71193-8

71193-8

No. 71193-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CARRI WILLIAMS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR SKAGIT COUNTY

The Honorable Susan K. Cook

BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

STATUTES

RULES

A. SUMMARY OF ARGUMENT

Larry and Carri Williams used increasingly punitive parental discipline to attempt to alter the perceived misbehavior by their adopted children, H.W. and I.W. As a result, H.W. died. Larry and Carri Williams were charged with homicide by abuse, first degree manslaughter, and first degree assault of a child. Ms. Williams was convicted as charged, but sentenced only on the homicide by abuse and first degree assault of a child counts.

Ms. Williams submits the State failed to prove that H.W. was under the age of 16, an essential element of homicide by abuse, and failed to prove I.W. suffered substantial bodily harm, an essential element of first degree assault of a child. In addition, Ms. Williams contends the trial court erred in barring the testimony of a defense witness, erred in failing to declare a mistrial for the State's misconduct, and erred in failing to declare a mistrial for prosecutorial misconduct during closing argument. Finally, Ms. Williams submits the terms "torture" and "extreme indifference to human life" were unconstitutionally vague as applied to Ms. Williams' conduct, the trial court erred in allowing expert testimony regarding the "torture," and cumulative error violated her right to a fair trial.

B. ASSIGNMENTS OF ERROR

1. The State failed to prove H.W. was under sixteen years of age, an essential element of the offense of homicide by abuse.

2. The State failed to prove that I.W. suffered substantial bodily harm, an essential element of the offense of first degree assault of a child.

3. The court erred in refusing to grant a mistrial based upon the State's misconduct.

4. The court denied Ms. Williams the right to present a defense when it refused to allow the testimony of Dr. Bartelink, a critical defense witness.

5. The prosecutor committed prejudicial misconduct during closing argument.

6. The terms "extreme indifference to human life" and "torture" as they were used in the homicide by abuse and first degree assault of a child statutes are unconstitutionally vague as applied to Ms. Williams.

7. The trial court erred in refusing to define the term "extreme indifference to human life" as expressed in Ms. Williams' Proposed Instruction 4C.

8. The trial court erred in allowing expert testimony on torture where the term is a matter of common understanding.

9. Cumulative error rendered Ms. Williams' trial unconstitutionally unfair.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires the State to prove every essential element of an offense beyond a reasonable doubt. To prove homicide by abuse, the State must prove the victim was under the age of 16. The evidence at trial established H.W. could have been anywhere from 13 years to 19 years of age, but there was insufficient evidence presented that H.W. was under the age of 16. Is Ms. Williams entitled to reversal of her conviction for homicide by abuse with instructions to dismiss?

2. To prove first degree assault of a child, the State was required to prove I.W. suffered substantial bodily harm. The State unsuccessfully attempted to prove that Ms. Williams caused scars on I.W.'s back despite evidence that I.W. had these scars before the Williams adopted him. Is Ms. Williams entitled to reversal of her conviction for first degree assault of a child with instructions to dismiss?

3. A trial court must declare a mistrial where nothing short of a new trial could cure the prejudice suffered by the defendant. Based upon the State's misconduct involving its own witness, the trial court struck the witness's testimony. But, the prejudice suffered by Ms. Williams from this misconduct could not be cured by the court's elected remedy. Did the trial court err in failing to declare a mistrial, necessitating reversal of Ms. Williams' convictions and remand for a new trial?

4. A trial court violates a defendant's right to present a defense when it bars the defendant from presenting witnesses on the defendant's behalf. The remedy for the late disclosure of a witness is to allow the other party the opportunity to interview this witness. Here, the defense admittedly committed a discovery violation in failing to timely disclose an expert witness, but the trial court excluded the witness as the remedy for the discovery violation. Did the trial court's order deny Ms. Williams her right to present a defense thus necessitating reversal of her convictions and remand for a new trial?

5. A prosecutor commits misconduct during closing argument where he expresses a personal opinion. Here, the prosecutor twice expressed his personal opinion, and in both instances the court

sustained the defense objection. Is Ms. Williams entitled to reversal of her convictions for prosecutorial misconduct where the prosecutor engaged in improper argument after being warned?

6. A statutory term is unconstitutionally vague where it fails to provide ascertainable standards of guilt to protect against arbitrary enforcement. Here, the terms "torture" and "extreme indifference to human life" were unconstitutionally vague as applied to Ms. Williams where her defense rested on parental discipline and where the trial court failed to define these terms despite a request to do so. Is Ms. Williams entitled to reversal of her convictions where they rested on these unconstitutionally vague terms?

7. The trial court must exclude expert testimony where the testimony would not be helpful to the jury. Where the term "torture" is a term of common understanding, did the trial court err in allowing expert testimony on torture, requiring reversal of Ms. Williams' convictions?

8. Is Ms. Williams entitled to reversal of her convictions and remand for a new trial where cumulatively the errors committed by the trial court violated her right to a fair trial?

D. STATEMENT OF THE CASE

1. The charges. Larry and Carri Williams were married in 1990. 8/28/2013RP 87. Over the course of their marriage, the two had seven biological children. 8/27/2013RP 44. The youngest was born in 2004. 8/27/2013RP 45. They wanted to have more children, but after the last birth, Ms. Williams was unable to have any more children. 8/27/2013RP 46. In 2008, the Williams adopted two children from Ethiopia, I.W. and H.W. 8/9/2013RP 72.

Mr. Williams worked for the Boeing Company in Everett for 26 years, and Ms. Williams home-schooled their children while running and managing the household. 8/27/2013RP 43-44. Ms. Williams was a strict disciplinarian; she imposed rules on the children, and they were punished if they did not obey. 8/7/2013RP 11; 8/27/2013RP 124-25; 8/28/2013RP 103.

According to the Williams, they had issues concerning I.W.'s and H.W.'s ability or willingness to obey the rules imposed in the house. 8/27/2013RP 518/28/2013RP 100-03. Both Williams meted out the punishment for their adopted children's failure to obey the rules. 8/5/2013RP 60; 8/6/2013RP 57.

In a very misguided attempt at the parental discipline of I.W. and H.W. over a period of approximately two years, H.W. died. After a lengthy investigation by the Skagit County Sheriff's Office, the Williams were charged with one count each of homicide by abuse, one count each of first degree manslaughter, and one count each of first degree assault of a child. CP 1-2. A seven week jury trial began on July 13, 2013.

2. The saga of Tenassay Woldetsidik. On May 6, 2013, the State notified the defense that it intended to call as a witness Tenassay Woldetsidik, who claimed to be H.W.'s "uncle" and who the State intended to fly to the United States from Ethiopia. 5/9/2013RP 77-79. According to the State, Woldetsidik would be bringing H.W.'s "birth certificate" from Ethiopia. 5/9/2013RP 87-88.

At trial, Woldetsidik testified he was from Addis Ababa, Ethiopia and was H.W's uncle. 8/9/2013RP 134. He testified he lived with H.W.'s family and remembered the day that H.W. was born. 8/9/2013RP 135-36. He recorded H.W.'s birth and date in the family Bible. 8/9/2013RP 150. According to Woldetsidik, H.W.'s mother abandoned the family just after H.W.'s birth and Woldetsidik's family raised H.W. until H.W.'s father's death. 8/9/2013RP 137-38. Shortly

after H.W.'s father's death, H.W. was taken to the orphanage from which she was adopted by the Williams. 8/9/2013RP 143.

Upon the completion of his testimony and on the following day, instead of returning to Ethiopia, Woldetsidik fled the motel in Mt. Vernon in which he had been staying. 8/13/2013 51. On August 20, 2013, the defense discovered that one of the prosecutors, Richard Weyrich, had gone to Woldetsidik's motel room after Woldetsidik had fled and gathered up the items in the motel room and took them to his home. 8/13.2013RP 10. Weyrich waited three days before turning the items over to Mt. Vernon Police. 8/13/2013RP 10. Mr. Williams moved to disqualify Weyrich on the basis that he had become a witness in the matter. After a discussion between the parties and the court, Weyrich was allowed to remain. 8/13/2013RP 18.

On August 26, 2013, the defense discovered that Weyrich had provided Woldetsidik with money prior to Woldetsidik fleeing, which the State had not previously disclosed. 8/26/2013RP 13. The court was concerned about the State's failure to disclose this information to the defense, but deferred any ruling. 8/26/2013RP 17. Later on August 26, 2013, the defense moved to dismiss the matters, or alternatively, to strike the testimony of Mr. Woldetsidik based upon the State's failure

to disclose its payments to Woldetsidik. 8/26/2013RP 113. The court refused to dismiss the matter but agreed to strike Woldetsidik's testimony as well as the admission of the family Bible and other evidence admitted through the testimony of Woldetsidik because of the State's failure to disclose the payments. 8/26/2013RP 116. The court instructed the jury not to consider Woldetsidik's testimony or any of the evidence admitted through his testimony. 8/26/2013RP 121.

On August 28, 2013, the defense moved for a mistrial on the basis that merely striking Woldetsidik's testimony was insufficient to purge the prejudice from his testimony, thus dismissal was the only remedy. 8/28/2013RP 6. The court refused to grant a mistrial finding that striking the testimony was a sufficient remedy. 8/28/2013RP 7.

3. The exclusion of Dr. Bartelink's testimony. On August 13, 2013, the defense gave notice that they intended to call as a witness, Dr. Erik Bartelink, an anthropologist and professor at California State University at Chico, who conducted radiocarbon testing on two of H.W.'s teeth to determine her approximate age. CP 256. Dr. Bartelink used two of H.W.'s teeth and, based upon the results of his testing, was to opine in court that H.W. was between 15 and 20 years of age. CP 256. The State moved to exclude Dr. Bartelink's testimony, claiming

the notice that Mr. William's intended to call Dr. Bartelink was too late, occurring during the trial, thus a violation of CrR 4.7. CP Supp __, Sub No. 290, 293; 8/13/2013RP 55-57.[1] The defense opposed the State's motion, noting that the need for Dr. Bartelink's testimony only became clear when the State provided late notice of H.W.'s cousin's anticipated testimony about H.W.'s age. CP Supp __, Sub No. 291. In addition, the defense noted the remedy for the late notice would have been for the State to have the opportunity to interview Dr. Bartelink. CP Supp ___, Sub No. 291; 8/13/2013RP 66.[2] The trial court agreed with the need to allow Dr. Bartelink to testify, excusing the late notice because the need for the testimony had only recently arisen because of the testimony of Mr. Woldetsidik, and agreed to allow Dr. Bartelink to testify. 8/13/2013RP 74.

Subsequently, the State again moved to exclude Dr. Bartelink's testimony on the basis that it was cumulative and not relevant, the witness not qualified to testify about his conclusions, and the science

---

[1] The Supplemental Designation seeks to designate pleadings filed by Mr. Williams and placed only in the superior court file involving his case. *State v. Larry Williams*, No. 11-1-00927-0. Ms. Williams specifically adopted Mr. Williams' arguments.

[2] Ms. Williams joined in Mr. Williams' motion and moved to add Dr. Bartelink to her witness list as well. 8/13/2013RP 67-69.

underlying his conclusions did not meet the standard under *Frye,*[3] as it was not generally accepted in the scientific community. CP Supp __, Sub No. 296; 8/27/2013RP 72-77. The court ultimately excluded Dr. Bartelink's testimony, finding no justification for his late disclosure in light of the fact his testimony was no longer relevant once the court struck the testimony of Woldetsidik. 8/27/2013RP 77-81. The court also ruled Dr. Bartelink's testimony would have been cumulative and not relevant. 8/27/2013RP 77-81. In rebuttal, Ms. Williams reemphasized that the refusal to allow the testimony of Dr. Bartelink violated her right to present a defense to no avail:

> With respect to Dr. Bartelink, I agree you have a Sixth Amendment right to call witnesses. What you don't have a right to do is to come up with a witness in the middle of trial that you've never disclosed before for no good reason, and so that's the basis for not allowing Dr. Bartelink.

8/28/2013RP 7.

4. The prosecutor's closing argument. During closing argument, twice the prosecutor expressed his personal belief:

> [MR. WEYRICH:] [Larry Williams] was the one who approved of this isolation, putting them out there in the – at the picnic table or at the kitchen table, I guess at times.

---

[3] *Frye v. United States,* 293 F. 1013 (D.C.Cir.1923) (holding that scientific evidence is admissible only where it is based on methods that are generally accepted in the relevant scientific community).

He said he never gave them bad food. The fact of the matter, I think the testimony is that he did give them leftovers. And what is his response? The response was that they stole. *And I do take offense at the words –*

MS. FORDE: Objection.

THE COURT: Sustained.

MS. FORDE: Prosecutorial misconduct.

THE COURT: The objection is sustained.

MS. FORDE: I would ask for a curative instruction.

THE COURT: Ladies and gentlemen, you're instructed to disregard the statement about being offended. Go ahead.

. . .

[MR. WEYRICH:] And we sort of had a disagreement on the witness stand, and talking about whether you could blow up things because you would hurt this atlas. *And I disagree, and –*

MS. FORDE: Objection, your Honor. Prosecutorial misconduct. He's again commenting on his opinion of the evidence.

THE COURT: Sustained. Mr. Weyrich –

MR. WEYRICH: Yes.

MS. FORDE: And I would move for a curative instruction.

THE COURT: Ladies and gentlemen, you're instructed to disregard the portion of the argument where Mr. Weyrich comments on his disagreement.

9/4/2013RP 20, 43 (emphasis added).

At the conclusion of closing arguments, the defense moved for a mistrial, submitting that a curative instruction was not sufficient to purge the prejudice suffered by the defendants from the prosecutor's improper argument:

> MS. FORDE: I would move for a mistrial based on prosecutorial misconduct during closing argument. Two times I objected to Mr. Weyrich interjecting his personal beliefs about the evidence, both times it was sustained, yet he continued to do so.
>
> The first time he said that he was offended about the stealing food thing. Again, that was sustained. The second time he talked about his argument and what he believed so far as the credibility of an expert witness.

9/4/2013RP 60. Ms. Williams joined in the motion for a mistrial.[4] 9/4/2013RP 61.

5. Verdict and sentencing. At the conclusion of the trial, the jury found Ms. Williams guilty of all charges. CP 362-63, 364.[5] The jury was unable to reach a verdict on the homicide by abuse count for

[4] Ms. Williams also noted that the prosecutor claimed in his argument that the temperature at the time of H.W.'s death was in the 50's, of which there was no evidence in the record to support the claim. 9/4/2013RP 61. The court agreed, noting this was a misstatement of the evidence. 9/4/2013RP 62-63.

[5] The jury also found the aggravating factors charged and designed to enhance the first degree manslaughter conviction. CP 369. These became moot when the trial court dismissed the manslaughter conviction at sentencing.

Mr. Williams, but he was convicted on the remaining counts. 9/9/2013RP 191-95.

At sentencing, the court dismissed the manslaughter count as to Ms. Williams on double jeopardy grounds. CP 380. The court declared a mistrial on the homicide by abuse count regarding Mr. Williams. 9/9/2013RP 198. Ms. Williams was sentenced to a standard range term of 443 months. CP 385.

E. ARGUMENT

1. THE STATE FAILED TO PROVE MS. WILLIAMS WAS GUILTY OF HOMICIDE BY ABUSE OR FIRST DEGREE ASSAULT OF A CHILD

a. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt. In a criminal prosecution, the State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey,* 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is "[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational

trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Green*, 94 Wn.2d at 221. A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

b. The State failed to prove H.W. was under the age of 16 years, an essential element of the offense of homicide by abuse. Viewing all of the evidence presented to the jury at trial on the issue of H.W.'s age, one comes away with the conclusion that no one had any idea how old she was and, most importantly here, that the State failed to prove H.W. was under the age of 16.

Under RCW 9A.32.055(1), a person is guilty of homicide by abuse if "under circumstances manifesting an extreme indifference to human life, the person causes the death of a child . . . under sixteen years of age, and the person has previously engaged in a pattern or practice . . . of assault or torture of said child." *State v. Madarash*, 116 Wn.App. 500, 510, 66 P.3d 682 (2003).

The primary issue at Ms. Williams' trial was whether H.W. was under 16 years of age at the time of her death. The State realized this

fact and moved to exhume H.W.s body approximately a year after the initial burial but prior to trial, in order to X-ray the body and extract two of her teeth, upon which tests were conducted and which all of the evidence from all of the experts emanated. The State sought to prove H.W.'s age using two methods: evaluation of the X-rays to determine H.W.'s "bone age," and examination of the teeth to determine H.W.'s maturity which is directly related to age. The medical examiner was not asked to, nor did he make, a determination of H.W.'s age during the autopsy.[6]

Forensic dentist Gary Bell testified he was present when H.W.'s exhumed body was examined. He examined her teeth, their development and took X-rays of H.W.'s teeth. 8/9/2013RP 22-24. Based upon the development of H.W.'s teeth at the time of her death, Bell opined that H.W. was approximately 16 years of age, but conceded this was a subjective finding and she could have been anywhere from 13 years of age to 18 years of age. 8/9/2013RP 28-45. Bell admitted that he was unable to say with any reasonable degree of certainty that H.W. was under the age of 16. 8/9/2013RP 62.

---

[6] Dr. Selove, the forensic pathologist who conducted the autopsy was told H.W. was 13 years of age and he noted that her body was consistent with that age. 7/30/2013RP 29.

Forensic dentist David Sweet, testified for Ms. Williams after he reviewed Bell's report and conclusions as well as reviewed the X-rays taken by Bell during the examination of H.W.'s exhumed body. 8/22/2013RP 11-12, 22-31. Dr. Sweet was told H.W. was between 13 years and 19 years of age. 8/22/2013RP 30. After his evaluation of the X-rays, Dr. Sweet opined that H.W. was 16 to 16.25 years of age plus or minus 1.5 years. 8/22/2013RP 45. Bell did not disagree with this analysis or conclusion. 8/9/2013RP 55.

Katherine Taylor, a forensic anthropologist for the King County Medical Examiner's Office, also examined the X-rays of H.W. and her best estimate of H.W.'s age was 15 years of age, but could have been anywhere between 13 years of age and 17 years of age. 8/23/2013RP 10, 41-50. Her opinion was H.W. was "hovering" around 15 years of age plus or minus two years. 8/23/2013RP 41.

Jordan Haber, a radiologist who had extensive experience in making age determinations from X-rays, testified for Ms. Williams that he reviewed Ms. Taylor's report, examined the X-rays, and opined that H.W. was between 15 years of age and 17 years of age to a reasonable degree of medical certainty. 8/29/2013RP 9-24, 41, 54.

Finally, Carolyn Roesler, a doctor of general medicine in Australia, testified she volunteered in Ethiopia and met H.W. in 2007. 8/13/2013RP 77-81. Roesler last saw H.W in 2008 just before H.W. left for the United States. 8/13/2013RP 85-86. In her role as a doctor, Roesler spent time around H.W. and characterized her with the behavior of a 10 to 11 year old child. 8/13/2013RP 87. Roesler saw H.W. unclothed on occasions and did not observe any pubic hair, apparent breast development, or other visual signs of sexual development. 8/13/2013RP 95. In her professional opinion, Roesler testified H.W. was between 10 years of age and 11 years of age in 2008.[7] 8/13/2013RP 116.

None of the experts who testified, either for the State or for Ms. Williams, testified H.W. was 16 years of age or under. The testimony ranged from 13 years of age to 19 years of age, but no one testified with a reasonable degree of medical certainty that H.W. was under the age 16 years. Only Dr. Roesler opined H.W. was between 13 and 14 years of age, but her opinion was undercut by the State's other experts who found H.W. to be between 13 and 18 years of age. Further, Bell

[7] H.W. died in 2011, thus, according to Roesler, H.W. would have been 13 or 14 years of age at the time of her death.

and Richards' opinions were based upon clinical analysis of X-ray teeth examination, where Roesler was based solely on visual examination from afar; she never acted as a treating physician in her interactions with H.W. 8/13/2013RP 89.[8]

Based on the inability of any expert to state definitively that H.W. was under the age of 16, the State failed to prove Ms. Williams was guilty of homicide by abuse.

c. The State failed to prove I.W. suffered substantial bodily harm, an essential element of the offense of first degree assault of a child. The State's theory regarding the offense of first degree assault of child involving I.W. was that Ms. Williams caused the scars that were visible on I.W.'s back. In fact, the evidence established I.W. had these scars *before* he was adopted by the Williams, thus the State failed to prove Ms. Williams was guilty of first degree assault of a child.

RCW 9A.36.120(1)(b)(i) provides, "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 . . . Causes substantial bodily harm, and the person has previously engaged in a

[8] Roesler's only "examination" of H.W. consisted of a removal of some eye lesions. 8/13/2013RP 89.

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, or (B) causing the child physical pain or agony that is equivalent to that produced by torture."[9]

As noted, the State's theory at trial was that Ms. Williams caused the scars. Yet, the evidence failed to establish this fact. C.W. and S.W., Ms. Williams' daughters saw scars when I.W. first arrived. 8/5/2013RP 82, 125; 8/6/2013RP 79. Similarly, Ms. Williams' sons, Ja.W. and Jo. W. saw the scars when I.W. first came to live in the Williams' household. 8/15/2013RP 167; 8/16/2013RP 85. Carol Miller, Ms. Williams' sister, and Charlotte Miller, Ms. Williams' mother also agreed. 8/28/2013RP 48, 59. 8/28/2013RP 59. Finally, Mr. and Ms. Williams saw scars on I.W.'s face and back when they first saw him after he arrived from Ethiopia. 8/27/2013RP 120-21; 8/28/2013RP 96-100.

Dr. Clark, the children's doctor was the only witness to testify he never saw any marks or scars on I.W. during his examinations of

---

[9] One would assume the State would agree that I.W.'s diagnosis as suffering from Post-Traumatic Stress Disorder (PTSD) does not qualify as a "physical harm" for the purposes of determining whether I.W. suffered substantial bodily harm. *See State v. Van Woerden*, 93 Wn.App. 110, 119, 967 P.2d 14 (1998) ("PTSD . . . does not meet the definition of bodily injury because it is foremost the impairment of a mental, as opposed to a physical, condition"), *review denied*, 137 Wn.2d 1039 (1999).

I.W. 8/8/2013RP 110, 130. But, Dr. Clark had no independent knowledge regarding scars or marks on I.W., only that his records did not indicate any scars or marks. 8/8/2013RP 110. This was far different from the Williams' family who remembered when I.W. first came to their home. The family distinctly remembered seeing scars and marks on I.W.'s back.

In light of the State's failure to prove Ms. Williams caused the scars, the verdict is unsupported by the evidence.

d. This Court must reverse and remand with instructions to dismiss the conviction. Since there was insufficient evidence to support Ms. Williams' convictions, this Court must reverse the convictions with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."), *quoting Burks v. United States,* 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

2. THE EXCLUSION OF DR. BARTELINK AS A REMEDY FOR A DISCOVERY VIOLATION IMPERMISSIBLY INFRINGED MS. WILLIAMS' CONSTITUTIONALLY PROTECTED RIGHT TO PRESENT A DEFENSE

a. Ms. Williams was constitutionally entitled to present a defense, that included admission of any relevant evidence, which did not substantially prejudice the State. It is fundamental that an accused person has the constitutionally protected right to present a defense. U.S. Const. Amend. VI; *Holmes v. South Carolina,* 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006); *State v. Franklin,* 180 Wn.2d 371, 377, 325 P.3d 159 (2014); *State v. Ellis,* 136 Wn.2d 498, 527, 963 P.2d 843 (1998). The Washington Constitution provides for a right to present material and relevant testimony. Art. I § 22; *State v. Roberts,* 80 Wn.App. 342, 350-51, 908 P.2d 892 (1996) (reversing conviction where defendant was unable to present relevant testimony). The defense bears the burden of proving materiality, relevance, and admissibility. *Id.*

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging

> their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

The evidence sought to be admitted by the defendant need only be of "minimal relevance." *State v. Jones,* 168 Wn.2d 713, 720, 230 P.3d 576 (2010). ER 401 provides that evidence is relevant if it makes a fact "of consequence to the determination of the action" more or less probable. "The threshold to admit relevant evidence is low, and even minimally relevant evidence is admissible." *State v. Gregory,* 158 Wn.2d 759, 835, 147 P.3d 1201 (2006). To be relevant, the evidence need provide only "a piece of the puzzle." *Bell v. State,* 147 Wn.2d 166, 182, 52 P.3d 503 (2002).

"[I]f [the evidence is] relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." *State v. Darden,* 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). The State's interest in excluding prejudicial evidence must also "be balanced against the defendant's need for the information sought," and relevant information can be barred only "if the State's interest outweighs the defendant's need." *Id.* "[T]he integrity of the

truthfinding process and [a] defendant's right to a fair trial" are important considerations. *State v. Hudlow,* 99 Wn.2d 1, 14, 659 P.2d 514 (1983) For evidence of *high* probative value "it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22." *Id.* at 16.

b. The trial court failed to establish the extreme remedy of exclusion was warranted for a potential violation of CrR 4.7. While the defense may have given late notice that Dr. Bartelink would be a witness at trial, he was not a stranger to the State. The State questioned him at a pretrial hearing held on December 13, 2012, regarding his pretrial declaration noting his need for A.W's teeth for radiocarbon dating, the results of which was to be his trial testimony. 12/13/2012RP 16-23.

Discovery in criminal cases is regulated by CrR 4.7. A trial judge has broad authority under the rule to control the discovery process and impose sanctions for failure to abide by the rules. CrR 4.7(h)(7). While CrR 4.7(h)(7)(i) permits the superior court to exclude a defense witness whose identity was not timely disclosed to the State, the court does not have *carte blanche* to do so. *State v. Hutchinson,* 135 Wn.2d 863, 881-83, 959 P.2d 1061 (1998).

That rule reads in pertinent part:

> [I]f ... a party has failed to comply with an applicable discovery rule ... the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.

CrR 4.7(h)(7)(i). Typically, sanctions for discovery violations do not include exclusion of evidence. *State v. Ray,* 116 Wn.2d 531, 538, 806 P.2d 1220 (1991). However, evidence may be excluded when that is the *only* effective remedy. *Hutchinson,* 135 Wn.2d at 881-83.

The "deems just" language in CrR 4.7(h)(7)(i) gives a trial court limited *discretion* to exclude a defense witness as a sanction for a discovery violation. *Hutchinson,* 135 Wn.2d at 881-84, *quoting* CrR 4.7(h)(7)(i). Exclusion is an "extraordinary remedy" under CrR 4.7(h) that "should be applied narrowly." *Hutchinson,* 135 Wn.2d at 882.

The *Hutchinson* court identified four factors that a trial court should consider when determining whether to exclude evidence as a sanction for a discovery violation. 135 Wn.2d at 882-83, *citing Taylor v. Illinois,* 484 U.S. 400, 415 n. 19, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). Pursuant to *Hutchinson*, the trial court should weigh: (1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the

extent to which the witness's testimony will surprise or prejudice the State; and (4) whether the violation was willful or in bad faith. *Hutchinson,* 135 Wn.2d at 882-83; *State v. Venegas*, 155 Wn.App. 507, 521-22, 228 P.3d 813 (2010).

In *Hutchinson*, the defendant sought to proffer a diminished capacity and/or voluntary intoxication defense. Although the defendant had been examined by the experts retained by the defense, he refused to be examined by the State's expert or answer any of the State expert's questions. As a sanction, the trial court excluded the defense experts. At trial, and after the State rested, the defendant moved for reconsideration of the exclusion order, noting that he was prepared to be examined by the State's expert without any conditions. *Hutchinson*, 135 Wn.2d at 874. The court refused to reconsider its order of exclusion. *Id* at 874-75. The Supreme Court affirmed the defendant's conviction, finding the late decision to allow examination by the State's expert prejudiced the State by its inability to counter the defense experts and the discovery violation was willful by the defendant. *Id* at 883-84.

Here, the trial court failed to assess the violation under any of the suggested factors in *Hutchinson*. The trial court merely concluded

the notice of intent to call the witness was late, the evidence was cumulative and unnecessary once Woldetsidik's testimony was stricken. But the court failed to identify any reason why postponing Bartelink's testimony to allow the State to interview him was not an adequate remedy. Certainly this was an adequate remedy since the State had already had the opportunity pretrial to question him about his testing.

Application of the *Hutchinson* factors do not support the "extraordinary remedy" of exclusion here. *Hutchinson,* 135 Wn.2d at 882. That Dr. Bartelink was ultimately listed as a defense witness was certainly not a surprise to the State. Dr. Bartelink's request for H.W.'s teeth for testing and the substance of his testing was the focus of a pretrial hearing where the State cross-examined him. The State already knew who he was, what his qualifications were, and what testing he would be doing. The only "new" information that was part of the late notice was his final conclusions from his testing as stated in his report. Therefore, postponing Dr. Bartelink's testimony until the State could interview him would have served as an effective, less severe sanction. *See, e.g. Hutchinson,* 135 Wn.2d at 881 (stating that a party's failure to identify witnesses in a timely manner is "appropriately remedied" by

continuing trial to give the nonviolating party time to interview the new witness).

In addition, as noted in earlier portions of this brief, the issue that was the most contentious was whether H.W. was under 16 years of age since her exact age was undetermined prior to her death. Excluding Dr. Bartelink's testimony regarding H.W.'s age undermined Ms. Williams' defense on this critical issue.

Finally, defense counsels' discovery violation was not a willful or bad faith violation of CrR 4.7, and the court made no finding of such. As noted, Dr. Bartelink's identity and substance of his testimony was not a surprise to the State. Although his testimony was initially targeted to counter Woldetsidik's testimony, it was also important to counter the testimony of the State's anthropologist, Ms. Taylor and Dr. Roesler.

In sum, the trial court's rationale for excluding Dr. Bartelink's testimony was untenable. The trial court placed too much emphasis on the fact the notice to the State was tardy, made during trial without considering a lesser sanction, such as postponing Dr. Bartelink's testimony to allow the State to interview him.

c. The error in refusing to allow Dr. Bartelink's testimony was not a harmless error. The trial court's decision to exclude evidence is normally reviewed for abuse of discretion. *State v. Perez-Valdez,* 172 Wn.2d 808, 814, 265 P.3d 853 (2011), *citing State v. Bashaw,* 169 Wn.2d 133, 140, 234 P.3d 195 (2010), *overruled on other grounds*, *State v. Nunez*, 174 Wn.2d 707, 285 P.3d 21 (2012). However, an erroneous evidentiary ruling that violates the defendant's constitutional rights is presumed prejudicial unless the State can show the error was harmless beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 377. *See also Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (error of constitutional magnitude can be harmless if it is proven to be harmless beyond a reasonable doubt).

An error is harmless "if we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error." *Jones,* 168 Wn.2d at 724, *quoting State v. Smith,* 148 Wn.2d 122, 139, 59 P.3d 74 (2002).

The State cannot meet its burden of proving the error was harmless. The primary issue regarding count I, homicide by abuse, was whether the State could prove H.W. was under 16 years of age. The

experts' opinions ranged from 13 years to 19 years. Dr. Bartelink's testing was a different way of assessing age from the other experts and added a different dimension. So it is very possible that a reasonable jury may have reached a different result and determined H.W. was 16 years of age or older, thus acquitting Ms. Williams of count I. The error was not harmless beyond a reasonable doubt. *Jones*, 168 Wn.2d 724-25.

3. A MISTRIAL WAS THE ONLY REMEDY THAT WOULD HAVE REMOVED THE TAINT FROM THE STATE'S MISCONDUCT INVOLVING WOLDETSIDIK'S APPEARANCE AS A WITNESS

a. A mistrial was the only remedy that could cure the prejudice from the State's mistakes and misconduct regarding the appearance of Woldetsidik. A mistrial should be granted when an irregularity in the trial proceedings, viewed in light of all of the evidence, is so prejudicial as to deprive the defendant of a fair trial. *State v. Post,* 118 Wn.2d 596, 620, 826 P.2d 172, 837 P.2d 599 (1992). Courts consider several factors in determining whether a trial court has erred in refusing to grant a motion for mistrial: (1) the seriousness of the irregularity, (2) whether the challenged evidence was cumulative of other evidence properly admitted, and (3) whether the irregularity could

be cured by an instruction to disregard the evidence. *State v. Escalona,* 49 Wn.App. 251, 254, 742 P.2d 190 (1987), *citing State v. Weber,* 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983). The decision to grant or deny a motion for a mistrial is reviewed for abuse of discretion. *State v. Rodriguez,* 146 Wn.2d 260, 269, 45 P.3d 541 (2002). The Supreme Court has stated that abuse of discretion will be found for denial of a mistrial only when "'no reasonable judge would have reached the same conclusion.'" *State v. Emery,* 174 Wn.2d 741, 765, 278 P.3d 653 (2012), *quoting State v. Hopson,* 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). Courts will overturn a trial court's denial of a mistrial motion when there is a "'substantial likelihood'" that the error affected the jury's verdict. *Rodriguez,* 146 Wn.2d at 269-70 (internal quotation marks omitted), *quoting State v. Russell,* 125 Wn.2d 24, 85, 882 P.2d 747 (1994).

b. The bizarre saga of Woldetsidik and the part the State played in it warranted a mistrial. The State's repeated misconduct, culminating in its admission that Woldetsidik had been paid by the prosecutors prior to his testimony led the trial court to strike Woldetsidik's testimony and all evidence derived from him. Yet, given the extremely damaging emotional nature of his testimony, the only

remedy available to the trial court that could have truly expunged the taint of the prosecutors' conduct regarding Woldetsidik was to declare a mistrial. The trial court erred in failing to do so.

In *Escalona,* the defendant was convicted of first degree assault with a knife. At trial, a witness for the State volunteered that "Alberto already has a record and stabbed someone." *Escalona,* 49 Wn.App. at 253. The prejudicial nature of the remark led to reversal of the conviction. In concluding that the trial court's instruction to disregard the remark could not cure the prejudice, the Supreme Court emphasized the seriousness of the irregularity, the weakness of the State's case, and the logical relevance of the statement. *Escalona,* 49 Wn.App. at 256.

Here, the prejudice was even more substantial than that in *Escalona*. Woldetsidik claimed to be related to H.W., to have been present when she was born, and in her life until the time she was taken to the orphanage from which she was put up for adoption. In addition, Woldetsidik carried with him from Ethiopia, a copy of what he claimed was the family Bible, which had key dates enshrined in it, and which the State entered into evidence. This evidence was very emotional, and very powerful in this emotionally charged case, and in sharp contrast to the non-specific scientific evidence. Merely striking the testimony

could not purge the taint to the jury from this emotional testimony. The trial court erred in failing to grant the defense motion for a mistrial.

4. THE PREJUDICE TO MS. WILLIAMS FROM THE PROSECUTOR'S MISCONDUCT DURING CLOSING ARGUMENT COULD ONLY BE REMEDIED BY A MISTRIAL

a. Ms. Williams had a constitutionally protected right to a fair trial free from prosecutorial misconduct. The United States Supreme Court has stated that a prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). Because "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence," appellate courts must exercise care to insure that prosecutorial comments have not unfairly "exploited the Government's prestige in the eyes of the jury." *United States v. Young*, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). Because the average jury has confidence that the prosecuting attorney will faithfully observe his or

her special obligations as the representative of a sovereign whose interest "is not that it shall win a case, but that justice shall be done," his or her improper suggestions "are apt to carry much weight against the accused when they should properly carry none." *Berger,* 295 U.S. at 88.

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution as well as article I, section 22 of the Washington State Constitution. *Estelle v. Williams,* 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *In re Personal Restraint of Glasmann,* 175 Wn.2d 696, 703, 286 P.3d 673 (2012). Prosecutors are more than mere advocates or partisans, rather, they represent the People and act in the interest of justice. *State v. Fisher,* 165 Wn.2d 727, 746, 202 P.3d 937 (2009).

> Defendants are among the people the prosecutor represents. The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated.

State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport,* 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). To prevail on a claim of prosecutorial misconduct, the defendant must show both improper conduct and

resulting prejudice. *State v. Thorgerson,* 172 Wn.2d 438, 442, 258 P.3d 43 (2011). To show prejudice the defendant must show that there was a substantial likelihood that the misconduct affected the jury verdict. *Id.*

> Thus, deciding whether reversal is required is not a matter of whether there is sufficient evidence to justify upholding the verdicts. Rather, the question is whether there is a substantial likelihood that the instances of misconduct affected the jury's verdict. We do not decide whether reversal is required by deciding whether, in our view, the evidence is sufficient.

Glasmann, 175 Wn.2d at 711(internal citations omitted). The ultimate inquiry is not whether the error was harmless or not harmless, but rather whether the impropriety violated the defendant's due process rights to a fair trial. *Davenport*, 100 Wn.2d at 762.

Comments made by a deputy prosecutor constitute misconduct and require reversal where they were improper and substantially likely to affect the verdict. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). If the statements were improper, and an objection was lodged, courts then consider whether there was a substantial likelihood that the statements affected the jury. *Reed,* 102 Wn.2d at 145.

b. The prosecutor continued to express his personal opinions even after being admonished by the court. A prosecutor's expressions of personal opinion about the defendant's guilt or the witnesses' credibility are improper. *State v. Dhaliwal,* 150 Wn.2d 559, 577-78, 79 P.3d 432 (2003). Here, the prosecutor twice expressed his personal opinion about the evidence, the second time after having a defense objection sustained and a curative instruction given, thus being placed on notice that this conduct was improper. As a consequence, the prosecutor was on specific notice that his personal opinion was improper. In spite of this admonishment, the prosecutor again expressed his personal opinion about the evidence. In light of the prosecutor's failure to heed the admonishment, the court's continued use of the curative instruction became ineffective in attempting to cure the prejudice.

c. The misconduct had a substantial likelihood of affecting the jury's verdict. A defendant establishes sufficient prejudice to require reversal by showing a substantial likelihood the misconduct affected the verdict. *Glasmann,* 175 Wn.2d at 704. In determining whether the misconduct warrants reversal, courts consider its

prejudicial nature and cumulative effect. *State v. Boehning,* 127 Wn.App. 511, 518, 111 P.3d 899 (2005).

This matter was tried in an emotionally charged courtroom in which the trial court admonished the spectators to hold their impassioned outbursts during the closing argument. The prosecutor's argument took this fervor to a higher level by adding his personal opinion to the evidence, further tainting the jury. Given the nature of this trial and the fact the victims were children, it seems clear there was a substantial likelihood that the prosecutor's misconduct affected the jury's verdict. Accordingly, Ms. Williams is entitled to a new trial.

5. THE TERMS "TORTURE" AND "EXTREME INDIFFERENCE TO HUMAN LIFE" WERE UNCONSTITUTIONALLY VAGUE AS APPLIED TO MS. WILLIAMS' ACTIONS

a. Statutes must contain ascertainable standards to guide the police and juries in enforcing the statute. A statute is unconstitutionally void for vagueness if it (1) does not define the criminal offense with sufficient definiteness so that ordinary people can understand what conduct is proscribed, or (2) provide ascertainable standards of guilt to protect against arbitrary enforcement. *City of Spokane v. Douglass,* 115 Wn.2d 171, 178, 795 P.2d 693 (1990). The vagueness doctrine is aimed at preventing the delegation of "basic

policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford,* 408 U.S. 104, 108-09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

A statute that lacks standards and allows law enforcement to subjectively decide what conduct is proscribed or what conduct will comply with a restriction in any given case is unconstitutionally vague. *State v. Maciolek,* 101 Wn.2d 259, 267, 676 P.2d 996 (1984). A statute is unconstitutionally vague on this ground if it "'contain[s] no standards and allow[s] police officers, judge, and jury to subjectively decide what conduct the statute proscribes or what conduct will comply with a statute in any given case.'" *Douglass,* 115 Wn.2d at 181, *quoting Maciolek*, 101 Wn.2d at 267. The statute must "provide 'minimal guidelines ... to guide law enforcement.'" *Douglass,* 115 Wn.2d at 181, *quoting State v. Worrell,* 111 Wn.2d 537, 544, 761 P.2d 56 (1988).

The constitutionality of a statute is reviewed *de novo*. *City of Spokane v. Neff,* 152 Wn.2d 85, 88, 93 P.3d 158 (2004). Where a vagueness challenge does not implicate the First Amendment, the statute is evaluated as applied to the particular facts of the case and the

party's conduct. *City of Seattle v. Montana,* 129 Wn.2d 583, 597, 919 P.2d 1218 (1996).

Since the conduct alleged to have been committed by Ms. Williams was not core First Amendment conduct, the statutes must be evaluated as applied. In addition, Ms. Williams concedes the statutes define the criminal offenses with sufficient definiteness so that ordinary people can understand what conduct is proscribed, but submits the statutes lack ascertainable standards to prevent arbitrary enforcement.

b. The terms "torture" and "extreme indifference to human life as used in Ms. Williams' case are unconstitutionally vague. The offenses of first degree assault of a child and homicide by abuse utilize the term "torture" to attempt to define the conduct alleged to be a violation of those offenses. The term "extreme indifference to human life" is also utilized in the homicide by abuse statute.

Here the State alleged that Ms. Williams used physical punishment against H.W. as well as deprived her of food, served her cold and still frozen food, forced her to eat outside, shower outside, and generally stay outside, forced her to sleep in a barn, locked shower room, and later a locked closet, forced her to use an outdoor porta-potty, did not allow her to participate in family activities, and did not

allow her to speak to other family members. 7/16/2013RP 27-28. All of this conduct was alleged to constitute torture and extreme indifference to H.W.'s life.

Regarding I.W., the conduct alleged was much the same as the conduct alleged to have been committed against H.W. Ms. Williams was alleged to have spanked I.W., deprived him of food as well as serving him cold and still frozen food, forced him to sleep in a locked shower room, and excluded him from participation in family activities, as well as not allowing him to speak to family members.

Ms. Williams submits that, although this may have been misguided parenting, without some guidance, a parent, police officer, or jury would not have known whether these allegations constituted torture or extreme indifference to human life.

The term torture was the focus of the decision in *State v. Russell*, where the term was deemed not vague. 69 Wn.App. 237, 247, 848 P.2d 743 (1993). The defendant in *Russell*, prior to the death of the nine month-old child and over the course of the child's short life, fractured the child's clavicle, fractured the child's skull which resulted in a subdural hematoma, caused another head injury leading to a second subdural hematoma, retinal bleeding, and brain damage, and ultimately

caused the child's death by inflicting a severe blow to the abdomen which ruptured the liver and caused severe bleeding. The child had also been struck in the head with brass knuckles. *Id* at 241-42, 246. While the appellate court ruled that the term "torture" was not vague because the term provided sufficient notice of what conduct was prohibited, the court did not reach the question of whether the term set ascertainable and adequate standards of guilt. *Id* at 247. The court instead focused on the terms "pattern or practice of assault" in RCW 9A.32.055, and finding ascertainable and adequate standards as to those terms. *Id.*

Russell relied upon the decision in *State v. Brown*, 60 Wn.App. 60, 802 P.2d 803 (1990), *review denied*, 116 Wn.2d 1025, 812 P.2d 103 (1991), *disapproved on other grounds, State v. Grewe*, 117 Wn.2d 211, 219-90, 813 P.2d 1238 (1991), in concluding the term "torture" was not vague. *Russell*, 69 Wn.App. at 247. In *Brown*, the defendant was convicted of second degree assault of his 11 year-old son. The statute required that the defendant "[k]nowingly inflict[ed] bodily harm which by design cause[d] such pain or agony as to be the equivalent of that produced by torture." RCW 9A.36.021(g).[10] The defendant had struck his son with a belt several times, but admitted he had "lost it"

[10] RCW 9A.32.021 was amended in 2007 so that the subsection including the term "torture" is now found at RCW 9A.32.021(f).

and had caused massive bruising and tissue damage. *Brown*, 60 Wn.App. at 62-63. The *Brown* court found the term "torture" not to be unconstitutionally vague because it is a term of common understanding. *Brown*, 60 Wn.App. at 64-65.

Russell and Brown are simply not helpful in this matter. Here, the conduct of Ms. Williams was nowhere near as severe the defendants in *Russell* and *Brown*. All of the actions of Ms. Williams were conducted as corporal punishment of one's child, which this State has specifically authorized. *See* RCW 9A.16.100 ("the physical discipline of a child is not unlawful when it is reasonable and moderate and is inflicted by a parent, teacher, or guardian for purposes of restraining or correcting the child."). Further, the examples of conduct of a parent specifically listed in RCW 9A.16.100, which is deemed not to be proper discipline of a child, is unlike any of the discipline meted out by Ms. Williams. *Id.* ("(1) Throwing, kicking, burning, or cutting a child; (2) striking a child with a closed fist; (3) shaking a child under age three; (4) interfering with a child's breathing; (5) threatening a child with a deadly weapon; or (6) doing any other act that is likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks."). Since none of the conduct alleged to have

been committed by Ms. Williams is defined by either the homicide by abuse statute or the parental discipline statute, the jury was left to subjectively decide what conduct the statute proscribes or what conduct will comply with the statutes, which is the definition of unconstitutionally vague statutes.

The problem was exacerbated when the trial court refused to instruct the jury using Ms. Williams' proposed instruction defining "extreme indifference to human life." CP Supp ___, Sub. No. 4C. Given the opportunity to assist the jury, the court instead steadfastly refused, and in the process, failed to cure the vagueness of the term.

The terms were vague in a case involving the defense of reasonable parental discipline because they do not provide ascertainable standards to protect against arbitrary enforcement. Ms. Williams was convicted under these unconstitutional statutes and her convictions must be reversed.

6. IN LIGHT OF COURT DECISIONS THAT DEEMED THE TERM "TORTURE" TO BE A TERM OF NORMAL UNDERSTANDING, THE COURT ERRED IN ALLOWING EXPERT TESTIMONY REGARDING THIS ELEMENT

a. Opinion testimony is only allowed if it would be helpful to the jury. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." ER 702. The expert testimony must be helpful to the trier of fact. *Id.; Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha,* 126 Wn.2d 50, 102, 882 P.2d 703, 891 P.2d 718 (1994). So whether the expert testimony is admissible turns on whether the witness qualifies as an expert, bases the opinions on legally appropriate information, and whether the expert opinion would be helpful to the trier of fact. *Queen City Farms,* 126 Wn.2d at 102. "Generally, expert evidence is helpful and appropriate when the testimony concerns matters beyond the common knowledge of the average layperson, and does not mislead the jury to the prejudice of the opposing party." *State v. Farr–Lenzini,* 93 Wn.App. 453, 461, 970 P.2d

313 (1999), *quoting State v. Jones,* 59 Wn.App. 744, 750, 801 P.2d 263 (1990), *review denied,* 116 Wn.2d 1021 (1991).

Where the jurors are as competent as an expert to reach a decision on the facts presented without an expert's opinion, the expert's opinion is not helpful because it does not offer the jurors any insight that they would not otherwise have. *State v. Smissaert,* 41 Wn.App. 813, 815, 706 P.2d 647 (1985) ("If the issue involves a matter of common knowledge [like the effects of alcohol] about which inexperienced persons are capable of forming a correct judgment, there is no need for expert testimony.").

b. The opinion testimony was not helpful to the jury since the term "torture" is a term of common understanding. The State sought to admit the testimony of the two experts to testify about torture. The experts, John Hutson and Katherine Porterfield, testified that the term "torture" is not beyond the understanding of the jury and that a layperson could make a determination of what constituted torture. 8/1/2013RP 62, 162, 8/14/2013RP 17.

In addition, in *Russell, supra*, the appellate court ruled the term "torture" is "commonly understood." 69 Wn.App. at 247, *accord*, *Brown*, 60 Wn.App at 65-66 (torture a term that was not vague and that

is commonly understood). Given the fact the term "torture" is a term of common understanding, the trial court erred in allowing the expert testimony on this topic since it was not helpful to the jury.

c. The error was not a harmless error in light of the State's theory at trial. The erroneous admission of expert testimony under ER 702 is not harmless where, within reasonable probabilities, it materially affected the outcome of the trial. *State v. Wilber*, 55 Wn.App. 294, 299, 777 P.2d 36 (1989).

The State's theory at trial was that Ms. Williams' actions constituted the torture of H.W. and I.W. The experts' testimony repeatedly referenced conduct by Ms. Williams that in their opinion constituted torture. This testimony was extremely prejudicial in light of Ms. Williams' defense that she was engaging in appropriate parental discipline. Thus, the question for the jury was whether Ms. Williams acted appropriately in disciplining the children in the manner she did. The State's improper use of the experts was prejudicial to Ms. Williams because it was designed to take this element of the offenses away from the jury by improperly putting an expert's imprimatur on the State's theory. The improper use of the experts was not a harmless error.

7. THE CUMULATIVE EFFECT OF THE MULTIPLE ERRORS REQUIRES REVERSAL OF MS. WILLIAMS' CONVICTIONS

Under the cumulative error doctrine, courts may reverse a defendant's conviction when the combined effect of errors during trial effectively denied the defendant her right to a fair trial, even if each error standing alone would have been harmless. *State v. Weber,* 159 Wn.2d 252, 279, 149 P.3d 646 (2006); *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

Should this Court conclude that any one of these errors alone is insufficient to warrant reversal, Ms. Williams submits that these many errors collectively warranted reversal of her convictions. Accordingly, Ms. Williams requests this Court reverse her convictions.

F. CONCLUSION

For the reasons stated, Ms. Williams asks this Court to reverse her convictions for homicide by abuse and first degree assault of a child with instructions to dismiss for a failure of the State to prove these offenses. Alternatively, Ms. Williams asks this Court to reverse her convictions and remand for a new trial as the trial court erroneously failed to grant a mistrial, denied her the opportunity to present a

defense, erred in allowing expert testimony and in failing to define unconstitutionally vague terms.

DATED this 16th day of September 2014.

Respectfully submitted,

THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project - 91025
Attorneys for Carri Williams

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

STATE OF WASHINGTON, Respondent, v. CARRI WILLIAMS, Appellant.	)))))))))	NO. 71193-8-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF SEPTEMBER, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	ERIK PEDERSEN, DPA SKAGIT COUNTY PROSECUTOR'S OFFICE COURTHOUSE ANNEX 605 S THIRD ST. MOUNT VERNON, WA 98273	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	CARRI WILLIAMS 370021 WASHINGTON CORRECTIONS CENTER FOR WOMEN 9601 BUJACICH ROAD NW GIG HARBOR, WA 98332-8300	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF SEPTEMBER, 2014.

X _____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
(206) 587-2711