

No. 36136-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

LEON LEE REYES,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 06-1-00890-3
The Honorable Kathryn Nelson, Judge

OPENING BRIEF OF APPELLANT

STEPHANIE C. CUNNINGHAM
Attorney for Appellant
WSBA No. 26436

4616 25th Avenue NE, No. 552
Seattle, Washington 98105
Phone (206) 526-5001

TABLE OF CONTENTS

I. SUMMARY OF THE CASE	1
II. ASSIGNMENTS OF ERROR.....	1
A. Assignments of Error.....	1
B. Issues Pertaining to the Assignments of Error.....	3
III. STATEMENT OF THE CASE.....	6
A. Substantive Facts.....	6
1. <u>Hayden's Family and Medical History</u>	6
2. <u>Hayden's Final Days</u>	13
3. <u>Medical Testimony</u>	17
B. Procedural History	20
IV. ARGUMENT & AUTHORITIES	22
A. The State failed to present sufficient evidence to prove beyond a reasonable doubt all the essential elements of the crimes charged.	22
1. <u>The State did not prove all the essential elements of the crime of homicide by abuse.</u>	22
a. <i>The State's evidence did not establish that Leon was the individual who inflicted Hayden's fatal injury.</i>	23
b. <i>The State's evidence did not establish an extreme indifference to Hayden's life.</i>	25
c. <i>The State's evidence did not establish that Leon engaged in a pattern of abuse.</i>	28

2. <u>The State did not prove all the essential elements of the crime of second degree murder.</u>	31
B. Leon was denied his right to effective assistance of counsel when his trial attorney essentially conceded an unproved but essential fact during closing argument.	31
C. The trial court’s failure to vacate Count II, the second degree murder conviction, violated Leon’s double jeopardy protections.	34
D. The trial court erred when it imposed an exceptional sentence because the State’s evidence did not prove the aggravating factor and because the facts of this case do not sufficiently distinguish this crime from other homicide by abuse cases.	38
V. CONCLUSION	43

TABLE OF AUTHORITIES

CASES

<i>City of Tacoma v. Luvене</i> , 118 Wn.2d 826, 827 P.2d 1374 (1992)	22
<i>In re Pers. Restraint of Percer</i> , 150 Wn.2d 41, 75 P.3d 488 (2003)	34
<i>State v. Adams</i> , 138 Wn. App. 36, 155 P.3d 989 (2007)	26, 27, 42, 43
<i>State v. Berube</i> , 150 Wn.2d 498, 79 P.3d 1144 (2003).....	41
<i>State v. Early</i> , 70 Wn. App. 452, 853 P.2d 964 (1993).....	32
<i>State v. Edwards</i> , 92 Wn. App. 156, 961 P.2d 969 (1998)....	26, 27, 42
<i>State v. Graham</i> , 78 Wn. App. 44, 896 P.2d 704 (1995).....	32
<i>State v. Grewe</i> , 117 Wn.2d 211, 813 P.2d 1238 (1991).....	39
<i>State v. Leavitt</i> , 49 Wn. App. 348, 743 P.2d 270 (1987)	32
<i>State v. Madarash</i> , 116 Wn. App. 500, 66 P.3d 682 (2003)	25, 26, 27, 28, 29, 30, 42
<i>State v. Mierz</i> , 127 Wn.2d 460, 901 P.2d 286 (1995)	31
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	22
<i>State v. Womac</i> , 130 Wn. App. 450, 123 P.3d 528 (2005).....	36, 37
<i>State v. Womac</i> , 160 Wn.2d 643, 160 P.3d 40 (2007)	35, 36, 37, 38, 41
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	31, 32

OTHER AUTHORITIES

RCW 9.94A.535	39
RCW 9.94A.537	39
RCW 9.94A.585	39
RCW 9A.32.050	31
RCW 9A.32.055	23, 28, 30
U.S. Const. amd. V	34
U.S. Const. amd. VI	31
Wash. Const. Article I, § 9.....	34
Wash. Const. art. I, § 22 (amend. x)	31
5 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, CRIMINAL PROCEDURE § 25.1(b) (2d ed. 1999)	34

I. SUMMARY OF THE CASE

Hayden Kostecky died on February 22, 2006, at the age of two, from severe head injuries. Medical personnel believed his injuries resulted from being forcefully shaken by an adult. Because Hayden had a history of injuries, some of which were sustained while under the care of his step-father, Leon Reyes, and because the explanations for the injuries were sometimes contradictory, the police and the prosecutor suspected Leon had inflicted the fatal injury. Although nobody had ever observed Leon being physical or abusive towards Hayden; although Hayden had been cared for by several other people in the days before he became fatally ill; and although the doctors did not pinpoint the time the fatal injury occurred, the State charged and a jury convicted Leon of homicide by abuse and second degree murder.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The State failed to meet its burden of proving every essential element of the crime of homicide by abuse.
2. The State failed to present sufficient evidence to prove beyond a reasonable doubt that Leon Reyes committed the assault that caused Hayden Kostecky's fatal injury, an

essential element of the crime of homicide by abuse.

3. The State failed to present sufficient evidence to prove beyond a reasonable doubt that Leon Reyes' behavior manifested an extreme indifference to Hayden Kostelecky's life, an essential element of the crime of homicide by abuse.
4. The State failed to present sufficient evidence to prove beyond a reasonable doubt that Leon Reyes engaged in a pattern of abuse against Hayden Kostelecky, an essential element of the crime of homicide by abuse.
5. The State failed to meet its burden of proving every essential element of the crime of second degree murder.
6. The State failed to present sufficient evidence to prove beyond a reasonable doubt that Leon Reyes assaulted Hayden Kostelecky and caused his fatal injury, an essential element of the crime of second degree murder.
7. Leon Reyes received ineffective assistance of counsel when his trial attorney essentially conceded an unproved but essential fact during closing argument.
8. The trial court violated Leon Reyes' double jeopardy protections when it conditionally dismissed Count II rather than vacating the conviction.

9. The trial court erred when it entered Findings of Fact 9, 10, 11, 12 and 14 in support of its decision to impose an exceptional sentence.
10. The State did not establish, beyond a reasonable doubt, that Hayden Kostelecky was particularly vulnerable, the aggravating fact used to support Leon Reyes' exceptional sentence.
11. The trial court abused its discretion when it imposed a 480-month exceptional sentence because the sentence is clearly excessive in light of the facts of this case and in comparison to other cases involving the crime of homicide by abuse.

B. Issues Pertaining to the Assignments of Error

1. Did the State prove that Leon Reyes caused Hayden Kostelecky's fatal injury, where there was no medical testimony establishing the time the injury occurred, Hayden showed symptoms consistent with his fatal head injury for several days before he collapsed, several other people cared for Hayden in the days and hours before he collapsed, and where no witness ever observed Leon physically punish or abuse Hayden? (Assignments of Error 1 & 2)
2. Did the State fail to prove that Leon Reyes manifested an

extreme indifference to Hayden Kostelecky's life, where no witnesses ever observed Leon physically punish or abuse Hayden, the fatal injury could have occurred in less than 10 seconds, and where Leon did not withhold medical treatment or care from Hayden but instead called 911, begged for help in saving Hayden's life, attempted CPR, and provided any information he could think of to assist law enforcement and medical aid personnel in treating Hayden? (Assignments of Error 1 & 3)

3. Did the State fail to prove that Leon Reyes engaged in a pattern of abuse against Hayden Kostelecky, where no witnesses ever observed Leon physically punish or abuse Hayden, no medical witness testified that Hayden's prior injuries were non-accidental, where witnesses testified that Hayden was a normal, active toddler who often ran around and fell down, and that Hayden's two older brother's often played very rough with Hayden? (Assignments of Error 1 & 4)
4. Did the State fail to prove that Leon Reyes caused Hayden Kostelecky's fatal injury, where there was no medical testimony establishing the time the injury occurred, Hayden

showed symptoms consistent with his fatal head injury for several days before he collapsed, several other people cared for Hayden in the days and hours before he collapsed, and where no witnesses ever observed Leon physically punish or abuse Hayden? (Assignments of Error 5 & 6)

5. Did Leon Reyes receive ineffective assistance of counsel when his trial attorney told the jury that he probably shook Hayden Kostelecky and caused the fatal injury, a disputed but essential fact that the State was required to prove in order to obtain convictions on both charges? (Assignment of Error 7)
6. Did the trial court violate Leon Reyes' double jeopardy protections by only conditionally dismissing Count II, when the recent Supreme Court case of *State v. Womac* requires that the conviction be vacated? (Assignment of Error 8)
7. Where the evidence showed that Hayden Kostelecky was often cared for by adults other than Leon Reyes, and that Hayden was verbal and able to express himself and ask for help from these other adults, did the State prove beyond a reasonable doubt that Hayden was particularly vulnerable? (Assignments of Error 9 & 10)

8. Where the facts of this case are far less egregious than other homicide by abuse cases, and where those defendants received standard range sentences, was the trial court's imposition of a 480-month exceptional sentence clearly excessive and an abuse of discretion? (Assignments of Error 9 & 11)

III. STATEMENT OF THE CASE

A. Substantive Facts

1. Hayden's Family and Medical History

Leon and Laura Reyes were married in November of 2005.¹ (RP 455)² Leon had two sons, Pacey and Tristan, Laura had Hayden, and they had one daughter together, Kiara. (RP 198, 455, 590, 592) By February of 2006, Laura was pregnant with their second child together. (RP 198-99, 592-93) Tristan was then seven years old, Pacey was four years old, and Hayden was two years old. (RP 198, 589, 590)

Laura and Leon had agreed that Leon would not physically

¹ For the sake of clarity within this brief, Leon Reyes and his family will be referred to by their first names.

² Transcripts from the trial proceedings, labeled Volumes I through XVI, are consecutively paginated, and will be referred to simply as "RP." The pages in the volume containing the sentencing hearing, labeled Volume 17, are not consecutive with the remaining trial transcripts, and will therefore be referred to as "SRP 17."

discipline Hayden, and Laura would not physically discipline Tristan and Pacey. (RP 591) Occasionally, however, Laura would spank Hayden if he misbehaved. (RP 601) Laura told Leon's uncle that she would spank or use a belt to discipline Hayden. (RP 845)

Laura and Leon were also trying to potty-train Hayden. (RP 466) Their approach was to sit Hayden on the toilet until he went potty or for five minutes, whichever occurred first. (RP 469-70) Hayden was successful at first, but regressed after Kiara's birth. (RP 466) He began having more accidents, which frustrated Leon. (RP 466-67) Several people thought Leon was overly strict with the potty training, and Laura believed it was not fair that Leon punished Hayden for accidents when he was having diarrhea shortly before his death. (RP 545-46, 468-69, 533, 705)

For a period of time, Hayden, Pacey and Tristan all attended the same daycare center. (RP 456) The program supervisor described Hayden as a happy, outgoing child. (RP 646) Hayden did not like to leave when Leon picked him up at the end of the day. (RP 639) Additionally, as Hayden grew older, he became more "clingy" and resistant to change. (RP 646)

In addition to bumps and bruises that family members and doctors all describe as normal for an active toddler, Hayden

suffered several notable injuries during the year that Leon and Laura were married. (RP 253, 405, 627-28) For example, Hayden suffered bruising on his scrotum, and Leon said that Hayden had slipped getting out of the bathtub. (RP 557) Leon later told police that Hayden scraped his testicles on the shower door tracks on the edge of the tub. (RP 119) But Laura told a friend that Leon said Hayden fell onto the tracks. (RP 403) This explanation is medically consistent with Hayden's injury. (RP 243)

Once Leon told Laura that Hayden had fallen asleep on the toilet, then fallen over and hit his head. (RP 471) Laura was not home at the time. (RP 471) Later Laura noticed bruising on Hayden's inner thigh and forehead. (RP 473) But bruising on the legs is unlikely to be caused by a fall from a toilet. (RP 901)

Another time Hayden injured his forehead, and Leon said that he had slipped and fallen in the bathtub. (RP 561-62, 119) Leon also stated that, when he lunged to catch Hayden, he slammed his knee into the glass shower door, causing the door to break in two places. (RP 564-65)

Hayden also injured his ankle. Leon stated to several people that it occurred because he bent down while holding Hayden, and Hayden's leg got twisted between Leon's legs. (RP

393-94, 565-66, 650) Laura told police she did not see the incident, but testified at trial that she was present when it occurred. (RP 565-67, 570) Hayden was examined by a doctor for this injury. (RP 238-39)

Laura took Hayden to the doctor consistently to deal with injuries and sicknesses. (RP 238, 240, 241, 264) Hayden's major injuries were reported to doctors and are recorded in Hayden's medical records. (RP 265) Laura sought regular medical care for Hayden, and Leon never objected and often accompanied Laura to the appointments. (RP 587-88)

In June of 2005, Hayden suffered an arm injury that Laura and Leon initially believed occurred at the daycare center. (RP 121, 267, 270, 550-51) Subsequently, Leon told friends and family that the injury may have occurred accidentally when he was roughhousing with Hayden, or alternatively when he tried to assist Hayden when Hayden was choking. (RP 542, 547, 629, 638) According to one family member, Laura and Leon were not making excuses for how it happened, but were merely wondering whether those incidents could have caused the injury. (RP 543)

Laura and Leon took Hayden to the doctor to examine the arm. (RP 240, 267, 269) The doctor diagnosed a small fracture on

Hayden's elbow, and placed it in a cast. (RP 268-69) The doctor did not contact CPS because she felt no cause for concern. (RP 269) She believed the injury was consistent with an accident. (RP 380)

The daycare employees denied that the injury occurred at their facility, and did contact CPS. (RP 371, 627, 635, 644, 649) This was the only referral ever made to CPS regarding Hayden. (RP 371) The social worker interviewed Laura and Leon at their home, and observed Hayden. (RP 371) Leon and Laura told the social worker that they believed the injury occurred at the daycare center, and Leon did not say he believed he might have caused it. (RP 372-73) Leon did volunteer information about Hayden's prior ankle injury. (RP 374)

The social worker testified that Laura and Leon cooperated during the visit, and that Hayden's behavior was normal. (RP 381) She noted nothing in Hayden's behavior that caused concern, and she closed the case without further action. (RP 376, 381)

Laura pulled Hayden out of the daycare facility a few days later. (RP 631-32) After that, Leon cared for the children when Laura worked. (RP 201, 458) In addition to Leon, the children were often cared for by Mary Jane Gutierrez, Leon's aunt, Boyd

Kostelecky, Laura's father, and by Patty Richards, Boyd's girlfriend.
(RP 385, 386-87, 432, 600-01, 868-69)

In December of 2005, Laura took Hayden to the pediatrician because he had been vomiting. (RP 264, 897) The doctor noted that Hayden seemed fine, other than the intestinal issue, and diagnosed a simple virus. (RP 898, 901) The doctor found Hayden to be a normal child, and did not note any unusual behavior or injuries. (RP 898, 899) Hayden was taken to the doctor again for vomiting and watery eyes in February of 2006, just days before he died. (RP 241) There are no notes in the medical records of any suspicious marks, bruises or behavior. (RP 241)

A week or two before Hayden became fatally ill, Laura noticed a coin-sized mark on his stomach that appeared to be in the shape of a shoe print. (RP 576-77) Laura asked Leon about the mark, and he appeared surprised to learn of it. (RP 578) The next morning while Leon was at work, she compared the treads of all the shoes in the home to the pattern on Hayden's stomach, and did not find a match. (RP 579) Before trial, Laura drew a picture for the prosecutor showing what she remembered of the pattern, and that pattern resembled the tread on the bottom of the shoes worn by Leon at the time of his arrest. (RP 579-81, 715-16; Exh 2;

Exh. 89)

Several witnesses testified that Tristan and Pacey were often rough with Hayden. (RP 420-21, 589, 781-82, 797, 804, 882-83) Laura also testified that she felt Tristan and Pacey were too physical with him. (RP 589) Tristan and Pacey once put a mattress on top of Hayden, then jumped from the bunk bed ladder onto the mattress and Hayden. (RP 476-77) Patty Richards testified that the older boys were "rambunctious", and often wrestled or pushed Hayden. (RP 419, 420-21) Leon's aunt once saw Tristan and Pacey try to jump off the top bunk onto Hayden, and saw Pacey try to jump onto Hayden while he was sitting on the couch. (RP 781-82, 804) Hayden was also an active child who often fell down, and he loved to climb on the bunk bed. (RP 405, 602) Tristan described at least one incident when Hayden jumped off the bunk bed. (RP 526-29)

None of Laura's or Leon's friends or family ever observed Leon physically discipline Hayden, Tristan or Pacey, use force against the boys, or act inappropriately towards the boys. (RP 452, 453, 534, 541, 825, 869) In fact, Leon was observed using non-physical time-outs on the couch to discipline Hayden. (RP 436-37, 534) Boyd believed Hayden was afraid of Leon. (RP 437) But not

a single friend or family member testified that they had any concern for Hayden's safety when he was with Leon. (RP 425-26, 441-42, 597)

2. Hayden's Final Days

The week before Hayden's death, he had been complaining that his head and stomach hurt, and he had vomited several times. (RP 207-08, 574-75) Laura assumed he had caught a virus that had been going around. (RP 575-76, 595)

In the evening of February 19, 2006, Laura went shopping with Hayden and Patty. (RP 597-98, 406) Hayden seemed unwell, and was unusually tired and clingy. (RP 599, 406-10) Nevertheless, Hayden went home with Patty to spend the night. (RP 408) Patty noticed that Hayden seemed to have a low-appetite, had low-energy, and his stomach seemed harder than usual. (RP 407, 410, 411, 413) Hayden also complained that his stomach hurt. (RP 406) His sleep was restless, and at one point he awoke saying "Papa, get away. Papa, get away." (RP 411-12) Papa is the name Hayden used to refer to Boyd. (RP 422) Patty did not seek or suggest medical attention for Hayden at that time. (RP 424)

Patty returned Hayden to Laura at about 1:00 in the

afternoon of February 20. (RP 459) Hayden was clingy and out-of-sorts when Laura saw him that afternoon. (RP 460) Because Laura had to work, she drove the children to Mary Jane's home, where the children remained until Leon finished working. (RP 459-60, 870-71, 872) Mary Jane testified that Hayden seemed quieter than usual that afternoon. (RP 871)

After work, Leon invited his friend James Baldwin to come spend the evening with the family. Baldwin testified that the kids all seemed fine, and that they had snacks and watched a movie. (RP 446-47) Leon became annoyed when the older boys did not take proper showers when asked, but Leon only asked them to do it over again, and did not use any physical punishment. (RP 448-49, 453) Everything seemed fine when Baldwin left. (RP 449)

Later that evening, Leon called 911 in a panic because Hayden was convulsing, vomiting, and having trouble breathing. (RP 99, 105, 127, 144) On the 911 tape, Leon can be heard pleading for help, and receiving instruction on how to remove any vomit blocking Hayden's airways and on how to perform CPR. (Exh. 90)

Tacoma Police Officers Debra Vause and Stephen O'Keefe arrived first. (RP 144, 659-60) Upon entry they observed Hayden

laying on the floor, and Leon kneeling over him rocking back-and-forth. (RP 144, 660, 666) Leon was “frantic”, “anxious”, and “panicked”, and appeared to be crying. (RP 127, 129, 132, 150, 666) Leon screamed that Hayden was not breathing, and begged the officers to help him and to save Hayden. (RP 144, 660, 667) The officers immediately attended to Hayden. They cleared vomit out of his mouth and administered CPR, and Hayden took a breath but he continued to vomit and have trouble breathing. (RP 144-45, 660-61) More police officers arrived, and eventually medical aid personnel arrived as well. (RP 359-60)

While medical aid personnel treated Hayden, Officer Henry Betts talked to Leon in an effort to obtain any information that would assist in Hayden’s treatment. (RP 103) Leon cooperated, volunteered information about Hayden’s medical history and prior injuries, and provided the officers with contact information for Hayden’s pediatrician. (RP 132, 136, 139) While they talked, baby Kiara began to cry and Leon picked her up to comfort her. (RP 131) Betts testified that Leon handled Kiara appropriately. (RP 131)

Leon told police that he thought Hayden fell out of a bunk bed. (RP 99, 104) Leon said he was in the kitchen doing dishes

while the boys played in their bedroom, when he heard crying. (RP 104) He went into the bedroom and one of the older boys told him that Hayden had fallen from the bunk bed. (RP 104) Hayden stood up and pointed to his head, saying "head, head, head." (RP 104) Leon stated that he picked Hayden up and he went limp and unconscious, and his muscles began to spasm. (RP 104-05) Leon said that he took Hayden to the bathroom and splashed water on his face in an effort to wake him up. (RP 105) Hayden then began to vomit, and Leon became scared. (RP 105) Leon took Hayden to the living room and called 911. (RP 105)

Vause testified that Tristan told her he did not see what happened. (RP 147, 661) Betts also did not believe that the condition of the home matched the story Leon told him. (RP 116, 117) Betts issued Leon his *Miranda* warnings and continued to question him. (RP 109-10) Leon detailed some of Hayden's medical history and explained how the injuries occurred. (RP 119-21) Leon completed a written statement, and agreed to go to the station for further questioning. (RP 122) During that interview, Leon told substantially the same story regarding the night's events. (RP 202-206) He also stated that he thought the injuries were a result of rough play with the older boys. (RP 203, 207)

3. Medical Testimony

Medical aid personnel transported Hayden to Mary Bridge Children's Hospital. (RP 162, 367) Doctors there discovered that Hayden had a large amount of blood collecting under his skull. (RP 175-76) They also noted retinal hemorrhaging behind both of Hayden's eyes, and that Hayden's abdomen was distended. (RP 165, 171) Doctors operated to remove the blood collecting against Hayden's brain. (RP 179-80, 181) The next morning, doctors ran a test to determine if Hayden had any remaining brain function. (RP 187, 319) He did not, and was declared brain dead. (RP 187-88, 319) Doctors removed Hayden from life-support on the morning of February 22, and Hayden passed away. (RP 190, 320-21)

The State's medical witnesses believed that Hayden's head injury was caused by a forceful, non-accidental acceleration and deceleration, such as being shaken by an adult. (RP 165-66, 177, 191, 227-28, 234) The medical witnesses explained that when a child is forcefully shaken, the brain oscillates back-and-forth inside the head, causing direct injury to the brain, in addition to the sheering of blood vessels resulting in bleeding inside the skull. (RP 165-66, 228-20) The witnesses did not believe the type of head injury Hayden sustained could have been caused by a fall from a

bunk bed, and could not have been inflicted by another child. (RP 191, 230, 234)

Their conclusions were based on several factors. First, retinal hemorrhaging in both eyes is an indicator of having being shaken, and is rarely seen in blunt force head injuries. (RP 165, 235, 259) And in most circumstances, when bleeding inside the skull is caused by a fall or a blunt force blow to the head, there will be an accompanying skull fracture. (RP 233) Hayden did not have any skull fractures. (RP 177, 234) Bleeding inside the skull without an accompanying skull fracture can occur with a shaking injury. (RP 231-32) Hayden also had a fractured rib, which sometimes accompanies a shaking injury.³ (RP 231, 284)

The medical witnesses testified that a severe shaking injury can be inflicted in less than 10 seconds. (RP 259) Noticeable symptoms of a shaking injury can include headaches and vomiting. (RP 245-46) These symptoms can last several days, depending on the severity of the injury. (RP 245-46) In addition, doctors found evidence of coagulation of blood inside Hayden's skull, which indicates bleeding several hours or even days old. (RP 261) The

³ If the child is held under the arms and around the ribcage during the shaking event, it can cause fractures to the child's ribs. (RP 231)

older bleeding and recent bleeding could have resulted from the same injury. (RP 263) None of the medical witnesses in this case testified as to the approximate time the suspected shaking of Hayden occurred.

During an autopsy, the medical examiner noted other current and past injuries to Hayden. He found a recent injury to the top of Hayden's head, which caused some bleeding inside the skull. (RP 279, 283-84) Hayden had a bruise close to his hairline on the left side of his forehead that was several days old. (RP 281-82) Hayden had suffered substantial injuries to his abdominal organs, which likely occurred all at the same time and with one blow. (RP 286-89, 301) The injuries showed signs of healing, which indicated that they were likely one to two weeks old, but the medical examiner could not pinpoint the time of injury. (RP 289, 300) Hayden also had a large, recent bruise on his left thigh, and small, older bruises on his inner thighs. (RP 290)

The abdominal injuries suffered by Hayden can cause abdominal distension, vomiting, lethargy, and diarrhea. (RP 244-46) The bruising on Hayden's thigh was unusual, and appeared to be caused by a long, thin object such as a belt or cord. (RP 251) The bruises on Hayden's forehead and head are common for active

toddlers. (RP 253-54)

The medical examiner testified that the abdominal injuries were not fatal. (RP 301-02) The cause of death was Hayden's head injuries. (RP 291, 301-02) He noted that the shaken child theory is controversial, and concluded that Hayden's injuries are consistent with both a shaking incident and blunt force trauma. (RP 302-03)

B. Procedural History

The State charged Leon with one count of homicide by abuse (RCW 9A.32.055) and one count of second degree murder (RCW 9A.32.050(1)(b)). (CP 5-6) The State charged the crimes as two separate counts, not in the alternative. (CP 5-6) The State further alleged aggravating factors that would subject Leon to an exceptional sentence (RCW 9.94A.535(3)). (CP 5-6)

Before trial, Leon moved to dismiss the homicide by abuse charge because the State's proposed evidence did not establish the elements of the charge. (RP 64-65; CP 7-12) The court denied the motion. (RP 72) Following the State's case in chief, Leon again moved to dismiss the homicide by abuse charge for lack of proof. (RP 727-29) This time the court agreed and dismissed the charge. (RP 729) However, after the State requested

reconsideration, the court reversed its ruling and allowed both charges to go to the jury. (RP 759; CP 82-87, 88-95)

The jury convicted Leon as charged on both counts. (CP 126-29; RP 998) Leon moved to dismiss the second degree murder conviction on double jeopardy grounds, but the court denied the motion. (RP 1014-14, 1017) Leon also objected without success to the exceptional sentence process and instructions. (RP 1019-20, 1034, 1041-42) After additional presentation and deliberation, the jury also found as an aggravating factor that Hayden was particularly vulnerable or incapable of resistance. (CP 199-200; RP 1047-61, 1071)

The court sentenced Leon to an exceptional sentence of 480 months on the homicide by abuse charge. (SRP17 19; CP 242, 244) The court did not sentence Leon on the second degree murder charge. (SRP17 4; CP 241-42) Instead, the court noted in the Judgment and Sentence and in a separate Appendix that the second degree murder conviction "is a valid conviction" and the court would sentence the defendant on Count II if "it were not prohibited from doing so by the double jeopardy provisions of the state and federal constitutions." (CP 242, 317) This appeal timely follows. (CP 313)

IV. ARGUMENT & AUTHORITIES

A. The State failed to present sufficient evidence to prove beyond a reasonable doubt all the essential elements of the crimes charged.

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” *City of Tacoma v. Luvone*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, 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). “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.

1. The State did not prove all the essential elements of the crime of homicide by abuse.

The State charged Leon in count one with homicide by abuse under RCW 9A.32.055. (CP 5) That statute provides, in relevant part:

A person is guilty of homicide by abuse if, under circumstances manifesting an extreme indifference to

human life, the person causes the death of a child or person under sixteen years of age, a developmentally disabled person, or a dependent adult, and the person has previously engaged in a pattern or practice of assault or torture of said child, person under sixteen years of age, developmentally disabled person, or dependent person.

RCW 9A.32.055(1) (emphasis added.) In this case, the State's evidence failed to prove beyond a reasonable doubt that Leon caused Hayden's death, that Leon's actions manifested an extreme indifference to Hayden's life, or that Leon had engaged in a pattern of abuse of Hayden.

- a. *The State's evidence did not establish that Leon was the individual who inflicted Hayden's fatal injury.*

RCW 9A.32.055(1) requires the State to prove that the defendant's act "cause[d] the death of a child[.]" In this case, the State's medical witnesses testified that they believed Hayden's fatal head injuries resulted from being forcefully shaken by another person. (RP 165-66, 177, 191, 227-28, 234) None of the doctors testified as to the time that the injury occurred, except that it seemed to be "recent." (RP 306) One doctor testified that a child can suffer headaches, stomach pain, and vomiting for several days after a shaking incident. (RP 245-46) Hayden exhibited these symptoms prior to and on February 19 and 20. (RP 207-08, 406,

574-75) And there was evidence of both older bleeding (hours or even days old) and more recent bleeding inside Hayden's skull that likely resulted from the same injury. (RP 261, 263)

Accordingly, the State's evidence did not establish that the shaking incident occurred on the evening of the 20th, during the time that Hayden was with Leon. Rather, it is entirely possible that the injury occurred prior to the evening of the 20th, and during a time when Hayden was under the care of someone other than Leon. Hayden spent the afternoon of the 19th with Laura, the night and morning of the 19th and 20th with Patty, and the afternoon of the 20th with Mary Jane. (RP 597-98, 408, 459-60, 870-71, 872) Hayden was not exclusively in Leon's care during the days and hours leading up to his collapse on the evening of the 20th.

It is impossible to conclude, beyond a reasonable doubt, that the shaking incident occurred on the evening of the 20th, and that Leon was the person responsible. In fact, the medical evidence indicates that the shaking occurred before that evening. The State therefore failed to prove that Leon committed the act that caused Hayden's death, and therefore failed to prove the crime of homicide by abuse.

- b. *The State's evidence did not establish an extreme indifference to Hayden's life.*

The term "extreme indifference," as used in RCW 9A.32.055(1), is not statutorily defined. In interpreting the phrase, this Court has looked to the dictionary definition of each term:

According to *Webster's*, the word "extreme" means "existing in the highest or the greatest possible degree: very great: very intense." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 807 (1969). The word "indifference" means "the quality or state of being indifferent." WEBSTER'S, *supra*, at 1151. "Indifferent" means "looked upon as not mattering one way or another," or "regarded as being of no significant importance or value." WEBSTER'S, *supra*, at 1151.

State v. Madarash, 116 Wn. App. 500, 512, 66 P.3d 682 (2003).

This Court concluded that "in order to have acted with extreme indifference to [the victim's life, the defendant] simply had to not care whether [the victim] lived or died." *Madarash*, 116 Wn. App. at 512.

In *Madarash*, this Court found sufficient evidence to establish "extreme indifference" under the following facts:

After Madarash forced [the four-year-old victim] Jennifer to drink the Diet Pepsi, Jennifer threw up on herself. Rather than helping Jennifer, Madarash forced her into a cold bath, began throwing water in her face, and held her face under the water. Evidence of bruises developing on Jennifer after she arrived at the hospital shows that she struggled to escape from the bathtub. Madarash forced her to

remain in the bathtub, all the while throwing cups of water in her face. When Jennifer cried and pleaded with Madarash to stop, Madarash told her that she did not care whether Jennifer did not like it and that she was not going to stop.

After Jennifer was taken out of the tub, she was wheezing, throwing up, and had diarrhea. Madarash did not call 9-1-1 dispatch until Jennifer collapsed. At the hospital, Madarash displayed no signs of emotion over Jennifer's death. Instead, she chuckled as she told a friend that Jennifer had vomited in Madarash's hair.

Madarash, 116 Wn. App. at 512-13.

In *State v. Edwards*, Division 1 found sufficient evidence of extreme indifference where the defendant admitted to a series of past abusive acts towards the child victim, admitted pushing the child off the couch causing a head injury, medical testimony established that a significant amount of force was necessary to inflict the fatal injury, and the defendant did not seek immediate medical attention when it was clear that the child was in distress. 92 Wn. App. 156, 163-64, 961 P.2d 969 (1998). In *State v. Adams*, Division 3 found sufficient evidence of extreme indifference where the defendant "admitted that he head-butted his infant son twice in the back of the skull and that he forcibly stuffed a sock in [his son's] mouth to stop him from crying." 138 Wn. App. 36, 50, 155 P.3d 989

(2007).⁴

Unlike the facts of *Madarash*, *Adams* and *Edwards*, the facts of this case do not establish an “extreme indifference” to Hayden’s life. If, assuming for the sake of argument, Leon did shake Hayden and cause his head injury, the surrounding circumstances do not show that Leon did not care if Hayden lived or died. There is no evidence that Leon delayed in calling 911 or delayed medical care after Hayden showed signs of severe trauma, like *Madarash* and *Edwards*. There is no evidence that Leon engaged in any cruel behavior towards Hayden after the injury, like *Adams* and *Madarash*. He did not display lack of concern for Hayden’s condition and eventual death, like *Madarash*.

Rather, Leon called 911 as soon as Hayden became violently ill; he was panicked and crying; he attempted to clear Hayden’s airways and tried to give CPR; he begged police and medics to save Hayden’s life; he gave police any information that might help them treat Hayden; and he inquired into Hayden’s

⁴ In reaching its decision, the *Adams* court relied on case law interpreting the term “extreme indifference” as used in the first degree murder statute, RCW 9A.32.030(1)(b). *Adams*, 138 Wn. App. at 50 (citing *State v. Dunbar*, 117 Wn.2d 587, 593, 817 P.2d 1360 (1991)). However, both Division I and this Court have rejected the argument that the phrase “extreme indifference to human life” as used in the homicide by abuse statute, should be given the same interpretation as when it is used in the first degree murder statute. See *Edwards*, 92 Wn. App. at 163-64; *Madarash*, 116 Wn. App. at 511-12.

condition when he was being questioned at the police station.⁵ These acts do not show that Leon was even remotely indifferent to Hayden's life, let alone extremely indifferent.

Clearly, the Legislature, by choosing the terms "extreme" and "indifference", intended to require something more than simply a disregard for consequences. The statute requires more than just a momentary lack of concern for whether the defendant's act would cause an injury. It requires proof of the highest possible disregard for life and death. That proof is not present in this case. The State failed to establish, beyond a reasonable doubt, that Leon ever exhibited an extreme indifference to Hayden's life, and therefore failed to prove the crime of homicide by abuse.

c. *The State's evidence did not establish that Leon engaged in a pattern of abuse.*

RCW 9A.32.055(1) requires the State to establish that the defendant engaged in a pattern of abuse of the child victim. The State must show that the defendant "regularly or habitually" assaulted or tortured the child. *Madarash*, 116 Wn.2d at 514.

In *Madarash*, this Court found sufficient evidence of a pattern of abuse where numerous witnesses testified that they

⁵ RP 99, 105, 127, 129, 132, 136, 139, 144, 150, 211, 660, 667; Exh. 90.

continually saw bruises, welts and scratches on the child victim, and they personally observed Madarash repeatedly beat, burn, kick, and otherwise abuse and torture the child over a lengthy period of time. 116 Wn. App. at 505-06, 514-15.

In this case, the State presented evidence of prior injuries to Hayden, several of which occurred when Hayden was in Leon's exclusive care. There is no evidence in the record, however, that these injuries were non-accidental. There is no indication from Hayden's medical records, the CPS social worker, Hayden's treating physicians, or the medical examiner, that Hayden's non-fatal injuries were anything other than accidental.

Leon gave explanations for a number of the injuries, and friends and family members did not doubt his explanations. (RP 441-42, 597) None of the witnesses ever observed Leon abuse, assault, or physically discipline Hayden. (RP 452, 453, 534, 541, 825, 869) Except for one incident where a daycare employee called CPS, not one witness, including the CPS social worker, treating physicians, family or friends, ever expressed any concern for Hayden's health or safety when he was with Leon. (RP 376, 381, 425-26, 441-42, 597, 898, 899) And Hayden, who was verbal at the time, never confided to Laura or any other trusted adult that

Leon had ever hurt him. (RP 422, 597)

During the time he received these injuries, Hayden was also in the care of several other individuals and attended a daycare center. (RP 385, 386-87, 456, 600-01, 868-69) He was a normal toddler who ran, fell down, and loved to climb on things. (RP 405, 602) His older brothers were rough with him, and liked to wrestle, push, and jump on him. (RP 420-21, 589, 781-82, 797, 804, 882-83) There is no way, based on the existing record, to conclude beyond a reasonable doubt that all or most of Hayden's injuries occurred with and at the hands of Leon.

It is not enough for the State to show that Hayden had a pattern of injuries. It must show that Leon had a pattern of intentionally causing Hayden's injuries. RCW 9A.32.055(1); *Madarash*, 116 Wn. App. at 514. It must show that the abuse occurred regularly or frequently, not just once. *Madarash*, 116 Wn. App. at 514 (citing *State v. Russell*, 69 Wn. App. 237, 247, 848 P.2d 743 (1993)). The State failed to make such a showing in this case. The evidence does not establish that more than one of Hayden's injuries resulted from an assault by Leon, and the State failed to prove this element of homicide by abuse.

2. The State did not prove all the essential elements of the crime of second degree murder.

The State charged Leon in count two with second degree murder under RCW 9A.32.050(1)(b). (CP 6) Under that statute, a person commits second degree murder when he “commits or attempts to commit any felony, including assault . . . and, in the course of and in furtherance of such crime . . . he . . . causes the death of a person[.]” RCW 9A.32.050(1)(b). As argued in detail above, the State’s evidence did not prove, beyond a reasonable doubt, that Leon was the individual who inflicted Hayden’s fatal injury. The argument presented in Section IV.A.1.a is hereby incorporated by reference. The State did not prove that Leon committed the fatal assault, and his second degree murder conviction must be dismissed.

B. Leon was denied his right to effective assistance of counsel when his trial attorney essentially conceded an unproved but essential fact during closing argument.

Effective assistance of counsel is guaranteed by both U.S. Const. amd. VI and Wash. Const. art. I, § 22 (amend. x). *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). A criminal defendant claiming ineffective assistance of

counsel must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. *State v. Early*, 70 Wn. App. 452, 460, 853 P.2d 964 (1993); *State v. Graham*, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." *State v. Leavitt*, 49 Wn. App. 348, 359, 743 P.2d 270 (1987). However, a defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." *Strickland*, 466 U.S. at 693. Both prongs of the *Strickland* test are met here.

First, Leon's counsel's performance fell below objective standards of reasonableness when he conceded guilt to the jury during closing arguments. Even though counsel had repeatedly tried to show through questioning of witnesses that the injury was not caused by shaking and not caused by Leon, counsel stated to the jury:

There shouldn't be any question in your mind that it

was a violent death. It was from shaking. It was for probably around ten seconds. It doesn't take very long. It was out of frustration, probably. Probably from potty training, the lack thereof. But even at that time -- but even at that , think, if the discipline went too far, if this effort to potty-train this child went too far, that doesn't mean that Mr. Reyes acted with extreme indifference, or that it was part of a practice or pattern of abuse. It was just frustration, you know.

(RP 964-65) Clearly, trial counsel was attempting to encourage the jury to find Leon guilty of one of the lesser-included offenses, which were included in the instructions to the jury. (CP 164-71)

However, as argued in detail above, the State did not prove that Leon inflicted Hayden's fatal injuries. (See section IV.A.1.a, above.) Trial counsel's statement that he did was an invitation to the jury to decide this unproved fact in favor of the State. Counsel could have still argued for a lesser-included offense by saying that Leon did not shake Hayden, but if the jury believed that he did it could convict of a lesser-included offense. Leon suffered prejudice because counsel's argument effectively relieved the State of its burden to prove this essential fact.

Leon was denied his constitutional right to effective assistance of counsel, and his convictions should be reversed.

C. The trial court's failure to vacate Count II, the second degree murder conviction, violated Leon's double jeopardy protections.

The double jeopardy doctrine protects defendants against "prosecution oppression." 5 Wayne R. LaFare, Jerold H. Israel & Nancy J. King, *CRIMINAL PROCEDURE* § 25.1(b), at 630 (2d ed. 1999). The Fifth Amendment to the United States Constitution provides "[n]o person shall ... be subject for the same offense to be twice put in jeopardy of life or limb" Article I, section 9 of the Washington Constitution mirrors the federal constitution stating "[n]o person shall be ... twice put in jeopardy for the same offense." "Washington's double jeopardy clause offers the same scope of protection as the federal double jeopardy clause." *In re Pers. Restraint of Percer*, 150 Wn.2d 41, 49, 75 P.3d 488 (2003) (citing *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995)). Both prohibit "(1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense imposed in the same proceeding." *Percer*, 150 Wn.2d at 48-49 (citing *State v. Bobic*, 140 Wn.2d 250, 260, 996 P.2d 610 (2000); *Gocken*, 127 Wn.2d at 100).

In *State v. Womac*, the State charged the defendant with

homicide by abuse (Count I), second degree murder (Count II), and first degree assault of a child (Count III), alleging that his single act of abuse caused the child victim's fatal brain injury. 160 Wn.2d 643, 647-48, 160 P.3d 40 (2007). Womac was not charged in the alternative, but rather with three separate counts as separate charges. 160 Wn.2d at 647, 660. A jury convicted on all three counts. 160 Wn.2d at 647.

At sentencing, Womac moved to dismiss Counts II and III, claiming dismissal was necessary to avoid a double jeopardy violation. The State asked that the charges and verdicts on Counts II and III remain in place until Count I had survived postsentence challenges. The trial court determined double jeopardy did not require dismissal of Counts II and III and left both convictions on Womac's record. *Womac*, 160 Wn.2d at 648.

The trial court imposed an exceptional sentence on Count I only, and entered an appendix to the Judgment and Sentence, which stated:

Count II, murder in the second degree, is a valid conviction and the court would sentence the defendant on Count II if it were not prohibited from doing so by the double jeopardy provisions of the state and federal constitutions. ... Count III is a valid conviction but no punishment will be imposed because of double jeopardy concerns."

Womac, 160 Wn.2d at 655.

The Court of Appeals initially directed the trial court to “conditionally dismiss Counts II and III,” allowing for reinstatement should Count I later be reversed, vacated, or otherwise set aside. *State v. Womac*, 130 Wn. App. 450, 460, 123 P.3d 528 (2005).

Womac subsequently sought review at the State Supreme Court. The Supreme Court found that the trial court’s failure to vacate Counts II and III violated *Womac*’s double jeopardy protections because he committed a single offense against a single victim, but received three convictions for that single offense. *Womac*, 160 Wn.2d at 650.

Womac remains exposed to danger as three separate convictions (arising from a single offense) remain on his record after the trial court determined that sentencing on all three would violate double jeopardy.

160 Wn.2d at 651. The Supreme Court rejected the Court of Appeals’ solution of conditional dismissal, remanded *Womac*’s case, and ordered the trial court to vacate Counts II and III (his second degree murder and assault convictions). 160 Wn.2d at 660, 664.

In this case, the State also charged two crimes stemming from a single offense against a single victim. (CP 5-6) The State

charged Leon in Count I with homicide by abuse and Count II with second degree murder. (CP 5-6) The State did not charge the crimes in the alternative, but rather as two distinct, separate crimes and counts. (CP 5-6) The jury convicted on both counts. (CP 126-29; RP 998)

Leon's sentencing hearing was held on March 30, 2007, after publication of the Court of Appeals' *Womac* opinion, but before publication of the Supreme Court's *Womac* opinion.⁶ The prosecutor presented an appendix to the Judgment and Sentence, which acknowledged that sentencing on both counts would violate double jeopardy, and provided for a conditional dismissal of Count II (second degree murder). (RPS 4-5) The court entered an exceptional sentence on Count I (homicide by abuse), and signed the Appendix conditionally dismissing Count II. (SRP17 19; CP 241-42, 244, 317-18) The Appendix reads:

1. Imposing separate punishments for Count I (homicide by abuse) and Count II (murder in the second degree) would violate constitutional double jeopardy protections given the facts presented to the court and the jury.
2. Count II, murder in the second degree, is a valid conviction and the court would sentence the defendant on Count II if it were not prohibited from

⁶ The Court of Appeals issued its decision on November 22, 2005, and the Supreme Court issued its decision on June 14, 2007. See *Womac*, 130 Wn. App. 450, *supra.*; *Womac*, 160 Wn.2d 643, *supra.*

doing so by the double jeopardy provisions of the state and federal constitutions.

3. Count II, murder in the second degree, is a valid conviction and any alleged error pertaining to Count II must be raised in the appeal from this case.

(CP 317-18)

This conditional dismissal is clearly improper under the Supreme Court's holding in *Womac*:

The Court of Appeals' conditional dismissal of Womac's lesser charges and verdicts, allowing for reinstatement if the greater verdict and sentence are later set aside, is entirely without support. The State may bring (and a jury may consider) multiple charges arising from the same criminal conduct in a single proceeding. Courts may *not*, however, enter multiple convictions for the same offense without offending double jeopardy.

160 Wn.2d at 658 (citing *Womac*, 130 Wn. App. at 458-59) (additional internal citations omitted). Leon's second degree murder conviction (Count II) must therefore be vacated. *Womac*, 160 Wn.2d at 660, 664.

D. The trial court erred when it imposed an exceptional sentence because the State's evidence did not prove the aggravating factor and because the facts of this case do not sufficiently distinguish this crime from other homicide by abuse cases.

A trial court may impose a sentence outside the standard sentence range if it finds, "that there are substantial and compelling

reasons justifying an exceptional sentence.” RCW 9.94A.535.

“The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt.” RCW 9.94A.537(3).

If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court may sentence the offender . . . up to the maximum allowed . . . for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence.

RCW 9.94A.537(6).

RCW 9.94A.585(4) governs appellate review of the imposition of an exceptional sentence:

To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

To justify an exceptional sentence, the asserted aggravating factor must be sufficiently substantial and compelling to distinguish the crime in question from others in the same category. *State v. Grewe*, 117 Wn.2d 211, 215-16, 813 P.2d 1238 (1991).

In this case, the jury found that Hayden was “particularly vulnerable or incapable of resistance due to extreme youth.” (CP

199-200) Based on this verdict, the trial court entered the following findings of fact:

9. The court finds there is an aggravating circumstance in this case that justifies an exceptional sentence above the standard range.
10. The aggravating circumstance found by the court is the same as that found by the jury beyond a reasonable doubt.
11. Considering the purposes of the Sentencing Reform Act, the aggravating circumstance found by the jury beyond a reasonable doubt, and the same aggravating circumstance found by the court, there is a substantial and compelling reason justifying an exceptional sentence.
12. Considering the purposes of the Sentencing Reform Act, sentencing within the standard range is not an appropriate sentence; 480 months is the appropriate sentence.
14. The sentence of 480 months is the appropriate sentence given the defendant's actions in this case.

(CP 324)

However, the evidence in the record does not support the jury's or judge's finding that Hayden was particularly vulnerable, or that he was more vulnerable than other victims of the crime of homicide by abuse. For example, in *State v. Berube*, the Court affirmed the trial court's finding of victim vulnerability in a homicide by abuse case because the evidence showed that the 23-month old victim completely depended on the defendants for his well being

and could not communicate to any other adult about the abuse. 150 Wn.2d 498, 513, 79 P.3d 1144 (2003). In *Womac*, the defendant received an exceptional sentence based in part on victim vulnerability because the victim was his four-month old son. 160 Wn.2d at 647-48.

Here, Hayden was over two-years old and not fully dependent on Leon for his care. He was also cared for by several other adults, including his mother Laura, his aunt Mary Jane, his grandfather Boyd, and Boyd's girlfriend Patty. (RP 385, 386-87, 432, 600-01, 868-69) Hayden was verbal, able to express himself, and able to talk about what he was feeling, and therefore able to communicate with and ask for help from these other adults in his life. (RP 422, 597) Accordingly, the evidence in this case does not show that Hayden was particularly vulnerable, or more vulnerable than other victims of the same crime.

The 480-month sentence was also clearly excessive. Leon's standard range is 261 to 347 months. (CP 242) The trial court's sentence adds an additional 133 months to Leon's standard range maximum, and nearly doubles the low end of the standard range.

In addition, when viewed in the context of the sentences imposed in other homicide by abuse cases, it is clear that this

sentence is clearly excessive. For example, in *Madarash*, the defendant engaged in a horrific pattern of “continual torture, assault, and extreme cruelty” toward the child victim over a period of several years. 116 Wn. App. at 515, 502, 505-07. Madarash admitted to engaging in a lengthy episode of abuse and humiliation towards the victim, which ultimately caused her fatal condition, and Madarash showed no sorrow or remorse at her death. 116 Wn. App. at 504. Madarash did not receive an exceptional sentence.

In *Edwards*, the defendant admitted that he gave the child victim adult prescription medication and that he sometimes blew marijuana smoke into her face. 92 Wn. App. at 159. He admitted that he picked the victim up by the hair, causing clumps of hair to be pulled out, and he admitted causing deep bruises on her stomach and bottom. 92 Wn. App. 159. When the victim was clearly in medical distress, Edwards did not seek medical care. 92 Wn. App. at 160. Edwards received a standard range sentence. 92 Wn. App. at 160.

In *Adams*, the defendant head-butted his 11-week old son twice, and stuffed a sock into his mouth to muffle his crying. 138 Wn. App. at 41-42. The baby died from a severe lack of oxygen to the brain. 138 Wn. App. at 43. Doctors also noted skull fractures,

and separate older rib fractures and a leg fracture. 138 Wn. App. at 41-42. Adams received a standard range sentence. 138 Wn. App. at 44.

In short, the facts of this case do not establish that Hayden was particularly vulnerable or that the circumstances of his life and death are significantly more egregious than in other homicide by abuse cases. The trial court therefore erred when it imposed an exceptional sentence, and Leon should be resentenced within his standard range.

V. CONCLUSION

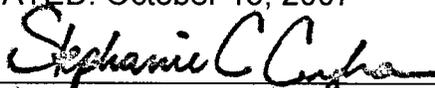
The State's evidence in this case does not establish when the fatal injury occurred, and therefore does not establish that it occurred while Hayden was in Leon's exclusive care. It also shows that Hayden was a normal, active toddler with several care-givers and two older, physically aggressive brothers. Therefore, the evidence also does not establish that Leon caused Hayden's other past injuries. And the evidence shows that Leon immediately sought medical care for Hayden and did whatever he could to assist medical personnel in their efforts to save Hayden. Accordingly, the State did not prove that Leon caused Hayden's death, that he exhibited an extreme indifference to Hayden's life, or

that he engaged in a pattern of abuse of Hayden. Leon's convictions for homicide by abuse and second degree murder must both be dismissed.

In addition, Leon received ineffective assistance of counsel when his attorney relieved the State of its burden of proving that Leon caused Hayden's fatal injury. This error also requires reversal of Leon's convictions.

If this court affirms Leon's convictions, then the Supreme Court's opinion in *Womac* mandates that Leon's second degree murder conviction be reversed to prevent a violation of Leon's double jeopardy protections. Finally, the trial court erred when it imposed an exceptional sentence, and Leon should be sentenced within his standard range.

DATED: October 15, 2007



STEPHANIE C. CUNNINGHAM

WSBA No. 26436

Attorney for Leon L. Reyes

CERTIFICATE OF MAILING

I certify that on 10/15/2007, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) Leon L. Reyes, DOC#797818, Monroe Correctional Complex - WSRU, P.O. Box 777, Monroe, WA 98272-0777.



STEPHANIE C. CUNNINGHAM

WSBA No. 26436

10/15/2007
10:15 AM
10/15/2007
10:15 AM
10/15/2007
10:15 AM
10/15/2007
10:15 AM