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NO. 35605-8-II  
IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

JEAN L. ROBBINS,

Appellant.

ST-10  
Gmm

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ON APPEAL FROM THE  
SUPERIOR COURT OF MASON COUNTY

Before the Honorable James B. Sawyer, II, Judge

OPENING BRIEF OF APPELLANT

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PM 8/29/07

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**A. ASSIGNMENTS OF ERROR**

1. The appellant's trial counsel was ineffective during closing argument.

2. There was insufficient evidence to support a conviction for assault in the third degree.

3. The trial court erred by entering the following Conclusions of Law pertaining to a *Knapstad* motion, insofar as the conclusions pertain to the court's ruling preventing the defense from introducing testimony regarding parental right pursuant to *State v. Baxter*:

2. That under the facts presented and stipulated to, a parent does not have a parental right to initiate or authorized or authorize the circumcision of the parent's minor male child by a person who is not a medical professional trained in such a procedure,

3. That a circumcision performed under such a scenario is an offensive touching as a matter of law.

4. The trial court's refusal to permit the defense to present any evidence on religious motive, parental right, or consent denied the appellant her right to a fair trial under Washington Constitution, Article 1, § 3 and under United States Constitution, Fourteenth Amendment.

5. The trial court erred in giving the following jury instruction, based on the holding of *State v. Baxter*, 134 Wn. App. 587,

141 P.3d 92 (2006):

Instruction No. 11

A parent who is not a medical or religious professional trained in such a procedure does not have a parental right to perform a circumcision of the parent's minor male child.

A parent does not have a parental right to initiate or authorize the circumcision of the parent's minor male child by a person who is not a medical or religious professional trained such a procedure.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the appellant's trial counsel provided ineffective assistance when he conceded that the appellant committed assault in the third degree during closing argument and asked the jury to find the appellant guilty of that offense? Assignment of Error No. 1.

2. Whether there was sufficient evidence of assault in the third degree where the State did not present sufficient evidence to prove that the appellant acted with criminal negligence where the appellant's boyfriend performed a circumcision on her son J.R., and where the boyfriend had some medical training as a medic, and where a doctor described the circumcision procedure as being "cosmetic" and like "getting your ears pierced." Assignment of Error No. 2.

3. The trial court's refusal to allow the appellant to present any evidence regarding parental right, religious motive or consent denied

the appellant her right to a fair trial under Washington Constitution, Article I, § 3 and under United States Constitution, Fourteenth Amendment? Assignments of Error No. 3 and 4.

4. An accused person has the due process right to jury instructions that accurately state the law and make the relevant standard manifestly apparent to the jury. Did the trial court err by permitting Instruction 11, which precluded argument that a parent has a parental right to initiate or authorize circumcision of a child by a person who is not a medical or religious professional trained such a procedure, based on the holding of *Baxter*, where the facts of *Baxter* differ significantly from the appellant's case? Assignment of Error No. 5.

### C. STATEMENT OF THE CASE

#### 1. Procedural history:

Jean Robbins was charged by amended information filed in Mason County Superior Court on July 18, 2006, with assault of a child in the second degree (domestic violence), and in the alternative, assault of a child in the third degree (domestic violence), contrary to RCW 9A.36.140(1) and 9A.36.031(1)(d). CP at 106-07.

A jury convicted Jean Robbins of third degree assault (domestic violence) on October 30, 2006. CP at 22, 23, and 24. 3Report of

Proceedings [RP] at 414-15.<sup>1</sup>

**a. *Knapstad* motion.**

The trial court heard Robbins' motion to dismiss the case pursuant to *State v. Knapstad*<sup>2</sup> on June 2, 2006. 1RP at 97. Defense counsel argued that Robbins had a parental right to obtain a circumcision for J.R. 1RPat 102-03. CP at 133-39. The court entered the following Findings of Fact and Order Denying Motion to Dismiss [sic] on June 30, 2006. CP at 113-14.

CONCLUSIONS OF LAW

1. The court has jurisdiction over the subject matter of these proceedings and the parties to it.
2. That under the facts presented and stipulated to, a parent does not have a parental right to initiate or authorized or authorize the circumcision of the parent's minor male child by a person who is not a medical professional trained in such a procedure.
3. That a circumcision performed under such a scenario is an offensive touching as a matter of law.

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<sup>1</sup> The Verbatim Report of Proceeding consists of three volumes:  
1 RP August 17, 2005 Arraignment; October 3, 2005 Omnibus; October 17, 2005 Pretrial; October 31, November 17, November 21, November 28, December 5, December 12, December 19, December 23, December 27, 2005, January 6, January 9, January 13, March 31, April 4, April 10, April 17, 2006 Readiness; April 21, 2006 Motion, April 28, 2006 Readiness, June 2, 2006 Knapstad motion, June 6, 2006 Readiness, July 7, 2006 Trial status, July 14, 2006 Trial status, July 28, 2006 Mistrial declared, October 13, October 20, 2006 Readiness, October 23, 2006 Argument.  
2 RP October 24, 2006, October 25 2006 Jury trial  
3 RP October 30, 2006 Jury trial, Sentencing October 31, 2006.  
<sup>2</sup> *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

Accordingly, the court enters the following:

ORDER

I

The court denies the defendant's motion for a dismissal.

CP at 113-14.

**b. First trial.**

After numerous delays, the case went to trial in July, 2006. A mistrial was declared on July 28, 2006, due to the medical unfitness of defense counsel to proceed with the trial. 1RP at 135. CP at 80.

On August 15, 2006—two weeks after the mistrial—this Court issued *State v. Baxter*, 134 Wn. App. 587; 141 P.3d 92 (2006). In *Baxter*, the defendant was convicted for attempting to circumcise his eight-year-old son at home. This court found that given the child's age and the circumstances surrounding the incident, the trial court did not err in precluding Baxter from asserting a consent defense. *Baxter*, 134 Wn. App. at 599.

In addition, this Court held that although Baxter had the right to control his son's care and upbringing, that right did not extend to the type of harm he inflicted on his son, and his religious motive was not a valid defense to the corresponding criminal liability, and therefore affirmed

trial court's ruling that excluded evidence of Baxter's religious motive. *Baxter*, 134 Wn. App. at 600-02.

**c. Second trial.**

Trial to a jury commenced October 24, 2006, the Honorable James B. Sawyer presiding. The State moved *in limine* to preclude testimony regarding consent, religious, or parental right to circumcise J.R. 2RP at 174. The defense noted its opposition to the motion, arguing that *State v. Baxter* is distinguishable from the facts in Robbins' case. As noted *supra*, Baxter attempted to circumcise his eight-year-old son in a dirty bathtub, with no medical training, using a hunting knife and animal wound cauterizing powder as his tools. *Baxter*, 134 Wn. App. at 591.

The court reiterated its previous ruling and denied the introduction of testimony regarding consent, parental right, or religious motive at trial. 2RP at 182.

During closing argument, Robbins' defense counsel told the jury:

You've got assault three under what we call a different prong. It's a different way of getting there, okay. It's because she inflicted bodily harm, basically without a medical license. She did an at-home circumcision. That's assault three. That's what I told you in opening statement. I told you in opening statement, I believe, and I'm telling you—I started off by saying isn't it nifty that the State's not talking about these things. They're saying this lady circumcised her kid at home, that's assault two. That's what they told you in their opening statement, that's what

they told you in closing argument.

What I told you in opening was, you have assault three. Now, what I'm telling you in closing is you do not have assault two; you have assault three beyond a reasonable doubt. And that's what I'm asking you---that's the verdict I'm asking you to return, to come back and convict my client of assault in the third degree.

3RP at 408-09.

**d. Jury instructions.**

Defense counsel noted its objection to Instruction 11. 3RP at 360-

61. The instruction, based on the holding of *Baxter*, provides:

A parent who is not a medical or religious professional trained in such a procedure does not have a parental right to perform a circumcision of the parent's minor male child.

A parent does not have a parental right to initiate or authorize the circumcision of the parent's minor male child by a person who is not a medical or religious professional trained such a procedure.

CP at 38.

**e. Verdict.**

The jury found Robbins guilty of the alternative offense of third degree assault (DV). 3RP at 414-15. CP at 22, 23, and 24. The jury found her not guilty of assault in the second degree as charged in Count 1.

3RP at 415.

**2. Sentencing:**

The matter came on for sentencing on February 2, 2006. 3 RP at 417-450. Judge Sawyer imposed a standard range sentence of 60 days, with 30 days converted to 240 hours community service. RP at 442. CP at 6-21.

Timely notice of this appeal followed. CP at 5.

**3. Substantive facts:**

Detective Luther Pittman of the Mason County Sheriff's Department interviewed Joe Curry and Jean Robbins pursuant to a report that Curry performed a circumcision on J.R., Robbins' son. 2RP at 283-90. Curry told Det. Pittman that he performed the circumcision during Christmas break in 2003. 2RP at 290. J.R. was born October 7, 1996. 2RP at 266. State's Exhibit 7, Excerpt 14.

J.R. testified that he was circumcised by Curry when he was seven years old. 2RP at 277. He said that it happened in the bathroom of Curry's house, and he used "[a] model knife and some scissors." 2RP at 278. He said that his mother, Jean Robbins, was present and that she knew that the circumcision was happening. 2RP at 278. State's Exhibit 7, Expert 14. J.R.'s mother and Curry lived together at the time. 2RP at 279.

Curry had some medical training as a result of serving in the

military as a medic. State's Exhibit 7, Excerpt 11. Robbins and Curry researched the circumcision procedure on the internet, and purchased a topical agent to use as a local anesthetic. They bought "a scalpel-type set" and sterilized the utensils by washing them in disinfectant and then boiling them. State's Exhibit 7, Excerpt 14.

Dr. Brad Anderson examined J.R. on March 6, 2003, when he was seven years old. 2RP at 222, 226. Robbins and Curry, who had brought J.R. to the doctor's appointment, asked about a possible circumcision of J.R. 2RP at 222. Dr. Anderson explained to Curry and Robbins that circumcision was "a cosmetic procedure" and that there "was no real medical necessities for it." 2RP at 222. Dr. Anderson stated that the procedure is "like getting your ears pierced." 2RP at 224.

Dr. Anderson examined J.R. again in May, 2005. 2RP at 228. J.R.'s uncle brought him in to see Dr. Anderson regarding a concern that J.R. had been circumcised. 2RP at 228. Dr. Anderson testified that there was "scarring noted and that it was consistent with an amateur circumcision done outside of a medical office . . . ." 2RP at 228. Dr. Anderson noted that there was evidence of scar formation from overly aggressive circumcision and "[o]ver-removal of foreskin." 2RP at 228, 231. Dr. Anderson said that there may be "a lot of potential complications

from this scar” but that he could not be one hundred percent sure if J.R. would suffer complications from the circumcision. 2RP at 250.

Dr. Michael Ellen, a urologist, examined J.R. in April 2006. 3RP at 319. Dr. Ellen observed some swelling in J.R.’s case, and testified that the scarring he observed appeared to be permanent. 3RP at 320, 324. Dr. Ellen testified that the steps to ensure that a circumcision turns out properly is to “make sure you don’t take too much tissue;” “make sure you take enough tissue[;]” and you “need to make sure you’re not going to damage the urethra.” 3RP at 322. He testified that there are “a lot of potential problems that can happen.” 3RP at 322. Dr. Ellen testified that it was hard to determine with any certainty whether there would be future complications from the circumcision. 3RP at 323. He stated that J.R. “might have a problem when he grows up that he might have scar tissue there” and that he “might require surgery to fix that.” 3RP at 323.

Dr. Ellen noted that although he did not routinely perform newborn circumcisions, in his practice he had “managed complications of circumcisions done by pediatricians on children . . .” 3RP at 322.

#### **D. ARGUMENT**

1. **ROBBINS' ATTORNEY PROVIDED  
INEFFECTIVE ASSISTANCE OF COUNSEL  
AT TRIAL.**

The test for ineffective assistance of counsel is whether (1) defense counsel's performance fell below the objective standard of reasonableness, and (2) whether this deficiency prejudiced the defendant. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Counsel's performance is deficient if it falls below a minimum objective standard of reasonable attorney conduct. *State v. Glenn*, 86 Wn. App. 40, 44, 935 P.2d 679 (1997), *review denied*, 134 Wn.2d 1003 (1998).

a. **Robbins' Counsel Was Ineffective By  
Conceding the Defendant's Guilt to the  
Third Degree Assault In Closing  
Argument.**

Robbins argues that her counsel was ineffective by conceding her guilt to the lesser charge of third degree assault in closing argument. Defense counsel explicitly requested the jury to convict Robbins of third degree assault. 3RP at 408-09.

The defendant's only possibility of acquittal of the lesser charge of third degree assault was to convince the jury that the procedure did not constitute assault, that the procedure did not result in bodily harm, or that the decision to have Curry perform the circumcision was not criminally

negligent. When the defendant's counsel failed to argue that the facts did not constitute assault and was not the result of criminal negligence, he effectively told the jury he did not believe his own client. *See, e.g., Wiley v. Sowders*, 647 F.2d 642, 649-50 (6<sup>th</sup> Cir. 1981) (lawyer's comments in closing argument that are functional equivalent of a guilty plea may deprive a defendant of effective assistance).

Robbins argues this failure of her counsel, in addition to being prejudicial, constituted an utter abandonment of her defense and a failure to subject the State's case to meaningful adversarial testing, requiring no showing of specific prejudice. For example, in *United States v. Swanson*, 943 F.2d 1070 (9<sup>th</sup> Cir. 1991), the federal Court of Appeals held that no proof of prejudice was required when defense counsel repeatedly conceded that the prosecution had proved its case beyond a reasonable doubt. *Swanson*, 943 F.2d at 1075. This exception to the *Strickland* prejudice requirement applies when "counsel entirely fails to subject the prosecution's case to adversarial testing." *United States v. Cronin*, 466 U.S. 648, 659, 104 S. Ct. 2039, 2047, 80 L. Ed. 2d 657 (1984). Here, Robbins argues that her counsel's deficient performance in all the aspects argued above amounted to an actual or constructive complete denial of counsel under *Cronic*.

**b. Robbins' Trial Counsel's Deficient Performance Was Ineffective, Requiring Reversal Under Both *Strickland* and *Cronic*.**

Prejudice under *Strickland* results where it is reasonably probable that “but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. Lord*, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991) (quoting *Strickland*, 466 U.S. at 694). This *Strickland* standard does not require the reviewing court to be convinced that it is more likely than not that the defendant would not have been convicted but for the attorney’s deficiency, but only requires a reasonable probability of prejudice, which is defined as a “probability sufficient to undermine confidence in the outcome.” *Strickland*, at 694. Here, counsel’s concession to the jury in closing argument that his client was guilty of third degree assault should cause any confidence in the outcome of Robbins’ trial to be seriously undermined.

In addition, Robbins argues that her counsel’s deficient performance in these respects amounted to an actual or constructive complete denial of her right to counsel under *United States v. Cronic*, requiring reversal. See e.g. *Chadwick v. Green*, 740 F.2d 897, 900 (11<sup>th</sup> Cir. 1984); *Cochiocoa v. Johnson*, 238 F.3d 278, 283 (5<sup>th</sup> Cir.2000).

2. **ROBBINS SHOULD NOT STAND CONVICTED OF ASSAULT IN THE THIRD DEGREE BECAUSE THE EVIDENCE FOR THE CHARGE IS INSUFFICIENT.**

There is insufficient proof to convict Robbins of assault in the third degree. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant’s guilt beyond a reasonable doubt, but only that substantial evidence supports the State’s case. *State v. Fiser*, 99 Wn. App. 714, 718, 995 P.2d 107, *review denied*, 141 Wn.2d 1023 (2000). Substantial evidence is evidence that “would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.” *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972).

As charged and instructed in the alternative count, assault in the

third degree required proof that Robbins, with criminal negligence, caused bodily harm to J.R. CP at 107.

Dr. Anderson testified that he observed scarring and that J.R. had received an “overly aggressive” circumcision. He speculated that J.R. may experience pain with erections in the future, but that he could not say so with certainty. Similarly, Dr. Ellen testified that the scarring appeared permanent, and that J.R. may have significant impairment in the future, or that he was going to have minimal functional impairment, but that it was too early to tell.

The doctors’ testimony about the nature and extent of the scarring that occurred as a result of the circumcision may be sufficient evidence of bodily harm, but the testimony does not prove that Curry or Robbins acted with criminal negligence. Criminal negligence requires proof that a person fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care a reasonable man would exercise in the same situation. RCW 9A.08.010(1)(d). Here, Dr. Anderson testified that the procedure is similar to getting pierced ears and that it is considered a cosmetic procedure. 2RP at 224-26. Significantly, Dr. Ellen mentioned that mistakes can occur in the procedure even when performed

by professionals; he testified that he has “managed complications of circumcisions done by pediatricians on children . . . .” 3RP at 322.

Without more evidence of criminal negligence, the evidence of Robbins’ culpability is insufficient.

3. **IS THIS COURT’S RULING IN *STATE V. BAXTER*, AFFIRMING A TRIAL COURT’S REFUSAL TO ALLOW THE DEFENSE TO PRESENT ANY EVIDENCE ON PARENTAL RELIGIOUS MOTIVE CONTROLLING AUTHORITY IN VIEW OF THE FACTS OF ROBBINS’ CASE?**

This Court held in *State v. Baxter*, 134 Wn. App. 587; 141 P.3d 92 (2006) that in making a determination as to whether consent is a defense, a court considers the particular act, the surrounding circumstances, and society's interest in the activity involved. *Baxter* involved a man with no medical training, who concluded that God was directing him to circumcise his eight-year-old son. He did so by numbing his son's penis with ice and attempted to remove the boy's foreskin with a hunting knife. Afterward, he attempted to control the bleeding with an animal wound cauterizing powder. This did not work and he called 911. Medical and law enforcement personnel found the eight year old lying in a dirty bathtub, bleeding from the penis. Baxter was charged with second degree assault of a child. *Baxter*, 134 Wn. App. at 591.

The trial court excluded evidence of Baxter's motive and the child's consent. This Court upheld the trial court's ruling, finding that "considering E.N.B.'s age and the circumstances surrounding the incident, the trial court did not err in precluding Baxter from asserting a consent defense." *Baxter*, 134 Wn. App. at 599.

Baxter also argued that he should been permitted to explain to the jury that his actions were motivated by religious exercise and the control of his son's upbringing. This Court disagreed, finding that the harm Baxter inflicted on his son triggered the State's right to impose criminal liability, and the religious motive did not affect the criminality of the act. *Baxter*, 134 Wn. App. at 601-02.

This Court also noted that "cutting a child's genitalia is also disfavored in public policy. Congress and several states have passed legislation outlawing female circumcision, also known as female genital mutilation." (Citations omitted). *Baxter*, 134 Wn. App. at 602-03.

While this point of view is certainly outside the mainstream of popular thought, the performance of a circumcision on an eight-year-old boy, by a layman using improper tools in an unsanitary environment, raises many of the dangers contemplated by Congress and other legislatures in their prohibitions of the female procedure. Thus, while Baxter had the right to control his son's care and upbringing, that right did not extend to the type of harm he inflicted on his son, and his religious motive was not a valid defense to the corresponding criminal liability. Accordingly, the trial court did not err in excluding evidence of that motive.

*Baxter*, 134 Wn. App. at 603.

In the present case, the trial court, relying on *Baxter*, precluded the defense from presenting evidence regarding Robbins' religious motive and consent. Robbins submits that a significant part of *Baxter* was grounded in the particular facts of that case. *Baxter* had no medical training and the procedure was performed under unhygienic conditions with an improper instrument. J.R.'s procedure, however, was performed by someone with some medical training, albeit lacking training in circumcisions. In addition, Robbins and Curry researched the procedure, obtained an anesthetic, obtained instruments they believed to be appropriate, and made sure that the instruments were sterilized. This Court, in affirming the trial court's ruling precluding mention of consent, took into consideration "E.N.B.'s age and the circumstances surrounding the incident[.]" In the present case, J.R. was seven years old, while E.N.B. was eight. More significantly, however, is that Robbins took substantial precautions to ensure that the circumcision was performed correctly. Although Dr. Anderson and Dr. Ellen discussed the scarring that occurred, the result was not nearly as egregious as the circumstances of *Baxter*. Robbins asserts that the facts of her case merit revisiting the issue of consent, parental right, and particularly the issue of religious motivation, and that

the trial court erred in precluding testimony pertaining to consent, parental right, and religious motive, and erred by submitting Instruction 11 to the jury, which was based on *Baxter*.

While due process does not guarantee every person a perfect trial, both our state and federal constitutions do guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). As part of this right to a fair trial, due process also guarantees that a defendant charged with a crime will be allowed to present relevant, exculpatory evidence in his or her defense. *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

In the case at bar, the State alternatively charged Robbins with third degree assault of a child under RCW 9A.36.140(1) and RCW 9A.36.031(1)(d).

RCW 9A.36.140(1) provides as follows:

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

The latter statute states:

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

(d) With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm; or

RCW 9A.36.031(1)(d).

The term “assault” as it is used in Washington law has three possible definitions: “(1) an attempt, with unlawful force, to inflict bodily injury upon another (attempted battery); (2) an unlawful touching with criminal intent (battery); and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm (common law assault).” *State v. Nicholson*, 119 Wn. App. 855, 860, 84 P.3d 877 (2003). In the case at bar, the information alleges the second of these definitions. Thus, in this case, the State had the burden to prove that the defendant acted “unlawfully” and with “criminal intent.”

Many “touchings” as the term is used to define assault are neither “unlawful” nor done with “criminal intent,” even if the touching results in significant physical damage. For example, a touching performed in self-defense is not “unlawful.” RCW 9A.16.020. In some “touchings” charged as assault are not “unlawful” if done with the consent of the person who is “touched.” The decision is *State v. Hoitt*, 97 Wn. App. 825,

987 P.2d 135 (1999), addresses the issue concerning when consent will and will not make certain conduct legal.

In *Hoitt*, the juvenile defendant and his friend were playing a game with BB guns in which they shot at each other. As a result of the game, the defendant shot his friend in the eye, causing permanent injury. After the incident, the state charged the defendant with third degree assault and obtained a conviction after a trial in which the court refused to allow the defense to argue consent. The defendant then appealed. In addressing this issue, the court first stated the following concerning the defense of consent.

Consent can be a defense to a criminal assault [97 Wn. App. 827] charge. *State v. Simmons*, 59 Wn.2d 381, 388, 368 P.2d 378 (1962) (the defense was applied in a sexual assault charge). Most recently, in *State v. Shelley*, 85 Wn. App. 24, 929 P.2d 489, *review denied*, 133 Wn.2d 1010, 946 P.2d 402 (1997), Division One held that consent can be a defense to an assault occurring during an athletic contest. During a game of “pickup” basketball, Shelley punched another play, breaking his jaw. Division One reviewed the use of consent as a defense and extended its use beyond that of sexual assault, adopting the approach of the Model Penal Code. Under *Shelley*, consent can be a defense if “the conduct of defendant constituted foreseeable behavior in the play of the game” and the injury “occurred as a by-product of the game itself.” *Shelley*, 85 Wn. App. at 34, 929 P.2d 489. *Cf. State v. Dejarlais*, 136 Wn.2d 939, 969 P.2d 90 (1998) (consent not a defense to charge of violating a domestic violence protection order).

*State v. Hoitt*, 97 Wn. App. at 826-827 (footnote omitted).

Applying this standard, the court affirmed the conviction, holding that shooting BB guns at each other is contrary to public policy and not the type of activity “generally accepted by society as lawful athletic contests, competitive sports, or concerted activities not forbidden by law.” *Hoitt*, at 827.

By contrast, in the case at bar, there are many types of consensual physical procedures that are regularly performed in our society that are not considered contrary to public policy, and are not considered an assault. These include all types of body piercing, tattooing, branding, scarring, and body mutilation, all performed by non-physicians. Ritual circumcision, particularly in the Jewish community (called a bris), has been performed for thousands of years, and is still performed without the aid or presence of a physician. None of these procedures have been held to be contrary to public policy.

Thus, in the case at bar, the trial court violated Robbins’ due process right to present a valid defense when it refused to allow her to argue consent, parental right, and religious motive as a defense, and when it submitted Instruction 11 to the jury.

**E. CONCLUSION**

For the foregoing reasons, Jean Robbins respectfully requests that this Court reverse her conviction. In the unlikely event that she does not prevail, she asks this Court to deny any State request for costs on appeal.

DATED: August 29, 2007.

Respectfully submitted,

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'P. Tiller', written over the printed name 'THE TILLER LAW FIRM'.

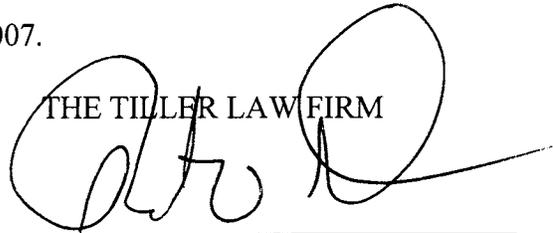
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PETER B. TILLER - WSBA 20835  
Of Attorneys for Jean Robbins



Ms. Jean L. Robbins  
3100 SE Orlando St., B306  
Port Orchard, WA 98366

Dated: August 29, 2007.

THE TILLER LAW FIRM  
  
PETER B. TILLER – WSBA #20835  
Of Attorneys for Appellant

CERTIFICATE OF  
MAILING

2

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COURT OF APPEALS  
DIVISION TWO  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON  
BY mm  
DEPUTY

STATE OF WASHINGTON )  
 )  
 Respondent, )  
 )  
 v. )  
 Jean L. Robbins )  
 (your name) )  
 )  
 Appellant. )

No. 35605-8-II

STATEMENT OF ADDITIONAL  
GROUNDS FOR REVIEW

I, Jean L. Robbins, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

Robbins' counsel erred in not insisting on the defenses right to present their own medical specialist.

Additional Ground 2

Defense counsel refused to present testimony offered up by eyewitnesses in the case

If there are additional grounds, a brief summary is attached to this statement.

Date: October 7<sup>th</sup>, 2007

Signature: Jean L. Robbins

AFFIDAVIT

STATE OF WASHINGTON  
COUNTY OF MASON

I, Jean L. Robbins, declare under penalty of perjury that the following statements with in this affidavit are true and correct to the best of my knowledge and have been executed on this 7<sup>th</sup> day of October 2007, at Port Orchard, Washington, Kitsap County.

I, Jean Robbins did discuss and request of both my legal councils, Adrian Pimentel and Eric Vally the matter of a medical specialist to testify for the defense.

I certify that I discussed and instructed Mr. Vally to call Mr. Joe Curry and Mr. Jesse D. Robbins II and have them testify on my behave.

I certify that I informed Mr. Vally that he was under no uncertain terms to concede to Third Degree Assault, he felt this may be needed and I refused, I didn't wait all this time to go to trial to concede to something I could have pled to all along.<sup>1</sup>

  
\_\_\_\_\_  
Affiants Signature

Dated this 7<sup>th</sup> day of October, 2007

Affidavit pursuant to 28 U.S.C. 1746, Dickerson V. Wainwright, 624 F, 2d 1184 (1980);  
Affidavit sworn as true and correct under penalty of perjury and has full force of the law  
and does not have to be verified by Notary Public.

  
\_\_\_\_\_

<sup>1</sup> AFFIDAVIT

## ADDITIONAL GROUNDS I

### ROBBINS' COUNSEL ERRED IN NOT INSISTING ON THE DEFENSES RIGHT TO PRESENT THEIR OWN MEDICAL SPECIALIST.

I, Jean Robbins repeatedly asked my council for the right to have my own medical expert, one that would not have been poisoned with prior information about the case, be it only that this was a home circumcision. One that is familiar with the different types of circumcisions such as that the defense offered up to show the court that there are many types of circumcisions, these depending upon the preference of each individual concerning the final outcome of the treatment.

At the initial interview between my lawyer and myself I instructed him that we would need a medical specialist for my defense. I informed him that the allegation from Dr. Anderson that the circumcision bordered on mutilation was incorrect and that I would need a specialist in the field of circumcision itself. Mr. Pimentel agreed with me and told me he had his investigator on the job of locating a specialist for us.

At the time that the legal council for the defense of my case, also the co-defendants case and the states case interviewed Jesse D. Robbins Sr. they all came to the conclusion that a medical specialist was needed. (See transcripts Pg 49) I was told that I would finally get what I had been asking for. On January 6, 2006 I agreed to a continuance because Mr. Pimentel, my legal council insisted that he needed time to find me a specialist. He and none of his associates ever did this.

I was unaware that the attorneys involved had already decided to have *one* Specialist for both the State's case and the Defense! That they went about locating this Doctor by first inquiring if he would be willing to testify. So rather than bring the child in for an uninformed exam and then subpoenaing the Doctor, the prosecutors office informed the Doctor by notifying the would be witness of even the slightest bit of information on this case, (in particular that they are with the prosecuting attorneys office. This could have implied many things to the doctor.) They tainted his findings and conclusions. (See transcripts Pg 319 were Dr. Ellen states answers "yes" to the State's question, "did you see a particular patient on April 19<sup>th</sup> of this year by the name of Joshua *for the purpose of your – for what you're being called for today?*" Dr. Ellen states that he was, "asked by the Mason County District Attorney" to examine Joshua and testify. (See transcript Pg 325)

My intention for my defense was to have testimony for the jury from a doctor who had performed circumcisions like the one that was performed on Joshua. I wanted to discuss the different types of circumcisions being requested and performed on patients around the world today. I provided my attorney with pictures and testimonials from men that had circumcisions like this, some from their original circumcision and some who had had the surgery to make it just like or very much like the results that Joshua has. I'm afraid that the transcripts that I received don't give me these so I would ask you to look this information over in full.

## ADDITIONAL GROUNDS II

Defense counsel Mr. Eric Vally refused to present testimony offered up by eyewitnesses in the case. These witnesses, Joseph J. Curry and Jesse D. Robbins were subpoenaed in this trial and never called to testify as to what they witnessed. This decreased the creditability of Jean Robbins.

At the last minute Mr. Vally refused to put Joseph Curry and Jesse Robbins on the stand so that they could offer to the jury a collaboration as to the facts of the case. Consequently the jury was left to speculate.