NO. 46357-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

AIMEE MOSES,

Appellant.

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

The Honorable Stephanie A. Arend, Judge

AMENDED BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court violated the appellant's right to the presumption of innocence by sustaining the State's objection to argument by defense counsel that evidence must be considered while presuming the appellant's innocence.

Issues Pertaining to Assignment of Error

Counsel for the appellant's co-defendant argued the jury must consider the evidence while presuming the defendants' innocence. The prosecutor objected that such argument misstated the law. The court improperly sustained the State's objection. Did the court violate the appellant's constitutional right to be presumed innocent throughout deliberations?

B. STATEMENT OF THE CASE[1]

1. Procedural facts

The State charged Aimee Moses (Moses) and her husband Justin Moses (Justin) with second degree criminal mistreatment[2] of M.A.

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[1] This brief refers to the 20 volumes of verbatim reports as follows: 1RP – 2/24/14; 2RP – 2/25/14; 3RP – 2/26/14; 4RP – 3/14/14; 5RP – 4/4/14; 6RP – 4/21/14; 7RP – 4/22/14; 8RP – 4/23/14; 9RP – 4/28/14; 10RP – 4/29/14; 11RP – 4/30/14; 12RP – 5/1/14; 13RP – 5/5/14; 14RP – 5/6/14; 15RP – 5/7/14; 16RP – 5/8/14; 17RP – 5/12/14; 18RP – 5/13/14; 19RP – 5/14/14; and 20RP – 5/28/14.

occurring between December 1, 2011 and February 27, 2012. CP 1, 20-21. The State also alleged three aggravators to be considered by a jury: deliberate cruelty to the complainant (RCW 9.94A.535(3)(a)); that the complainant was particularly vulnerable or incapable of resistance (RCW 9.94A.535(3)(b)); and that Moses used her "position of trust, confidence, or fiduciary responsibility to facilitate" the crime (RCW 9.94A.535(3)(n)). CP 20-21.

The charges arose from the Muckleshoot tribe's placement of M.A. and older sister V.A., both the tribal equivalent of "dependent" children, with the Moses family. M.A. was four or five years old during the

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[2] RCW 9A.42.030(1) defines second degree criminal mistreatment as follows:

> (1) A parent of a child, the person entrusted with the physical custody of a child . . . is guilty of criminal mistreatment in the second degree if he or she recklessly, as defined in RCW 9A.08.010, either (a) creates an imminent and substantial risk of death or great bodily harm, or (b) causes substantial bodily harm by withholding any of the basic necessities of life.

The State charged "creates . . . risk of death or great bodily harm" and "causes substantial bodily harm" as alternatives. The jury entered a special verdict stating it was not unanimous as to the first alternative but was unanimous as to the second. CP 122. The jury was also instructed it must be unanimous as to which "basic necessity of life" ("food, water, shelter, clothing, and medically necessary health care") was withheld. CP 98, 109 (Instructions 28, 39).

charging period. CP 2-3. M.A. lost a significant amount of weight under the Moses's care and was hospitalized for malnourishment. CP 2-3.

The jury was instructed on the lesser degree offenses of third and fourth degree criminal mistreatment.[3] CP 84-88. But it convicted Moses and Justin as charged. CP 116-18. The jury found each of the three aggravators applied as to Moses.[4] CP 119-21. The court found each of the aggravators alone constituted a substantial and compelling reason to

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[3] Under RCW 9A.42.035, a person is guilty of third degree criminal mistreatment

> if the person is the parent of a child, is a person entrusted with the physical custody of a child . . . , and either:
>
> (a) With criminal negligence, creates an imminent and substantial risk of substantial bodily harm to a child . . . by withholding any of the basic necessities of life; or
>
> (b) With criminal negligence, causes substantial bodily harm to a child . . . by withholding any of the basic necessities of life.

Under RCW 9A.42.037, a person is guilty of fourth degree criminal mistreatment crime if such a person:

> (a) With criminal negligence, creates an imminent and substantial risk of bodily injury to a child . . . by withholding any of the basic necessities of life; or
>
> (b) With criminal negligence, causes bodily injury or extreme emotional distress manifested by more than transient physical symptoms to a child . . . by withholding the basic necessities of life.

[4] The jury convicted Justin of the charged crime but found only two of the aggravators applied. 19RP 2017.

depart from the standard range and sentenced Moses to 60 months of confinement, the statutory maximum for the offense. CP 128-31.

Moses timely appeals. CP 158.

2. Trial testimony

M.A. was born in January of 2007 to Carole A. 11RP 786; 12RP 978; 13RP 1201. His sister V.A. is two years older. 13RP 1201. The Muckleshoot tribe (tribe) determined M.A. and V.A. were "youth in need of care,"[5] analogous to dependent children under state law, in June of 2008. 11RP 787; 13RP 1201. Carole is a member of the tribe and therefore the children fall under tribal jurisdiction. 10RP 698-99; 11RP 776-77. Debbie Guerrero became the children's social worker children starting in 2010. 11RP 732, 786. Guerrero recalled M.A. had behavior issues related to food from the time that she was assigned to the case. 11RP 833-36.

The tribe's Child and Family Services department places "youth in need of care" in licensed and unlicensed homes within the tribe, or if necessary, in outside foster homes. 10RP 697-98. The preference, however, is for relative placement. 10RP 697-99; 11RP 729, 783-84. Relatives do not receive a stipend like state-licensed foster parents. 10RP

[5] 11RP 730.

700, 746-47, 785. Rather, relatives are provided modest vouchers for food and clothing. 10RP 700; 11RP 747.

Justin Moses is Carole's mother's first cousin. 13RP 1200-01. After Sydney Martinez, the previous foster parent, informed the tribe she could no longer care for M.A. and V.A., the tribe searched for other placements.[6] 11RP 787-88. Carole and the previous social worker recommended the Moses family because they had cared for the children of Carole's significant other, who were eventually returned to him. 11RP 788, 860; 13RP 1202, 1218. After a meeting between Carole, the tribe, Moses and Justin, and others, the tribe placed M.A. and V.A. with the family in September of 2011. 10RP 693-94, 742-43; 11RP 791-92, 837-38; 13RP 1203. Guerrero heard from Martinez that M.A. had eating issues but she was not sure whether the information was shared at the meeting. 10RP 672, 690; 11RP 839.

Ryan Dennis supervised Carole's biweekly visits with M.A. and V.A. starting in early September of 2011, shortly before the Moses family took custody. 10RP 551, 559; 13RP 1205. Dennis heard from Martinez

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[6] Sydney Martinez was the foster parent for M.A. and V.A. between October of 2009 and September of 2011. 10RP 665. M.A. had food-related behavior issues in her care: he ate very quickly, overate to the point of discomfort, and always claimed to be hungry. 10RP 666-67, 678, 682. In addition, Martinez had to closely supervise M.A. because he ate non-food items. 10RP 668, 679, 683.

that M.A. had eating issues. 10RP 558. In particular, he was told M.A.'s stomach failed to signal to his brain that he felt full, so he would eat to excess.[7] 10RP 558. In fact, at an October 2011 visit M.A. ate so much he said he needed to vomit. 10RP 561. The Moses family initially provided snacks for visits. 10RP 561, 63. Carole also took the children to a restaurant on one occasion. 10RP 562; 13RP 1206. At the December 18 visit, however, Moses said M.A. had a problem with his esophagus and could only eat every five hours. 10RP 565, 80. She told Dennis not to permit M.A. to eat at visits.[8] 10RP 565-66. She repeated the admonition at the January 8 visit and at the January 22 visit, which was the final visit Dennis supervised. [9] 10RP 566-57. Moses told Dennis that M.A. had been to the doctor for the condition. 10RP 577.

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[7] There is a serious medical condition that causes similar symptoms. After removal from the Moses family, M.A. was evaluated for and found not to suffer from the condition. 15RP 1553, 1561-62.

[8] Moses told Carole that M.A. had an eating disorder that might require surgery and therefore she should not bring snacks to visits. 13RP 1207, 1223.

[9] Guerrero decided to ask the tribal court to suspend visitation based on Moses's reports the children were acting out after visits and because Carole was not participating in remedial services. The tribe hoped withholding visits would provide an incentive to participate. 11RP 797-98, 844, 851-52.

At the January 8 visit, Dennis noticed M.A. had lost weight, and he mentioned it to his supervisor. 10RP 569, 582. At the last visit, M.A. was even thinner, and he had less energy than usual. 10RP 571-72. Like Dennis, Carole noticed M.A. seemed tired. 13RP 1210.

M.A. began attending preschool at Daffodil Elementary in Sumner in September of 2011. 10RP 618-19. The preschool is affiliated with the Early Childhood Education and Assistance Program (ECEAP), a state program that also provides families of enrolled children community support services. The program includes periodic home visits. 10RP 619-21.

Moses told school employees she had concerns regarding M.A.'s eating habits, including that he ate non-food items. 10RP 627-28, 630. Vicki Jones, a family support specialist with the school, did a health screening of M.A. and recorded his height and weight. 10RP 635-36. In October of 2011, M.A. weighed 45.6 pounds. 10RP 644. [10]

When M.A. returned to school after winter break, Jones noticed M.A. appeared to have lost weight. 10RP 639-40. Jones weighed M.A., and he had lost nearly eight pounds. 10RP 643-44, 653.

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[10] M.A.'s former pediatrician, Dr. David Joosten, testified that M.A. was consistently in the 25th percentile for height and 95th percentile for weight. 11RP 875-88. At M.A.'s last medical appointment before placement with the Moses family, he weighted 47 pounds. 11RP 878; 16RP 1734-36.

The school served a family-style lunch for the children; generally, the children served themselves. 10RP 627-28. On January 11, Moses told Jones that M.A. had a tear in his esophagus and he should only have a single serving of food. 10RP 644. Moses told Jones she planned to have M.A. evaluated for this condition at his scheduled well-child checkup in late February. 10RP 638, 645, 654.

January 11 was the last day M.A. attended preschool. 10RP 645-46. Concerned about M.A.'s failure to attend,[11] Jones called Moses on February 7 and left a message that she and M.A.'s teacher, Claire O'Brien, planned to visit the Moses home the following day. 10RP 647.

O'Brien was M.A.'s preschool teacher in the afternoon preschool program. 14RP 1305-06. She recalled that M.A. was "short and stocky" at the start of the school year. 14RP 1311, 1316. O'Brien was told M.A. had behavior issues related to eating. She noticed he ate quickly. 14RP 1313. School staff addressed this by having M.A. set down his utensil between bites and giving him smaller initial portions. 14RP 1314, 1318. O'Brien did not recall M.A. eating non-food items or getting sick at school. 14RP 1320-21.

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[11] The school monitored attendance because if a child was not attending, the school could enroll another to take advantage of state funding. 14RP 1309-10.

Like Jones, O'Brien noticed M.A.'s attendance was poor after the winter break. 14RP 1321. When M.A. returned, he appeared to have lost weight and announced to O'Brien that he was "skinny," although he appeared otherwise healthy. 14RP 1322, 1346.

Between January 31 and February 6, O'Brien left Moses several messages regarding M.A.'s absences. 14RP 1323, 1325. O'Brien heard back from Moses the day O'Brien planned to visit the home unannounced. 14RP 1325-26. Moses explained the family had had car trouble. 14RP 1326, 1337-39. O'Brien scheduled a visit for February 17. The day before the scheduled visit, Moses called and said she had to go out of town. 14RP 1327. Meanwhile, O'Brien arranged for the school district to provide transportation for M.A. so he could resume attending school. 14RP 1336-37, 1354, 1357.

After speaking with Moses on February 16, O'Brien became concerned about M.A.'s welfare, and she contacted CPS, and later, Guerrero. 14RP 1328, 1340-41.

Guerrero received a series of messages from O'Brien in late February. 11RP 801, 846. Guerrero also learned of a related CPS report. 11RP 799. After speaking with O'Brien on February 27, Guerrero asked Justin to bring M.A. to the tribal offices. 11RP 801, 847.[12]

Justin brought M.A. to the office later that day. Employees were shocked at the child's emaciated appearance. 10RP 701-02; 11RP 803-04. When asked what happened, Justin said M.A. had had a growth spurt and lost weight. 11RP 804-05. He also said that M.A. had eaten food off the floor and from the garbage at school, which caused M.A. to become ill. 11RP 806.

Moses arrived later that evening and spoke with King County deputies, who had been summoned to the office. 11RP 808. Meanwhile, M.A. was taken to the hospital. 11RP 808. Guerrero and another tribal social worker followed M.A. to the hospital and took photographs of him, which were admitted at trial. 11RP 815.

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[12] Guerrero visited the Moses home *before* the children were placed in the home but never again visited. 11RP 795. Guerrero was, however, required to check on M.A. every 90 days. 11RP 731-32, 843-44. Guerrero thought she saw M.A. between September and February, but acknowledged there was no record of that. 11RP 843, 849. Guerrero's supervisor, Francis Cacalda, thought he saw M.A. in December of 2011 but was not sure. 11RP 774-75.

M.A. weighed 33 pounds when he was admitted to the hospital on February 27. 12RP 924. M.A. reported to the admitting physician, Dr. Daniel Krebs, that he had not had breakfast or lunch the day of admission. 12RP 932. Moreover, he said he had been sent to his room for eating candy at dinner time. 12RP 932.

According to Dr. Krebs and other treating physicians, M.A. showed signs of severe malnourishment. 12RP 933; 13RP 1134. He had sunken eyes, prominent ribs, and atrophied leg muscles. 12RP 933, 936-37. He appeared weak and was unable to hop on his feet or climb into his bed. 12RP 933, 936. His weight was unusually low for his age.[13] 12RP 935. A physical therapist evaluated M.A. and noted that he was weaker than a normal five-year-old and lacked normal endurance levels. 14RP 1365-68.

Throughout M.A.'s hospitalization, Krebs and other physicians performed a number of blood tests. 12RP 941-49; 13RP 1120-23. The results ruled out infection and disease as the cause of M.A.'s weight loss. 12RP 941-49, 1067, 1093; 13RP 1112, 1120-25; 15RP 1500-02; 16RP

[13] M.A. was in the fifth percentile for weight and height upon admission. 13RP 1134; 15RP 1538.

1693-94, 1723.[14] Other tests indicated M.A. had not been eating enough protein. 13RP 1129; 15RP 1506.

Treating physicians were uncertain how long M.A. had been receiving inadequate nutrition. 12RP 964. One of the physicians testified the weight loss would have occurred over more than a few days. 12RP 1097. Another testified she believed the period was more than a week and as much as four to six weeks. 15RP 1511. The physicians did not believe M.A. had been given no food. Rather, he was fed an insufficient amount. 15RP 1527, 1533-34.

Dr. Krebs and other physicians described a dangerous phenomenon known as "re-feeding syndrome." 12RP 940-41. For example, when a malnourished person suddenly eats a normal diet, stores of certain minerals may suddenly deplete, causing health problems. 12RP 941, 1069, 1097, 1115. The physicians acknowledged this was unlikely to occur in a hospital setting. 12RP 1089-90; 15RP 1530-31. M.A.'s diet was, accordingly, closely monitored during his stay at the hospital. He was fed a diet consisting of 70 percent of the normal amount of calories. 12RP 955-56, 967, 1069.

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[14] Although M.A. reportedly suffered from diarrhea at the tribal office after being fed, the condition did not continue in the hospital. 11RP 807; 13RP 1112. One physician testified it was not unusual for a malnourished person to experience diarrhea when fed. 15RP 1503, 1524.

M.A. improved throughout his hospitalization and was being fed a normal diet by March 3. 12RP 1079; 13RP 1132. But he gained weight even at the 70 percent diet and weighed approximately 40 pounds upon his discharge on March 6. 12RP 1081; 13RP 1131, 1140. M.A. continued to gain weight at his next foster home. 13RP 1230-31; 16RP 1744-45.

Dr. Yolanda Duralde evaluated M.A. two weeks after his discharge. 15RP 1499. He had improved significantly, although there were a few lingering physical effects. 15RP 1508-10, 1512-15.

Dr. Duralde testified a period of starvation can have long-term effects. It can affect the liver and cause the body to store fat abnormally. Moreover, M.A. might never grow as tall as if had he been fed a sufficient amount during the period of malnourishment. 15RP 1510, 1528. Similarly, because his brain was in the process of growing during the period of malnourishment, he might suffer long-term cognitive effects. 15RP 1510, 1528; 16RP 1683, 1690.

Dr. Duralde testified even seriously obese children on special diets should be closely monitored to ensure they get enough calories to allow for normal growth and development. 15RP 1536-37. Such a child should not lose weight. Ideally, the child should grow taller and become more height-weight proportionate. 15RP 1537.

On February 27, 2012, Deputy James Shimensky was called to the Muckleshoot Child and Family Services office. 10RP 520. M.A. was being treated by paramedics. 10RP 521. Shimensky, his partner, and a social worker spoke with Moses in a conference room. 10RP 523. The partner read Moses her rights, and she agreed to talk. 10RP 523.

Asked what M.A.'s favorite foods were, Moses listed fish sticks with hot sauce, as well as jalapeño peppers.[15] 10RP 524, 527. Moses said she first noticed A.M. was losing weight in November of 2011. She started feeding him children's supplement drink and tried to get an appointment at the pediatrician, but had difficulty doing so. 10RP 526, 530-31. Moses stopped taking M.A. to preschool because he got sick from eating off the floor and the school was unable to control the behavior. 10RP 527.

On March 1, CPS investigator Heather Hasse went to the Moses home to do a safety check on Moses's older biological children. 13RP 1165. Both of the girls appeared healthy, and Hasse determined they were not at risk in the home. 13RP 1173, 1177, 1189-90. She asked some questions about M.A. even though the matter was outside CPS jurisdiction. 13RP 1165, 1175. Moses told Hasse she was told M.A. had

[15] M.A. was also reportedly served spicy foods at the Martinez residence. Martinez explained that her husband was of Mexican descent. 10RP 677.

a condition that prevented him from feeling full and that he would eat until he threw up. 13RP 1166. Moses was also told that M.A. was considered obese. 13RP 1166. Moses attempted to address M.A.'s issues by feeding him healthy foods. In general, however, M.A. ate what the rest of the family ate. 13RP 1166, 1170, 1196. Moses hypothesized M.A. may have lost weight due to overeating and throwing up. 13RP 1167.

Moses explained that she had not taken M.A. to preschool because the family had car trouble. 13RP 1167, 1188. But the school had been in the process of setting up transportation for M.A. 13RP 1168. Moses acknowledged she canceled a planned February 17 home visit, but she felt the school had blown it out of proportion. 13RP 1169.

Detective Thomas Catey interviewed Moses and Justin on May 24, 2012 at their home.[16] The audio recording of the joint interview[17] was redacted into two portions, one as to each defendant, and both were played for the jury. 15RP 1597; Ex. 73 (Justin Moses interview); Ex. 74 (Aimee Moses interview).

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[16] The court instructed the jury that any statements by Moses were only to be considered as to Moses, not Justin. The court gave an identical instruction regarding Justin's statements. CP 77 (Instruction 7); 15RP 1595.

[17] Exhibit 71, which was not admitted at trial, is a transcript of the full joint interview.

Carole had requested relative placement of M.A. and V.A. with the Moses family. Ex. 74; Ex. 71 at 5-6. Moses described M.A. as easygoing, unlike his sister, V.A., who tended to throw tantrums, especially when she had visits with Carole.[18] Ex. 74; Ex. 71 at 6-7.

M.A., however, had issues surrounding food. At the time of placement, Guerrero told Moses M.A. should not have sugar and that he should be watched closely because he had a history of eating non-food items. Ex. 74; Ex. 71 at 8. He also ate and drank to the point of near vomiting. Ex. 74; Ex. 71 at 8-9. Like M.A.'s teachers, Moses was able to slow M.A.'s eating by having him set down his utensil between bites. Ex. 74; Ex. 71 at 8. Moses put a gate on M.A.'s room at night so he would not get out of his room and misbehave: He had gotten into other family members' belongings, as well as food, at night. Ex. 74; Ex. 71 at 8-9, 12-13.

During a typical day, M.A. ate breakfast at home, lunch at school, and dinner with the rest of the family. Ex. 74; Ex. 71 at 9-10. The family frequently ate a meal known as "Indian tacos." Ex. 74; Ex. 71 at 11-12. M.A. seemed to like spicy food. He asked for jalapeños on his tacos and hot sauce on his pizza. Ex. 74; Ex. 71 at 11.

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[18] Moses requested that the visits be reduced because they caused the children to act out. Ex. 37; Ex. 74; Ex. 71 at 37.

The family had experienced a number of misfortunes leading to M.A.'s poor school attendance after winter break. The first week after the break, Moses sprained her ankle and could not drive. After that, M.A. got sick. Then, there was an ice storm, and a tree fell on the car the family had been borrowing, so Justin had to use the family car to go to work. Ex. 74; Ex. 71 at 13, 29. Moses missed the planned ECEAP home visit because she had to care for a sick relative. Ex. 74; Ex. 71 at 14.

Moses denied restricting M.A.'s food. Ex. 74; Ex. 71 at 15, 22. She attributed M.A.'s apparent weight loss to a "growth spurt" and a healthier diet than he had previously been served. Ex. 74; Ex. 71 at 16. Moses denied telling anyone M.A. had a torn esophagus or that his food should be restricted. She did warn caregivers to make sure he did not eat off the floor. Ex. 74; Ex. 71 at 18-19, 27, 29.

A friend of the Moses family testified at trial. He was a frequent visitor at the home and never saw the Moses family withhold food from M.A. 16RP 1778-81. He noticed M.A. had lost weight, but he did not appear sickly, merely "athletic." 16RP 1780.

Moses's teenage daughter, A.S., testified M.A. was provided a normal diet, although sugar was restricted on the advice of previous caregivers. 16RP 1788-91, 1803. A.S. acknowledged that M.A. lost weight in the home, but the weight loss was gradual. 16RP 1792.

M.A., then seven years old, testified at trial. 12RP 978. He remembered living with Martinez as well as the Moses family. 12RP 979-81. He had his own room in the Moses home, but the door was blocked by a gate, and he was not permitted to leave the room without permission, or he would be punished. 12RP 983, 1026.[19] If he wanted to get out, he would ask, and Moses or Justin would let him out. 12RP 984, 997, 1029-30, 1059. He remembered attending school during that time period. 12RP 986-87. After school, he played video games and then ate dinner with the family. 12RP 987, 1051.

M.A. testified he and Justin sometimes ate hot sauce and jalapeño peppers on their food. 12RP 988, 1002, 1013. M.A. did not like jalapeños. 12RP 988, 1049.[20] But he did like hot sauce. 12RP 1014-15. M.A. recalled everyone ate the same thing for dinner and he specifically recalled eating "chili mac." 12RP 1000, 1021, 1051. M.A. had Cheerios or waffles for breakfast. 12RP 990, 1021. In interviews with a forensic

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[19] M.A.'s sister V.A. recalled there was a gate blocking M.A.s bedroom door. According to V.A., M.A. was confined to his room for stealing a soda and because he ate off the floor. 15RP 1569-70. She also recalled that, while the siblings lived with the Moses family, M.A. was hungry a lot, and was made to use small spoons so he would eat more slowly. 15RP 1573-74.

[20] V.A. testified M.A. ate jalapenos only infrequently, when the family ate Indian tacos. 15RP 1587. But she also recalled her brother did not like eating them. 15RP 1579.

interviewer after removal from the Moses family, he also reported being served "TV dinners" at the home. Exs. 46, 47.

M.A. provided conflicting testimony about the provision of food at the Moses home. At first, he testified he never felt hungry and got enough to eat. 12RP 1003. On redirect, he testified he did not like living at the Moses home because they starved him and "no one" was allowed to give him food. 12RP 1028. He later testified that he was fed sometimes, and he did not know what "starved" meant or where he heard the word. 13RP 1040-41, 1044. [21] M.A. also recalled being tired and sleeping a lot while he lived with the family. 12RP 1001, 1053.

The State introduced into evidence M.A.'s two interviews with forensic interviewer Cornelia Thomas. The first occurred March 1 at the hospital, and the second occurred on March 22 at Pierce County's Child Advocacy Center. 14RP 1387, 1392, 1400; Exs. 46 and 47. According to Thomas, M.A. gave few "narrative" responses to her questions, but he provided information spontaneously and corrected Thomas when she repeated back information incorrectly. 14RP 1390, 1405.

M.A. gained weight but continued to struggle with a variety of food-related behavior issues at his next foster home. 14RP 1264-67, 1275,

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[21] At the first interview, M.A. told the forensic interviewer he was never served breakfast. Ex. 46. At the second interview, he said he *was* served breakfast. 15RP 1447; Ex. 47.

1278-79, 1283-84, 1288, 1292. The foster parents put an alarm on his door and set it at night because he snuck out of his room to get food. 12RP 1007-08, 1010, 1054, 1056; 13RP 1261, 1286, 1296-98.

3. Closing arguments

In closing, counsel for Moses argued there was no question that M.A. was malnourished and that he did not get enough food. 18RP 1940. However, Moses did not have a plan to deprive M.A. of food. 18RP 1945. The evidence showed M.A.'s weight loss was gradual, that M.A. was not otherwise ill, and that Moses was unaware of medical opinion that a child should never lose weight, but rather grow into it. 18RP 1945-46, 1961-62. Moses did not intend to withhold M.A. from others' view, and had valid explanations for not taking M.A. to school. 18RP 1947. While Moses did attempt to control M.A.'s diet, this was based on information from the tribe and the risk that he would eat something harmful. 18RP 1942-43, 1948. Counsel suggested Moses told others about a torn esophagus because she feared M.A. could vomit from overeating, which could cause internal damage. 18RP 1948-49. Finally, consistent with the lesser degree offenses, counsel argued Moses was at most negligent – she did not know what she was doing was dangerous; rather she "should have known," but did not know, her actions could have harmful effects. 18RP 1859-60.

Justin's counsel argued the tribe provided the Moses family inadequate information regarding the scope of M.A.'s food issues. 18RP 1865, 1972-73. Former foster parent Martinez also struggled with these issues and also received inadequate information and assistance from the tribe. 18RP 1970. Counsel also argued Justin was, at most, guilty of the lesser offenses. 18RP 1972. In addition, the State did not prove M.A. suffered substantial bodily harm because being thin was not tantamount to "substantial disfigurement" required under one definition of substantial bodily harm.[22] 18RP 1987. Moreover, the jury was to consider the evidence, including the photographs of M.A. taken on February 27, while presuming the defendants' innocence. 18RP 1987. The State immediately objected, stating, "That's a misstatement of the law." 18RP 1987. The court sustained the objection. 18RP 1987.

[22] CP 96 (Instruction 26); see also RCW 9A.42.010(2)(b) (defining "substantial bodily harm" as "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part."

C. ARGUMENT

THE COURT VIOLATED THE APPELLANT'S RIGHT TO BE PRESUMED INNOCENT BY SUSTAINING THE STATE'S OBJECTION TO CLOSING ARGUMENT THAT ACCURATELY DESCRIBED THE SCOPE OF THE PRESUMPTION OF INNOCENCE.

Here, the jury was instructed that Moses was presumed innocent and that "[t]his presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt." CP 73 (Instruction 3). However, the prosecutor objected when Justin's counsel argued the jury must view evidence in light of the presumption of innocence. Before the jury, the prosecutor incorrectly claimed this argument misstated the law. The court sustained the objection. Taken as a whole, this exchange informed jurors that the prosecutor's objection was well taken, and that the jurors need not evaluate the evidence with the presumption of innocence in mind. Because the exchange seriously undermined the presumption of innocence, reversal is required.

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of our criminal law." Coffin v. United States, 156 U.S. 432, 453, 15 S. Ct. 394, 403, 39 L. Ed. 481 (1895). This presumption "is a basic component of a fair trial," Estelle v. Williams, 425

U.S. 501, 503, 96 S Ct. 1691, 1692, 48 L. Ed .2d 126 (1976), and derives from the Due Process Clauses under the Fifth and Fourteenth Amendments of the Constitution, Taylor v. Kentucky, 436 U.S. 478, 485-86 n. 13, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978).

An instruction on reasonable doubt alone has been held insufficient to insufficient to satisfy due process. Id. at 485. An instruction on the presumption of innocence performs two separate functions. First, as a corollary to the standard of proof, it reminds the jury that the prosecution bears the burden of persuading the jury of the defendant's guilt beyond a reasonable doubt, and absent such proof, the jury must acquit. United States v. Thaxton, 483 F.2d 1071, 1073 (5th Cir. 1973). Second, it cautions the jurors to remove from their minds any suspicion that arises from the arrest and charge itself and to reach their conclusion solely from the legal evidence presented at trial. Id. (quoting 9 Wigmore on Evidence § 2511, at 407 (3d ed. 1940)). These components have been referred to as the "persuasion" and "purging" functions. Thaxton, 483 F.2d at 1073.

In Washington, an accused is always entitled to an instruction that she is presumed innocent. State v. McHenry, 13 Wn. App. 421, 424, 535 P.2d 843, 845 (1975) aff'd, 88 Wn. 2d 211 (1977). Such an instruction is fundamental to a fair trial. Matter of Lile, 100 Wn.2d 224, 227, 668 P.2d 581, 583 (1983) (citing Winship, 397 U.S. 358; Coffin, 156 U.S. 432).

The importance of such an instruction has been repeatedly emphasized by the Legislature and the courts of this state. E.g., RCW 10.58.020;[23] State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007); State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977); State v. Tyree, 143 Wash. 313, 315, 255 P. 382 (1927).

The presumption of innocence continues throughout the entire trial and may only be overcome, if at all, during deliberations. State v. Venegas, 155 Wn. App. 507, 524, 228 P.3d 813 (quoting 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01 (3d ed. 2008), review denied, 170 Wn.2d 1003 (2010). In Venegas, the prosecutor stated that the presumption of innocence erodes every time the jury hears evidence of the defendant's guilt. 155 Wn. App. at 524. This Court held that the prosecutor committed flagrant misconduct by making an improper argument with no basis in law. Id. at 525.

The presumption of innocence does not stop at the beginning of deliberations. Rather, it persists until the jury, after considering all the

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[23] RCW 10.58.020 provides that:

> Every person charged with the commission of a crime shall be presumed innocent until the contrary is proved by competent evidence beyond a reasonable doubt; and when an offense has been proved against him or her, and there exists a reasonable doubt as to which of two or more degrees he or she is guilty, he or she shall be convicted only of the lowest.

evidence, is satisfied the State has proved the charged crime beyond a reasonable doubt. State v. Evans, 163 Wn. App. 635, 644, 260 P.3d 934, 939 (2011) (reversing based on flagrant, prejudicial prosecutorial misconduct).

A court's ruling may lend the court's "imprimatur" to a prosecutor's comments. State v. Perez-Mejia, 134 Wn. App. 907, 920, 143 P.3d 838, 845 (2006). Here, the prosecutor's objection, and the court's ruling on the objection, essentially directed the jury to disregard the presumption once the jury began deliberating, an admontion that "seriously dilute[d] the State's burden of proof." Evans, 163 Wn. App. at 644. Given the Court's "imprimatur," the effect was no different than had the court instructed the jury that the presumption of innocence had eroded by the time deliberations began.

Where the jury is instructed erroneously as to the presumption of innocence, courts do not engage in harmless error review set forth in Chapman v. California, 386 U.S. 18, 23, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), which looks at a case in its entirety to analyze the effect of the error on the jury's verdict. United States v. Doyle, 130 F.3d 523, 536 (2d Cir. 1997) (reversing based on finding that jury instruction improperly diluted the presumption of innocence). Rather, a court assesses whether there is a reasonable likelihood that the jury misinterpreted the reasonable

doubt instruction. Id.[24] This Court need only decide whether there was a reasonable likelihood that the jury misunderstood the reasonable doubt standard, of which the presumption of innocence is an important component. E.g., Thaxton, 483 F.2d at 1073.

Here, given the court's endorsement of the State's objection to proper legal argument on the presumption of innocence, there was a reasonable likelihood the presumption of innocence was diluted. The jury was likely left with an impression of the law akin to the prosecutor's argument in Venegas, that the presumption of innocence had already eroded, and the jury need not evaluate the evidence in light of this presumption. 155 Wn. App. at 524.

Because there was a reasonable likelihood the jury misapplied the most crucial of instructions, this Court should reverse Moses's conviction. Doyle, 130 F.3d at 539.

But even if, for the sake of argument, the error is subject to a constitutional harmless error analysis, Moses prevails. Under State v. Brown, this Court may hold an error harmless only if it is satisfied

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[24] See also Sullivan v. Louisiana, 508 U.S. 275, 278-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) ("harmless error" review is not pertinent to judicial scrutiny of an erroneous reasonable doubt instruction, because error in this essential instruction is per se harmful and must result in reversal of the conviction).

"beyond a reasonable doubt that the jury verdict would have been the same absent the error." 147 Wn.2d 330, 332, 341, 58 P.3d 889 (2002).

The State cannot prove the court's "dilution" of the burden of proof was harmless in this case. Moses acknowledges that, based on the evidence and the parties' arguments, outright acquittal was unlikely. Moses acknowledged that M.A. had suffered malnourishment in her care. But she argued, persuasively, that there was no "plan" to deprive him of food or to cause him suffering. 18RP 1943. Rather, Moses engaged in a misguided attempt to improve M.A.'s health. 18RP 1942-43, 1945-46, 1948. The tribe provided limited information, resources, and oversight, and Moses did the best she could in extraordinarily difficult circumstances. 18RP 1942-43, 1970.

If the jury had viewed the evidence, and Moses's actions, with the appropriate presumption in mind, there was a reasonable likelihood the jury would have convicted her on only a lesser charge. Notably, the jury did not unanimously find Moses created an "imminent and substantial risk of death or great bodily harm." CP 122. Rather, it found her guilty on the second alternative, "causes substantial bodily harm." CP 122; RCW 9A.42.030(1). This is consistent with the level of bodily harm required to prove the lesser crime of third degree mistreatment. See RCW 9A.42.035 (person meeting certain requirements is guilty if

she, with criminal negligence, "creates an imminent and substantial risk of substantial bodily harm" or "causes substantial bodily harm" by withholding basic necessity of life).

The court's act in sustaining the prosecutor's ill-conceived objection diminished Moses's chances for conviction on a lesser charge. And because the State cannot demonstrate beyond a reasonable doubt that the error was harmless, this Court should reverse her conviction. Brown, 147 Wn.2d at 344.

D. CONCLUSION

The trial court violated the appellant's due process right to the presumption of innocence when it sustained the State's improper objection. This Court should reverse Moses's conviction.

DATED this 30TH day of December, 2014.

Respectfully submitted,

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Attorneys for Appellant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 46357-1-II
	)	
AIMEE MOSES,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF DECEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **AMENDED BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] AIMEE MOSES
DOC NO. 374663
WASHINGTON CORRECTIONS CENTER FOR WOMEN
9601 BUJACICH ROAD NW
GIG HARBOR, WA 98332

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF DECEMBER 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

December 30, 2014 - 1:57 PM

Transmittal Letter

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Court of Appeals Case Number: 46357-1

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