75111-5

FILED
Oct 14, 2016
Court of Appeals
Division I
State of Washington

NO. 75111-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER SEFTON,

Appellant.

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

The Honorable James D. Cayce, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The appellant was denied a fair trial when detectives repeatedly their expressed his opinions on appellant's guilt in a recorded interview and at trial.

2. Defense counsel was ineffective for failing to object to the detectives' inadmissible opinion testimony.

3. The court violated the appellant's right to jury unanimity as to the charge of first degree assault of a child.

4. The court violated the appellant's constitutional right to jury unanimity as to the charge of first degree criminal mistreatment.

5. The prosecutor's incurably prejudicial misconduct in closing argument denied the appellant a fair trial.

6. Defense counsel was ineffective for failing to object to the prosecutor's misconduct.

7. The sentencing court erred in ordering a mental health evaluation and treatment as a condition of community custody.

8. The court erred in entering a lifetime no-contact order prohibiting all contact between the appellant and his younger child.

Issues Pertaining to Assignments of Error

1. Where police detectives repeatedly expressed their opinions on the appellant's guilt in a recorded interview, and at trial, was the

appellant denied his constitutional right to a fair trial on the first degree criminal mistreatment charge?

2. Was counsel ineffective for failing to object to such testimony?

3. First degree assault of a child, as charged and instructed in this case, requires, in part, that the State prove an intentional touching or striking causing substantial bodily harm. Witnesses described three possible injuries that could constitute the assault resulting in substantial bodily harm. Where the prosecutor did not elect which act constituted the single charged assault, instead emphasizing all three, and the trial court did not give a unanimity instruction, did the court violate the appellant's right to a unanimous verdict?

4. Was the appellant's right to jury unanimity violated where there was insufficient evidence to prove each alternative means of committing first degree criminal mistreatment?

5. The State argued in closing that unlike "the system," "we"—i.e., the prosecutor and the jury—must not fail the complainant children, and must be "swift and virtuous."[1] The State also argued in rebuttal that, to demonstrate that society valued children, the jury should

[1] 23RP 2184.

show the complainants that "they are valued and they will be protected."[2] Did the State's arguments, calculated to align jurors with the prosecution and to appeal to jurors' sympathies and prejudices, constitute incurably prejudicial misconduct, denying the appellant a fair trial?

6. Was counsel ineffective for failing to object to the misconduct?

7. Did the trial court err when it required mental health treatment and evaluation as a condition of community custody, without following the required statutory procedures?

8. The trial court entered a lifetime no-contact order prohibiting all contact with the appellant's younger son, who was not the subject of a crime of conviction. Where the State offered no rationale for the *duration* of the no-contact order, and the court made no findings regarding the need for a lifetime order, did the court abuse its discretion?

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[2] 23RP 2272.

B. STATEMENT OF THE CASE[3]

1. Charges, verdicts, and sentence

The State charged Christopher Sefton and fiancée Lori Lloyd with first degree assault of a child[4] and second degree assault of a child as to Sefton's son K.S. (born 5/3/07) (counts 1 and 2, charged in the alternative).[5] CP 55. Sefton and Lloyd were also charged with first

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[3] This brief refers to the verbatim reports as follows: 1RP – 1/19/16; 2RP – 1/21/16; 3RP – 1/25/16; 4RP – 1/27/16; 5RP – 1/28/16; 6RP – 2/1/16; 7RP – 2/2/16; 8RP – 2/4/16; 9RP – 2/8/16; 10RP – 2/9/16; 11RP – 2/11/16; 12RP – 2/22/16; 13RP – 2/23/16; 14RP – 2/24/16 (morning); 15 RP – 2/24/16 (afternoon); 16RP – 2/25/16; 17RP – 2/29/16; 18RP – 3/1/16; 19RP – 3/2/16; 20RP – 3/3/16; 21RP – 3/7/16; 22RP – 3/8/16; 23RP – 3/10/16; 24RP – 3/11/16; 25RP – 3/14/16; 26RP – 4/21/16 (sentencing); and 27RP – 5/10/16. All volumes are consecutively paginated except 15RP (2/24/16 afternoon).

[4] RCW 9A.36.120(1) provides in part that

> A person eighteen years of age or older is guilty of the crime of assault of a child in the first degree if the child is under the age of thirteen and the person:
>
> . . . .
>
> (b) Intentionally assaults the child and . . . :
>
> . . . .
>
> (ii) Causes substantial bodily harm, and the person has previously engaged in a pattern or practice either of (A) assaulting the child which has resulted in bodily harm that is greater than transient physical pain or minor temporary marks, or (B) causing the child physical pain or agony that is equivalent to that produced by torture.

[5] Each count in this case was charged as a crime of domestic violence, as defined by RCW 10.99.020. CP 55-61.

degree criminal mistreatment[6] of K.S. (count 3). CP 57. The State alleged counts 1-3 were committed between October 1, 2013 and March 20, 2014. CP 55-57.

Sefton and Lloyd were also charged with the unlawful imprisonment of R.L.,[7] K.S., and D.S.[8] (counts 4, 5, and 6, respectively). CP 57-60. Beginning dates for the charges varied, but each charge had an end date of March 20, 2014. CP 58-59.

The State also charged Sefton with two additional charges: first degree rape of a child as to R.L. (count 7) occurring between April 1, 2011 and March 20, 2014, and fourth degree assault as to D.S., occurring between June 14, 2012 and March 20, 2014 (count 8). CP 60.

---

[6] Under RCW 9A.42.020

> A parent of a child, the person entrusted with the physical custody of a child or dependent person . . . is guilty of criminal mistreatment in the first degree if he or she recklessly, as defined in RCW 9A.08.010, causes great bodily harm to a child . . . by withholding any of the basic necessities of life.

"'Basic necessities of life' means food, water, shelter, clothing, and medically necessary health care, including but not limited to health-related treatment or activities, hygiene, oxygen, and medication." RCW 9A.42.010(1). For purposes of chapter 9A.42 RCW, "[g]reat bodily harm" is defined as "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily part or organ." RCW 9A.42.010(2)(c).

[7] R.L. (born 1/15/06) is Lloyd's daughter.

[8] D.S. (born 6/14/12) is Sefton and Lloyd's son in common.

The State alleged three aggravators as to each felony: deliberate cruelty, under RCW 9.94A.535(3)(a); victim's particular vulnerability, under RCW 9.94A.535(3)(b); and crime of domestic violence, part of ongoing pattern of abuse, under RCW 9.94A.535(3)(h)(i). CP 56.

At the close of the State's case, the court dismissed count 6, the unlawful imprisonment charge relating to D.S. 21RP 1897-98. The jury acquitted Sefton and Lloyd of the remaining unlawful imprisonment charges (counts 4 and 5). CP 138-39. The jury also acquitted Sefton the fourth degree assault charge (count 8). CP 141. The jury deadlocked, and a mistrial was declared, as to the first degree child rape charge relating to R.L. (count 7). CP 140; 25RP 2297.

The jury convicted Sefton and Lloyd of the remaining charges, counts 1-3.[9] CP 135-37. The court ultimately dismissed count 2, which was charged in the alternative to count 1, on double jeopardy grounds. 26RP 2325. The jury found each aggravator applied as to each count. CP 144-45, 148-51.

The court sentenced Sefton and Lloyd to an exceptional sentence of 240 months of incarceration on count 1. CP 171, 173. As to count 3,

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[9] As to count 3, the jury was also instructed on the lesser offense of second degree criminal mistreatment, which differs from the first degree in that it requires a defendant to have recklessly "created an imminent and substantial *risk* of death or great bodily harm" or to have "[c]aused substantial bodily harm" by withholding any of the basic necessities of life. CP 95-96 (emphasis added).

the court imposed an exceptional sentence of 120 months and ran it concurrent to the count 1 sentence. CP 173.

The court entered findings of fact and conclusions of law in support of the exceptional sentences. CP 178-79. These stated that each one of the aggravators was a "substantial and compelling reason, standing alone," for the sentences. CP 179; see also 27RP 2334 (oral ruling).

The court also imposed 36 months of community custody. CP 174. As a condition of community custody, the court ordered Sefton to "obtain a mental health evaluation and follow all recommendations including taking prescribed medication if recommended." CP 177.

The court imposed lifetime "domestic violence" no-contact orders between Sefton and his children K.S. and D.S. Supp. CP ___ (sub nos. 138 and 139). But the court stated, orally, that it might reconsider its decision as to written contact, depending on what was determined in dependency proceedings and "if . . . not reversed on appeal." 26RP 2326. But the no contact orders and the judgment and sentence do not contain any indication that the orders are subject to amendment. Supp. CP ___ (sub nos. 138, and 139); CP 173.

2. Trial testimony

a. Lay witnesses and physicians

Carrie Sasser was the school nurse at Gildo Rey Elementary school in Auburn, as well as nearby Chinook Elementary. 9RP 657-58. K.S. attended Gildo Rey for kindergarten and the first semester of first grade, but he transferred to Chinook in late January of 2014. 9RP 594, 626.

Sasser first met K.S. when he was a student at Gildo Rey. 9RP 658. In late October of 2013, K.S.'s first grade teacher, Tammy Boorn, reported that K.S was hungry in class and hoarded food. 9RP 668. Sasser contacted Lloyd, who explained that K.S. had been ill with a stomach virus and was therefore placed on a restricted diet consisting of mild foods and carbohydrates. 9RP 668-70; 10RP 721-22. Sasser suggested that K.S. eat more protein. 9RP 669.

According to Sasser, K.S.'s family disclosed no food allergies for the 2012-2013 academic year. 9RP 663. His family did report that K.S. had severe emotional issues that required counseling. 9RP 662. The following year, 2013-2014, K.S.'s student health information sheet indicated that K.S. was allergic to artificial colors and flavors, and it instructed that K.S. was not permitted to have food with added sugar. 9RP 663. Sasser sent a form home with K.S. requesting clarification regarding K.S. food restrictions, but she did not hear back from the family. 9RP 664.

First grade teacher Boorn testified that K.S. was preoccupied with food. 10RP 761, 764. He ate from other children's lunch trays and

obtained food out of the trash. 10RP 761. Sefton told Boorn that K.S. was not allowed to have food with high fructose corn syrup. 10RP 774. Boorn bought special food for K.S. so he could participate in classroom celebrations. 10RP 763.

K.S. missed school October 29, 2013. Sasser called and spoke with Sefton. Sasser told Sefton that K.S. appeared to be losing weight and asked if the family needed help with food. Sefton denied the family had problems obtaining food. 9RP 671.

When K.S. returned to school the following day, Sasser and Boorn decided to track K.S.'s weight. 9RP 661, 672-73; 10RP 725, 770; see also 11RP 910 (testimony of Sasser's assistant). K.S. weighted 57.75 pounds on October 30, 2013. 9RP 672-73. Sasser weighed K.S. at Gildo Rey, and later at Chinook, after he transferred. His weight fluctuated. 9RP 674-88. It appeared to increase during the school week and then decrease over the weekend. He also lost weight during school breaks. 9RP 675, 677; 10RP 776 (K.S. lost four pounds over winter break).

After receiving a referral from Sasser reporting K.S.'s weight loss, a Child Protective Services (CPS) investigator, Heather Prescott, met with K.S. at school on October 31. 12RP 1145; 18RP 1665. Prescott also met with the family, including Lloyd, a few weeks later. 12RP 1154. She also

contacted K.S.'s doctor, who did not have concerns about K.S. or his family. 12RP 1161-62. No further action was taken. 18RP 1667.

Boorn testified that, at the beginning of the 2013-2014 school year, K.S.'s appearance was relatively "typical." 10RP 767. But when Boorn last saw K.S. in January of 2014, he appeared "skinny" and had a bruised face. 10RP 767. Since kindergarten, his hair had changed from thick and brown to ashy and patchy. 10RP 767.

Sasser made another CPS referral after winter break, based on K.S.'s appearance and food-seeking behavior at school. 18RP 1668-69. Another staff member made a referral a few days later, after K.S. appeared at school without a coat. 18RP 1670. "Stepsister" R.L. reported that K.S. got in trouble and Sefton took his coat. 18RP 1670; see also 9RP 678; 10RP 778 (Sasser and Boorn testimony about lack of coat). Another CPS investigator, Nina Gonzalez, met with K.S., who described the various types of punishments he received at home. 18RP 1673. He also told Gonzalez that "sometimes" he was not allowed to eat. 18RP 1674. K.S. reported he did not eat dinner the night before because he did not finish his homework. 18RP 1674. Gonzalez met with Sefton, who explained that K.S. did not get dessert when he did not finish his homework. 18RP 1675-76. Sefton and Lloyd explained that K.S. was, at times, required to do pushups to "blow off steam." 18RP 1676.

K.S. left Gildo Rey in late January 2014. K.S. choked on a muffin he had obtained from the trash. Teacher Boorn performed the Heimlich maneuver on K.S., and he spit out the muffin. 10RP 784. K.S. was seen by the nurse, but the school did not call for outside medical treatment. 10RP 786. After learning what had occurred, Sefton contacted the school and expressed frustration regarding the school's failure to supervise K.S. and failure to seek medical attention. 10RP 842-45 (testimony of Gildo Rey principal). After the choking incident, Sefton sought permission from the Auburn school district to move K.S. from Gildo Rey to Chinook Elementary. 9RP 621, 629; 10RP 814.

After the transfer, Sefton contacted the Chinook office and directed the school not to provide food to K.S. 9RP 621, 625. K.S. was not permitted to eat school-provided breakfasts or lunches, 10RP 724, 734, 737, only the lunch he brought from home. 9RP 624, 681, 688; Ex. 50. Sefton explained to staff that K.S. was refusing to eat breakfast at home. 9RP 621-23, 630-31. Sefton also asked the school to not allow K.S. to sleep at school because he was having trouble sleeping at night. 9RP 625.

Jill Hopkins, K.S.'s first grade teacher at Chinook, testified that K.S. seemed preoccupied with food and often asked when he would eat next. 11RP 953-54, 964-69. Hopkins received instructions from K.S.'s family that he was only permitted to eat healthful foods such as fruits and

vegetables. 11RP 961, 964-66, 990; Ex. 50. Lloyd reportedly became upset when she learned that K.S. was given Goldfish crackers, because the crackers had artificial colors. 11RP 989, 996-97.

K.S. made comments to Hopkins about not sleeping, but he did not explain why he was not sleeping. 11RP 955, 984-85. According to Hopkins, K.S. fell asleep in class and on the playground. 11RP 956-58. She knew of the instructions that K.S. was not permitted to sleep at school, but she ignored them. 11RP 957-58.

Jesse Rodriguez, a Chinook counselor, testified that in late February, Sasser brought K.S. into Rodriguez's office and showed her large purple bruise on the top of K.S.'s ear. Rodriguez noticed what she believed were fingernail marks near the bruise. 9RP 598, 601; see also 9RP 683-84 (nurse Sasser's testimony regarding ear bruise). K.S. did not know how he got the marks. 9RP 600. Rodriguez also noticed bruising on K.S.'s arm. 9RP 599. Rodriguez made a referral directly to CPS intake rather than contacting the CPS worker already assigned to K.S.'s case. 9RP 599; 18RP 1681. Rodriguez had become frustrated with CPS's inaction regarding K.S. 9RP 599, 611.[10]

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[10] Rodriguez recalled another occasion when Hopkins brought K.S. to the school office with socks on his hands. 9RP 608. K.S. said Sefton told him not to remove the socks. 9RP 609. When staff removed the socks, K.S.'s hands were red and swollen. 9RP 609; see also 11RP 962-63 (Hopkins testimony). K.S. told staff he

Social worker Gonzalez again interviewed K.S. at Chinook on February 28. 18RP 1682. Rodriguez was present. K.S. disclosed that his father gave him blended sandwiches for dinner, and had done so the night before. 9RP 603; 18RP 1687-89, 1710-11. K.S. explained it was because he took big bites. 18RP 1688. He also explained he did not eat the same meal as the others because he was messy. 9RP 602-03; 18RP 1689. K.S. said he did not eat breakfast the day before because he did not get ready on time, and he was not allowed to have breakfast at school. 18RP 1692. K.S. also told Gonzalez that, for punishment, he had to take cold showers, stand in a corner, and do pushups. 9RP 603; 18RP 1702-04, 1712. K.S. offered a number of possible explanations for his bruised ear but denied anyone had grabbed it. 18RP 1697. He said he felt safe at home. 18RP 1712. Gonzalez testified she did not have enough information to remove K.S. from the home at that point. 18RP 1704. However, she took photos of K.S.'s ear. 18RP 1714-15.

R.L. and K.S. testified at trial. R.L. said Sefton and Lloyd gave K.S. a "special drink" consisting of hot dog or peanut butter sandwich "smoothies." 16RP 1455, 1501. According to R.L., he was given the

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had been required to put his hands in hot water. 9RP 609. Hopkins testified this incident occurred March 20. 11RP 962, 979-80.

drink after he choked on the muffin. 16RP 1456-57. Unlike K.S., R.L. ate regular food. 16RP 1456.

R.L. also testified Lloyd and Sefton held K.S. by the ear and walked him around in circles. 14RP 1462, 1472. K.S. screamed. 16RP 1462. R.L. also claimed that Sefton and Lloyd locked all the children in a scary closet for hours. 16RP 1466.

In contrast, K.S. testified he was placed in the closet for timeouts for only a few minutes at a time. 17RP 1605. The door was not locked. 17RP 1605. He denied that the other children were placed in timeouts in the closet. 17RP 1594-95, 1609.

K.S. disliked living with Sefton and Lloyd. 17RP 1587. He was the only one who got the blended drinks. 17RP 1615. He did not like the drinks. 17RP 1591-92. K.S. recalled that, on occasion, he was not permitted to eat. This made him angry. 17RP 1592-93.

Dr. Rebecca Wiester, the medical director at the Seattle Children's Hospital "Child Protection Program," provides medical consultation for the Department of Social and Health Services. 13RP 1236-37, 1245. CPS sent her photos of K.S.'s ear bruise on February 28, 2014. 13RP 1245; Ex. 80. She noted the bruises were still present on March 7. 13RP 1251.

According to Wiester, ear bruises suggest "inflicted trauma" because ears do not bruise easily. 13RP 1249. Wiester was skeptical that

sleeping on the floor, the explanation provided, could have caused K.S.'s ear injury. 13RP 1246-47, 1256.

After reviewing the photos of K.S.'s ear, Wiester recommended that K.S. be evaluated at Children's Hospital as soon as possible. 13RP 1253. She also recommended that the emergency department contact CPS if K.S. did not show up. 13RP 1253.

Social worker Gonzalez testified she contacted Sefton and Lloyd on February 28, 2014 and told then K.S. needed to be taken to Children's for evaluation of the ear bruise. 18RP 1716. Sefton refused, but offered to take K.S. to the local hospital in Auburn instead. 18RP 1717. Gonzalez told Sefton that if he did not take K.S. to Children's by 9 p.m., then CPS would have law enforcement visit the home. 18RP 1718. Children's contacted CPS that evening with concerns the injury was not accidental. 18RP 1718-19.

Social worker Xiao Jackson was the on-call social worker on March 1, 2014, a Saturday. According to Jackson, the evening before, CPS received a referral from Children's after K.S. did not appear. 12RP 1177-78. Jackson's supervisors ordered her to do a face-to-face welfare check and instructed her to make sure K.S. was seen at Children's. 12RP 1177-82, 1190. Jackson contacted Auburn police to accompany her on the visit. 12RP 1179.

When Jackson arrived at Sefton and Lloyd's apartment complex, however, police officers were already there. The officers told Jackson they had visited family the previous evening and everything was fine. 12RP 1181. When Jackson insisted that K.S. be taken to Children's, Sefton and Lloyd protested that driving to Seattle was too costly. 12RP 1182. Police intervened on the family's behalf, and K.S. was taken to the Auburn hospital. 12RP 1183-85, 1191-92. At the hospital, K.S. told Jackson he had injured his ear while sleeping on the floor during the family's recent vacation. 12RP 1188.

Dr. Wiester spoke with the Auburn physicians who evaluated K.S. She found their observations concerning. 13RP 1254-58.

Counselor Rodriguez spoke with Sefton again on March 3. Sefton had called Chinook to talk to the principal, who was not available. 9RP 604. Sefton was angry that school staff was giving K.S. food. 9RP 605. In addition, Sefton said he did not want nurse Sasser to have contact with K.S. 9RP 606; see also 10RP 744-46 (Chinook principal's testimony regarding in-person meeting with Sefton). Sefton explained that K.S.'s mental health issues led him to fabricate things. 9RP 606. Sefton also told Rodriguez that he was revoking school staff's permission to communicate with Sound Mental Health, which was providing in-school counseling services to K.S., and also revoking the school's permission to

communicate with CPS. 9RP 605. Sefton believed CPS was discriminating against him because he was a single father. 9RP 606.

By March 4, according to Sasser, K.S. weighed 52.25 pounds. 9RP 688. On that date, Sasser testified, K.S.'s nose was red, his lips were dry and cracked, and he had dark circles under his eyes. 9RP 686. Sasser asked K.S. what he ate at home. K.S. said his dad put his sandwiches in a blender. 9RP 686. But K.S. did not like blended sandwiches. 9RP 686.

Sasser asked why K.S.'s nose was red. 9RP 686. K.S. said it was because he had been sleeping on the floor. 9RP 686. K.S. said he *was* allowed to sleep, but that he had been awakened so that he could replace R.L.'s covers. 9RP 687. Nonetheless, Sasser believed K.S. was sleep-deprived based on his appearance, his statements about having to cover R.L., and Boorn's prior reports that Sefton kept K.S. up late to finish his homework. 10RP 708; see also 10RP 788-90, 793-95 (Boorn testimony describing interactions with Sefton about homework). In contrast, Sefton reported K.S. kept himself up at night. 9RP 689.

On March 4, 2014, Sefton sent a letter to the school prohibiting nurse Sasser from sharing medical information regarding K.S. 9RP 690-91; Ex. 21 (letter). However, on March 18, K.S. was brought to the nurse's office because he had been sleeping on the playground. 9RP 692; see also 9RP 644-45 (recess supervisor's testimony). Sasser noticed a

bruise on K.S.'s forehead, and his right hand was red and swollen. 9RP 692; Ex. 18.

Sefton and Lloyd eventually brought K.S. to Children's Hospital on March 7 asking that he be seen for mental health concerns. They reported K.S. had engaged in self-harm and was behaving violently toward others. 13RP 1258-60. Emergency department staff did not notice unusual behavior. K.S. told Children's staff he felt safe at home. He said he injured his own ear by slapping himself on the head to stay awake so he could watch a movie with Sefton. 13RP 1261-62.

On March 20, the last day K.S. was at Chinook, Sasser was asked to evaluate K.S. in his classroom. 9RP 693; 11RP 1005. K.S. was shaking and complained that he was tired. He was unable to tie his shoes because his hands were trembling. 9RP 693; 11RP 1004-05.

Police were called to the school, and they took K.S. to Children's Hospital. 9RP 693-94; 10RP 750. Upon discharge, he did not return to Sefton, but was instead placed with relatives. 17RP 1619.

Auburn police Officer Aldo Arroyo responded to the Chinook on March 20, 2014. 11RP 859. He noticed K.S. had a purple bruise on his lip. 11RP 861. He asked K.S. how he got the bruise. K.S. said he was leaning forward in the car to tie his shoe when his dad reached back and struck him in the mouth. 11RP 863; see also Ex. 75 (March 2014 forensic

interview of K.S. describing incident). His dad hit him frequently. Sometimes it made his head feel dizzy. 11RP 865.

Sefton had also hit K.S. that day, before school. 11RP 866. K.S. had wet the bed. 11RP 866. Sefton stripped K.S. of his pajamas, spanked him hard, and made him take a cold shower. 11RP 866.

Dr. Wiester saw K.S. at the Children's Hospital emergency department on March 21, the day after his arrival. 13RP 1266. He was in bed and very focused on food. 13RP 1267.

Wiester testified that K.S.'s growth charts, indicating weight gain, then a leveling off, and then weight loss, were unusual because children are always growing and gaining weight.[11] 13RP 1269. Weight loss may be caused by disease or a protein-deficient diet. 13RP 1269-70. K.S. did not suffer from any diseases that would cause weight loss. 13RP 1270. K.S.'s blood tests were, rather, consistent with malnutrition. 13RP 1270-71.

Physically, K.S. had swollen feet, ankles, and lower legs. 13RP 1272, 1277, 1288; Ex. 81 (various photos). Wiester testified that swelling

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[11] K.S. saw primary care physician Dr. Neil Golan from 2012 until he was removed from Sefton. 12RP 1043. Dr. Golan confirmed that, according to the medical records, K.S. gained weight steadily for a time. His weight plateaued for a short period, and then began to decrease. 12RP 1073-76, 1107-08; Ex. 65. This was unusual for a child of K.S.'s age. 12RP 1108, 1119. However, before the case was under investigation, Dr. Golan did not notice any problems, nor did he alert Sefton and Lloyd to any issues with weight. E.g. 12RP 1071-78.

of lower extremities may be caused by lack of protein, which prevents blood from leaking form blood vessels. 13RP 1272. K.S.'s ribs were prominent, indicating a "wasting" of subcutaneous tissue; but, his abdomen was swollen, which is consistent with malnutrition. 13RP 1285; 14RP 1362.

K.S.'s skin had a "brawny" appearance, i.e., was reddish and shiny. 13RP 1272. Wiester noted K.S.'s hands were slightly swollen and appeared to be suffering from "dermatitis." 13RP 1282; Ex. 81 (various photos); Ex. 93 (same). Wiester did not know if there was a connection between K.S.'s teachers' observations of K.S.'s hands and her observations in the hospital. 13RP 1282. Dr. Ronald Kaplan, the treating physician at the Children's emergency department, testified that K.S.'s hands appeared swollen. 14RP 1351.

Wiester testified that malnutrition affects all organs and body systems. K.S.'s test results indicated his organs had been affected. In addition, malnutrition may inhibit the immune system. It may also affect heart functioning, although there was no indication that K.S.'s heart was on the verge of failing. Malnutrition also affects brain growth and development, and chronic malnutrition may affect a child's overall cognitive potential. 13RP 1273.

Dr. Kaplan acknowledged that K.S.'s heart and liver were functioning properly, and confirmed no life-saving treatments were required in K.S.'s case. 14RP 1362-64. Although blood tests indicated levels of some minerals were low, others were normal. 14RP 1367.

Dr. Wiester testified that, as indicated by pictures taken at Children's, K.S.'s body had a number of bruises and marks. Many of the marks were consistent with inflicted trauma. 13RP 1280-85, 1287-94. Dr. Kaplan testified similarly. 14RP 1344-45, 1349-54.

Wiester testified that, based on the observations of school staff and others, K.S.'s case met many of the characteristics of child "torture," as defined by a recent publication in Dr. Wiester's field, rather than typical child abuse. 13RP 1302-04.

b. Interviews and lead detective's testimony about interviews

Sefton was arrested a week later, on March 27, 2014. 18RP 1769. He waived his right to remain silent and gave a lengthy interview attended by multiple Auburn detectives, including Detective Douglas Faini, who testified at trial. 18RP 1769. The interview in its entirety was played for the jury. Ex. 124 (DVD of interview); Ex. 121 (transcript of interview, used as listening aid but not admitted). Detective Francesca Nix and

another detective, "Detective Doll," identified only as "male," appear in the interview transcript. Ex. 121; 2RP 46; 20RP 1866.

Lloyd was also interviewed by detectives the afternoon of March 27 (Ex. 120, 3/24/14 interview transcript, used as listening aid), as well as the following morning after her arrest (Ex. 119, 3/28/14 interview transcript, used as listening aid).

In his interview, Sefton states that, for the month before K.S. was removed, he had been making blended meals for K.S. from ingredients such as hot dogs and vegetables. Sefton told detectives that he consulted with Lloyd on what to put in the blended meals. He did so because Lloyd had culinary training and had consulted with nutritionists related to R.L.'s gastrointestinal issues. Sefton stated repeatedly that resorted to blending the meals (1) due to his fear that K.S. would choke again and (2) because, at home in particular, K.S. refused to eat other foods and otherwise acted out with his food rather than eating it. Ex. 121 at 32-34, 85-86, 98, 166, 210, 260-61. Sefton also repeatedly indicated that, consistent with K.S.'s medical records, he believed K.S. had maintained appropriate weight. E.g. Ex. 121 at 187-88.

In Lloyd's own interview, however, Lloyd denies Sefton consulted her about the blended meals. E.g. Ex. 121 at 270 (detectives' statements

in Sefton interview regarding Lloyd interview); Ex. 120 at 3-4, 40-41 (Lloyd's first interview); Ex. 119 at 7-8 (Lloyd's second interview).

The interviews played for the jury contain expressions of the detectives' opinions, particularly relating to the criminal mistreatment charge, involving food deprivation. In Lloyd's first interview, played for the jury after Sefton's, Lloyd denies knowledge, based on her work schedule, of the blended drinks Sefton gave K.S. for breakfast. Detective Nix states, "You can't deny this . . . [d]eniability is not a way out of this one." Detective Faini then states, "We are looking at, are you purposely abusing this child to the point of starvation where he is malnourished and has to be hospitalized." Ex. 120 at 43. Faini later states, "Here's the problem. I take what [Sefton] says and I . . . take what you said and then I take what the [Children's Hospital] doctors say and I've got neglect because [Sefton] is not making sense." Ex. 120 at 53.

Toward the end of Sefton's interview—after the detectives had likely completed their much shorter interview of Lloyd[12]—Detectives Nix and Faini tell Sefton that Lloyd has denied she knows about the blended meals. They tell Sefton that this indicates that "Lloyd knows that she's been doing something wrong" as far as feeding K.S. Ex. 121 at 274.

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[12] Ex. 121 at 298 (Sefton's interview ends at "7:36"); Ex. 120 at 57 (Lloyd's interview ends at "1906," i.e., 7:06).

Later, Faini tells Sefton of Lloyd's arrest and states "you're [also] under arrest for neglect of a child felony. [Lloyd] made some comments it is quite clear that I, I believe the food issue, the chopping up in a blender was not in an effort to make sure [K.S.] had adequate food but it's a form of discipline." Ex. 121 at 278-79. Faini then states, "I'm gonna tell you right now[,] you tried to take this story coupled with [Lloyd's] story[,] then take everything the medical community has to say [] and what your kid is saying[,] there's no way they're gonna believe that you were everything you could to keep [K.S.] . . . properly nutritioned [sic]. No way. No way." Ex. 121 at 283. Faini continues, "Because they're gonna say if [Lloyd is] lying then why is she lying. And I'm gonna tell you what the answer is gonna be[,] because she knew he was so wrong she doesn't want to come to grips with it." Ex. 121 at 283. Near the end of the interview, Faini embarks on a theme, repeatedly asserting that Sefton was using the blended meals as a form of discipline, or even torture, and stating that Sefton got in "over his head" and that the situation "got away from" Sefton. Ex. 121 at 292-93, 296.

During a break during the playing Sefton's interview for the jury, and out of the jury's presence, Sefton's attorney stated his concern that he had provided ineffective assistance by failing to previously object to the detectives' interjections of opinion in the recorded interview. 19RP 1788.

The court, however, ruled that such comments were merely part of detectives' interview technique and directed that defense counsel address the matter on cross-examination of Detective Faini. 19RP 1789. The court also noted that such cross-examination would not open the door to the detective's *actual* opinion about Sefton's guilt. 19RP 1789.

After Sefton's interview was played for the jury, the prosecutor asked Faini a number of questions. In the context of explaining why Faini let Sefton talk for long periods, Faini testified that, even if Faini *knew* something Sefton said was incorrect or he believed it was a lie, he wanted to hear Sefton's story in his own words. In other words, Faini accepted certain information as "truthful" as an interrogation tactic, to build rapport with Sefton and make him think Faini believed him. 19RP 1792.

On cross examination by Sefton's counsel, Faini acknowledged that detectives may use a ruse, that is, lie, in suspect interviews. 20RP 1862. When Sefton complained about CPS, Faini said he too had issues with CPS. Faini explained that that statement was not "exactly" a lie. 20RP 1864-65. Sefton's counsel then asked about a statement by the "male," i.e., Detective Doll, in the Sefton interview. The detective tells Sefton he doesn't think Sefton intended to hurt K.S. Faini did not believe the other detective really believed that. 20RP 1866.

Sefton's counsel also asked if Faini's goal was to get a "confession." Faini denied this. He then stated, "I'm not trying to get confession, I'm just trying to get the truth out. And my attempt is to try to enact some type of reaction where he would be *more truthful*." 20RP 1866 (emphasis added). Faini acknowledged, however, that Sefton never changed his position that the blended meals were intended to prevent K.S. from choking. 20RP 1866.

During the interview, Sefton offered to let Faini look at his phone, but Auburn police were unable to download the information with the software available to them. 19RP 1796-97, 1833. But detectives were able to extract data from Lloyd's phone, including photos of the children and text conversations between Sefton and Lloyd. 20RP 1833, 1845-56.

Some selected text chains are critical of K.S. and express frustration regarding K.S.'s behavior. E.g. 20RP 1846-48, 1852; Ex. 97 at 2-5. In one exchange, Lloyd informs Sefton she told K.S.'s teacher that K.S. was given "smoothies" to increase his calorie intake; he had been refusing other healthy food because the "nurse" fed him junk food. Lloyd then appears to advise Sefton to "[s]tick with that." 20RP 1856; 21RP 1891; Ex. 97 at 1. In the exchanges, however, Sefton expresses confusion regarding reports that K.S. had been losing weight, because his growth charts had previously appeared to be normal. Ex. 97.

Detective Faini also testified he went through thousands of photos on Lloyd's phone. Most photos of K.S. on Lloyd's phone depict injuries. 20RP 1835-40; Ex. 82.

c. Sefton's testimony

Sefton testified that K.S.'s biological mother, with whom Sefton had a contentious relationship, essentially abandoned K.S. at Sefton's mother's house in 2008. 21RP 1903. Sefton then moved in with his mother and began caring for K.S. 21RP 1903.

K.S. was a difficult child, particularly at home. 21RP 1905, 1965. He engaged in self-harm and was violent toward his siblings as well as Sefton and Lloyd. 21RP 1905; see also 21RP 2006-08 (Lloyd's similar testimony). Sefton had to discipline K.S. to control his behavior. 21RP 1904. Sefton spanked K.S. or "popped" K.S. in the head if he used a bad word. 21RP 1914, 1972. Sefton had K.S. do pushups as a form of redirection because K.S. continued to act out even when placed in a timeout. 21RP 1915, 1971; see also 21RP 2006-08, 2102 (Lloyd's similar testimony). Sefton testified that, based on the layout of the car and D.S.'s car seat, he could not have reached behind him and hit K.S. in the mouth. 21RP 1924.

Sefton discovered K.S.'s bruised ear while the family was on a trip to Portland, but he did not know what, exactly, had caused it. 21RP 1919-

20. In addition, Sefton denied keeping K.S. awake at night. Rather, K.S. kept himself awake teasing R.L., who slept in the bunk above him. 21RP 1926, 1967. Also, Sefton never prevented K.S. from wearing his coat. K.S. had a yellow coat, but he refused to wear it because he wanted a coat in Seahawks team colors. 21RP 1905.

Sefton removed K.S. from Gildo Rey because school staff did not keep K.S. safe. 21RP 1913. Sefton was frustrated that the choking incident occurred in the morning, but he was not told about it until 3:00 p.m. 21RP 1908. He was also frustrated because he had warned Boorn that K.S. needed to be watched around the garbage, yet she failed to supervise him adequately. 21RP 1913.

Sefton denied withholding food for punishment. 21RP 1921. Rather than arguing with K.S., Sefton sent K.S. to bed without dinner if he refused to eat the family meal. But this happened rarely. 21RP 1921, 1943-44.[13] Sefton began preparing blended meals after the choking incident. He tried to make them nutritious and palatable. 21RP 1921.[14]

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[13] Lloyd worked outside the home, while Sefton stayed home with the children. 21RP 2109-10. Lloyd testified that, on occasion, she would return from work and learn Sefton had not yet fed the children, such as when Sefton was busy caring for D.S. 21RP 2022-23. Lloyd also testified that, sometimes, K.S. would simply refuse to eat the food she served. 21RP 2027.

[14] Sefton denied the "stick with that" text from Lloyd dealt with the blended meals. He pointed out that it was part of a string of garbled, out-of-order texts. 21RP 1918-19, 1932-33; Ex. 97.

C. ARGUMENT

1. SEFTON WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL ON CRIMINAL MISTREATMENT WHERE, IN INTERVIEWS PLAYED FOR THE JURY AND AT TRIAL, DETECTIVES EXPRESSED THEIR OPINIONS ON HIS GUILT.

Police detectives repeatedly expressed their opinions on Sefton's guilt, both in recorded interviews and at trial. Although counsel's objection was somewhat tardy, he preserved the objection by objecting in the court below, when that court still had an opportunity to remedy the prejudice. Yet the court overruled counsel's objection and directed that the matter be handled on cross-examination. Under the circumstances, the error was preserved for review, and the error was not harmless beyond a reasonable doubt. Sefton was denied his right to a fair trial on the criminal mistreatment charge.

a. Police officers' opinion on guilt, whether introduced via trial testimony or through an interview, is prohibited in Washington.

The role of the jury is to be held "inviolate." CONST. art. I, §§ 21. The jury's fact-finding role is essential to the constitutional right to trial by a jury of one's peers. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989). A witness may not offer opinion testimony. State v. Kirkman, 159 Wn.2d 918, 927-28, 155 P.3d 125 (2007). Expressions of personal belief as to guilt are "clearly inappropriate." State v.

Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). "Such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury." Kirkman, 159 Wn.2d at 927.

Police opinion testimony is especially prejudicial because "an officer's testimony often carries a special aura of reliability." Id. at 928 (citing State v. Demery, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001) (plurality opinion); see also State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003) (where an opinion on veracity of a defendant is expressed by a government official such as a police officer, the opinion may influence the factfinder and deny the accused a fair and impartial trial).

In determining whether a statement constitutes improper opinion testimony, this Court considers the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact. Montgomery, 163 Wn.2d at 591 (quoting Demery, 144 Wn.2d at 759)

In Demery, the trial court admitted a videotaped interview of the defendant in which two police officers accused the defendant of lying and said they did not believe his story. 144 Wn.2d at 756 n. 2. Four justices held the recorded statements were not opinion testimony, reasoning that the videotaped statements were different from trial testimony, which bore

an added "aura of special reliability and trustworthiness." Id. at 763 (plurality opinion).

But another four justices held that statements on the videotape were essentially the same as live testimony and were, therefore, inadmissible opinion testimony. Id. at 767-73 (Sanders, J., dissenting). And one justice, the tiebreaker, found the officers' videotaped statements impermissible opinion evidence but determined that the error was harmless.[15] Id. at 765-67 (Alexander, C.J., concurring). Thus, a majority of justices concluded that the evidence, even though it was admitted through a video tape, was inadmissible opinion about another witness's credibility. Id. at 765-73; see also State v. Jones, 117 Wn. App. 89, 91-92, 68 P.3d 1153 (2003) ("We find no meaningful difference between allowing an officer to testify directly that he does not believe the defendant and allowing [him] to testify that he told the defendant during questioning that he did not believe him. In either case, the jury learns the police officer's opinion about the defendant's credibility. [C]lothing the opinion in the garb of an interviewing technique does not help.").

[15] The concurring justice applied a non-constitutional harmless error standard based on the parties' apparent *agreement* that the error was not of constitutional magnitude. Id. at 766.

b. The error was preserved because defense counsel's objection was sufficiently timely for the court to remedy the error.

Here, Sefton's objection was preserved. Although defense counsel did not specifically object before the Sefton interview was played,[16] he did object in time for the court to remedy the error. 19RP 1787; see State v. Lindsay, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014) (recognizing that moving for a mistrial after a prosecutor's rebuttal argument preserves the issue of prosecutorial misconduct for appellate review).

But the court overruled the objection, appearing to accept the State's argument that the detectives' opinions were merely part of their investigative technique. 19RP 1788-89. Rather than striking the testimony or taking other appropriate action, the court ruled that defense counsel should handle the manner on cross-examination. 19RP 1788. Thus, the error Sefton now asserts was preserved for this Court's review.[17]

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[16] Counsel filed a general motion in limine to exclude police officers' opinion testimony on Sefton's guilt. CP 30; 1RP 27. The State did not object, and the court granted the motion. 1RP 28. However, counsel did not specifically address the interview at that time.

[17] In the event that this Court finds the error was not preserved, Sefton may raise this issue for the first time on appeal. It is well established that an explicit or nearly explicit opinion on credibility or guilt is manifest constitutional error that may be raised for the first time on appeal. Montgomery, 163 Wn.2d at 595. As established below, the detectives' statements as a whole clearly convey their opinions on Sefton and Lloyd's guilt.

c. The testimony constituted impermissible opinion testimony, and the error was not harmless.

Contrary to the court's ruling, the detectives' statements constituted improper opinion testimony under Demery. Moreover, the error was not harmless.

Consideration of the relevant factors establishes that the detectives' opinions were improper and prejudicial. See Montgomery, 163 Wn.2d at 591 (courts to consider type of witness, nature of the testimony, charges, defense to charges, and other evidence supporting charges).

Here, Sefton's defense to the mistreatment charge was that he was attempting to provide K.S. adequate nutrition. However, based on a number of factors, was compelled to provide blended drinks. But, in the interviews of Sefton and Lloyd, who were charged as accomplices, the detectives made a number of comments expressing their opinions on the guilt of both Sefton and Lloyd. [18] In Lloyd's first interview, after Lloyd denied knowledge of the blended meals, Detective Nix told her she could not deny the charges. Faini opined that Lloyd and Sefton were purposely starving K.S. Ex. 120 at 43. Faini later opined that the evidence established "neglect" of K.S. Ex. 120 at 53. Toward the end of Sefton's

[18] See CP 7 (accomplice liability instruction); 23RP 2187 (prosecutor's statement in closing that Lloyd and Sefton were "coconspirators who are aiding and abetting one another in this whole process").

interview, the detectives opined "Lloyd knows that she's been doing something wrong." Ex. 121 at 274. Later, when Faini told Sefton he was under arrest for felony "neglect," Faini stated "[Lloyd] made some comments it is quite clear that I, I believe the food issue, the chopping up in a blender was not in an effort to make sure he had adequate food but it's a form of discipline." Ex. 121 at 278-79. Faini then stated that Sefton's story, that he was attempting to provide proper nutrition to K.S., was not believable. Faini went on to opine Lloyd lied because she knew what Sefton did was wrong. Ex. 121 at 283. Finally, at the close of the interview, Faini repeatedly asserted that Sefton was using the blended meals as a form of discipline, or even torture. Detective Faini then stated, repeatedly, that Sefton got in "over his head" and the situation "got away from" Sefton. Ex. 121 at 292-93, 296.

Based on the type of witness (police detectives), the nature of the testimony (repeated opinions that Sefton and/or Lloyd were guilty), and based on the charge and defense to the charge (discussed in detail below), this Court should find the detectives' statements were impermissible opinions on guilt. The fact that the opinions were offered primarily through an interview, rather than in the courtroom, does not diminish their impropriety, nor does it diminish their prejudicial effect.

An error of constitutional magnitude is presumed prejudicial, and the State bears the burden of proving the error was harmless beyond a reasonable doubt. State v. W.R., Jr., 181 Wn. 2d 757, 770, 336 P.3d 1134 (2014); State v. Olmedo, 112 Wn. App. 525, 533, 49 P.3d 960 (2002). An error is harmless only if this Court cannot reasonably doubt that the jury would have arrived at the same verdict in its absence. State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010).

The State was required to prove that Sefton "recklessly, as defined in RCW 9A.08.010, cause[d] great bodily harm to a child or . . . by withholding any of the basic necessities of life," that is, food. State v. Koch, 157 Wn. App. 20, 30, 237 P.3d 287 (2010). "A person is reckless . . . 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 person would exercise in the same situation." RCW 9A.08.010. In this case, the wrongful act is the causation of "great bodily harm." State v. Johnson, 180 Wn.2d 295, 306, 325 P.3d 135 (2014). For purposes of chapter 9A.42 RCW, "[g]reat bodily harm" is defined as "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily part or organ." RCW 9A.42.010(2)(c).

This is a high bar, even under the chapter 9A.42 RCW definition of "great bodily harm." The State's theory was not that Sefton was withholding *all* food. Under the State's theory, the State had to prove that Sefton knew of, and disregarded, a risk that he might cause his son "great bodily harm" by giving him the blended drinks.

The detectives' opinions—including opinions that Lloyd was lying because she knew she and Sefton were doing something wrong, that the blended food was given a form of discipline or torture rather than as a means of keeping K.S. safe, that the evidence established "neglect" of K.S., and that Sefton's claim that he was attempting to provide proper nutrition to K.S. was not believable—possessed the "special aura of reliability" attributed to statements by law enforcement. Demery, 144 Wn.2d at 765 (plurality opinion). In contrast, in his interview, Sefton espoused a number of beliefs and ways of thinking that the jury may have found odd or eccentric.[19] Given the choice between these upstanding detectives on one hand, and unconventional and opinionated Sefton and Lloyd on the other, the jury was likely to have been swayed by the detectives' improper opinion testimony.

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[19] See, e.g., Ex. 121 at 46-51, 121-26 (discussion of Sefton's religious beliefs and hobbies).

The State cannot demonstrate the error was harmless beyond a reasonable doubt as to the criminal mistreatment count. Indeed, even under a non-constitutional harmless error standard, the error was likely to have affected the jury's verdict.[20] This Court should, therefore, reverse Sefton's criminal mistreatment conviction. Olmedo, 112 Wn. App. at 533.

2. COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE DETECTIVES' OPINION ON GUILT.

In the event that this Court concludes this issue was not preserved by timely objection, Sefton was denied his right to the effective assistance of counsel.

Every accused person is guaranteed the right to the effective assistance of counsel under Article I, Section 22 of the state constitution and the Sixth Amendment. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

A person asserting ineffective assistance must show (1) his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor performance prejudiced him. State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010) (citing Strickland, 466

[20] See State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986) (where error is not of constitutional magnitude, error is considered prejudicial if, within reasonable probabilities, the outcome of the trial was materially affected).

U.S. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). This Court reviews claims of ineffective assistance de novo, as they present mixed questions of law and fact. A.N.J., 168 Wn.2d at 109.

With respect to the deficient performance prong, "[t]here is a strong presumption that defense counsel's conduct is not deficient," but an accused rebuts that presumption if "no conceivable legitimate tactic explain[s] counsel's performance." State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). To meet the prejudice prong, an accused person must show a reasonable probability "based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel's deficient representation." McFarland, 127 Wn.2d at 337.

The failure to object to the detectives' improper and highly prejudicial opinion on guilt was unreasonably deficient. Legitimate trial strategy or tactics may constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). But there is no possible strategic reason for failing to object to such damaging testimony. Moreover, defense counsel clearly recognized the prejudice from this improper opinion testimony. 1RP 27-28 (pretrial motions); 19RP 1787.

For the reasons stated in argument 1 above, Sefton has also shown prejudice.

In addition, the court directed defense counsel to address the matter on cross examination. But counsel's cross examination did nothing to remedy the prejudice created by the introduction of the opinion evidence in the interviews. In fact, it likely made the situation worse. On cross-examination, for example, Detective Faini testified that Detective Doll was using a ruse when he stated he didn't think Sefton intended to hurt K.S. This informed jurors the other detective *did* believe Sefton wanted to hurt K.S. 20RP 1866. Counsel's inept cross-examination also led Faini to state, "I'm not trying to get a confession, I'm just trying to get the truth out. And my attempt is to try to enact some type of reaction where [Sefton] would be *more truthful*." 20RP 1866 (emphasis added).

In summary, in the event that this Court finds that counsel's objection to the opinion testimony was untimely, the failure to object constituted ineffective assistance. Sefton has established both deficient representation and prejudice. For this reason as well, this Court should reverse Sefton's criminal mistreatment conviction. Thomas, 109 Wn.2d at 232.

3. SEFTON'S RIGHT TO A UNANIMOUS JURY VERDICT WAS VIOLATED BECAUSE THE STATE DID NOT ELECT WHICH ACT CONSTITUTED ASSAULT OF A CHILD, THE TRIAL COURT FAILED TO GIVE A UNANIMITY INSTRUCTION, AND THE ERROR WAS NOT HARMLESS.

The trial court violated Sefton's right to a unanimous jury verdict on count 1, first degree assault of a child. The crime, as charged, and as the jury was instructed, required the State to prove an intentional touching or striking causing substantial bodily harm to K.S. Witnesses described at least three possible injuries that could constitute the substantial bodily harm. The prosecutor did not elect which act constituted the single charged assault. Instead, she highlighted a number of possible separate acts. The court did not instruct the jury it must unanimously agree on the act constituting the charged crime. This omission was not harmless beyond a reasonable doubt. As a result, the conviction should be reversed.

a. An assault conviction must be reversed in a multiple acts case where the trial court fails to give a unanimity instruction and the State fails to elect the act it is relying on.

As charged and instructed in this case, a person "eighteen years of age or older" is guilty of first degree assault of a child if the child is under 13 years old and that person intentionally assaults the child and causes substantial bodily harm. RCW 9A.36.120(1)(b)(ii). As charged in this case, the accused must also have "previously engaged in a pattern or

practice either of (A) assaulting the child which has resulted in bodily harm that is greater than transient physical pain or minor temporary marks, or (B) causing the child physical pain or agony that is equivalent to that produced by torture." RCW 9A.36.120(1)(b)(ii); CP 75-76 (jury instructions).

Substantial bodily harm is defined as "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.04.110(4)(b). Bruising *may* provide sufficient evidence of substantial bodily harm. State v. Ashcraft, 71 Wn. App. 444, 455, 859 P.2d 60 (1993); cf. State v. Hovig, 149 Wn. App. 1, 13, 202 P.3d 318 (2009) ("serious bruising can rise to the level of 'substantial bodily injury'").

Assault was defined, in part, at common law as

> an intentional touching, striking, cutting, or shooting of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching, striking, cutting, or shooting is offensive, if the touching, striking, cutting, or shooting would offend an ordinary person who is not unduly sensitive.

State v. Smith, 159 Wn.2d 778, 781-82, 154 P.3d 873 (2007) (defining "battery," one of three ways of committing assault). Here, the jury was

given this definition, although the definition was limited to touching or striking. CP 80 (instruction 14).

Criminal defendants in Washington have a right to a unanimous jury verdict. CONST. art. I, § 21. When the State presents evidence of multiple acts that could constitute a charged crime, "the State must tell the jury which act to rely on in its deliberations or the [trial] court must instruct the jury to agree on a specific criminal act." State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), overruled on other grounds by Kitchen, 110 Wn.2d 403. The State's failure to elect the act, coupled with the court's failure to instruct the jury on unanimity, is constitutional error. Kitchen, 110 Wn.2d at 411. "The error stems from the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction." Id.

Such an error may be raised for the first time on appeal, moreover, because a trial court's failure to give a unanimity instruction is a manifest error affecting a constitutional right. State v. Holland, 77 Wn. App. 420, 424, 891 P.2d 49 (1995).

The State need not elect, and the court need not give a unanimity instruction, however, if the evidence shows the accused was engaged in a "continuing course of conduct" rather than multiple acts. State v. Handran,

113 Wn.2d 11, 17, 775 P.2d 453 (1989). Appellate courts have considered various factors in determining whether a continuing course of conduct exists in a particular case. Evidence that the charged conduct occurred at different times and places tends to show that several distinct acts occurred rather than a continuing course of conduct. Id. In contrast, evidence that an offense involves a single victim, or that an accused engages in a series of acts toward the same objective, supports the characterization of those acts as a continuing course of conduct. Id.

Four cases are instructive. In State v. Crane, the Supreme Court discussed the proper application of the continuing course of conduct exception. There, the Court found that the evidence indicated that, although there were a number of assaults against the same victim over the course of a week, there was actually only a two-hour period during which the fatal injuries were inflicted. In such a situation, the Court reasoned, the "continuous conduct" exception applied. 116 Wn.2d 315, 326-30, 804 P.2d 10, cert. denied, 501 U.S. 1237 (1991).

In Handran, defendant was charged with first degree burglary based on intent to commit assault against his ex-wife. 113 Wn.2d at 12. He argued on appeal that the court failed to instruct the jury that it must be unanimous as to which act alleged constituted the "assault" element of first degree burglary. Id. at 17. The Supreme Court held that the arguably assaultive acts occurring

in quick succession did not require a unanimity instruction because they were part of a course of conduct intended to secure sex with a single victim. Id.

And in State v. Fiallo-Lopez, the defendant argued that the trial court should have given a unanimity instruction on the charge of delivery of cocaine. 78 Wn. App. 717, 723, 899 P.2d 1294 (1995). He argued the evidence showed two discrete acts of delivering cocaine, delivery of a "sample" to a restaurant and a later delivery of baggies of cocaine at a second location. Id. at 725. This Court disagreed, holding the two deliveries of cocaine were a continuing course of conduct, i.e., one continuous delivery of drugs by Fiallo to the same recipient. Id. at 725-26.

In State v. King, however, this Court held that failure to give unanimity instruction was reversible error where State's evidence showed two distinct episodes of cocaine possession occurring at different times, in different places, and involving two different containers. 75 Wn. App. 899, 903-04, 878 P.2d 466 (1994).

In Petrich, the Court similarly rejected the State's continuing course of conduct argument. Petrich was charged with one count of indecent liberties and one count of second degree statutory rape. 101 Wn.2d 566. Each incident occurred at a separate time and place. The only connection between the incidents was the victim. Id. at 571. The acts did not constitute a

continuing course of conduct. And because the Court could not find the error harmless, it reversed. Id. at 573.

b. The trial court failed to instruct the jury on unanimity, the State did not elect the act it was relying on, and the reported assaults reflected multiple acts rather than a continuing course of conduct.

On this charge, the trial court did not instruct the jury it must be unanimous as to the act it was relying upon, and there was no election by the State. Under the case law, moreover, the reported assaults did not constitute a continuing course of conduct.

The absence of either an election or instruction constitutes a constitutional error. This is because it is possible that all of the jurors did not rely on the same criminal act when convicting the defendant, "resulting in a lack of unanimity on all elements necessary for a conviction." State v. Greathouse, 113 Wn. App. 889, 916, 56 P.3d 569 (2002), review denied, 149Wn.2d 1014 (2003).

Here, the court did not instruct the jurors that they must agree on the act constituting the charged assault. Such an instruction was required because the alleged acts did not constitute a continuing course of conduct. As outlined in the State's closing argument, which is summarized below, the evidence described at least three distinct possible assaults of K.S. that the jury could have relied on as the primary assault resulting in substantial

bodily harm. RCW 9A.36.120(1). The evidence indicated these acts occurred at different—and uncertain—dates, times, and places. For example, the ear bruising was first noticed in late February, whereas the red hands made their appearance in mid to late March. E.g. 9RP 692. But the date of the mouth injury is uncertain based on the record. 11RP 863. As a result, this case is more like Fiallo-Lopez or Petrich. For example, in Petrich, although the complainant was the same, each incident occurred at a separate time and place. Petrich, 11 Wn.2d at 571. Under the circumstances, the State cannot demonstrate that each of the three possible assaults represented a continuing course of conduct.

Next, the prosecution may elect the act it is relying on via verbal statement, as long as the State clearly identifies the act upon which the charge is based. State v. Carson, 184 Wn.2d 207, 227-28, 357 P.3d 1064 (2015). But here, the State never elected the act constituting the count 1 assault. Indeed, the State discussed three possible assaults in closing argument.

In closing, the State discussed the standard required for substantial bodily harm. 23RP 2188. The State urged the jury to convict on both the higher charge, count 1, as well as the second degree charge, count 2. 23RP 2189. The prosecutor mentioned a variety of acts that could

constitute assault, but she clarified that not all would necessarily constitute substantial bodily harm:

> And I'll talk about specific instances that come to mind, but at this moment, you know, pushing, tapping on the head, shoving, rubbing dirt around the face,[21] those would be physical pain or injury or an impairment of physical condition, but they wouldn't rise to this substantial bodily harm where you have bruising, lacerations that occur on one day, but are still present days later.

23RP 2188-89. The prosecutor went on to describe at least three acts that may have produced substantial bodily harm:

> We know that in [K.S.'s] forensic interview from March 2014 here in this courthouse several years ago . . . ., he talked about [Sefton] hitting him in the face and how it was bleeding. And he still had injuries present in the emergency room, if you recall, on the 20th of March, that bruising that the doctor photographed around his mouth[22] that was kind of yellow and discolored. So that's one . . . piece of evidence to consider for an assault.
>
> We have his CPS interview with Nina Gonzalez. . . . He's not really sure where this ear injury came from, maybe it was fleas, and he was scratching it, or maybe it was the carpet, he just didn't really know. He doesn't know how he got the bruises on his arm that had been there and noticed by CPS days earlier on the 26th when . . . school made their first report of abuse on February 26th.

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[21] A maintenance technician at Sefton and Lloyd's apartment complex testified he saw Sefton rub dirt in K.S.'s face. 11RP 1011.

[22] The prosecutor later argued:

> Of course, Officer Arroyo's testimony was very impactful. [K.S.] . . . said his father turned around and popped him in the mouth and split open his mouth. . . .

23RP 2193.

> And CPS didn't come physically look at him until the 28th, unfortunately.
>
> . . . .
>
> And then we know from [R.L.'s] testimony about the abuse that she saw, for [K.S.], she talked about the defendants taking his ear, interestingly, and pulling it and walking him around in a circle. And he would be screaming in pain.
>
> And I want you to think about that ear injury that you saw and whether or not that's really consistent with sleeping on the carpet or sleeping on the floor or fleas biting him and him scratching himself, or if an adult in his life, Mr. Sefton or Ms. Lloyd, was taking that little boy by the ear and pulling him around, because that is a mechanism of injury that was consistent with that injury according to Dr. Weister.
>
> We also have, of course, Ms. Hopkins, the first grade teacher at Chinook Elementary who saw the socks on his hands that last day he was in her class on the 20th of March and took the socks off because he couldn't actually do any school work with them on. . . . . And he said something about hiding burns. And when she looked at his hands, they were all red and they looked like they had been burned.[[23]]

23RP 2190-92.

Thus, in closing, the State discussed three distinct possible assaults that the jury could find resulted in substantial bodily harm. But the State made no attempt to elect one of the three as the basis for the predicate assault resulting in substantial bodily harm, necessary to prove first degree assault of a child.

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[23] The prosecutor also pointed out that K.S. was seen by the maintenance technician on another occasion with socks on his hands. 23RP 2201.

c. The error was not harmless beyond a reasonable doubt.

The failure to give a unanimity instruction in a multiple acts case is an error of constitutional magnitude and will be deemed harmless only if no rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt. State v. Hanson, 59 Wn. App. 651, 659, 800 P.2d 1124 (1990).

The error here was not harmless. A rational trier of fact could have entertained a reasonable doubt as to the cause of K.S.'s red hands. For example, Dr. Wiester was unable to say whether the redness had been caused by assault, malnutrition, or irritated skin. 13RP 1372, 1382; see also 14RP 1351 (Dr. Kaplan's testimony); Ex. 121 at 151, 249 (Sefton's explanation of redness as result of irritating soap). Wiester testified that "brawny" skin is a frequent sign of malnutrition. 13RP 1272. Although malnutrition was one of the allegations in this case, it does not conform with the common law definition of assault, which is required to prove assault of a child. A reasonable juror could have entertained a reasonable doubt as to one of the possible incidents the State relied on in closing.

Because a unanimity instruction was required but not given in this case, and because the State cannot meet its burden to show the error was harmless, count 1 must be reversed. Hanson, 59 Wn. App. at 660.

4. TON'S RIGHT TO A UNANIMOUS JURY VERDICT ON THE CRIMINAL MISTREATMENT CHARGE WAS VIOLATED WHERE INSUFFICEINT EVIDENCE SUPPORTED EACH ALTERNATIVE MEANS OF ESTABLISHING FIRST DEGREE CRIMINAL MISTREATMENT.

First degree criminal mistreatment may be committed by the alternative means of withholding food, water, shelter, clothing, or medically necessary health care, any one of which must cause the requisite level of harm. There was insufficient evidence that anything but food was withheld.

Although this appears to be an issue of first impression, this Court should determine that first degree criminal mistreatment is an alternative means crime as to the particular "necessity of life" that is withheld. Due to insufficiency of evidence on the various alternate means of committing the offense, the trial court needed to either instruct the jury that it must unanimously agree as to a means, or issue a special verdict form specifying the means relied upon. Reversal of the conviction is required because, in the absence of these measures, there was no particularized expression of jury unanimity on each of the alternative means.

a. A conviction must be reversed where there is insufficient evidence to support an alternative means of committing a crime upon which the jury was instructed.

When alternative means are alleged, the right to a unanimous jury verdict includes the right to unequivocal jury unanimity on the means by which the defendant committed the crime.

The accused has a constitutional right to a unanimous jury verdict. U.S. CONST., amend. VI; CONST. art. 1, § 22. "This right includes the right to an expressly unanimous *verdict*." State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994) (emphasis in original). A unanimity error amounts to manifest constitutional error under RAP 2.5(a)(3) that may be raised for the first time on appeal. Crane, 116 Wn.2d at 325; State v. Hursh, 77 Wn. App. 242, 248, 890 P.2d 1066 (1995), abrogated on other grounds, State v. Roggenkamp, 153 Wn.2d 614, 106 P.3d 196 (2005).

When alternative means are alleged, the right to a unanimous jury verdict includes the right to express jury unanimity on the means by which the defendant committed the crime. Ortega-Martinez, 124 Wn.2d at 707. "If the evidence is *sufficient* to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to

affirm a conviction because [the Court] infers that the jury rested its decision on a unanimous finding as to the means." Id. at 707-08. "[I]f the evidence is *insufficient* to present a jury question as to whether the defendant committed the crime by any one of the means submitted to the jury, the conviction will not be affirmed." Id. at 708. The sufficient (or substantial) evidence test[24] is satisfied only if the reviewing court is convinced "a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt." In re Detention of Halgren, 156 Wn.2d 795, 811, 132 P.3d 714 (2006) (quoting Kitchen, 110 Wn.2d at 411).

b. Withholding food, water, shelter, clothing, or medically necessary health care are alternative means of committing first degree criminal mistreatment.

Withholding food, water, shelter, clothing, or medically necessary health care are each alternative means of committing first degree criminal mistreatment. Under RCW 9A.42.020,

> A parent of a child, the person entrusted with the physical custody of a child or dependent person . . . is guilty of criminal mistreatment in the first degree if he or she recklessly, as defined in RCW 9A.08.010, causes great bodily harm to a child . . . *by withholding any of the basic necessities of life.*

[24] In conducting alternative means analyses, the terms "substantial evidence" and "sufficient evidence" are used interchangeably. See Ortega-Martinez, 124 Wn.2d at 708 (sufficient evidence).

(Emphasis added). "'Basic necessities of life' means food, water, shelter, clothing, and medically necessary health care, including but not limited to health-related treatment or activities, hygiene, oxygen, and medication." RCW 9A.42.010(1). For purposes of chapter 9A.42 RCW, "[g]reat bodily harm" is defined as "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily part or organ." RCW 9A.42.010(2)(c).

The to-convict instruction for first criminal mistreatment in this case included the element that each defendant, between October 1, 2013 and March 20, 2014, withheld any of the "basic necessities of life" from K.S. CP 87 (instruction 20). The jury was instructed that "basic necessities of life" means "food, water, shelter, clothing, and medically necessary health care, including but not limited to health-related treatment or activities, hygiene, oxygen, and medication." CP 92 (instruction 24). The to-convict instruction thus presented the jury with the option of convicting various alternative means.

"An 'alternative means crime' is one 'that provide[s] that the proscribed criminal conduct may be proved in a variety of ways.'" State v. Peterson, 168 Wn.2d 763, 769, 230 P.3d 588 (2010) (alteration in original)

(quoting Smith, 159 Wn.2d at 784). Because the legislature has not defined what constitutes an alternative means crime, whether a statute provides an alternative means for committing a particular crime is left to judicial determination. Peterson, 168 Wn.2d at 769. This Court reviews questions of statutory interpretation de novo and interprets statutes to give effect to the legislature's intentions. State v. Bunker, 169 Wn.2d 571, 577-78, 238 P.3d 487 (2010).

There is no bright-line rule for making this determination, and this Court must evaluate each case on its own merits. Peterson, 168 Wn.2d at 769. "The statutory analysis focuses on whether each alleged alternative describes 'distinct acts that amount to the same crime.'" State v. Sandholm, 184 Wn.2d 726, 734, 364 P.3d 87 (2015) (quoting Peterson, 168 Wn.2d at 770). The more varied the criminal conduct, the more likely the statute describes alternative means. Sandholm, 184 Wn.2d at 734. Thus, this Court must focus its analysis on the different underlying acts that could constitute the same crime. State v. Owens, 180 Wn.2d 90, 96-97, 323 P.3d 1030 (2014). To constitute distinct alternative means, the various underlying acts must vary significantly. Id. at 97. In contrast, when the statute describes minor nuances inhering in the same act, the more likely the various "alternatives" are merely facets of the same criminal conduct. Sandholm, 184 Wn.2d at 734.

Stating methods of committing a crime in the disjunctive does not necessarily indicate that there are alternative means of committing a crime. State v. Lindsey, 177 Wn. App. 233, 24041, 311 P.3d 61 (2013). A statute divided into subparts is more likely to designate alternative means. Id. at 241. However, it is not necessary that a statute be divided into subparts for it to constitute an alternative means crime. State v. Nonog, 145 Wn. App. 802, 187 P.3d 335 (2008).

Nonog is instructive. There, this Court observed that, under the pertinent statute

> A person commits the crime of interfering with the reporting of domestic violence if the person:
> (a) Commits a crime of domestic violence, as defined in RCW 10.99.020; and
> (b) *Prevents or attempts to prevent the victim of or a witness to that domestic violence crime from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official.*

RCW 9A.36.150(1) (emphasis added).

The State argued that the three ways of attempting to report a crime "are simply definitional and that the crime itself may be committed by only one means, i.e., by preventing (or attempting to prevent) the victim or witness from making a report." Nonog, 145 Wn. App. at 812. This Court acknowledged that, typically an alternative means statute will state a single offense with subsections. This Court held, nonetheless, that

the variations in RCW 9A.36.150(1) were not merely descriptive or definitional, but were themselves essential terms establishing alternative means of committing the crime. Nonog, 145 Wn. App. at 812-13.

In State v. Peterson, 174 Wn. App. 828, 301 P.3d 1060 (2013), this Court held that, as in Nonog, the first degree animal cruelty statute, RCW 16.52.205(2), set out three distinct ways of committing the crime, starvation, dehydration, and suffocation.[25] These terms—although not set forth in distinct subsections— were not merely descriptive or definitional but were, instead, essential elements of the crime of animal cruelty in the first degree. Peterson, 174 Wn. App. at 851-52.

Here, as in Nonog and Peterson, the criminal mistreatment statute is not divided into subparts. Nonetheless, the criminal mistreatment statute provides for distinct alternative means of accomplishing the necessary level of harm. Based on the undeniable similarity of the criminal mistreatment statute to the statutes at issue in Nonog and Peterson, this Court should determine that first degree criminal mistreatment is an alternative means crime.

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[25] Under RCW 16.52.205(2), "[a] person is guilty of animal cruelty in the first degree when, except as authorized by law, he or she, with criminal negligence, starves, dehydrates, or suffocates an animal and as a result causes: (a) Substantial and unjustifiable physical pain that extends for a period sufficient to cause considerable suffering; or (b) death."

c. The first degree criminal mistreatment conviction must be reversed because there is insufficient evidence to support any alternative means besides the withholding of food.

This Court should reverse Sefton's first degree criminal mistreatment conviction because substantial evidence does not support any of the alternative means besides the withholding of food. In determining whether the right to jury unanimity has been violated, "[t]he test is whether sufficient evidence exists to support each of the alternative means presented to the jury." State v. Kinchen, 92 Wn. App. 442, 451, 963 P.2d 928 (1998). "If the evidence is insufficient to support any one of the means submitted to the jury, the conviction will be reversed." Id. In determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006).

In the light most favorable to the State, there was sufficient evidence to support a finding that Sefton withheld food from K.S. But there is insufficient evidence to conclude Sefton committed the crime of first degree criminal mistreatment based on any of the other means. Although there was some evidence that K.S.'s coat was withheld at one point, there was no evidence linking that to any bodily harm.

There was no jury unanimity instruction on alternative means and, unlike in the case of first degree assault of a child, no special verdict specifying which of the alternative means the jury relied upon[26] "A general verdict of guilty on a single count charging the commission of a crime by alternative means will be upheld only if sufficient evidence supports each alternative means." Ortega-Martinez, 124 Wn.2d at 708. As a result, the conviction for first degree criminal mistreatment, count 3, must be reversed.

5. SEFTON WAS DENIED A FAIR TRIAL BECAUSE THE STATE COMMITTED INCURABLY PREJUDICIAL MISCONDUCT IN CLOSING ARGUMENT.

The prosecutor committed misconduct in closing and in rebuttal argument. Because the prosecutor's comments were incurably prejudicial, this Court should reverse both of Sefton's convictions.

The prosecutor began her closing argument with the following admonition:

> As I said at the onset [sic] of this case, there are typically three parties to child abuse: The abused, the abuser, and the bystanders. And true to form, there were plenty of bystanders in this case. But the time of reckoning is upon us, and none of us will be mere bystanders.
>
> Nature in this case has failed. The instinct for parents to love and nurture their children has failed. The system designed to step in and step up in this circumstance has failed.

[26] CP 142-43 (count 1 special verdict); CP 146-47 (count 2 special verdict).

> *We will not fail. We will be swift and just and virtuous against what is before us in this shadow of humanity.*

23RP 2184 (emphasis added).

Then, in rebuttal, continuing its theme, the State concluded argument by stating that

> How much our society values its children can be measured by how well they are treated, how well they are protected, and *it is time to show [K.S., R.L., and D.S.] that they are valued and that they will be protected.*

23RP 2272 (emphasis added). Defense counsel did not object.

"A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law." State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). At the same time, a prosecutor "functions as the representative of the people in a quasijudicial capacity in a search for justice." Id. A prosecutor fulfills neither role by securing a conviction based on proceedings that violate a defendant's right to a fair trial. Rather, such convictions undermine the integrity of the criminal justice system as a whole. State v. Walker, 182 Wn.2d 463, 476, 341 P.3d 976 (2015). When a prosecutor commits misconduct, she may deny the accused a fair trial. In re Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012); U.S. CONST. amend. 14; CONST. art. 1, § 3.

Here, the State argued in closing that unlike "the system," which had failed, "we"—that is, the prosecutor and the jury—must not fail the complainant children. The prosecutor exhorted the jury to be "swift and virtuous" in doing so, and then appeared to refer to the accused (and their milieu) as the "shadow of humanity."[27] The State also argued in rebuttal that in order to demonstrate that, presumably, American society as a whole valued children, the jury should show the complainant children that "they are valued and they will be protected." In other words, to do so, the jury had to convict Sefton.[28]

But a prosecutor's exhortations to "send a message," or equivalent statements, have been repeatedly held to be improper. One reason such statements are improper is that they urge the jury to resolve the case on grounds other than the facts and the applicable law. State v. McNallie, 64 Wn. App. 101, 111, 823 P.2d 1122 (1992), aff'd, 120 Wn.2d 925 (1993); see also State v. Powell, 62 Wn. App. 914, 918, 816 P.2d 86 (1991) (prosecutor's closing remarks improper because they, in effect, told the jury that a not guilty verdict would send a message that children who reported sexual abuse would not be believed, thereby "declaring open season on children"), review denied, 118 Wn.2d 1013 (1992).

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[27] 23RP 2184.

[28] 23RP 2272.

In State v. Bautista-Caldera, this Court held an argument that "exhorts the jury to send a message to society about the general problem of child sex abuse" constitutes an improper emotional appeal. 56 Wn. App. 186, 195, 783 P.2d 116 (1989). Likewise, in State v. Ramos, this Court determined the prosecutor's argument "that the jury should convict in order to protect the community from drug dealing" was an improper appeal to the jury's passions and prejudices. 164 Wn. App. 327, 338, 263 P.3d 1268 (2011).

Similar to the misconduct in Bautista-Caldera, the prosecutor's argument was also intended to invoke a sense of societal shame and guilt among the jurors, encouraging them to render a verdict on their emotions rather than the evidence. See also State v. Thierry, 190 Wn. App. 680, 691, 360 P.3d 940 (2015) (State's argument that if the jury did not believe the child's complainant's testimony "then the State may as well just give up prosecuting these cases, and the law might as well say that [t]he word of a child is not enough," improperly invited jury to decide the case on emotional basis rather than the merits).

Defense counsel did not object to the improper arguments. Where defense counsel fails to object, prosecutorial misconduct is, nonetheless, reversible error when the misconduct is incurable by corrective instruction. State v. Walker, 164 Wn. App. 724, 730, 736, 265 P.3d 191,

as amended (Nov. 18, 2011). In this respect, a reviewing court's analysis of the prejudicial impact of misconduct does not rely on a review of *sufficiency* of the State's evidence. Walker, 182 Wn.2d at 479.

Here, the prosecutor's argument was of a type that has been held to be incurably prejudicial. See Powell, 62 Wn. App. 914, 816 P.2d 86 (1991) (reversing, despite lack of objection, to State's improper "send a message" argument in child molestation case). Moreover, the prosecutor's remarks were the last thing the jury heard before commencing deliberations. Comments made at the end of a prosecutor's rebuttal argument are more likely to cause prejudice. Lindsay, 180 Wn.2d at 443 (citing United States v. Sanchez, 659 F.3d 1252, 1259 (9th Cir. 2011) (significant that prosecutor made improper statement "at the end of his closing rebuttal argument, after which the jury commenced its deliberations"); United States v. Carter, 236 F.3d 777, 788 (6th Cir. 2001) (significant that "prosecutor's improper comments occurred during his rebuttal argument and therefore were the last words from an attorney that were heard by the jury before deliberations").

For the foregoing reasons, the prosecutor's remarks were improper. Based on the character and timing of the remarks, they were incurably prejudicial. This Court should therefore reverse Sefton's convictions.

6. COUNSEL ALSO PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO THE MISCONDUCT, DENYING SEFTON A FAIR TRIAL

In addition, defense counsel provided ineffective assistance by failing to object to the misconduct detailed above.

As stated above, an accused person asserting ineffective assistance must show (1) his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor performance prejudiced him. A.N.J., 168 Wn.2d at 109. Again, with respect to the first prong, an accused rebuts the presumption of effective representation if "no conceivable legitimate tactic explain[s] counsel's performance." Reichenbach, 153 Wn.2d at 130. To meet the prejudice prong, an accused person must show a reasonable probability "based on the [trial court] record . . . that the result of the proceeding would have been different but for counsel's deficient representation." McFarland, 127 Wn.2d at 337.

When a prosecutor resorts to improper argument, counsel has a duty to interpose a contemporaneous objection '"to give the court an opportunity to correct counsel, and to caution the jurors against being influenced by such remarks."' State v. Emery, 174 Wn.2d 741, 761-62, 278 P.3d 653 (2012) (quoting 13 WASHINGTON PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 4505, at 295 (3d ed. 2004)).

Counsel's failure to preserve error constitutes ineffective assistance and justifies examining the error on appeal. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980). If objections are necessary to preserve error, no reasonable strategy or tactic explains failure to object on the record. Even if declining to object is a reasonable tactic in order to avoid drawing attention to the misconduct, defense counsel may still object to misconduct outside the presence of the jury, after arguments have concluded. See Lindsay, 180 Wn.2d at 441 (adopting exception to contemporaneous objection rule in prosecutorial misconduct cases to avoid repeated interruptions to closing arguments). Here, counsel rendered ineffective assistance by failing to object to the prosecutor's improper arguments. No tactic explains the failure to preserve the error.

Defense counsel's failure to object to each instance of prosecutorial misconduct was, moreover, prejudicial. The State's argument urged the jury to resolve the case on grounds other than the facts of the case and the applicable law. In a case where the evidence was likely to have provoked strong reactions in jurors, the remarks likely influenced the verdicts. For the reasons stated in argument 4 above, the prosecutor's argument was prejudicial.

Because Sefton has demonstrated both deficient performance and prejudice, counsel's ineffective assistance denied him a fair trial. For this reason as well, both convictions should be reversed.

7. THE COURT ERRED IN ORDERING MENTAL HEALTH EVALUATION AND TREATMENT AS A CONDITION OF COMMUNITY CUSTODY.

The sentencing court erred in ordering mental health evaluation and treatment. The court ordered Sefton to "obtain a mental health evaluation and follow all recommendations including taking prescribed medication if recommended" as a condition of community custody. CP 177. Because the court failed to make the statutorily required finding that Sefton was a mentally ill person as defined in RCW 71.24.025 and that this condition was likely to have influenced the offense, the condition must be stricken.

Sentencing errors derived from the sentencing court's failure to follow statutorily mandated procedures may be raised for the first time on appeal. State v. Jones, 118 Wn. App. 199, 210, 76 P.3d 258 (2003). A sentencing court may order an offender to undergo mental health treatment as a condition of community custody only if it complies with statutory procedures. RCW 9.94B.080; State v. Brooks, 142 Wn. App. 842, 850, 176 P.3d 549 (2008). The court must find that reasonable grounds exist to believe the offender is a mentally ill person as defined in RCW 71.24.025,

and that the mental health condition likely influenced the offense. RCW 9.94B.080; Brooks, 142 Wn. App. at 851; accord State v. Lopez, 142 Wn. App. 341, 353, 174 P.3d 1216 (2007), review denied, 164 Wn.2d 1012 (2008).

Here, the sentencing court made no finding that Sefton was mentally ill or that any mental illness influenced his offenses. Therefore, the court was not authorized to impose mental health counseling or treatment. This Court should remand to strike the condition.

8. THE LIFETIME NO-CONTACT ORDER PREVENTING SEFTON FROM CONTACTING YOUNGER SON D.S. VIOLATES SEFTON'S FUNDAMENTAL RIGHT TO PARENT.

The all-encompassing lifetime no-contact order entered in this case as to younger son D.S. violates Sefton's fundamental right to parent. This Court should remand for the imposition of an appropriately tailored order.

Here, the State sought no-contact orders at sentencing. The prosecutor stated

> I'm asking the Court to impose no contact orders not only with [K.S.], but also with [R.L.] and [D.S.] because they were definitely present and part of the abuse and, in particular, [R.L.] was sort of brainwashed to a degree that she negatively saw and spoke about [K.S.].
>
> If the Court ever had an opportunity to read the medical journal for child torture as a form of abuse, it specifically addresses the fact that offenders who engage in this behavior simply cannot be allowed to parent any child.

> It's not just the target child, it's any child. And so I would ask for lifetime no contact orders with all three children.

26RP 2315. D.S. was 21 months old at the time he was removed from his parents in March of 2014. 21RP 1982. Sefton was not convicted of any crime relating to D.S.

The court entered a domestic violence no-contact order prohibiting all contact with D.S. until April 21, 2099. Supp. CP ____ (sub no. 139, Domestic Violence No-Contact Order); 26RP 2326.

As a condition of community custody, a sentencing court may order an offender to "[r]efrain from direct or indirect contact with the victim of the crime or a specified class of individuals." RCW 9.94A.703 (3)(b). Under RCW 9.94A.505(9), the court may also impose "crime-related prohibitions" as a condition of sentence. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). Such prohibitions may include "an order of a court prohibiting contact that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). No-contact orders may extend up to the statutory maximum for the crime in question. State v. Armendariz, 160 Wn.2d 106, 119-20, 156 P.3d 201 (2007).

Parents have a fundamental liberty interest in the "care, custody, and management" of their children. Santosky v. Kramer, 455 U.S. 745,

753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). The imposition of crime-related prohibitions is generally reviewed for abuse of discretion. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P .3d 686 (2010). But appellate courts more carefully review conditions that interfere with a fundamental constitutional right. Id.

A sentencing court necessarily abuses its discretion by violating defendant's constitutional rights. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). A court also abuses its discretion when its decision is based on incorrect legal analysis or an erroneous view of the law. State v. Kinneman, 155 Wn.2d 272, 289, 119 P.3d 350 (2005).

State interference with the fundamental right to parent is subject to strict scrutiny. Warren, 165 Wn.2d at 34. "[C]onditions that interfere with fundamental rights must be sensitively imposed," with "no reasonable alternative way to achieve the State's interest." Id. at 32, 35. Thus, a sentencing court may not impose a no-contact order between a defendant and his biological children as a matter of routine practice. Rainey, 168 Wn.2d at 377-82. Instead, the court must consider whether the order is reasonably necessary in *scope* and *duration* to prevent harm to the children. Id. For example, less restrictive alternatives such as indirect contact or supervised contact may not be prohibited unless there is a

compelling State interest barring all contact. Warren, 165 Wn.2d at 32; State v. Ancira, 107 Wn. App. 650, 655, 27 P.3d 1246 (2001).

Prior case law guides this Court's decision and requires remand for modification of the order prohibiting all contact for life with D.S., so that an appropriately tailored order may be issued instead. For example, in Ancira, a man was charged with violating an order prohibiting contact with his wife. Ancira, 107 Wn. App. at 652. He drove away with his four-year old child, whom he refused to return until his wife agreed to talk with him. Id. Following conviction for violation of the original no-contact order, the court imposed another order that also prohibited contact with Ancira's children for five years. Id. at 652-53.

This Court held that the no-contact order violated Ancira's fundamental right to parent. Id. at 654. The State had a compelling interest in preventing children from witnessing domestic violence. But the State failed to demonstrate how supervised visitation without the mother's presence, or indirect contact by telephone or mail, would jeopardize this goal. Id. at 654-55.[29]

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[29] See also State v. Sanford, 128 Wn. App. 280, 289, 115 P.3d 368 (2005) (where Sanford was convicted of misdemeanor assault of children's mother out of children's sight and hearing, and where there were no allegations he committed or threatened violence against the children, trial court erred in restricting Sanford to supervised visitation).

In Rainey, a man was convicted of kidnapping his three-year-old daughter. 168 Wn.2d at 371. In addition to kidnapping, Rainey attempted to use the daughter to harass the mother. Id. at 379-80. For example, he sent letters sent to his daughter from jail blaming the mother for breaking up the family. Id.

The sentencing court imposed a lifetime no-contact order with the child. Id. at 374. On review, the Supreme Court agreed the evidence was sufficient to establish that some duration of no-contact order, including prohibitions on indirect and supervised contact, was reasonably necessary to protect the child. Id. at 380.

The Court nevertheless reversed the order because the State made no attempt to demonstrate why the lifetime prohibition was reasonably necessary. Moreover, the sentencing court provided no justification for the order's lifetime duration. Id. at 381-82. The Court observed that

> what is reasonably necessary to protect the State's interests may change over time. Therefore, the command that restrictions on fundamental rights be sensitively imposed is not satisfied merely because, at some point and for some duration, the restriction is reasonably necessary to serve the State's interests.

Id. at 381. The Court therefore remanded for resentencing. Id. at 382.

Here, Sefton was acquitted of assaulting D.S. Regardless of what D.S. witnessed, he was only 21 months old when he was removed

from Sefton's home and he is unlikely to retain memories of his life with Sefton. Moreover, as D.S. ages into adolescence and young adulthood, he will not be at the same dangers identified by the State at sentencing. As in Rainey, the State did not explain why a lifetime prohibition on contact was necessary. 26RP 2315. As in that case, the sentencing court gave no explanation for the duration of the order. 26RP 2326.

The State cannot demonstrate that the court's life time no-contact order was narrowly tailored or reasonably necessary to effectuate a compelling State interest. Warren, 165 Wn.2d at 32. The sentencing court therefore abused its discretion in entering the order. Iniguez, 167 Wn.2d at 280. As such, this Court should remand for resentencing and imposition of an appropriately tailored order. Rainey, 168 Wn.2d at 82; see also State v. Howard, 182 Wn. App. 91, 101, 328 P.3d 969 (2014) (remand required when a reviewing court is unable to determine whether a specific provision or term is reasonably necessary).

9. THIS COURT SHOULD NOT AWARD THE COSTS OF APPEAL.

As a final matter, if Sefton does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 of the Rules of Appellate Procedure. This Court has ample discretion to deny the State's request for costs. For example, RCW 10.73.160(1) states the "court of appeals . . .

may require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000).

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn2d 827, 834, 344 P.3d (2015). Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id.

The existing record establishes that any award of appellate costs would be unwarranted in this case. The record is replete with evidence of Sefton's indigency. He is, moreover, facing a 240-month sentence, which will greatly impede his ability to pay the costs of his appeal. CP 173.

Moreover, at sentencing, the court imposed only mandatory fines, waiving other costs. CP 172. The trial court then found Sefton to be indigent and found that he could not contribute anything to the costs of appellate review. CP 161-63 (Order of Indigency); see also CP 164-66 (Motion and Declaration for Order of Indigency, declaring that Sefton has no assets). Indigence is presumed to continue throughout the appeal. State v. Sinclair, 192 Wn. App. 380, 393, 367 P.3d 612 (citing RAP 15.2(f)), review denied, 85 Wn.2d 1034 (2016).

In summary, in the event that Sefton does not substantially prevail on appeal, this Court should not assess appellate costs against him. Provided that this Court believes there is insufficient information in the record to make such a determination, however, this Court should remand for the superior court, a fact-finding court, to consider the matter.

D. CONCLUSION

Sefton was denied a fair trial when detectives repeatedly expressed their opinions on his guilt in recorded interviews and at trial. Defense counsel may also have been ineffective based on his handling of the inadmissible opinion testimony. Sefton was also denied his constitutional right to jury unanimity on that count. As a result, the criminal mistreatment conviction should be reversed. Sefton's first degree assault of a child conviction should be reversed as well, because the court violated Sefton's right to a unanimous jury verdict on that count.

The prosecutor's incurably prejudicial misconduct in closing argument also denied Sefton a fair trial on all counts. For similar reasons, defense counsel provided ineffective assistance by failing to object to the prosecutor's misconduct.

Remand for resentencing is also required. The sentencing court erred in ordering mental health evaluation and treatment as a condition of community custody without following statutorily mandated procedures.

In addition, the court erred in entering a lifetime no-contact order prohibiting all contact between Sefton and younger child D.S.

Finally, in the event that the State is the prevailing party, this Court should deny any request for appellate costs based on Sefton's indigency.

DATED this 14th day of October, 2016.

Respectfully submitted,

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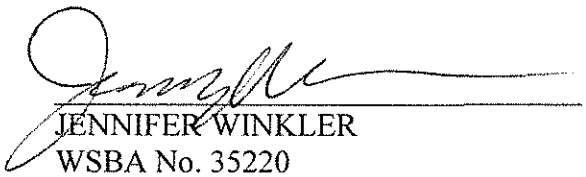

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