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I. PROCEDURAL HISTORY

The appellant was charged by information with murder in the second degree and assault of a child in the second degree. The charges were that the appellant had killed his daughter Justice and injured his other daughter Liberty. Justice and Liberty were twin girls born to the appellant and his wife Krystal Pingle.

Well in advance of trial, an amended information was filed that added alternative counts for both the homicide and the assault charges. This information added alternative charges of manslaughter in the first degree and assault of a child in the third degree. The appellant proceeded to jury trial on May 12, 2008. On May 30, 2008, the jury returned guilty verdicts for the crimes of manslaughter in the first degree and assault of a child in the third degree. On June 17, 2008, the court sentenced the appellant to one hundred and fourteen months in prison, but allowed him to be released upon posting of an appeal bond in the amount of \$250,000.

The appellant subsequently failed to report to the Department of Corrections and fled to Texas. After an extensive manhunt involving a number of police agencies, the United States Marshals apprehended the appellant in Euless, Texas. The appellant was then returned before the Superior Court of Cowlitz County on September 1, 2009, and was remanded to prison to serve his sentence.

II. STATEMENT OF FACTS

a. MOTIONS IN LIMINE

On November 16, 2007, the parties appeared in court to argue a number of motions in limine and to address the trial date in this case. At that time, appellant's trial counsel moved to sever the homicide and assault charges for separate trials. This motion was resisted by the State. RP 118-132. After hearing the State's offer of proof, the court denied the motion to sever. The court held that severance was inappropriate, as it believed the evidence was cross-admissible in order to show identity, a common scheme or plan, or the lack of accident. RP 126-127. After the court denied the motion to sever, appellant's trial counsel stated that "[M]y concern at that juncture then is frankly I would rather only try one trial and main case...". RP 127. As noted by appellant, trial counsel never renewed his motion to sever.

At the hearing on November 16, 2007, the appellant also moved to exclude the State from offering testimony by Dr. Marjorie Grafe, a neuropathologist with Oregon Health and Sciences University, that she had examined certain tissue slides taken during Justice's autopsy and had not observed a neomembrane on these slides. RP 137-144. The appellant objected to this testimony on the basis of surprise, although Dr. Janice Ophoven, a forensic pathologist retained by the appellant, had introduced

the issue of the neomembrane to the case. RP 153, 154-155. The existence of neomembrane would support the appellant's theory that Justice died as a result of a chronic subdural hematoma. RP 140.

The appellant demanded the exclusion of Dr. Grafe's testimony, or in the alternative an opportunity to retain his own neuropathologist to examine the slides and testify regarding the neomembrane issue. RP 153, 159-160, 168. The trial judge expressed some concerns with continuing the case further, noting that it was already almost two years after Justice's death. RP 171. Ultimately, the trial judge agreed to grant the appellant's request for a continuance, stating that it would allow the appellant to secure a neuropathologist to review the slides. RP 175. The trial judge phrased the issue before this new defense expert as "Here's the slide. Is there a neomembrane?" and also noted "That's the issue. That's the only issue." RP 176-177.

On May 9, 2008, the parties appeared in court to address a number of motions in limine. At this time, the appellant indicated that he was considering not calling Dr. Ophoven as a witness, as he had now retained Dr. Jan Leestma, a neuropathologist, as a expert. RP 240-241. The State then moved to exclude Dr. Leestma from testifying on any issues other than the question of the neomembrane, or in the alternative, neuropathological issues. RP 246-247. This motion was based on the

specific limitation the trial court had placed on the third defense expert, all obtained at public expense, when the continuance was granted on November 16, 2007. RP 247-248.

Upon reviewing a copy of Dr. Leestma's report, the trial court expressed concern regarding the purported discovery of microscopic evidence on slides from Justice's heart and lungs. RP 251. The trial court noted that it had granted a continuance to allow the appellant to obtain a neuropathologist to address the neomembrane issue, but that this expert had produced a report addressing, *inter alia*, new findings in the heart and lungs. RP 257. When confronted by the trial court, the appellant claimed that this was not a new issue but that it had in fact originated with Dr. Ophoven's report. RP 258, 266-267.

The trial court also expressed concerns with the relevance of Dr. Leestma's claims regarding the heart and lungs, as his ultimate opinion was that Justice died from a chronic subdural hematoma, not heart or lung problems. RP 267-271. The appellant's trial counsel himself stated that he didn't think the findings "were substantial." RP 270. The State then further objected that these findings were ascribed no significance by Dr. Leestma, and were thus essentially speculative.

The trial court then reviewed a transcript of a pre-trial interview of Dr. Leestma. In this interview, Dr. Leestma stated that "I'm not quite sure

what [the heart finding] means.” RP 280-281. Regarding the lungs, Dr. Leestma was asked whether this finding could simply be the result of Justice having a cold. The doctor’s response to this was “Good question. I don’t know.” RP 281. Unsurprisingly, the trial court was highly concerned about these statements, stating “I think ‘I don’t know’ is conclusive.” *Id.* The trial court succinctly summarized Dr. Leestma’s opinion regarding the heart and lung slides as “I found these things. I don’t really know what they mean.” RP 285. Having so found, the trial court then ruled that Dr. Leestma was barred from expressing any opinions on these findings. RP 286.

At trial, the State renewed its motion to exclude the purported heart and lung findings discovered by Dr. Leestma. At this time, the trial court directly questioned Dr. Leestma regarding the heart and lung issue. Dr. Leestma again asserted that Justice had not died from heart failure, but rather from a chronic subdural hematoma. RP 2938. The trial court then affirmed its earlier ruling, noting that the parties had been preparing for trial for over two years and that Dr. Leestma’s findings were both new and speculative. RP 2949. The trial court observed that Dr. Leestma’s finding:

‘The presence of iron-positive alveolar macrophages in a baby who experienced only thirty minutes of resuscitation suggest a prior early element of cardiac failure’ is totally new to me. Totally new. The statement itself is ambivalent. ‘Suggests’. ‘Suggest’, which I understand as maybe it is and maybe it isn’t. The introduction of a

new issue which maybe has some probative value and maybe doesn't at this point in the trial is totally inappropriate...

RP 2949-2950.

The trial court later further stated "I might have—I probably would have a very different attitude if this witness said these things are uncontrovertibly indicative of a certain process." RP 2952-2953. However, as Dr. Leestma's testimony was equivocal and speculative, the trial court again refused to allow the testimony. RP 2956.

b. TRIAL TESTIMONY

Justice and Liberty Pingle were born on October 28, 2005 to the appellant and his wife Krystal Pingle. RP 2150. Krystal Pingle worked at Canterbury Gardens, a nursing home, while pregnant with the twins. After the birth, Krystal Pingle was on maternity leave for around a month, but returned to work on December 19, 2005, leaving the appellant home with the infants. RP 2150-2151. Before Krystal Pingle returned to work, she never observed any bruising, scrapes, or marks on either Justice or Liberty. RP 2153.

Some time between the 19th and 25th of December, Krystal Pingle returned home from work to find a red mark on Liberty's forehead. RP 2155-2156. When Krystal Pingle discussed this injury with the appellant, he stated that he was not in the room with Liberty when the injury

occurred, but assumed she must have rubbed her forehead on a rough surface. RP 2161, 2165, 2222. The appellant was the only person caring for Liberty when this injury occurred. RP 2166.

From the 20th to the 22nd of January, no one other than Krystal Pingle or the appellant saw Justice or Liberty. RP 2207. On January 20, 2006, Krystal Pingle again returned home for work and found an injury on Liberty. The appellant had been the only person caring for Liberty and Justice that day. RP 2178, 2180. When she got home, Krystal Pingle immediately noticed a bruise on the left side of Liberty's face. At the same time, Krystal Pingle also noticed two purple bruises on Justice's face. RP 2187, 2188, 2191. When she asked the appellant about these bruises, the appellant stated he believed the babies' pacifiers had somehow caused the injuries. RP 2180, 2188.

The next day, January 21, 2006, Krystal Pingle again went to work, leaving the babies in the appellant's care. RP 2191-2192. After returning home, Krystal Pingle gave Justice a bath. While bathing her, Krystal Pingle noticed a purple bruise on Justice's lower back. RP 2193-2194. The appellant did not look at the bruise, but again claimed that the pacifier must have caused it. RP 2195.

On January 22, 2006, Krystal Pingle left for work at 6:35 a.m., leaving Justice and Liberty with the appellant. RP 2199. Around 10:30

a.m., she called the appellant at home to check on the children. The appellant told her that Justice had eaten four ounces of formula that morning. RP 2200-2201. That afternoon, Krystal Pingle got off work at 2:00 p.m., and returned to the apartment at around 2:30 p.m. When she walked into the living room and asked the appellant how the day had gone, the appellant told her that Justice had spit up badly. RP 2201.

Krystal Pingle decided to check on Justice, and walked into the nursery, which was dimly lit. Upon entering the room, Krystal Pingle immediately noticed that something was wrong with Justice, as she was very pale. RP 2203. The appellant was next to her, and claimed that Justice was okay and was just sleeping. RP 2206. Krystal Pingle quickly picked up Justice and took her into the living room, where she noticed her daughter was blue and was not breathing. RP 2203-2204. Krystal Pingle then called 911. Id.

Paramedics from Cowlitz Fire District No. 2 responded to Ms. Pingle's 911 call, and arrived on the scene within minutes. RP 445. The paramedics, lead by Troy Hicklin, entered the Pingles' apartment along with Longview police, firefighters, and deputies from the Cowlitz County Sheriff's office. RP 449-450. Mr. Hicklin assessed the situation and decided to immediately transport Justice to the hospital in Longview, St. John's Medical Center. RP 451-452. Once Justice was in the ambulance,

Mr. Hicklin noticed a number of bruises and a scratch on the child's face. RP 455. Mr. Hicklin also observed bruising on Justice's lower back. RP 456.

Once Justice arrived at St. John's, Dr. Brian Hoyt, an emergency medicine physician, directed the efforts to resuscitate her. RP 669. Upon arrival at the hospital, Justice was still not breathing and had no heartbeat. Dr. Hoyt's described her as appearing "basically dead at that point." RP 672. Although Dr. Hoyt attempted to revive Justice, this was unsuccessful. RP 677. During his treatment of Justice, Dr. Hoyt noticed the same injuries that Mr. Hicklin had seen. These injuries included bruising on her face and back. RP 677. Dr. Hoyt noted that these bruises appeared recent, as they were purple in color. RP 680, 683. Dr. Hoyt further indicated the bruises on Justice's lower back appeared to be fingertip bruises. RP 684. In his opinion, it was abnormal for an infant of Justice's age to have suffered these bruises, as she would not be moving around and able to injure herself. RP 684, 695.

The day of Justice's death, the police briefly interviewed the appellant at the hospital. The appellant stated that he had fed Justice around four ounces of formula at 7:20 a.m. on the 22nd of January. RP 1592. Later that day, the police conducted a formal interview of the appellant at the Longview Police Department. RP 1646. During this

interview, the appellant stated that he was unemployed and was the primary caregiver for Justice and Liberty. RP 1648, 1650. The appellant stated the babies were not in day care or cared for by babysitters. RP 1650, 1671.

The appellant confirmed that Krystal Pingle had been at work on January 20th from around 7 am to 2 pm. The appellant further stated that on January 21st, he had noticed a bruise on Justice's face. RP 1654-1655. The appellant explained the baby's pacifier had caused this bruise because she was "very active and moves around a lot." RP 1655. He also stated that Krystal Pingle had told him about the bruise she noticed on Justice's back, but that he hadn't felt it necessary to look at this injury. RP 1669-1670.

The appellant further confirmed that on January 22nd, Krystal Pingle had gone to work, leaving him alone with the babies. RP 1657. The appellant said that he fed Justice about six ounces of formula that morning around 8:00 am per his usual routine. RP 1657-1658, 1660. The appellant then said he next fed Justice at around 11:30 am, and that during this feeding Justice had a bad spit up. RP 1661-1662. After this spit up, he put Justice back in the crib with Liberty. RP 1663. The appellant stated he then did some cleaning around the house and was in and out of the babies' room, he said that Justice "looked normal" when he checked on her during

between 12:30 and when Krystal Pingle arrived home at 2:30. RP 1663-1664, 1666-1667.

When questioned by the police, the appellant denied that the babies had ever fallen or been dropped. RP 1667. The police further questioned the appellant about the large scab that appeared on Liberty's forehead before Christmas of 2005. Specifically, the police asked how Liberty had received this injury to her forehead. The appellant stated that in late December, Liberty had been lying on her stomach and had rubbed her head back and forth on the living room floor, causing the injury. RP 1671-1672. The appellant further described this as being "really weird." RP 1672. When asked about the other injuries to Liberty, the appellant admitted she had recent bruising on her temple but again claimed that the pacifier had caused this injury. RP 1674.

The same day as Justice's death, January 22nd, Dr. Clifford Nelson conducted an autopsy of her remains at the Coroner's office. RP 1741. Dr. Nelson is a board certified forensic pathologist, and is employed as a medical examiner by the State of Oregon. RP 1719. Dr. Nelson has particular expertise in conducting autopsies of children and infants, having conducted 337 autopsies of children under the age of three. RP 1725-1734, 1737.

At the autopsy, Dr. Nelson observed a large number of external injuries to Justice's body. These included an abrasion to the right side of her neck and a contusion to the front of her neck. RP 1757-1758. Dr. Nelson also observed five bruises on the left side of Justice's face. RP 1759. His opinion was that these facial bruises were consistent with grip marks. RP 1876. After turning Justice over, Dr. Nelson saw several bruises on her lower back. RP 1760. There was also bruising evident around Justice's hips. RP 1765-1766. Microscopic examination revealed these were recent injuries. RP 1843, 1846. Regarding the appellant's claim that the pacifier had somehow bruised Justice, Dr. Nelson examined the pacifiers seized from the residence and found, unsurprisingly, this could not have caused the bruising on her face and back. RP 1871-1872. Dr. Nelson further stated that bruising of this sort was not normal for an infant of Justice's age. RP 1950.

After beginning his internal examination, Dr. Nelson found further evidence of injury to Justice. Specifically, Dr. Nelson found deep bruising within her chest on the left side, which was not apparent externally. RP 1786-1787. Also, Justice's forehead had a deep bruise that also could not be seen externally. RP 1789. This bruise indicated an impact to her head that left a large bruise deep within the scalp. RP 1790, 1943.

Dr. Nelson then began to open Justice's skull as part of his autopsy protocol. As Dr. Nelson sawed open the skull, a large amount of blood flowed out from within. This was an abnormal finding, absent trauma, and was further complicated when Dr. Nelson found a "very, very fresh" subdural hemorrhage covering the surface of Justice's brain. RP 1804. A subdural hemorrhage occurs when bridging veins within the skull are ruptured. RP 1808. In this case, Dr. Nelson also observed subarachnoid hemorrhage where the veins had been broken away from Justice's brain. RP 1810. The hemorrhage within Justice's skull was acute, and of very recent origin. RP 1818, 1826.

Dr. Nelson also found subdural hemorrhaging in the lumbar region of Justice's spine. RP 1836, 1839. A severe flexing of the spine would be required to cause this injury. RP 1840. Also, there was a tear in the dentate ligament of Justice's spine. RP 1841. Dr. Nelson also found hemorrhaging in the optic nerve sheaths of both Justice's eyes. RP 1844.

As part of the autopsy, Dr. Nelson submitted Justice's brain and spinal cord to Dr. Marjorie Grafe, a neuropathologist in the employ of Oregon Health and Sciences University. RP 2026, 2036. Dr. Grafe's examination found no evidence of an ongoing disease process, such as a chronic subdural hematoma or cortical vein thrombosis. RP 2040-2045.

Rather, Dr. Grafe found a number of acute, recent traumatic injuries to Justice. These included subarachnoid hemorrhage around Justice's brain stem. RP 2047, 2055. Dr. Grafe also examined Justice's spine, and found subarachnoid hemorrhage around the spinal cord and nerve roots, as well as tears in the covering of the spinal cord, the dura. RP 2050-2051, 2053. These tears would be caused by traumatic flexing or stretching of the spine. RP 2054-2055. Dr. Grafe's opinion was that the likely cause of all these injuries was trauma inflicted on Justice. RP 2126. Significantly, Dr. Grafe does not work for the same employer as Dr. Nelson, and received no compensation for her work, testimony, or opinions. RP 2120-2121.

Based on the autopsy and Dr. Grafe's findings, Dr. Nelson's opinion as a forensic pathologist was that Justice's injuries were caused by her being grasped around the hips and back and then snapped or shaken, causing subdural hemorrhaging, axonal injury, and death. RP 1852. Dr. Nelson explained that the subdural hemorrhage is not the cause of death, but is rather a marker for an acceleration/deceleration force being applied to the brain. Violent acceleration/deceleration of the brain damages nerve fibers known as axons, and can cause a person to stop breathing and die. RP 1856-1857. Dr. Nelson's opinion was there was no other possible

explanation for the constellation of injuries suffered by Justice. RP 1987-1988.

Additionally, based on the history provided by the appellant that Justice ate normally around 7:30 am on the 22nd, Dr. Nelson was able to place the time of death between 7:30 am and 2:30 pm, because Justice would not have been able to eat after suffering her injuries. RP 1865-1867. Dr. Nelson's ultimate opinion was that the cause of death was closed head injuries, and that the manner of death was homicide. RP 1873-1874.

Dr. Floyd Burton, a pediatrician with eighteen years experience, provided care to Justice and Liberty after their birth. RP 996, 998. Dr. Burton saw the babies in November of 2005, and observed them to be doing very well and progressing. RP 1001. Unfortunately, Dr. Burton next saw the twins on January 22nd, 2006, when he was called to the emergency department to assist the efforts to resuscitate Justice. RP 1007. After Justice was pronounced dead, Dr. Burton admitted Liberty to the hospital due to concerns she may have a viral infection. RP 1014. Dr. Burton examined Liberty and noticed a number of injuries he was concerned about. RP 1016. Specifically, Dr. Burton observed a large red mark on her forehead, two bruises on her left cheek, a bruise near her left eyebrow, and petechial bruising in her left ear. RP 1019-1028.

Dr. Burton opined that Liberty would not have been able to cause these injuries to herself, due to her state of development. RP 1031-1032. Dr. Burton also stated that a pacifier lying in a crib would not have caused these injuries. RP 1032. Regarding the injury to Liberty's ear, Dr. Burton's opinion was this was the result of an impact, and was a traumatic injury. RP 1033, 1086. Though Dr. Burton could not quantify the amount of force needed to cause Liberty's bruises, he did state that incidental contact or normal handling would not cause these injuries. RP 1094.

Dr. Burton was shown a photograph, Exhibit 65, of the injury to Liberty's forehead. Dr. Burton stated this photograph depicted the red mark he had seen on Liberty, but at an earlier point in the healing process when it was still scabbed over. RP 1035-1036. Dr. Burton stated that, in his opinion, the injury to Liberty's forehead was not consistent with a rub mark as it was circular rather than linear in shape. RP 1036-1037. Dr. Burton could not provide an exact cause for the injury, but did state it could be a burn. RP 1037-1038.

Dr. Burton further stated that Liberty would not have had sufficient motor control and strength to rub her head on a surface to cause the forehead injury. Dr. Burton stated that his opinion, as a pediatrician with 18 years of experience, was that he was 99% sure the injury was not caused by Liberty rubbing her head on something. RP 1041-1042.

On January 25th, 2006, Dr. Naomi Sugar examined Liberty at Harborview Medical Center in Seattle. RP 1479. Dr. Sugar is pediatrician, and has been working in this field since 1982. RP 1471. Dr. Sugar's specialization is in child abuse, and she has extensive training and expertise working with victims of physical and sexual abuse. RP 1472-1478. On the 25th of January, Dr. Sugar examined Liberty and also reviewed medical records and photographs from her admission to the hospital three days prior. RP 1486. At that time, Dr. Sugar noted a bruise to Liberty's left temple. RP 1487. Other injuries noted by Dr. Burton in the medical records had healed and were not apparent to Dr. Sugar. RP 1487-1489.

Dr. Sugar testified that it is highly unusual to find bruises on a three month-old infant, particularly one that had been born prematurely like Liberty. RP 1497-1498. This opinion was based both on Dr. Sugar's clinical experience, and a study she herself had conducted of the prevalence of bruises in infants and toddlers. RP 1499. Dr. Sugar's peer reviewed study found that of infants in Liberty's development range, only 1 in 225 was found to have a bruise. Thus, the prevalence of bruises in infants the same development age as Liberty and Justice was 0.4%. RP 1502.

Dr. Sugar further stated that Liberty would not have been able to cause the bruising observed by Dr. Burton. RP 1498. Also, Dr. Sugar viewed photographs taken by the police on January 22nd, when Dr. Burton admitted Liberty to the hospital. RP 1506. Dr. Sugar's opinion was that these bruises were not compatible with being caused by Liberty falling or being dropped, as the bruises appeared on several different areas of the child's face. RP 1507. Instead, Dr. Sugar's opinion was that the injuries suffered by Liberty were consistent with the child's face being struck or gripped hard by a hand. Id.

Finally, Dr. Sugar also viewed a photograph, Exhibit 65, of the large red mark on Liberty's forehead. Unsurprisingly, as with Dr. Burton, Dr. Sugar testified that the child could not have caused this injury by rubbing her head back and forth on the floor, as claimed by the appellant. RP 1509-1511.

Krystal Pingle's sister, Alicia Powell-Torres, testified that as the trial in this case was approaching, she received a phone call from Cordell Stone's residence. Mr. Stone is the appellant's grandfather. RP 1427-1428. Ms. Powell-Torres testified that the appellant's wife told her "not to say anything" if contacted by the police. RP 1421. Ms. Powell-Torres also testified that she heard the appellant in the background on the call, and that he also told her not to say anything to the police. RP 1422. Ms. Powell-

Torres had been interviewed as a witness by the police during the initial investigation and had written a five-page statement. RP 1420, 1431.

The appellant then called Dr. Ronald Uscinski, a neurosurgeon, and Dr. Jan Leestma, a neuropathologist, as expert witnesses in his defense. They testified at length to the defense's theory that Justice had died as a result of a chronic subdural hematoma, likely dating from birth. RP 2591-3206. The appellant did not call Dr. Ophoven as a witness. The appellant also called a number of the appellant's family members as witnesses. These witnesses claimed they had observed Liberty rubbing her head on various objects. RP 2338-2525. In support of the "head-rubbing defense" the appellant introduced into evidence a crib and mattress. RP 2457. The appellant purported that this mattress had a rough surface. RP 2457-2458.

After hearing this evidence, the jury convicted the appellant of manslaughter in the first degree and assault in the third degree. The appellant was sentenced to 116 months in prison, to be followed by a term of community custody. However, as noted previously, the appellant remained free on bond until September of this year.

III. ISSUES PRESENTED

1. Did the trial court abuse its discretion by excluding speculative testimony offered by Dr. Leestma?
2. Was trial counsel ineffective for failing to renew a motion to sever the counts?
3. Were the jury's verdicts unsupported by substantial evidence?

IV. SHORT ANSWERS

1. No.
2. No.
3. No.

V. ARGUMENT

I. The Trial Court Did Not Abuse Its Discretion By Excluding Unhelpful and Improper Testimony.

The appellant argues that he was unable to present a defense due to the trial court's exclusion of Dr. Leestma's purported findings of microscopic abnormalities in Justice's heart and lungs. However, the trial court was within its discretion to exclude this evidence, as it was both unhelpful to the jury and in violation of earlier rulings by the court. Furthermore, the exclusion of this evidence, which was trivial and of no real import, could not have prejudiced the appellant in any meaningful fashion.

On appeal, this Court reviews the admission or exclusion of evidence under an abuse of discretion standard. State v. Baldwin, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs only when the trial court's decision is "manifestly unreasonable or based upon untenable grounds or reasons." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001); quoting State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). This standard also applies to a trial court's exclusion of expert testimony offered by the defense. State v. Cheatham, 150 Wn.2d 626, 652, 81 P.3d 830 (2003).

To be admissible, expert testimony, including that offered by a criminal defendant, must be helpful to the jury. Cheatham, 150 Wn.2d at 645. Washington courts have regularly excluded expert testimony offered by criminal defendants where the testimony would not be helpful or is speculative. See Cheatham (eyewitness identification); State v. Swan, 114 Wn.2d 613, 656, 790 P.2d 610 (1990) (suggestibility of child sex victims); State v. Mak, 105 Wn.2d 692, 715, 718 P.2d 407 (1986) (eyewitness identification). Regarding review of a trial court's decision on whether expert testimony is "helpful", the Supreme Court has observed that

[I]t is not this court's duty to supplant the trial court's discretion with our own. We noted long ago that trial courts must be afforded an amount of discretion in these matters because the line between that which is helpful and that which is unhelpful cannot be 'very accurately drawn.'

Cheatham, 150 Wn.2d at 845, citing State v. Smails, 63 Wn.2d 172, 179, 115 P. 82 (1911).

Recently, this Court has addressed the exclusion of expert testimony in State v. Lewis, 141 Wn.App. 367, 166 P.3d 786 (2007). In Lewis, this Court upheld the trial court's exclusion of expert testimony offered by the defense regarding methamphetamine consumption by a homicide victim. In so doing, the Court noted that the testimony was speculative and unhelpful to the jury. 141 Wn.App. at 797. Further, the Court astutely observed that under Cheatham, the trial court was given "broad discretion" to decide whether to exclude such testimony. Id.

In the instant case, the trial court did not abuse its discretion by excluding testimony from Dr. Leestma that was both unhelpful to the jury and in violation of the court's early ruling allowing a continuance of the trial date from November of 2007 to May of 2008. The trial court granted the appellant's continuance request to allow him to obtain a neuropathologist to testify on the neomembrane issue. Dr. Leestma's proposed testimony greatly exceeded this ruling by the court, and introduced new matters that were not contemplated by the court when the continuance was allowed.

Moreover, neither Dr. Leestma nor appellant were able to explain to the trial court the significance of the heart and lung findings, or what effect that would have on the doctor's opinion on the cause of death. Instead, Dr. Leestma phrased his findings in vague terms that rendered his opinion of such little value that it would have been unhelpful to the jury. See RP 280-281, 2938. Confusingly, these findings were apparently unrelated to the main thrust of Dr. Leestma's testimony, which was that Justice had died of a chronic subdural hematoma. RP 2938. Given this, it cannot be said that the trial court engaged in a manifest abuse of discretion, or based its ruling on untenable grounds as required for the appellant to prevail. See Stenson, 132 Wn.2d at 701.

Rather than an abuse of discretion, the record indicates the trial court carefully considered the proffered testimony and ultimately found it so lacking in probative value that it should be excluded. RP 2949-2950. As noted by this court in Lewis, a trial judge is vested with great discretion to admit or exclude evidence. Here, the trial judge decided to exclude evidence from a witness who stated his findings "suggested" certain facts, but that he "wasn't sure what they meant" and that he just "didn't know." This record does not even approach the level of proof required for the appellant to persuade this Court the learned trial judge committed a manifest abuse of discretion.

Finally, should this Court find the exclusion of this testimony was somehow improper, any error was harmless. The two findings that were excluded were vague, and their actual importance remained mysterious to Dr. Leestma even as he testified at trial. Even appellant's trial counsel described these findings as not being very substantial. RP 270. Indeed, had the appellant wished to introduce the heart and lung findings, he could have simply called Dr. Ophoven to testify to this issue, as she had included these issues in her report. RP 258, 266-267. The appellant's failure to call Dr. Ophoven strongly indicates this testimony was not regarded as at all essential to the defense.

Furthermore, the appellant presented lengthy testimony from Dr. Leestma and Dr. Uscinski regarding their theory that a chronic subdural hematoma had rebleed and killed Justice. RP 2591-3206. This testimony capped off a trial that lasted almost three weeks. To argue that the introduction of this testimony, the probative value of which was at best minuscule, would have swayed the outcome is simply not credible. When the totality of the trial is considered, any error that did occur was harmless. See State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996).

II. Trial Counsel Was Not Ineffective for Failing to Renew His Motion to Sever, As This Motion Was Without Merit.

The appellant argues that his trial counsel was ineffective for failing to renew the pre-trial motion to sever. The court had previously denied this motion, finding the evidence was cross-admissible between the two counts. RP 126-127. As the trial court correctly denied the motion, trial counsel was not ineffective for deciding not to further pursue a fruitless issue. Also, there is no prejudice to the appellant because the counts were properly joined.

It is presumed that defendants received effective assistance of counsel. State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003); State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). Thus, the appellant bears the burden of proof on this issue. To prove his claim of ineffective assistance, the appellant must show that (1) trial counsel's performance was deficient and (2) this deficiency prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987). Counsel's performance becomes deficient when it falls below an "objective standard of reasonableness." State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Thus, to prevail on this claim, the appellant must show that the motion to sever would have been granted if trial counsel had made it, and

that there is a reasonable probability the outcome of the trial would have been different. Stenson, 132 Wn.2d at 707-708; State v. Price, 127 Wn.App. 193, 203, 110 P.3d 1171 (2005).

A trial court's decision regarding severance of offenses will be reversed only upon a showing of a manifest abuse of discretion. State v. Watkins, 53 Wn.App. 264, 766 P.2d 484 (1989); State v. Brythow, 114 Wn.2d 713, 790 P.2d 154 (1990). To determine whether severance is necessary, the courts look to a four factors: (1) the strength of the State's evidence on each count; (2) the clarity of the defenses as to each count; (3) whether the trial court properly instructed the jury to consider each count separately; and (4) the cross-admissibility of the evidence. State v. Watkins, 53 Wn.App. 264, 269, 766 P.2d 484 (1989).¹

Charges are properly joined for trial where they are of the same or similar character. CrR 4.3(a)(1). Thus, the defendant bears the burden of demonstrating that a joint trial would be so manifestly prejudicial as to outweigh the concern of judicial economy. State v. Thompson, 74 Wn.2d 774, 775, 446 P.2d 571 (1968); Brythow, 114 Wn.2d at 718. The courts have noted that this burden is difficult to meet. State v. Alsup, 75 Wn.App. 128, 131, 876 P.2d 935 (1994), citing State v. Grisby, 97 Wn.2d

¹ However, the lack of cross-admissibility does not require severance as a matter of law. See State v. Kalakosky, 121 Wn.2d 525, 825 P.2d 1064 (1993).

493, 647 P.2d 6 (1982). As the following cases illustrate, the “heavy burden” described by the courts is rarely met by the defense, though complaints regarding joinder are commonplace.

In State v. Price, 127 Wn.App. 193, 110 P.3d 1171 (2005), this Court held counsel was not ineffective for failing to renew a pre-trial motion to sever charges involving two different victims separated by almost ten years. There, the defendant was charged with molesting one child in 2001 and another in 1992. Price, 127 Wn.App. at 197. This Court found severance was inappropriate as the jury was instructed to consider each count separately, and because the evidence was cross-admissible to rebut a claim of accident or mistake. Id. 204-205.

Similarly, in State v. Standifer, 48 Wn.App. 121, 737 P.2d 1308 (1987), the defendant was charged with raping three different women in separate incidents. Trial counsel moved to sever the charges prior to trial, but did not renew the motion, thus barring appellate counsel from raising the issue. This Court found the failure to renew the motion was not ineffective, as the jury was instructed to consider each count separately per WPIC 3.01. Standifer, 48 Wn.App. at 126-127.

Even in cases where defense counsel renewed the motion, and the issue was preserved for appeal, appellate courts are loath to find an abuse of discretion on this issue. Indeed, severance was held to be inappropriate

where the defendant was charged with raping five different women in five distinct incidents. State v. Kalakosky, 121 Wn.2d 525, 537, 825 P.2d 1064 (1993). Also, in Brythow, the court found severance was not required where the defendant was charged with two different robberies, not part of a common *modus operandi*, over the course of a month. 114 Wn.2d 713. Again in State v. Markle, 118 Wn.2d 424, 823 P.2d 1101 (1992), the court held severance was not required in a case where two separate minor victims accused the defendant of various sex crimes.

Furthermore, in State v. Easterbrook, 58 Wn.App. 805, 795 P.2d 151 (1990), the court once more found severance was not appropriate where the defendant was charged with the burglary and rape of one woman and another separate burglary with sexual connotations that occurred a month later and involved a different victim. Yet again, in State v. Robinson, 38 Wn.App. 871, 691 P.2d 213 (1984), the court held severance inappropriate where the defendant was charged with shooting his wife's nephew and then murdering her lawyer five days later, noting that the events were "inextricably intertwined."

In the instant case, when the four factors set forth in Watkins are considered, it is apparent that the trial judge did not abuse his discretion. The State had a strong case on both the homicide and the assault charge. In both cases, the victims, Justice and Liberty, suffered injuries while in

the exclusive care and control of the appellant. The appellant offered absurd explanations for the injuries suffered by both infants, claiming they were accidents caused by a rug or a pacifier. The medical evidence clearly established these excuses were patently false, and that the injuries were abusive in nature. This was not a case where one count was markedly weaker than another, and the facts do not aid the appellant's claim that severance was necessary.

Also, the defenses offered by the appellant to the two counts were clear and distinct. The defense to the homicide charge was that Justice's death was a tragic accident, while the defense to the assault charge was that Liberty was not assaulted and that her injuries were either accidental or self-inflicted. An implicit defense to both charges was also that, if a crime had occurred, the appellant was not the guilty party. These defenses are not mutually antagonistic, and do not support the claim that severance was necessary.

As in Price and Standifer, the jury in this case was given the standard instruction that each count should be considered separately, and that their verdict on one count should not control their verdict on another count. RP 3380; WPIC 3.01. Thus, the jury was properly instructed and this factor also does not support severance.

The final Watkins factor is whether the evidence of each count would be cross-admissible in a separate trial. Here, the victims both displayed very similar facial bruising. Indeed, injuries to both babies' faces were described as resembling grip marks. The appellant claimed in both cases that pacifiers had somehow caused these bruises, a claim that was soundly refuted by the State's experts. Also, the bruises all appeared within a short space of time leading up to Justice's death on January 22nd. Given this, evidence of each count would have been properly cross-admissible even in separate trial, as noted by the trial court. The injuries to the twins were part of the *res gestae* of the case. See State v. Lillard, 122 Wn.App. 422, 93 P.3d 969 (2004) (A defendant cannot commit a string of related offenses and then seek to exclude certain acts, thus creating a fragmented version of what actually happened); State v. Hughes, 118 Wn.App. 713, 77 P.3d 681 (2003).

Furthermore, the evidence of each count was admissible to show identity, a common scheme or plan, and the absence of mistake or accident. See State v. Suttle, 61 Wn.App. 703, 812 P.2d 119 (1991) (identity); State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003) (common scheme or plan); State v. Womac, 130 Wn.App. 450, 123 P.2d 528 (2005) (absence of mistake or accident). The trial court correctly noted this factor in denying the pre-trial motion to sever.

Thus, when the relevant case-law and the unique facts of this case are considered, it cannot be said that trial counsel was ineffective or that the trial court committed a manifest abuse of discretion. Instead, it is apparent that the trial court correctly denied the request for severance, as there was no legal support for the motion. Trial counsel, rather than being ineffective, prudently chose to focus his efforts on more fruitful endeavors than renewing motions that were without any basis and that had already been denied by the trial judge. The appellant must carry two heavy burdens to prevail on this claim, first showing that trial counsel was ineffective and second showing a manifest abuse of discretion by the trial court. The appellant has failed to meet either burden, and this Court should reject his claim.

III. The Jury's Verdicts Were Supported by Substantial Evidence, As There Was Ample Evidence of the Appellant's Guilt.

Appellant argues there was insufficient evidence to show he killed his daughter Justice and assaulted his daughter Liberty. Appellant contends the sole evidence supporting these convictions is the fact that Liberty had bruising and Justice had died. This claim is a gross misstatement of the record at trial, and the appellant's brief purposefully fails to include any meaningful rendition of the actual evidence at trial.

After the true record is considered, the appellant's claims are exposed as being wholly without merit.

When the sufficiency of the evidence is challenged, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the defendant was guilty beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-222, 616 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Partin, 88 Wn.2d 899, 906-907, 567 P.2d 1136 (1977). Moreover, a claim of insufficiency "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

a. There Was Ample Evidence the Appellant Assaulted Liberty.

Contrary to the fanciful assertions of the appellant, there was ample evidence to support the jury's finding the appellant was guilty of assaulting Liberty. It was undisputed that the appellant was the primary caregiver and the only person present when Liberty was injured. RP 2166, 2178, 2180, 2193-2194. Furthermore, the appellant offered bizarre explanations for the injuries that occurred while Liberty was in his sole custody and care, specifically claiming that the pacifiers had somehow

bruised her and that she had rubbed her head on the living room floor and caused the large red mark on her forehead. RP 1674, 1671-1672.

While these excuses were ridiculous on their face, the State presented the testimony of two pediatric doctors, Dr. Sugar and Dr. Burton, who both testified that the appellant's explanations were not consistent with the injuries observed on Liberty and that Liberty could not in fact have caused the injury to her forehead as the appellant claimed. RP 1509-1511, 1032, 1041-1042. Instead, Dr. Liberty's medical opinion was that the bruising to Liberty's face and ear were consistent with a slap or hard squeeze. RP 1507.

The appellant claims that Krystal Pingle's testimony the appellant was alone with Liberty when her injuries occurred was somehow insufficient to support the verdict. See Appellant's Brief at 33. However, unfortunately for appellant, an appellate court defers to the jury's determination of witness credibility. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Thus, the evidence against appellant was that while he was left alone with Liberty, bruises and a large red mark appeared on her body. The appellant offered explanations for these injuries that were refuted by medical testimony as being impossible or highly improbable. Indeed, the medical testimony established the injuries were most likely caused by a

slap or a hard grip, either one of which would be an assault. The only other person with access to Liberty denied injuring her. Also, the appellant attempted to dissuade a witness against him, Ms. Powell-Torres, from speaking to the police on the eve of his trial. RP 1422. The law requires this evidence be assumed to be true and that it be interpreted most strongly against the appellant. See Partin, 88 Wn.2d 906-907; Salinas, 119 Wn.2d at 201. When this is done, there can be no doubt that there was more than sufficient evidence to support the jury's verdict. This Court should reject any claim otherwise.

b. There Was Ample Evidence the Appellant Killed Justice.

As with the count involving Liberty, the appellant fails to set forth any of the relevant facts for the homicide charge, instead offering a narrow and incomplete version of the evidence. However, the actual evidence adduced at trial showed that Justice suffered a large number of injuries while in the appellant's exclusive care. These injuries included extensive facial bruising, bruising on her back and hips, spinal injuries, and finally the brain injuries that caused her death.

Dr. Nelson, a forensic pathologist with extensive clinical experience, offered a cogent theory of the mechanism of Justice's death. This theory, acceleration/deceleration, was supported by the injuries

apparent on Justice's body and the autopsy findings. RP 1852, 1856-1857, 1987-1988. Dr. Grafe's independent examination supported this opinion, as her findings were that Justice had suffered extensive traumatic injuries consistent with her spine being violently stretched or flexed. RP 2054-2055, 2126. In the days leading up to her death, injuries appeared on Justice while the appellant was caring for her. RP 2187, 2188, 2191, 2193-2194. The appellant claimed a pacifier caused these injuries, an excuse that was refuted by Dr. Nelson. RP 2180, 2188, 1871-1872. Finally, the Ms. Pingle's testimony and the appellant's statements to the police, combined with Dr. Nelson's medical expertise, established that the fatal injury to Justice occurred while she was in his sole care and custody. RP 1865-1867.

As with the testimony on the assault charge, the jury was entitled to believe or disbelieve Ms. Pingle, Dr. Nelson, and Dr. Grafe. The jury's verdict indicates it found this testimony credible and persuasive. Such determinations will not be second-guessed by an appellate court. Camarillo, 115 Wn.2d at 71, State v. Thomas, 150 Wn.2d 821, 847-875, 83 P.3d 970 (2004). Again, when all the State's evidence regarding Justice's death is assumed to be the truth and interpreted most strongly against the appellant, there can be no doubt there was more than sufficient

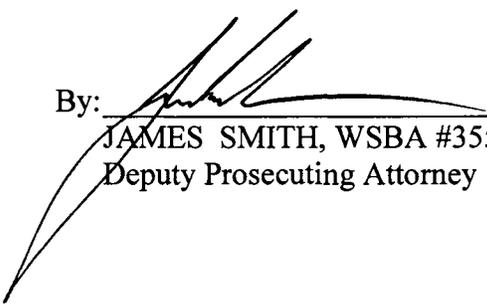
evidence to support the jury's verdict. See Partin, 88 Wn.2d 906-907; Salinas, 119 Wn.2d at 201.

VI. CONCLUSION

Based on the preceding argument, the State respectfully requests the Court to deny the instant appeal. The appellant has failed to show the trial judge abused his discretion, or that his trial counsel was ineffective. Furthermore, the jury's verdicts were supported by sufficient evidence to demonstrate the appellant's guilt. The State asks this Court to affirm the judgment and sentence in this cause.

Respectfully submitted this 30th day of September 2009.

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