32103-7-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TYSON J. ROMANESCHI, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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APPELLANT'S ASSIGNMENTS OF ERROR

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 PRESENTED

1. Was there substantial evidence in the record from which the trial court could have found the confession to be voluntary by a preponderance of the evidence?

2. Did the trial court err when it read an incorrect instruction number 9 to the jury, and, before deliberations, corrected the written instruction?

3. Did the appellant waive any claim of error in the trial court's failure to preserve a record, during the informal jury instructions conference, where appellate counsel has made no attempt to supplement or cure the record?

4. Was there sufficient evidence to support the conviction of the appellant for assault of a child in the first degree?

STATEMENT OF THE CASE

The appellant/defendant, Tyson Romaneschi, was charged by second amended information in the Spokane County Superior Court on June 14, 2012, with assault of a child in the first degree; violation of a no contact order; violation of an order of protection; and tampering with a witness (for acts occurring on or about between December 13, 2011 and February 3, 2012). CP 79.

CRR 3.5 HEARING

Before trial commenced, the Honorable MaryAnn Moreno held a CrR 3.5 hearing on October 19, 2012, to determine the admissibility of statements made by the appellant to law enforcement during the investigation of the crimes. RP 27 – 73[1].

[1] Verbatim Report of Proceedings (RP) (CrR 3.5 hearing) (October 19, 2012).

Spokane police detectives, Neil Gallion and Jan Pogachar, investigated allegations against the appellant to include serious assault of an infant.

Prior to February 7, 2012, Detective Gallion made telephonic arrangements to speak with the victim's mother, Shanya Tipton, at the police station. RP 30; RP 44. On February 7, 2012, Ms. Tipton arrived at the police station with the appellant.[2] RP 30. Ms. Tipton was interviewed first. RP 31.

Thereafter, the appellant was interviewed in a conference room[3] at the police station by Detective Gallion and Detective Jan Pogachar.

Prior to the interview, the appellant was advised of his Miranda warnings at 10:58 am. RP 30-32. The detective used a preprinted rights card to advise the defendant. RP 31. The appellant was advised: 1) "You have the right to remain silent;" 2) "Anything you say can will be used

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[2] Ms. Tipton testified at the time of trial she previously told the defendant if he had nothing to hide, he should schedule an appointment with the police and speak with them. RP 237.

[3] The conference room is approximately eight feet by twelve feet. RP 42. It has a table in the middle of the room and approximately six chairs. It is contained in the office where the detectives are based. RP 48 Although armed, the detectives were in plain clothes. RP 43; RP 55. Detective Gallion stated Mr. Romaneschi was allowed restroom use and he would have been offered refreshments or other amenities if requested. RP 45. Detective Pogachar did not believe the appellant was offered restroom use. RP 57.

against you in a court of law;" 3) "You have the right to talk to an attorney at this time before answering any questions;" 4) You have the right to have your attorney present during the questioning;" and 5) "If you cannot afford an attorney, one will be appointed for you without cost before any questioning if you so desire;" and 6) "Do you understand my questions?" RP 31-32.

Afterward, the appellant was allowed to read the rights card. He indicated he understood the rights and he acknowledged the same on the rights card. RP 32. The time of the appellant's signature on the rights card was 11:34 am. RP 32. No promises were made to the defendant prior to or during the interview. RP 67.

Detective Gallion explained to the appellant that his baby had serious injuries and they were not accidental. RP 32; RP 34. The appellant was advised he was a suspect before the interview. RP 45.

The appellant initially stated he was "shocked" about the baby's injuries. RP 33. He indicated he was a "new" parent and he wanted to take some parenting classes because he did not think he was doing a good job. RP 33. The appellant was informed that significant force was used against the child. RP 34. He responded that he could have caused the injuries by tightly hugging the child and he didn't know his own strength. RP 34. He explained that he used a certain technique to hug the baby. RP 34; RP 36.

He claimed he did so to help the baby sleep. RP 36. He knew of no other method to do so. RP 37. The appellant became increasingly agitated and emotional during the interview. RP 37. His voice got louder and his demeanor went up and down. RP 37. The detective attempted to calm him down during the interview. RP 37.

The appellant was next advised of the different bruises and fractures atop and within the baby's body. RP 37-38. Appellant explained how he would bend the baby's feet up to her nose, playing what he called the "sniffy game." RP 38; RP 50. He demonstrated by quickly moving his hands with the baby's legs. RP 38. Appellant then claimed someone else must have caused the injuries. RP 38. At this point in the interview, the appellant became angry. RP 38;RP 49. He advised he becomes easily "frustrated." RP 49. He repeatedly stated he did nothing intentional to the baby. RP 38-39.

The appellant again was asked about the origin of the injuries. RP 38-39. He asserted he was holding the baby and "squeezing" her to help her sleep. RP 39. He claimed it would enable her to fall asleep faster if she was crying. RP 39. He further advised he loved to squeeze the baby's hands. RP 39. However, he did not think he would hurt her by doing so. RP 39-40.

Detective Gallion told the appellant that he did not believe him. The appellant admitted he had not been truthful. RP 40; RP 46. Detective Pogachar continued with additional interview questions. RP 47.

She asked the appellant if the fractures to the baby's ribs were caused by the appellant squeezing too hard. RP 49. The appellant continued to deny he hurt the child but he did admit that he was too "rough" at times. RP 50. The appellant admitted the mother, Ms. Tipton, took the baby from him because he was too "rough" with the baby. RP 50. Thereafter, and at the request of the appellant, the interview ended at 12:15.

After the hearing, the court orally made findings of fact and conclusions of law. RP 71-73. The court held the statements would be admissible at the time of trial. RP 71-73. Subsequently, the court entered written findings of fact and conclusions of law. CP 117-119.

TRIAL.

1. State's witness-Shayna Tipton

At the time of trial, Ms. Tipton testified her biological daughter-the victim E.R. - was born December 13, 2011. RP 205. Ms. Tipton was engaged to the appellant at the time and he was E.R's biological father.RP 207-08; RP 210[4]. Ms. Tipton sought appropriate medical care

[4] Verbatim Report of Proceedings (July 9, 2013) (trial).

for the baby during and after the pregnancy. RP 208; RP 211-13. The appellant assisted Ms. Tipton in feeding the child in the late evening and early morning hours. RP 218.

There were times the baby became agitated when the appellant held her. RP 223-224. When the appellant held the baby she would cry. RP 224. The baby was approximately two to three weeks old when Ms. Tipton began to notice a change in the baby's behavior. This change occurred when the baby was near the appellant. RP 271. During this time frame, Ms. Tipton observed a bruise on the baby's arm and shoulder. RP 225. She testified the appellant was rough with the baby. RP 226. He played the "sniffy game." RP 226. She provided other examples of what she perceived as "rough" behavior, such as the appellant pouring a bottle of water over the child's face during a bath. RP 227.

When the appellant fed the baby at night, he would always take her into the bathroom and close the door. RP 227. He would turn a heater fan on in the bathroom making it difficult for Ms. Tipton to hear sounds from the bathroom[5]. RP 227-28. Several times she was awakened from a deep sleep by the baby crying very loudly, close to a shrieking sound. RP 228. This caused Ms. Tipton alarm because E.R. was a quiet baby. RP 228.

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[5] Ms. Tipton did testify the fan was soothing to the child. RP 275.

This happened several times. RP 229. On one occasion, she took the child from the defendant and volunteered to take over the nighttime feedings. RP 228. During one night time feeding, the appellant was overheard, through the bathroom door, yelling at the baby to "Shut the f--k up." RP 294.

Ms. Tipton asked the appellant why the baby was crying. RP 229-30. He said he would hold her and play the "squeeze game." RP 230. He did so to facilitate the child falling asleep. RP 231. After Ms. Tipton took over the nighttime feeding, the baby had no difficulty falling asleep. RP 231.

In February 2012, the baby was admitted to Deaconess Medical Center for a urinary tract infection. RP 232. During this hospital stay, an x-ray revealed the baby had rib fractures. RP 235. Ms. Tipton subsequently asked the appellant if he caused the fracture not knowing his own strength. RP 235. He replied he could understand how he could have caused the fracture. RP 235.[6] At the hospital, Ms. Tipton was also advised

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[6] On March 1, 2012, Ms. Tipton sought and was granted a protection order prohibiting the appellant from having contact with her. RP 240 (trial transcript) (July 7-8, 2013). The court also granted a pretrial order prohibiting contact between the appellant and the baby. RP 240-41. During the pendency of the protection order, the appellant and Ms. Tipton often had contact. RP 245. On a number of occasions, the appellant attempted to convince Ms. Tipton not testify that he did not cause the injuries. RP 246-47. He also asked Ms. Tipton speak with his attorney;

by medical staff that the baby was undernourished because of the trauma she had experienced. RP 284.

The child did not sustain any further fractures after she was physically removed from the appellant. RP 261.

2. State's witness-Dr. Timothy Crum

Dr. Crum testified E.R. was born with no complications. RP 301. The baby initially gained weight and was above her birth weight. RP 304. When the baby was 51 days old, she was treated by Dr. Crum. He diagnosed a urinary tract infection and he referred the baby to Deaconess Medical Center for treatment. RP 310.

3. State's witness-Detective Neil Gallion

Detective Gallion was the lead detective on the case. On February 6, 2012, Detective Gallion was advised the baby was at Deaconess Medical Center with serious injuries. RP 324-25. At the hospital, he observed the child's family members. RP 325. The detective initially spoke with the appellant. RP 327. The appellant appeared calm at the hospital. RP 327. The detective advised the appellant that he needed to speak with him. RP 328. The conversation ended because the appellant had to leave the hospital. RP 328.

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that his attorney would help her fill out paperwork to get the order of protection dismissed. RP 248-50. The order of protection was subsequently dismissed. RP 254. He also told her not to speak with CPS and law enforcement. RP 256.

The detective made arrangements by telephone to meet and speak specifically with Ms. Tipton at the police station. 331. She arrived at the police station[7] on February 7, 2012, at 11:00 a.m. with the appellant. RP 331. Ms. Tipton was interviewed first while the appellant remained in the lobby. RP 332. Ms. Tipton was advised of her rights, which she waived, and then asked general questions. RP 333-34. The interview lasted approximately 30 minutes. RP 334.

Detective Gallion then invited the appellant to speak with him. RP 336. Appellant agreed to do so. RP 337. Before speaking with the appellant, he was advised of his rights, which he waived, and he agreed to speak with detectives. RP 336-37. Appellant said he wanted to be fully honest and cooperate with the police. RP 338. The appellant was interviewed in a conference room as opposed to an interview room because Detective Gallion thought it would be less stressful. RP 372-73.

The appellant was asked general questions regarding his relationship with Ms. Tipton and her pregnancy. RP 339. The detective advised him that significant force was used against the child and her injuries were not accidental. RP 340. The appellant told the detective that he would hug the child against his chest very tightly and he didn't know

[7] Most detectives are housed in an office building separate from the main police station. RP 332.

his own strength. RP 340. The appellant specifically told the detective he hugged the child against his chest by crossing his arms and then squeezing the child. RP 341. The appellant claimed he hugged the child in this manner to help her sleep; he did not mean to hurt her. RP 341.

The detective told the appellant about the different fractures discovered by doctors. RP 343. The appellant described and demonstrated to the detective how he would rapidly bend the baby's legs up and down; to and from her nose, calling it the "sniffy" game. RP 343. He did so to make the baby cry; if the baby cried, she would fall asleep faster. RP 376. The appellant also relayed how he loved to squeeze the baby's hands. RP 345.

The detective told the appellant the only thing he wanted was the truth. RP 346. Appellant confirmed he had not been truthful. RP 345-46. Detective Gallion next advised Detective Pogachar took over the interview. Detective Gallion had to keep calming the appellant down. RP 374.

During the interview, the appellant was calm with bouts of crying and as the interview progressed, he became agitated, angry and loud. RP 342.

4. State's witness-Detective Jan Pogachar

Detective Pogachar asked the appellant about the fracture to the baby's leg. RP 382. The appellant told the detective he never meant to hurt the child; although he thought he was too rough at times. RP 382

On February 8, 2012, the appellant called Detective Gallion now claiming that the hospital staff had assaulted the child. RP 346-47.

5. State's witness-Dr. Michelle Messer

Dr. Messer practices pediatric medicine, specializing in child abuse and neglect. RP 419-20. She has specialized in this area since 2007. RP 419. She was consulted regarding potential child abuse of the victim in the present case. RP 424. She starts every consult with a strategy of ruling out child abuse. RP 423-24. She reviews all chart reports and then examines the child from head to toe. RP 424. If available, she will also consult with family members during this process. RP 424.

Dr. Messer observed the baby on February 8, 2012. RP 427. The baby's outward appearance was normal and there were no signs of rickets. RP 432. The doctor did observe splints on the baby's left arm and left leg. RP 432. An x-ray initially revealed healing rib fractures on both sides of the chest. RP 436.[8] There were also fractures in the elbow bone, forearm,

[8] Dr. Messer testified x-rays show showed healing on the left side anterior 4th, 5th, 6th, 7th, and 10th rib fractures in the back toward the side, and the right anterior 10th, 11th, and 12th posterior rib fractures that

a finger, right forearm, right femur, left femur, and bones in the lower leg and left foot. RP 437. The doctor noted the fractures were in different stages of healing and that force must have been applied to the child "over and over and over" again. RP 437-39. A total of 21 fractures were noted by the doctor. RP 438.

Dr. Messer testified with a six-week-old baby, one would not observe fractures such as those found with E.R, even if the child had rickets. RP 488. She further testified that during her 28 years of practice, she had encountered only two cases of rickets in children. RP 305.

The doctor opined these were injuries of abuse and were not accidental. RP 447-48.

6. State's witness-Dr. David Atkins

Dr. Atkins is a board certified radiologist in western Washington. RP 515. He reviewed the chest x-rays taken of the baby upon entry into the hospital. RP 520. He observed healing chest fractures on both sides of the chest. RP 521-23. The fractures were at different stages of mending. RP 524. He also observed multiple other healing fractures about the baby's body. RP 527-29. In addition, the doctor noted a fracture of the left

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appeared chronic in nature with new bone formation. RP 436. A substantial amount of force is required to cause rib fractures and other fractures in an infant. RP 443; RP 486. Dr. Atkins, a radiologist, observed the same. RP 531. He observed a total of 10 rib fractures. RP 532.

forearm; a left hand finger; a right thighbone; and four separate fractures on the right leg which included one above and one below the knee. RP 534-39. There were two possible fractures located on the left forearm. RP 539.

7. Defense witness-Dr. Steven Gabaeff

Dr. Gabaeff reviewed the medical reports and records associated with the case. RP 645. This doctor initially testified regarding his review of the baby's medical history before and after admittance into the hospital. RP 645. Dr. Gabaeff believed the rib fractures were sustained at birth. RP 675; 715-16. He opined that a baby suffering from rickets could have sustained an injury during birth. RP 680. He further testified it was his opinion that the baby suffered from calcium deficiency which placed the baby in a position to be susceptible to fractures. RP 726-59. He also speculated that hospital staff may have contributed to some of the fractures from handling the baby. RP 724-48; RP 751-755. The doctor ultimately stated this case turned into an infantile rickets case which facilitated the baby's fractures. RP 766-70. He did not consider the appellant's actions toward the baby in his analysis. RP 766-70.

8. Defense witness-Karey Romaneschi

The appellant is her son. He was 27 years old at the time of trial. RP 853. She stated she never saw the appellant treat the baby

inappropriately. RP 858. She stated the baby did not cry very often. RP 858. She never heard the baby cry when the appellant held her. RP 859. She never heard of the "sniffy game" as described by the appellant. RP 871.

9. Defense witness-Jody Maier.

She observed the baby four to five times in December, 2011, and January, 2012. RP 888. She stated the appellant was gentle with the baby. RP 891.

10. Defense witness-Sheldon Platt

His brother is the appellant. RP 894. He never observed the appellant hold the baby in what he considered to be an inappropriate manner. RP 897.

11. Defense witness-Eric Malmquist

Mr. Malmquist is a longtime friend of the appellant. RP 903. He observed the baby three to four times a week. RP 904. In his opinion, the appellant treated the baby appropriately. RP 906. He never saw the baby cry. RP 905. He did not observe any injuries on the child. RP 907-09.

12. Jury selection

At the end of testimony and after an informal instruction conference, the trial court invited the parties to make exceptions or objections, on the record, to the court's jury instructions. RP 929. Neither

the State nor the appellant had any objections or exceptions to the court's instructions. RP 929. The trial court read all of the instructions to the jury in open court. RP 929-46. At the end of the closing argument, the jury was sent home for the evening and instructed to return the next morning to begin deliberations. RP 996-997. The court then advised the parties that instruction number 9 (definition instruction for first degree assault of a child) included an additional prong which was not included in instruction number 10 (elements instruction for first degree assault of a child). RP 997-98.[9] Instruction number 10 was accurate statement of

[9] Instruction number 9 stated: "A person commits the crime of assault of a child in the first degree if the person is 18 years of age or older and the child is under the age of 13 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." RP 935-36.

Instruction number 10 stated: "To convict the defendant of the crime of assault of a child in the first degree, each of the following elements must be proved beyond a reasonable doubt: (1) that on or about December 13th, 2011, and February 3rd, 2012, the defendant intentionally assaulted [E.R.] Romaneschi and caused substantial bodily harm; (2) that the defendant was 18 years of age or older and [E.R.] Romaneschi was under the age of 13; (3) that the defendant had previously engaged in a pattern or practice of assaulting [E.R.] which had resulted in bodily harm that was greater than transient physical pain or minor temporary marks; and (4) that any of these acts occurred in the State of Washington. If you find from the evidence that these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if after weighing the evidence you have a reasonable doubt as to any one of

the law. RP 998. Both parties agreed the court should correct the elements instruction number 9 to reflect the charge in the information. RP 998. The court and parties departed for the evening. RP 1000.

The appellant was convicted of the assault of a child in the first degree; violation of a no contact order; and violation of an order of protection on July 13, 2013. CP 100; CP 104; CP 105. The verdict form for the witness tampering charge was not signed by the jury. CP 106.

The appellant was sentenced to a standard range sentence on all charges. CP 385; CP 389; CP 394. This appeal followed.

V. ARGUMENT

A. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD FROM WHICH THE TRIAL COURT COULD HAVE FOUND THE CONFESSION WAS VOLUNTARY.

In the written findings of fact and conclusions of law, the trial court found under 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 In addition, the court orally found there were no threats; and, the atmosphere in the conference room during the appellant's

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these elements, then it will be your duty to return a verdict of not guilty." RP 936.

interview was not coercive. RP 72.[10] The court also found the appellant was not locked in any room or handcuffed, (FF 8; CP 118) and, when the appellant terminated the interview, he walked out of the interview and let himself out of the building (FF 11; FF 12; CP 118).

The Fifth Amendment to the United States Constitution states that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Article I, section 9 of the Washington State Constitution provides the same protection. *State v. Mendes,* 180 Wn.2d 188, 194, 322 P.3d 791 (2014).

Standard of review regarding a confession.

This court reviews de novo the validity of a suspect's waiver of Miranda rights and it will uphold the trial court's voluntariness determination "if there is substantial evidence in the record from which the trial court could have found the confession was voluntary by a preponderance of the evidence." *State v. Aten,* 130 Wn.2d 640, 664, 927 P.2d 210 (1996); *see also State v. Broadaway,* 133 Wn.2d 118, 130, 942 P.2d 363 (1997).

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[10] Where written findings of fact are incomplete, this court may rely on the trial court's oral findings for purposes of review. *State v. Bynum,* 76 Wn.App. 262, 884 P.2d 10 (1994), *review denied,* 126 Wn.2d 1012, (1995).

To be admissible, this court has found a defendant's statement to law enforcement must pass two tests of voluntariness: (1) the due process test, whether the statement was the product of police coercion; and (2) the *Miranda* test, whether a defendant who has been informed of his rights thereafter knowingly and intelligently waived those rights before making a statement. *State v. DeLeon,* 341 P.3d 315, 330 (Wn.App. Div. 3, 2014); *State v. Reuben,* 62 Wn.App. 620, 624, 814 P.2d 1177 (1991).

A reviewing court will evaluate the totality of the circumstances to determine whether custodial statements were voluntarily given. *DeLeon,* 341 P.3d at 330. When examining the totality of the circumstances surrounding a defendant's confession, courts consider the location, length, and continuity of the interrogation; the defendant's maturity, education, physical condition, and mental health; and whether the police had advised the defendant of his Fifth Amendment rights. *State v. Unga,* 165 Wn.2d 95, 101, 196 P.3d 645 (2008). Additionally, "[t]he totality-of-the-circumstances test specifically applies to determine whether a confession was coerced by any express or implied promise or by the exertion of any improper influence." *Unga,* 165 Wn.2d at 101

A defendant's custodial statements are not admissible at trial if police tactics manipulated or prevented the defendant from making a rational, independent decision about giving a statement. *Unga,* 165 Wn.2d

at 102. The question is "[w]hether [the interrogating officer's] statements were so manipulative or coercive that they deprived [the suspect] of his ability to make an unconstrained, autonomous decision to confess." *Unga,* 165 Wn.2d at 102

A police officer's psychological ploys such as playing on the suspect's sympathies, saying that honesty is the best policy for a person hoping for leniency, or telling the suspect that he could help himself by cooperating may play a part in a suspect's decision to confess, "but so long as that decision is a product of the suspect's own balancing of competing considerations, the confession is voluntary." *Unga,* 165 Wn.2d at 102; *State v. Rupe,* 101 Wn.2d 664, 679, 683 P.2d 571 (1984).

For example, in *Unga,* the appellant argued that a detective induced his confession with a promise not to prosecute. *Unga.* at 107. The court noted that a "promise does not per se render a confession involuntary; it is one factor among the totality of the circumstances." *Id.* at 108. Unga received his *Miranda* rights, understood and waived those rights, and was old enough to make a voluntary and intelligent statement. *Id.* at 108. There was no evidence that he lacked capacity. *Id.* Unga's questioning lasted only 30 minutes, he was in a room with the door left open, and there was no evidence that the detective used a threatening tone or intimidated him. *Id.* at 109. And, there was no evidence that Unga was

denied food, sleep, or bathroom facilities. *Id.* Under the totality of the circumstances, Unga's confession was not coerced. *Id.* at 111.

Here and contrary to the appellant's claim and argument, he was advised by Detective Gallion he could have a lawyer before and at the time of questioning. RP 31. The trial court found the appellant had been advised of his Miranda warning prior to questioning by officers. CP 118. The record is devoid of any evidence that law enforcement spoke with defendant-other than a short visit with him at the hospital-until he arrived unannounced with his fiancé at the detective's office on February 7, 2012.

With respect to the appellant's mental state during the interview, he claims he was immature and/or in a fragile mental health at the time of questioning is unsupported in the record. *See*, App.Br. at 28.

There is no evidence supporting the suggestion that the officers played "good cop" and "bad cop" other than by supposition in appellant's opening brief. *See*, App.Br. at 25. The fact that both officers questioned the appellant does not aid his argument.

The record is bare of any facts which would suggest the appellant's free will was domineered to the degree that he said what he believed the officer's wanted to hear. To the contrary, he described his behavior toward the child as inadvertent throughout the interview, CP 38-39; he minimized his involvement stating he did not know his own strength, RP 34; and he

terminated the interview on his own volition, by walking out of the detectives' office. RP 52.

In summary, the appellant received his rights both verbally and in writing, he understood the warnings and waived those rights. There was no evidence he lacked capacity or that he was impaired. The questioning only lasted approximately 45 minutes. The conference room door was unlocked. Appellant eventually walked out of the office after ending the interview. There is no evidence the detectives threatened the appellant or intimidated him. To the contrary, detectives attempted to calm the appellant during the interview. There was no evidence the appellant was denied food, sleep, or the restroom facility.

Under the totality of the circumstances, the appellant's confession was not coerced and there was no error.

B. THE TRIAL COURT DID NOT ERR WHEN IT READ AN INCORRECT INSTRUCTION NUMBER 9 TO THE JURY AND, BEFORE DELIBERATIONS, CORRECTED THE WRITTEN INSTRUCTION.

The appellant complains for the first time on appeal that the trial court's instruction number nine (definitional instruction) was incorrect when read to the jury, but corrected in written form and provided to the jury before deliberations began. There is no dispute the trial court's

corrected definitional instruction number 9 was a correct statement of the law.

1. The appellant has waived his claim of error.

Generally, a party who fails to object to jury instructions in the trial court waives a claim of error on appeal. RAP 2.5(a)[11]; *State v. Schaler*, 169 Wn.2d 274, 282, 236 P.3d 858 (2010); *State v. Smith*, 174 Wn.App. 359, 364, 298 P.3d 785 (2013). This court reviews a challenged jury instruction de novo. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

As this court observed in *State v. Guzman Nuñez*, 160 Wn.App. 150, 157, 248 P.3d 103 (2011), *aff'd*, 174 Wn.2d 707, 285 P.3d 21 (2012): "[T]he general rule has specific applicability with respect to claimed errors in jury instructions in criminal cases through CrR 6.15(c),[12] requiring that

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[11] RAP 2.5(a) states an appellate court may refuse to review any claim of error which was not raised in the trial court. An error of constitutional magnitude can be raised for the first time on appeal. RAP 2.5(3); *Scott*, 110 Wn.2d at 685.

[12] CrR 6.15(c) states: "**Objection to Instructions.** Before instructing the jury, the court shall supply counsel with copies of the proposed numbered instructions, verdict and special finding forms. The court shall afford to counsel an opportunity in the absence of the jury to object to the giving of any instructions and the refusal to give a requested instruction or submission of a verdict or special finding form. The party objecting shall state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused. The court shall

timely and well stated objections be made to instructions given or refused 'in order that the trial court may have the opportunity to correct any error.'" *Accord, State v. Sublett,* 176 Wn.2d 58, 75-76, 292 P.3d 715, (2012) (any objections to the instructions, as well as the grounds for the objections, must be put in the record to preserve review).

Here, the appellant waived his claim of error because he did not object at the time the court took exceptions and objections to the jury instructions. An objection to the incorrect instruction number 9 would have permitted the trial court the opportunity to correct the minor error before verbally instructing the jury. RP 929. In fact, the appellant acknowledged the error before deliberations began and agreed that the error should be fixed in the written instruction. RP 998. However, he did not request the court reinstruct the jury with respect to the correct written instruction number 9 before deliberations began. He cannot, at this time, cry foul because he had the opportunity to have the trial court correct and reread instruction number 9 to the jury.[13] He has waived his claim of error.

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provide counsel for each party with a copy of the instructions in their final form."

[13] In *State v. Sanchez,* 122 Wn.App. 579, 94 P.3d 384 (2004), this court was presented with different facts. In *Sanchez,* the trial court "skipped over" the jury instruction defining assault when it orally instructed the jury on the law. 122 Wn.App. at 585. Thus, having followed CrR 6.15(a) and (c), the trial court then failed to read aloud (for whatever

2. The appellant cannot establish actual prejudice, and, therefore, an issue of constitutional magnitude.

To overcome RAP 2.5(a) and raise an error for the first time on appeal, an appellant must first demonstrate that the error is "truly of constitutional dimension." *State v. O'Hara,* 167 Wn.2d 91, 98, 217 P.3d 756 (2009). This court will not assume an error is of constitutional magnitude. *State v. Scott,* 110 Wn.2d, 687, 727 P.2d 492 (1988). A constitutional error is manifest "[i]f the appellant can show actual prejudice, i.e., there must be a 'plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.'" *State v. Gordon,* 172 Wn.2d 671, 676, 260 P.3d 884 (2011) (citation omitted). Stated alternatively, the appellant must "identify a constitutional error and show how the alleged error actually affected the [appellant]'s rights at trial." *O'Hara,* 167 Wn.2d at 98.[14]

This court narrowly construes exceptions to RAP 2.5(a). *State v. Montgomery,* 163 Wn.2d 577, 595, 183 P.3d 267 (2008).

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reason) a final instruction agreed upon by both parties, as contemplated by CrR 6.15(d). In contrast, at Appellant's trial, the trial court initially read to the jury, every instruction agreed upon by both parties, and, it satisfied CrR 6.15(d).

[14] Jury instructional errors that appellate courts have held constituted manifest constitutional error include: directing a verdict, shifting the burden of proof to the defendant, failing to define the beyond a reasonable doubt standard, failing to require a unanimous verdict, and omitting an element of the crime charged. *O'Hara,* 167 Wn.2d at 100.

In determining whether a claimed error is manifest, this court views the claimed error in the context of the record as a whole, rather than in isolation. *Scott*, 110 Wn.2d at 688. Manifest error is "unmistakable, evident or indisputable." *State v. Burke*, 163 Wn.2d 204, 224, 181 P.3d 1 (2008). Instructional error is not automatically constitutional error. *Guzman Nunez*, 160 Wn.App. at 159.

"[A]s long as the instructions properly inform the jury of the elements of the charged crime, any error in further defining terms used in the elements is not of constitutional magnitude." *State v. Gordon*, 172 Wn.2d at 677, ; *State v. Stearns*, 119 Wn.2d 247, 250, 830 P.2d 355 (1992). "Even an error in defining technical terms does not rise to the level of *constitutional* error." *Gordon*, 172 Wn.2d at 677.[15]

The present case falls under the latter category because it is definitional. The appellant cannot and has not established a plausible showing that the asserted error had practical or identifiable consequences at the time of trial. *O'Hara*, 167 Wn.2d at 99. Because he fails to establish

[15] For example, failure to instruct on a lesser included offense, *State v. Mak*, 105 Wn.2d 692, 745-49, 747, 718 P.2d 407 (1986), *overruled on other grounds, State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994); and the failure to define individual terms, *Scott*, 110 Wn.2d at 690-91; *O'Hara*, 167 Wn.2d at 101, do not constitute manifest constitutional error.

any consequences, he fails to identify a manifest error affecting a constitutional right. The appellant's claim fails and it has no merit.

3. If this court determines that submitting the corrected definitional instruction number 9 to the jury before deliberations, without reinstructing the jury, is of constitutional magnitude, it was harmless error.

Should this court determine that a claim of manifest constitutional error has been raised, "it may still be subject to a harmless error analysis." *O'Hara,* 167 Wn.2d at 98. "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *State v. Schaler,* 169 Wn.2d 274, at 287–88. By example, omission of an element from a "to convict" instruction is harmless error if it is clear beyond a reasonable doubt that the error did not contribute to the verdict. *Neder v. United States,* 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); *State v. Thomas,* 150 Wn.2d 821, 840–41, 83 P.3d 970 (2004).

Even if the appellant can successfully establish the jury instruction claim raises a manifest constitutional error, it was harmless. The trial court's corrected "definitional" instruction number 9 and the "elements" instruction number 10 both accurately informed the jury of the "elements" of assault of a child in the first degree and the State's burden to prove each element beyond a reasonable doubt. Moreover, the appellant did not tailor

the presentation of his case or his closing argument on the inclusion of the "torture" prong in the elements instruction. Nor was it discussed or argued by either side during the case or closing argument. There was no evidence the jury based its decision on the inclusion of the "torture" prong language during the original reading of the jury instructions. Accordingly, there was no error.

C. THE APPELLANT HAS WAIVED ANY CLAIM OF ERROR IN THE TRIAL COURT'S FAILURE TO PRESERVE A RECORD DURING THE INFORMAL INSTRUCTIONS CONFERENCE WHERE APPELLATE COUNSEL HAS MADE NO ATTEMPT TO SUPPLEMENT OR CURE THE RECORD.

The appellant complains there was no record of the court's informal instruction conference. *See,* App.Br. at 33; RP 929.

A criminal defendant must have a "record of sufficient completeness" for appellate review of potential errors. *State v. Larson,* 62 Wn.2d 64, 66, 381 P.2d 120 (1963) But a "complete verbatim transcript" is not required. *State v. Tilton,* 149 Wn.2d 775, 781, 72 P.3d 735 (2003).

In *Tilton, supra*, the court held a reconstructed record was insufficient and reversed where (1) the defendant's testimony was not recorded, *Id.* at 779; (2) his trial lawyer had no recollection of the defendant's testimony; and (3) the defendant's unrecorded testimony was essential to his appeal. *Id.* at 783. Despite its holding under the specific facts of the case, the Supreme Court generally noted that a new trial will

seldom be required when a report of proceedings is not recorded or where it has been lost. *Id.*

It is the appellant's duty to make all reasonable efforts to acquire a record of sufficient completeness for appellate review. RAP 9.1 (b).

Here, the appellant has not used any of the available means of providing a substitute record of the informal instructions conference. RCW 2.32.200 requires the court reporter to create a full report of oral proceedings only at the affirmative request of either party or counsel, or at the option of the trial judge. *In re Adoption of Coggins,* 13 Wn.App. 736, 738, 537 P.2d 287 (1975). Appellant did not request a record of the informal jury instruction conference.

Moreover, Appellant could have prepared a narrative report of proceedings (RAP 9.3), an agreed report of proceedings (RAP 9.4), or affidavits from counsel and/or the trial court to determine what occurred at the instruction conference. See, *State v. Miller*, 40 Wn.App. 483, 698 P.2d 1123 (1985) (the defendant waived any claim of error in trial court's failure to preserve a record where appellate counsel made no attempt to cure the record with affidavits from the court or counsel).

The appellant’s claim is without merit.

D. THERE WAS SUFFICIENT EVIDENCE TO CONVICT THE APPELLANT OF ASSAULT OF A CHILD IN THE FIRST DEGREE.

1. Standard of review for sufficiency of evidence.

The appellant claims the State did not establish the appellant's intent to commit the crime of assault of a child in the first degree. *See,* App.Br. at p. 34.

In reviewing claims of insufficiency of the evidence, the standard of review is whether any rational trier of fact, viewing the evidence in a light most favorable to the State, could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 316, 99 S.Ct. 2781, 2787, 61 L.Ed.2d 560 (1979); *State v. Green,* 94 Wn.2d 216, 616 P.2d 628 (1980); *State v. McBride* 74 Wn.App. 460, 463, 873 P.2d 589 (1994).

This court draws all reasonable inferences from the evidence in favor of the State and interprets it most strongly against the defendant. *State v. Brown,* 162 Wn.2d 422, 173 P.3d 245 (2007). An insufficiency claim admits the truth of the State's evidence and all reasonable inferences from it. *Brown,* 162 Wn.2d at 428. "Credibility determinations are for the trier of fact and are not subject to review." *Thomas,* 150 Wn.2d at 874. The appellant was charged under RCW 9A.36.120(1). That statute provides, in pertinent part, and, as charged in the information:

> A person eighteen years of age or older is guilty of the crime of assault of a child in the first degree if the child is under the age of thirteen and the person:… (b) Intentionally assaults the child and… (ii) Causes substantial bodily harm, and the person has previously engaged in a pattern or practice either of (A) assaulting the child which has resulted in bodily harm that is greater than transient physical pain or minor temporary marks….

RCW 9A.36.120(1).

The trial court defined assault for the jury with instruction number 11. It stated:

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

RP 935-36.

Intent is defined as acting with the 'objective or purpose to accomplish a result which constitutes a crime.' RCW 9A.08.010(a). *See,* instruction number 12.

2. Evidence of intent.

A finder of fact may reasonably infer criminal intent from the defendant's conduct as a matter of logical probability. *State v. Myers,* 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). In making this inference, circumstantial evidence is equally reliable as direct evidence. *Myers,* 133 Wn.2d at 38. Accordingly, a jury evaluates the credibility of all witnesses,

and the existence of conflicting evidence does not justify a new trial; instead, the finding of the jury is final. *State v. Williams*, 96 Wn.2d 215, 221, 634 P.2d 868 (1981).

Here, the child arrived at the hospital and it was determined that she had 21 separate fractures throughout her six-week-old body that were in various stages of healing. Dr. Messer stated force was applied "over and over and over" again to the child.

The appellant admitted he, at times, was too "rough" with the child. For instance he would forcefully press the child against his chest to cause the child cry to facilitate her sleep; or he would rapidly bend the child's legs up and down to facilitate the child falling asleep; and/or he would squeeze the child's hands very hard. He also told detectives he becomes easily frustrated. He also admitted the child's mother took E.R. from him because he was too rough. He also became angry with detectives and Detective Gallion had to calm him down during the interview.

The child's mother observed bruising on the baby's arm and shoulder. Several times while the appellant was feeding the child at night, the mother heard the baby crying very loudly, close to a shrieking sound even though the baby was normally quiet. At one point, the mother took over the entire feeding. The baby did not have any more fractures after she was physically removed from the appellant's care.

The appellant's attempt to minimize or deny his actions to law enforcement is of no consequence. At times, suspects will deny or minimize their criminal activity to gain favor with law enforcement or others.

Certainly a jury could infer, from both direct and circumstantial evidence, that appellant repeatedly used substantial force over a period of time against the baby causing multiple serious fractures. His intent to assault the child generally materialized when the child cried or became fussy. A jury could infer appellant became angry and frustrated with the baby because she would not stop crying; resultantly, appellant causing pain and injury to the baby.

Interpreting the evidence in the light most favorable to the State, a reasonable jury could find the appellant's actions over a period of time were intentionally harmful or offensive to the baby which caused substantial bodily injury.

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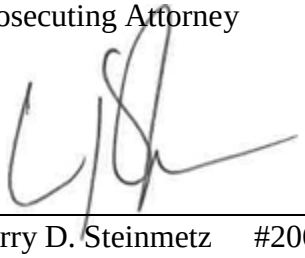
CONCLUSION

The respondent respectfully requests the court affirm the defendant's convictions and sentence for the reasons stated above.

Dated this 23rd day of February, 2015

LAWRENCE H. HASKELL
Prosecuting Attorney



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, v. TYSON J. ROMANESCHI, Appellant,	NO. 32103-7-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on February 23, 2015, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Kenneth Kato
khkato@comcast.net

and mailed a copy to:

Tyson J. Romaneschi, DOC #369903
Airway Heights Corrections
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Airway Heights, W 99001

2/23/2015	Spokane, WA	Crystal McNees
(Date)	**(Place)**	**(Signature)**