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NO. 65353-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

IDRIS TURNER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN ERLICK

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the prosecutor's inadvertent use of the term "child abuse" (as opposed to "non-accidental trauma") in her opening statement denied Turner a fair trial, given the overwhelming evidence of Turner's severe beatings of P.T., which left 2 ½-year-old P.T. blind in one eye, scarred, and with emotional and cognitive impairments.

2. Whether the trial court properly declined to strike the response of a renowned expert in pediatric child abuse who described commonalities in victims of child torture generally, but made no comment as to whether P.T. was a victim of child torture or as to Turner's guilt.

3. Whether the case should be remanded to the trial court to clarify that the previously ordered "substance abuse" evaluation and treatment applies only to alcohol.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

In an amended information, the State charged defendant Idris Turner with one count of assault of a child in the first degree, contrary to RCW 9A.36.120(1)(b)(i) and (ii). CP 49. The jury convicted Turner as charged. CP 108. The trial court imposed a standard range sentence. CP 213-17. In doing so, the court stated,

Mr. Turner having sat through this trial and having heard the unimaginable and inexcusable violence that you committed on young [P.T.], I have no reservation in imposing the high end of the sentence. This is a case of breach of trust, and inhumane acts. There is no sentence that I can impose that will heal [P.T.]'s injuries both physical and emotional. I don't know what scars this will leave on her body or her soul as she grows up. It's up for her to decide what forgiveness if any to give you. It's up to me and the legal system to impose the appropriate

punishment for your inexplicable[,] unjustified and inhumane conduct.

20RP 16.¹

Turner appeals. CP 203.

2. SUBSTANTIVE FACTS

During a time when P.T.'s mother was bedridden due to complications of her pregnancy, Turner (who is not P.T.'s biological father), was supposed to care for 2 ½-year-old P.T. Instead, Turner beat P.T. so severely and so often that P.T. ended up blind in one eye, unable to walk normally, cognitively impaired, and deeply, emotionally scarred.

a. People, Places And Custody Of P.T.

P.T.'s mother, Trina Washington-Eastland, lived with her foster mother, Afua Ndiaye from age 9 to 18. 14RP 87-88. About three weeks after Washington's 18th birthday, she became pregnant. 9RP 12.

Washington gave birth to P.T. on April 11, 2006. 14RP 88. Intermittently after P.T. was born, P.T. would spend one or two nights with Ndiaye.

9RP 17. Ndiaye said that P.T. loved to dance and sing, but P.T. hoarded food, as if as though no more food was coming. 9RP 17-18.

Washington began dating Turner in July 2007 and, a short time later, Turner started living with Washington and P.T. 14RP 89-90. On

¹ The State adopts Turner's designation of the verbatim report of proceedings. See Br. of Appellant at 2-3 n.1.

November 20, 2008, Washington gave birth to another daughter, A.T., whose father is Turner. 14RP 101.

Washington's pregnancy with A.T. was "high-risk" and, because Washington was often confined to bed, Ndiaye and Turner had temporary custody of P.T. at different times. 14RP 97-99, 101-03. Ndiaye cared for P.T. primarily between April and September 2008. 9RP 18, 30; 14RP 99. Turner had custody of P.T. from approximately mid-September to mid-October and again from early November until November 29, 2008.² 14RP 102-03.

During the summer of 2008, and while Washington was pregnant with A.T. and on bed-rest, Turner met Courtney Douglas. 10RP 24-26. Within a week, Turner had moved into Douglas's apartment ("Fleming apartment") in downtown Seattle. Id. The apartment complex was managed by Myel Jewell, who had become good friends with Douglas. 13RP 46, 49.

About one week later, Turner introduced Joy Brannon to Douglas. 10RP 27. Turner told Douglas that Brannon was his "best friend." 10RP 27. Brannon moved into the Fleming apartment with Douglas and Turner. 10RP 27-29.

² Washington said that Turner had returned P.T. to her for about one or two weeks and then Washington returned P.T. to Turner's care in early November. 14RP 102-03.

Turner also introduced his “step-daughter” P.T. to Douglas. 10RP 30. He explained that P.T.'s mother was pregnant and taking care of P.T. was too much for her. Id. On occasion, P.T. would spend the night at the Fleming apartment. 14RP 31. Douglas said that P.T. was a typical 2-year-old—singing, dancing and playing.

After Douglas got evicted from the Fleming apartment, she, Turner and Brannon moved into the Springtree Condominiums. 10RP 29. It was there that Douglas deduced Brannon and Turner were more than “just friends.” 10RP 29. Douglas also learned that Turner and Washington were still in a relationship. 10RP 37-38. P.T. lived at the Springtree condominium with Douglas, Turner and Brannon. 10RP 34.

Following the November 21, 2008 “CD incident” (detailed below in § 2.e), Jewell allowed Douglas, Turner and P.T. to stay with her at her West Seattle apartment. 10RP 70-71, 75; 13RP 62-64. When Jewell first met P.T. (in October 2008), P.T. was delightful, very happy and very peaceful. P.T. loved to dance and play with Jewell's four-year-old son. 13RP 46-51.

b. Potty-training, Turner's Lectures And A Beating That Douglas Witnessed.

P.T. has had difficulties with her bowel movements since she was an infant. 9RP 40-41; 14RP 90-91. When P.T. was about 16 months old,

Washington spanked P.T. with her hand to encourage P.T. to move her bowels. 14RP 92. But by the end of September 2008, when Ndiaye returned P.T. to Washington's custody, P.T. had stopped having so much difficulty. 9RP 42.

Once Turner assumed custody of P.T., he whipped then 2 ½-year-old P.T. with a belt “if she didn't shit.” Ex. 132, at 13. Initially, Turner lectured P.T.—sometimes for hours—about “pooping.” 10RP 34-35, 76. The lectures happened every day. 10RP 41. If P.T.'s attention wandered, Turner grabbed her face and said, “Look at me.” 10RP 41-42; Ex. 132, at 32. Turner grabbed P.T.'s face so often that P.T.'s jaw line had bruises. 10RP 43. He referred to P.T. as his “little soldier.” 12RP 56; Ex. 132, at 33. If P.T. stopped standing straight in front of Turner, or tried to sit down, Turner grabbed P.T.'s arm and jerked her back up. 10RP 44. Turner admonished P.T. not to “play[] a game with him.” 13RP 70. He was trying to potty-train her. 13RP 70.

Turner whipped P.T. because P.T.'s problems with bowel movements frustrated him; he said, “I couldn't have her in there for the whole damn day.” Ex. 132, at 12, 67. When he “whooped her” with his leather belt, it left marks, welts and cuts on P.T. Ex. 132, at 13-14, 21, 30. Turner stopped whipping P.T. with one of his belts because he said that it “fucked her up.” Ex. 132, at 8. Once when Turner whipped P.T., she fell

off the toilet and “busted her fucking mouth.” Ex. 132, at 15. Turner said that “[p]issed me off, 'cause I gotta (*sic*) explain that to her mother.” Ex. 132, at 26. He told P.T., “[G]et up. Stop playing the game.” *Id.* Sometimes after whipping P.T., Turner would be “as sweaty as fuck . . . [b]ecause it's hot . . . in the bathroom and I'm fuckin' whippin' her ass.” Ex. 132, at 17.

In addition to whipping P.T., he would put P.T. in the bathtub and spray water in her face with a shower nozzle. Turner said that he did this because “[P.T.] don't (*sic*) like water on her face”; it “agitated her.” Ex. 132, at 22-23. Turner said, “[S]he just hated that shit.” Ex. 132, at 23.

Once, at the Springtree condominium, after Turner had lectured P.T. (to no avail), Turner took P.T. into the bathroom. Douglas heard two smacks. 10RP 46. Douglas stood outside the bathroom door and heard Turner speak “firmly” to P.T. When Douglas opened the door, she saw P.T. on the floor, in a fetal position and not making a sound. 10RP 49-52. Turner held a belt high above his head, poised to strike P.T. again. 10RP 52-53. When Douglas asked Turner what he was doing, he attacked Douglas. Turner backed Douglas into a corner and struck her forcefully over and over again with the belt; Douglas got welts on her arms, legs and back. 10RP 55-56. After Douglas “surrendered,” Turner returned to P.T. and whipped her harder than he initially had. He beat P.T. everywhere on

her body. 10RP 56-57. Douglas was too afraid of Turner to call the police. 10RP 59.

c. Restaurant Incident (April 18, 2008).

On April 18, 2008, Ndiaye brought P.T. to a restaurant so that Washington could visit with her. 9RP 19-21, 42-43. When P.T. saw her mother, she had "mixed emotions." 9RP 21. But when P.T. saw Turner, she became terrified. P.T. stood up in her booster chair and started screaming; P.T. said, "No, no!" 9RP 21-22. Turner scolded P.T. He told her to stop crying; he said, "You know I'm going to get you." 9RP 23. Before Washington and Turner showed up, Ndiaye said that P.T. had colored, enjoyed her lunch and had been happy. 9RP 22.

After this incident, and primarily for P.T.'s safety, Ndiaye and Washington executed a written, temporary custody agreement. 9RP 43-44. Washington relinquished "full care and custody" of P.T. to Ndiaye because she was pregnant and "very ill with an at risk pregnancy." 9RP 44; 14RP 97-98.

d. Swedish Hospital Incident (July 10, 2008).

On July 10, 2008, Helen Bodkin, a registered nurse at Swedish Hospital, had gone to Washington's hospital room to start an IV. 8RP 8-12. Outside the closed door, Bodkin heard angry adult voices. 8RP 12-13. Bodkin walked into the room and saw P.T. sitting in the bed with

Washington. Washington shook P.T.'s shoulders and told her to "be quiet, be quiet." 8RP 13. P.T. sobbed and sucked in air to try and stop herself from crying. 8RP 13-14, 22.

Turner "snatched" P.T. from her mother's lap, threw her over his lap, and "started to beat on her." 8RP 16, 28-29. Turner, whose arms were very muscular, forcefully spanked P.T. five or six times. 8RP 15-17, 23, 26. Turner did not just "swat" P.T.; he raised his arm above his shoulder and struck P.T. on her lower back and her "little backside." 8RP 17, 30. P.T. cried loudly. 8RP 17. Never before had Bodkin seen anyone strike a child with so much force and violence. Bodkin said, "It was scary to observe. I couldn't imagine how it felt to [P.T.]." 8RP 17-18. As a mandatory reporter of child abuse, Bodkin made a referral to Child Protective Services (CPS). 8RP 12, 20.

Ndiaye had been out of town when the Swedish Hospital incident occurred. 9RP 26. After Ndiaye resumed her custody of P.T. on July 13th or 14th, she noticed very dark--almost black--circular bruises on P.T.'s buttocks, hip and lower back. 9RP 26-27, 50. P.T. had none of that bruising before Ndiaye left town on July 6. 9RP 50. Ndiaye reported P.T.'s bruises to CPS.³ 9RP 51.

³ CPS met with Ndiaye and Washington, took photographs of P.T.'s bruises and opened a case file on P.T. CPS did not take any other action at that time. 15RP 12-21.

e. “CD Incident” (November 21, 2008).

On November 21, 2008, at the Fleming apartment, Turner refused to let Joy Brannon in.⁴ 10RP 63-64. Brannon broke down the door. Id. She accused Turner of stealing her money and Brannon then struck Turner at least four times with a metal compact disk (CD) rack. 10RP 65-66; 12RP 13-14. Because Turner held P.T. in front of him, Douglas assumed, but did not actually see, that Brannon struck P.T. with the CD rack. 10RP 65-67; 12RP 14-15. Douglas grabbed the CD rack from Brannon. 10RP 66.

Turner left P.T. on the bed and tried to flee the apartment. Brannon grabbed a knife and attempted to stab Turner, but he escaped. 10RP 66-68; 12RP 16. Douglas picked up P.T., left the apartment and walked down the hall. 10RP 67-68. From behind, Brannon pushed Douglas down the ramps in front of the apartment. 10RP 67-68; 12RP 18. Douglas dropped P.T., who hit her head on the railing. 10RP 67-68; 12RP 18-19. Douglas asked P.T. if she was okay, and P.T. said yes. 10RP 68; 12RP 20.

Douglas and P.T. went to Jewell's West Seattle apartment. P.T. did not appear to be injured. 10RP 69; 12RP 20-21. A short time later,

⁴ Douglas's former neighbor had called and told her that some people were in her apartment. 10RP 62-63; 11RP 123-25. When Douglas returned, she saw a “frantic” Brannon, along with the apartment manager outside the door. 10RP 63; 11RP 125.

Turner arrived. Turner, Douglas and P.T. stayed at the Springtree condominium for the next three days; they then moved in with Jewell and her son (West Seattle apartment). 10RP 70-74.

f. “Thanksgiving Incident” (November 26-29, 2008).

On Wednesday, November 26, 2008, in the hall outside the bathroom, Jewell and Douglas heard Turner yell and P.T. cry. 10RP 76. Turner hit P.T. with a belt because she had not defecated. 13RP 28; Ex. 133. P.T. fell off the toilet and onto the floor where Turner continued to beat P.T. After she defecated on the floor, Turner put P.T. in the bathtub. 13RP 28-29; Ex. 133.

When Douglas opened the door, Turner screamed at her. 10RP 77; 13RP 73. P.T. was in the bathtub, naked, as Turner held the showerhead and sprayed water in P.T.'s face. 10RP 77; 12RP 34. P.T. gasped for air. 10RP 77. Douglas thought that Turner would kill P.T. because P.T. could not breathe. 10RP 81. Turner explained that P.T. “plays games with him, that she has evil ways like her mother and . . . he needs to break her from those ways. . . .” 13RP 74, 83. Turner said that P.T. could “boo boo”—she just did not want to because she was an “actor.” 13RP 74; Ex. 132, at 25. Later, Douglas noticed that P.T.'s mouth was “messed up.” 12RP 41-42.

Turner later explained to the police that P.T. hit her head when he whipped her and it was an accident.⁵ 13RP 29; Ex. 133. Turner said that was when he noticed a “knot” or bump on P.T.'s forehead and he “felt terrible because she still had scars from me whoopin (*sic*) her before.” 13RP 29-31; Ex. 133.

On Thanksgiving, P.T. had a big bow tied around her head and covering her face. 14RP 7. Turner forced P.T. to stand while she ate. 13RP 65-67; 14RP 7. P.T. tried to sit a few times, but at each instance Turner ordered her to stand. 13RP 66. Jewell told Turner that she was unconcerned about P.T. possibly spilling food, but Turner said that “[P.T.] thinks people are her maids,” and he needed to teach her that “people won't do things for her.” 13RP 66.

Later that night, P.T.'s crying and gurgling awakened Jewell. 13RP 80. Jewell heard what sounded like a body part bumping against the porcelain in the tub. 13RP 83-84. When Turner came out, he explained that P.T. had fallen, but was okay. 13RP 82. P.T. whimpered. 13RP 82.

The next day, Jewell agreed to watch P.T. (who was asleep in Turner's arms), so that Turner could visit Washington and newborn A.T. 13RP 87. A scarf covered most of P.T.'s head and face. 13RP 89-90; 14RP 15-16. Several hours later, Jewell grew concerned because P.T. had

⁵ After an investigation, Turner was arrested on December 1, 2008. 6RP 85; 7RP 110-13.

slept all day. 13RP 91-92; 14RP 19-20. As Jewell removed P.T.'s scarf and clothing, she noticed bruises on P.T.'s face and a knot on P.T.'s forehead. 13RP 94-96; 14RP 19-20. Then Jewell realized that P.T.'s condition was serious. 14RP 29.

At about that time, Douglas returned from work. 13RP 97. Jewell told Douglas that something was wrong with P.T.—she was unconscious. 13RP 97; 14RP 21. About 15 minutes later, Turner returned. 12RP 46-47. Jewell implored Turner to take P.T. to the hospital. She told Turner that, “Something's wrong with your baby.” 14RP 21.

Turner was very, very angry; he insisted that P.T. was playing a game and that she could walk. 10RP 97; 13RP 97-98; 14RP 23-24. Turner tried to stand P.T. up next to him, and when P.T. reached for Turner's leg to brace herself from falling, Turner moved his leg and let P.T. fall. 10RP 97-100; 13RP 97-98; 14RP 23-24. Turner whipped P.T. on her leg because he thought that she was disobeying him; despite his command to stand, P.T. kept falling down. 10RP 97-100; 13RP 98-100.

Turner sat and held P.T. He insisted that P.T. was fine—just asleep. 13RP 100. A few minutes later, P.T. seized. 10RP 91-92; 14RP 26-27. P.T. shook, balled up her fists, tensed, and then went limp. 10RP 92-93. Each seizure lasted a few minutes. 10RP 93. Douglas and Jewell

begged Turner to take P.T. to the hospital, but still he refused. 10RP 94, 97; 13RP 101, 111.

Douglas and Jewell got ice to rub on P.T. to try and stop the seizures. 10RP 94-98; 12RP 49-51; 13RP 104-11; 14RP 27-29. Despite Turner's efforts to thwart Douglas and Jewell, the women removed P.T.'s clothing to ice her. 10RP 94; 13RP 105. That is when they saw P.T.'s "battered body." 10RP 94-97. P.T. was bruised all over her body. 10RP 96; 13RP 106-10. P.T.'s hair was missing from both sides of her head.⁶ 10RP 61; 13RP 109. P.T. had cuts on her stomach where Turner had whipped her with a belt and finger marks on her arms from where Turner had grabbed her. 13RP 106-07. Some of the bruises looked as though they were healing while other bruises appeared fresh. 13RP 108.

Turner said that he could not believe he had done this to his baby. He told Jewell how he had inflicted the injuries; he then told P.T. to fight, be strong and that she would be okay. 13RP 106-09. Turner repeatedly said, "Oh my baby, I did this to you. I am so sorry. I don't want to go to jail, I don't want to go to prison." 10RP 97; 13RP 111. He threatened to kill himself and everybody else. 13RP 112. While Turner blamed the women for P.T.'s condition (the women frustrated him so much that he

⁶ Some of P.T.'s hair was stashed behind a stereo in Turner's room. 7RP 38, 47-51; 13RP 122.

beat P.T.), P.T. kept seizing, but she no longer woke up or moaned.⁷

10RP 102; 13RP 111-13; Ex 132, at 8. Turner would not take P.T. to the hospital because of the “fuckin' bruises and shit on her leg.” Ex. 132, at 45.

The next morning (November 29), Turner put P.T. in her stroller; he told Jewell that P.T. was awake and fine. 13RP 119. But Jewell said that when Turner left with P.T., she was still unconscious. 13RP 119. And later that same day, when Turner returned P.T. to Washington, Washington said that she knew P.T. needed immediate hospitalization— P.T. was unconscious and unresponsive. 14RP 103-04.

g. P.T.'s Medical Condition.

When P.T. arrived at the emergency room of Valley Medical Center (VMC), she was lethargic, limp, unresponsive to stimuli (except for deep pain), her eyes were dilated, several areas of her body were swollen, she had an elevated white blood count (indicative of inflammation or stress to her body), she was anemic, her CT scan was abnormal, she possibly had a traumatic brain injury, she was breathing abnormally, covered with bruises and purplish discoloration, she had puncture-like wounds to her right leg, her buttocks was swollen, raised,

⁷ Douglas estimated that over the course of the night, P.T. had more than 20 seizures, each one stronger and lasting longer. 10RP 101.

discolored, and she had retinal hemorrhaging that was consistent with a series of traumatic events. 9RP 62-91. P.T. was coma-like. 9RP 93. The doctors and nurses intubated P.T. and transferred her to Harborview Medical Center (HMC) in critical condition. 9RP 75, 79.

At HMC, Dr. Kenneth Feldman, an expert in pediatric child abuse, treated P.T.⁸ 10RP 105-18; 11RP 67. In addition to the injuries and conditions observed by the VMC's medical team, Dr. Feldman noted that P.T. had injuries characteristic of a child whipped to the point of bleeding (P.T. had areas where her skin had been torn off), laboratory evidence of muscle damage from beatings that P.T. had sustained, traumatic injuries to her scalp (where she had hair loss), a burn mark on the top of her right hand that resulted from contact with a hot solid object, literally dozens of bruises on all body surfaces, bleeding in both eyes, a torn retina in her left eye, old fluid around her brain (indicative of previous brain trauma), and fresh blood in the normal fluid space around P.T.'s brain. 10RP 119-27; 11RP 4-18.

P.T. is blind in her left eye and has impaired vision in her right eye, diagnoses confirmed by pediatric ophthalmologist Dr. Jason Cheung.

⁸ P.T. stayed at Harborview Medical Center for one week; she was then transferred to Children's Hospital, where she remained a patient until January 8, 2009 (she was in intensive care until December 17, 2008 and in rehabilitation the remainder of the time). 11RP 5.

11RP 17, 73-76. Dr. Cheung said that it would take a severe force (not a seizure) to separate the layers of P.T.'s retina. 11RP 78, 87. Dr. Cheung expects that P.T. will never have any functional vision out of her left eye (she may see shadows or light) and over time, P.T.'s right eye might slightly improve, but the structural damage in her eye will not get better. 11RP 89-91.

According to Dr. Feldman,

Our whole constellation of injuries that we have discussed, the pattern, the characters, the injuries, isn't what you see in accidents. The type of head injury she sustained isn't the sort of thing you see with a simple accidental impact. She has got evidence of blows to the front of the head, to the side of the head. She has got evidence of trauma literally on every surface of her body. They (*sic*) types of body injuries you almost only see with inflicted injury so that the whole constellation of, none of it fits with accidents and all of it fits with abuse, or with inflicted injuries.

11RP 21. In Dr. Feldman's expert opinion, the injuries that P.T. sustained were the result of non-accidental trauma. 11RP 20-21.

P.T. needed functional and emotional rehabilitation. 11RP 22. In addition, P.T. suffers from Post-Traumatic Stress Disorder (PTSD)—a rare diagnosis for a child. 11RP 23-26, 68-69. P.T. was “hyper-vigilant,” a characteristic of PTSD. 11RP 23-24. Whenever anyone other than Ndiaye approached P.T., P.T. got into a ball, screamed and became

emotionally distraught.⁹ 11RP 24. P.T. became fearful when Ndiaye had to leave. 9RP 31. P.T. could not see, stand or walk—she could barely sit up. 9RP 31, 33. Ndiaye made “cuddle palettes” on the floor with gymnasium mat pillows, blankets and toys; she stayed with P.T. almost every night. 9RP 33-34. Still, P.T. was a child on constant “high alert.” Dr. Feldman said it was as if as though P.T. felt the next blow was coming. 11RP 24.

h. Defense Theory.

Dr. Lily Jung, Chief of Neurology at Swedish Hospital, reviewed all of P.T.'s medical records, CT scans and MRI's, including one from June 19, 2006, the only time previous to the day after Thanksgiving that P.T. had a seizure.¹⁰ 17RP 3-13. Dr. Jung said that, at birth, P.T. had an “agenesis of the corpus collosum,” which means that the two hemispheres of P.T.'s brain could not communicate effectively with one another. 17RP 16-19. This particular defect predisposed P.T. to have seizures. 17RP 20.

P.T. was also born with sickle cell trait. 17RP 21. Sickle cell trait, according to Dr. Jung, predisposed P.T. to venous thrombosis or clotting

⁹ After Ndiaye returned P.T. to Washington's custody (end of September 2008), the next time that she saw P.T. was at HMC. P.T. was nonresponsive, fearful, bruised severely all over her body, and she had hair missing from her scalp and skin was missing. 9RP 30-33.

¹⁰ According to P.T.'s treating physician at the time, the isolated seizure was the result of low sodium. 11RP 35-36.

of the veins. 17RP 21-22. Dr. Jung stated that, based on the CT scan VMC had done on November 29, 2008, P.T. had such a clot, deep within her brain (not a place where a clot could result from trauma). 17RP 23-25.

Dr. Jung said that P.T.'s change of consciousness on November 29 was due to prolonged seizures on November 28, which were the result of intracranial pressure, which in turn was the result of the venous thrombosis associated with her sickle cell trait. 17RP 47. Dr. Jung stated that the trauma from the increased brain pressure—which had been caused by P.T.'s blood clot—damaged P.T.'s optic nerve and caused P.T. to lose her sight. 17RP 36-42, 50-53.

Additionally, Dr. Jung said that she does not think P.T. will have any limitation on her cognitive abilities or her motor development. 17RP 45-46. Dr. Jung also said that she did not believe P.T. suffered from PTSD. 17RP 44. However, Dr. Jung conceded that P.T.'s hyper-vigilance (her screaming, crying and curling up in a ball whenever any medical personnel approached her) could be symptomatic of PTSD. 17RP 50.

On cross-examination, Dr. Jung conceded that she has never done any work in child abuse pediatrics, or pediatrics in general—including pediatric neurology. 17RP 47.

Finally, the defense contended that any injuries observed by medical personnel when P.T. was admitted to VMC on November 29,

2008, resulted from Brannon's November 21st CD rack assault on Turner (and P.T. since Turner held P.T. in front of him).¹¹ 18RP 48-49. Yet, even Dr. Jung said that the only injury she could attribute to the "CD incident" was the swelling and bruising in the soft tissue of P.T.'s forehead. 17RP 57-58.

C. ARGUMENT

1. THE PROSECUTOR'S INADVERTENT USE OF THE TERM "CHILD ABUSE" IN HER OPENING STATEMENT DID NOT DEPRIVE TURNER OF A FAIR TRIAL.

Turner contends that the deputy prosecutor's use of the term "child abuse" in her opening statement, and in violation of the trial court's pre-trial ruling, warranted a mistrial. Br. of Appellant at 16-24.

Specifically, Turner contends that the prosecutor's remark was a "serious irregularity" because the term "child abuse" is inherently prejudicial and the remark was tantamount to improper opinion testimony, *i.e.*, that Dr. Feldman believed the charged crime had been committed, that the "challenged evidence" was not cumulative and that the "irregularity" could not be cured by an instruction. Id.

¹¹ Dr. Feldman did not believe that P.T.'s depressed consciousness and seizures resulted from the incident on November 21, 2008 because P.T.'s behavior was normal until the day after Thanksgiving. 11RP 21-22.

This Court should reject Turner's claim for three reasons. First, Turner's argument is built around a faulty premise—that the prosecutor's remarks were evidence. They were not and the trial court so instructed the jury. Second, given the graphic, admissible evidence of Turner's assaults on P.T., any inherent prejudice associated with the term "child abuse," did not deny Turner a fair trial. Finally, Turner analyzes the prosecutor's remark as a serious "trial irregularity." Yet, the trial court found the remarks constituted inadvertent misconduct. This Court should reject Turner's claim.

a. Motions In Limine, Prosecutor's Remark And The Trial Court's Rulings.

Pre-trial, Turner moved to exclude testimony by Dr. Feldman that described P.T.'s injuries as either non-accidental or child abuse. 5RP 24; CP 39. The trial court granted Turner's motion as to Dr. Feldman's use of the term "child abuse," but denied the motion as to the term "non-accidental trauma." 5RP 25; CP 96 (ruling XIV).

During her opening statement, the deputy prosecutor discussed Dr. Feldman's expected testimony. 6RP 74. She stated, Dr. Feldman is employed by Children's Hospital. . . . It is his job to, not only to treat patients, but to determine whether or not injuries that are sustained to a child are *accidental or non-accidental*. He will tell you about his

observations with [P.T.]. . . . Dr. Feldman will tell you that he determined, based on everything, based on the injuries that [P.T.] sustained, the knots on her head, the bleeding of her brain, the bleeding, sorry, in her eyes, behind her eyes, the welts, the scars, the injuries that she had all over her body, that that was *not an accidental trauma*. Dr. Feldman will tell you that of the number of years, decades that he has been doing this work, this is one of the worst cases of *child abuse* that he has ever seen. Now, miraculously, [P.T.] survives. She suffered brain damage. She suffered blindness in one eye and doctors are not sure whether or not she will ever regain vision in that eye or not. The extent of her brain damage is unknown except that she will not be a normal child. We, we won't have a real understanding of the extent of her brain damage until she is actually in kind of an academic setting and her cognitive abilities are really challenged, but Dr. Feldman will tell you that she is not the same child as she would have been had she not suffered these *non-accidental* injuries.

6RP 74.

During the recess that immediately followed the prosecutor's opening statement, defense counsel objected. Counsel confirmed that the trial court had ruled Dr. Feldman could not describe P.T.'s injuries as *child abuse*, and that he would only be permitted to say the injuries were *non-accidental*. 6RP 76. The prosecutor, who did not recall using the

term child abuse, said that any violation of the court's order was "completely inadvertent." 6RP 77.

The trial court denied the motion for a mistrial.¹² The court said,

The purpose of opening statement is to advise the jury of what the witnesses will testify to. At this time, Dr. Feldman will not be allowed to testify this is the worst case of child abuse he has ever seen because he won't be referring to it as child abuse. *Whether he can refer to it as the worst case of this type of incident he has ever seen, is not before the Court.* But given that it is not a direct violation or intentional violation of the Court's Order in Limine, I am going to deny the motion for a mistrial, but remind [the prosecutor] that there is not to be testimony with respect to "child abuse." He is to use the term non-accidental trauma.

6RP 77.

b. The Diminimis, Unintentional Violation Of A Pre-trial Ruling Did Not Deprive Turner Of A Fair Trial.

Every criminal defendant has a federal and state constitutional right to a trial by an impartial jury. U.S. CONST. AMEND. VI¹³; Const. art. I, § 22 (amend. 10)¹⁴. The right, however, does not include an error-free or "perfect" trial. In re Personal Restraint of Elmore, 162 Wn.2d 236,

¹² After the recess, the trial court said that it would hear defense counsel's motion. Although it was reasonable for the court to assume that defense counsel sought a mistrial, no such motion was made. 6RP 76-77.

¹³ "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

¹⁴ "In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury."

267, 172 P.3d 335 (2007); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

“A defendant who alleges improper conduct on the part of a prosecutor must first establish the prosecutor's improper conduct and, second, its prejudicial effect.” State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). “Prejudice on the part of the prosecutor is established only where ‘there is a substantial likelihood the instances of misconduct affected the jury's verdict.’” Id. (quoting Pirtle, 127 Wn.2d at 672). The prejudicial nature of the misconduct depends upon the facts of each case. State v. Torres, 16 Wn. App. 254, 264, 554 P.2d 1069 (1976). “A trial court ruling on prosecutorial misconduct will be given deference on appeal.” State v. Luvene, 127 Wn.2d 690, 701, 903 P.2d 960 (1995). “The trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial.” Luvene, 127 Wn.2d at 701.

At the outset, it is important to distinguish between any prejudicial effect of the prosecutor's opening remarks, which were not evidence, and the prejudicial effect of the evidence admitted at trial. The State's evidence against Turner was prejudicial—it is why the evidence was relevant and probative of Turner's guilt. See, e.g., State v. Read, 100 Wn.

App. 776, 782–83, 998 P.2d 897 (evidence is not *unfairly* prejudicial merely because it is harmful or detrimental to case; “it is unfairly prejudicial only if it has the capacity to skew the truth-finding process”), rev. granted, cause remanded, 142 Wn.2d 1007 (2000).

Turner blurs the distinction. First, the prosecutor's remarks were not evidence. The jury in this case was instructed that,

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.

CP 112 (quoting WPIC 151)¹⁵ (emphasis supplied); 18RP 3-4. The jury is presumed to follow the court's instructions. State v. Brown, 132 Wn.2d 529, 618, 940 P.2d 546 (1997). There is nothing here to forestall that presumption.

Second, despite any inherent prejudice associated with the term “child abuse,” it is not as evocative as the word “torture.” The jury was

¹⁵ In the trial court's preliminary instructions to the jury, the court admonished the jury that, “The lawyers' remarks, statements and arguments are intended to help you understand the evidence and apply the law. However, the lawyers' statements and arguments are not the law and *are not evidence in the case*. The evidence is the testimony and the exhibits.” 4RP 72 (quoting WPIC 1.01). See also 18RP 42 (at the beginning of defense counsel's closing argument, counsel reminded the jury that the “statements of counsel are not evidence”).

told that the State had charged Turner with assault in the first degree and that such crime could be committed by one who assaulted a child and “caused the child physical pain or agony that is equivalent to that produced by torture.” 4RP 13; CP 49, 120-22. Child abuse is defined as “mistreatment of a child by a parent or guardian, including neglect, beating, and sexual molestation.”¹⁶ Yet, torture is “the act of inflicting excruciating pain, as punishment or revenge, as a means of getting a confession or information, or for sheer cruelty.”¹⁷

Here, the evidence demonstrated that Turner inflicted excruciating pain on P.T. over and over and over again. See, e.g., Ex. 132. The question, therefore, is not whether the term child abuse was inherently prejudicial, but, rather, whether the term was *unfairly* prejudicial. Unlike the cases upon which Turner relies as support for his contention that “child abuse” is inherently prejudicial, the evidence of abuse in this case was relevant to the very issue that the jury had to resolve.¹⁸

¹⁶ Definition available at: <http://dictionary.reference.com/browse/child+abuse>.

¹⁷ Definition available at: <http://dictionary.reference.com/browse/torture>.

¹⁸ See Br. of Appellant at 21, citing e.g., Garcia v. Providence Medical Center, 60 Wn. App. 635, 644-45 n.2, 806 P.2d 766 (1991) (finding in a medical malpractice case, evidence that a CPS worker had previously visited Garcia was *irrelevant* and highly inflammatory); Valmonte v. Bane, 18 F.3d 992 (2nd Cir. 1994) (holding that the minimal due process the State afforded Valmonte before including her name on a central register of alleged child abusers violated Valmonte's liberty interest and due process rights); and Barnett v. State, 178 Ga. App. 685, 344 S.E.2d 665 (1996) (holding that testimony of *unrelated* sexual and physical child abuse so inflammatory as to deny defendant fair trial for allegedly assaulting a police officer).

Additionally, other evidence, to which there was no objection, referred to the interaction between Turner and P.T. as “child abuse,” not merely “non-accidental trauma.” As a nurse, Ms. Bodkin is a “mandatory reporter”; she stated that she must report *child abuse*. 8RP 12. After Bodkin witnessed Turner “discipline” P.T., Bodkin called hospital security and then made a report of child abuse to CPS.¹⁹ 8RP 12, 20.

Before Dr. Feldman testified, the parties and the court agreed that Dr. Feldman would be permitted to testify about his expertise: child abuse. 10RP 104. Feldman told the jury about his award for lifetime services and contributions to the field of child abuse, the child abuse societies of which he is a member, his research into child abuse and the numerous articles and book chapters that he had written on the subject. 10RP 106-14.

Then, during cross-examination, defense counsel first elicited Feldman's expertise in reviewing imaging (CTs and MRIs) in abuse cases. 11RP 66. Counsel asked, “Now, insofar as your reading of CT scans and MRI's of the brain, is that part of your specialty?” Dr. Feldman responded, “Reading them in *abuse cases* is part of my specialty.”

¹⁹ Turner endorsed Maquetta Carter, a CPS investigator, as a defense witness. Carter said that she followed up on Bodkin's referral. Two days after the Swedish Hospital incident, Carter saw bruises on P.T.'s back and lower buttocks—some of the bruising looked old and some looked new. 15RP 12-17.

11RP 66. Defense counsel moved to strike the answer, but, because the answer was responsive, the court overruled the objection. 11RP 66.

Counsel next asked Dr. Feldman if he was board certified in pediatrics. 11RP 66. Feldman replied, "I'm board certified in pediatrics and *child abuse* pediatrics." 11RP 66. The following exchange then occurred:

- Q. We spoke earlier about meeting at Children's Hospital where [the prosecutor] was present and I asked you some questions.
- A. Correct.
- Q. About this matter.
- A. Yep.
- Q. And it is your testimony here today that you are board certified in the specialty of *child abuse*?
- A. *Child abuse pediatrics specialty, yes.*
- Q. As of when?
- A. As of the last week in January.
- Q. So on January 7th when we met you told me that child abuse would become a board certified or sub specialty as of this year?
- A. Correct.
- Q. For the first time?
- A. Correct.
- Q. And you're saying that since that meeting you've become certified?
- A. Correct.

11RP 67.

Finally, there is not a substantial likelihood that the prosecutor's misstep affected the jury's verdict. See Dhaliwal, 150 Wn.2d at 578. Although the prosecutor mistakenly used the term child abuse instead of trauma when she outlined Dr. Feldman's anticipated testimony, overwhelming evidence supported her remark: this was the worst case of child abuse many people, including Dr. Feldman, had ever seen.

Witness after witness described P.T.'s battered and abused body. See, e.g., 9RP 67 (Dr. Cameron Buck, the emergency room doctor who treated P.T. upon her admission to VMC testified, without objection, that P.T. was the type of patient who “sticks in your mind for a long time, and I would say it is something that I will never forget”); 7RP 71 (Sergeant Daniel Figaro saw “bruising and scars, and injuries all over most of her body”); 9RP 31 (Afua Ndiaye saw “severe bruises over [P.T.'s] body”); 9RP 77, 83, 85 (Dr. Buck described “multiple areas of subacute bruising and swelling to both the upper and lower extremities . . . puncture-like wounds [and P.T.'s buttocks] was deformed, swollen, raised, and discolored”); 10RP 94 (Douglas said that she and Jewell saw P.T.'s “battered body”); 10RP 121, 124 (Dr. Feldman observed that P.T.'s “left thigh had a hatching of white marks with residual scabs . . . indicative of whippings there . . . [and] a burn from contact with a hot solid object that was still partially blistered and not yet healed on [the top] of her right hand

. . . [and injuries] pretty characteristic of a child who had been whipped to the point of bleeding from the area where she is whipped”); 11RP 76-79 (Dr. Cheung said P.T.'s retinal hemorrhaging, which caused loss of vision in her left eye, was the result of “severe force”); and 13RP 108 (Jewell stated that P.T.'s “arms were bruised, her hands were bruised, her legs were bruised. She was pretty much covered in bruises”).

Yet, it was likely Turner's own words that impressed the minds of the jurors. Despite never using the word “abuse,” Turner's repeated admissions: “I've whooped [P.T.'s] ass,” “I'd whip [P.T.] if she didn't shit,” “I stopped whooping her with that belt cause fuck, caused (*sic*) it fucked [P.T.] up,” and that “sometimes after whipping [P.T.],” I would sit on the tub, “sweaty as fuck,” could leave no doubt in the jurors' minds that this was most likely one of the worst cases of child abuse that the jurors--or anyone else--had ever seen. Ex. 132, at 8, 13, 17, 21. Turner's claim therefore fails.

c. Any “Trial Irregularity” Was Not So Serious That It Warrants A New Trial.

Turner analyzes the prosecutor's remark as a “trial irregularity.” Trial irregularities are irregularities that occur during a criminal trial that implicate the defendant's due process rights to a fair trial. State v. Davenport, 100 Wn.2d 757, 761 n.1, 675 P.2d 1213 (1984). In

considering whether a trial irregularity warrants a new trial, the court must consider (1) the seriousness of the irregularity; (2) whether the statement was cumulative of evidence properly admitted; and (3) whether the irregularity could have been cured by an instruction. State v. Post, 118 Wn.2d 596, 620, 837 P.2d 599 (1992). A mistrial should be granted only when "nothing the trial court could have said or done would have remedied the harm done to the defendant." State v. Gilcrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979) (quoting State v. Swenson, 62 Wn.2d 259, 280, 382 P.2d 614 (1963)). The trial court has wide discretion to cure trial irregularities and its decision is reviewed for abuse of discretion. Post, 118 Wn.2d at 620. Great deference is given to the trial court because it is in the best position to discern prejudice. State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

Given the evidence in this case, any trial irregularity was not serious. Unlike many of the cases that Turner cites in support of his claim that a mistrial was warranted, the prosecutor's isolated reference to child abuse was unintentional; she did not deliberately disregard the court's order. See, e.g., Br. of Appellant at 18-19 (citing State v. Jungers, 125 Wn. App. 895, 902-06, 106 P.3d 827 (2005) (prosecutor's argument in closing improperly referenced *stricken evidence*); State v. Wood, 44 Wn. App. 139, 146, 721 P.2d 541 (1986) (prosecutor asked questions and

made references that appeared to be *intentional violations* of an order in limine)). The trial court here specifically found that the prosecutor's remark was “not a direct violation or [an] intentional violation of the Court's Order in Limine.” 6RP 77.

Turner also argues that the irregularity was serious because, by telling the jury that Dr. Feldman thought this was one of the worst cases of child abuse that he had ever seen, the prosecutor “notified the jurors the doctor believed the charged crime had been committed.” Br. of Appellant at 22. In support of his argument, Turner relies on State v. Farr-Lenzini, a case that is inapposite. See Br. of Appellant at 22 (citing State v. Farr-Lenzini, 93 Wn. App. 453, 460, 970 P.2d 313 (1990)).

In Farr-Lenzini, a prosecution for attempting to elude a police officer, a Washington State Patrol trooper testified that he believed, based on his training and experience, “the person driving that vehicle (Farr-Lenzini) was attempting to get away from me and knew I was back there and refusing to stop.” Farr-Lenzini, 93 Wn. App. at 458. Division Two of this Court reversed the conviction because, although the trooper was “an expert for purposes of police procedures, speed, vehicle dynamics, and accident reconstruction,” he was not an expert on the driver's state of mind. Id. at 461. The trooper's opinion, whether as a lay or an expert

witness, lacked a factual basis and therefore, impermissibly commented on the defendant's guilt. Id. at 461-65.

In this case, the prosecutor's remark did not signal to the jury what Dr. Feldman believed as to Turner's guilt or innocence. There is a distinction between whether Dr. Feldman, an expert in the field of child abuse, believed that P.T.'s injuries were the result of abuse (or non-accidental trauma) and whether Dr. Feldman believed that Turner had inflicted the abuse. See, e.g., State v. Baird, 83 Wn. App. 477, 484-86, 922 P.2d 157 (1996) (holding the doctors' statements that the cuts to the victim were deliberate were permissible opinions), rev. denied, 131 Wn.2d 1012 (1997). As in Baird, Dr. Feldman's opinion did not rely upon a judgment about the defendant's credibility, but rested upon his experience and training and treatment of P.T.'s injuries. See Baird, at 485-86. The fact that Dr. Feldman's opinion supported the jury's conclusion that Turner was guilty did not make it an improper opinion on guilt. See id.

Turner next contends that the "evidence" in this case was not cumulative because no witness testified the "'child abuse' was some of the worst seen."²⁰ Br. of Appellant at 22. The State disagrees.

²⁰ Turner again blurs the distinction between counsels' remarks, which are not evidence, and evidence properly admitted at trial.

Contrary to Turner's claim, the substance of properly admitted evidence (testimony by Nurse Bodkin and Dr. Feldman) was that P.T.'s abuse was some of the worst ever seen. Bodkin said that in her 18 years as a registered nurse, she had never seen anyone spank a child with so much force. 8RP 17. Dr. Feldman said that since 1983, he had evaluated about 1,350 child abuse cases.²¹ Yet, despite all of his experience with child abuse victims, Dr. Feldman still had a "pretty vivid" memory of P.T. Dr. Feldman said, "[T]he extent of [P.T.'s] injuries was quite large and her injuries themselves were quite dramatic." 10RP 118.

Finally, Turner contends that the "irregularity" here was so serious that it could not be cured by an instruction. See Br. of Appellant at 22-23 (quoting State v. Mack, 80 Wn.2d 19, 24, 490 P.2d 1303 (1971) ("An instruction to disregard is futile where the evidence admitted into the trial is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.")). Turner's argument misses the mark. The *evidence* in this case was prejudicial and of such a nature as to likely impress itself upon the minds of the jurors. Again, the prosecutor's opening remarks were not evidence.

²¹ Dr. Feldman said that he had evaluated approximately 50 cases each year since 1983. 10RP 116.

As stated above, the evidence in this case was undoubtedly of such a nature as to likely impress itself upon the minds of the jurors, as it had impressed itself upon the minds of the witnesses—lay and expert. Consequently, when viewed against the backdrop of all the evidence, the prosecutor's isolated remark in her opening statement did not so taint the trial such that Turner did not receive a fair trial. See State v. Weber, 99 Wn.2d 158, 164, 659 P.2d 1102 (1983). This Court should reject Turner's claim.

2. THE PROSECUTOR DID NOT COMMIT MISCONDUCT.

Turner next contends that the prosecutor committed misconduct during her direct examination of Dr. Feldman and again in her closing argument. Specifically, Turner claims that the prosecutor violated a pre-trial ruling when she asked Dr. Feldman about his research into commonalities of victims of child torture. Turner also argues that the prosecutor unfairly attacked defense counsel in her closing argument.

This Court should reject both claims. First, Turner did not preserve the issue of alleged misconduct during Dr. Feldman's testimony for appellate review and, because the evidence purported to be an opinion on Turner's guilt is not manifest constitutional error; it may not be raised for the first time on appeal. Second, the prosecutor did not elicit “profile

testimony” and Dr. Feldman did not render any opinion as to whether Turner was guilty. Finally, even if the prosecutor's question regarding commonalities of child torture or some of the prosecutor's remarks in closing argument were improper, Turner has not demonstrated that he suffered prejudice.

a. The Prosecutor Did Not Elicit Improper “Criminal Profile” Testimony.

i. Facts.

Before Dr. Feldman testified, the prosecutor asked the trial court to clarify its ruling that prohibited Dr. Feldman from using the term “child abuse” when he described P.T.'s injuries. 5RP 24-25; 10RP 104. The court said that, with respect to Dr. Feldman's qualifications, he would be permitted to use the term child abuse; but he had to refrain from characterizing this incident as child abuse. 10RP 104. The court said, “But in terms of his training and terms of his background, in terms of his publications he may refer to the terminology child abuse.” 10RP 104-05. Defense counsel conceded that, in the context of describing his expertise, Dr. Feldman could not avoid the term child abuse. 10RP 104.

During Dr. Feldman's testimony, he detailed his extensive research and contributions to the field of child abuse pediatrics. 10RP 106-13. Dr. Feldman's primary research is focused on childhood injuries, both inflicted and accidental. He has published 50 original articles and 20 book

chapters on the subject. 10RP 112-13. Dr. Feldman's current research includes his participation in a case series that tries to "define and exemplify child torture." 10RP 114. The prosecutor followed up with Dr. Feldman about the child torture research. She asked, "Have you reached any findings with regard to commonalities in the victims of child torture. Dr. Feldman responded,

[I]t is very common for the victim child to be scapegoated, and if the child is attributed with being willful or stubborn or having problems with eating or having problems with urine or bowel movements and these attributions in turn allow the abuser and often many of the other household members--

10RP 114.

Defense counsel objected based on a "Pretrial ruling." 10RP 115. Counsel said that he could elaborate, and the parties then had an unrecorded sidebar. 10RP 115.

ii. Waiver and RAP 2.5.

At the outset, the State disagrees that Turner has preserved this issue for review. Counsel's objection at trial was based on a "Pretrial ruling." Pretrial, the court ruled as follows: "Defendant's motion to preclude Dr. Feldman from referring to his finding that the trauma [to P.T.] was non-accidental is DENIED. However, the State's witnesses may not refer to the trauma as "child abuse." CP 96; 5RP 24-25. Neither

Turner nor his counsel made any attempt to record the sidebar; therefore the issue is not preserved for appellate review. State v. Nguyen, 134 Wn. App. 863, 871-72, 142 P.3d 1117 (2006).

Additionally, Turner may not raise a claim of improper opinion testimony for the first time on review because it is not manifest constitutional error. State v. Kirkman, 159 Wn.2d 918, 934-37, 155 P.3d 125 (2007). In order for a witness's testimony to constitute an improper personal opinion of the defendant's guilt, the statement must be explicit or almost explicit. Id. at 937. Here, the challenged testimony addressed a research project to define and exemplify child torture generally. 10RP 114. The statement was not an explicit or almost explicit personal opinion of Turner's guilt. Accordingly, this issue may not be raised for the first time on appeal.

- iii. Dr. Feldman's testimony regarding victims of child torture in general was not "profile testimony."

Should this Court choose to review Turner's claim of prosecutorial misconduct, the Court must first determine whether the prosecutor's questions constituted misconduct and, if so, whether there is a substantial likelihood that the misconduct affected the jury verdict, thereby denying Turner a fair trial. State v. Charlton, 90 Wn.2d 657, 663-64, 585 P.2d 142 (1978); see also State v. Smith, 104 Wn.2d 497, 510, 707 P.2d 1306

(1985) (“The appropriate inquiry is whether the testimony, when viewed against the backdrop of all the evidence, so tainted the trial that [the defendant] did not receive a fair trial.”). The Court will reverse the conviction only if there is a substantial likelihood that the misconduct affected the jury verdict. State v. Suarez-Bravo, 72 Wn. App. 359, 366, 864 P.2d 426 (1994).

The Court reviews for an abuse of discretion a trial court's refusal to strike evidence. Deschamps v. Mason County Sheriff's Office, 123 Wn. App. 551, 563-64, 96 P.3d 413 (2004).

This Court has found it permissible for an expert witness to testify about common behavioral symptoms exhibited by victims. See, e.g., State v. Florczak, 76 Wn. App. 55, 73, 882 P.2d 199 (1994) (finding testimony about behavior that a victim exhibits is typical of a group is permissible so long as it does not suggest the guilt of the defendant), rev denied, 126 Wn.2d 1010 (1995); State v. Stevens, 58 Wn. App. 478, 496-97, 794 P.2d 38, (finding no abuse of discretion where the trial court permitted an expert to testify about common behavioral symptoms to exist in sexually abused children generally), rev. denied, 115 Wn.2d 1025 (1990).

In Stevens, the trial court permitted an expert to testify about common symptoms associated with sexual abuse. Stevens, 58 Wn. App. at 496. The testimony was,

Q: What behavioral signs and symptoms would be important for you [to] have in putting together the whole picture?

A: Things that are commonly found as part of sexual abuse which [need] to be treated when they're found, things like sexually acting out, enuresis, which is bed wetting, or daytime wetting, and lack of bowel control, psychosomatic problems like abdominal pain, headache, anger, tantrums, nightmares, difficult behavior that children have that make their management complicated.

Id.

Stevens and other Washington cases have permitted expert testimony generally describing symptoms exhibited by a victim when not offered as a direct assessment of the victim's credibility. Id. at 496-97 (citing State v. Ciskie, 110 Wn.2d 263, 279-80, 751 P.2d 1165 (1988) (expert allowed to testify about symptoms that victims of battered woman syndrome exhibit, but not that victim in that case fit the profile); State v. Madison, 53 Wn. App. 754, 764-65, 770 P.2d 662 (expert permitted to testify about "recantation phenomenon," and to offer explanations for why child victims may recant, but never asserted that the victim fit the profile), rev. denied, 113 Wn.2d 1002 (1989)).

Similarly, in this case Dr. Feldman started to testify about commonalities in child torture victims (when defense counsel objected), but he never asserted that P.T. was a victim of child abuse, let alone torture. See 10RP 114 (Dr. Feldman said, "*if the child is attributed with*

being willful or stubborn or having problems with eating or having problems with urine or bowel movements. . . .) He never said that P.T. was so attributed. And, most certainly Dr. Feldman's testimony did not assess P.T.'s credibility, because P.T. (at 2 ½ -years-old) never testified.

Contrary to Turner's claim, Dr. Feldman's testimony was not impermissible "criminal profile" testimony. Dr. Feldman never offered any opinion on whether Turner fit the profile of a child torturer or that Turner tortured children generally or P.T. specifically. Rather, Turner's statements, quoted extensively above, provided the basis for the jury to determine that Turner "scapegoated" P.T. (after waiting two hours for P.T. to have a bowel movement, Turner gave her a "whooping"--he said he could not have her in there "for the whole damn day. That's what frustrated me") and "scapegoated" Douglas and Brannon (their bickering made him so frustrated that he did this to "his baby.")). Ex. 132, at 12; 13RP 111.

Moreover, because Turner's defense theories--that Brannon caused P.T.'s brain damage when she assaulted Turner with the CD rack or that P.T.'s symptoms were the manifestation of congenital birth defects--offered alternative explanations for P.T.'s injuries, the challenged testimony was relevant. As such, the trial court exercised proper

discretion in allowing Dr. Feldman's testimony to stand. See Deschamps, 123 Wn. App. at 563-64.

- iv. Overwhelming evidence supported the jury's verdict.

Even if this Court determines that the prosecutor forced Dr. Feldman to violate a pretrial ruling, as Turner has alleged²², overwhelming evidence supported Turner's conviction. Putting aside for the moment all of the other witnesses' testimony about the sounds they heard when Turner "whooped" P.T. or P.T.'s bruised and battered body that they saw after Turner beat P.T. to within an inch of her life, Turner's rants in his taped statement were proof beyond a reasonable doubt that he had committed the crime of assault of a child in the first degree. Ex. 132; see also, section C.1.b of this brief, *supra*.

The trial court summed it up best when, at sentencing, the court said,

Mr. Turner having sat through this trial and having heard the unimaginable and inexcusable violence that you committed on young [P.T.], I have no reservation in imposing the high end of the sentence. This is a case of breach of trust, and inhumane acts. There is no sentence that I can impose that will heal [P.T.]'s injuries both physical and emotional. I don't know what scars this will leave on her body or her soul as she grows up. It's up for her to decide what forgiveness if any to give you. It's up to me and the legal system to impose the appropriate

²² Br. of Appellant at 26.

punishment for your inexplicable[,] unjustified and inhumane conduct.

20RP 16.

b. Turner Has Failed to Establish Prejudice Vis-à-vis The Prosecutor's Remarks.

Turner argues that by disparaging the defense theories, the prosecutor committed misconduct that warrants a mistrial. The Court should reject Turner's claim. Even if the prosecutor did not articulate her point very well, there is no likelihood, much less a substantial likelihood, that her remarks affected the jury's verdict.

To establish prosecutorial misconduct, the defendant must show that the prosecutor's conduct was both improper and prejudicial. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Prejudice is established only if the defendant demonstrates a substantial likelihood that the misconduct affected the jury's verdict. Id. at 52. The impropriety and prejudicial impact of a prosecutor's remarks “must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.” State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

During her closing argument, the State reiterated that it had the burden of proving the charge beyond a reasonable doubt. 18RP 39. The prosecutor then told the jury that it did not have the burden of resolving

every question that a juror might have. She said, “The defense has done a good job of raising self-willed red herrings to distract your attention from the real issues.” 18RP 39. Defense counsel objected; he said that the prosecutor had called into question the legitimacy of the defense. The court overruled his objection. Id.

The prosecutor then challenged the conflicting defense theories: spontaneous bruising²³, or a metabolic disorder,²⁴ or Brannon caused the injuries when she assaulted Turner and P.T. with the CD rack.²⁵ Although the prosecutor should perhaps have avoided the term red herring, she did not disparage defense *counsel*, as Turner claims; rather, she challenged some of the alternative explanations that the defense had offered by way of explaining P.T.'s injuries.²⁶

Turner contends that the prosecutor misled the jury because she questioned Dr. Jung's explanations for P.T.'s injuries. See 18RP 29.

²³ 9RP 112-13 (defense counsel tried unsuccessfully to elicit testimony from Dr. Buck that a person born with sickle cell trait is more susceptible to bleeding or bruising than one without the trait).

²⁴ 11RP 38-39 (defense counsel tried unsuccessfully to elicit testimony from Dr. Feldman that P.T. had a metabolic disorder that caused her constipation).

²⁵ Yet, Turner's expert witness, Dr. Lily Jung, said that the only injury she could attribute to the CD incident was the swelling and bruising in P.T.'s forehead. 17RP 57-58.

²⁶ Because of this distinction, the cases that Turner cites, which involve attacks on defense counsel, are inapposite. See Br. of Appellant at 29, and cases cited therein. Likewise, the prosecutor here, unlike the prosecutor in Warren, did not argue matters outside the record. Br. of Appellant at 28 and citation therein.

There is nothing improper about that.²⁷ And, although the State did not call witnesses to rebut Dr. Jung's theories, in its case-in-chief, the State presented testimony of Dr. Feldman, a recognized expert in child abuse. The State also presented pediatric ophthalmologist, Dr. Cheung, who unequivocally stated that it was severe force, and not a seizure as Dr. Jung later said, that caused P.T.'s retinal damage, *i.e.*, her loss of vision.

Moreover, defense counsel determinedly argued his theories of the case. 18RP 41-51, 53-65. He challenged the conclusions that Doctors Feldman and Buck had reached. 18RP 57-59. Counsel argued why Dr. Jung's explanation made sense: P.T. had pre-existing conditions that caused P.T.'s near fatal condition, not trauma. 18RP 59-60.

At the end of the day, the evidence was overwhelming. See § C.1.b, *supra*. Turner had inflicted too many scars to count—on P.T.'s body and on her soul. See 20RP 13-14. The prosecutor's short comment, in the course of a six-week trial, even if error, had no affect on the jury's verdict. This Court should affirm Turner's conviction.

²⁷ Contrary to Turner's claim, the prosecutor did question Dr. Jung's credentials. See 17RP 48-50 (Dr. Jung conceded that she had no experience with pediatric neurology, let alone child abuse pediatrics).

**3. THE TRIAL COURT NEEDS TO CLARIFY A
CONDITION OF COMMUNITY CUSTODY.**

Turner claims that the trial court erred when it imposed, as a condition of community custody, an order that required Turner to obtain a “substance abuse evaluation and follow all treatment recommendations.” Br. of Appellant at 31-36; CP 221. Turner is correct. At sentencing, the trial court had evidence of Turner's alcohol - but not substance - abuse. Consequently, the trial court should amend the judgment and sentence to clarify that Turner shall obtain an alcohol abuse evaluation and follow all treatment recommendations.

At the time that Turner committed his crime (February 1 - November 29, 2008), the trial court's statutory authority was limited to ordering conditions of community custody mandated by former RCW 9.94A.700(4), optional under former RCW 9.94A.700(5)²⁸, or the trial court could order participation in rehabilitative programs or to otherwise perform affirmative conduct “reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community. . .” under former RCW 9.94A.715(2)(a).²⁹

²⁸ Former RCW 9.94A.700 was recodified as RCW 9.94B.050 by LAWS 2008, CH. 231, § 56, effective August 1, 2009.

²⁹ Former RCW 9.94A.715 was repealed by LAWS 2008, CH. 231, § 57 and LAWS 2009, CH. 28, § 42.

Division Two of this Court has addressed whether a trial court could order an offender to participate in alcohol counseling, given the lack of evidence that alcohol had contributed to his crimes. State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003). In order to avoid rendering any portion of either former RCW 9.94A.715(2) or former RCW 9.94A.700(5)(c) superfluous, the court held that “alcohol counseling ‘reasonably relates’ to the offender’s risk of reoffending, and to the safety of the community, only if the evidence shows that alcohol contributed to the offense.” Jones, 118 Wn. App. at 208.

In this case, the trial court ordered Turner to undergo a “substance abuse evaluation” and follow all treatment recommendations. CP 221. However, there was no evidence that any substance, other than alcohol, contributed to Turner’s offense. CP 162, 174-77, 180, 182, 189-90, 202. In evaluations from 2007 and 2008 to determine Turner’s eligibility for public assistance from the Department of Social and Health Services, and in a November 2008 psychological evaluation, Turner admitted to his history of alcohol abuse. CP 162, 174-77, 180, 182, 189-90, 202. The reports span the time that Turner had custody of, and horribly abused, P.T. The evidence, submitted by the defense to the trial court, in mitigation of the sentencing consequences showed that Turner’s alcohol abuse contributed to his offense. As such, the trial court had the authority to

order an alcohol abuse evaluation and any follow up treatment. See Jones, 118 Wn. App. at 208. But because the trial court imposed a substance abuse evaluation, the court should modify the judgment and sentence to clarify the scope of the evaluation.

D. CONCLUSION

For the reasons stated above, the State asks this Court to affirm Turner's conviction and to remand for correction of the judgment and sentence.

DATED this 24 day of March, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Andrew Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of Brief of Respondent, in STATE V. IDRIS TURNER, Cause No. 65353-9-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name Bora Ly
Done in Seattle, Washington

03/24/11
Date