97850-6

THE SUPREME COURT

FOR THE STATE OF WASHINGTON

State of Washington

Vs.

Cynthia Sue Miller

AMENDED

PETITION FOR DISCRETIONARY REVIEW

ROMAINE LOKHANDWALA LAW GROUP, LLP.
Zishan Lokhandwala, WSBN 53260
Attorneys for Petitioner

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I. INTRODUCTION

This Petition for discretionary review seeks reversal of the Court of Appeals decision filed on October 15, 2019 in Case No. 48672-5-II, State of Washington vs. Cynthia Sue Miller, terminating review and concluding that the evidence before the trial court was sufficient to support the first degree child assault and second degree child assault convictions, as well as their additional conclusions that the trial court's findings that Miller's crimes manifested deliberate cruelty were supported by the evidence.

II. IDENTITY OF PETITIONER

Petitioner, Cynthia Sue Miller ("Miller") is the "Appellant" in the Court of Appeals and the "Defendant" in the Thurston County trial court. The grounds for this petition for discretionary review are that the decision of the Court of Appeals for the Second Division has so departed from the accepted and usual course of jurisprudence as to justify review by this Court.

III. CITATION TO APPELLATE DECISION TO BE REVIEWED

Petitioner requests the Washington Supreme Court review and reverse the Court of Appeals' decision in Case No. 48672-5-II, State of

Washington vs. Cynthia Sue Miller, herein the "Unpublished Opinion." A copy of said Unpublished Opinion is attached herein.

IV. ISSUES PRESENTED FOR REVIEW

1. The Unpublished Opinion of the Court of Appeals fails to identify evidence that can demonstrate that Miller actually and proximately caused damages as required under RCW 9A.36.120 in a manner that comports with due process provisions of the United States Constitution as well as precedent of both the Washington State Supreme Court and the Washington State Court of Appeals. This Unpublished Opinion utterly strips Miller of the protections she enjoys pursuant to the due process clause of the United States Constitution, as interpreted by this court and in precedential decision of the Washington State Court of Appeals.
2. The Unpublished Opinion of the Court of Appeals fails to identify evidence sufficient to support any finding that Miller proximately caused the serious injuries noticed on the victim as required under RCW 9A.36.130 in a manner that comports with due process provisions of the United States Constitution as well as precedent of both the

Washington State Supreme Court and the Washington State Court of Appeals.

3. The Unpublished Opinion of the Court of Appeals is completely bereft of evidence sufficient to show that Miller manifested deliberate cruelty towards the victim by any action on her part that should have enhanced her sentence to 423 months.

V. STATEMENT OF THE CASE

a. Petitioner Seeks Discretionary Review of The Court of Appeals' Decision Affirming The Trial Court's Conviction of First and Second Degree Child Assault And "Deliberate Cruelty" To Justify Sentence of 423 Months.

The trial court sitting without a jury convicted Appellant, Cynthia Sue Miller, of two counts of Assault of a Child in the First Degree, and in the alternative two counts of Assault of a Child in the Second Degree, one count of Assault of a Child in the Third Degree, and one count of Criminal Mistreatment in the Fourth Degree. This conviction was based upon the trial court's speculation that Miller must have imposed the serious injuries the victim testified to by the forensic examiner, despite the lack of any competent evidence that those particular injuries had been

caused by Miller. The trial court imposed an exceptional sentence of 423 months after determining that five separate "aggravating factors" existed as to both the First Degree and Second Degree charge. These factors were: a) that S.K. was a family member as defined under RCW 10.99.020; b) manifestation of deliberate cruelty to S.K.; c) reasonable knowledge of S.K. being particularly vulnerable or incapable of resistance; d) defendant's use of position of trust to facilitate the abuse; e) domestic violence as defined in RCW 10.99.020 and exhibited an ongoing pattern of psychological or physical abuse of S.K. as well as deliberate cruelty to S.K. The trial court imposed a total exceptional sentence of 423 months. The Court of Appeals affirmed the trial court's ruling, concluding that the evidence was sufficient to support the first degree child assault and second degree child assault convictions, finding that despite testimonial or documentary evidence connecting Miller's use of physical force on the victim with the serious injuries reported by the forensic medical examiner and despite the denial by the victim that Miller caused these injuries. (See Petitioner's Appendix ("P.A."), 2: 1-5) The Court of Appeals additionally concluded that the trial court's findings that Miller's crimes manifested deliberate cruelty

to justify imposition of a 423 month sentence were supported by the evidence. (*Id*.) Petitioner here contends that in making these findings, the Court of Appeal so departed from the accepted and usual course of jurisprudence as to justify review by this Court. That contention is based upon the complete silence, in the record it reviewed, as to the identity of the person who perpetrated the grievous bodily harm upon the minor noted in the forensic medical examination as testified to by Nurse Wahl. Yet these injuries themselves serve as the gravamen of the crimes for which Miller stands convicted. In short, Miller stands convicted of causing serious bodily injury to a child on mere speculation that because at some unidentified time, she did impose physical discipline on the minor through for exempted disciplinary or corrective reasons. We contend that this was the only evidence of a critical element of any assault on a minor, and that all evidence of any conduct on the part of Miller is fully and reasonably reconcilable with a finding that Miller imposed minimal, or no, bodily harm to the minor. Because the standard of proof was beyond reasonable doubt and because there was no direct evidence (e.g. testimony) that Miller's blows were of such severity to cause broken bones, or permanent scars, or indeed,

anything beyond transient pain and no injury was testified to by anyone other than Wahl, it would not be possible for the Court of Appeals, applying the appropriate standards of review, to find that the evidence was sufficient to support proper conviction of Miller on any charge beyond that of misdemeanor assault on a minor, and possibly, an assault that was authorized under the rules of parental disciplinary exemption. (See RCW 9A.16.100)

b. The Court of Appeals' Determination of Facts Did Not Establish That Miller Committed An Act That Inflicted Great or Substantial Bodily Harm to S.K.

Below is a summation of the facts as determined by the Court of Appeals that predicated the appeals court's affirming of the trial court's conviction of Miller on both RCW 9A.36.120 and RCW 9A.36.130:

S.K. lived with her grandmother, Miller, by placement through child protective services and court order. In October 2013, when S.K. was nine years old, the Department of Social and Health Services (DSHS) received a report concerning possible neglect of S.K. A social worker went to S.K.'s school to meet with S.K. and noticed that S.K. was wearing old faded clothes and that she had some abrasions on her face. (P.A., 2: 8-12) There was no evidence offered to the worker that these abrasions were caused by any act of Miller whatsoever. (*Id*.) The social worker asked S.K. about her grandmother, Miller, and S.K.'s "demeanor changed

a little bit and she started to fidget with some of her little toys that were on the desk and she averted her gaze and looked down." (P.A., 2: 13-15) S.K. also said that "she ha[d] to ask her grandma before she c[ould] eat and she said there was a lock on the refrigerator and sometimes that she st[ole] food." (P.A., 2: 17-18) The social worker and Thurston County Sheriff's Deputy Jamie Gallagher spoke with Miller at her home and Miller told them that she had "whipped" S.K. the night before for parental disciplinary reasons. (P.A., 3: 1-2) Miller denied that there was a lock on the refrigerator, but she did say that there was a lock on the freezer and that "she doesn't allow the children to go through the refrigerator freely." (P.A., 3: 2-4) An advanced registered nurse practitioner examined S.K. at the Child Abuse and Sexual Assault and Maltreatment Center. The nurse practitioner observed that S.K. had multiple facial injuries. (P.A., 3: 5-7) *She also had bruises on her entire body including "patterned bruising around the lateral aspect of the right buttock" and "small, circular, brown . . . fingerprint pattern bruising." Notably, there was also bruising "between her labia and her anus*" and there was "erythema or redness on both sides" and bruising "up against her left labia but more in the fold of her groin." (P.A., 3: 8-11) [emphasis added] X-rays were taken of S.K. on November 5. (P.A., 3: 15) Dr. Shireen Khan, a pediatric radiologist, reviewed S.K.'s x-rays and rendered a report. (P.A., 3: 16) The X-rays

showed that S.K. had five different fractures on her body including "both of her ulnas, her elbow, her pinkie finger and her toe." (P.A., 3: 17-18) Khan described the X-ray showing S.K.'s pinky finger and said that it showed "inflammation and thickening of kind [of] the outer lining of bone that happens with inflammation or with healing fractions" and that there was "buckling" which can be from trauma. (P.A., 3: 19-21) In the X-ray of S.K.'s left forearm, she noted that there was "a lucency fracture through the back of the mid ulna, and along the lateral margin of it you see really smooth, fairly mature periostitis" indicative of a "largely healed fracture" that she said was a "month or two old." (P.A., 4: 2-4) When asked if a child would obtain this type of fracture through trauma, Khan responded, "Typically, a long fracture is traumatic." (P.A., 4: 3-5) S.K. denied that she had ever been hurt by Miller. S.K. was moved into a foster home and her foster parent, Kristen Whitcomb, testified that when S.K. first started living with her, "[s]he had a lot of scabbing on her face. . . . She was really thin, her hair was falling out. . . . Her clothes were bleach sustained [sic]." S.K. would hide in public areas because she was afraid her grandmother would find her. S.K. told Whitcomb that sometimes she would not be allowed to eat when she was in the care of her grandmother, and she would have to sit at the kitchen table and watch everybody else eat. S.K. also disclosed to Whitcomb that she had to stand against a wall while her

grandmother and cousin would yell “Jehovah” at her. (P.A., 5: 1-7) Whitcomb further testified that S.K. revealed that her grandmother had held her head underneath water in the bathtub, that her grandmother would tie her wrists to the door in the bathroom when company was over and tell them that she was not there and she would get juice and water and until the company was gone. Miller used a cane to beat the “demon” out of S.K., and S.K. said that this happened 16 to 22 times.(P.A., 5: 8-15) S.K. did not fix a time when this conduct allegedly took place, and gave no testimony that would link the conduct with the objective findings by Nurse Wahl. (*Id*.) Nor did S.K. testify as to the force of the blows she received and did not report any serious physical manifestation or consequences of those strokes. (*Id*.) Whitcomb testified that S.K. told her that on one occasion her grandmother was mad at her, said she was going to kill her, and came after her with a steak knife. Gallagher interviewed S.K. again on December 31. Gallagher noted that “[s]he was taller, her hair had started to grow back. . . . I didn’t notice as much scarring and scabs on her face, she looked like she had put on weight.” (P.A., 5: 16-19) There was no evidence of any stab wounds, or any other wounds that would be attributable to being attacked with a blade. There was no evidence of psychological trauma from any reported incidents. (*Id*.) During this interview, S.K. disclosed to Gallagher that Miller had tried to drown her in

the bathtub. She said Miller "put her hand on my head and pushing [sic] my head in the water." (P.A., 5: 19-21) Notably, she did not describe any physical symptoms of drowning, nor did she ascribe any physical symptoms to the "drowning." She did not say how long her head was under water. (*Id*.) S.K. said that sometimes Miller would tie S.K.'s hands together and to the bed. Miller "would use tight straps and she was tying it really bad where my wrist [sic] were red." (P.A., 6: 1-3) However, S.K. did not describe any physical injuries, nor say how long her wrists remained red. (*Id*.) When asked about the bruises, S.K. said she was hit by this "hard stick, it was very long and it was very hard and it hurts really bad." (P.A., 6: 7-9) Notably, S.K. did not define "really bad," nor did she describe any injuries received from these blows. Moreover, she did not relate how long the pain lasted for. (*Id*.) Detective Gallagher did not ask S.K. if it was any action of Miller that caused any injuries to S.K. (*Id*.) At trial, S.K. described how Miller would hit her with a bamboo stick and Miller would hit her "about ten times sometimes." (P.A., 6: 13-15) When asked if she was ever spanked by Miller, S.K. responded, "Yes. I would get spanked with a belt." (P.A., 6: 16-18) S.K. said that she had bruises from Miller hitting her. Notably, no scar tissue was observed on S.K.'s buttocks during the forensic examination, nor were any scars located there. (*Id.) S*.K. did not describe what she meant by "scars" or "scar tissue," nor

how long these "scars," or "scar tissue" remained on her buttocks. S.K. did not describe the extent or duration of the "bruising" she testified to. (*Id*.) Notably, S.W. did not describe the nature of the "pain" and whether it was physical, or emotional, nor did she offer any evidence as to its meaning. (*Id*.) S.W. described a time when Miller got a pillow, put it in S.K.'s face, sat on S.K., and then laughed about it. S.W. said that S.K. could not breathe when this happened.(P.A., 7: 7-8)) Notably, S.W. did not describe the extent or severity to which S.K. allegedly could not breathe during this described occurrence. (*Id*.) Over the objection of Defendant's counsel, Dr. Joyce Gilbert, testified as an expert for the State. She testified that the clinical definition of "torture" was two distinct separate episodes of physical assault or one prolonged episode of physical assault in addition to two or more episodes of psychological maltreatment, which then results in severe injury to the child and/or can result in death of the child, who asserted that psychological maltreatment can include isolating a child or depriving the child of food, water, and nourishment. (P.A., 7: 16-17) The defense presented the testimony of a child protective services worker, Alex Tarasar. Tarasar testified that he investigated a case involving H.W. and A.W., who were S.K.'s cousins, and he placed them in the home of Miller and that there appeared to be food available for the children at that time (P.A., 8: 1-2)

VI. ARGUMENT

A conscientious review of all of the evidence adduced at trial and relied upon in the Appellate court's decision, resolving all reasonable inferences in favor of the State, except as to those where a reasonable inference existed from circumstantial evidence in favor of the defendant, yields only : **[1]** that Miller "spanked" S.K. intermittently for disciplinary reasons in a manner so exempted under RCW 9A.16.100 and that no evidence exists on the record indicating that the spanking on the buttocks caused more than transient physical pain or minor temporary marks; **[2]** that Miller, on one occasion, tied S.K.'s hands to the bed rails for disciplinary reasons in a manner so exempted under RCW 9A.16.100, to prevent her from leaving the room, or getting into mischief, for which there was no evidence of bodily harm, nor any evidence that would relate this event temporally to the objective observations of Nurse Wahl on forensic physical exam. Wahl admitted that she had no reason to relate her findings as to the severe physical injuries noted to any specific conduct on the part of Miller and that SK denied that Miller hurt her in any way; **[3]** that no evidence was adduced to show that this the alleged "drowning" caused S.K. to suffer any of the symptoms associated with drowning, or that it was anything more than a child's fanciful interpretation of having her head pushed under water in a bathtub, nor was there even any evidence

of duration.; **[4]** that Miller put locks on the freezer to keep S.K. and her other children from over-eating in a manner so exempted under RCW 9A.16.100; **[5]** that the evidence was wholly insufficient to relate any of Miller's conduct, to the injuries discovered, which included peculiarly, bruising "between her labia and her anus" and bruising "up against her left labia but more in the fold of her groin." (P.A., 3: 9-12)

Washington State Law provides that 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. (See RCW 9A.16.100) Washington State Law further mandates that the Due Process clause, applicable to The State of Washington by incorporation through the Fourteenth Amendment of the United States Constitution, explicitly protects the accused against conviction except upon proof beyond a reasonable doubt of every single fact necessary to constitute the crime with which she is charged. (See U.S. Const. Amend. XIV) When a crime, as here with RCW 9A.36.120 and RCW 9A.36.120, requires not merely conduct but also a specified result of conduct, a defendant generally may not be convicted unless their conduct is both (1) the actual cause, and (2) the "legal" cause (often called the "proximate cause") of the result. (See Burrage v. United States, 571 U.S. 204 (2014); see also Apprendi v. New Jersey, 530 U.S. 466, 471 (2000))

To be convicted of RCW 9A.36.120, the State must prove, beyond a reasonable doubt, the following:

> "(1) 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:
> (a) Commits the crime of assault in the first degree, as defined in RCW **9A.36.011**, against the child; or
> (b) Intentionally assaults the child *and* either:
> (i) Recklessly inflicts great bodily harm; or
> (ii) Causes substantial bodily harm, *and* the person has previously engaged in a pattern or practice either of (A) assaulting the child which has resulted in bodily harm that is greater than transient physical pain or minor temporary marks, or (B) causing the child physical pain or agony that is equivalent to that produced by torture." [emphasis added]

The State was thus required to demonstrate beyond a reasonable doubt that : (a) Miller was a person eighteen years of age or older; (b) S.K. was under the age of thirteen; (c) Miller committed an intentional act unto S.K.; ***AND*** (d`1) That such action of Miller recklessly *inflicted great bodily harm* unto S.K. ***OR*** (d`2) that Miller *inflicted substantial bodily harm* unto S.K. ***AND*** (e`2) Miller has previously engaged in a pattern or practice either of (i) assaulting the child which has resulted in bodily harm that is greater than transient physical pain or minor temporary marks, or (ii) causing the child physical pain or agony that is equivalent to that produced by torture. (See RCW 9A.36.120) Pursuant to the clear and express language of RCW 9A.36., the State is required to actually

demonstrate by way of demonstrative evidence that any injuries discovered on S.K. that were in fact demonstrative of great or substantial bodily harm were *actually* and *proximately* caused by an action of Miller, and that there is no reasonable alternative whatsoever to explain those injuries. (See *Id.*; see also State v. Kiser, 87 Wash.App. 126 (1997)(Explaining that this statute explicitly requires proof of a principal intentional assault which causes substantial bodily harm, and previous pattern or practice of causing pain.)) While the State may use circumstantial evidence to demonstrate causation, pursuant to Washington and federal law, if the evidence adduced *also* gives rise to an inference that indicates defendant's innocence under this statute, as opposed to her guilt, the State is required to draw such inference that favors defendant's innocence. (See *Id.;* see also Smith v. State, supra, 74 Wn.2d 744)

In fact, some of the injuries discovered on S.K., such as the bruising observed by Nurse Wahl on S.K.'s buttock "just between her labia and her anus" and "bruising medially up against her left labia but more in the fold of S.K.'s groin" were wholly misconstrued / misapplied by the State both at trial and in Appeal. Peculiarities such as these that tend to indicate that Appellant **did not** cause the injuries to S.K., however the State erroneously cites this as evidence that Miller is guilty. (See *Id.)*

In short, the inferences drawn from this evidence by the trial court, as upheld by the Court of Appeals, are not reasonable at all.

To be convicted of RCW 9A.36.130, the State must prove, beyond a reasonable doubt, the following:

> "(1) A person eighteen years of age or older is guilty of the crime of assault of a child in the second degree if the child is under the age of thirteen and the person:
> (a) Commits the crime of assault in the second degree, as defined in RCW **9A.36.021**, against a child; or
> (b) Intentionally assaults the child *and* causes bodily harm that is greater than transient physical pain or minor temporary marks, *and* the person has previously engaged in a pattern or practice either of
> (i) assaulting the child which has resulted in bodily harm that is greater than transient pain or minor temporary marks, or
> (ii) causing the child physical pain or agony that is equivalent to that produced by torture."

The record must contain sufficient evidence to demonstrate beyond a reasonable doubt that : (a) Miller was a person eighteen years of age or older; (b) S.K. was under the age of thirteen; (c) Miller committed an intentional act unto S.K.; ***AND*** (d) That such action of Miller *caused bodily harm* unto S.K. that was greater than transient physical pain or minor temporary marks ***AND*** (e`1) that Miller has previously engaged in a pattern or practice of assaulting the child in a manner that has resulted in greater than transient pain or temporary marks ***OR*** causing S.K. physical pain or agony that is equivalent to that produced by torture. (See RCW

9A.36.130) Pursuant to the clear and express language of RCW 9A.36.130, conviction mandates that the State prove beyond a reasonable doubt that there actually was an infliction of bodily harm unto S.K. that was greater than transient physical pain or temporary marks. This requires that the State actually demonstrate by way of sufficient evidence that any injuries discovered on S.K. that were in fact demonstrative of such bodily harm as to potentially give rise to a RCW 9A.36.130 violation were *actually* and *proximately* caused by an action of Miller, and that there is no reasonable alternative whatsoever to explain those injuries (See U.S. Const. Amend. XIV; see also State v. Cardenas-Flores, 194 Wash.App. 496 (2016))

VII. REASONS FOR GRANTING THIS PETITION

1. THE DECISION TO BE REVIEWED CONFLICTS WITH DECISIONS OF THE WASHINGTON STATE SUPREME COURT AND THE WASHINGTON STATE COURT OF APPEALS ON THE INTERPRETATION OF *RCW 9A.36.120* AND *RCW 9A.36.130.*

Although both *RCW 9A.36.120* and *RCW 9A.36.130* clearly require that the State establish beyond a reasonable doubt that there be great, substantial, or significant bodily harm actually inflicted unto the child by

an action of the defendant, the lower state courts in this case did not honor this mandate. Instead, both the trial court and the Court of Appeals completely ignored the law and prior decisions on these matters by both The Washington State Supreme Court and The Washington State Courts of Appeal, as well as the Ninth Circuit Court of Appeals and the United States Supreme Court. (See State v. Kiser, supra, 87 Wash.App. 126 (Explaining that the statute of RCW 9A.36.130 explicitly requires proof of a principal intentional assault which inflicts substantial bodily harm, *and*, previous pattern or practice of causing pain.); see also In re Dependency of H.S., supra, 188 Wash.App. 654 (Explaining the statute of RCW 9A.16.100 explicitly holds physical discipline of a child is not unlawful when it is reasonably moderate and inflicted by a parent or guardian for the purposes of restraining or correcting the child's behavior, as well as when reasonably related to the purpose of promoting the welfare of the minor, including prevention or punishment of the minor's conduct.)

2. THE DECISION TO BE REVIEWED CONFLICTS WITH DECISIONS OF THE WASHINGTON STATE SUPREME COURT AND THE WASHINGTON STATE COURT OF APPEALS ON THE MATTER OF APPLICATION OF AGGRAVATING FACTORS.

Imposition of 'aggravating factors' in sentencing a defendant must comport with due process as well; accordingly, Petitioner's argument on

appeal that the 'aggravating factors' were unlawful should have convinced the Court of Appeals because the imposition of aggravating factors in this case must have necessarily failed because: [1] the injuries noted on S.K. were not proven to be proximately caused by Miller in a manner consistent with the underlying statutes charged; [2] Miller has not been proven to have committed an act not exempted under RCW 9A.16.100; and [3] the State has not proven that Miller even committed an act that manifested more 'deliberate cruelty' than one who was properly convicted of First and/or Second Degree Assault of a Child. (See State v. Ferguson, supra, 142 Wn.2d at 648; see also State v. Crutchfield, 53 Wn.App. 925 (1989); State v. Clinton, 48 Wn.App. 671, 677 (1987) (Imposition of such aggravating factors requires a finding that Miller has manifested 'deliberate cruelty' to her victim such that she belongs in a class separate and distinct from those who are in fact guilty of First and Second Degree Assault of a Child). There does not appear to be any way that the State of Washington can be any more clear in espousing its intent that the State actually establish beyond a reasonable doubt that there be sufficient bodily harm discovered on the child, and that such perceptible bodily harm was demonstrated to have actually been inflicted unto the child by an action of the defendant. While the statute drafted by our State Legislature is incredibly clear, and The Washington State Supreme Court has had no

difficulty in deciphering the statute and effecting appropriate adjudications, these justices here with Miller felt empowered to disregard state law and constitutional mandate.

VIII. CONCLUSION

The evidence before the trial court was sufficient to support convictions of first degree child assault and second degree child assault and application of aggravating factors to enhance Miller's sentence to 423 months. The trial court's conviction of Miller under RCW 9A.36.120 and RCW 9A.36.130 is contrary to how such statutes have been applied and interpreted in prior decisions of The Supreme Court of The State of Washington, and denies Miller of any protections afforded to her under the state and federal constitution. It is for the foregoing reasons, that Miller respectfully requests the Court grant discretionary review in this case.

Respectfully Submitted,

Romaine Lokhandwala Law Group, LLP.
Attorneys For Petitioner, Cynthia Sue Miller

___**s/** Zishan Lokhandwala__
Zishan Lokhandwala

THE SUPREME COURT

FOR THE STATE OF WASHINGTON

State of Washington

Vs.

Cynthia Sue Miller

PETITIONER'S APPENDIX

PETITION FOR DISCRETIONARY REVIEW

ROMAINE LOKHANDWALA LAW GROUP, LLP.
Zishan Lokhandwala, WSBN 53260
Attorneys for Petitioner

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Division Two

October 15, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CYNTHIA SUE MILLER, Appellant.	No. 48672-5-II UNPUBLISHED OPINION

CRUSER, J. — Cynthia Sue Miller appeals her conviction and sentence for two counts of first degree child assault and two counts of second degree child assault.[1] She also challenges certain aggravating factors related to these convictions. Miller argues that the evidence was insufficient to support these convictions. Miller further contends that the trial court erred because the aggravating factors of "deliberate cruelty" were not supported by the evidence and the exceptional sentence was not warranted. Lastly, Miller argues that the trial court improperly denied her motion for release on bail pending appeal.[2] Miller raises additional arguments in her statement of additional grounds (SAG).

[1] Miller also was convicted of one count of third degree child assault and one count of fourth degree criminal mistreatment, but she does not appeal those convictions.

[2] In a footnote, Miller argues that that the trial court erred in allowing an expert witness to testify as to the definition of torture. Miller does not assign error to this issue. Because this argument is made in a footnote, we decline to consider it. *State v. Harris*, 164 Wn. App. 377, 389 n.7, 263 P.3d 1276 (2011).

We conclude that the evidence was sufficient to support the first degree child assault and second degree child assault convictions. We additionally conclude that the trial court's findings that Miller's crimes manifested deliberate cruelty were supported by the evidence. Also, the trial court properly exercised its discretion in denying Miller's request for an appeal bond. And we reject Miller's SAG arguments. Accordingly, we affirm.

FACTS

I. BACKGROUND FACTS

S.K.[3] lived with her grandmother, Miller. In October 2013, when S.K. was nine years old, the Department of Social and Health Services (DSHS) received a report concerning possible neglect of S.K. A social worker went to S.K.'s school to meet with S.K. When the social worker first observed S.K., she noticed that S.K. was wearing clothes that looked older and a little bit faded and that S.K. had some abrasions on her face.

The social worker asked S.K. about her grandmother, Miller, and S.K.'s "demeanor changed a little bit and she started to fidget with some of her little toys that were on the desk and she averted her gaze and looked down." 2 Verbatim Report of Proceedings (VRP) at 284. The social worker indicated that S.K. looked a bit uncomfortable and then S.K. said her grandmother was really nice. S.K. told the social worker that her two cousins and her sister slept in a room together and that S.K. sleeps in a back bedroom with her other cousin. S.K. also said that "she ha[d] to ask her grandma before she c[ould] eat and she said there was a lock on the refrigerator and sometimes that she st[ole] food." *Id.* at 286.

[3] We use initials to identify minor victims to protect their privacy.

The social worker and Thurston County Sheriff's Deputy Jamie Gallagher spoke with Miller at her home. Miller said that she had "whipped" S.K. the night before. *Id.* at 291. Miller denied that there was a lock on the refrigerator, but she did say that there was a lock on the freezer and that "she doesn't allow the children to go through the refrigerator freely." *Id.* at 292.

An advanced registered nurse practitioner examined S.K. at the Child Abuse and Sexual Assault and Maltreatment Center. S.K. continued to eat throughout the entire time she was at the clinic. The nurse practitioner observed that S.K. had multiple facial injuries. She also had bruises on her entire body including "patterned bruising around the lateral aspect of the right buttock" and "small, circular, brown . . . fingerprint pattern bruising." 1 VRP at 151. There was also bruising "between her labia and her anus" and there was "erythema or redness on both sides" and bruising "up against her left labia but more in the fold of her groin." *Id.* at 152. There was a three-inch raised scratch on her scalp. Furthermore, she had red dots on both sides of her eyelids called "petechiae." *Id.* at 157. The nurse practitioner testified that "[t]ypically, we see that more in strangulation or some sort of an airway occlusion, but because or it also could be how she -- how she is." *Id.* at 157. X-rays were taken of S.K. on November 5.

Dr. Shireen Khan, a pediatric radiologist, reviewed S.K.'s x-rays and rendered a report. The X-rays showed that S.K. had five different fractures on her body including "both of her ulnas, her elbow, her pinkie finger and her toe." 3 VRP at 455.

Khan described the X-ray showing S.K.'s pinky finger and said that it showed "inflammation and thickening of kind [of] the outer lining of bone that happens with inflammation or with healing fractions" and that there was "buckling" which can be from trauma. *Id.* at 444. She dated this injury to be about 10 days to 3 or 4 weeks old at the time the X-rays were taken. In

the X-ray of S.K.'s left forearm, she noted that there was "a lucency fracture through the back of the mid ulna, and along the lateral margin of it you see really smooth, fairly mature periostitis" indicative of a "largely healed fracture" that she said was a "month or two old." *Id.* at 447. When asked if a child would obtain this type of fracture through trauma, Khan responded, "Typically, a long fracture is traumatic." *Id.* at 448.

On that same arm, Khan described a "lateral condylar fracture of the humerus," an elbow fracture. *Id*. This fracture was consistent with trauma. Khan could not say how old the "[l]ateral condylar fractures" were but they could be months old. *Id.* at 454. There was also healing evidence of a fracture along the ulna of S.K.'s right arm. This fracture could be 10 days to 3 or 4 weeks old. Also, there was a subacute fracture on S.K.'s left toe. "Subacute" means that the fracture is in the early stages of healing so it was about 7 to 14 days old.

The social worker questioned the other children in the home as part of the investigation. One of the children said that S.K. had a demon inside her and that because of this, S.K. had to stand in a corner with a bible over her head while they shouted "Jehovah" at her. 2 VRP at 352. S.K.'s sister talked about Miller "beating" S.K. *Id.* at 350.

Gallagher interviewed S.K. on November 18. S.K. seemed reluctant to talk about Miller and would change the subject. During this interview, S.K. denied that she had ever been hurt. However, she did say that her mom or grandma and her cousins and sister thought that she had a demon in her body.

The State initially charged Miller with second degree child assault –domestic violence.

S.K. was moved into a foster home and began making disclosures to her foster parent, Kristen Whitcomb. Whitcomb testified that when S.K. first started living with her, "[s]he had a

lot of scabbing on her face. . . . She was really thin, her hair was falling out. . . . Her clothes were bleach sustained [sic]." *Id.* at 255. S.K. would hide in public areas because she was afraid her grandmother would find her. S.K. told Whitcomb that sometimes she would not be allowed to eat when she was in the care of her grandmother, and she would have to sit at the kitchen table and watch everybody else eat. S.K. also said that her sister would sneak her food because she did not get to eat that day. S.K. also disclosed to Whitcomb that she had to stand against a wall while her grandmother and cousin would yell "Jehovah" at her. *Id.* at 259.

Whitcomb further testified that S.K. revealed that

> her grandmother had held her head underneath water in the bathtub, that her grandmother would tie her wrists to the door in the bathroom when company was over and tell them that she was not there and she would get juice and water and until the company was gone. That could last up to two days. She told me that she was beat with a bamboo stick.

Id. at 259. Whitcomb said S.K. indicated that she could not breathe when her grandmother held her under water. Miller used a cane to beat the "demon" out of S.K., and S.K. said that this happened 16 to 22 times. *Id.* at 260. Whitcomb testified that S.K. told her that on one occasion her grandmother was mad at her, said she was going to kill her, and came after her with a steak knife.

Gallagher interviewed S.K. again on December 31. Gallagher noted that "[s]he was taller, her hair had started to grow back. . . . I didn't notice as much scarring and scabs on her face, she looked like she had put on weight." 3 VRP at 490. During this interview, S.K. disclosed to Gallagher that Miller had tried to drown her in the bathtub. She said Miller "put her hand on my head and pushing [sic] my head in the water." Ex. 37 at 6. She told Gallagher that Miller was mad when that happened and that her sister was trying to stop Miller.

S.K. said that sometimes Miller would tie S.K.'s hands together and to the bed. Miller "would use tight straps and she was tying it really bad where my wrist [sic] were red." *Id.* at 10. When describing the "straps," S.K. said they were black and "have these little things that you just pull a string and tie it as good as you could." *Id.* This happened "[a] lot of times." *Id.* Miller was the only one that ever tied her up. This happened in third grade and her wrists would be sore for five or six days.

When asked about the bruises, S.K. said she was hit by this "hard stick, it was very long and it was very hard and it hurts really bad." *Id.* at 11. S.K. told Gallagher that she did not think she was treated the same as the other kids in the house and that the other kids were never tied to their beds. She was not able to eat for a couple of days, but the other children could eat.

II. BENCH TRIAL

Miller waived her right to a jury trial, and a bench trial was held. S.K. testified at trial. S.K. described how Miller would hold her underwater and she was not able to breath. She said this happened more than once. S.K. also described how Miller would hit her with a bamboo stick and Miller would hit her "about ten times sometimes." 1 VRP at 65. S.K. testified that Miller tied her to her bed and how her wrists were sore for more than a week after. She also testified that her hands would be tied together with a rope in the bathroom and she sometimes had to sleep in the bathroom.

When asked if she was ever spanked by Miller, S.K. responded, "Yes. I would get spanked with a belt." *Id.* at 73. S.K. said that she had bruises from Miller hitting her. When asked if she had scars from Miller, S.K. said, "Yes . . . [o]n my bottom. . . . Well, they're actually not scars, they're actually scar tissue." *Id.*

When asked if other people hurt her in the house, S.K. said, "There was a person name [sic] Dean and he used to roll me in the carpet and slammed [sic] me on the floor." *Id.* at 75. However, when asked whether the other things she had talked about were things Miller did to her, S.K. responded, "Yeah." *Id.*

S.K.'s sister, S.W., also testified. S.W. testified that S.K. was not treated the same as the others in the house and said, "[S]he was kind of in a lot of pain and . . . she wasn't really treated really nice." *Id.* at 118. S.W. described a time when Miller got a pillow, put it in S.K.'s face, sat on S.K., and then laughed about it. S.W. said that S.K. could not breathe when this happened.

Dr. Joyce Gilbert, the Medical Director of the Sexual Assault Clinic and Child Maltreatment Center at Providence St. Peter Hospital, testified as an expert for the State. She testified that the clinical definition of "torture" was

> two distinct separate episodes of physical assault or one prolonged episode of physical assault in addition to two or more episodes of psychological maltreatment, which then results in severe injury to the child and/or can result in death of the child.

2 VRP 385-86. She asserted that psychological maltreatment can include isolating a child or depriving the child of food, water, and nourishment. In comparison to child abuse, torture is more of the "dehumanizing, degrading aspect, terrorizing the child" and "there's much more dominance and control." *Id.* at 388.

The defense presented the testimony of a child protective services worker, Alex Tarasar. Tarasar testified that he investigated a case involving H.W. and A.W., who were S.K.'s cousins, and he placed them in the home of Miller. Tarasar walked through Miller's home on October 11, 2013, and Miller told him that S.K. was a challenging child for her. He said that there appeared to

be food available for the children at that time. However, he noted that S.K. "appeared to be very shy and quiet and withdrawn." 4 VRP at 651.

During trial, the State filed a third amended information. The third amended information charged Miller with first degree child assault—domestic violence based on the fractured ulna (count I), first degree child assault—domestic violence based on the lateral condylar fracture of the humerus (count II), second degree child assault—domestic violence based on recklessly inflicting substantial bodily harm or intentionally strangling or suffocating S.K. (count III), third degree child assault—domestic violence (count IV), fourth degree criminal mistreatment—domestic violence (count V), second degree child assault—domestic violence based on intentional suffocation (count VI).[4] The State alleged aggravating circumstances on counts I through IV. Miller did not object to the third amended information. The following colloquy occurred between the court and Miller's defense counsel:

> THE COURT: . . . I take it that you took the time during our break to talk to your client about the third amended information?
>
> [DEFENSE COUNSEL:] I did, Your Honor. She can be arraigned on it. She's familiar with the amendment now. She's prepared to be arraigned and waive arraignment, waive further advisement, enter a plea of not guilty to the third amended complaint, waive reading.

Id. at 602-03.

III. VERDICT AND SENTENCING

The trial court found Miller guilty of first degree child assault—domestic violence, under the substantial bodily harm prong (the fracture of the ulna) (count I), first degree child assault—

[4] The third amended information also charged Miller with alternatives for counts I and II. The alternative for count I was second degree child assault—domestic violence and the alternative for count II was second degree child assault—domestic violence.

domestic violence, under the substantial bodily harm prong (the fracture of the humerus) (count II), second degree child assault—domestic violence by recklessly inflicting substantial bodily harm (count III), third degree child assault—domestic violence (count IV), fourth degree criminal mistreatment—domestic violence (count V), and second degree child assault—domestic violence by suffocation (count VI).

The trial court also found aggravating circumstances for counts I, II, III, and IV. The aggravating circumstances that are germane to this appeal are that Miller's conduct manifested deliberate cruelty to S.K. pursuant to RCW 9.94A.535(3)(a) and that Miller's conduct constituted deliberate cruelty to or intimidation of S.K. while being an offense involving domestic violence under former RCW 10.99.020 (2004) pursuant to RCW 9.94A.535(3)(h)(iii).[5]

The trial court imposed a total exceptional sentence of 423 months. Miller appeals her conviction and sentence.

IV. MOTION FOR RELEASE PENDING APPEAL

After sentencing, Miller filed a motion in the superior court for release on bail pending appeal. The superior court ruled that

> the decision to grant or deny an appeal bond is a discretionary decision of the Court. Release on bail in this case is inappropriate due to the seriousness of the offenses. The record does not show any extenuating circumstances that would make release on an appeal bond appropriate given the particular facts and circumstances of this case.

Clerk's Papers (CP) at 415. Miller also appeals the superior court's ruling on bail pending appeal.

[5] Miller does not challenge the remaining aggravating circumstances that were found by the trial court. Therefore, we do not discuss them.

DISCUSSION

I. SUFFICIENCY OF THE EVIDENCE

Miller argues that the State failed to prove beyond a reasonable doubt that Miller was guilty of two counts of first degree child assault and two counts of second degree child assault. We disagree.

A. PRINCIPLES OF LAW

The State must prove each essential element of a crime beyond a reasonable doubt. *State v. Chacon*, 192 Wn.2d 545, 549, 431 P.3d 477 (2018). Evidence is sufficient to support a conviction if, viewing the evidence in the light most favorable to the State, any rational trier of fact can find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). "All reasonable inferences from the evidence are drawn in favor of the State and interpreted most strongly against the defendant. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence carry equal weight. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

B. FIRST DEGREE CHILD ASSAULT

The State charged Miller with two counts of first degree child assault. The alleged substantial bodily harm for count I was a fractured ulna and for count II it was a fractured humerus. Miller argues that there was insufficient evidence to convict her of the two counts of first degree child assault.

To convict Miller of first degree child assault as charged, the State had to prove beyond a reasonable doubt that Miller was 18 years of age or older and that she, on or between March 17, 2011 and October 31, 2013, intentionally assaulted S.K., caused substantial bodily harm, and

> ha[d] previously engaged in a pattern or practice either of (A) assaulting the child which [ ] resulted in bodily harm that [was] greater than transient physical pain or minor temporary marks, or (B) caus[ed] the child physical pain or agony that [was] equivalent to that produced by torture.

RCW 9A.36.120(1)(b)(ii).

1. SUBSTANTIAL BODILY HARM

Specifically, Miller argues that there was no evidence presented at trial to show that she caused substantial bodily harm to S.K. Miller states that S.K.'s testimony established that Miller caused only "transient physical pain or minor temporary marks."[6] Appellant's Opening Br. at 31. With regard to S.K.'s fractures, Miller argues that she could not be found beyond a reasonable doubt to be the cause of those injuries.

Substantial bodily harm is defined as "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the

[6] Miller cites to *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996), multiple times throughout her brief to argue that S.K.'s statements were inconsistent and refuted at trial and are not evidence of the body of the crime. But Miller's reliance on *Aten* is misplaced.

Corpus delicti means the "'body of the crime.'" *Id.* at 655 (quoting 1 MCCORMICK ON EVIDENCE § 145 at 227 (John W. Strong ed., 4th ed. 1992)). The court in *Aten* explained that the corpus delicti rule prevents defendants from being convicted based on a defendant's own confessions or admissions alone and that the State must present independent evidence other than the confession that the crime a defendant described took place. *Id.* at 656-57. Miller relies on *Aten* to say that "[a] statement from a minor is not evidence of the body of the crime." Appellant's Opening Br. at 32 n.2. This is a misstatement of the law.

function of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.04.110(4)(b).

Dr. Khan, a pediatric radiologist, testified at trial that S.K. had five different fractures on her body including "both of her ulnas, her elbow, her pinkie finger and her toe." 3 VRP at 455. She further testified that as a pediatric radiologist, in all of her almost 18 years of experience, she had never seen this many fractures in a 9-year-old other than those who "have a history of recent major trauma like [a motor vehicle accident] or something like that." *Id.* Khan testified that the fractures were consistent with trauma. She also testified that the pinky finger fracture in the X-ray was about 10 days to 3 or 4 weeks old, the left ulna fracture was about a month or two old, the right ulna fracture was 10 days to 3 or 4 weeks old, and the subacute fracture on S.K.'s toe was about 7 to 14 days old. X-rays were taken of S.K. on November 5.

The nurse practitioner who examined S.K. testified about the bruising all over S.K.'s body. She described the pattern bruising on S.K.'s right buttock. The nurse practitioner testified that "[o]n an abused child of this age, the data supports and shows that there's frequently bruising on the face, the head, the neck, followed by the buttock and the trunk." 1 VRP at 165. She testified that "when we have all of these bruises all together on one little body without any explanation of what happened, it is [sic] big red flag for nonaccidental trauma." *Id.* at 167. The court reviewed the photos of the cuts and bruises on S.K.'s body as well as the X-rays and traumagram.

S.K. testified that Miller tied her to her bed with straps that would tighten around her wrists and that her wrists were sore for more than a week after this happened. S.K. told the detective that this happened in third grade. Taken together with the fractured wrists, this is circumstantial

evidence that S.K.'s fractures were caused by Miller tying her up. Circumstantial and direct evidence carry equal weight. *Delmarter*, 94 Wn.2d at 638.

Additionally, S.K. testified that Miller hit her with a bamboo stick. S.K. said that she had bruises from Miller hitting her. When viewing the evidence in the light most favorable to the State, any rational trier of fact could find that Miller intentionally assaulted S.K. and caused substantial bodily harm.

2. PATTERN OF ASSAULT/TORTURE

Miller argues that there was no evidence presented at trial that Miller engaged in a pattern of assault for the purpose of causing S.K. pain equivalent to torture as required under RCW 9A.36.120. Miller argues that the State "only has evidence that Miller spanked S.K. on the buttocks, that Miller tied S.K.'s arms one night to keep her from getting into mischief—both of which are allowed under RCW 9A.16.100."[7] Appellant's Opening Br. at 35.

Miller relies on *State v. Jennings*, 106 Wn. App. 532, 24 P.3d 430 (2001), as a "proper template" for what constitutes torture. Appellant's Opening Br. at 35. In *Jennings*, the defendant pleaded guilty to first degree child assault where he stated that he

> "fractured the skull and tibia of L.T. while she was less than 13 years old and inserted lamp oil into L.T.'s veins causing severe metabolic acidosis. [He] also, with intent to inflict great bodily harm against L.T., intentionally assaulted her by inserting a spoon into her rectum and vagina thereby causing pain or agony equivalent to torture."

[7] RCW 9A.16.100 provides that "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."

106 Wn. App. at 538. We are unpersuaded that in order to constitute torture, the "torture" has to be equivalent to the same factual scenario in *Jennings.*

Chapter 9A.36 RCW does not contain a definition of torture. *State v. Brown*, 60 Wn. App. 60, 65-66, 802 P.2d 803 (1990), *overruled on other grounds by State v. Chadderton*, 119 Wn.2d 390, 832 P.2d 481 (1992), and *State v. Russell*, 69 Wn. App. 237, 247, 848 P.2d 743 (1993), are instructive. The court in *Brown* held that the term "torture," as used in the second degree assault statute, was not unconstitutionally vague because it "provides notice, with a reasonable degree of certainty, of what conduct is forbidden." 60 Wn. App. at 66. In *Russell*, we also determined that the word "torture" in the homicide by abuse statute may be commonly understood. 69 Wn. App. at 247.

At trial, Dr. Gilbert testified as to the clinical definition of "torture":

> [T]wo distinct separate episodes of physical assault or one prolonged episode of physical assault in addition to two or more episodes of psychological maltreatment, which then results in severe injury to the child and/or can result in death of the child.

2 VRP 385-86.[8]

Here, the State presented sufficient evidence that Miller had engaged in a pattern or practice of causing S.K. physical pain or agony that was equivalent to that produced by torture. There was evidence that Miller treated S.K. differently from the other children and would deprive S.K. of

[8] In a footnote, Miller argues that that the court erred in allowing an expert witness to testify as to the definition of torture. Miller does not assign error to this issue. Because this argument is made in a footnote, we decline to consider it. *Harris*, 164 Wn. App. at 389 n.7. Placing an argument in a footnote is ambiguous as to whether it is intended to be part of the appeal. *State v. Johnson*, 69 Wn. App. 189, 194 n.4, 847 P.2d 960 (1993). "Judges are not like pigs, hunting for truffles buried in briefs." *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991).

food. S.K. testified that Miller tied her to her bed "almost every night." 1 VRP at 68. S.K's sister, S.W., testified that S.K. "was kind of in a lot of pain and . . . she wasn't really treated really nice." *Id.* at 118. Additionally, the State presented evidence that Miller repeatedly beat S.K. with a bamboo stick. There was also testimony that Miller believed S.K. had a "demon" inside her and would force her to hold a bible over her head while Miller yelled Jehovah. *Id.* at 64-65.. The State's evidence demonstrated both physical and psychological forms of torture.

3. OTHER SUSPECT

Miller additionally contends that there was a reasonable doubt because someone else could have caused S.K.'s injuries. However, we disagree because S.K. identified Miller as the person who committed these crimes. Although S.K. also described an incident where a person named Dean rolled her into a carpet and threw her on the floor, S.K. identified Miller as the person who had hit her with a stick, tied her to her bed, and deprived her of food. Therefore, Miller's argument fails.

In viewing the evidence in the light most favorable to the State, we conclude that any rational trier of fact could find that Miller committed the two counts of first degree child assault beyond a reasonable doubt. Thus, Miller's claim that there is insufficient evidence to support her two convictions for first degree child assault fails.

C. SECOND DEGREE CHILD ASSAULT

The State charged Miller with two counts of second degree child assault. The basis for count III was that Miller committed second degree assault of a child by intentionally assaulting S.K. who was under the age of 13 and thereby recklessly inflicted substantial bodily harm or that Miller intentionally strangled or suffocated S.K, a child. RCW 9A.36.130(1)(a), .021(1)(a), (g).

The trial court found Miller guilty of count III based on "recklessly inflict[ing] substantial bodily harm." CP at 191. For count VI, the State alleged that Miller committed second degree assault of a child by intentionally suffocating S.K. RCW 9A.36.130(1)(a), .021(1)(g). The court found Miller guilty of this count stating that Miller assaulted S.K. by suffocation. Miller argues that there was insufficient evidence to convict Miller of the two counts of second degree child assault.[9] We disagree.

1. SECOND DEGREE ASSAULT BY SUBSTANTIAL BODILY HARM—COUNT III

Miller argues that the State failed to prove beyond a reasonable doubt that Miller recklessly inflicted substantial bodily harm.

As described above, the State presented evidence of S.K.'s five fractures. The fractures were consistent with trauma. S.K. testified that Miller hit her with a bamboo stick. S.K. also told Detective Gallagher that she was hit by this "hard stick, it was very long and it was very hard and it hurts really bad." Ex. 37 at 11. S.K. testified that Miller hit her with a bamboo stick about 10 times. The State presented sufficient evidence that Miller recklessly inflicted substantial bodily harm on S.K.

2. SECOND DEGREE ASSAULT BY SUFFOCATION—COUNT VI

Miller argues that "[t]he State also failed to prove beyond a reasonable doubt that [she] previously engaged in a pattern or practice of assaulting S.K. that resulted in bodily harm that is

[9] Miller does not specify which counts she is challenging. Under the third amended information, Miller was alternatively charged with second degree assault of a child for counts I and II. Miller was then also charged with second degree assault of a child in counts III and VI. The trial court did not find Miller guilty of the alternative charges in counts I and II. However, the court found Miller guilty of second degree assault of a child in counts III and VI. Therefore, we assume Miller is challenging counts III and VI.

greater than transient pain or minor temporary marks, or causing pain or agony to S.K. equivalent to torture." Appellant's Opening Br. at 42. However, Miller is arguing insufficient evidence based on the wrong statute. Miller ignores the fact that for second degree assault of a child under RCW 9A.36.130(1)(a), a person is guilty if they commit the crime of second degree assault as defined in RCW 9A.36.021 against a child, which includes assaulting another by "strangulation or suffocation." RCW 9A.36.021(g). This is one of the provisions with which Miller was charged and found guilty of.

Suffocation is the "means to block or impair a person's intake of air at the nose and mouth, whether by smothering or other means, with the intent to obstruct the person's ability to breathe." RCW 9A.04.110(27). At trial, S.K. testified that Miller held her head underwater in the bathtub. She said that she could not breathe and her face turned blue. And she asserted that this happened more than once. S.K. disclosed this information to Whitcomb and Gallagher, which was presented at trial, and S.K. also testified to this at trial. Furthermore, S.K.'s sister, S.W., testified that Miller retrieved a pillow, put the pillow in S.K.'s face, and sat on her. S.W. said that Miller laughed about it and that S.K. could not breathe.

"Credibility determinations are for the trier of fact." *Camarillo*, 115 Wn.2d at 71. It appears the judge found S.K.'s and her sister's testimony credible at trial. We conclude that sufficient evidence supported the conviction for count VI based on the evidence of suffocation.

Ultimately, we conclude that the State presented sufficient evidence to support the two counts of second degree child assault.[10]

II. EXCEPTIONAL SENTENCE

The trial court found aggravating factors for counts I, II, III, and IV. Miller argues that the court improperly imposed an exceptional sentence because the aggravating factors were not supported by the evidence. In her analysis, however, Miller appears to challenge only the findings of "deliberate cruelty." To the extent that certain sentences in her brief could be read as an attempt by Miller to challenge all of the aggravating factors, her brief contains no argument relating to any factor other than deliberate cruelty. Therefore, we consider only the aggravating factors related to "deliberate cruelty." *See* RAP 10.3(a)(6). We conclude that the trial court did not err.

A. PRINCIPLES OF LAW

A trial court may impose a sentence outside the standard sentence range for an offense if it finds that there are substantial and compelling reasons to justify an exceptional sentence. RCW 9.94A.535.[11] To reverse a sentence outside the standard range, we must find that either the reasons

[10] Miller asks us to consider additional evidence outside the record pursuant to RAP 9.11 and ER 201. Miller requests that we review the transcript of proceedings in a separate case where "Kenneth Spears confesses to sexually assaulting S.K." Appellant's Opening Br. at 38. Miller tries to add to the record in this case based on her personal restraint petition (PRP). But in Miller's PRP, we already decided this evidence would likely not change this court's decision. *In re Pers. Restraint of Miller*, No. 49451-5-II, slip op. at 7 (Wash. Ct. App. Jan. 23, 2018) (unpublished), http:/www.courts.wa.gov/opinions/pdf/D2%2049451-5-II%20Unpublished%20Opinion.pdf. Thus, we reject these arguments.

[11] We cite to the current version of the statute because, for our purposes, it has remained substantively the same.

for the sentence are not supported by the record or the reasons do not justify the sentence outside the standard range, or that the sentence was clearly excessive or lenient. RCW 9.94A.585(4).

There are three questions that we analyze to determine the appropriateness of an exceptional sentence:

> "1. Are the reasons given by the sentencing judge supported by evidence in the record? As to this, the standard of review is clearly erroneous.
> 2. Do the reasons justify a departure from the standard range? This question is reviewed de novo as a matter of law.
> 3. Is the sentence clearly too excessive or too lenient? The standard of review on this last question is abuse of discretion."

State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005) (quoting *State v. Ha'mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997), *abrogated by State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015)).

B. DELIBERATE CRUELTY

Miller's brief contains argument and analysis for only the "deliberate cruelty" aggravating factor, but it is unclear whether she is asking us to reverse the deliberate cruelty aggravating factor as to counts I, II, III, and IV, or just two of the four counts. Miller states without citation to the record that "[t]wo of them rely on a finding of *'deliberate cruelty'* which the lower court clearly did not have evidence to support." Appellant's Opening Br. at 47.

For counts I, II, III, and IV, the trial court found that Miller's conduct manifested deliberate cruelty to S.K. pursuant to RCW 9.94A.535(3)(a). The court also found that for these four counts, Miller's conduct constituted deliberate cruelty to S.K. under RCW 9.94A.535(3)(h)(iii), which requires that the offense involve domestic violence under former RCW 10.99.020.[12]

[12] Former RCW 10.99.020(8) defines victim as "a family or household member who has been subjected to domestic violence."

Deliberate cruelty is "'gratuitous violence or other conduct which inflicts physical, psychological, or emotional pain as an end in itself.'" *State v. Copeland*, 130 Wn.2d 244, 296, 922 P.2d 1304 (1996) (quoting *State v. Scott*, 72 Wn. App. 207, 214, 866 P.2d 1258 (1993), *aff'd sub nom. State v. Ritchie*, 126 Wn.2d 388, 894 P.2d 1308 (1995), *abrogated by O'Dell*, 183 Wn.2d 680)). It involves "'cruelty of a kind not usually associated with the commission of the offense in question.'" *Id.* (internal quotation marks omitted) (quoting *State v. Crane*, 116 Wn.2d 315, 334, 804 P.2d 10 (1991), *abrogated by In re Pers. Restraint of Andress*, 147 Wn.2d 602, 565 P.3d 981 (2002)).

Miller contends that there was a lack of evidence at trial that Miller had an intent of causing S.K. pain or emotional distress. Miller further contends that the only injury that "could even conceivably be linked to an act" by Miller was the ulnar fracture, which did not appear to be particularly serious. Appellant's Opening Br. at 51. Miller also appears to argue that the court erred by considering elements of the crimes charged as factors supporting the exceptional sentence. We disagree.

With respect to counts I, II, III, and IV, Miller's conduct exceeded that required to prove the elements of the offenses. S.K. had five fractures consistent with fractures from trauma. S.K. had severe pattern bruising over her body. The pediatric radiologist, testified that in almost 18 years of experience, she had never seen this many fractures in a 9-year-old other than those who "have a history of recent major trauma like [a motor vehicle accident] or something like that." 3 VRP at 455.

S.K. testified that specifically, Miller hit her with a bamboo stick about 10 times sometimes. She said that Miller tied her to her bed with her two wrists together "almost every

night." 1 VRP at 68. S.K. also said that her wrists hurt "almost the whole night" because she would move and the ties would get tighter and tighter. *Id.* at 69. S.K. stated that Miller would also tie her hands together with a rope and attach the rope to the shower rod so that she was forced to sleep in the bathtub. And S.K. asserted that Miller held her head under water "[m]ore than once." *Id.* at 62.

There also was evidence presented at trial that Miller treated S.K. differently than the other children. Miller would sometimes not give S.K. food and when she did give her food, it would be leftover scraps. S.K.'s sister said that she would share her food with S.K. because she thought S.K. did not get enough. Miller said that S.K. had a demon inside her and would force S.K. to hold a bible over her head while they said Jehovah.

Based on the evidence, we conclude that the trial court's findings of "deliberate cruelty" for counts I, II, III, and IV were supported by the record. Thus, the trial court did not abuse its discretion in imposing an exceptional sentence.

III. MOTION FOR RELEASE ON BAIL

Miller argues that the court improperly denied her motion for release on bail pending appeal. We disagree.

A. PRINCIPLES OF LAW

"There is no right to release pending appeal." *State v. Cole*, 90 Wn. App. 445, 447, 949 P.2d 841 (1998); *State v. Smith*, 84 Wn.2d 498, 499, 527 P.2d 674 (1974). Trial courts have broad discretion to decide whether to release a defendant pending appeal. *Cole*, 90 Wn. App. at 447. We review a trial court's decision to deny bail pending appeal for abuse of discretion. *Cole*, 90 Wn. App. at 447; *Smith*, 84 Wn.2d at 501-03.

RCW 10.73.040 addresses bail pending appeal and provides in part,

> In all criminal actions, except capital cases in which the proof of guilt is clear or the presumption great, upon an appeal being taken from a judgment of conviction, the court in which the judgment was rendered, or a judge thereof, must, by an order entered in the journal or filed with the clerk, fix and determine the amount of bail to be required of the appellant.

CrR 3.2(h) provides, "After a person has been found or pleaded guilty, and subject to RCW 9.95.062, 9.95.064, 10.64.025, and 10.64.027, the court may revoke, modify, or suspend the terms of release and/or bail previously ordered."

B. THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR RELEASE ON BAIL PENDING APPEAL

Miller asserts that under RCW 10.73.040, the court must fix and determine the amount of bail required. The court in *Smith* stated that "the fixing of bail and the release from custody traditionally has been, and we think is, a function of the judicial branch of government." 84 Wn.2d at 501. The court held that to the extent RCW 10.73.040 conflicted with former CrR 3.2(h) (1973),[13] it was superseded by former CrR 3.2(h) because the right to bail is procedural and within the province of the court rules. *Id.* at 502.

In *State v. Hunt*, the court noted that the first whole sentence of RCW 10.73.040 (the section Miller relies on) is superseded by CrR 3.2(f).[14] 76 Wn. App. 625, 628 n.1, 886 P.2d 1170 (1995).

[13] At that time, former CrR 3.2(h) read,

> A defendant (1) who is charged with a capital offense, or (2) who has been found guilty of a felony and is either awaiting sentence or has filed an appeal, shall be released pursuant to this rule, unless the court finds that the defendant may flee the state or pose a substantial danger to another or to the community. If such a risk of flight or danger exists, the defendant may be ordered detained.

Smith, 84 Wn.2d at 500-01.

[14] In 1995, CrR 3.2(h) was numbered as CrR 3.2(f).

We agree because this portion of RCW 10.73.040 conflicts with CrR 3.2, and the court rule controls the procedure for setting an appeal bond. Therefore, Miller is incorrect in asserting that the court must fix and determine the amount of bail pending appeal under RCW 10.73.040.

Miller also argues that bail is excessive when it is not set at an amount reasonably calculated to ensure the asserted governmental interest. Miller further contends that the Eighth Amendment protection against "excessive" bail applies to postconviction release pending appeal. Miller relies on *Hudson v. Parker*, 156 U.S. 277, 15 S. Ct. 450, 39 L. Ed. 424 (1895), for this proposition. But there does not appear to be a discussion of the Eighth Amendment in *Hudson.* The Supreme Court in *Hudson* did state,

> The statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction, and pending a writ of error.

Id. at 285. However, it appears that the federal Bail Reform Act of 1984, 18 USC § 3143(b), reversed this presumption. *United States v. Hart*, 906 F. Supp. 102, 104 (N.D.N.Y. 1995).

Miller also argues that there is a presumption of release for defendants in noncapital cases. But "[t]here is no right to release pending appeal." *Cole*, 90 Wn. App. at 447. And "there is no presumption of innocence pending appeal." *State v. Devin*, 158 Wn.2d 157, 169, 142 P.3d 599 (2006). Trial courts have broad discretion to determine whether or not to grant bail following conviction. *Cole*, 90 Wn. App. at 447.

Here, we do not have the record of the hearing for the motion to release. However, the court found that

> the decision to grant or deny an appeal bond is a discretionary decision of the Court. Release on bail in this case is inappropriate due to the seriousness of the offenses.

> The record does not show any extenuating circumstances that would make release on an appeal bond appropriate given the particular facts and circumstances in this case.

CP at 415. Miller was sentenced to 423 months for serious offenses against a child. Based on our limited record, the trial court did not abuse its discretion in denying Miller's motion for bail pending appeal.

IV. SAG ISSUES

A. OUTSIDE THE RECORD

Miller raises a number of issues in her SAG. Miller appears to argue that she was denied her right to counsel at a court hearing where an attorney was originally present to represent someone else but then represented her. She also asserts that this attorney was ineffective because he "had no time for discovery to represent" her and that she felt his intent was to get the hearing to proceed further. SAG at 4 (underline omitted). Miller makes a similar argument at a later hearing that an attorney "did nothing to defend" her.[15] *Id.* at 5 (underline omitted). Miller additionally argues that the State failed to investigate child abuse allegations brought to its attention. She further contends that the State suppressed evidence of other suspects in violation of *Brady.*[16] These issues are too vaguely presented or pertain to matters outside the record.

[15] Miller additionally argues that law enforcement and her attorney have used the wrong name and that her legal last name is "Rhodes." SAG at 5 (underline omitted). This is not a claim of trial court error and because there is no relief we can give her, we do not address this argument. *See* RAP 10.10.

[16] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). We already addressed and rejected Miller's alleged *Brady* violation claim in her PRP. *See Miller*, No. 49451-5-II, slip op. at 7.

Therefore, we do not address them on direct appeal. RAP 10.10(c); *State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995).

B. ASSERTION TOO VAGUE

Miller argues "officers of the court lied under oath and withheld critical evidence that more than likely could have changed the procedure as well as the outcome of [her] case." SAG at 7 (underline omitted). Miller does not specify which officers of the court she alleges lied or what evidence was withheld. RAP 10.10(c) requires that the appellant "inform the court of the nature and occurrence of alleged errors." Here, Miller's assertion of error is too vague to allow us to identify the issue, and we do not reach it.

C. ILLEGAL ARREST

Miller argues that she was illegally arrested and charged without probable cause and that she was taken into custody on December 20, 2013, to prevent her from appearing at a fact finding hearing.

During Gallagher's testimony, defense counsel asked what probable cause Gallagher had to arrest Miller. Gallagher responded, "I would have to review my probable cause statement at that point. I don't know what it was." 4 VRP at 622. Defense counsel also asked,

> [DEFENSE COUNSEL]. The judge found probable cause based on a statement issued by somebody out of the prosecutor's office. Isn't that true?
> [GALLAGHER]. Yes, sir.
> [DEFENSE COUNSEL]. Okay. Not your statement of probable cause.
> [GALLAGHER]. It was based on my statement of probable cause. Again, I haven't read the charging documents to that -- at that point. I haven't read my probable cause statement. I couldn't testify to what it said.

Id. at 623. Here, we do not have Gallagher's statement of probable cause in the record. Therefore, based on this record, we cannot review whether she had probable cause to arrest Miller. As a result, we do not reach this issue.

D. PREJUDICE

Miller appears to argue that the trial court's denial of her motion for bail pending appeal is proof that the court "prejudiced" her. SAG at 7 (underline omitted). However, as explained above, "[t]here is no right to release pending appeal." *Cole*, 90 Wn. App. at 447; *Smith*, 84 Wn.2d at 499. Trial courts have broad discretion to decide whether to release a defendant pending appeal. *Cole*, 90 Wn. App. at 447. Because this issue was addressed above, we do not discuss it further.

E. THIRD AMENDED INFORMATION

Miller argues that when the State filed the third amended information, Miller did not recall entering a plea and she did not remember her attorney telling her of the charges prior to the trial.

The State filed a third amended information during trial. The trial court asked defense counsel whether he discussed the third amended information with Miller and defense counsel asked for a break to discuss it with Miller. Later the court asked,

> THE COURT: . . . I take it that you took the time during our break to talk to your client about the third amended information?
>
> [DEFENSE COUNSEL]: I did, Your Honor. She can be arraigned on it. She's familiar with the amendment now. She's prepared to be arraigned and waive arraignment, waive further advisement, enter a plea of not guilty to the third amended complaint, waive reading.

4 VRP at 602-03. Therefore, the record shows that Miller was informed of the third amended information and that she entered a plea of not guilty. Miller's claim fails.

CONCLUSION

We conclude that the State presented sufficient evidence to support the first degree child assault and second degree child assault convictions, the trial court's findings that Miller's crimes manifested deliberate cruelty were supported by the evidence, and the trial court properly exercised its discretion in denying Miller's request for an appeal bond. We reject Miller's SAG arguments. Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

CRUSER, J.

We concur:

MAXA, C.J.

LEE, J.

ROMAINE LOKHANDWALA LAW GROUP LLP

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