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SONYA KRASKI
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

The State of Washington, Plaintiff, vs. MICHAEL J. MORRIS Defendant.	73278-1 No. 09-1-01071-9 REPLY TO RESPONSE TO STATE'S MOTION TO TRANSFER MOTON FOR NEW TRIAL PURSUANT TO CrR 7.8

In response to the State's motion to transfer, the defendant repeats the arguments raised in his motion for new trial pursuant to CrR 7.8. Specifically the defendant claims Dr. Feldman's expert testimony should have been excluded, and counsel's treatment of that testimony was constitutionally deficient performance. The defendant's arguments are based on a misstatement of the facts and the law applicable in to this case.

To the extent that the defendant attempts to directly litigate the admissibility of expert testimony he completely ignores the requirements of CrR 7.8(b)(5) on which he relies for relief. As to his ineffective assistance of counsel claim, he ignores what counsel did do to defend against the expert opinion. In some instances his assertions of what counsel did not do are unsupported by any evidence, and to the extent the record does show what counsel did, the evidence refutes his claims. The defendant has thus not borne his burden to make a substantial showing that he is entitled to relief. The court should therefore transfer his motion to the Court of Appeals to be treated as a personal restraint petition pursuant to CrR 7.8(c)(2).

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I. The defendant misstates the applicable law

The defendant relies on CrR 7.8(b)(5) as a basis on which the court should grant him a new trial. That rule "will not apply when the circumstances used to justify the relief existed at the time the judgment was entered." State v. Smith, 159 Wn. App. 694, 700, 247 P.3d 775 (2011). The defendant ignores this authority and argues that in addition to the ineffective assistance of counsel claim this rule provides relief from judgment when his Due Process right to a fair trial was violated. Response at 3, 29. The defendant provides no authority for the proposition that he may now attack the admissibility of evidence he did not challenge at trial based entirely on information that was available to him at the time.

Statutes limiting collateral relief from judgment are designed to promote finality in judgments. In re Bonds, 165 Wn.2d 135, 141, 196 P.3d 672 (2008). Thus an attack on a facially valid judgment may only be brought if filed within one year after the judgment becomes final. RCW 10.73.090. There are exceptions, such as when the defendant presents "newly discovered evidence, if the defendant acted within reasonable diligence in discovering the evidence and filing the petition or motion." RCW 10.73.100(1). Relief pursuant to CrR 7.8(b)(5) is similarly limited. Smith, supra. For that reason, it does matter whether the evidence that the defendant relies upon that was generated after trial changes what had previously been known about the science relating to abusive head trauma before trial. Because they do not change the debate, the defendant's arguments that directly challenge the admission of Dr. Feldman's testimony cannot support his motion.

Stating that the defendant has a due process right to a fair trial does not change the analysis. The defendant's due process argument rests on the claim that Dr. Feldman's testimony was not reliable. The United States Supreme Court has held that "the potential unreliability of a type of evidence does not alone render its introduction at the defendant's trial fundamentally unfair." Perry v. New Hampshire, __ U.S. __ 132 S.Ct. 716, 181 L.Ed.2d 694

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(2012). There the court held that admission of unreliable identification testimony did not violate due process, as long as the unreliability did not result from any improper government conduct. Id.

"The Constitution...protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit." Id. at 723. Here, the defendant had the opportunity to challenge Dr. Feldman's testimony on the basis he now asserts at the time of trial. That opportunity afforded him the fair trial he was entitled to. His arguments relating to the admissibility of Dr. Feldman's testimony are only relevant to the prejudice prong of his ineffective assistance of counsel claim.

The defendant incorrectly asserts that "[t]he State thus bore the burden of proving A.M's medical findings were the result of abusive shaking by Mr. Morris." Response at 24. In fact the State was not required to prove the mechanism of injury. Rather the State was required to prove (1) the defendant was over 18 years old, (2) A.M. was under 13 years old, (3)(a) the defendant committed the crime of assault first degree as defined in RCW 9A.36.011 against the child or (3)(b) intentionally assaulted the child and recklessly inflicts great bodily harm. RCW 9A.36.120, Ex. 1 to transfer motion. The defendant's arguments based on his erroneous statement of the law should be rejected.

From this misstatement of the law the defendant argues that where the expert testimony "constituted the proponents only evidence of causation, the court's admissibility determination under ER 702 and other rules of evidence must consider the State's burden of proof." Response at 24 (emphasis in the original). The argument suggests that the analysis to determine the admissibility of expert testimony is dependent on whether that is the sole evidence supporting an element of the offense or whether it is cumulative of other evidence supporting it. This assertion is made without citation to any authority. Where no authority is

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cited to support a proposition the court assumes that after diligent search counsel found none. In re Haghighi, 167 Wn. App. 712, 724, 276 P.3d 311 (2012).

The argument also conflates the analysis for admissibility of evidence with sufficiency of the evidence. The defendant correctly states that expert testimony is inadmissible if it is based on conjecture. State v. Lewis, 141 Wn. App. 367, 389, 166 P.3d 786 (2007), review denied, 163 Wn.2d 1030 (2008). He then asserts that Dr. Feldman's opinion was insufficient to satisfy the burden of proof "since proof that leaves open the real possibility" that the defendant did not cause A.M.'s medical findings could not satisfy the State's burden of proof. Response at 24.

Whether evidence is admissible and whether there is sufficient evidence to sustain the State's burden of proof are two completely separate inquiries. The former involves application of the rules of evidence and constitutional provisions such as the Sixth Amendment right to confrontation and the Fourth Amendment right to be free of unreasonable searches and seizures. The latter contemplates whether, after viewing all of the admissible evidence in a 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. Green, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980).

Finally, the defendant asserts that expert testimony is inadmissible under ER 702 and applicable case law. Response at 23. He has cited cases that generally discuss the basis for admission of expert testimony, but cites no case that has specifically found the expert testimony at issue in this case is inadmissible although courts in this state have admitted that kind of expert testimony. State v. Daniels, 124 Wn. App. 830, 836 n.2, 103 P.3d 249 (2004), State v. Fero, 125 Wn. App. 84, 92-93, 104 P.3d 49 (2005). The undersigned has found no case in Washington that directly addresses admissibility of either SBS or AHT as a diagnosis under ER 702. Cases in other jurisdictions that have addressed the issue have found the diagnosis of SBS/AHT is admissible. State v. Lopez, 412 S.E.2d 390 (1991), State v. MClary, 541 A.2d 96, (1998), In re Lou R., 499 N.Y.S.2d 846 (1986). See also cases cited in State's "Motion for

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Preliminary Determination of Whether or not a Frye Hearing is Necessary." App. J, Defendant's CrR 7.8 motion.

2. The defendant has misstated the facts

The defendant argues that Dr. Feldman "determined based on the clinical picture, that A.M. was abusively shaken by her last caregiver." Response at 3. To support that assertion he relies on the prosecutor's closing argument. Id. The defendant's argument fails to appreciate the difference between direct and circumstantial evidence, and the prosecutor's role in closing to assist the jury in evaluating the evidence by permissibly drawing inference from the evidence that was introduced. The defendant also asserts that Dr. Feldman "clearly said [shaking] was" involved, even though he did not use the term SBS. Response at 22.

Here Dr. Feldman's testimony did not address the defendant's culpability at all. Rather his testimony supported the elements of intent, recklessness, and great bodily harm. Dr. Feldman reviewed A.M.'s medical records, interviewed A.M.'s mother for a history, examined A.M., and recommended further tests before ruling out any non-traumatic cause of A.M.'s injuries. 6-2-11 RP 118-137; 6-3-11 RP 9. He was clear in his testimony that in his opinion, based on the objective observations, her history, and what he knew from the relevant literature, that A.M.'s injuries were traumatic, and not the result of illness or disease. 6-3-11 RP 4. Relying on studies that had been done the doctor testified that A.M's constellation of injury, subdural hematoma and retinal hemorrhages, were "typically the result of whiplash forces to the head." 6-3-11 RP 5. He acknowledged there is a debate whether shaking can cause the kind of injuries A.M. had, but shaking was a force that caused whiplash to occur. 6-3-11 RP 7. Dr. Feldman testified that after going through a differential diagnosis, weighing the possibilities and excluding them one by one, to a reasonable degree of medical certainty A.M. suffered from abusive head trauma. 6-3-11 RP 13. He specifically testified that he did not know what the specific mechanism of injury was because "I wasn't in the room when it happened." 6-3-11 RP 16-17.

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The Court of Appeals has ruled similar testimony introduced through Dr. Feldman was admissible under the rules of evidence. State v. Jones, 59 Wn. App. 744, 750, 801 P.2d 263 (1990). Like the testimony at issue here, Dr. Feldman's testimony in Jones was based on his review of the evidence and inferences drawn therefrom. Id. at 749. It was not inadmissible simply because it touched on ultimate issues for the jury to decide. Id. at 750.

The defendant also asserts that Dr. Feldman did not consider all possible causes of A.M.'s injuries. Response at 18-19. The record clearly demonstrates that Dr. Feldman indeed did consider all possible causes before conclusively forming the opinion that A.M. suffered traumatic injury that had been inflicted rather than caused by accident. 6/2/11 RP 118-138, 155-157; 6/3/11 RP 3-4. Dr. Feldman also reviewed the reports from the defendant's expert witnesses. After considering the information in those reports he maintained his original diagnosis. 6/3/11 RP 29-34.

3. The defendant has not demonstrated he was deprived of effective assistance of counsel

The defendant claims that his trial attorney rendered ineffective assistance of counsel because she failed to investigate the science behind Dr. Feldman's medical opinion before settling on a strategy that did not include a motion to suppress that testimony. Counsel has a duty to conduct a reasonable investigation or to make a reasonable decision that makes a particular investigation unnecessary. In re Davis, 152 Wn.2d 647, 721, 101 P.3d 1 (2004). "An attorney's action or inaction must be examined according to what was known and reasonable at the time the attorney made his choices." Hendricks v. Calderon, 70 F.3d 1032, 1036 (9th Cir. 1995).

The defendant bears the burden of coming forth with competent evidence to establish the facts that entitle him to relief. In re Rice, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). The defendant attempts to meet his burden to demonstrate that counsel failed to conduct a reasonable investigation before settling on a strategy by reference to circumstantial evidence.

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Response at 21. This circumstantial evidence does not answer what counsel had done before settling on a strategy. Counsel obtained funds to get medical records from Harborview Hospital after the original date for the Frye hearing to supplement the records her predecessor obtained before the Frye hearing had been scheduled. See Sub 22, 23, 48, 49. This suggests that counsel wanted to conduct more investigation before determining whether a suppression hearing would be successful.

The circumstantial evidence sheds little light on what counsel actually did to investigate the case. Notably the defendant does not provide an affidavit from counsel stating what she had done before deciding on a particular strategy, the person who is in the best position to state what she did or did not do before settling on a trial strategy. As noted in the State's transfer motion counsel clearly was educated regarding the literature on AHT by the time the case went to trial. Transfer motion at 14-15. Counsel could have conducted adequate research to conclude that a Frye hearing would not likely result in suppression of Dr. Feldman's expert opinion. Or she could have determined that further investigation was warranted before deciding to challenge his opinion by cross examination and presenting other expert testimony. The glaring absence of any affidavit from counsel stating exactly what she did and did not do before settling on a trial strategy defeats any claim that she performed deficiently in this regard.

The defendant's remaining arguments regarding the efficacy of confessions to corroborate studies that identified common physical findings in inflicted trauma cases, the biomechanical studies that the defendant asserts undermines the AHT diagnosis,' and the legal implications of the AHT diagnosis all relate to whether the defendant was prejudiced; i.e. had counsel brought these arguments in a motion to suppress Dr. Feldman's testimony would that motion have been successful? Absent an affirmative showing that a suppression motion would be granted there is no showing of actual prejudice in an ineffective assistance of counsel claim. State v. McFarland, 127 Wn.2d 322, 337 n.4, 899 P.2d 1251 (1995).

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The defendant's confession argument implies that all confessions are involuntary, or at the least it cannot be said they are voluntary. The defendant's own case does not support that inference since he stipulated that his confession was voluntary. 2/28/11 RP 3. Officer Murphy used open ended questions when he interviewed the defendant. The defendant explained what happened, and the officer had the defendant write a statement memorializing what the defendant told the officer. While writing the statement the defendant spontaneously approached the officer and added that he had shaken A.M. twice. 6/2/11 RP 37-42. The Vinchon study Dr. Feldman referred to was a prospective study wherein the confessions used to corroborate inflicted head abuse were obtained by a forensic pediatrician during or after court proceedings were made public. As Dr. Feldman explained there are other studies that use confessional data as well which statistically tend to confirm shaking as a mechanism of injury, leading to the conclusion that the confessions are at least "partially legitimate." 6/3/11 RP 28-29. Even one author cited by the defendant confirms that confessions produce the evidence to support the conclusion that shaking contributes to AHT. Motion app. P, Dias The Case for Shaking at 370. Given that the scientific community accepts and relies on confessions to study the viability of shaking as one mechanism that can produce the constellation of injuries suffered by A.M., the criticism for use of confessions would go to the weight and not admissibility of Dr. Feldman's testimony.

The biomechanical studies on which the defendant relies likewise would go to the weight and not admissibility of Dr. Feldman's testimony. Those studies by no means are the final word on AHT and the injuries associated with that diagnosis. Some of the studies are flawed. Others have been challenged by new research. Transfer motion at 23-24. In one study the authors conclude that initial research conducted by Duhaime et al was flawed. Those authors conclude that 'it cannot be categorically stated, from a biomechanical perspective, that pure shaking cannot cause fatal head injuries in an infant" Response Ex. EE, Cory and Jones, Can Shaking

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Alone Cause Fatal Brain Injury? At 317, 332. Other scientists recognize that biomechanical studies have their limitations, and must be considered in conjunction with clinical data. Motion App O, Margulies and Coats Biomechanics of Head Trauma in Infants and Young Children at 361.

The defendant's claim that the legal implications of an AHT diagnosis have some bearing on the admissibility of that evidence should also be rejected. He asserts the diagnosis was unreliable because its name focuses on the cause of clinical findings and that there is an organized effort to meet challenges to the admission of AHT evidence. He cites absolutely no authority for the proposition that a particular class of evidence is inadmissible for those reasons. The court should presume that his counsel has diligently searched for authority to support that position and found none. Haghighi, 167 Wn. App. at 724. In the absence of any authority those facts would not render the testimony inadmissible.

The defendant's arguments concerning the reliability of Dr. Feldman's testimony relate to whether that evidence is helpful to the trier of fact under ER 702. Lake v. Puget Sound Energy, Inc. 176 Wn.2d 909, 918, 296 P.3d 860 (2013). The supplemental materials appended to his response brief do not provide unquestionable support for this position. The biomechanical study by Jones and Cory contradicted the conclusion reached in the study by Duhaime et. al. that shaking alone could not cause subdural and retinal hemorrhages. Response, Ex. EE at 317. The article by Dr. Uscinski relies on sources that have been discredited, including the biomechanical study by Bandak[1] and the evidence based medicine review conducted by Donohoe[2]. The defendant also relies on an article[3] authored by two clinical law professors who head the Innocence Projects in their respective law schools, one of the doctors who testified on

[1] Bandak's calculations were criticized by Margulies, Prang, and Myers, transfer motion Ex. 7

[2] Dr. Feldman testified that Donohoe violated all of the principals for doing an evidence based review. 6/3/11 RP 25-26. This criticism is echoed and explained in more detailed in Dr. Narang's comprehensive article on abusive head trauma. See transfer motion Ex. 6 at 533-535.

[3] Response Ex. GG Findley et. al, Shaken Baby Syndrome, Abusive Head Trauma, and Actual Innocence: Getting it Right, 12 Hous. J. Health & Policy 209 (2012).

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behalf of the defendant in this case, and a doctor from England who was found by one court in her native country to have "fallen into that category of expert identified by Butler-Sloss P. in Re LU & LB, namely the expert who has developed a scientific prejudice."[4]

Courts generally interpret helpfulness to the trier of fact broadly and will favor admissibility in doubtful cases. State v. Groth, 163 Wn app. 548, 564, 261 P.3d 183 (2011). None of the arguments raised by the defendant support the conclusion that Dr. Feldman did not follow the scientifically accepted procedure in coming to the opinion that A.M. suffered abusive head trauma. While those arguments may challenge some of the science on which the diagnosis of abusive head trauma is based, it remains a diagnosis that is accepted in the relevant medical and scientific communities. See Ex. 5, transfer motion, Ex. 6 transfer motion at 574-576. A motion to suppress Dr. Feldman's testimony on that basis would not have succeeded. The defendant was therefore not prejudiced when counsel did not pursue a Frye hearing to seek suppression of Dr. Feldman's testimony.

For the foregoing reasons, and the reasons stated in the State's Transfer motion, the State asks the Court to transfer the defendant's CrR 7.8 motion to the Court of Appeals to be treated as a personal restraint petition.

DATED this 2nd day of December, 2014.

Respectfully submitted,

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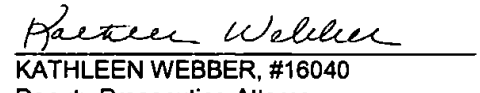

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[4] The court was referring to Dr Waney Squires who testified in A Local Authority v. S (2009) EWHC 2115 (Fam). The case may be accessed at http://www.famlylawweek.co.uk/site.aspx?i=ed53850. The quote in this lengthy opinion appears at paragraph 285.

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