No. 32103-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

TYSON J. ROMANESCHI, Appellant.

BRIEF OF APPELLANT

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1. The court erred by denying the motion to suppress.

2. The court erred by entering finding of fact 13:

> There was no testimony that there was anything coercive, any kind of trick techniques used or any kind of coercion, whether physical, psychological, or otherwise by law enforcement.

3. The court erred when it read incorrect instruction 9 to the jury, later changed that instruction in the written set given to the jury, and did not read the revised instruction to the jury.

4. The court erred by instructing the reporter not to report the jury instruction conference.

5. The State's evidence was insufficient to support the conviction for assault of a child in the first degree because it failed to prove intent beyond a reasonable doubt.

Issues Pertaining to Assignments of Error

A. Did the court err by denying the motion to suppress when it found the statements were not coerced? (Assignments of Error 1 and 2).

B. Did the court err when it read instruction 9 to the jury, later changed that instruction in the written set given to the jury, and

did not read the revised instruction to the jury? (Assignment of Error 3).

C. Did the court err by instructing the court reporter not to report the jury instruction conference? (Assignment of Error 4).

D. Was the State's evidence insufficient to support the conviction for assault of a child in the first degree when it failed to prove intent beyond a reasonable doubt? (Assignment of Error 5).

II. STATEMENT OF THE CASE

Tyson J. Romaneschi was charged by second amended information with count I: assault of a child in the first degree; count II: violation of a no contact order; count III: violation of an order for protection; and count IV: tampering with a witness. (CP 162). Prior to trial, he moved to suppress statements he made to police. The court held a CrR 3.5 hearing to determine whether those statements to police should be suppressed. (CP 117; 10/19/12 RP 27). He claimed they were coerced. (10/19/12 RP 70). Finding the statements admissible, the court entered these findings of fact and conclusions of law:

FINDINGS OF FACT

1. On February 7, 2012, the defendant voluntarily met

with Detectives Gallion and Pogachar at the Spokane Police Detectives' Office at the invitation of the detectives to talk about his daughter's injuries.

2. Detective Gallion advised the defendant of his *Miranda* warnings from a rights card prior to questioning him.

3. The defendant waived his rights and agreed to answer the detectives' questions.

4. There was no indication that the defendant did not understand his rights.

5. There was no indication that he was under the influence of alcohol or drugs.

6. There was no indication that he was befuddled by any of the standard rights that were read from the rights card. He appeared to understand his rights and clearly waived them.

7. The Detectives' Office is a securely locked building like others on the court house campus.

8. The defendant was not handcuffed and he was not locked inside a room.

9. There was no indication that he was not free to leave.

10. The defendant made numerous statements to the detectives about his interactions with his daughter and how she may have sustained her injuries.

11. After a period of time the defendant advised the detectives that he did not want to answer any additional questions and the interview ended.

12. The defendant walked out of the Detectives' Office conference room and let himself out of the building.

13. There was no testimony that there was anything coercive, any kind of tricky techniques used or any kind of coercion, whether physical, psychological, or otherwise by law enforcement.

14. From the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW

1. The defendant was read his constitutional rights prior to being asked any questions.

2. The defendant indicated that he understood his rights and he answered questions.

3. The defendant willingly gave up his rights and answered questions.

4. When the defendant advised he did not want to answer any more questions, he stopped and left.

5. This was an interrogation, so to speak, but it was not custodial in nature in any stretch of the imagination.

6. Even if it were, the defendant was read his *Miranda* warnings.

7. The statements made by the defendant would be admissible at time of trial. (CP 117-119).

The case proceeded to jury trial.

Shayna Tipton was the mother of ENR, born on December 13, 2011. (7/9/13 RP 205-06). The father of their baby girl was Mr. Romaneschi. (*Id*. at 206). Part of the prenatal care was to take

vitamin D. (*Id*. at 209). Mr. Romaneschi and Ms. Tipton were engaged and she stayed with him at his mother's house. (*Id*.). Ms. Tipton had a normal delivery and was taking vitamins and solely breast-feeding ENR. (*Id*. at 211).

Dr. Timothy Crum at Rockwood Clinic was ENR's physician. (7/1913 RP 211-12). Her first well-baby visit with Dr. Crum was on the third day of life and the second visit was about 7 days later. (*Id*. at 212). Both Ms. Tipton and Mr. Romaneschi went to the doctor's. (*Id*. at 213). ENR was on liquid vitamin D at Dr. Crum's direction. (*Id*.). After her second visit, she was also being fed Enfamil newborn formula to supplement the breast-feeding. (*Id*. at 214). Mr. Romaneschi usually gave ENR the formula at night while Ms. Tipton breast-fed her in the day. (*Id*.). The parents were not working. (*Id*. at 215). Mr. Romaneschi's mother Karey, his sister Ashley, and her boyfriend Eric Malmquist baby-sat ENR. (*Id*.). Ms. Tipton had no concerns with any of the baby-sitters. (*Id*. at 215, 220-21).

Mr. Romaneschi interacted and played with ENR a lot. (7/9/13 RP 222). He would hold her and she would sometimes cry. (*Id*. at 224). His mother told Ms. Tipton that was normal and it was

just ENR getting used to a man around. (*Id*.). She did not cry, however, with Mr. Romaneschi's father or Mr. Malmquist. (*Id*.). Ms. Tipton said she had some concern ENR had been hurt by Mr. Romaneschi when she saw bruises on her arm and shoulder. (*Id*. at 225). But she did not say anything until after the bruises as she did not think he was hurting her, just a bit rough. (*Id*.).

Ms. Tipton noted that when Mr. Romaneschi fed ENR at night, he would go into the bathroom and turn the fan on. (7/9/13 RP 227-28). The sound of the bathroom fan was soothing to her and helped her fall asleep. (*Id*. at 275). When Ms. Tipton heard their baby crying, she knew something was wrong. (*Id*.). Ms. Tipton took ENR and told Mr. Romaneschi to get out. (*Id*.). When asked what was going on, he said that was how ENR went to sleep by his squeezing and holding her and, the harder she cried, the faster she went to sleep. (*Id*. at 228-31).

On February 5 or 6, 2012, ENR had a fever and went to see Dr. Crum. (7/9/13 RP 232). She had a urinary tract infection and was transported to Deaconess Hospital. (*Id*.). Nothing was said about fractures that day. (*Id*. at 282-83). The doctors did say, however, that ENR had signs of "failure to thrive." (*Id*. at 283-84).

A PICC line was inserted into her hand to give her intravenous antibiotics. (*Id*. at 234). When X-rays were taken to make sure the line was in the proper position, they showed broken bones in ENR's rib cage. (*Id*. at 234-35). Ms. Tipton told the nurse it had to have been Mr. Romaneschi. (*Id*. at 235). But she did question if it were possible that hospital staff could have caused the injuries. (*Id*. at 290).

Ms. Tipton discussed with Mr. Romaneschi how the fractures could have happened and perhaps he did not know his own strength. (7/9/13 RP 235). He said yes, he could see how he could have. (*Id*.). On the third day, CPS and the police asked Ms. Tipton to leave the hospital room. (*Id*. at 236). She called police the day after to set up an appointment to talk. (*Id*. at 237). There was nothing to hide so she and Mr. Romaneschi both went. (*Id*.). Ms. Tipton talked to Detective Gallion, as did Mr. Romaneschi. (*Id*. at 238). By the next day, she knew the State was going to be filing charges against him. (*Id*. at 239).

Mr. Romaneschi had a no-contact order against him on ENR and a protection order against him on Ms. Tipton. (7/9/13 RP 239). Several times while the orders were in effect, he had contact with

both. (*Id*. at 242-45, 255).

Ms. Tipton said Mr. Romaneschi did most of the diaper-changing and ENR did not scream during those times. (7/9/13 RP 264-66). ENR did not have any health problems until the appointment when she had the urinary tract infection. (*Id*. at 272).

Dr. Crum was ENR's primary care doctor. (7/10/13 RP 297-98). He first saw her on the third day of life, December 16, 2011, when both parents brought her in. (*Id*. at 300). The doctor had no concerns then. (*Id*. at 302). ENR had no deformities and all was OK. (*Id*. at 303). He did, however, recommend vitamin D for the baby and vitamins for mother. (*Id*. at 302). Dr. Crum next saw ENR on December 23, 2011, which was routine for newborns. (*Id*. at 303). Again, he had no concerns about ENR. (*Id*. at 306).

On visit 3 on February 3, 2012, at 51 days old, ENR had a fever and was crying and sweating when Ms. Tipton brought her in. (7/10/13 RP 306). After blood and urine samples were taken, the doctor felt it was likely a urinary tract infection so he called for an ambulance to take her to Deaconess. (*Id*. at 307). ENR had a fall-off in weight, probably from acute illness. (*Id*.). Doctor Crum recommended that she be admitted to the hospital because infants

less than two months old with evidence of infection are at risk for severe infection. (*Id*. at 308). The doctor noted she had no muscular/skeletal development issues, but she was rather quiet, which meant to him she was likely sick. (*Id*.). ENR had no signs of rachitic rosary, that is, physical symptoms consistent with rickets. (*Id*. at 308-09). Doctor Crum told the parents they could expect ENR to get intravenous antibiotics and hydration, X-rays, and a 72-hour stay. (*Id*. at 310). ENR's care was then transferred to Deaconess. (*Id*.).

Doctor Crum saw no bruising on ENR in any of these three visits. (7/10/13 RP 319-20). Nothing was tender when he palpated her abdomen. (*Id*. at 320). He had no suspicion that ENR had been abused. (*Id*.).

Detective Neil Gallion investigated a possible child assault against ENR. (7/10/13 RP 324-25). At the hospital on February 6, 2012, Mr. Romaneschi was calm and nonconfrontational. (*Id*. at 325, 327). The detective told him he was there to investigate serious injuries to ENR. (*Id*. at 327). Detective Gallion arranged an interview with Mr. Romaneschi and also with Ms. Tipton for February 7, 2012. (*Id*. at 328-30). He talked with both of them that

day. (*Id*. at 321, 336).

Detective Gallion told Mr. Romaneschi he was not under arrest, but was trying to find out how ENR got her injuries. (7/10/13 RP 333). The detective nonetheless gave him his *Miranda* rights. (*Id*. at 332, 336). Mr. Romaneschi said he understood and wanted to answer questions and signed his rights card. (*Id*. at 336). The detective told him ENR had serious non-accidental injuries and wanted to find out how and why. (*Id*. at 338). Detective Gallion said he only wanted to hear the truth from Mr. Romaneschi, who said he wanted to be fully honest and cooperative. (*Id*.).

He told the detective he wanted to take parenting classes as he was not doing a good enough job. (7/10/13 RP 340). When told the baby had nonaccidental injuries from significant force used against her, Mr. Romaneschi said he would hug ENR against his chest when holding her and did not know his own strength so the injuries could have happened when hugging her tightly. (*Id*. at 341). He hugged her to try to get her to sleep and could have possibly hurt her. (*Id*.). He had no idea how her arm and leg were injured. (*Id*.). Mr. Romaneschi said he needed parenting classes and a job. (*Id*. at 342). He did not know how the bruises

happened. (*Id*. at 343).

Detective Gallion read the report listing the different fractures, which indicated significant force. (7/10/13 RP 343). Mr. Romaneschi then described the sniffy game, where he would put ENR's feet up to her nose. (*Id*.). He said somebody else must have done it. (*Id*. at 344). Mr. Romaneschi got angry and said he would never intentionally hurt ENR. (*Id*.). He again said he would squeeze ENR to get her to go to sleep and she would go to sleep faster if she was crying. (*Id*. at 345).

Detective Gallion told him he was not telling the truth. (*Id*. at 345-46). Mr. Romaneschi was getting exercised and agitated with him, so Detective Gallion passed the questioning on to Detective Janell Pogachar. (*Id*. at 346). She asked Mr. Romaneschi if he ever had momentary losses of control, to which he said he did get frustrated easily as that was his personality. (*Id*. at 381). But he did not lose control with ENR, who he loved to death. (*Id*.). Detective Pogachar asked him if her ribs could have been broken from squeezing too hard and he said he thought so. (*Id*. at 381-82). Mr. Romaneschi said he never meant to hurt her and may have been too rough with her at times. (*Id*.). He mentioned one time at

night when Ms. Tipton came into the bathroom and took the baby away from him. (*Id*.). He helped feed ENR about once or twice a week when she would get worked up and not go back to sleep. (*Id*. at 384). If she did not go back to sleep in 30-40 minutes, he would squeeze her. (*Id*.).

Dr. Michelle Messer, a pediatric hospitalist, had a consult involving ENR for her opinion regarding concerns for abuse. (7/10/13 RP 418, 422). Generally, she goes through the child's medical charts and talks to the family if present to get a history. (*Id*. at 423). The doctor examines the child from head-to-toe so she can render an opinion whether there is abuse or accidental injuries. (*Id*. at 426). But no family was present when she checked ENR on February 8, 2012. (*Id*.). Dr. Messer only knew she was seeing her concerning the fractures. (*Id*. at 427). ENR was in the hospital because of a difficult time growing and a fever. (*Id*. at 428).

Since ENR had a possible urinary tract infection that necessitated a PICC line for giving intravenous antibiotics for a period of time, a chest X-ray was needed to make the sure the line was placed correctly. (7/10/13 RP 429). The X-ray for the PICC line was where the fractures were spotted. (*Id*.). In her head-to-toe

examination of ENR, Doctor Messer found no head abnormalities and no rashes or bruises on the skin. (*Id*. at 430). ENR's examination was pretty normal. (*Id*. at 431). Dr. Messer saw no signs of rachitic rosary or rickets in general. (*Id*. at 431-32). With rickets, it is easier to have injuries to the bone, causing fractures. (*Id*. at 434). But it still requires force to break a bone. (*Id*. at 425).

ENR also had full-body X-rays. (7/10/13 RP 435). A brain CT-scan was normal. (*Id*. at 436). There were bilateral healing rib fractures, which prompted the skeletal survey, that is, an X-ray of every bone in the body. (*Id*.). They showed healing 4, 5, 6, 7 and 10 rib fractures in the back and back toward the side. (*Id*.). The right 10-12 posterior rib fractures looked chronic in nature with new bone formation indicating healing. (*Id*.).There was also a transverse fracture of the proximal ulna on the left and a possible distal radical healing metaphyseal fracture, a fracture of the fourth digit, and right forearm possible distal radial metaphyseal fracture. (*Id*. at 437). The right femur had a bucket-handle fracture and the right tibia-fibula area had a proximal and distal metaphyseal set of healing fractures. (*Id*.). There was a bucket-handle fracture of the left femur. (*Id*. at 438). The left tibia-fibula had proximal and distal

metaphyseal fractures with new bone formation. (*Id*.). Doctor Messer said there were 21 total fractures in various stages of healing. (*Id*.). The fractures were basically in all three time frames: acute, subacute, and chronic. (*Id*. at 439). A bucket-handle fracture happens if you hold one end and pull on the other, a traction-type injury. (*Id*. at 440). Dr. Messer indicated bilateral rib fractures usually resulted from squeezing of the chest and required a substantial amount of force. (*Id*. at 442-43). She said ENR could not cause those fractures to herself. (*Id*. at 444). Dr. Messer further opined that inserting the PICC line at the hospital did not cause the fractures. (*Id*. at 446). In her opinion, ENR suffered injuries of abuse. (*Id*. at 447).

Dr. David Atkins, a board-certified radiologist, looked at the chest X-ray of ENR in February 2012. (7/15/13 RP 515, 519). He noticed fractures, which were an indication of a problem with nonaccidental injury. (*Id*. at 519). There were healing fractures on both sides of the chest. (*Id*.at 521). Different times of healing were taking place. (*Id*. at 523). Dr. Atkins also looked at the full-body X-rays of ENR. (*Id*. at 527). He saw acute and healing fractures at multiple sites, mostly the ends of long bones. (*Id*.). The only clean

break was through the shaft of the left forearm; the others were the ends of bones. (*Id*. at 529). ENR also had 10 rib fractures. (*Id*. at 530-32). She had a fracture of the end of the right femur, a fracture of the first part of the tibia and fibula, and a fracture at the end of the tibia and fibula. (*Id*. at 536). There were fractures of the left distal femur (thigh bone) and of the tibia and fibula, with fractures just above and below the knee, along with a fracture of the first bone of the big toe. (*Id*. at 538). Dr. Atkins did not see any sign of rickets in ENR. (*Id*. at 543-56). He did acknowledge, however, that bucket-handle fractures were most common as a result of a fall, not abuse trauma. (*Id*. at 565).

The State rested. (7/15/13 RP 571). Mr. Romaneschi's motion to dismiss all counts was denied. (*Id*. at 580-84).

Dr. Steven Gabaeff, the defense expert, practiced emergency medicine from 1976-2011 and had been involved in clinical forensic medicine from 1988 to the present. (7/16/13 RP at 627). He opined there was a present epidemic of vitamin D deficiency causing infantile rickets, which he believed ENR had. (*Id*. at 642). The doctor pointed to Dr. Crum's ordering vitamin D supplementation at ENR's third day of life without even having

specific information it was needed, that is, he could give vitamin D empirically. (*Id*. at 645-46). Her weight was in the 23rd percentile and the goal was to keep it around the same percentile. (*Id*. at 646-47). There were no signs of trauma or abuse on the third day of life. (*Id*. at 650). On the well-baby visit at about 10 days, ENR's weight went up to the 34th percentile and she appeared normal with no broken bones, bruises, tenderness, or signs of trauma. (*Id*.).

At 51 days, ENR had a severe kidney infection and was transferred to the hospital from Dr. Crum's office. (7/16/13 RP 651). Her weight had dropped to the 8th percentile. (*Id*. at 652). There was no tenderness, bruising, swelling, and no issues with her range of motion. (*Id*. at 655). She was transferred to Deaconess for 10 days of intravenous antibiotics. (*Id*.).

The emergency room physician did an examination, which revealed no pain, bruising, or swelling. (7/16/13 RP 656). ENR was irritable, however. (*Id*.). From February 3 to 5, 2012, there was no indication of any bone injury, trauma, or bruising and no suspicion of abuse. (*Id*. at 659).

The frequency of feeding should be every three hours, but Ms. Tipton was only feeding ENR 3-5 hours and contributed to the

falling weight. (7/16/13 RP 660). Doctor Gabaeff noted the supplementation with formula of breast-feeding, indicating the insufficiency of breast-feeding. (*Id*. at 661). On February 4, 2012, ENR's thighs were slightly swollen, probably from Dr. Crum's giving 4 ml. of antibiotic drug in each leg. (*Id*. at 662). On February 5, she was doing well and had gained ½ pound. (*Id*. at 664). ENR was switched to a stronger antibiotic to which the infection was sensitive so a PICC line was inserted in her left hand. (*Id*. at 665). At 11 that evening, the chest X-ray was taken to determine if the end of the PICC line was in the right place. (*Id*. at 666). There were four fractures on the left side of the chest all in a row, but no one had seen it on the initial X-ray. (*Id*.). These fractures triggered the inquiry into child abuse. (*Id*.).

A skeletal survey was done. (7/16/13 RP 667). CPS was notified. (*Id*. at 668). Dr. Gabaeff noted the first chest X-ray on February 3, 2012, was read as normal, but there were two deformities on the right 10th and 11th ribs that were noticed four days later. (*Id*. at 672). The doctor also said there was callus on the ribs, indicating a conventional healing reaction to the two rib fractures. (*Id*. at 673). Doctor Gabaeff stated there were eight

findings associated with rickets in ENR. (*Id*. at 725). Her skull was quite thin along the table of the skull and was characteristic of vitamin D deficiency and infantile rickets. (*Id*. at 727-28). ENR's jaw had no calcium at all and she had rib-flaring, known to be present with rickets. (*Id*. at 728-730). The trumpet-shaped deformity was very characteristic of infantile rickets. (*Id*. at 730). Cupping at the end of bones was also a rickets-related finding. (*Id*.). Hypermineralization of the metaphysis, is a condition where a calcified portion of bone becomes hyper-dense. (*Id*. at 732). The long growth of bone at the cartilage-bone interface is typically misdiagnosed as corner (bucket-handle) fractures. (*Id*. at 733). The island of calcification makes the mechanism that would normally produce a corner fracture impossible, as in ENR's case. (*Id*. at 736, 738). Her metaphyseal hypermineralization was one of the findings for infantile rickets. (*Id*. at 738). Undercalcification of the ribs and arms are also an indication of vitamin D deficiency. (*Id*. at 745-47).

Doctor Gabaeff indicated findings other than those radiographic distinguished between fractures and rickets. (7/16/13 RP 747). Pain, swelling, and decreased range of motion go with a

broken bone. (*Id*.). He stated a fracture of a bone virtually guarantees pain. (*Id*. at 748). At Dr. Crum's or at the hospital, ENR had no pain. (*Id*. at 748-49). Only after February 6, 2012, did ENR have pain. (*Id*. at 749). With her undercalcification, her bones were very weak and only moderate amounts of force, typically normal handling, can create fractures. (*Id*. at 751-52). Accordingly, he opined the fracture of the left forearm was caused by starting the IV at the hospital. (*Id*. at 752). The lack of pain and intrathoracic or lung injury and evidence of healing rib fractures substantiated Dr. Gabaeff's belief there was no abuse, but injuries related to rickets. (*Id*. at 752-55). The rib fractures were in various stages of healing and not acute, further indicating they were not caused by acute trauma. (*Id*. at 756-57). Rather, they were about 6-8 weeks old and thus pointed pretty closely to being incurred at birth. (*Id*. at 756). Dr. Gabaeff opined the rib fractures were sustained at birth itself and were deformation fractures caused by uterine contractions. (*Id*. at 757-58). He said he was 95% certain and held this opinion to a reasonable medical certainty. (*Id*. at 758, 839). The doctor noted there was an epidemic of vitamin D deficiency with findings supported by the literature that 85% of babies were

born with weak, deficient bones subject to cracks under normal forces of labor. (*Id*. at 759). The only acute fracture was of the arm, which occurred inadvertently while starting the IV on ENR's hand and "having somebody in charge of holding that arm still." (*Id*. at 840). This arm fracture was consistent with rickets. (*Id*.).

Karey Romaneschi said Ms. Tipton and her son Tyson lived at her house from mid-July 2011 to February 2012. (7/17/13 RP 853-54). ENR was born while they were living with her. (*Id*. at 854). She said Tyson was not rough or inappropriate with ENR while changing her diaper, feeding her, or holding her. (*Id*. at 857-58). He did not squeeze her. (*Id*. at 858, 861). When Ms. Romaneschi changed ENR, she did not see any bruises or swelling and did not notice any tenderness or pain. (*Id*. at 862-63). ENR did not shriek or cry out in pain. (*Id*. at 865). Ms. Romaneschi did not hear her son yell at ENR. (*Id*. at 868). She neither saw vitamin D supplements at her home nor ENR being given any. (*Id*. at 870).

Judy Maier, Ms. Romaneschi's friend, held ENR and saw no bruising on her legs nor heard her cry out in pain. (7/17/13 RP 889). She said Mr. Romaneschi was very gentle with ENR and did not squeeze her or mishandle her when changing her diaper. (*Id*.

at 890-92).

Sheldon Romaneschi, Tyson's brother, did not see him hold ENR inappropriately or squeeze her. (7/17/13 RP 897). She did not cry out in pain or shriek and could move her arms and legs. (*Id*. at 897-98). He did not see Tyson or Ms. Tipton give ENR any vitamin D drops. (*Id*. at 898). Sheldon, like his mother, also did not see Tyson play the sniffy game with ENR. (*Id*. at 871, 899) He did not hear Tyson yell at the baby either. (*Id*. at 901).

Mr. Malmquist was at Karey Romaneschi's home about 3-4 times a week while Tyson, Ms. Tipton, and ENR were living there. (7/17/13 RP 903-04). He did not see Tyson squeeze ENR and she did not cry when he held her. (*Id*. at 905). Tyson was never rough with her. (*Id*. at 906). Mr. Malmquist saw no bruising or swelling on ENR, who did not cry out in pain when Tyson changed her diaper. (*Id*.). He did not see Tyson or Ms. Tipton give ENR any vitamin D drops. (*Id*. at 907). The defense rested. (*Id*. at 911).

On rebuttal, the State introduced evidence that Karey Romaneschi said in a July 2, 2013 interview that Ms. Tipton had started supplementing vitamins for ENR when instructed to do so by the doctor. (7/17/13 RP 915-16). Although Ms. Romaneschi

said she gave ENR fortified vitamin water once, she did not say she gave vitamin E drops to her. (*Id*. at 918).

There were no exceptions to the instructions, but the court instructed the reporter not to report the jury instructions conference. (7/17/13 RP 929). After reading the instructions to the jury, the court saw instruction 9 defining the crime of assault of a child in the first degree included the "torture prong," an alternative not charged by the State and so acknowledged by it. (*Id*. at 935, 998). But instruction 10, the to-convict instruction for assault of a child in the first degree, was correct and did not have the "torture prong." (*Id*. at 936, 988; CP 256). The court corrected instruction 9, but did not read that revised instruction to the jury. (*Id*. at 998-99; CP 255).

Mr. Romaneschi was found guilty of count I: assault of a child in the first degree with special verdicts that the victim was particularly vulnerable or incapable of resistance and he used a position of trust to facilitate commission of the crime; count II: violation of a no-contact order; and count III: violation of a protection order. (10/25/13 RP 1004-07; CP 280, 282-86). There was a hung jury on count IV. (CP 286). His motion for a new trial on the assault conviction was denied. (*Id*. at 1078-70). The court

sentenced Mr. Romaneschi to 120 months on the assault conviction and 364 days suspended on the two gross misdemeanor convictions for violation of no-contact/protection orders. (*Id*. at 1090; CP 385, 389, 394). He appeals, challenging his conviction of assault of a child in the first degree. (CP 384).

III. ARGUMENT

A. The court erred by denying the motion to suppress when it found the statements were not coerced.

Mr. Romaneschi argued below that he was coerced into making inculpatory statements to Detectives Gallion and Pogachar. (*See* 10/19/12 RP 70-71). In finding the statements admissible, the court entered finding of fact 13:

> There was no testimony that there was anything coercive, any kind of tricky techniques used or any kind of coercion, whether physical, psychological, or otherwise by law enforcement. (CP 118).

A finding of fact will not be disturbed if it is supported by substantial evidence. *State v. Radcliffe*, 164 Wn.2d 900, 907, 194 P.3d 250 (2008). Substantial evidence supports a finding if it is of such of a character that would convince an unbiased thinking mind of the truth of the fact. *Davis v. Microsoft Corp.*, 149 Wn.2d 521,

532, 70 P.3d 126 (2003). Although the court found no hint of any coercion, the totality of the circumstances shows to the contrary.

Mr. Romaneschi was given his *Miranda* rights at the beginning while he was aware Detective Gallion wanted to know how the injuries to ENR occurred. (10/19/12 RP 31-32). He told the detective he loved ENR to death. (*Id*. at 33). Detective Gallion emphasized to him the injuries she suffered were nonaccidental and significant force used against her. (*Id*. at 32, 32). He told the detective about squeezing ENR to get her to sleep and possibly hurting her. (*Id*. at 36). Mr. Romaneschi became increasingly agitated; his voice got louder; his demeanor was up and down; he was crying, emotional, and going from anger to crying again. (*Id*. at 37). While in this agitated state, the detective forged on and read Mr. Romaneschi the report listing the different fractures and told him he did not believe he was telling the truth. (*Id*. at 38, 40). The detective got him to say he had not been telling the truth and wanted to do so. (*Id*. at 40). Although Detective Gallion encouraged Ms. Tipton to get an attorney, he did not choose to advise Mr. Romaneschi to do the same. (*Id*. at 43). And he was indeed a suspect in the case before the interview. (*Id*. at 45). The

"bad cop" stepped out of the picture.

Detective Pogachar, the "good cop," then took over to ask Mr. Romaneschi questions. (10/19/12 RP 40, 47). Using a less confrontational approach, she got him to embellish on what he had told Detective Gallion to the point of agreeing with her that ENR's ribs may have been broken from squeezing too hard. (*Id*. at 49-51). Detective Pogachar did not tell Mr. Romaneschi he needed an attorney at the interview. (*Id*. at 55). After telling her he had been out of work for three years and was very frustrated about it, he wanted to end the interview and did. (*Id*. at 52).

Mr. Romaneschi contends his statements were coerced in violation of his right against self-incrimination. The Fifth Amendment states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." Art. 1, § 9 of the Washington State Constitution provides "[n]o person shall be compelled in any criminal case to give evidence against himself." The protection provided by Art. 1, § 9 is the same as that provided by the Fifth Amendment. *State v. Earls*, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991). Admission of an involuntary confession at trial violates both provisions.

Although the State argued the interview was not custodial, the police nonetheless chose to give Mr. Romaneschi his *Miranda* warnings and the State is bound by that choice to be held to a higher standard. In determining whether statements obtained during custodial interrogation are admissible against the accused, the court must look at the totality of the circumstances surrounding the interrogation to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel. *Miranda v. Arizona*, 384 U.S. 436, 475-77, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966).

Since the Fifth Amendment protects a person from being compelled to give evidence against himself, the question whether admission of a confession constituted a violation of the Fifth Amendment does not solely depend on if the confession was voluntary, but rather "coercive police activity is a necessary predicate to the finding that a confession is not "voluntary.'" *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S. Ct. 515, 93 L. Ed.2d 473 (1986). Accordingly, the conduct of the police in putting pressure on the defendant to confess and his ability to resist that pressure are important. *State v. Unga*, 165 Wn.2d 95, 101, 196

P.3d 645 (2008).

Factors that may be relevant in looking at the totality of the circumstances are the length of the interrogation; its continuity; the defendant's maturity, education, physical condition, and mental health; and whether the police advised him of the rights to remain silent and to have counsel present during custodial interrogation. *Unga*, at 101 (quoting *Withrow v. Williams*, 507 U.S. 680, 693-94, 113 S. Ct. 1745, 123 L. Ed.2d 407 (1993)). This test applies to determine whether Mr. Romaneschi's confession was coerced by the exertion of any improper influence. *State v. Broadaway*, 133 Wn.2d 118, 132, 942 P.2d 363 (1997).

The question is whether the interrogating officers' statements were so manipulative or coercive that they deprived Mr. Romaneschi of his ability to make an unconstrained, autonomous decision whether to confess or otherwise inculpate himself. *Unga*, 165 Wn.2d at 102. The interview was continuous and lasted about 45 minutes. (10/19/12 RP 57). The location was at the detectives' office, a securely locked building on the courthouse campus. (CP 118). He was not told he could, or should, have an attorney at the interview. (10/19/12 RP at 43, 55). The record reflects Mr.

Romaneschi's immaturity and fragile mental health at being accused of harming his own daughter. (*Id*. at RP 37). He became increasingly agitated and exhibited mood swings from anger to crying that showed his fragility and susceptibility to suggestion from the interrogating officers that his description of his conduct in activities such as putting ENR to sleep or changing her diaper, although seemingly innocuous and any harm done accidental, was actually inculpatory and he did not even know it.

The officers' psychological ploys such as playing "good cop – bad cop" to get an emotionally distraught Mr. Romaneschi to say what they wanted him to say and telling him they just wanted to hear the truth, with him in mind as the suspect, were so manipulative and coercive that they deprived him of his ability to make a free and independent decision to make the statements. *See Unga*, 165 Wn.2d at 102. In the totality of the circumstances, Mr. Romaneschi was coerced into making the inculpatory statements and the admission of his involuntary confession violated the Fifth Amendment and Art. 1, § 9 of the Washington State Constitution. *Unga*, 165 Wn.2d at 100. He is entitled to a new trial.

B. The court erred when it read incorrect instruction 9 to the jury, later changed that instruction in the written set given to the jury, and did not read the revised instruction to the jury.

The court read an erroneous instruction 9 to the jury:

> A person commits the crime of assault of a child in the first degree if the person is eighteen years of age or older and the child is under the age of thirteen and the person intentionally assaults the child and causes substantial bodily harm; and the person has previously engaged in a pattern or practice either of assaulting the child which has resulted in bodily harm that is greater than transient physical pain or minor temporary marks *or causing the child physical pain or agony that is equivalent to that produced by torture.* (italics added, 7/17/13 RP 935-36).

After reading all the instructions to the jury, the court noticed there was a problem with instruction 9:

> Number 9 and Number 10, Mr. Romaneschi is charged under the – on the first-degree assault of a child under the prong of "had previously engaged in a pattern or practice of assaulting, resulting in bodily harm," not the – I'll just call it the "torture prong." And they're alternatives. You've only charged one. So in No. 10 it's correct, but then if you look at No. 9, it also includes the definition of what assault of a child in the first degree is and it includes that torture. Now, I know the WPIC includes both, but should that – should that piece be in there? (7/17/13 RP 998).

The defense commented that instruction 9 with the "torture prong" gave the State "an alternative way to convict my client that has not been proposed and is not charged." (*Id*.). The court agreed:

> And it's not an element. So I just – I just wonder if that's going to be confusing. And I would – I would think that if we stopped at "temporary marks," period, and took out the rest of that line, that would be more consistent with the charge and with the elements. (*Id*.).

The State also concurred that instruction 9 should mirror the elements instruction 10. (*Id*.).

The court then changed instruction 9 by taking out the "torture prong." (7/17/13 RP 999). The record does not reflect, however, that the corrected instruction was read to the jury by the court as it is required to do. *State v Wilcox*, 20 Wn. App. 617, 619, 581 P.2d 596 (1978) (citing CR 51(g) and RCW 2.32.200). And the rule requires that modifications to the instructions be made before they are read to the jury. *Id*. That did not happen here where the modification was made after the court had already read the erroneous instruction to the jury.

Jury instructions must accurately state the law and must not be misleading. *Rekhter v. DSHS*, 180 Wn.2d 102, 117, 323 P.3d

1036 (2014). The instruction 9 was read to the jury was inaccurate, misleading, and confusing as recognized by the court. But it did not read the revised instruction and simply gave the jury the written instruction that was in conflict with the one already read to them. Even more egregious, the erroneous instruction added an alternative means of committing the crime of assault of a child in the first degree that was not charged. This is prejudicial error.

The court orally instructed the jury on an uncharged alternative means of committing assault of a child in the first degree and failed to correct the error by reading revised instruction 9 to the jury, thus causing confusion that prejudiced Mr. Romaneschi's right to a fair trial because the jury may have convicted him under the uncharged alternative. *State v. Chino*, 117 Wn. App. 531, 540, 72 P.3d 256 (2003). The error was not cured by giving the jury the correct written instruction 9 since the court had orally given them the incorrect instruction, causing an irreconcilable conflict as to the elements of the offense. This error is of constitutional magnitude. *State v. Jain*, 151 Wn. App. 117, 121, 210 P.3d 1061 (2009), *review denied*, 167 Wn.2d 1017 (2010).

Instructing the jury on an uncharged alternative means is a

violation of the defendant's right to be informed of the nature of the charges against him. *State v. Laramie*, 141 Wn. App. 332, 343, 169 P.3d 859 (2007). The manner of committing a crime is an essential element and the defendant must be informed of this element in the charging document so he may prepare a proper defense. *State v. Severns*, 13 Wn.2d 542, 548, 125 P.2d 659 (1942). There is no dispute that the second amended information did not charge Mr. Romaneschi with the "torture prong," as characterized by the court. (CP 162).

Mr. Romaneschi, however, does not challenge the sufficiency of the charging document. Rather, he claims error based on the court's orally instructing the jury on an uncharged alternative and its failure to correct that error by reading the revised correct instruction. *See Laramie*, 141 Wn. App. at 337, 341.

Allowing the jury to consider an uncharged alternative means of committing a crime violates the defendant's right to notice and is reversible error. *Jain*, 151 Wn. App. at 124. When a defendant is convicted of a crime by finding he committed acts not charged, it is not harmless error beyond a reasonable doubt. *Id*.; *Gautt v. Lewis*, 489 F.3d 993 (9th Cir. 2007), *cert. denied*, 552 U.S.

1245 (2008). Mr. Romaneschi's conviction for assault of a child in the first degree must be reversed.

C. The court erred by instructing the court reporter not to report the jury instruction conference.

In the verbatim report of proceedings, the following notation appears:

> A conference in open court regarding jury instructions was held but not reported per instruction of the Court. (7/27/13 RP at 929).

A criminal defendant appealing his conviction is entitled to transcription of all those portions of the verbatim report of proceedings necessary to present the issues raised on review. RAP 9.2(b). The appellate court may remand a case for a new trial where the trial court's report of proceedings is inadequate. *State v. Larson*, 62 Wn.2d 64, 381 P.2d 120 (1963). To satisfy due process, the appellate court must have a record of sufficient completeness for a review of the errors raised by the appellant in a criminal case. *Id*. at 67.

Mr. Romaneschi raises the issue concerning the erroneous instruction 9 read to the jury and later corrected by the court in the written set provided to it. The jury instruction conference,

however, was not reported by instruction of the court. There is no authority for it to instruct the court reporter not to report an important part of the trial proceedings. Moreover, there is a good probability that the court and the parties discussed in that conference whether revised instruction 9, eliminating an uncharged alternative to the crime of assault of a child in the first degree, should be read to the jury. The jury is presumed to follow the instructions of the court, but it gave conflicting and confusing instructions. In these circumstances, the record is not of sufficient completeness for review of this issue raised by Mr. Romaneschi. A new trial is warranted. *State v. Burton*, 165 Wn. App. 866, 883-84, 269 P.3d 337, *review denied*, 174 Wn.2d 1002 (2012).

D. The State's evidence was insufficient to support the conviction for assault of a child in the first degree because it failed to show intent beyond a reasonable doubt.

The State must prove beyond a reasonable doubt every element of a charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970). As reflected in the to-convict instruction, the State had to prove Mr. Romaneschi intentionally assaulted ENR. (Instruction 10, CP 256). Instruction 11 provided:

> An assault is an intentional touching of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching is offensive, if the touching would offend an ordinary person who is not unduly sensitive. (CP 257).

The definition of "intent" was given in instruction 12:

> A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime. (CP 258).

The evidence at trial was that Mr. Romaneschi had no intent to harm, that is, assault, his baby daughter. He loved her to death, but he admittedly lacked parenting skills. Although he meant no harm, Mr. Romaneschi may have been too rough with her at times and neither knew his own strength nor the fragility of a newborn.

In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Even in that light, the evidence fell short of showing by the requisite quantum of proof that Mr. Romaneschi had the intent to assault ENR. Indeed, the jury struggled with the same question as reflected in its inquiry to the court:

> In order to convict the defendant of first degree assault, must he know that his actions result (constitute) a crime. (CP 279).

There was no evidence Mr. Romaneschi had any criminal intent to assault ENR. The only way the jury could get there was to stack inference on inference from his coerced statements. Without those statements, there is not even circumstantial evidence of any intent to assault. The existence of facts cannot be based on guess, speculation, or conjecture by the jury. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). But that is what the jury impermissibly did to find intent. Because the State's evidence was insufficient to prove intent beyond a reasonable doubt, the conviction for assault of a child in the first degree must be reversed.

IV. CONCLUSION

Mr. Romaneschi respectfully asks this court to reverse his conviction of child assault in the first degree and dismiss the charge or remand for new trial.

DATED this 23rd day of December, 2014.

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CERTIFICATE OF SERVICE

I certify that on December 23, 2014, I served the brief of appellant by first class mail, postage prepaid, on Tyson J. Romaneschi, # 369903 , PO Box 2049, Airway Heights, WA 99001; and by email, as agreed by counsel, on Mark E. Lindsey at SCPAappeals@spokanecounty.org.