

No. 63017-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

ERIC EARL HOLZKNECHT,

Appellant

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FILED
STATE OF WASHINGTON


OPENING BRIEF OF APPELLANT

On Appeal from Snohomish County Superior Court,
The Hon. Larry E. McKeeman, Presiding

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ORIGINAL

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A. ASSIGNMENTS OF ERROR

1. Appellant Eric Holzkecht assigns error to the entry of the judgment and sentences for Counts I, II & III. CP 7-19 & 20-31.

2. Mr. Holzkecht assigns error to the entry of Verdict Forms B, C & D, CP 49-51, and to the entry of Special Verdict Forms 1, 2 & 3. CP 46-48.

3. The trial court erred when it failed to enter a written order memorializing its decision to admit Mr. Holzkecht's statements under RCW 10.58.035(3).

4. The trial court erred when it admitted Mr. Holzkecht's extra-judicial statements under RCW 10.58.035, that statute being unconstitutional.

5. There was no corpus delicti to support admission of Mr. Holzkecht's extra-judicial statements.

6. The trial court erred when it admitted conclusion testimony from the State's witnesses that certain injuries to a young child were "non-accidental" and the result of "abuse."

7. Mr. Holzkecht assigns error to the following portion of Instruction No. 1:

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the

law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

CP 57. A full copy of Instruction No. 1 is attached in Appendix A.

8. Mr. Holzknecht assigns error to Instruction No. 13, CP 70, a copy of which is attached in Appendix B.

9. There is insufficient evidence to sustain the convictions.

10. The prosecutor committed misconduct and violated Mr. Holzknecht's confrontation rights when she impeached a critical witness with an alleged prior inconsistent statement but then failed to complete the impeachment.

11. Mr. Holzknecht's right to confront witnesses was violated by the admission of out-of-court conclusions by medical experts who did not testify in court.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court comply with the procedures set out in RCW 10.58.035 before admitting Mr. Holzknecht's statements?

2. Is RCW 10.58.035 constitutional?

3. Was there independent evidence of a crime?

4. Should the trial court have admitted conclusion testimony from the State's witnesses that certain injuries were "non-accidental" and the result of "abuse?"

5. Should the jury have been told that it had nothing to do with the punishment?

6. Did the instruction defining assault exclude essential elements of the offense?

7. Was there sufficient evidence to sustain the convictions?

8. Where the prosecutor impeached a key witness with an alleged prior inconsistent statement, should she have tied up the impeachment?

9. Was Mr. Holzkecht's right to confront witnesses violated by the admission of conclusion testimony by four experts who did not testify in court?

C. STATEMENT OF THE CASE

1. *Procedural History*

By amended information filed in Snohomish County Superior Court, the State charged Eric Holzkecht with three counts of assault of a child in the second degree. CP 90-91. The case was tried to a jury between November 17 and 20, 2008, the Hon. Larry McKeeman presiding.

Prior to jury selection, the defense moved for the exclusion of conclusion testimony by the State's experts that certain injuries were the result of "abuse" or "non-accidental" trauma. CP 93; RP I 8-10.¹ The court denied the motion. RP I 10-11. The defense also moved to exclude Mr. Holzkecht's out-of-court statements unless the State could establish a corpus delicti of the crime of assault of a child. CP 94-95; RP I 14-18. The court denied the motion, ruling that it had reviewed RCW 10.58.035, and "assuming the State can meet the burden that's set forth in that statute, I would certainly be prepared to admit those statements under that statute . . . I think the statute is directly applicable at this point." RP I 22. The court did not memorialize its ruling in writing, as required by RCW 10.58.035(3).

After testimony, the court instructed the jury that it could convict Mr. Holzkecht on each count if it found that Mr. Holzkecht committed the crime of assault in the second degree against G.H., who was under thirteen years of age. Instructions No. 9, 10, & 11. CP 66-68. Instruction No. 12 then stated:

¹ The verbatim report of proceedings will be referred to as follows:

RP (5/23/08) – Stipulation and Agreed Trial Continuance, 5/23/08

RP I – Jury Trial, 11/17-18/08

RP II – Jury Trial, 11/19-20/08; Sentencing 1/28/09

RP (11/17/08) – Jury Selection and Opening Statements, 11/17/08

A person commits the crime of assault in the second degree when he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm.

CP 69. Instruction No. 13 defined assault:

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

CP 70.

There were no exceptions to any of the jury instructions. RP II 261.

The jury returned verdicts of “guilty” to Counts II and III, CP 50-51, and returned a verdict of “guilty” for Count I to the lesser offense of assault of a child in the third degree. CP 49.

The Court had instructed the jurors that:

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

CP 57. Despite this language, the jury was given instructions on the issue of the vulnerability of the victim, CP 86-87, and the jury made findings on three Special Verdict form that in fact she was particularly vulnerable. CP 46-48.

Based upon the jury's special verdict, the trial court imposed an exceptional sentence of 84 months on Counts II & III, which was 9 months over what the court determined to be the standard range. CP 7-19. The court imposed a 12 month sentence on Count I. CP 20-31. The sentences on all three counts run concurrently. This appeal then timely followed. CP 5-6.

2. *Substantive Facts*

Eric and Amy Holzkecht met as teenagers, and got married in their early 20s. RP I 75-76. Their relationship was "wonderful" and they lived with Mr. Holzkecht's family in Marysville while they saved money for their own house. RP I 69, 97. Ms. Holzkecht really wanted a baby for a long time, RP I 129, and the couple was very happy when their first baby, Grace, was born on September 27, 2007. RP I 69, 97.

From the day that Grace came home from the hospital, she cried a lot, and the young couple called 911 because she would not stop. The paramedics came out, and said she was fine. When the crying continued, Ms. Holzkecht insisted that they take the baby to the emergency room, but, once there, the ER staff said that Grace was fine. RP I 97-99. Mr. and Ms. Holzkecht then took Grace to a series of medical appointments with her pediatrician, Dr. Alka Alta-Barrio. RP I 24-27, 98-101. The couple believed that Grace was

more fussy than she should have been, cried during diaper changes, no matter who changed her, and was really fussy in the evenings. RP I 103, 109. Although Ms. Holzkecht always felt from that something was “not right” with Grace, the doctors felt she was normal. RP I 25-28, 115.

In the first two months of her life, Grace was usually in Ms. Holzkecht’s care, although others, such as Ms. Holzkecht’s mother, Mr. Holzkecht’s parents, and Mr. Holzkecht’s sister, helped with changing her diapers or giving her a bottle. RP I 71-75, 96, 201. There were only three or four times when Ms. Holzkecht left Grace alone with Mr. Holzkecht. RP I 75. Mr. Holzkecht’s parents would sometimes baby-sit when Mr. and Ms. Holzkecht went on a short break, or went to the store together. RP I 201. Mr. Holzkecht’s sister babysat one time. RP I 96. Another time, a couple from Mr. and Ms. Holzkecht’s church watched Grace. RP I 120. Ms. Holzkecht’s aunt, Lorinda Feagles, once watched Grace when Ms. Holzkecht was visiting in other rooms of Ms. Feagles’ house. RP I 131-32.

Like any young couple, Mr. and Ms. Holzkecht were stressed by their newborn infant, particularly one who would not stop crying, and Mr. Holzkecht sometimes lost his patience. If Mr. Holzkecht was frustrated, he would go for a walk or go for a drive to the store. RP I 88, 115, 123, 136.

When Ms. Holzkecht became frustrated and needed time alone, Mr. Holzkecht's parents would take Grace in their room for hours at a time. RP I 115-16.

When Mr. Holzkecht would change Grace's diaper, he moved more quickly than others thought he should. Ms. Feagles saw Mr. Holzkecht changing a diaper at the hospital and thought that he was too quick and rough, and that "he's either very comfortable with a newborn or he was maybe showing off." RP I 129. Ms. Holzkecht also thought that her husband was a little rough with Grace, and that he moved too fast when changing her diaper. RP I 81, 136, 146; RP II 256-57. When Ms. Holzkecht would tell Mr. Holzkecht this, he did not get angry, but would be frustrated and would say, "Honey, you're overreacting. She's fine." RP I 104. She also saw Mr. Holzkecht lifting Grace up by one leg to change her diaper. RP I 87, 136. Ms. Holzkecht explained that Mr. Holzkecht would lift her up just enough to slide a diaper under her. RP I 87, 102.

One time, when Ms. Holzkecht was taking off her makeup in the bathroom, Mr. Holzkecht was changing Grace's diaper. Grace started defecating all over the place and Mr. Holzkecht pushed her out of the way to prevent things from being soiled. When Ms. Holzkecht came into the

room, Mr. Holz knecht was crying and said, "I think I may have hurt her" because he used too much pressure on her. Ms. Holz knecht noticed some immediate bruising on Grace's legs. RP 82-83, 108. The next day, though, Grace was moving her legs and "kicking around, all happy." RP I 108.

Ms. Feagles also noticed some bruises on Grace's legs as well when Mr. and Ms. Holz knecht brought Grace over to her house for a visit. RP I 131-32. Ms. Holz knecht "covered them up real quick" and Ms. Feagles could only see them later when she had Grace alone. RP I 131-32.

On November 27, 2007, Mr. and Ms. Holz knecht brought Grace to see the pediatrician for her regular two-month check-up. The exam was normal and Dr. Alta-Barrio gave her immunizations in her thighs. RP I 26 A few days later, on November 30th, Grace was extremely fussy and cried nonstop. Around 12:30 a.m. on December 1st, the young couple noticed that Grace was holding her right leg up and was not moving it. RP I 86-87.

A few hours later, the very first thing in the morning, they took Grace to a walk-in clinic. RP I 88. The clinic sent the couple to Providence Hospital, where an initial physical exam revealed that Grace had a limited range of motion to her right lower extremity and was uncomfortable, but exhibited no other signs of trauma or bruising. RP I 36.

X-rays would later show that there was a long oblique or spiral fracture to the right femur (thigh bone), a metaphyseal fracture of the right tibia (shin bone), and a metaphyseal fracture of the left tibia. RP II 214-219. Staff at Providence recommended that Grace be transported to Children's Hospital. Mr. Holzkecht's father questioned whether the young couple could afford an ambulance and the couple suggested that they drive Grace to Children's themselves. Providence, though, had monies available for charity cases, and paid for the ambulance. RP I 42-44, 114, 122-23.

Once at Children's Hospital, medical staff called in the police, who took Grace into protective custody. RP I 55-56, 137. Children's Hospital has a child protection (or protective) team which handles cases of suspected abuse. The team includes specialized doctors (in this case, Dr. Naomi Sugar) and social workers, and is required to work with Child Protective Services. RP I 57, 153; RP II 254. Dr. Sugar explained her collaborative role with CPS and law enforcement:

It means in practice that I'm called in as a consultant when there's a patient who is hospitalized or seen as an outpatient or seen by – You know, law enforcement gets involved or Child Protective Services gets involved. They can call me and ask me to render an opinion or recommend other steps to take. So that happens in both hospitals that I work at. And also, I'm available to medical professionals and others throughout the State of Washington.

RP I 150.

The Child Protective Team tried to figure out how Grace's injuries took place. Various team members, as well as the police, interviewed Mr. and Ms. Holzkecht, who tried, the best they could, to go back over the past few months and figure out what could have caused the injuries.² Both Mr. and Ms. Holzkecht told the police and Children's staff that Mr. Holzkecht would change Grace's diapers too quickly and a little roughly, and Mr. Holzkecht told an officer about the defecation incident and admitted he thought he may have hurt Grace. Both made it clear that they never thought Mr. Holzkecht intentionally hurt their child. RP I 55-56, 116-17, 136, 138, 143-44, 157, 196; RP II 256-57; Ex. 2. Ms. Holzkecht exhibited an anxious and nervous demeanor prior to a key interview with Dr. Sugar, RP II 259, and was very emotional while talking with a social worker. RP I 55-56. In contrast, while upset, Mr. Holzkecht's affect was "flat" and smiled with relief when he came back from an interview. RP I 56, 118.

The State attempted to portray Ms. Holzkecht as a submissive woman, who stopped talking to the members of the protective team when her

² See RP I 95 (when asked by a social worker how this happened, Ms. Holzkecht told her about her husband changing Grace quickly – "I was just trying to come up with something."); Ex 2 & RP I 143 (Mr. Holzkecht tells police that he was "not sure how the injuries to Grace happened," but suggests ways he may have caused them).

husband came into the room. RP I 55. The State's theory was that Ms. Holzkecht "minimized what happened" RP II 271, and impeached her with a series of prior inconsistent statements. RP I 71-75, 77-82, 120-22, 136, 196-98; RP II 256-57.

The prosecutor asked Ms. Holzkecht if she was "submissive" to her husband, and she responded that "as a husband and wife, you honor each other" and "had a great respect for each other." RP I 124. Ms. Holzkecht asked what the prosecutor meant by the term "submissive," and the prosecutor explained, "Submit to what he wants to do and what he wants to see happen." RP I 124. Ms. Holzkecht denied that to be the case. The prosecutor asked Ms. Holzkecht if she recalled being interviewed for an assessment by someone involved with CPS, and if she remembered "saying that you were submissive to your husband?" RP I 124. Ms. Holzkecht stated: "No, I do not." RP I 124. The prosecutor never called any witness connected to CPS to verify whether or not Ms. Holzkecht said she was "submissive."

Dr. Sugar ordered a series of tests to see if there were metabolic or genetic causes for Grace's injuries. RP I 169-70. Without objection, Dr. Sugar testified about the conclusions of three geneticists, Dr. Raff, Dr. Miller,

and Dr. Byers, an orthopedist, Dr. Goldberg, and one endocrinologist, Dr. Kletter. Dr. Sugar told the jury that Dr. Miller concluded: “So I think we can rule out osteogenesis imperfecta as a cause for Grace’s fractures . . . I concur that non-accidental trauma is the most likely cause of Grace’s fractures.” RP I 179. According to Dr. Sugar, Dr. Raff stated “I do not recognize OI . . . in this child,” and Sugar explained that “OI” meant osteogenesis imperfecta. RP I 179. Dr. Byers, though, thought Grace had a gray coloring to her eyes which was “suggestive of osteogenesis imperfecta” and referred her for more testing. RP I 180. As for Dr. Goldberg, he told Dr. Sugar that “he didn’t see a reason why he would see the baby; that there was nothing further that he could offer.” RP I 181. Finally, Dr. Sugar stated that Dr. Kletter concluded that “there was not a metabolic reason for the baby to have fractures, and his impression overall was non-accidental trauma. He said the x-rays and laboratory tests rule out metabolic bone disease as the cause of the fractures.” RP I 183.

Dr. Sugar and a pediatric radiologist at Children’s, Dr. Stephen Done, both concluded that the fractures (and bruising) were uncommon and the fractures were the result a yanking or twisting of Grace’s legs. RP I 171-76; RP II 217, 223-24, 232-34, 242-43. Both doctors thought that the force used

on the legs would have to have been more than the force used during a normal diaper change, RP I 173, “not unless it’s being changed by a gorilla.” RP II 249. Dr. Sugar testified that if the injuries were caused by Grace being yanked up by her feet, “it would have looked very abnormal to anybody who saw it.” RP I 174. Similarly, Dr. Done said that picking a child up by the legs would not have caused the injuries unless “the baby came with it and went off the table.” RP II 242.

Dr. Sugar concluded that all three fractures were caused by separate actions, but all could have taken place at the same time – within 30 seconds of each other. RP I 176-77. Dr. Done thought that the age of the fractures differed – the femur fracture was “subacute” and was not a fresh fracture; the right tibia fracture was one to two weeks old; and the left tibia fracture was “even older yet.” RP II 214.

Consistent with the trial court’s earlier rulings, Dr. Sugar, Dr. Done, various social workers and other witnesses testified about their opinions (and the opinions of the numerous out-of-court experts) that Grace’s injuries the result of “abuse” and “non-accidental trauma,” even so far as testifying that the injuries were “very highly specific for non-accidental trauma,” “quite unique to child abuse,” “rarely caused by accidents,” a “probable diagnosis

of non-accidental injury,” and “the fractures were abusive fractures; that somebody had hurt this baby.” RP I 50, 169, 173, 176, 178-79, 181-83; RP II 215, 230-34, 241, 244-45.³

D. ARGUMENT

1. *The Trial Court Erred When It Admitted Evidence of Mr. Holzkecht’s Out-of-Court Statements*

Central to the State’s case were statements that Mr. Holzkecht allegedly made to his wife, to law enforcement and to various medical staff that he may have caused Grace’s injuries.⁴ See RP II 264, 268, 271-72, 306-07 (references to defendant’s admissions during State’s closing argument). The trial court admitted these statements without first making a determination that there was a corpus delicti of the charged crimes. Instead, the court admitted Mr. Holzkecht’s statements solely because of a 2003 statute, RCW 10.58.035. RP I 22. The trial court erred.

³ Dr. Done did admit that spiral fractures could occur accidentally if a baby’s leg was caught in a crib and someone pulled it out. RP II 244.

⁴ The statements include: RP I 55-56 (Mr. Holzkecht told social worker he was tired, was rough with her diaper changes in the morning, and may have pulled on Grace’s leg “too hard,” but it was not intentional); RP I 82 (Mr. Holzkecht tells Ms. Holzkecht “I think I may have hurt her” and explains about the defecating incident); RP I 138 (Mr. Holzkecht tells officer that he did not have the patience he should, that he had once grabbed the baby by the legs and he might have accidentally injured her); Ex. 2 & RP I 143 (Mr. Holzkecht’s written statement to the officer, admitting he was too “rough” and frustrated, that he grabbed Grace’s legs and “pushed a little too hard” causing marks and hurting her, and may have broken her legs when grabbing her by one leg to change her or when examining her the night before).

RCW 10.58.035⁵ allows for admission of a defendant’s confession, admission or statement “where independent proof of the corpus delicti is absent, and the alleged victim of the crime is dead or incompetent to testify,” if the trial court concludes there is substantial independent evidence of the “trustworthiness” of the statement. RCW 10.58.035(2) sets out a series of factors the trial court “shall consider” when determining if a statement is trustworthy. By adopting this statute, the Legislature intended (1) to overrule the Supreme Court’s holding in *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996), and (2) to adopt the federal rule set out in *Opper v. United States*, 348 U.S. 84, 75 S. Ct. 158, 99 L. Ed. 101 (1954). See House Bill Report, EHB 1427 (2003 Sess.) (copy in Appendix).

a. *The Trial Court Did Not Enter a Written Order*

Under RCW 10.58.035, the trial court was required to memorialize its ruling in a “written order setting forth the rationale for admission.” RCW 10.58.035(3). No such written order was ever entered in this case, and, in fact, the trial court failed even to make oral findings regarding the factors set out in RCW 10.58.035(2). RP I 22. Thus, the trial court’s decision is essentially unreviewable since there is no way on appeal to argue that the trial

⁵ A copy of this statute is reproduced in the statutory appendix.

court erred when weighing such factors as the character of the witnesses reporting the statements, whether there was a written record, the relationship between the witnesses and the defendant, where there is no record of such weighing having taken place at all.

While some of the RCW 10.58.035 factors may have been met (i.e. a record was made of some of Mr. Holzknacht's statements to the police and hospital workers), many of the factors were not met. For instance, some of the witnesses had biases (such as Ms. Holzknacht) which would bear on the "character" of the witnesses. The circumstances of other statements (made under the stress of discovering one's baby has broken bones and being accused of causing those injuries) would make the statements tend to be unreliable. As trial counsel argued below, Mr. Holzknacht, who is not a physician, was asked to "offer up an explanation," RP I 18, and to "speculate as to what caused these injuries." RP I 14. His speculations about the causes of his daughter's injuries are hardly "trustworthy."⁶

Moreover, even under the "trustworthiness" test of RCW 10.58.035, the trial court still needed to identify sufficient evidence that the criminal

⁶ See *State v. Aten*, 79 Wn. App. 79, 89, 900 P.2d 579 (1995) (corpus rule also protects against "uncorroborated admissions springing from a false subjective sense of guilt. A defendant who falsely believes herself guilty may 'admit' that guilt through any description of the events in question, whether that description is given to police or a close friend, whether inculpatory, exculpatory, or facially neutral."), *aff'd State v. Aten, supra*.

conduct at the core of the offense has occurred. *See* RCW 10.58.035(2) (when determining whether an admission is trustworthy, the court “shall consider . . . (a) Whether there is any evidence corroborating or contradicting the facts set out in the statement, including the elements of the offense.”).⁷ The trial court did not identify any independent evidence that a criminal act took place, nor is there any such independent evidence. *See infra* § D(1)(c). While Mr. Holzknacht may have thought he caused his daughter’s injuries in his statements, the medical evidence, offered by the State itself, did not corroborate his belief that the injuries were caused by too much force during diaper changes.

Accordingly, in the absence of a written order (or even an oral ruling) setting out the basis for the trial court’s decision under RCW 10.58.035, the trial court abused its discretion when admitting Mr. Holzknacht’s admissions to his wife, hospital personnel and the police. *See State v. Rivers*, 129 Wn.2d 697, 706, 921 P.2d 495 (1996) (abuse of discretion for trial court to fail to balance ER 609 factors on the record). Given the lack of any other evidence that Mr. Holzknacht was the cause of Grace’s injuries, this error cannot be

⁷ *See also United States v. Lopez-Alvarez*, 970 F.2d 583, 591 (9th Cir. 1992) (Under *Opper*, “the state no longer need introduce independent, tangible evidence supporting every element of the *corpus delicti*. Instead, the state is required to support independently only the gravamen of the offense - the existence of the injury that forms the core of the offense and a link to a criminal actor - with tangible evidence.”).

harmless. Had the evidence of Mr. Holzknrecht's admissions not been admitted, there is a reasonable probability that the outcome of the trial would have been different. Reversal for a new trial should result.⁸

b. RCW 10.58.035 is Unconstitutional

Because the corpus delicti requirement protects people from being convicted based upon unreliable admissions, the requirement that a court find independent evidence of a crime protects due process of law. *See State v. Bartholomew*, 101 Wn.2d 631, 640, 683 P.2d 1079 (1984) (“We deem particularly offensive to the concept of fairness a proceeding in which evidence is allowed which lacks reliability.”). Because RCW 10.58.035 attempts to do away with the historically based corpus delicti requirement, that statute unconstitutionally denies defendants like Mr. Holzknrecht due process of law under U.S. Const. amend. 14 and Wash. Const. art. 1, § 3, because it allows for conviction based upon unreliable and uncorroborated, extra-judicial confessions or admissions, and his convictions should therefore be reversed. This issue is pending before the Washington State Supreme Court in *State v. Dow*, No. 81243-8, a case that was argued in May 2009.

⁸ An alternative remedy is to remand the case for a new hearing on the issue of the admissibility of the extra-judicial statements. *See State v. Calegar*, 133 Wn.2d 718, 723, 947 P.2d 235 (1997) (remand where trial court did not balance ER 609 factors).

But even apart from the due process arguments, RCW 10.58.035 is unconstitutional because it violates the separation of powers. The corpus delicti rule is a rule of procedure, judicially adopted by the courts. The Legislature's attempts to "overrule" such a procedure unconstitutionally trenches on the powers of the judiciary.⁹ While the branches of government are not "hermetically sealed," *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994), attempts by one branch of government to "trench" upon the powers of another, or the delegation of one branch's powers to another, are improper and unconstitutional. *See State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002).

This constitutional grant of power to the judiciary under Wash. Const. art. 4, § 1, gives the Supreme Court the power to adopt procedural rules that govern "practice and procedure pertain[ing] to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated." *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007) (internal quotations and citations omitted). "Where rule of court is inconsistent with the procedural statute, the power of this court to establish

⁹ This separation of powers argument is entirely separate from the due process argument raised in *Dow* and has not been raised in that case.

the procedural rules for the courts of this state is supreme." *Petrarca v. Halligan*, 83 Wn.2d 773, 776, 522 P.2d 827 (1974).

The corpus delicti rule is a judicially created evidentiary rule that “establishes the foundational requirements for admitting a defendant's statements or admissions.” *State v. Dow*, 142 Wn. App. 971, 978, 176 P.3d 597 (Quinn-Brintnall, J., opinion), review granted 164 Wn.2d 1007, 195 P.3d 87 (2008). The Legislature cannot simply “overrule” a decision of the Supreme Court on such a matter, and the judiciary is not bound to follow blindly Legislative attempts to change the law.¹⁰

Here, the trial court simply deferred to RCW 10.58.035 without independently making a judicial determination of admissibility, under the tests set out by the Supreme Court in *Aten* and other prior cases. Thus, the trial court abdicated its responsibilities under Wash. Const art. IV. The convictions should therefore be reversed.

¹⁰ Compare *State v. Zwicker*, 105 Wn.2d 228, 713 P.2d 1101 (1986) (refusal to take breath test not relevant and not admissible, despite implied consent law) with *State v. Long*, 113 Wn.2d 266, 272, 778 P.2d 1027 (1989) (court uses judicial powers to follow Legislative determination of relevancy of refusal). See also *City of Fircrest v. Jensen*, 158 Wn.2d 384, 399, 143 P.3d 776 (2006) (court follows Legislature's intent to make breath test fully admissible, but reserving judicial power to exclude it in particular case); *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983) (upholding the procedural limitations of the Rape Shield statute based upon court's own conclusions as to relevancy and the prejudice in sex cases, not simply because the Legislature adopted the statute).

c. ***There Was No Independent Evidence of a Crime***

Under the corpus delicti rule, the State must show "a certain act or result forming the basis of the criminal charge and the existence of a criminal agency as the cause of such act or result." *State v. Meyer*, 37 Wn.2d 759, 763, 226 P.2d 204 (1951). "[C]onfessions or admissions of a person charged with a crime are not sufficient, standing alone, to prove the corpus delicti and must be corroborated by other evidence." *Aten*, 130 Wn.2d at 655-56. "[T]he independent evidence must be consistent with guilt and inconsistent with a [] hypothesis of innocence. If the independent evidence supports reasonable and logical inferences of both criminal agency and noncriminal cause, it is insufficient to corroborate a defendant's admission of guilt." *State v. Brockob*, 159 Wn.2d 311, 329, 150 P.3d 59 (2006) (citations and internal quotes omitted).

Below, the prosecutor argued that a corpus existed because of conclusion testimony by various experts that Grace's injuries were "non-accidental." RP I 15. However, as will be explained in the following section, the admission of such conclusory testimony itself was error. Without such erroneous testimony, and without Mr. Holzkecht's statements, there was only evidence that Mr. Holzkecht changed Grace's diapers quickly and that

she suffered three fractures to her leg. There was no other evidence of any criminal behavior, that someone assaulted Grace with criminal intent, and thus there was no independent evidence to admit Mr. Holzkecht's statements. Accordingly, it was error to admit Mr. Holzkecht's statements, and there was insufficient other evidence to support a conviction under the due process clauses of U.S. Const. amend. 14 and Wash. Const. art. 1, § 3. *See State v. Dow*, 142 Wn. App. at 986-87 (Houghton, J., dissenting). The convictions should be reversed and the charges dismissed with prejudice.

2. *The Trial Court Erred By Allowing the State's Experts to Give Conclusion Testimony about Whether Grace's Injuries Were the Result of "Abuse" and "Non-Accidental"*

Neither the prosecutor's nor any witness in this case were of the opinion that Mr. Holzkecht intentionally broke his daughter's legs. Rather, the prosecutor's theory was simply that Mr. Holzkecht intentionally jerked his daughter's leg too hard while he was changing her diaper, that this intentional act constituted a simple assault, and that, in this way, Mr. Holzkecht recklessly caused substantial bodily harm. *See* RP II 276. This theory was supported by the jury instructions which allowed for conviction based upon a finding that Mr. Holzkecht merely intentionally touched his

daughter in an offensive manner, and that this touching recklessly caused substantial bodily harm. Instructions No. 12 & 13, CP 69-70.

Despite the fact that the State's theory of the case was that Mr. Holzkecht unintentionally harmed his daughter, the trial court allowed the State's experts to characterize, in front of the jury, Grace's injuries as "non-accidental" in nature and the result of "abuse." RP I 50, 169, 173, 176, 178-79, 181-83; RP II 215, 230-34, 241, 244-45. Allowing this conclusion testimony was error.

Impermissible conclusion testimony may constitute reversible error because it violates the defendant's constitutional right to a jury trial and due process of law, under U.S. Const. amends. 6 & 14, U.S. Const. art. III, § 2, and Wash. Const. art. 1, §§ 3, 21 & 22. *See State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). Moreover, conclusion testimony on an issue of law usurps the judge's function to declare what the law is. Wash. Const. art. 4, § 16. *See State v. Clausing*, 147 Wn.2d 620, 628, 56 P.3d 550 (2002) ("For an expert to testify to the jury on the law usurps the role of the trial judge. . . . Each courtroom comes equipped with a 'legal expert,' called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards.") (internal quotations and citations omitted).

To be sure, under some circumstances, it is not improper for an expert to give an opinion on the ultimate issue. ER 704. It may even be permissible for an expert to give an opinion as to whether certain injuries were deliberately inflicted. *See State v. Baird*, 83 Wn. App 477, 922 P.2d 157 (1996) (in case where defense argued diminished capacity, trial court did not err when allowing experts to testify that certain injuries were deliberately inflicted).

However, even under ER 704 and cases construing that rule, an expert cannot give an opinion on the ultimate issue that is really just a legal conclusion, a conclusion that exceeds the expert's qualifications. In *State v. Christopher*, 114 Wn. App. 858, 60 P.3d 677 (2003), the defendant was tried for prescription fraud. The trial court admitted into evidence some medical records which contained notes of a phone call with the defendant's pharmacist, characterizing a particular phone contact as "fraudulent." 114 Wn. App. at 861. The Court of Appeals reversed, noting:

Only an *expert* witness is permitted to express an opinion regarding an ultimate issue that is to be decided by the jury. ER 704; *State v. Baird*, 83 Wn. App. 477, 485, 922 P.2d 157 (1996). Here, the pharmacist, who passed on information to a nurse at the Walla Walla Clinic, was not qualified to make a legal conclusion regarding a phone call (i.e., that it was fraudulently made).

114 Wn. App. at 862-63 (emphasis in original). *See also State v. Clausing*, 147 Wn.2d at 629 (error to allow director of pharmacy board to the jury that a physician's prescriptions were no longer valid after the revocation of the physician's license).

In the instant case, whatever reason various doctors may have had to conclude that Grace's injuries were the result of "abuse" and were "non-accidental," ultimately the issue was legal, not medical, in nature. The State's experts, while apparently qualified to render medical opinions, were not lawyers and were unqualified to render opinions as to legal issues and to attach what actually are incorrect legal labels to medical conditions.

To the State's experts, Grace's injuries were "non-accidental" which may be a medical term of art. Yet, Grace's injuries *were* the result of an accident in a legal sense, which includes an unexpected, undesirable and unintended occurrence.¹¹ Given the undisputed fact that Mr. Holzknicht

¹¹ The Supreme Court has explained:

The term "accident" has at least two plausible yet distinct definitions. On the one hand, . . . "accident" may be defined as an unintended event. *See Webster's New World College Dictionary* 8 (4th ed. 1999) ("a happening that is not . . . intended"); *see also American Heritage Dictionary* 10 (4th ed. 2000) ("[l]ack of intention; chance"); [citation omitted] On the other hand, . . . the term "accident" may be defined as an event that is "unusual" or "unexpected," whether the result of intentional action or not. . . . *See Black's Law Dictionary* 15 (6th ed. 1990) ("an unusual, fortuitous, unexpected, unforeseen, or unlooked for

(continued...)

never intended to fracture Grace's legs, the injuries suffered by Grace were still "accidental."

Similarly, while Grace's injuries might properly be characterized as the result of "neglect," they were not the result of "abuse" which is a legal term reserved for actions that are non-accidental. *See* WAC 388-15-009 ("Physical abuse means the nonaccidental infliction of physical injury or physical mistreatment on a child."). Again, maybe "abuse" is some sort of medical term of art, but whatever that medical term is, it does not match with the legal definition of that term.

Allowing the State's medical experts to give legal conclusory legal opinions not only interfered with Mr. Holzknacht's right to a jury trial and due process (under U.S. Const. amends. 6 & 14, U.S. Const. art. III, § 2, and Wash. Const. art. 1, §§ 3, 21 & 22), but also interfered with the court's function under Wash. Const. art. 4, § 16, to explain to the jury what the law is. It was the court's duty to give instructions to the jury, setting out the

¹¹(...continued)

event, happening or occurrence" and "if happening wholly or partly through human agency, an event which under the circumstances is unusual and unexpected by the person to whom it happens"); *see also* American Heritage Dictionary, *supra*, at 10 ("[a]n unexpected and undesirable event," "[a]n unforeseen incident").

Olympic Airways v. Husain, 540 U.S. 644, 651 n.6, 124 S.Ct. 1221, 157 L.Ed.2d 1146 (2004).

elements of the offense. Here, the experts were allowed to give opinions to the jurors that conflicted with the legal definitions of those terms.

When ruling that the experts could describe Grace's injuries as "non-accidental" and "abuse," the trial court stated that the jury would be instructed that they are free to ignore the expert's testimony. RP I 10. In fact, the jury was given such an instruction. Instruction No. 8, CP 65. Yet, this instruction must be seen in the context of the general instruction which told the jurors to "consider all of the evidence that I have admitted." Instruction No. 1, CP 56. Thus, although not bound by the experts' conclusions that the injuries were "non-accidental" and the result of "abuse," the jurors were required to consider that conclusion testimony, conclusions about legal terms that were inaccurate. *See State v. Clausing*, 147 Wn.2d at 629 (fact that court gave jury curative instruction after witness gave a legal opinion was not significant – "But the testimony is a legal opinion, no matter what the court said, and an erroneous one at that. The evidence was, then, improperly admitted. And the court's cautionary instruction to the jury was not curative.").

The error was not harmless. One of the key issues in the trial was whether Mr. Holzkecht's "roughness" during diaper changes constituted a

crime. The legal testimony from the State's experts that Mr. Holzkecht's actions constituted "abuse" and that the injuries were "non-accidental," when none of the other evidence supported such conclusions, was prejudicial. Without this conclusion testimony, the jurors would have been left simply with the scientific testimony about the nature of the fractures and the evidence that, while Mr. Holzkecht did not intend to cause his daughter any harm, he was too rough with her during diaper changes. This evidence would not have been sufficient to convict him of assault of a child in the second degree in Counts II and III. The convictions in those counts should therefore be reversed and the case remanded for a new trial.

3. *The Jury Does Have a Role in Punishment and it Was Constitutional Error to Instruct the Jury to the Contrary*

Under U.S. Const. amends. 6 & 14, *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the trial court could not have imposed the exceptional sentences in Counts II and III without a jury verdict finding facts that warranted an exceptional sentence. Indeed, legislation in Washington regarding exceptional sentences adopted after *Blakely* specifically assigns to the jury the task of determining whether a

victim is particularly vulnerable. RCW 9.94A.535 – .537. In keeping with this scheme, the jurors in Mr. Holzknacht’s case were given special verdict forms and instructions, CP 46-48, 86-87, to determine if Mr. Holzknacht knew or should have known Grace was particularly vulnerable.

Despite this sentencing role, the trial court instructed the jurors:

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

Instruction No. 1, CP 57. This instruction violated the right to a jury trial and due process under U.S. Const. amends. 6 & 14. While there was no exception below, the error is constitutional in nature and should be reviewed under RAP 2.5(a)(3).

The quoted language from Instruction No. 1 is derived from a different era – an era that attempted to draw strict boundaries between the jury’s role as fact-finder and the judge’s role as law-giver. *See, e.g., Shannon v. United States*, 512 U.S. 573, 579, 114 S. Ct. 2419, 129 L. Ed. 2d 459 (1995) (“The principle that juries are not to consider the consequences of their verdicts is a reflection of the basic division of labor in our legal system between judge and jury. The jury’s function is to find the facts and to decide

whether, on those facts, the defendant is guilty of the crime charged. The judge, by contrast, imposes sentence on the defendant after the jury has arrived at a guilty verdict.”). *Accord: State v. Magers*, 164 Wn.2d 174, 189, 189 P.3d 126 (2008) (plurality).

The United States Supreme Court’s jurisprudence beginning with *Apprendi* changes this analysis. It no longer is accurate to divide the judge’s and jury’s roles into separate packages. It no longer is the case that “juries decide the facts; judges sentence.” Under current law, the purpose of the jury is not just to be a “better factfinder” than a judge, *see Schriro v. Summerlin*, 542 U.S. 348, 355-56, 124 S. Ct. 2519, 159 L.Ed.2d 442 (2004); rather, the jury’s function is to “control” the judiciary by interposing members of the community between a defendant and the government to act as a “circuitbreaker” in the State’s machinery of justice. *Blakely*, 542 U.S. at 306.

Historically, at the time of the adoption of the Sixth Amendment, juries usually had knowledge of the sentencing consequences of convictions, and used that knowledge to return verdicts to lesser charges to avoid harsh sentencing consequences. *See United States v. Polizzi*, 549 F. Supp.2d 308, 405-18 (E.D.N.Y. 2008), *rev’d* 564 F.3d 142 (2d Cir. 2009). Thus, in a post-*Apprendi* and post-*Blakely* world, juries are in fact intimately involved in the

sentencing process, and juries cannot fulfill their federal constitutional function if they are told that they are not involved in sentencing.

This conclusion does not necessarily violate past precedent. In the past, courts have assumed that juries in non-capital cases had no role in sentencing, and thus, under that system, jurors should not be told of the punishment in a particular case. *See State v. Townsend*, 142 Wn.2d 838, 846, 15 P.3d 145 (2001). However, now that juries do in fact have a critical role in sentencing, and, as in Mr. Holzknacht's case, the judge was powerless to impose an exceptionally long sentence without the jury's involvement, it was constitutional error, which violated U.S. Const. amends. 6 & 14, to instruct the jury that it "has nothing whatever to do with any punishment that may be imposed." Instruction No. 1.

This error was not harmless, given the exceptional sentences that were imposed. The remedy should either be the vacation of the exceptional sentences or reversal of the convictions.

4. The Jury Was Not Given Proper Assault Instructions

Even if Mr. Holzknacht was too rough with Grace during diaper changes, no one claimed that he intended to fracture Grace's legs. The question of Mr. Holzknacht's intent was central to the case, and his lawyer

argued that even if Mr. Holzknrecht used more force than was necessary during the defecation incident, his intent was not to hurt Grace but to get her out of the way of the feces. RP II 296-97. The State responded by arguing:

You do not have to believe he intended to cause injury. You do not. That is not what the law says. The only intent there has to be is to commit assault, to commit the acts that constitute assault. That's the only intent we're talking about here. If I push you, intentional assault. You read those jury instructions carefully. There does not need to be intent to commit injury.

RP II 301. The State was referring to Instruction No. 13. CP 70.¹² This instruction, though, does not accurately state the essential elements of assault.

Contrary to Instruction No. 13, assault requires a jury finding that the defendant not only intentionally touched another person in a harmful or offensive manner, but also that the person *intended the touching to be harmful or offensive*. Moreover, the instruction is defective because it does not include the element of lack of consent, lack of permission or unlawfulness. The fact that the jury was not properly instructed on the

¹² Instruction No. 13 reads:

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

CP 70.

essential elements of the crime of assault denied Mr. Holzknrecht due process under U.S. Const. amend. 14 and Wash. Const. art. 1, § 3, and the right to trial by jury under U.S. Const. amends. 6 & 14, U.S. Const. art. III, § 2, and Wash. Const. art. 1, §§ 21 & 22, and is constitutional error that can be raised for the first time on appeal under RAP 2.5. *State v. Mills*, 154 Wn.2d 1, 6-8, 109 P.3d 415 (2005).¹³

Because "assault" is not defined in the statute, "courts resort to the common law for definitions." *State v. Byrd*, 125 Wn.2d at 712. "Washington recognizes three common law definitions of assault: (1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is incapable of inflicting that harm." *State v. Stevens*, 158 Wn.2d 304, 311, 143 P.3d 817 (2006). The jury was instructed only on the second of these definitions. Instruction No. 13, CP 70.

Criminal assault by means of an unlawful touching is based on the civil tort of battery. *Seattle v. Taylor*, 50 Wn. App. 384, 388, 748 P.2d 693

¹³ While it may be that no definition of assault need be given to the jury, because the term is of "common understanding," *State v. Daniels*, 87 Wn. App. 149, 155-56, 940 P.2d 690 (1997), this rule does not apply where the jury is given an *incorrect* listing of the elements of the crime, particularly incorrect language regarding *mens rea*. See *State v. Byrd*, 125 Wn.2d 707, 887 P.2d 396 (1995) (court reverses assault conviction where jury is misinstructed on intent).

(1988). This type of assault is an unpermitted, non-consensual touching that is harmful or offensive to a reasonable person. *State v. Garcia*, 20 Wn. App. 401, 403, 579 P.2d 1034 (1978); Prosser, *Torts* (4th ed. 1971) at 37. The unpermitted, non-consensual nature of the touching makes it “unlawful.” *State v. Shelley*, 85 Wn. App. 24, 28-29, 929 P.2d 489 (1997); *State v. Thomas*, 98 Wn. App. 422, 424, 989 P.2d 612 (1999).

The *mens rea* for battery assault is that a person must touch another with the intent to cause reasonable offense or harm (“unlawful touching with criminal intent”). Simply intentionally touching another without an intent to cause offense or harm has never been sufficient. For instance, in *O'Donoghue v. Riggs*, 73 Wn.2d 814, 440 P.2d 823 (1968),¹⁴ a patient at Eastern State Hospital, Ms. O'Donoghue, sued the State of Washington for injuries caused when a nurse, Ms. Riggs, allegedly used excessive force in placing her in a line of patients going to dinner. Ms. O'Donoghue testified that she was protesting about going down some stairs when Ms. Riggs told her she had to go and pushed her into line, and she fell down. Ms. Riggs denied that any incident occurred at all. On appeal, Ms. Riggs assigned error to the

¹⁴ In *Seattle v. Taylor*, *supra*, this Court upheld the constitutionality of Seattle’s “offensive touching” assault ordinance, stating: “The concept of offensive touching is well rooted, and persons of ordinary understanding from the early days of the common law to the present have understood its meaning.” *Seattle v. Taylor*, 50 Wn. App. at 388. *O'Donoghue v. Riggs*, *supra*, was one of the cases cited to as authority for this proposition.

submission to the jury of a negligence theory of liability, and argued that if the incident occurred at all, it would have been a battery. 73 Wn.2d at 819.

The Supreme Court, however, held that under Ms. O'Donoghue's testimony, two results were possible -- the tort of battery or an action based on negligence:

If the incident occurred, as the jury had a right to believe, then Mrs. Riggs' conduct would constitute negligence if she unintentionally but carelessly used excessive force in placing Mrs. O'Donoghue in the line of patients going to dinner. Under such circumstances as we have here, the intention with which Mrs. Riggs acted would be the primary question in determining whether her act should be deemed negligent or whether it would constitute battery. . . .

An act cannot, however, be considered a battery unless the actor intended to cause a harmful or offensive contact with another person.

O'Donoghue v. Riggs, 73 Wn.2d at 819-20 (emphasis added). Thus, because it was not clear from Ms. O'Donoghue's testimony whether Ms. Riggs had the requisite intent to cause an offensive or harmful contact, the jury was properly instructed on both theories of liability. *Id.*

Similarly, in *Garratt v. Dailey*, 46 Wn.2d 197, 279 P.2d 1091 (1955),¹⁵ the Court was confronted with a battery case where a five year old

¹⁵ *Garrett* is the other civil case relied on by this Court in *Seattle v. Taylor*, 50 Wn. App. at 388.

child allegedly pulled a chair out from under an adult. The key issue was the child's mental state, there being no question that the child engaged in a "volitional act. . . i.e. the moving of the chair." 46 Wn.2d at 201. The Court held that to constitute a battery, the plaintiff would have to prove that the child either intended to cause a harmful or offensive contact, or, at least, knew with a substantial certainty that the plaintiff would attempt to sit down where the chair had been. 46 Wn.2d at 200-202. *See also Garratt v. Dailey*, 49 Wn.2d 499, 304 P.2d 681 (1956) (second appeal after remand where trial court found that child had requisite mental state). In reaching this decision, the Court recognized that if the child did not have the intent to be offensive or if the child did not know that the plaintiff was attempting to sit down, there would be no liability on a battery theory. The Court cited to the *First Restatement of Torts*, 29, § 13 for the accepted principle that an act is a battery only if "the act is done with the intention of bringing about a harmful or offensive contact." 46 Wn.2d at 200-01.

As noted, these tort concepts have been adopted into the criminal law definition of assault. For instance, in *State v. Humphries*, 21 Wn. App. 405,

586 P.2d 130 (1978),¹⁶ a defendant spat at a police officer during an arrest. The issue was whether the prosecutor should have characterized this conduct during closing argument as a simple assault. The Court of Appeals upheld the argument and cited to federal law which defined assault in the following manner: "Although minor, it is an application of force to the body of the victim, a bodily contact *intentionally highly offensive*." 21 Wn. App. at 409, quoting *United States v. Frizzi*, 491 F.2d 1231, 1232 (1st Cir. 1974) (emphasis added).¹⁷

The jury instructions in the instant case failed to include the common law elements of battery assault. To begin with, Instruction No. 13 improperly limited the "intent" element to the "touching or striking" itself, and did not require the actor intend his or her actions to be offensive or harmful. Secondly, Instruction No. 13 did not include the element that the touching or striking be "unlawful" or without consent or permission.

¹⁶ *Humphries* was the third case relied upon by this Court in *Seattle v. Taylor, supra*, as the source of the common law understanding of offensive touching assault. 50 Wn. App. at 388.

¹⁷ There has been some language in various cases that suggest that the only intent in battery is to intend to touch another person, and that the State need not prove an intent to cause offense or harm. See, e.g., *State v. Keend*, 140 Wn. App. 858, 166 P.3d 1268 (2007); *State v. Esters*, 84 Wn. App. 180, 927 P.2d 1140 (1996). A close review of those cases, however, reveals that the courts were simply holding that a defendant need not have the specific intent to inflict substantial bodily harm to be guilty of assault in the second degree. These cases never changed the common rule that an actor still must have at least an intent to cause offense to commit either criminal or tortious battery.

Thus, the jury was incorrectly told that it could convict Mr. Holz knecht without regard to whether he intended to cause Grace offense or harm and without regard to whether he was lawfully touching Grace in the first instance. In other words, the court told the jury that it could convict Mr. Holz knecht (as the State argued) even if it concluded that Mr. Holz knecht lawfully touched his daughter to change an diaper, and even if he intended to touch her to change her diaper, but unintentionally caused her offense or harm by using too much force, thereby recklessly injuring her. This was error.

The failure to include the proper mental state was very prejudicial to Mr. Holz knecht and is grounds for reversal of Counts II and III.¹⁸ The missing elements allowed the prosecutor to argue to the jury that all the State had to do is to find Mr. Holz knecht intended to touch Grace, that this touching was harmful or offensive to a reasonable person, even if Mr. Holz knecht did not intend to cause harm, and that substantial bodily harm was thereby recklessly inflicted. The State never had to prove that Mr. Holz knecht acted “unlawfully” and that his touching of Grace was intended to cause harm or offense. While the jury may not have to be given an instruction defining

¹⁸ Failure to instruct on an essential element is automatic reversible error. *State v. Smith*, 131 Wn.2d 258, 265, 930 P.2d 917 (1997). *But see State v. Jennings*, 111 Wn. App. 54, 62-65, 44 P.3d 1 (2002). However, the error here is prejudicial.

assault at all, *State v. Daniel, supra*, if any instruction was given, it should have listed the proper elements of the crime, including the proper mental state. *State v. Byrd, supra*. Because Instruction No. 13 violated due process of law and the right to a jury trial under the Washington and U.S. Constitutions, this Court should reverse Counts II and III, and remand for a new trial on those two counts.

5. *There Was Insufficient Evidence to the Sustain Convictions*

Grace was rarely outside the care and custody of his mother; Mr. Holzkecht only had sole control over Grace a few times; and there were numerous other people who occasionally cared for Grace. While Mr. Holzkecht may have been a little rough with Grace when changing her diaper and may have lifted her by one leg during this process, as all the experts agreed, none of Grace's injuries could have been caused by these actions. While Mr. Holzkecht may have thought he was responsible, the conclusions of a young first-time parent with no medical training were rebutted by the State's own expert witnesses.

The relevant test for sufficiency of evidence under U.S. Const. amend. 14 and Wash. Const. art. 1, § 3, is "whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have

found the essential elements of the crime *beyond a reasonable doubt*." *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (Wash. Sup. Ct.'s emphasis), *quoting Jackson v. Virginia*, 443 U.S. 307, 318, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979). The State failed to meet this test in this case.

First, there was insufficient evidence that it was Mr. Holzkecht who caused Grace's injuries, and not any of the other many people who helped care for Grace. While Mr. Holzkecht admitted he was too rough when he changed Grace's diapers, his belief, as noted, was wrong and his actions could not have caused her injuries. Simply because no one else confessed to causing the injuries or no one else was observed causing the injuries does not mean that Mr. Holzkecht was the person who injured Grace.

While the State argued that Mr. Holzkecht was guilty because of his demeanor at the hospital, RP II 268-69, if judgments can be made based upon demeanor at all, Ms. Holzkecht was equally suspect. She was anxious before a key interview, RP II 259, and when she learned of the injuries, she "immediately became tearful." RP I 55. For every inference about Mr. Holzkecht's demeanor, the same inferences can be made about Ms. Holzkecht's. *See State v. Allen*, 50 Wn. App. 412, 416-18, 749 P.2d 702

101 Wn.2d 355, 360, 678 P.2d 798 (1984). Such an intent cannot be inferred from the natural consequences of someone's acts, but rather the prosecution must offer sufficient proof of the defendant's subjective mental state. *See Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L.Ed.2d 39 (1979).

Here, Mr. Holzkecht's objective always was to help Grace – to change her diaper or to get her out of the way of the feces, which are all perfectly lawful objectives. If he used too much force, perhaps he was negligent, but there was no evidence that he acted with an evil mind and that he wanted to hurt Grace, a point that both Mr. and Ms. Holzkecht insisted upon when talking to the authorities. There was therefore insufficient evidence to sustain a conviction for Counts II and III under U.S. Const. amend. 14 and Wash. Const. art. 1, § 3. The convictions on these two counts should be reversed and the charges dismissed.

6. *The State's Failure to Tie Up Its Impeachment of Amy Holzkecht Requires Reversal*

The State argued that Amy Holzkecht “minimized what happened,” RP II 271, and attempted to make Ms. Holzkecht conform to a stereotype – of a woman who is submissive to her abusive husband, who stops talking when he comes into the room. In an effort to paint Ms. Holzkecht in this light, the State impeached her with an alleged prior inconsistent statement –

that she supposedly told a someone connected to CPS that she was “submissive to her husband.” RP I 124. When Ms. Holzkecht denied this, the State never called the CPS worker to tie up the impeachment. This constituted misconduct and violated Mr. Holzkecht’s confrontation rights.

“A prosecutor's impeachment of a witness by referring to extrinsic evidence that is never introduced may violate a defendant's right to confrontation.” *State v. Miles*, 139 Wn. App. 879, 885-86, 162 P.3d 1169 (2007). The State cannot use impeachment as a means of submitting evidence to the jury that is otherwise unavailable. *State v. Babich*, 68 Wn. App. 438, 444, 842 P.2d 1053 (1993). If the State asks questions that imply the existence of a prejudicial fact (such as a prior inconsistent statement), the State commits misconduct unless it can prove that fact. *Miles*, 139 Wn. App. at 885-88; *Babich*, 68 Wn. App. at 444-45.

Here, once the prosecutor alleged that Ms. Holzkecht told a CPS worker that she was “submissive” to her husband, she was bound to prove up her allegations when Ms. Holzkecht denied them. Her failure to do so left the jury with the misimpression that Ms. Holzkecht was lying. The unproven insinuation that Ms. Holzkecht was lying violated Mr. Holzkecht’s right to confront witnesses under U.S. Const. amend. 6 and

Wash. Const. art. 1, § 22, and constituted misconduct in violation of due process, protected under U.S. Const. amend. 14 and Wash. Const. art. 1, § 3. Insofar as the defense attorney did not object to the prosecutor's cross-examination, this is irrelevant. *See State v. Babich*, 68 Wn. App. at 446 (error occurred not at time questions asked, but when State rests, having failed to call impeachment witness).

Given the centrality of Ms. Holzkecht's credibility in this case, this error cannot be harmless. Ms. Holzkecht repeatedly insisted that her husband would never intentionally hurt Grace and that whatever "roughness" she saw was not sufficient to cause a fracture. The State depended on its innuendo that Ms. Holzkecht was "minimizing" her husband's actions. Given this innuendo, the failure to call a critical impeachment witness cannot be harmless. Reversal on all three counts is required.

7. Mr. Holzkecht's Confrontation Clause Rights Were Violated By the Introduction of Out-of-Court Statements of Medical Experts

One of the key issues in this case was whether there could have been some other explanation for Grace's injuries – some explanation other than criminal behavior. The State attempted to convince the jury that doctors at Children's Hospital exhausted all options, and that Grace's injuries could

only have been caused by an assault, rather than any metabolic or organic problem. Toward this end, the State introduced hearsay evidence, through Dr. Sugar, that numerous other doctors – Dr. Miller, Dr. Raff, and Dr. Kletter – all ruled out osteogenesis imperfecta and other metabolic conditions as causes for Grace’s fractures and that they concluded that the injuries were the result of non-accidental trauma. Dr. Sugar also noted that a fourth doctor (Dr. Byers) referred her on for additional testing, and that she had consulted yet a fifth doctor, an orthopedist, Dr. Goldberg. Dr. Sugar read into the record the conclusions of these absent doctors. RP I 179-83.

The admission of this medical testimony, through Dr. Sugar, violated Mr. Holzknicht’s right to confront witnesses under U.S. Const. amends. 6 & 14 and Wash. Const. art. 1, § 22. This issue can be raised for the first time on appeal under RAP 2.5(a). *State v. Kronich*, 160 Wn.2d 893, 899-900, 161 P.3d 982 (2007).

In *Crawford v. Washington*, 541 U.S. 36, 124 S. St. 1354, 158 L.Ed.2d 177 (2004), the Supreme Court made it clear that the Sixth Amendment “guarantees a defendant's right to confront those who 'bear testimony' against him. [Citation omitted]. A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the

witness is unavailable, the defendant had a prior opportunity for cross-examination.” *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S. Ct. 2527, 2531, 174 L.Ed.2d 314 (2009). In *Melendez-Diaz*, the Supreme Court recently held that the Confrontation Clause was offended by the introduction at trial of the out-of-court certifications of expert forensic witnesses who gave conclusions about whether a substance was cocaine.

Of course, medical reports created for treatment purposes are not “testimonial.” *Melendez-Diaz*, 129 S. Ct. at 2533 n.2. On the other hand, forensic medical reports prepared for the purposes of litigation are testimonial. See *United States v. Magyari*, 63 M.J. 123, 127 (C.A.A.F. 2006) (holding before *Melendez-Diaz* that report of random, administrative urinalysis report is nontestimonial but that “the same types of records . . . prepared at the behest of law enforcement in anticipation of prosecution” may be testimonial); *State v. Laturner*, 38 Kan.App.2d 193, 163 P.3d 367 *rev. granted* (12/18/07) (lab reports prepared for purposes of prosecution testimonial). As *Melendez-Diaz* makes clear, the Confrontation Clause gives the defendant the right to cross-examine the actual expert whose opinion is given in court.

In this case, after the police were called in, Dr. Sugar coordinated a team (“the Child Protective Team”) that worked collaboratively with law enforcement and CPS to assess whether certain injuries constituted child abuse. RP I 150. This team tried to rule out organic or metabolic causes for Grace’s injuries, and thus it asked Dr. Goldberg, Dr. Miller, Dr. Kletter, Dr. Byers and Dr. Raff evaluate the case. Their reports were testimonial because they were obtained for the purpose of litigation – for the purpose of helping Dr. Sugar assist law enforcement to gather evidence to use against Mr. Holz knecht. As testimonial reports, under *Melendez-Diaz*, their admission through Dr. Sugar violated Mr. Holz knecht’s right to confront witnesses under U.S. Const. amends. 6 & 14 and Wash. Const. art. 1, § 22.

This Confrontation Clause error is reversible unless it is harmless beyond a reasonable doubt. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). In conducting the harmless-error inquiry, an appellate court should reverse unless the State can demonstrate beyond a reasonable doubt that the tainted evidence did not contribute to the conviction. *United States v. Alvarado-Valdez*, 521 F.3d 337, 342 (5th Cir. 2008). Washington courts have adopted the “untainted evidence” test “to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt.” *State v.*

Watt, 160 Wn.2d at 635-36.

In the instant case, Dr. Sugar's and Dr. Done's conclusions were based, in part, on the conclusions of the out-of-court experts.²⁰ Thus, Dr. Sugar's and Dr. Done's testimony was "tainted," and cannot be considered in the harmless error analysis. Moreover, the prosecutor herself attached great significance in her closing argument on the great lengths that the doctors at Children's Hospital took to rule out a metabolic cause for the fractures, and repeated verbatim Dr. Miller's and Dr. Kletter's conclusions. RP II 270, 272. Indeed, without the out-of-court testimony from these experts, the State would not have been able to demonstrate to the jury that Grace did not have some organic syndrome that caused her to suffer fractures. Thus, the admission of the out-of-court testimony of the absent doctors cannot be harmless beyond a reasonable doubt. *See United States v. Alvarado-Valdez*, 521 F.3d at 342-43 ("We cannot see how the government can conclusively show that the tainted evidence did not contribute to the conviction, because the government's closing argument relied on that very evidence."). Reversal on all counts for a new trial is required.

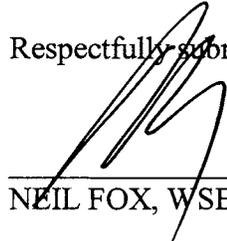
²⁰ *See* RP I 170 (Dr. Sugar reviewed one of the geneticist's reports before she reached her conclusions); RP I 178 (to rule out genetic or metabolic reasons to have weakness in the bones, Dr. Sugar had three geneticists evaluate Grace); RP I 183 (Dr. Sugar's conclusions based on her review of other doctors' reports; RP II 237 (Dr. Done's testimony that "[w]e ruled out osteogenesis imperfecta . . . we looked for that.").

E. CONCLUSION

This Court should reverse the convictions and remand either for dismissal or for a new trial. If the Court reverses Count I for a new trial, double jeopardy under U.S. Const. amends. 5 & 14 and Wash. Const. art. 1, § 9 only allows for a retrial on assault of a child in the third degree. *See Brazzel v. Washington*, 491 F.3d 976 (9th Cir. 2007).²¹

Dated this 4 day of September 2009

Respectfully submitted,



NEIL FOX, WSBA NO. 15277



LIZA BURKE, WSBA NO. 23138
Attorneys for Appellant

²¹ To the extent that *State v. Daniels*, 160 Wn.2d 256, 156 P.3d 905 (2007), *reconsideration denied*, 165 Wn.2d 627, 200 P.3d 711 (2009), compels a different conclusion, this Court should follow the Ninth Circuit's analysis in *Brazzel*.

Appendix A

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Appendix B

INSTRUCTION NO. 13

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

Appendix C

INSTRUCTION NO. 9

To convict the defendant of the crime of assault of a child in the second degree, as charged in Count I, each of the following elements must be proved beyond a reasonable doubt:

(1) That on or about the 27th day of September, 2007 through the 30th day of November, 2007, in an act separate and distinct from Counts II, and III, the defendant committed the crime of assault in the second degree against G.H.;

(2) That the defendant was eighteen years of age or older and G.H. was under the age of thirteen; and

(3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 10

To convict the defendant of the crime of assault of a child in the second degree, as charged in Count II, each of the following elements must be proved beyond a reasonable doubt:

(1) That on or about the 27th day of September, 2007 through the 30th day of November, 2007, in an act separate and distinct from Counts I and III, the defendant committed the crime of assault in the second degree against G.H.;

(2) That the defendant was eighteen years of age or older and G.H. was under the age of thirteen; and

(3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 11

To convict the defendant of the crime of assault of a child in the second degree, as charged in Count III, each of the following elements must be proved beyond a reasonable doubt:

(1) That on or about the 27th day of September, 2007 through the 30th day of November, 2007, in an act separate and distinct from Counts I and II, the defendant committed the crime of assault in the second degree against G.H.;

(2) That the defendant was eighteen years of age or older and G.H. was under the age of thirteen; and

(3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 12

A person commits the crime of assault in the second degree when he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm

INSTRUCTION NO. 14

Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.

INSTRUCTION NO. 15

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

INSTRUCTION NO. 26

You will also be given special verdict forms to record your determination of whether the victim was particularly vulnerable. If you find the defendant not guilty of Assault of a Child in the Second Degree and of Assault of a Child in the Third Degree do not use the special verdict forms. If you find the defendant guilty of Assault of a Child in the Second Degree or of Assault of a Child in the Third Degree, you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict forms "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If any one of you has a reasonable doubt as to the question, you must answer "no".

INSTRUCTION NO. 27

A victim is particularly vulnerable if because of extreme youth, advanced age, disability, ill health, or any other reason, the victim is less able to resist the defendant.



CL12695375

Filed in Open Court

November 20, 2008

SONYA KRASKI
COUNTY CLERK

By [Signature]
Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR SNOHOMISH COUNTY

STATE OF WASHINGTON)	CASE NO. 07-1-03743-2
)	
Plaintiff,)	
)	VERDICT FORM B
v.)	
)	
ERIC EARL HOLZKNECHT)	
Defendant.)	
_____)	

We, the jury, find the defendant, ERIC EARL HOLZKNECHT,

Guilty of the crime of Assault of a Child in the Second Degree
(write in "not guilty" or "guilty")

as charged in Count II

DATED this 20th day of November, 2008.

[Signature]
Presiding Juror

ORIGINAL

AB

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CL12695376

Filed in Open Court

November 20, 2008

SONYA KRASKI
COUNTY CLERK

[Signature]
Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR SNOHOMISH COUNTY

STATE OF WASHINGTON)	CASE NO. 07-1-03743-2
)	
Plaintiff,)	
)	VERDICT FORM C
v.)	
)	
ERIC EARL HOLZKNECHT)	
Defendant.)	
_____)	

We, the jury, find the defendant, ERIC EARL HOLZKNECHT,

Guilty of the crime of Assault of a Child in the Second Degree
(write in "not guilty" or "guilty")

as charged in Count III.

DATED this 20th day of November, 2008.

[Signature]
Presiding Juror

ORIGINAL

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CL12695377

Filed in Open Court

November 20, 2008

SONYA KRASKI
COUNTY CLERK

By

[Signature]
Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 vs.)
)
 ERIC EARL HOLZKNECHT)
)
 Defendant.)

No. 07-1-03743-2

VERDICT FORM D

We, the jury, having found the defendant not guilty of the crime of

Assault of a Child in the Second Degree in Count I as charged, or being unable to
(Crime from Verdict Form A)

unanimously agree as to that charge, find the defendant ERIC EARL HOLZKNECHT

Guilty of the lesser included crime of
(write in "not guilty" or "guilty")

Assault of a Child in the Third Degree .

DATED this 20th day of November, 2008.

[Signature]
Presiding Juror

ORIGINAL

AB
45



CL12695380

Filed in Open Court

November 20, 2008

SONYA KRASKI
COUNTY CLERK

[Signature]
Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR SNOHOMISH COUNTY

STATE OF WASHINGTON)

CASE NO. 07-1-03743-2

Plaintiff,)

SPECIAL VERDICT FORM 1

v.)

ERIC EARL HOLZKNECHT)

Defendant.)

We, the jury, return a special verdict by answering as follows:

Did the defendant, Eric Earl Holzknacht, at the time he committed the crime of Assault of a Child in the Second Degree or of the lesser included crime of Assault of a Child in the Third Degree as charged in Count I, know, or should have known, that the victim was particularly vulnerable or incapable of resistance?

ANSWER: Yes
(write in "YES" or "NO")

DATED this 20th day of November, 2008.

[Signature]
Presiding Juror

ORIGINAL

AS

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CL12695381

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR SNOHOMISH COUNTY

filed in Open Court
November 20, 20 08
SONYA KRASKI
COUNTY CLERK
[Signature]
Deputy Clerk

STATE OF WASHINGTON)

Plaintiff,)

v.)

ERIC EARL HOLZKNECHT)

Defendant.)

CASE NO. 07-1-03743-2

SPECIAL VERDICT FORM 2

We, the jury, return a special verdict by answering as follows:

Did the defendant, Eric Earl Holzknrecht, at the time he committed the crime of Assault of a Child in the Second Degree or of the lesser included crime of Assault of a Child in the Third Degree as charged in Count II, know, or should have known, that the victim was particularly vulnerable or incapable of resistance?

ANSWER: Yes
(write in "YES" or "NO")

DATED this 20th day of November, 2008.

[Signature]
Presiding Juror

ORIGINAL

AB

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Filed in Open Court

November 20, 2008

SONYA KRASKI
COUNTY CLERK

By: [Signature]
Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR SNOHOMISH COUNTY



CL12695382

STATE OF WASHINGTON)

) CASE NO. 07-1-03743-2

Plaintiff,)

) SPECIAL VERDICT FORM 3

v.)

ERIC EARL HOLZKNECHT)

Defendant.)

We, the jury, return a special verdict by answering as follows:

Did the defendant, Eric Earl Holzknecht, at the time he committed the crime of Assault of a Child in the Second Degree or of the lesser included crime of Assault of a Child in the Third Degree as charged in Count III, know, or should have known, that the victim was particularly vulnerable or incapable of resistance?

ANSWER: Yes
(write in "YES" or "NO")

DATED this 20th day of November, 2008.

[Signature]
Presiding Juror

ORIGINAL

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Statutory Appendix

Statutory Appendix

ER 704 provides:

Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

RAP 2.5 provides in part:

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. . .

RCW 9A.08.010 provides:

(1) Kinds of Culpability Defined.

(a) INTENT. A person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime.

(b) KNOWLEDGE. A person knows or acts knowingly or with knowledge when:

(i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

(ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.

(c) RECKLESSNESS. A person is reckless or acts recklessly when he knows of and disregards a substantial

risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation.

(d) CRIMINAL NEGLIGENCE. A person is criminally negligent or acts with criminal negligence when he fails to be aware of a substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable man would exercise in the same situation.

(2) Substitutes for Criminal Negligence, Recklessness, and Knowledge. When a statute provides that criminal negligence suffices to establish an element of an offense, such element also is established if a person acts intentionally, knowingly, or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts intentionally.

(3) Culpability as Determinant of Grade of Offense. When the grade or degree of an offense depends on whether the offense is committed intentionally, knowingly, recklessly, or with criminal negligence, its grade or degree shall be the lowest for which the determinative kind of culpability is established with respect to any material element of the offense.

(4) Requirement of Wilfulness Satisfied by Acting Knowingly. A requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements plainly appears.

RCW 9A.36.021 provides:

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

(c) Assaults another with a deadly weapon; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or

(g) Assaults another by strangulation.

(2)(a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony.

(b) Assault in the second degree with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135 is a class A felony.

RCW 9A.36.130 provides:

(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.

(2) Assault of a child in the second degree is a class B felony.

RCW 9A.36.140 provides:

(1) A person eighteen years of age or older is guilty of the crime of assault of a child in the third degree if the child is under the age of thirteen and the person commits the crime of assault in the third degree as defined in RCW 9A.36.031(1) (d) or (f) against the child.

(2) Assault of a child in the third degree is a class C felony.

RCW 10.58.035 provides:

(1) In criminal and juvenile offense proceedings where independent proof of the corpus delicti is absent, and the alleged victim of the crime is dead or incompetent to testify, a lawfully obtained and otherwise admissible confession, admission, or other statement of the defendant shall be admissible into evidence if there is substantial independent evidence that would tend to establish the trustworthiness of the confession, admission, or other statement of the defendant.

(2) In determining whether there is substantial independent evidence that the confession, admission, or other statement of the defendant is trustworthy, the court shall consider, but is not limited to:

(a) Whether there is any evidence corroborating or contradicting the facts set out in the statement, including the elements of the offense;

(b) The character of the witness reporting the statement and the number of witnesses to the statement;

(c) Whether a record of the statement was made and the timing of the making of the record in relation to the making of the statement; and/or

(d) The relationship between the witness and the defendant.

(3) Where the court finds that the confession, admission, or other statement of the defendant is sufficiently trustworthy to be admitted, the court shall issue a written order setting forth the rationale for admission.

(4) Nothing in this section may be construed to prevent the defendant from arguing to the jury or judge in a

bench trial that the statement is not trustworthy or that the evidence is otherwise insufficient to convict.

U.S. Const. art. III, § 2, provides in part:

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

U.S. Const. amend. 5 provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. 6 provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. 14, § 1 provides in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wash. Const. art. 1, § 3 provides:

No person shall be deprived of life, liberty, or property, without due process of law.

Wash. Const. art. 1, § 9 provides:

No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

Wash. Const. art. 1, § 21 provides:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Wash. Const. art. 4, § 1, provides:

The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide.

Wash. Const. art. 4, § 16 provides:

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

Wash. Const. art. 1, § 22 (amend. 10) provides in part:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases.

WAC 388-15-009 provides:

Child abuse or neglect means the injury, sexual abuse, or sexual exploitation of a child by any person under circumstances which indicate that the child's health, welfare, or safety is harmed, or the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child. An abused child is a child who has been subjected to child abuse or neglect as defined in this section.

(1) Physical abuse means the nonaccidental infliction of physical injury or physical mistreatment on a

child. Physical abuse includes, but is not limited to, such actions as:

- (a) Throwing, kicking, burning, or cutting a child;
- (b) Striking a child with a closed fist;
- (c) Shaking a child under age three;
- (d) Interfering with a child's breathing;
- (e) Threatening a child with a deadly weapon;
- (f) Doing any other act that is likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks or which is injurious to the child's health, welfare or safety.

(2) Physical discipline of a child, including the reasonable use of corporal punishment, is not considered abuse when it is reasonable and moderate and is inflicted by a parent or guardian for the purposes of restraining or correcting the child. The age, size, and condition of the child, and the location of any inflicted injury shall be considered in determining whether the bodily harm is reasonable or moderate. Other factors may include the developmental level of the child and the nature of the child's misconduct. A parent's belief that it is necessary to punish a child does not justify or permit the use of excessive, immoderate or unreasonable force against the child.

(3) Sexual abuse means committing or allowing to be committed any sexual offense against a child as defined in the criminal code. The intentional touching, either directly or through the clothing, of the sexual or other intimate parts of a child or allowing, permitting, compelling, encouraging, aiding, or otherwise causing a child to engage in touching the sexual or other intimate parts of another for the purpose of gratifying the sexual desire of the person touching the child, the child, or a third party. A parent or guardian of a child, a person authorized by the parent or guardian to provide childcare for the child, or a person providing medically recognized services for the

child, may touch a child in the sexual or other intimate parts for the purposes of providing hygiene, child care, and medical treatment or diagnosis.

(4) Sexual exploitation includes, but is not limited to, such actions as allowing, permitting, compelling, encouraging, aiding, or otherwise causing a child to engage in:

(a) Prostitution;

(b) Sexually explicit, obscene or pornographic activity to be photographed, filmed, or electronically reproduced or transmitted; or

(c) Sexually explicit, obscene or pornographic activity as part of a live performance, or for the benefit or sexual gratification of another person.

(5) Negligent treatment or maltreatment means an act or a failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction, on the part of a child's parent, legal custodian, guardian, or caregiver that shows a serious disregard of the consequences to the child of such magnitude that it creates a clear and present danger to the child's health, welfare, or safety. A child does not have to suffer actual damage or physical or emotional harm to be in circumstances which create a clear and present danger to the child's health, welfare, or safety. Negligent treatment or maltreatment includes, but is not limited, to:

(a) Failure to provide adequate food, shelter, clothing, supervision, or health care necessary for a child's health, welfare, or safety. Poverty and/or homelessness do not constitute negligent treatment or maltreatment in and of themselves;

(b) Actions, failures to act, or omissions that result in injury to or which create a substantial risk of injury to the physical, emotional, and/or cognitive development of a child; or

(c) The cumulative effects of a pattern of conduct, behavior or inaction by a parent or guardian in providing

for the physical, emotional and developmental needs of a child's, or the effects of chronic failure on the part of a parent or guardian to perform basic parental functions, obligations, and duties, when the result is to cause injury or create a substantial risk of injury to the physical, emotional, and/or cognitive development of a child.

Other Materials

HOUSE BILL REPORT

EHB 1427

As Passed Legislature

Title: An act relating to the admissibility of confessions and admissions in criminal and juvenile offense proceedings.

Brief Description: Allowing confessions and other admissions to be admitted into evidence if substantial independent evidence establishes the trustworthiness of the statement.

Sponsors: By Representatives Lantz, Delvin, O'Brien, Boldt, Blake, Hankins, Fromhold, Cody, Pearson, Mastin, Hunt, Roach, Moeller, Kagi, Benson, Rockefeller, McMahan and McDonald.

Brief History:

Committee Activity:

Judiciary: 2/28/03, 3/3/03 [DP].

Floor Activity:

Passed House: 3/17/03, 96-1.

Passed Senate: 4/15/03, 49-0.

Passed Legislature.

Brief Summary of Engrossed Bill

Changes the traditional corpus delicti rule to a trustworthiness rule, which allows a defendant's confession or admission to be admitted in a criminal proceeding if there is substantial independent evidence that tends to establish the trustworthiness of the confession or admission.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass. Signed by 8 members: Representatives Lantz, Chair; Moeller, Vice Chair; Carrell, Ranking Minority Member; McMahan, Assistant Ranking Minority Member; Campbell, Kirby, Lovick and Newhouse.

Minority Report: Do not pass. Signed by 1 member: Representative Flannigan.

Staff: Edie Adams (786-7180).

Background:

In a criminal proceeding, the prosecution has to prove that a crime has been committed and that the particular defendant charged is responsible for committing the crime. The first requirement, proving that a crime has been committed, is often referred to as the "corpus delicti," which literally means "the body of the crime." For example, to establish the corpus delicti in a murder case, the prosecution has to show that a person died and that the person died by criminal means.

Long ago, courts in the United States established a common law doctrine known as the corpus delicti doctrine. This doctrine provides that the prosecution in a criminal case may not establish the corpus delicti solely by the confession or admission of the defendant. The corpus delicti doctrine provides that a confession or admission may only be admitted if there is independent, corroborating evidence of the corpus delicti.

The corpus delicti doctrine developed as a result of distrust of the reliability of confessions and concern that juries are likely to accept confessions uncritically. The distrust of the reliability of confessions was founded on a number of concerns, including the possibilities that the confession was: elicited by coercion or force; misreported or misconstrued; based on a mistaken perception of the facts or law; or falsely given by a mentally disturbed individual.

The level of independent, corroborative evidence that is required under the corpus delicti doctrine varies widely between the federal courts and many state courts. Washington follows the traditional corpus delicti doctrine which provides that the independent, corroborative evidence must, by itself, establish a prima facie case of the corpus delicti.

In 1954 the United States Supreme Court, in Opper v. United States, adopted what is referred to as the "trustworthiness" doctrine. The "trustworthiness" doctrine provides that a defendant's confession or admission may be admitted to establish the corpus delicti if there is substantial independent evidence that tends to establish the trustworthiness of the confession or admission. The independent evidence does not need to establish, by itself, the corpus delicti. It need only support the essential facts of the confession or admission sufficiently to justify a jury inference that the confession or admission is true.

The corpus delicti doctrine has been criticized by legal scholars and commentators on a number of grounds, including that: it has outlived its usefulness now that many other safeguards exist to protect against unreliable confessions; and it places an unrealistic burden on the prosecution since modern criminal law has made crimes more numerous and complex. A majority of states continue to follow some form of the traditional corpus delicti doctrine that a confession or admission may not be admitted unless there is independent evidence that, by itself, establishes the corpus delicti. However, many states have adopted the federal "trustworthiness" rule of corpus delicti.

A person may be a witness in a judicial proceeding only if the person is competent and legally available to testify. Competency is based on the person's mental capacity to

receive an accurate impression of the facts about which he or she is examined and accurately remember and relate those facts truly.

Summary of Engrossed Bill:

The traditional corpus delicti rule is changed to a trustworthiness rule and standards for evaluating trustworthiness are provided.

In a criminal or juvenile offense proceeding where independent proof of the corpus delicti is not present, a confession or statement of a defendant is admissible if:

- The victim of the crime is dead or incompetent to testify; and
- There is substantial independent evidence that tends to establish the trustworthiness of the confession or statement.

In determining whether the defendant's confession or statement is trustworthy, the court must consider:

- Whether there is evidence corroborating or contradicting facts in the statement, including the elements of the offense;
- The character of the witness reporting the statement and the number of witnesses to the statement;
- Whether a record was made of the statement, and if so the timing of the making of the record; and
- The relationship between the witness and the defendant.

The court must issue a written order when finding that a statement is sufficiently trustworthy to be admitted.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.

Testimony For: The corpus delicti doctrine should be abandoned. It is an anachronistic rule that leads to unjust results. The rule is no longer necessary. There are many more safeguards in the law now that make the corpus delicti rule unnecessary. A hearing is held on the admissibility of a confession, the confession has to be voluntary, Miranda rights apply, the defendant has a right to an attorney, the jury is told to give whatever weight they see fit to the confession, and the state still has to prove the case beyond a reasonable doubt.

The corpus delicti doctrine doesn't come into play in very many cases, but it results in terrible injustice in the contexts of infant homicide and child sexual abuse where there is usually no physical evidence of the crime. After the state Supreme Court decision in Aten, the corpus delicti rule does a lot of harm, because that case requires that the independent evidence must be solely consistent with a crime. This makes infant homicide cases impossible to prosecute, even when the perpetrator has freely confessed, because it is not medically possible to tell whether a baby died from Sudden Infant Death Syndrome or from suffocation. Criminals know to go after vulnerable victims who cannot speak out in order to get away with the crime. The guilty people who go free have victims associated with them and their suffering stays with them forever. It is very difficult to make the public understand why we can't prosecute people who are coming forward and taking responsibility for their crimes.

The bill provides a better rule, the trustworthiness rule, than the current system in many ways. The federal system has had the trustworthiness rule since 1954 and they have not had problems with it. All we are talking about is whether the jury should be given the opportunity to hear the statement. The jury will determine what weight to give to the statement. Juries do a good job in sifting through all the evidence and reaching a determination.

Testimony Against: The corpus delicti doctrine is as old as the United States Constitution and serves a critical role in ensuring fairness and justice in criminal proceedings. This bill changes the focus of the law from the current standard of trustworthiness that a crime was committed to a standard of trustworthiness of the confession. Corpus delicti is not a difficult burden. The prosecution only has to make the most minimal showing that a crime may have occurred before using a defendant's statements to get a conviction.

The proponents of the bill have wrapped the issue around the vulnerable victim, but this bill is much broader than that by applying whenever a victim is "unavailable." Unavailability can include if the person refuses to testify or has a lack of memory on the subject. There are no complaints about corpus delicti in cases other than child death or child sexual abuse, which shows that the rule is fairly and justly applied. A Seattle P-I examination of child death cases determined that inadequate police investigation is the reason these cases can't be prosecuted, not the corpus delicti doctrine.

Corpus delicti is an important safeguard to prevent wrongful convictions and abolishing the doctrine will have a disproportionate impact on children and vulnerable adults. For every case in which this bill will help convict a guilty person, there will be scores of cases where people will be victimized by false confessions. This bill does not gain ground. It is proven that people, for inexplicable reasons, falsely confess to crimes. There is no adequate safeguard other than corpus delicti against convicting on a false confession. Jurors trust confessions; humans are unable to distinguish between true and false confessions. Even science has been unable to find a way to distinguish between true

and false confessions. Do not abolish the corpus delicti rule. This rule is necessary to protect innocent, vulnerable persons who falsely confess to crimes they did not commit.

Testified: (In support) Representative Lantz, prime sponsor; Tom McBride, Washington Association of Prosecuting Attorneys; Dave McCachran, Whatcom County Prosecutor; Art Curtis, Clark County Prosecutor; Seth Dawson, Washington Association of Child Advocacy Centers; and Suzanne Brown, Washington Coalition of Sexual Assault Programs and Washington Coalition of Crime Victim Advocates.

(Opposed) Kim Gordon, Bob Wayne, and Sherry Appleton, Washington Defender Association and Washington Association of Criminal Defense Lawyers.

Unpublished Decisions Attached Pursuant to GR 14.1(b)

Cited pursuant to:

Ohio Rules for Reporting Opinions, Rule 4

Rules of the Court of Criminal Appeals of Tennessee, Rule 19(4)



14 of 19 DOCUMENTS

State of Ohio, Plaintiff-Appellee, v. Anthony A. Wallace, Defendant-Appellant.

No. 08AP-2

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

2008 Ohio 5260; 2008 Ohio App. LEXIS 4398

October 9, 2008, Rendered

PRIOR HISTORY: [**1]

APPEAL from the Franklin County Court of Common Pleas. (C.P.C. No. 05CR11-7450).

DISPOSITION: Judgment affirmed.

COUNSEL: Ron O'Brien, Prosecuting Attorney, and Sheryl L. Prichard, for appellee.

Javier H. Armengau and Brian G. Jones, for appellant.

JUDGES: T. BRYANT, J. PETREE and SADLER, JJ., concur. T. BRYANT, J., retired of the Third Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

OPINION BY: T. BRYANT

OPINION

(REGULAR CALENDAR)

OPINION

T. BRYANT, J.

[*P1] Defendant-appellant, Anthony A. Wallace, appeals from the judgment of the Franklin County Court of Common Pleas entered upon a jury verdict convicting him of one count of aggravated burglary, one count of felonious assault, and five counts of rape. For the following reasons, we affirm that judgment.

[*P2] On October 3, 2005, Melinda Gray lived with her boyfriend, Jesse Linlee, and her two young children in a two-story, three-bedroom home on Belvidere Avenue in Columbus, Ohio. At approximately 4:00 a.m., Ms. Gray awakened Mr. Linlee for work, and he left shortly thereafter. Ms. Gray went to the bathroom and then returned to her second-floor bedroom.

[*P3] A short time later, Ms. Gray awoke to a noise in the bedroom and saw a man hovering over [**2] her. The man jumped on top of her and cut her face with a knife; she bled profusely from the wound. When she screamed, he put a pillow over her face and tried to smother her. She attempted to fight him off and was eventually successful in turning her head enough that she could breathe. The man then directed her to put a pillowcase over her head and lie on her back on the bed. He spread her legs apart, licked her vagina and rectum, and penetrated her vagina with his penis. He then penetrated her rectum with his penis while she was on her back. Defendant then forced her to get on her hands and knees on the bed; he got behind her and engaged in vaginal and anal intercourse again. Although he penetrated both her vagina and rectum, he did not ejaculate. The man kept the knife to Ms. Gray's face during the entire attack. He then ordered her to perform fellatio on him; he ejaculated into her mouth and told her to swallow the semen.

[*P4] Thereafter, the man instructed Ms. Gray to go into the bathroom and urinate. When she finished, he ordered her to spread her legs; he then washed her vagina and rectum with shower gel that contained what Ms. Gray described as "little gray balls." (Tr. 102.) The [**3] man then asked Ms. Gray if anyone else was in the house. When she responded that her five-year-old son and three-year-old daughter were present, the man threatened that when he was "done" with her he was "gonna go get" her son. (Tr. 87.) Ms. Gray told him he could have the \$ 100 she had sitting on top of the television set in her bedroom if he left her son alone. The man then left the bathroom and told her to stay there until she heard him leave the house. Ms. Gray heard the man walk into her bedroom, walk down the stairs, and exit the house through the front door.

[*P5] Ms. Gray returned to her bedroom and called

the police. When she went downstairs to wait, she noticed that all the windows, which did not have screens, were open. She surmised that the man opened the windows to obtain entry to the house. A police officer arrived shortly thereafter. As she reported the incident, she became increasingly distraught and vomited as a result. She wiped her mouth on a child's sock she found on the living room floor.

[*P6] Emergency medical personnel transported Ms. Gray to a nearby hospital. A sexual assault nurse examiner, Kailey Mahan, performed an external physical examination, as well as an internal [**4] pelvic examination, and prepared a report of her findings. (State's Exhibit B.) According to Ms. Mahan, Ms. Gray presented with a "flat affect," meaning she was not crying or smiling; this "flat affect" is typical of a person who suffers a trauma. (Tr. 203-204.) The physical examination revealed bruises and a laceration on Ms. Gray's face; the laceration still had dried blood on it. The pelvic examination revealed abrasions and a bath bead on Ms. Gray's vagina. (Tr. 209.) According to Ms. Mahan, these physical findings were consistent with the history relayed by Ms. Gray. Ms. Mahan also performed a rectal examination, which revealed no injuries. According to Ms. Mahan, this physical finding was also consistent with the history Ms. Gray provided, as she reported that she ultimately submitted to the rectal penetration in an effort to save her life. Ms. Mahan photographed these physical findings. (State's Exhibits C1-C9.) She also swabbed Ms. Gray's mouth, vagina, and rectum for DNA and sealed the swabs in the rape kit. An emergency room physician assistant closed the laceration on Ms. Gray's face with seven stitches.

[*P7] Columbus Division of Police Sexual Abuse Unit Detective David McKee [**5] interviewed Ms. Gray at the hospital. Detective McKee noted that Ms. Gray was "visibly upset" and "seemed traumatized." (Tr. 367, 393.) She provided a "very consistent, very forthright" statement regarding the incident and indicated that she did not know her assailant. (Tr. 393.)

[*P8] Thereafter, Detective McKee went to the crime scene and directed the collection of evidence and taking of photographs. Among the items collected were the pillow, pillowcase, and sheets from Ms. Gray's bed and the child's sock on which Ms. Gray wiped her mouth after she vomited.

[*P9] Detective McKee requested that the crime laboratory perform a complete DNA and blood analysis of the items collected from the crime scene and the rape kit. Columbus Division of Police Criminalist Debra Lambourne analyzed the evidence and prepared a report of her findings. (State's Exhibit F.) That analysis revealed that blood was present on the bedding items and that semen was present on the sock found at the crime scene and the vaginal swabs that were in the rape kit. Due to

the small amount of cellular material present in the semen on the vaginal swabs, Ms. Lambourne was unable to obtain a male profile. She was, however, able to obtain [**6] a male profile from the cellular material present in the semen contained on the sock.

[*P10] Following her release from the hospital, Ms. Gray and her family stayed with her father for two weeks; they eventually moved into another house. At some point during the time Ms. Gray lived with her father, she and Mr. Linlee returned to the Belvidere house to pack their belongings. Upon her arrival, Ms. Gray called the police to report that someone had broken into the house and stolen several items. While she waited for the police, she noticed a man riding a yellow bicycle. When the police arrived, she reported that the man on the yellow bicycle could be the person who attacked her.

[*P11] Three weeks after the assault, police arrested defendant approximately five blocks from the crime scene. A search incident to the arrest uncovered a small, dagger-style knife in defendant's right coat pocket. Following the arrest, Detective McKee collected DNA from defendant via oral swabs; he then submitted the swabs to the crime lab for comparison to the DNA evidence collected from the sock found at the crime scene. Ms. Lambourne performed the comparison analysis and prepared a report of her findings. (State's Exhibit [**7] G.) That analysis revealed that DNA contained in the semen on the sock matched the DNA obtained from the oral swabs collected from defendant.

[*P12] On November 3, 2005, the Franklin County Grand Jury indicted appellant on one count of aggravated burglary in violation of *R.C. 2911.11*, a first-degree felony, one count of felonious assault in violation of *R.C. 2903.11*, a second-degree felony, and five counts of rape in violation of *R.C. 2907.02*, all first-degree felonies. One of the rape counts carried a repeat violent offender specification pursuant to *R.C. 2941.149*.

[*P13] The trial court appointed the Franklin County Public Defender ("public defender") to represent defendant. Pursuant to defendant's request, the trial court removed the public defender and appointed private counsel. Later, again pursuant to defendant's request, the trial court removed the previously appointed private counsel and appointed private counsel chosen by defendant. Defendant voluntarily waived his right to a jury trial and elected to be tried by the court on the repeat violent offender specification only. Thereafter, the case proceeded to jury trial, and the jury convicted defendant on all counts in the indictment. Following [**8] a hearing, the trial court convicted defendant of the specification, found him to be a sexual predator, and sentenced him in accordance with law.

[*P14] Defendant timely appeals the trial court's judgment, advancing seven assignments of error, as

follows:

[I.] The trial court erred by refusing to allow Appellant to impeach Melinda Gray.

[II.] The State failed to provide trial counsel with exculpatory and impeaching evidence until the trial had already commenced.

[III.] The State failed to establish the proper chain of custody for various items of evidence.

[IV.] The convictions in the instant case are not supported by sufficient evidence.

[V.] The convictions in the instant case are against the manifest weight of the evidence.

[VI.] Trial counsel was ineffective for failing to present evidence of the stated defense which was that Melinda Gray does crack and traded sex with Appellant for crack.

[VII.] Trial counsel was ineffective for presenting two conflicting defense to the jury during trial.

[*P15] Defendant's first assignment of error contends that the trial court erred in denying him the opportunity to impeach Ms. Gray's testimony through prior inconsistent statements. Ms. Gray testified on cross-examination **[**9]** that she did not recall being interviewed in January 2006 by Nancy Smith, an investigator for the public defender. Defense counsel later called Ms. Smith as a witness in defendant's case-in-chief. Ms. Smith testified that she interviewed Ms. Gray in January 2006; she took notes and surreptitiously recorded the interview and later prepared a report and submitted it to the public defender who represented defendant at that time.

[*P16] Defense counsel then inquired about certain statements Ms. Gray allegedly made during the interview. The prosecutor objected on hearsay grounds. Thereafter, defense counsel and the trial court engaged in the following colloquy:

MS. CLARK: Your Honor, I'm asking this information on the basis that it is a contradictory statement to what Miss Gray said. And it's not hearsay.

THE COURT: It's not for that

purpose. You'd like it to be. But Miss Gray, my recollection was, she did not recall any conversations with people after the incident. I think the line of questioning establishing that there may have been another interview is entirely appropriate. But now we're getting into you're not contradicting. She simply said she didn't recall.

MS. CLARK: Your Honor, I agree that **[**10]** Miss Gray said that she didn't remember being interviewed by anyone including Miss Smith. But I do recall that she testified as to how the room appeared. And I think that Miss Smith has -- can make a statement that's in contradiction to that. And I think that's admissible.

THE COURT: I've ruled otherwise, Miss Clark. Objection is sustained.

MS. CLARK: So, Your Honor, are you saying that I can't ask her anything about the interview even if it's contradictory to what Miss Gray's already testified to?

THE COURT: Clearly what this witness says regarding another person's statement is hearsay. The question is whether or not it's an exception to the hearsay rule. The only possible exception would be to contradict her. She never testified as to what she told this particular witness. Had she testified as to what she said to this witness then this would be permissible examination and an exception to the hearsay rule. Because she did not ever say what it was she said to this witness, there's nothing to contradict.

(Tr. 493-495.)

[*P17] Defense counsel objected to the ruling and continued the examination of Ms. Smith. To that end, Ms. Smith reiterated that she interviewed Ms. Gray in January 2006, made a **[**11]** report of the interview, and submitted it to defendant's former counsel. Defense counsel asked that the report be marked as an exhibit but did not identify it by number. Defense counsel also requested that the report be admitted as evidence; the trial court stated it would consider it along with other defense exhibits at the close of defendant's case. Defense counsel never sought to admit the report and did not proffer either the report or Ms. Smith's proposed testimony.

[*P18] Defendant contends the trial court

improperly excluded Ms. Smith's testimony regarding statements Ms. Gray made during the January 2006 interview as inadmissible hearsay. Defendant maintains that the testimony constituted extrinsic evidence of a prior inconsistent statement admissible for impeachment purposes pursuant to *Evid.R. 613(B)*.

[*P19] *Evid.R. 613(B)* limits the use of extrinsic evidence to impeach a witness with either a prior inconsistent statement or prior inconsistent conduct. Weissenberger 2008 Ohio Evidence Courtroom Manual, 200. Extrinsic evidence is documentary or testimonial evidence submitted to the trier of fact after the conclusion of the testimony of the witness sought to be impeached. *Id.* A prior statement **[**12]** or conduct of a witness may be proved by extrinsic evidence only when two conditions are satisfied. *Id.* First, if the statement is to be offered solely for the purposes of impeaching the witness, a proper foundation must be laid and the witness must be afforded an opportunity to explain or deny the statement. Second, the subject matter of the statement must be a fact that is of consequence to the determination of the action other than the credibility of a witness, a fact that may be shown by extrinsic evidence under certain other rules of evidence, or a fact that may be shown by extrinsic evidence under the common law of impeachment. *Id.*

[*P20] *Evid.R. 613(B)(1)* requires the same foundation required by former law. *Id.* Accordingly, "the content of the statement, as well as the time, the place, and the persons to whom the statement was made or in whose presence the conduct was engaged in, must be disclosed to the witness prior to the introduction of any extrinsic evidence." *Id.* *Evid.R. 613(B)(1)* allows the trial court discretion to permit the introduction of extrinsic evidence in the absence of this foundation where "the interests of justice require." *Id.*

[*P21] In this case, the trial court did not **[**13]** err in limiting defense counsel's questioning of Ms. Smith concerning the statements Ms. Gray made to her during the January 2006 interview. Defense counsel failed to lay a proper foundation during the cross-examination of Ms. Gray for admitting this evidence for impeachment purposes as required by *Evid.R. 613(B)(1)*. Defense counsel asked Ms. Gray only if she recalled the interview with Ms. Smith; she did not question her regarding the detailed contents of the interview. Because Ms. Gray was never specifically asked about the statements she made during the interview, no foundation was laid for the introduction of Ms. Smith's testimony. Further, defendant has not established that the statements were inconsistent, as defense counsel failed to proffer either Ms. Smith's report or her proposed testimony. Accordingly, the trial court properly excluded Ms. Smith's testimony and we overrule the first assignment of error.

[*P22] Defendant's second assignment of error contends the state withheld exculpatory and impeaching evidence in violation of *Brady v. Maryland (1963)*, 373 U.S. 83, 83 S.Ct. 1194, 10 L. Ed. 2d 215. "Suppression by the prosecution of evidence that is favorable to the accused and 'material either to **[**14]** guilt or to punishment' is a violation of due process." *State v. LaMar*, 95 Ohio St.3d 181, 2002 Ohio 2128, P27, 767 N.E.2d 166, quoting *Brady*, at 87. "Evidence suppressed by the prosecution is 'material' within the meaning of *Brady* only if there exists a 'reasonable probability' that the result of the trial would have been different had the evidence been disclosed to the defense." *Id.*, citing *Kyles v. Whitley (1995)*, 514 U.S. 419, 433-434, 115 S.Ct. 1555, 131 L. Ed. 2d 490. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.*, quoting *Kyles*, at 434. An accused bears the burden of proving a *Brady* violation and denial of due process. *State v. Jackson (1991)*, 57 Ohio St.3d 29, 33, 565 N.E.2d 549.

[*P23] Defendant contends the state withheld information until after the trial began that the rape kit included pubic hairs collected from Ms. Gray during the sexual assault examination. Defendant maintains that had this information been made available to him prior to trial, he could have had the hairs tested for illicit substances. Defendant contends that **[**15]** if the hairs tested positive for an illicit substance, such evidence would lend credence to the defense theory that Ms. Gray traded sex for drugs and would also impeach her testimony that she did not willingly engage in sex with defendant.

[*P24] The record does not support defendant's claim that the state withheld information contained in the rape kit. On redirect examination, Ms. Mahan testified about the contents of the rape kit, State's Exhibit D, which included, inter alia, two envelopes marked, respectively, "[p]ubic hair combings" and "[c]ut pubic hairs." (Tr. 263-264.) On recross-examination, defense counsel elicited testimony from Ms. Mahan that she marked both envelopes "[n]ot present," meaning that she found no pubic hairs on Ms. Gray; accordingly, the envelopes were empty. (Tr. 282.) As Ms. Mahan's testimony establishes that no pubic hairs were collected from Ms. Gray and included in the rape kit, the state could not have withheld such evidence.

[*P25] Further, even if the rape kit included pubic hairs collected from Ms. Gray, defendant has failed to establish that the state withheld that information. Defense counsel never claimed that she had not been made aware of the contents of the **[**16]** rape kit prior to trial. Defense counsel did not object when the state identified and used the rape kit during redirect examination of Ms. Mahan. Although defense counsel objected when the

state rested its case and offered the rape kit into evidence, the objection was only to the jurors viewing it, not to the fact that defense counsel had not been apprised of the contents of the rape kit prior to trial. Objection on one ground does not preserve other, unmentioned grounds. *State v. Davis (1964)*, 1 Ohio St.2d 28, 33, 203 N.E.2d 357. For these reasons, defendant has failed to establish a *Brady* violation and a corresponding denial of due process. Accordingly, we overrule the second assignment of error.

[*P26] Defendant argues in his third assignment of error that the state failed to establish the proper chain of custody for the rape kit and the police evidence collection list, and, as a result, the trial court should have instructed the jury that this evidence should be afforded minimal credibility.

[*P27] The chain of custody is part of the authentication and identification requirements of *Evid.R. 901*. *State v. Barzacchini (1994)*, 96 Ohio App.3d 440, 457-458, 645 N.E.2d 137. The state maintains the burden of establishing the chain [**17] of custody. *State v. Brown (1995)*, 107 Ohio App.3d 194, 200, 668 N.E.2d 514, citing *Barzacchini, supra*. However, the state's burden is not absolute, as it "need only establish that it is reasonably certain that substitution, alteration or tampering did not occur." *State v. Blevins (1987)*, 36 Ohio App.3d 147, 150, 521 N.E.2d 1105. A chain of custody may be established by direct testimony or by inference. *State v. Conley (1971)*, 32 Ohio App.2d 54, 60, 288 N.E.2d 296. The proponent of the evidence need not offer conclusive evidence as a foundation, but must offer sufficient evidence to allow the question as to authenticity or genuineness to reach the jury. *State v. Ewing (Apr. 14, 1999)*, Lorain App. No. 97CA006944, 1999 Ohio App. LEXIS 1725. The trier of fact has the task of determining whether there exists a break in the chain of custody. *Columbus v. Marks (1963)*, 118 Ohio App. 359, 194 N.E.2d 791. Moreover, any breaks in the chain of custody go to the credibility or weight afforded to the evidence and not to its admissibility. *Blevins, supra*.

[*P28] Ms. Mahan testified that she sealed and packaged the samples collected in the rape kit and locked it in the hospital evidence room refrigerator in accordance with standardized hospital procedures. She further testified that these standardized [**18] procedures mandate that the evidence room may be accessed only by sexual assault nurse examiners, hospital security personnel, and authorized law enforcement officers. She also stated that authorized law enforcement officers are required to document retrieval of a rape kit from the evidence room. She admitted on cross-examination that documentation pertaining to the rape kit established that she released it; however, the documentation does not indicate to whom she released it.

She described this circumstance as "odd." (Tr. 284.) However, she identified the rape kit at trial and testified that it was in the same or similar condition as when it exited her custody.

[*P29] Defendant points to Ms. Mahan's testimony regarding the deficient hospital documentation as evidence that the state failed to meet its burden of establishing the proper chain of custody. However, defendant's argument ignores Ms. Mahan's testimony that the rape kit presented at trial was in the same or similar condition as it was when it left her custody.

[*P30] As noted, the trier of fact is tasked with determining whether there exists a break in the chain of custody, and that determination goes to the weight or credibility of the [**19] evidence. *Blevins, supra*. Here, based upon the evidence presented, the jury could have reasonably determined that the state established that it was reasonably certain that the rape kit was not subject to alteration or tampering.

[*P31] Regarding the evidence collection list, Detective Thomas Seevers, a member of the Columbus Division of Police Crime Scene Search Unit, testified that he prepared the document, State's Exhibit H-2, in conjunction with the collection of evidence at Ms. Gray's home. On cross-examination, Detective Seevers admitted that some of the identification boxes on State's Exhibit H-2 were not filled out, and, accordingly, the document might possibly apply to numerous crime scenes. On redirect examination, however, Detective Seevers testified that State's Exhibit H-2 correctly documented the evidence collected at the crime scene.

[*P32] Defendant points to Detective Seevers' testimony regarding the inadequate completion of State's Exhibit H-2 as evidence that the state failed to meet its burden of establishing the proper chain of custody for the evidence collected at the crime scene. However, defendant's argument ignores Detective Seevers' testimony that State's Exhibit H-2 applied [**20] to this case. Accordingly, based upon the evidence presented, the jury could have reasonably determined that the state established that it was reasonably certain that the evidence collection list properly delineated the evidence collected at the crime scene.

[*P33] As to defendant's argument that the trial court should have instructed the jury that the rape kit and evidence collection list were entitled to minimal credibility due to breaks in their respective chains of custody, we initially note that State's Exhibit H-2 was not offered into evidence. Further, defendant cites no authority for the proposition that the trial court was required to give such an instruction. Moreover, as the issue of the chain of custody goes to the weight to be afforded the evidence, the trial court's instructions to the jury that it was the sole judge of the facts, the credibility

of the witnesses, and the weight of the evidence sufficiently encompassed the chain of custody issue. A jury is presumed to obey the trial court's instructions. *State v. Ahmed*, 103 Ohio St.3d 27, 2004 Ohio 4190, P147, 813 N.E.2d 637. Accordingly, we overrule the third assignment of error.

[*P34] We will address defendant's fourth and fifth assignments of **[**21]** error together. Defendant argues in his fourth assignment of error that his convictions were based upon insufficient evidence. Defendant contends in his fifth assignment of error that the jury's verdict was against the manifest weight of the evidence.

[*P35] "The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different." *State v. Thompkins*, 78 Ohio St.3d 380, 1997 Ohio 52, 678 N.E.2d 541, paragraph two of the syllabus. Accordingly, we shall separately discuss the standard of review applicable to each.

[*P36] In *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, the Ohio Supreme Court set forth the standard of review when a claim of insufficiency of the evidence is made. "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *Id.* at paragraph two of the syllabus. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential **[**22]** elements of the crime proven beyond a reasonable doubt." *Id.*

[*P37] Whether the evidence is legally sufficient to sustain a verdict is a question of law, not fact. *Thompkins, supra*, at 386. In determining the sufficiency of the evidence, an appellate court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L. Ed. 2d 560. Accordingly, evaluation of witness credibility is not proper on review for evidentiary sufficiency. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002 Ohio 2126, P79, 767 N.E.2d 216. A jury verdict will not be disturbed unless, after viewing the evidence in a light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484, 2001 Ohio 4, 739 N.E.2d 749.

[*P38] A manifest weight argument is evaluated under a different standard. The weight of the evidence concerns the inclination of the greater amount of credible evidence offered in a trial to support one side of the issue

rather than the other. *State v. Gray* (Mar. 28, 2000), *Franklin App. No. 99AP-666*, 2000 Ohio App. LEXIS 1239 **[**23]**. In order for an appellate court to reverse the judgment of a trial court on the basis that the verdict is against the manifest weight of the evidence, the appellate court must unanimously disagree with the factfinder's resolution of the conflicting evidence. *Thompkins, supra*, at 387. Whether a criminal conviction is against the manifest weight of the evidence "requires an examination of the entire record and a determination of whether the evidence produced attains the high degree of probative force and certainty required of a criminal conviction." *State v. Getsy*, 84 Ohio St.3d 180, 193, 1998 Ohio 533, 702 N.E.2d 866.

[*P39] In a manifest weight of the evidence review, the court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and new trial ordered. *Thompkins, supra*. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. **[**24]** *Id.* at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 20 Ohio B. 215, 485 N.E.2d 717. The weight to be given the evidence and the credibility of the witnesses are primarily issues to be decided by the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212. The trier of fact has the benefit of seeing and hearing the witnesses testify and is in the best position to determine the facts of the case. *In re Good* (1997), 118 Ohio App.3d 371, 692 N.E.2d 1072.

[*P40] At the outset, we note that defendant asserts the same arguments under both his fourth and fifth assignments of error. Regardless of whether defendant is challenging his convictions on sufficiency grounds or on manifest weight grounds, we reject his arguments. The evidence reveals not only that the state carried its burden of proof and introduced sufficient evidence on each element of each of the crimes for which defendant was convicted, but that his convictions are supported by the manifest weight of the evidence.

[*P41] Defendant was convicted of one count of aggravated burglary. Accordingly, the state had to prove beyond a reasonable doubt that defendant, by force, stealth, or deception, trespassed in Ms. Gray's home when she was present with purpose to commit a criminal **[**25]** offense therein and that defendant inflicted physical harm upon Ms. Gray or had a deadly weapon or dangerous ordnance on him. *R.C. 2911.11*.

[*P42] Defendant first contends the state failed to prove that he entered Ms. Gray's home by "force, stealth, or deception." Ms. Gray testified that she did not invite

defendant into her home and that it appeared that defendant opened the first-floor windows to gain entry. She further testified that she became aware of defendant's presence in her home only when she was awakened by a noise in her bedroom and saw him hovering over her while she lay in bed.

[*P43] Defendant points to the cross-examination testimony of Detective Seevers, who testified that he neither observed nor collected any evidence that defendant forcibly broke into Ms. Gray's home. However, the state was not required to prove that defendant entered Ms. Gray's home by force. Rather, the state was required to prove that defendant entered Ms. Gray's home by force or by stealth or by deception. Although the term stealth is not defined in the Ohio Revised Code, this court has defined it as "any secret, sly or clandestine act to avoid discovery and to gain entrance into or to remain within a residence [**26] of another without permission." *State v. Lane* (1976), 50 Ohio App.2d 41, 47, 361 N.E.2d 535, quoting the trial court. According to this court, "[t]his is a proper definition of the word and is the one which the average person would understand the word to mean." *Id.* Here, Ms. Gray's testimony, if believed, established entry by stealth, as the jury could reasonably find that defendant entered Ms. Gray's residence through an open first-floor window and made his way to her second-floor bedroom quietly and furtively in order to avoid discovery.

[*P44] Defendant next contends the state failed to prove that he inflicted physical harm upon Ms. Gray. *R.C. 2901.01(A)(3)* defines "physical harm" as "any injury, illness, or other physiological impairment, regardless of its gravity or duration." Here, the evidence, if believed, established that defendant stabbed Ms. Gray in the face with a knife, causing a wound that required seven stitches to close. Hence, the state sufficiently established the element of physical harm.

[*P45] Defendant points to Ms. Gray's cross-examination testimony, where she stated that, in August 2005, her estranged husband hit her in the face. Defendant argues that this admission renders her testimony [**27] that defendant cut her face with a knife unreliable. However, Ms. Gray testified on redirect examination that the injuries she sustained in the August 2005 incident were no longer visible in October 2005. Further, other testimony and physical evidence corroborated Ms. Gray's testimony that defendant stabbed her with a knife during the October 2005 attack. Ms. Mahan testified that Ms. Gray presented at the hospital with a cut on her face and the emergency room physician assistant, Madonna McPherson, testified that closing the wound required seven stitches. Further, evidence collected at the crime scene included bloody bed sheets and a bloody pillowcase.

[*P46] Defendant also contends that the state failed

to prove that the knife used during the attack was a deadly weapon. For purposes of the aggravated burglary statute, "deadly weapon" has the same meaning as in *R.C. 2923.11(A)*. That statute defines "deadly weapon" as "any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon." This court has stated that "pursuant to *R.C. 2923.11*, a knife is clearly a deadly weapon." *State v. Banks* (June 15, 2000), *Franklin App. No. 99AP-1237*, 2000 Ohio App. LEXIS 2630 [**28]. See, also, *State v. Jamhour*, *Franklin App. No. 06AP-20*, 2006 Ohio 4987, P12 ("[a]s wielded, the knife met the definition of deadly weapon"). Accordingly, the evidence, if believed, established that defendant had a deadly weapon.

[*P47] Defendant also argues that the state did not prove that the knife he was carrying at the time of his arrest was the one used to stab Ms. Gray during the attack. Defendant points to the cross-examination testimony of Detective McKee, who stated that no evidence of Ms. Gray's blood or DNA was found on the knife. However, Detective McKee testified on redirect examination that he did not expect to find any DNA or blood on the knife, given the length of time that had passed between the time of the attack and defendant's arrest. For these reasons, we find that defendant's conviction for aggravated burglary was supported by sufficient evidence and was not against the manifest weight of the evidence.

[*P48] Defendant was also convicted of one count of felonious assault. Thus, the state had to prove that defendant knowingly caused serious physical harm to Ms. Gray or caused physical harm to Ms. Gray by means of a deadly weapon. *R.C. 2903.11*. [**29] We have already concluded that the state sufficiently proved that defendant caused physical harm to Ms. Gray and that he used a deadly weapon in doing so. Defendant raises the same arguments as those asserted in support of his claim as to the aggravated burglary conviction. Having already disposed of those arguments, we need not address them here. Accordingly, we find that defendant's conviction for felonious assault was supported by sufficient evidence and was not against the manifest weight of the evidence.

[*P49] Defendant was also convicted on five counts of rape. Therefore, the state had to prove that defendant engaged in sexual conduct with Ms. Gray when he purposely compelled her to submit by force or threat of force. *R.C. 2907.02(A)(2)*. *R.C. 2907.01(A)* defines "sexual conduct" as "vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another.

Penetration, however slight, is sufficient to complete vaginal or anal intercourse."

[*P50] Here, Ms. Gray testified [**30] that defendant cut her face with a knife, placed a pillowcase over her head, and forced vaginal and anal sex upon her. Thereafter, he turned her over and again engaged in vaginal and anal sex. Finally, defendant forced Ms. Gray to perform fellatio on him until he ejaculated. According to Ms. Gray, defendant committed all of these acts while wielding a knife. This evidence, if believed, was sufficient to support the five rape convictions.

[*P51] Further, other testimony and evidence corroborated Ms. Gray's testimony. Crime scene photographs depicted blood on the bed sheets and pillowcase. Ms. Mahan and Detective McKee testified that Ms. Gray's demeanor following the attack was that of a person who had been through a traumatic event. Ms. Mahan further testified that the physical examination revealed a laceration on Ms. Gray's face and abrasions and a bath bead on her vagina, and that these physical findings were consistent with the history relayed by Ms. Gray. Further, a sock found in the living room contained DNA matching that of defendant, corroborating Ms. Gray's testimony that she wiped her mouth on the sock shortly after defendant ejaculated in her mouth.

[*P52] Defendant maintains that the state [**31] did not prove that Ms. Gray was compelled to submit by force or threat of force. Specifically, defendant points to the absence of anal injuries as evidence that he did not compel Ms. Gray to submit by force or threat of force. However, Ms. Mahan testified that the absence of anal injuries was not unusual because Ms. Gray reported that she complied with defendant's orders.

[*P53] Defendant also points to Ms. Mahan's testimony that Ms. Gray reported that she had consensual sex with someone on October 1, 2005, as evidence that her vaginal abrasions could have resulted from that event rather than an attack on October 3, 2005. However, Ms. Mahan also stated that it was improbable that a woman engaging in consensual sex would suffer vaginal abrasions.

[*P54] Finally, defendant contends that the DNA found in semen contained on the sock corroborates his defense theory that Ms. Gray engaged in consensual sex with him in exchange for drugs. However, there was absolutely no evidence presented to support this theory. Indeed, no evidence was presented to establish that Ms. Gray was a drug abuser or that she had ever met defendant prior to the attack. Further, the DNA evidence actually corroborated Ms. Gray's [**32] testimony. Accordingly, we find that defendant's convictions for rape were supported by sufficient evidence and were not against the manifest weight of the evidence.

[*P55] Having determined that defendant's

convictions for aggravated burglary, felonious assault, and rape were supported by sufficient evidence and were not against the manifest weight of the evidence, we overrule defendant's fourth and fifth assignments of error.

[*P56] Defendant's sixth and seventh assignments of error contend that he received ineffective assistance of counsel at trial. The *Sixth Amendment to the United States Constitution* guarantees a criminal defendant the effective assistance of counsel. The burden of demonstrating ineffective assistance of counsel is on the defendant. *State v. Smith* (1985), 17 Ohio St.3d 98, 100, 17 Ohio B. 219, 477 N.E.2d 1128. In order to prevail on an ineffective assistance of counsel claim, defendant must meet the two-prong test enunciated in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674. Initially, defendant must show that counsel's performance was deficient. *Id.* at 687. To meet that requirement, defendant must show that counsel's errors were so serious that counsel was not functioning as the "counsel" guaranteed [**33] by the *Sixth Amendment*. *Id.* Defendant may prove counsel's conduct was deficient by identifying acts or omissions that did not result from reasonable professional judgment. *Id.* at 690. The court must then determine whether, in light of all circumstances, the identified acts or omissions were outside the range of professionally competent assistance. *Id.* In analyzing the first prong of the *Strickland* test, there is a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance. *Id.* at 689. Defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Id.*, citing *Michel v. Louisiana* (1955), 350 U.S. 91, 100, 76 S.Ct. 158, 100 L. Ed. 83.

[*P57] The second prong of the *Strickland* test requires defendant to prove that counsel's deficient performance prejudiced him. *Id.* at 692. This requires that defendant show that counsel's errors were so serious as to deprive him of a fair trial, a trial whose result is reliable. *Id.* at 687. Defendant would meet this standard with a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would [**34] have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

[*P58] Defendant first contends defense counsel's performance was deficient in failing to present evidence in support of the defense theory that Ms. Gray used drugs and engaged in consensual sex with defendant in exchange for drugs. Defendant claims that defense counsel should have had hair samples from the rape kit tested for illicit substances and should have called witnesses to testify that Ms. Gray was a drug abuser.

[*P59] Initially, we note that the record contains no

facts to indicate whether counsel failed to have the hair samples tested or whether counsel failed to make any effort to find witnesses to testify about Ms. Gray's alleged drug use. As this court stated in *State v. Matthews, Franklin App. No. 03AP-140, 2003 Ohio 6307*, "[i]t is impossible for a court to determine on a direct appeal from a criminal conviction whether counsel was ineffective in his representation where the allegation of ineffectiveness is based on facts dehors the record." *Id. at P31*, citing *State v. Gibson (1980), 69 Ohio App.2d 91, 95, 430 N.E.2d 954*. Defendant's claims are based on facts that cannot **[**35]** be ascertained from the record before us. Thus, we may not consider such claims in this direct appeal. A ruling in favor of defendant would be "purely speculative." *Id.*, quoting *State v. Madrigal, 87 Ohio St.3d 378, 390, 2000 Ohio 448, 721 N.E.2d 52*.

[*P60] Further, defendant's failure to have the hair samples tested could certainly be viewed as trial strategy. A reviewing court must extend great deference to counsel's trial decisions. *Id. at P29*. "Debatable trial tactics and strategies generally do not constitute ineffective assistance of counsel." *Id.*, citing *State v. Clayton (1980), 62 Ohio St.2d 45, 49, 402 N.E.2d 1189*. Ms. Mahan testified that there was no indication of a need to drug-test Ms. Gray. Accordingly, defense counsel may have decided not to pursue drug-testing for fear that the results would have damaged the defense case.

[*P61] In addition, defendant has failed to name any witnesses defense counsel could have called in his defense but did not. Such failure may mean that no such witnesses exist. If there was no additional witness testimony to be presented, defense counsel could not be ineffective in failing to present it.

[*P62] Defendant also contends that defense counsel's performance was inadequate in failing to **[**36]** object to leading questions posed by the prosecution on redirect examination of Ms. Gray. Defendant takes issue with three questions which were utilized to demonstrate that questions are not evidence. The Ohio Supreme Court has held that the failure to object to leading questions does not usually constitute ineffective assistance of counsel. *State v. Jackson, 92 Ohio St.3d 436, 449, 2001 Ohio 1266, 751 N.E.2d 946*. In reviewing the instances cited by defendant, defense counsel's decision to forego raising objections could be viewed as sound trial strategy, and we decline to second-guess that decision.

[*P63] Defendant also maintains that defense counsel's performance was deficient in failing to move for an acquittal, pursuant to *Crim.R. 29*, at the close of defendant's case. Defense counsel's failure to make a *Crim.R. 29* motion for acquittal is not ineffective assistance of counsel where such a motion would have been futile. *Defiance v. Cannon (1990), 70 Ohio App.3d*

821, 826-827, 592 N.E.2d 884, 8 Anderson's Ohio App. Cas. 113. The trial court may grant a *Crim.R. 29* motion only where, construing the evidence most strongly in favor of the state, the evidence is insufficient to sustain a conviction. *Jenks, supra*.

[*P64] Here, defense counsel made a *Crim.R. 29* motion **[**37]** at the close of the state's case, arguing primarily that Ms. Gray "ha[d] no credibility." (Tr. 482.) The trial court denied the motion, noting that it found the victim to be "very, very consistent" and credible. (Tr. 487.) Where, as here, the state's case-in-chief linked the defendant to the charged crimes, failure to move for a judgment of acquittal under *Crim.R. 29* does not constitute ineffective assistance of counsel. *State v. Small (May 1, 2001), Franklin App. No. 00AP-1149, 2001 Ohio App. LEXIS 1963*.

[*P65] Finally, defendant contends defense counsel's performance was deficient in presenting two conflicting defense theories. Defendant contends that defense counsel first claimed that Ms. Gray engaged in consensual sex with defendant in order to obtain drugs from him, but later argued that defendant was never present in Ms. Gray's home. Initially, we note that our review of the record reveals that defense counsel did not present conflicting defense theories. The defense theory throughout the entire trial was that Ms. Gray was a drug abuser who agreed to masturbate defendant in exchange for drugs; once the masturbation was completed, defendant wiped his semen on a sock he found on the floor and then refused to provide **[**38]** the drugs to Ms. Gray. To avenge the denial, Ms. Gray staged the crime scene, including cutting her own face with a knife, and reported to the police that she had been raped. Counsel presented this theory in opening statement, consistently developed it through vigorous cross-examination of the state's witnesses, particularly Ms. Gray, and argued it fervently during closing argument. Further, even assuming that defense counsel hinted at an alternative theory, the Ohio Supreme Court has stated that "it is not necessarily deficient performance for defense counsel to present inconsistent alternative theories to the jury." *State v. Mundt, 115 Ohio St.3d 22, 2007 Ohio 4836, P134, 873 N.E.2d 828*. Further, a mid-trial change in strategy does not necessarily constitute deficient performance. *Id.*

[*P66] Having determined that defendant has failed to establish that his trial counsel's performance was deficient, we need not examine prejudice. Accordingly, we overrule defendant's sixth and seventh assignments of error.

[*P67] Having overruled defendant's seven assignments of error, we hereby affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

PETREE and SADLER, JJ., concur.

2008 Ohio 5260, *, 2008 Ohio App. LEXIS 4398, **

6(C), Article IV, Ohio Constitution.

T. BRYANT, J., retired [**39] of the
Third Appellate District, assigned to
active duty under authority of *Section*



17 of 19 DOCUMENTS

**STATE OF TENNESSEE, APPELLEE, VS. HARVEY D'HATI MOORE,
APPELLANT.**

C.C.A. NO. 03C01-9704-CR-00131

COURT OF CRIMINAL APPEALS OF TENNESSEE, AT KNOXVILLE

*1998 Tenn. Crim. App. LEXIS 330***March 18, 1998, Opinion Filed**

SUBSEQUENT HISTORY: [*1] Permission to Appeal Denied January 18, 2000.

PRIOR HISTORY: KNOX COUNTY. Hon. Ray L. Jenkins, Judge. (Criminally Negligent Homicide).

DISPOSITION: AFFIRMED.

COUNSEL: For Appellant: William L. Brown, Knoxville, TN (at trial and on appeal). M. Jeffrey Whitt, Knoxville, TN (at trial only).

For Appellee: John Knox Walkup, Attorney General and Reporter, Nashville, TN. Sandy C. Patrick, Assistant Attorney General, Nashville, TN. Randall E. Nichols, District Attorney General and Fred Bright, Jr., Assistant District Attorney General, Knoxville, TN.

JUDGES: Gary R. Wade, Judge, CONCUR: David H. Welles, Judge, Jerry L. Smith, Judge.

OPINION BY: GARY R. WADE

OPINION

OPINION

The defendant, Harvey D'Hati Moore, was indicted for the first-degree child abuse murder of Kadijah Hopewell. *See Tenn. Code Ann. § 39-13-202(a)(4)* (Supp. 1993). The jury returned a verdict of guilt of the lesser grade offense of criminally negligent homicide. *See Tenn. Code Ann. § 39-13-212*. The trial court imposed a sentence of 452 days, which the defendant had already served by the time of trial.

In this appeal of right, the defendant presents the following issues for review:

(I) whether the evidence is sufficient;

(II) whether the trial court erred by instructing [*2] the jury on criminally negligent homicide; and

(III) whether the trial court erred by refusing to allow the defense line of questioning which would show that someone else committed the homicide.

We affirm the judgment of the trial court.

State's Proof

On April 28, 1994, four-month-old Kadijah Hopewell suffered "hemorrhages in her eye grounds, ... multiple bruises over the forehead, over the ... area of the bone beneath the eye on the left side and over the back and ... a crescent-shaped bruise on the ... thigh." According to her treating physician, Dr. Christopher Miller, she was "comatose and had a significant brain problem." There was a large amount of blood throughout much of the space that surrounds the brain. The victim survived until May 2, 1994, when taken off the ventilator.

Dr. Miller testified that the victim's injuries were the result of shaken baby syndrome, which he described as a "violent to and fro shaking of the body." Dr. Miller related that the injuries must have occurred very near the time emergency medical technicians (EMT's) first saw the child because she would have survived only a short period of time given the nature of the injuries, unless [*3] she received medical care. He estimated that the shaking "could have" occurred as early as twelve minutes before the EMT's first arrived but definitely within hours. It was his opinion that falling out of bed would not cause the type of injuries the victim suffered. He conceded that it

would not be unusual for a person who discovered a child not breathing to shake the child to try to get her to respond. Dr. Miller testified that a bruise on the victim's leg appeared to be a bite wound, but he had no opinion, however, as to when the injury occurred.

The defendant informed Dr. Miller that he was with the child prior to her admission to the hospital. He told the doctor that he had placed the child in bed and that he had heard a thump, and then discovered she had fallen to the floor. The defendant reported that the child was not breathing, and so he called 911 and received instructions for administering CPR until the paramedics arrived. Dr. Miller recalled the defendant saying the child had been "sleeping all day recently and that she had been crying for no apparent reason."

Dr. Joel Sanner, who also treated the victim, testified that he could not determine when the injuries were inflicted [*4] but was certain they could not have been caused by the victim's falling out of bed. It was his opinion that the degree of neurological suffering could only be caused by a far more severe trauma. Dr. Sanner described the injuries as shaken baby syndrome.

Dr. Joseph Childs testified that he detected no brain wave activity in the victim and determined she was brain dead. His CAT scan report showed "absolute evidence of shaken baby syndrome." Dr. Childs estimated that the victim was injured some four to six hours prior to her admission to the hospital. It was his belief that if the baby had been shaken before she was placed in the bed, she would not have been able to roll over. Dr. Childs conceded that shaken baby syndrome can be caused by repeated shaking over a period of time. He testified that while a single blunt trauma could cause some of the symptoms the victim suffered, retinal hemorrhaging is not typically caused by a single blunt trauma. Dr. Childs conceded that lethargy could be caused by a minor episode of shaking. He did not believe that chronic shaking had occurred in this instance because there was no bleeding in the subdural space.

Dr. James Hayes, who examined the victim [*5] the day after her hospitalization, observed that her clitoris was heavily bruised and greatly enlarged, probably due to abusive pinching. He described an elliptical-shaped burn outside her rectum, which appeared to be two to three days old. Dr. Hayes observed old healing tears of the rectum consistent with chronic forceful entry into the rectum and a bruise several days old on the victim's left thigh, apparently caused by a bite.

Arthur Bohanan, police specialist with the Knoxville Police Department, testified that he photographed the victim within a few hours of her admission to the hospital. He observed at least four bite marks on the victim's legs. Officer Bohanan acknowledged that Marsha Hopewell, the victim's mother, did not "show any

signs of a grieving mother" after the incident.

Marsha Hopewell, who was called as a state witness, testified that she had resided with the defendant and the victim in Austin Homes. She remembered that the victim, four-and-one-half months old at the time of her hospitalization, was able to roll over and scoot backwards on the floor. Ms. Hopewell recalled that at 9:00 on the morning of the hospitalization, the victim seemed like "her normal self." [*6] She described the location of the bed as in the corner of the room so that the left side and the head of the bed were against walls. Ms. Hopewell recalled that at 8:30 that evening, she placed the victim in the top left corner of the bed, placed a pillow at the victim's feet and on her right side, and then laid a blanket around the perimeter of the bed to keep the baby from falling. She testified that she ordinarily used pillows to keep the child in the bed, but because of a fall from the bed the day before, she used the blanket to further secure her.

Elwana Shorts, a friend who had been staying at the apartment for about a week, was present the evening the victim required hospitalization. Ms. Hopewell remembered spending the earlier part of the day at the apartment with the defendant and recalled that he drank two or three beers and smoked marijuana. Ms. Hopewell testified that she and Ms. Shorts left for about thirty minutes right after the victim was put to bed. As they were walking back to the apartment, the defendant hurriedly approached and informed them that the victim had fallen off the bed and was not breathing. The defendant informed Ms. Hopewell that when he called 911, [*7] he was instructed to shake the baby. Emergency personnel transported the victim to the hospital.

About two weeks before the shaking incident, Adrian Watson had kept the victim for three nights while Ms. Hopewell served a jail term. Ms. Hopewell recalled that, while at the Watson residence, the victim "got ... a bruise on the side of her face and a little cut on her behind." She remembered that on the date of the victim's hospitalization, prior to leaving the victim with the defendant, the only injuries were those that had occurred while in Ms. Watson's care. Ms. Hopewell recalled that the victim had no bite marks but admitted that she would occasionally "gnaw" playfully on the baby using only her lips. She insisted she never left teeth marks.

Ms. Hopewell testified that the defendant told her that he was in the living room lying on the couch when he heard the baby fall from the bed. When he went in the bedroom to check, the victim was not breathing. On a different occasion, the defendant told Ms. Hopewell that he was in the bathroom and that another unidentified female caused the injuries.

Ms. Hopewell testified that she had known the

defendant for about a month-and-a-half before [*8] he moved in with her. During that time, she never saw him harm the child in any way. She claimed that the defendant had never been violent towards her and treated the victim like "she was his own." In addition to the baby's rolling out of bed on April 27th, she had fallen off of the couch while in Watson's care.

Ms. Hopewell recalled that about two weeks before the shaking incident, the victim contracted bronchitis and a physician prescribed a breathing machine for her. While acknowledging that she had reported the week before the incident that the victim "slept a lot more than she was supposed to," Ms. Hopewell denied stating the child had rolled off the bed numerous times.

Ms. Hopewell remembered an interview by Detective Randy York, who asked if "anything sounded suspicious to you about [the defendant] after he had described all these injuries to you, that he was the only one with [the baby]." At that time, Ms. Hopewell told York that she did not see anything suspicious about it. At trial, Ms. Hopewell, who denied ever shaking the baby, speculated the defendant was the only person who could have inflicted the injuries. She then testified, "I'm not going to say that. I don't [*9] know if anybody came in the house while I was gone or not, so I can't point the finger at him at all."

Elwana Shorts, who "used" to be a close friend to Ms. Hopewell, arrived on the day of the victim's hospitalization around 4:00 P.M. She described the victim as alert, gave her a bath, and observed no bruises on the victim's neck, face, chest, or legs. Afterwards, the victim was fed and then fell asleep. She recalled leaving the apartment around 6:30 or 7:00 P.M. and being gone thirty to forty-five minutes. Ms. Shorts denied mentioning to Detective York a bruise caused by Ms. Hopewell's playfully "gnawing on [the victim's] leg" but did inform him that the victim had rash near the rectum. Ultimately, Ms. Short conceded on cross-examination that the child had a bruise on her right leg caused by her mother's "gnawing."

Detective Randy York testified that he conducted two separate interviews with the defendant, seventeen years old at the time, concerning the death of the victim. The defendant had claimed that he was in the living room on the couch when he heard the victim fall from the bed and hit the floor; he went into the bedroom and discovered she was not breathing. The defendant [*10] explained that he shook the child gently to revive her, sprinkled water on her face, and slapped her a few times. The defendant informed the detective that two or three days before the shaking incident, he noticed the victim had a black eye and a bruise on her face. When Detective York advised the defendant that the victim's injuries could not have been caused by falling from a bed, the defendant acknowledged that he shook the victim three

times in an attempt to get a response. When asked if he "lost it," the defendant responded negatively.

The defendant admitted that he was a "little intoxicated" when he heard the victim fall, conceding that he drinks and smokes marijuana every day. While denying any knowledge of who injured the victim, the defendant did point out that the child had suffered a black eye while in Ms. Watson's care. He claimed that he never saw Ms. Hopewell strike the victim. The defendant informed the detective that the victim was alert and awake when put to bed. The defendant insisted that he meant no harm to the child. The defendant contended that the burn appeared during Ms. Watson's care and the vaginal trauma occurred when Ms. Shorts cared for the victim a few [*11] hours before her hospitalization.

Defendant's Proof

Elwana Shorts testified that Ms. Watson had kept the baby during the day on April 25th, 26th, and 27th. She also identified an individual by the name of Clarendet who kept her. Ms. Shorts recalled the defendant and the victim's mother arguing about who would put the baby to bed on the evening prior to the hospitalization. She recalled that the defendant carried the baby to the bedroom and Ms. Hopewell followed; about five or ten minutes later, the defendant returned and lay on the couch while Ms. Hopewell remained with the baby for another five or ten minutes. When she returned to the living room area, the two women left. She recalled that the baby, who appeared normal and alert during the day, was asleep when taken to the bedroom.

Dr. Stuart Van Meter, a pathologist at UT Hospital, testified that the victim died of shaken baby syndrome. He described the bruises on the victim's legs and pubis "in a pattern typical of a human bite mark." It was his opinion that the bites occurred at the same time a few days to a week before the autopsy. He testified that the bruises could have been inflicted at about the time the child [*12] was admitted to the hospital. There were superficial abrasions on the pubis where the skin was scraped apparently by teeth. While Dr. Van Meter observed bruises on the front and back of the victim, he did not find any evidence of tearing of the rectum and could not determine what had caused the crescent-shaped injury near the rectum.

Private Investigator Barry Rice, who interviewed Ms. Hopewell in August of 1995, recalled her claim that the victim had fallen off the bed two to three times before and had stayed with Ms. Watson on a regular basis. He remembered her claim that about two weeks before her hospitalization, the victim had bruising, "acted funny," and slept a lot after a visit with Ms. Watson.

The defendant, who moved in with Ms. Hopewell in late February or early March of 1994, testified that he

treated the victim like his own and loved her. He claimed that he often had to remind Ms. Hopewell to take care of the child and not leave her alone. The defendant recalled that the victim had a black eye, a bruise on her jaw, and some kind of cut near her rectum after one particular weekend in Ms. Watson's care but that Ms. Hopewell refused his suggestion of medical care. He insisted [*13] that the child was never the same after that visit.

The defendant testified that he awoke around 9:00 A.M. on the day of the victim's hospitalization and spent much of the day playing basketball, drinking beer, and smoking marijuana. He claimed that he fed the baby and tried to play with her at about 6:00 P.M. and that, later, an argument ensued over who would put the baby to bed. The defendant recalled placing a pillow between the child and the wall so she would not fall from that side of the bed and placing a pillow at the foot of the bed so she would not "scoot" down. The defendant claimed that he used the pillows because the victim had fallen out of bed several times previously. He testified that he left the bedroom about five or ten minutes before Ms. Hopewell did and was on the couch when the two women left the apartment. The defendant contended that he was in the bathroom when he heard the child fall and, after rushing into the bedroom, found her limp. He explained that he shook her to get a response, tapped her on the face and sprinkled water on her face before calling 911.

Adrian Watson testified in rebuttal that she provided child care for the victim approximately five [*14] times, the last time being about two weeks before the victim died. She claimed that she kept the child, who had a bruise on her head, for three nights while Ms. Hopewell was in jail. When she asked the defendant what caused the bruise, the defendant said that she fell off the bed. Ms. Watson acknowledged that the victim rolled off the couch on one occasion while in her care but sustained no injuries. Ms. Watson also contended that she went to Ms. Hopewell's residence on occasion and found the victim alone in the apartment.

I

The defendant's first issue is that the evidence is insufficient to sustain a conviction for criminally negligent homicide. The defendant argues that "whoever harmed this baby did it deliberately and intentionally" and that there is no proof that the injuries were caused by an accident or negligence.

When the defendant challenges the sufficiency of the evidence on appeal, the state is entitled to the strongest legitimate view of the trial testimony and all reasonable inferences which might be drawn therefrom. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation [*15] of conflicts in the proof are matters entrusted to the jury as triers of fact.

Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). The relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Williams*, 657 S.W.2d 405, 410 (Tenn. 1983); Tenn. R. App. P. 13(e). A crime may also be established by the use of circumstantial evidence only. *State v. Tharpe*, 726 S.W.2d 896, 899-900 (Tenn. 1987); *Marable v. State*, 203 Tenn. 440, 313 S.W.2d 451, 457 (Tenn. 1958).

"Criminally negligent conduct which results in death constitutes criminally negligent homicide." *Tenn. Code Ann. § 39-13-212(a)*. Criminal negligence is defined as follows:

[A] person ... acts with criminal negligence with respect to the circumstances surrounding that person's conduct or the result of that conduct when the person ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation [*16] from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

Tenn. Code Ann. § 39-11-302(d).

Viewing the evidence in the light most favorable to the state, the proof shows that Ms. Shorts and Ms. Hopewell left the apartment between 8:30 and 8:40 P.M., on April 28, 1994, at which point the victim appeared to be acting normally. From then until the 911 call, the victim was in the exclusive care of the defendant. Expert testimony established the cause of death as shaken infant syndrome. A reasonable inference is that after the two women left the apartment, the defendant inflicted the fatal injuries. Yet the defendant adamantly denied any intent to harm or kill the infant. These facts support the conclusion that the defendant handled the victim in a violent manner, which qualified as a "substantial and unjustifiable risk," and that his failure to perceive that risk was a deviation from the standard of care an ordinary person would exercise under all the circumstances. *See also State v. Adams*, 916 S.W.2d 471 (Tenn. Crim. App. 1995) (where the proof showed the child victim suffered severe brain [*17] injuries while under the sole care and supervision of the defendant, there was sufficient evidence to support the verdict for criminally negligent homicide). In our view, the jury acted within its prerogative in determining that the defendant was guilty of criminally negligent homicide.

II

The defendant also argues that the trial court erred by instructing the jury on criminally negligent homicide. He complains that the instruction allowed the jury to reach a compromise verdict wherein the jury could "punish him as minimally as possible without letting him go outright." The defendant also claims that he was denied adequate notice that he would have to defend against an accidental killing. The trial court instructed on first degree aggravated child abuse murder, reckless homicide, and criminally negligent homicide. The defendant objected only to the instruction on reckless homicide.

The trial judge has a duty to give a complete charge of the law applicable to the facts of the case. *State v. Harbison*, 704 S.W.2d 314, 319 (Tenn. 1986). It is settled law that when "there are any facts that are susceptible of inferring guilt of any lesser included offense or offenses, then there [*18] is a mandatory duty upon the trial judge to charge on such offense or offenses. Failure to do so denies a defendant his constitutional right of trial by a jury." *State v. Wright*, 618 S.W.2d 310, 315 (Tenn. Crim. App. 1981) (citations omitted); *Tenn. Code Ann. § 40-18-110(a)*. When there is a trial on a single charge of a felony, there is also a trial on all lesser included offenses, "as the facts may be." *Strader v. State*, 210 Tenn. 669, 362 S.W.2d 224, 227 (Tenn. 1962). Trial courts, however, are not required to charge the jury on a lesser included offense when the record is devoid of evidence to support an inference of guilt of the lesser offense. *State v. Stephenson*, 878 S.W.2d 530, 549-50 (Tenn. 1994).

In *Wright v. State*, 549 S.W.2d 682 (Tenn. 1977), our supreme court confirmed the test to determine whether an offense is lesser and included in the greater offense. Quoting the late Justice Weldon White in *Johnson v. State*, 217 Tenn. 234, 397 S.W.2d 170, 174 (Tenn. 1965), the court ruled as follows:

The true test of which is a lesser and which is a greater crime is whether the elements of the former are completely contained within the latter, so that [*19] to prove the greater the State must first prove the elements of the lesser.

Wright v. State, 549 S.W.2d at 685-86.

Two years later, the supreme court again addressed the subject:

We believe that the better rule, and the one to be followed henceforth in this State, is the rule adopted implicitly by this court in *Wright v. State*, *supra*, that, in this

context, an offense is necessarily included in another if the elements of the greater offense, as those elements are set forth in the indictment, include, but are not congruent with, all the elements of the lesser. If there is evidence to support a conviction for such a lesser offense, it must be charged by the trial judge.

Howard v. State, 578 S.W.2d 83, 85 (Tenn. 1979).

In *State v. Trusty*, 919 S.W.2d 305, 310 (Tenn. 1996), our supreme court observed there are "two types of lesser offenses that may ... form the basis for a conviction: a lesser grade or class of the charged offense and a lesser included offense." A lesser grade is determined "by statute." *Id.* Criminal homicide is divided into the grades of "first-degree murder, second-degree murder, voluntary manslaughter, [and] criminally [*20] negligent homicide." *Id.* Under the analysis set forth in *Trusty*, we must conclude that criminally negligent homicide is a lesser grade offense of first-degree child abuse murder; because there was evidence to support the conviction for that lesser offense, we cannot conclude the trial court erred by charging it.

Trial judges should charge the jury on lesser included offenses charged in the indictment whether requested to do so or not. *Tenn. Code Ann. § 40-18-110(a)*. Failure to instruct on a lesser included offense denies a defendant his constitutional right to trial by jury. *State v. Wright*, 618 S.W.2d 310, 315 (Tenn. Crim. App. 1981).

In 1995, Judge Welles spoke for this court in its determination that an omission of a lesser included offense from the charge to the jury always requires a new trial. *State v. Boyce*, 920 S.W.2d 224 (Tenn. Crim. App. 1995). The opinion included a quote from *Poole v. State*, 61 Tenn. 288, 294 (1872):

However plain it may be to the mind of the Court that one certain offense has been committed and none other, he must not confine himself in his charge to that offense. When he does so he invades the province of the jury, whose [*21] peculiar duty it is to ascertain the grade of the offense. However clear it may be, the Court should never decide the facts, but must leave them unembarrassed to the jury.

Boyce, 920 S.W.2d at 927.

The thrust of the defendant's argument is that if criminally negligent homicide had not been charged, he

would have been acquitted and that the conviction on the lesser offense represents a compromise verdict. In our view, the defendant is still not entitled to relief. In *State v. Davis*, 751 S.W.2d 167 (Tenn. Crim. App. 1988), the defendant was indicted for first degree murder. The jury found him guilty of voluntary manslaughter. On appeal he argued the record was devoid of any evidence showing provocation. Our court rejected his claim:

On appeal, a conviction of a lesser degree of the crime charged, or of a lesser included offense, will be upheld, even if there is no evidence in the record to establish the technical elements of that crime, if the evidence demands a conviction of a higher degree of homicide than that found by the verdict, and there is either no evidence in support of acquittal of the greater crime, or if there is, the verdict of the jury clearly [*22] indicates that the evidence in support of acquittal was disbelieved, on the theory that the defendant was not prejudiced by the charge and the resulting verdict.

We therefore hold that the judgment is valid, though there was no evidence that the homicide was committed "on a sudden heat."

Davis, 751 S.W.2d at 170 (citations omitted).

Also, "when the law provides that criminal negligence suffices to establish an element of an offense, that element is also established if a person acts intentionally, knowingly, or recklessly." *Tenn. Code Ann. § 39-11-301(a)(2)*.

The defendant's complaint that he was not given proper notice that he would have to defend against negligent homicide is meritless. "An indictment charging a greater offense impliedly charges all lesser included offenses for which the proof would support a conviction." *State v. Banes*, 874 S.W.2d 73, 80 (Tenn. Crim. App. 1993). The indictment charging first degree murder was sufficient to put the defendant on notice for criminally negligent homicide.

III

The defendant's final argument is that the trial court erred by refusing to admit evidence suggesting that the victim's mother killed the child. The state [*23] argues that the proposed evidence was irrelevant. We find no reversible error.

An offer of proof was made by the defense. See *Tenn. R. Evid. 103*. Shannon Bean, an employee of the hospital where the victim was treated, saw the victim's

mother while at the hospital and made the following observation:

[Ms. Hopewell] had a flat affect or there were times where she was angry and distant from things that were going on ... There were different times where she was screaming at different people or laughing with her friends. There were times when it seemed like she was crying ... but it didn't look like she was really crying.

Beverly Schneider and Jeane Short would have testified in a similar fashion.

The defendant also sought to admit a letter, wherein, after the incident, Ms. Hopewell declared her love for the defendant, wrote that she missed having sex with him, and indicated that she did not believe he committed the crime.¹

1 In his brief the defendant also complains that the trial court would not let Detective Bohanan testify that the victim's mother told him she did not care about the baby. There was not an offer of proof so we may not consider the merits of the claim. See *Tenn. R. Evid. 103*; *Alley v. State*, 882 S.W.2d 810, 815 (Tenn. Crim. App. 1994).

[*24] It is always appropriate for a defendant, charged with a criminal offense to prove that another person had a motive to commit the offense for which he is charged. *Sawyers v. State*, 83 Tenn. 694, 695 (1885). In *State v. Kilburn*, 782 S.W.2d 199 (Tenn. Crim. App. 1989), this court noted as follows:

Where ... a defendant attempts to raise a third party defense, he is allowed to present proof tending to show that another had the motive and opportunity to have committed the offense. Where the proof is consistent with this hypothesis, it is to be considered by the jury.

782 S.W.2d at 204.

The evidence by which the guilt of a third party is to be established must conform to all the rules regulating the admission of evidence. Thus, the third person's guilt cannot be established by hearsay. *State v. McAlister*, 751 S.W.2d 436, 439 (Tenn. Crim. App. 1987). Where there is evidence tending to connect another person with the criminal act, evidence of that person's motive or intent and opportunity to commit the crime is admissible as long as it is not too remote in time nor too weak in probative value. 22A C.J.S. Criminal Law § 729 (1989).

The evidence to establish that [*25] someone other than the defendant is the guilty party must qualify as relevant if presented in the trial of the third party; and the evidence offered as to the commission of the crime by a third party must be limited to such facts as are inconsistent with the defendant's guilt, and to such facts as raise a reasonable inference of innocence. *Hensley v. State*, 28 Tenn. 243 (1848). To be admissible, the evidence must directly connect the third party with the substance of the crime and suggest that someone besides the accused is the guilty person. "Evidence which can have no other effect than to cast a bare suspicion on another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible." 22A C.J.S. Criminal Law § 729 (1989) (footnote omitted).

In our view, the proffered evidence was not relevant proof that Ms. Hopewell killed the victim. "Relevant evidence" is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would have been without the evidence." Tenn. R. Evid. 401. In *State v. Forbes*, 918 S.W.2d 431, 449 (Tenn. Crim. App. 1995), [*26] our court discussed the standard of review of a trial court's determination of relevancy:

Because an assessment of whether a piece of evidence is relevant requires an understanding of the case's theory and other evidence as well as a familiarity with the evidence in question, appellate courts give great deference to a trial judge's decision on relevance issues. Often it is stated that a trial court's decision on relevance will be reversed only for an abuse of discretion.

(quoting Neil P. Cohen, *Tennessee Law of Evidence*, § 401.5 at 70 (2d ed. 1990)).

Thus, we conclude the trial court did not abuse its discretion by refusing to admit the proffered evidence. That an observer thought Ms. Hopewell "was crying ... but it didn't look like she was really crying" lacks probative value. That a casual observer thought she did not grieve appropriately does not, in our view, make it more or less likely that Ms. Hopewell committed the offense. *See* Tenn. R. Evid. 401. Furthermore, Detective York testified that Ms. Hopewell did not appear to grieve over the victim's injuries. Thus, the jury was made aware

of the mother's demeanor after the victim's death.

The letter was [*27] also irrelevant. We disagree with the defendant's argument that the letter is relevant because it tends to show that Ms. Hopewell killed the victim. That Ms. Hopewell continued to have feelings for the defendant after the victim's death hardly suggests that she committed the crime. *See* Tenn. R. Evid. 401. The jury was aware of Ms. Hopewell's doubts about the defendant's having committed the crime. She testified that she was hesitant to point the finger of guilt at the defendant and speculated that someone else could have entered the apartment and inflicted the injuries. Ms. Hopewell also testified that the defendant was kind to the victim, treated her like she was his own child, and never harmed her.

Even if the proffered evidence should have been admitted, its content would have been cumulative. Thus, any error would have had no effect on the results of the trial. In *State v. Richardson*, 875 S.W.2d 671, 675 (Tenn. Crim. App. 1993), an attempted murder case where the defendant complained that he was denied the right to establish the victim's bias, our court found the error to be harmless. The defendant wanted to prove "certain court documents" that demonstrated he had "obtained [*28] a peace warrant against the victim." *Id.* at 674-75. Other witnesses, however, "testified to the threats the victim had made" *Id.* at 675. This court found the error to be harmless:

Based on these facts, we find that any error in the limitation on the defendant's cross-examination of the victim was harmless. The victim's bias against the defendant is apparent from this record. ... The jury was not, in our view, denied the opportunity to weigh that bias, in context, against the victim's credibility in describing his account of the crimes.

Id. at 675.

Accordingly, the judgment of the trial court is affirmed.

Gary R. Wade, Judge

CONCUR:

David H. Welles, Judge

Jerry L. Smith, Judge

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

STATE OF WASHINGTON,)	CAUSE NO. 63017-2-I
Respondent,)	
v.)	CERTIFICATE OF SERVICE
ERIC HOLZKNECHT,)	
Appellant)	

I, Bre Caldwell, certify and declare as follows:

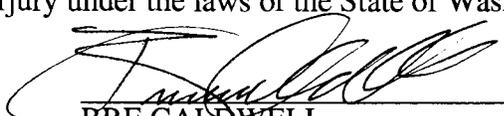
On 4th day of September 2009, I deposited in the United States Mail, with proper first-class postage attached, a copy of the attached Opening Brief of Appellant in this case, addressed to:

Janice Ellis
Snohomish County Prosecuting Attorney
Appellate Unit – Attn: Seth Fine
3000 Rockefeller, M/S 504
Everett WA 98201

Eric Holzkecht
DOC No. 327405
Monroe Correctional Complex (Twin Rivers)
P.O. Box 777
Monroe WA 98272-0777

I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

9/4/09 Seattle, WA
DATE AND PLACE


BRE CALDWELL