel where the record as a whole shows that he or she received effective representation and a fair trial. State v. Smith, 104 Wash.2d 497, 511, 707 P.2d 1306 (1985). Rather, the defendant must make "an affirmative showing of actual prejudice" demonstrating a manifest constitutional error. McFarland at 334, 338 (n. 2, citing, RAP 2.5(a)(3)).

The claimed ineffectiveness of Jon Devon's attorney does not even rise to the level of the above referenced cases. He claims three instances of failure to

object to testimony. The context of the alleged objectionable testimony from Dr. MacDonald and Detective Sloan are set out in the "Statement of the Case" above.

ER 702 permits experts to base an opinion on other information other than what the expert has personally observed. Experts, and lay witnesses, may express an opinion on the ultimate issue under ER 704. The alleged objectionable testimony of Dr. MacDonald's and defendant's own expert Dr. Plunkett, refer to the issue of Aden's injuries and his death being a homicide rather than an accident. Their testimony was not objectionable.

Additionally, Dr. MacDonald's testimony referencing "no good story" simply reiterated the testimony of virtually every other medical expert, that the extent of the injuries could not have resulted from the alleged fall from a woodpile. Even the defendant's experts conceded this point and that Aden was a "battered" child.

Regarding Dr. Plunkett's cross exam, he claimed to have reviewed and relied upon information contained in the investigative reports in forming his opinion that the death could have resulted from an accidental fall *as described* in the reports. Impeachment of Dr. Plunkett was proper on his selective use of statements to reach his opinion. Such impeachment is not substantive evidence. Additionally, the discussion was in the context of cross exam about the statutory protocol for coroners and medical examiners in Dr. Plunkett's home state of Minnesota, that he claimed to have helped develop. The testimony was not objectionable and was proper impeachment.

In Detective Sloan's testimony the term "smoking gun" was used in the context of explaining why detectives did not immediately execute a search warrant on the defendant's residence after they learned that the defendant's had begun moving out. The example was used to explain why there was no immediacy in searching the residence at that time.

In Appellant's brief, he concedes that each of these statements may not have had any impact on the jurors, but claims if taken as a whole they could have. For the purposes of claiming ineffective assistance, however, the appellant must then argue that in hindsight the defense attorney should known these three instances could be cumulative later on, and therefore he should have objected to each when they occurred.

In the present case, the appellant has failed to demonstrate that counsel's representation was deficient in any way. Appellant has not rebutted the presumption that a tactical reason existed for defense counsel not to object. Because the Appellant cannot demonstrate that counsel's actions were not based on legitimate trial strategy, or that any alleged error affected the outcome of the trial, this court should reject the claim of ineffective assistance.

5. There was no basis to grant defendants' motion to recuse

The Washington Code of Judicial Conduct 3(D) states in part:

> (1) Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances in which:
>
> > (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

Judge Allen sat on a dependency hearing involving requests to modify visitation with the defendant's infant. As part of that hearing, she was provided information on the injuries suffered by Aden Valdovinos.

The materials involving the injuries to Aden were also part of the criminal case file and the motions brought by the parties in the criminal case. Judge Allen had no personal knowledge of the information other than what was provided in court hearings and made part of the record.

Judge Allen also made numerous rulings in favor or the defendants during the criminal case. The appellant has provided no basis to find Judge Allen's impartiality in the case could have been questioned. There was no error in denying the defendant's motion to recuse prior to trial.

E. CONCLUSION

Defendants were not denied their right to public trial by conducting individual juror questioning. If the Court finds there was closure, the Bone-Club

factors were satisfied, and the violation was invited error as the defendants were the proponents of closure.

The accomplice instruction given was not deficient where it did not impose a duty to act. The use of the phrase "a crime" in the instruction was harmless error because the State was not relieved of its burden when only one criminal charge was at issue.

There was overwhelming evidence that Aden Valdovinos suffered abusive injury ultimate leading to his death. There was sufficient evidence of the defendants' involvement to find guilt for the crime of homicide by abuse and manslaughter second degree as principal or accomplice.

Jon Devon was not denied effective assistance of counsel where trial counsel did not object to certain testimony. The testimony was not objectionable. Even if it were, the decision to object is a tactical decision of the attorney.

There was no basis for Judge Allen to recuse herself based on defendants' motion. Judge Allen did not have outside personal knowledge about evidentiary issues or any bias toward the parties justifying disqualification.

Dated this 4th day of December 2007

Respectfully Submitted by:

KARL F. SLOAN, WSBA #27217
ProsecutingAttorney

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

YOLANDA E. DEVON, &
JON G. DEVON,

Appellant.

NO. 249573 & 249581

STATEMENT OF ADDITIONAL AUTHORITIES

COMES NOW the State of Washington, by and through, Karl F. Sloan, Prosecuting Attorney for Okanogan County, and respectfully requests that the Court consider the following additional authority pursuant to RAP 10.8.

Regarding the issue of public right to trial:

State v. Castro, 170 P.3d 78; 2007 Wash. App. LEXIS 2979 (2007) (The defendant validly entered a limited waiver of his right to a public trial when the defendant stated that he agreed with his counsel's statement that the defendant wished to allow jurors to be questioned in chambers and could not assert a violation of the public's right to an open trial as a grounds to reverse his conviction.)

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State v. Momah, 2007 Wash. App. LEXIS 3017 (Nov. 13, 2007) (The conducting of individual jury voir dire in chambers adjacent to the courtroom does not constitute a closing of the proceedings).

DATED this 4 of December, 2007.

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