

NO. 37916-3

COURT OF APPEALS  
DIVISION II

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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON  
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DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

WILLIAM FRANCIS WASAGESHIK, V., APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Susan K. Serko

No. 06-1-04487-0

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**BRIEF OF RESPONDENT**

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GERALD A. HORNE  
Prosecuting Attorney

By  
KIMBERLEY DEMARCO  
Deputy Prosecuting Attorney  
WSB # 39218

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly deny defendant's motion to suppress evidence discovered pursuant to a search warrant where the warrant established that there was criminal activity and showed a nexus between that activity and the place to be searched?
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3. Did the State present sufficient evidence to convince a reasonable fact finder that defendant was guilty of two counts of assault of a child in the first degree where T.W.'s injuries were both life-threatening and showed a pattern or practice of abuse?
4. Has defendant failed to show that the prosecutor's argument for an exceptional sentence was improper where it followed a trial in which the jury found an aggravating factor beyond a reasonable doubt?

B. STATEMENT OF THE CASE.

1. Procedure

On September 22, 2006, the State charged WILLIAM FRANCIS WASAGESHIK, V., hereinafter "defendant," with one count of assault of

a child in the first degree for an incident involving his two month old daughter, T.W. CP 2. On May 11, 2007, the State filed an amended information, adding an additional charge of assault of a child in the first degree. CP 10-11. On April 3, 2008, the State filed a second amended information, alleging the existence of an aggravating factor of particular vulnerability to the victim on both counts. CP 104-105.

On April 8, 2008, the case proceeded to jury trial before the Honorable Susan K. Serko. RP 1. The court held a combined CrR 3.5 and CrR 3.6 hearing on April 14, 2008. RP 14, 54. The CrR 3.5 hearing related to statements defendant made to Pierce County Sheriff Detectives Shaviri, Anderson<sup>1</sup>, and Berg. CP 350-367. The 3.6 hearing dealt predominately with a document found in a diaper bag that defendant and Ms. Wasageshik left in T.W.'s hospital room. CP 350-367. For the purpose of the hearing, defendant agreed to waive Detective Shaviri's presence as he was out of state for training. RP 25. The court ultimately ruled that defendant's statements were made while he was not in custody and were therefore admissible. CP 350-367; RP 109-110. The court further determined that T.W.'s diaper bag had been abandoned and that defendant did not have a reasonable expectation of privacy regarding its contents. CP 350-367; RP 125.

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<sup>1</sup> At the time she was investigating the case, Detective Lynelle Anderson was Lynelle Kern. RP 55. To avoid confusion, the State is using the name she used at trial.

Testimony commenced April 21, 2008 and continued through May 12, 2008. RP 152, 1272. On May 12, the jury found defendant guilty as charged, and returned special verdicts finding the aggravating factor of particular vulnerability to the victim due to extreme youth on both counts. CP 232, 234, 235, 237.

On June 13, the court sentenced defendant to an exceptional sentence. CP 368-371. In setting forth her reasons for the sentence, the court stated:

I must further the purposes identified by the legislature under 9.94A.010. I must protect the community from conduct that inflicts or threatens harm to individual and public interests. I must promote respect for the law by providing just punishment. In order to accomplish those goals, I keep in my mind a tiny, vulnerable, defenseless victim, [T.W.], who suffered extraordinary life threatening injuries at the hands of her father. These facts were found beyond a reasonable doubt and, in this Court's view, justify an exceptional sentence.

RP 1661-62. The court imposed high-end sentences of 123 months, and added 177 months on each count for exceptional sentences of 300 months, concurrent. CP 246-261. The court later entered findings of fact and conclusions of law to support her imposition of the exceptional sentence. CP 368-371.

Defendant filed this timely notice of appeal. CP 377-395.

## 2. Facts

On September 15, 2006, Ms. Wasageshik brought her two-month-old daughter, T.W., to Madigan Army hospital. RP 284. T.W. had a fever

and was, according to Dr. Pamela Moore, “as limp as a rag doll.” RP 284. Dr. Moore described T.W. as “toxic,” a word she only uses in the most extreme cases. RP 287.

According to Dr. Moore, Ms. Wasageshik told her that T.W. had been running a fever of up to 103 degrees for the previous three days. RP 285. Ms. Wasageshik also told her that T.W. was not as active as she normally was and that she was crying, extremely irritable, and very difficult to console. RP 285. Ms. Wasageshik also said that T.W. was not eating as well and that she would have to force her to take it in. RP 285.

Based on T.W.’s fever and Ms. Wasageshik’s statements, Dr. Moore was concerned that T.W. was septic, which is a serious bacterial blood infection. RP 289. Dr. Moore called in an inpatient team and told them they had to come “right now” because T.W. was very ill. RP 289. The team took cultures, including spinal fluid, and based on Ms. Wasageshik’s information, Dr. Moore prescribed antibiotics. RP 289-90.

Dr. Robert Newman was on the team that came in response to Dr. Moore’s call. RP 343. He noticed, in addition to the symptoms Dr. Moore described, that T.W. was also having difficulty breathing and was unable to move her arms. RP 344. Dr. Newman started T.W. on an IV; T.W. did not react to the insertion of the needle. RP 347. Dr. Newman, also concerned about the possibility of infection and ordered x-rays to rule out pneumonia. RP 348. T.W. was placed in isolation so as to prevent her possible contamination of the rest of the ward. RP 351. All of T.W.’s

blood cultures and the spinal fluid culture came back negative for infection. RP 348-49.

Meanwhile, T.W.'s x-rays showed signs of possible rib fractures. RP 349-50. Dr. Newman testified that this was a concern as eight-week old babies do not do anything to sustain fractures themselves. RP 349-50.

The following day, the doctors took additional x-rays of T.W. RP 352. The second set of x-rays confirmed T.W.'s sixth and seventh ribs showed healing fractures. RP 352. Based on those findings, Dr. Newman ordered a skeletal survey x-ray. RP 352.

The skeletal survey was performed on September 18th. RP 353. The x-rays revealed additional rib fractures and fractures to T.W.'s humerus, femur, wrist, and skull. RP 353; 374-75. The fractures on T.W.'s humerus and femur were described as metaphyseal fractures, also known as classic metaphyseal lesions (CML), corner fractures, and bucket handle fractures. RP 355, 376, 651-52. CML's occur when the tendon that is attached to the bone pulls off a piece of the bone. RP 355-56. A rotation or acceleration/deceleration force is required to cause CML's and they indicate non-accidental trauma. RP 356, 651-52.

Following the skeletal survey, Dr. Newman began to suspect non-accidental trauma or child abuse. RP 356. Dr. Newman contacted Child Protective Services (CPS) and also ordered a CT scan. RP 355, 357.

Dr. Newman then contacted defendant and Ms. Wasageshik. RP 357. He told them about the fractures and informed them that he had

contacted CPS. RP 357. According to Dr. Newman, defendant and Ms. Wasageshik had “surprisingly little response,” to being given this information. RP 362. The doctor testified that neither of the parents were forthcoming with an explanation of her injuries. RP 362. In Dr. Newman’s experience, when there is an accident with fractures, the parents tell him exactly what happened. RP 362. Defendant asked Dr. Newman if T.W.’s injuries could have occurred from falling off the bed. RP 362. Dr. Newman told defendant and Ms. Wasageshik that T.W.’s injuries were most consistent with shaken baby syndrome, a form of non-accidental trauma. RP 363. The doctor testified that a fall of two to three feet onto a carpeted floor would be insufficient force to cause T.W.’s injuries. RP 363-34.

Detectives Lynelle Anderson, Teresa Berg, and Ray Shaviri became involved in the case after a social worker at Madigan Hospital called the Sheriff’s Office. RP 1210. On September 19, 2006, the detectives met with T.W.’s doctors who related T.W.’s injuries and their diagnosis that this was non-accidental trauma. RP 1057-58, 1212-13. Based on T.W.’s injuries, the detectives placed her in protective custody. RP 1213.

Detectives Shaviri and Anderson interviewed defendant and Ms. Wasageshik. RP 158. Defendant agreed to a taped interview which was admitted into evidence. Ex. 1; RP 1060. During the interview, defendant said that he noticed T.W. was sick at approximately 1:00 p.m., on

Tuesday, September 12, 2006. Ex. 1. He was home alone with her while Ms. Wasageshik was at work. Ex. 1. T.W. was sleeping in her crib when he woke her up and noticed she had a “high pitch” cry. Ex. 1. He started to feed her and noticed she had a “sloppy suck” when she tried to eat. Ex. 1. When Ms. Wasageshik returned from work, she noticed T.W. was warm to the touch, and had a fever of 101 degrees. Ex. 1. That night, when defendant noticed T.W. was not moving her arms he said, “check this out,” and picked up her arm and dropped it. Ex. 1. T.W. was home alone with defendant again the following day. Ex. 1.

Detective Shaviri asked defendant if he knew of her injuries. Ex. 1. Defendant knew about her skull and right shoulder fracture from the doctors, but was shocked to hear about the rib fractures from the detectives. Ex. 1. Defendant then told the detectives that, on Tuesday morning, T.W. had “catapulted” off the bed. Ex. 1. Specifically, T.W. was in bed with him, approximately two feet from the edge of the bed. Ex. 1. He woke up to hear her crying on the floor. Ex. 1. Defendant said she likes to rock her head and that must have caused her to “catapult” off the bed and fall three feet to the carpeted floor. Ex. 1. Upon questioning, defendant agreed that two month old babies do not roll, and that even a grown person could not fly off a bed by just using their neck muscles. Ex. 1.

Defendant also told the officers that T.W. had done the same thing the only other time she had been left alone with him. Ex. 1. Defendant

stated he left T.W. propped in a corner the couch when she was only one month old. Ex. 1. While defendant acknowledged that rolling off the bed or couch could not have caused T.W.'s injuries, he had no other explanation for them. Ex. 1. Defendant was of the opinion that he, Ms. Wasageshik, and their daycare provider were incapable of shaking and throwing T.W. Ex. 1. During the interview, defendant sat rigid; he never asked the detectives to investigate how T.W. received any of her injuries, he never asked to see her. RP 1074-75, 1078, 1083.

After defendant left the hospital, the detectives interviewed Ms. Wasageshik. RP 1078. Ms. Wasageshik cried during the interview and became hysterical when the detectives told her they were placing T.W. in protective custody. RP 1081-84. Ms. Wasageshik said that defendant was jealous of the time she would spend with T.W. RP 1085. Ms. Wasageshik was so distraught that she vomited during the interview. RP 1082. She eventually calmed down and was allowed to say good-bye to T.W. RP 1084. When she left the hospital, she took several items with her, but left behind T.W.'s diaper bag. RP 1218.

T.W.'s daycare provider, Julissa Maldonado, testified that she first began watching T.W. on September 4, 2006. RP 436. She had T.W. all day during for the entire week. RP 436. She described T.W. that first week as "great," she would eat regularly, slept well, and she liked to watch the other children play. RP 436-37. When Ms. Maldonado watched T.W. on September 11, 2006, T.W. acted just like she had the first week. RP

441, 442. Ms. Wasageshik called her the following day and told her T.W. would be staying home with defendant. RP 442. Ms. Maldonado did not see T.W. again until September 14th. RP 442. Defendant and Ms. Wasageshik told Ms. Maldonado that T.W. had a fever and they were giving her Tylenol. RP 443. Ms. Maldonado noticed as the day progressed that T.W. was not using her arms, she was eating less, she slept more, and she would cry when picked up. RP 443, 445, 449. Ms. Maldonado also noticed that T.W. had a scrape on her nose, like a rug burn. RP 447. Ms. Maldonado encouraged Ms. Wasageshik to take T.W. to the doctor and gave her a written report of when T.W. ate, how much, the schedule of her diaper changes, and what her temperature was. RP 440, 450; Ex. 13. When T.W. was not brought to her the following Monday, Ms. Maldonado called the hospital to see if T.W. was there. RP 452.

On September 20, 2006, police executed a search warrant of defendant's apartment. RP 1219. Detective Shaviri wanted to take measurements of the height of the bed and couch from the ground. CP 34-

52<sup>2</sup>; RP 711. While they were in the apartment, the detectives observed a new-looking but blood-stained sleeper in the garbage, together with several beer bottles, a half full bottle of cognac, and a parenting book. RP 721, 1221-24. The detectives called the judge who issued the original warrant to get an addendum to seize the items in the trash. RP 1088, 1224. The top of defendant's bed measured two feet, four inches from the floor. RP 715. The seat of the couch measured 1 foot, 5 inches from the floor. RP 713-14.

Ms. Wasageshik told the detectives<sup>3</sup> that when she and defendant returned to the apartment, they noticed a property sheet listing the items that were seized. RP 1109. Defendant broke down crying and said, "I'm fucked. I'm going to jail." RP 1109-10.

The detectives arrested defendant the following day. RP 1090.

According to the doctors who examined T.W. and reviewed her scans, T.W. suffered from fractures in the back her second rib, both left and right sides; the left third, fourth, fifth, sixth, and seventh ribs; right humerous (bone of the upper arm); shoulder blade; both femurs (upper leg

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<sup>2</sup> A copy of the warrant is attached as Appendix A. It was made part of the record below as an attachment to defendant's motion and memorandum to suppress evidence (CP 34-52) and the court's findings and conclusions on admissibility of evidence CrR 3.5 and 3.6 (CP 350-367).

<sup>3</sup> During her testimony, Ms. Wasageshik was hostile to the State and initially denied or downplayed several statements she made during her interviews. When confronted with the transcripts of those interviews, however, she did admit to making each one. See RP 210-242, 256-273, 462-606.

bone) just above the knees; right radius (forearm bone); wrist; both sides of her skull; and the fourth vertebrae of her cervical spine. RP 636-37; 1291-95. She also had soft tissue injuries of subdural hematoma, a contusion of her brain stem, and contusion of her spinal cord. RP 636-37, 1298. The damage to her spinal cord affected T.W.'s ability to move her arms, and the brain stem injury affected her ability to breathe. RP 368, 377. The doctors also noticed that the fractures were in different stages of healing, indicating they had occurred at different times. RP 649, 695, 1296, 1311-13. T.W.'s subdural hematomas showed blood that was two to three weeks old and blood that was between six and seven days old. RP 680.

With the exception of defendant's expert witness, every doctor who examined T.W.'s injuries testified that they were the result of non-accidental trauma, specifically shaking with excessive force combined with a head impact. RP 299, 425, 667, 775, 972, 1139, 1326-27, 1332-33. T.W.'s subdural hematoma was caused by the permanent rupturing of the bridging veins across her brain. RP 1330-31. Dr. Newman described the force necessary to cause the fractures as:

[V]igorous, very severe shaking. What you're talking about is the tendon and tendons attach bone to bone, so you're talking about the tendon ripping off of the bone a little piece of the bone where the tendon attaches from the force of the arms or the legs flailing back and forth. And posterior rib fractures take significant force. It's equivalent to high-speed automobile accident to break the shoulder blade or the posterior ribs or squeezing, so it takes significant force.

RP 381. Also with the exception of the defense expert, every other doctor who examined T.W.'s injuries denied that she suffered from rickets, a vitamin D deficiency that affects bone density. RP 371, 378-79, 635, 699, 914, 937, 940, 972, 1318, 1322. Without treatment, T.W. could have died from her injuries and the doctors were surprised at how well she recovered. RP 296, 367-68, 377, 974, 1303, 1309.

The defense expert, Dr. Kathy Keller, is a pediatric radiologist from California. RP 814. She reviewed T.W.'s medical records, including x-rays, CT scans, and MRI images. RP 815-16. She testified that T.W.'s rib fractures were actually "pseudo fractures" caused by the muscles pulling a point of the rib in and out as T.W. breathed, or that they were broken during the trauma of a vaginal birth. RP 855, 857. She also testified that the subdural hematoma was related to the birthing trauma. RP 856. Finally, she stated that the birthing doctor's need to turn T.W. in the birthing canal to come out properly caused the fracture in her vertebrae. RP 862. All of the fractures occurred because, in her opinion, T.W. suffered from congenital rickets. RP 866-67. Yet Dr. Keller admitted she had never examined T.W., she had never treated a child with congenital rickets and that she did not review T.W.'s skull, brain, or spinal cord injuries. RP 879-80, 887. Dr. Keller also admitted that, if T.W. was not suffering from rickets, the only way she would have acquired her arm and leg fractures was through rough twisting and pulling. RP 900. Also without rickets, T.W.'s ribs could only have been fractured through severe

squeezing. RP 901. Finally, Dr. Keller agreed that, if T.W. did not have rickets, her injuries could result in death. RP 902.

The defense called Michelle and Daniel Cornwell to testify. RP 1436, 1444. They are a military couple who were friends with defendant and Ms. Wasageshik. RP 1437, 1447. The Cornwells would have defendant and his family over for barbeques every two weeks. RP 1437, 1447. Neither of the Cornwells ever saw defendant handle T.W. in an inappropriate manner. RP 1437, 1447. Mr. Cornwell admitted that he would not expect someone to beat their child in front of him. RP 1453.

Defendant testified on his own behalf. RP 1454. Defendant's testimony was essentially the same as his taped interview. Defendant testified that he was sleeping in bed and woke up to find T.W. on the floor. RP 1468. He admitted that an infant could not "catapult" off of a bed, and that was not what he meant. RP 1502. Defendant claimed he was scared when he saw how floppy T.W.'s arms were, which is why he "took action." RP 1514. Yet defendant did not take her to the doctor or the hospital. RP 1514. He asserted that the reason he did not inform the doctors immediately about T.W.'s fall was because he was in a state of shock. RP 1481. Defendant claimed that, after the interview with the detectives, he went home and decided to clean the apartment. RP 1487. Defendant said he threw away "things that were useless," including the blood-stained sleeper, the parenting book, beer bottles, and the half-full bottle of cognac. RP 1487, 1498. He explained that T.W.'s sleeper had

blood on it because, approximately a month prior, he had stuck his finger in T.W.'s mouth to see if she was hungry and she cut her mouth on his finger. RP 1488. He used the sleeper that was lying next to her to clean up the blood. RP 1489. Defendant claimed he hid the blood-stained sleeper and did not throw it away until the night T.W. was taken into protective custody. RP 1523-24. Finally, defendant claimed that Ms. Wasageshik had not related his comments to her correctly. RP 1528. Defendant denied making the statement that he was "fucked." RP 1529. He claimed he told Ms. Wasageshik that there was a possibility that he was going to be charged with child abuse and that he would be taken to jail. RP 1531.

C. ARGUMENT.

1. THE WARRANT TO SEARCH DEFENDANT'S APARTMENT WAS BASED ON PROBABLE CAUSE AS THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH THAT T.W. HAD BEEN ASSAULTED AND THERE WAS A NEXUS BETWEEN T.W.'S INJURIES AND THE RESIDENCE.

The issuance of a search warrant is reviewed for an abuse of discretion. *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). Great deference is given to the issuing judge's assessment of probable cause and any doubts are resolved in favor of the warrant's validity. *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994). The trial court's review is limited to the four corners of the affidavit supporting probable

cause. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

Although deference is given to the judge issuing the warrant, the trial court's assessment of probable cause is a legal conclusion reviewed de novo. *State v. Chamberlin*, 161 Wn.2d 30, 40-41, 162 P.3d 389 (2007).

The probable cause requirement cannot be met if based on nothing more than mere suspicion or personal belief that evidence of a crime will be found on the premises searched. *State v. Jackson*, 150 Wn.2d 251, 265, 76 P.3d 217 (2003).

Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). "Probable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched." *Thein*, 138 Wn.2d at 140, 977 P.2d 582 (internal quotations omitted).

Here, the affidavit in support of the issuance of the warrant set forth facts and circumstances sufficient to establish a reasonable inference that T.W. had been assaulted, that defendant had been the person who had assaulted her, and that evidence relating to the assault could be found in defendant's apartment.

T.W. was admitted to the hospital with several broken bones.  
Appendix A. Dr. Newman concluded that T.W.'s injuries were not

accidental, but inflicted. Appendix A. As T.W. was only two months old, she could not have fractured her own bones; it was reasonable to infer that she was assaulted.

Defendant and Ms. Wasageshik had been the only people taking care of T.W. since her birth. Appendix A. Defendant was home alone with T.W. when she allegedly fell out of the bed on September 12th, and when she had fallen off the couch when she was only three weeks old. Appendix A. Defendant displayed no emotion when discussing T.W.'s injuries. Appendix A. Defendant acknowledged that the extent of T.W.'s injuries did not comport with his explanation, but he insisted that they were caused by just the two falls. Appendix A. As defendant was the only person with T.W. when she was injured and his explanation was inadequate by his own admission, it was reasonable to infer that he caused T.W.'s injuries.

Defendant, Ms. Wasageshik, and T.W. resided at 11222 18<sup>th</sup> Avenue South, #H104, Tacoma, Washington. Appendix A. T.W. was injured at the apartment. Appendix A. The furniture T.W. allegedly fell from was still located in the apartment. Appendix A. The search warrant allowed detectives to take measurements of the height of the bed and couch, samples from the carpet and carpet pad from the bedroom and living room, and any documents to show who lived at the residence. Appendix A. Given defendant's explanation for T.W.'s injuries, the height of the furniture was relevant, as was the surface T.W. would have

landed on when she fell. As T.W.'s injuries were non-accidental and she acquired them while in the apartment with defendant, it was reasonable to infer that evidence of the crime could also be found within the apartment.

Because T.W. was home alone with defendant when she was injured, her injuries were not accidentally or self-inflicted, and defendant had no reasonable explanation for how she acquired them, the detectives had sufficient probable cause to obtain a warrant to search defendant's apartment for evidence relating to an assault.

2. THE COURT PROPERLY DENIED  
DEFENDANT'S MOTION TO SUPPRESS  
EVIDENCE OBTAINED FROM A DIAPER BAG  
THAT HAD BEEN ABANDONED IN T.W.'S  
HOSPITAL ROOM.

A trial court's findings of fact on a motion to suppress are reviewed under the substantial evidence standard. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *Id.* at 644. Unchallenged findings of fact are verities on appeal. *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003). When a finding of fact is improperly denominated as a conclusion of law, the reviewing court applies the standard applicable to findings of fact. *State v. Marcum*, 24 Wn. App. 441, 445, 601 P.2d 975 (1979).

The trial court's conclusions of law in an order pertaining to suppression of evidence is reviewed de novo. *State v. Johnson*, 128

Wn.2d 431, 443, 909 P.2d 293 (1996). Under the de novo standard, the trial court's conclusions of law must be supported by its findings of fact. *State v. Veltri*, 136 Wn. App. 818, 821, 150 P.3d 1178 (2007). Thus, when a defendant does not assign error to any of the findings of fact entered by the trial court, review "is limited to a de novo determination of whether the trial court derived proper conclusions of law from those findings." *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).

Credibility determinations are for the trier of fact and cannot be reviewed on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). An appellate court defers to the trier of fact on issues of credibility, conflicting evidence, and the persuasiveness of the evidence. *State v. E.J.Y.*, 113 Wn. App. 940, 952, 55 P.3D 673 (2002).

Defendant does not assign error to any of the trial court's findings of undisputed fact entered for the suppression hearing; therefore, all findings of fact are verities on appeal. See Appellant's Brief at 1; see also CP 350-367.<sup>4</sup> He does, however, assign error to the court's reasons for admissibility or inadmissibility of the evidence 3 and 4, which are both findings relating to the court's credibility determinations. As credibility determinations are solely the province of the fact finder, defendant's assignment of error is without merit.

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<sup>4</sup> A copy of the court's findings and conclusions on admissibility of evidence CrR 3.5 and 3.6 has been attached as Appendix B.

- a. The trial court properly found that diaper bag in the hospital room had been abandoned.

A warrantless search by the police is per se unreasonable unless it falls within one of the narrow exceptions to the warrant requirement. *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). The State bears the burden of proving that the warrantless search fits within one of these closely guarded exceptions. *State v. Smith*, 165 Wn.2d 511, 517, 199 P.3d 386 (2009) (citing *State v. Kinzy*, 141 Wn.2d 373, 384, 5 P.3d 668 (2000)). The police may not use an exception as pretext for an evidentiary search. *Smith*, at 517.

One of the exceptions to the warrant requirement is for voluntarily abandoned<sup>5</sup> property. *State v. Evans*, 159 Wn.2d 402, 407, 150 P.3d 105 (2007). A defendant's privacy interest in property may be abandoned voluntarily or involuntarily. *Id.* at 408. Voluntary abandonment is an ultimate fact or conclusion based generally upon a combination of act and intent. *Id.* (citing 1 Wayne R. LaFave, Search and Seizure § 2.6(b), at 574 (3d ed.1996)). "Intent may be inferred from words spoken, acts done, and other objective facts, and all the relevant circumstances at the time of the alleged abandonment should be considered." *Evans*, at 408 (citing *State*

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<sup>5</sup> Property will not be deemed voluntarily abandoned, and thus not subject to a warrantless search, if a person abandons it because of unlawful police conduct. *State v. Reynolds*, 144 Wn.2d 282, 288, 27 P.3d 200 (2001). In the present case, the record does not support a finding that the police acted unlawfully.

*v. Dugas*, 109 Wn. App. 592, 595, 36 P.3d 577 (2001)). The issue is not abandonment in the strict property right sense but, rather, “whether the defendant in leaving the property has relinquished her reasonable expectation of privacy so that the search and seizure is valid.” *Id.* In essence, what is abandoned is not necessarily the defendant’s property, but his reasonable expectation of privacy therein. *City of St. Paul v. Vaughn*, 306 Minn. 337, 237 N.W.2d 365, 371 (1975).

The status of the area searched is critical when one engages in an analysis of whether or not a privacy interest has been abandoned. *Evans*, at 409. That is because courts do not ordinarily find abandonment if the defendant had a privacy interest in the searched area. *See, e.g., Dugas*, 109 Wn. App. at 596, 36 P.3d 577 (holding defendant did not voluntarily abandon his jacket by placing it on the hood of his car after being arrested). The opposite generally holds true if the search is conducted in an area where the defendant does not have a privacy interest. *See, e.g., Reynolds*, 144 Wn.2d 282, 27 P.3d 200 (seizure of a jacket containing contraband found underneath vehicle stopped for traffic infraction was reasonable after defendant denied ownership); *State v. Young*, 86 Wn. App. 194, 935 P.2d 1372 (1997) (seizure of drugs thrown in bushes by defendant prior to his arrest was proper because it amounted to abandonment), *aff’d*, 135 Wn.2d 498, 957 P.2d 681 (1998).

The location of the item seized can effect whether a person has abandoned property. In *Evans*, the defendant consented to the search of

his truck. 159 Wn.2d at 405. Officers found a locked briefcase within the cab of the truck. *Id.* Evans denied ownership and refused permission to search the case. *Id.* at 405-06. Officers seized the case over Evans' objection and, pursuant to a warrant issued several days later, discovered materials consistent with the production of methamphetamine. *Id.* at 406. On appeal, the court determined that the evidence within the case should have been suppressed. *Id.* at 413. The court reiterated that article I, section 7 of the State constitution provides a privacy interest that exceeds that provided by the federal constitution. *Id.* at 412. The court held that under the Washington constitution, disclaiming ownership of an item that was located within an area in which a person has a privacy interest, is insufficient to show abandonment. *Id.* at 413.

A person does not have to disclaim ownership for a finding of voluntary abandonment. In *State v. Hepton*, 113 Wn. App 673, 677-78, 54 P.3d 233 (2002), *review denied*, 149 Wn.2d 1018, 72 P.3d 762 (2003), officers conducted a warrantless search of garbage bags left at an abandoned house next to the defendant's. Hepton argued that his use of the neighboring trash cans entitled him to a privacy interest in them. *Id.* at 678-79. The court held that the defendant did not have a privacy interest in garbage he had left at his neighbor's abandoned house because he could not reasonably expect to have a right to use the garbage can located next door. *Id.* at 680.

A defendant's behavior toward the item can help the court determine whether the property was abandoned. In *State v. Kealey*, 80 Wn. App. 162, 173-74, 907 P.2d 319 (1995), the court held that a purse, accidentally left in a department store was not abandoned, as evidenced by the fact that the defendant had returned within five minutes of leaving the bag and was frantic about losing it.

Defendant assigns error to the court's reasons for admissibility or inadmissibility of the evidence 16,<sup>6</sup> which states:

The court finds the search of the diaper bag at the hospital was lawful, as the diaper bag was abandoned when left at the hospital on the 19th of September, 2006.

CP 350-367. The record of the suppression hearing and the court's findings of fact support the court's conclusions that defendant had abandoned the diaper bag.

Here, neither defendant nor Ms. Wasageshik were forced out of the hospital, making them leave the diaper bag involuntarily. On September 19, 2006, defendant had an opportunity to say good-bye to T.W. and to retrieve items from her hospital room after his interview. RP 63, 73, 86. Defendant did not request to do either. RP 64, 86. He was not asked to leave the hospital until he began confronting Detective Shaviri. *See* CP 350-367 (Finding of fact 8, 9); RP 72. Ms. Wasageshik said good-bye to

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<sup>6</sup> Defendant also assigns error to the court's reasons for admissibility or inadmissibility of the evidence 15, yet he makes no argument in support of his assignment of error.

T.W. and she took several personal items from T.W.'s room, leaving behind the diaper bag. CP 350-367 (Finding of fact 11); RP 65, 88.

For over two weeks, the bag was left in T.W.'s hospital room. CP 350-367 (Finding of fact 14). The bag was accessible to anyone who entered T.W.'s room. CP 350-367 (Finding of fact 14). The bag was open and nurses were using it to store items they purchased for T.W. CP 350-367 (Finding of fact 14). Neither defendant nor Ms. Wasageshik attempted to retrieve the bag until Ms. Wasageshik called the hospital on October 2nd. CP 350-367 (Finding of fact 15). On October 2nd, Detectives Berg and Anderson was at the hospital visiting T.W. when the nurses informed her that T.W.'s diaper bag was still in her room and Ms. Wasageshik had called that day requesting to retrieve items from it. RP 66. The detectives documented the items in the bag and removed the property that belonged to the nurses. CP 350-367 (Finding of fact 15). Aside from the toys and clothes purchased by the nurses, the bag contained diapers, a bottle of Tylenol, a bottle, a thermometer, a changing pad, baby powder, and a daily report written by T.W.'s daycare provider. RP 67-68; Ex. 13.

In her oral ruling, the court reviewed the decision in *Evans*, 159 Wn.2d at 402, and specifically distinguished the facts in that case from the present case. RP 125. The court ultimately ruled that the diaper bag had been abandoned, not because it was merely left at the hospital, but because it was left at the hospital for three weeks, nurses were using it, and

defendant no longer had a reasonable expectation of privacy regarding the items within the bag. RP 125.

Unlike the defendant in *Kealey*, neither defendant nor Ms. Wasageshik rushed back to find the bag; neither of them appeared frantic to retrieve it. Neither of them put the hospital on notice for over two weeks that they wanted the bag back. In that time, the bag was open to anyone who might have come into T.W.'s hospital room, including doctors, nurses, police officers, other family members, foster parents, or anyone else who had business there. With nurses using the bag as storage, defendant cannot claim he exhibited any intent to keep the contents private.

Defendant cannot claim that he had any reasonable expectation of privacy in an item that had been left in a public hospital room for over two weeks with no attempts to retrieve it. The findings of fact entered by the trial court support the court's conclusion that the bag was abandoned.

- b. The officers' search of the bag was not unreasonable under the circumstances.

Even if an item is not abandoned, officers may still conduct a search without a warrant. "To establish that he had a reasonable expectation of privacy in the contents of a bag, a defendant must satisfy a two fold test: (1) Did he exhibit an actual (subjective) expectation of privacy by seeking to preserve something as private? *and* (2) [d]oes

society recognize that expectation as reasonable?” *Evans*, 159 Wn.2d at 409 (emphasis added). “Purses, briefcases, and luggage constitute traditional repositories of personal belongings protected under the Fourth Amendment.” *State v. Kealey*, 80 Wn. App. 162, 170, 907 P.2d 319 (1995) (citing *Arkansas v. Sanders*, 442 U.S. 753, 762, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979)).

In *Kealey*, 80 Wn. App. at 162, the defendant left her closed purse in a department store. A clerk took the purse into the back room and opened it. *Id.* at 165. She thought she smelled marijuana in the bag. *Id.* She removed a makeup bag and threw the purse into a corner of the room. *Id.* Five minutes later, defendant returned to the store, looking for her purse. *Id.* The clerk told defendant it was not left at the store and the defendant eventually left. *Id.* The following day, the assistant manager noticed the makeup bag on her desk. *Id.* at 165-66. She opened it, found marijuana, and thinking the items belonged to the clerk, called the police. *Id.* at 166. The clerk explained what had occurred the prior day and gave the purse to the officers. *Id.* Officers searched the purse for identification and, once it was found, set up a sting operation for defendant. *Id.* The trial court suppressed the evidence obtained through the warrantless search of Kealey’s purse. *Id.* at 166-67. On appeal, the court held that Kealey’s misplacement of the purse was not sufficient to overcome her expectation of privacy in it. *Id.* at 169-174. Yet the court overturned the trial court’s suppression ruling, finding that the officers’ duty to search for

identification justified the warrantless search. *Id.* at 174-75. The court also held that the “coexistence of investigatory and administrative motives does not invalidate the lawful search for identification.” *Id.* at 175.

In *State v. Carter*, 151 Wn.2d 118, 122, 85 P.3d 887 (2004), the defendant brought a machine gun to a gun class, put it on a table, and encouraged his students to handle it. Off-duty investigators for the Pierce County Prosecutor’s Office were among the students and, after the class was over, they seized the weapon. *Id.* at 122-24. The court held that Carter did not have a reasonable expectation of privacy in an object which has voluntarily been placed in open view of the public and which the public has been encouraged to handle. *Id.* at 126.

Defendant assigns error to the trial court’s reason for the admissibility or inadmissibility of the evidence 17, which states:

The court finds the defendant did not have a reasonable expectation of privacy in the diaper bag, as evidenced by several medical staff having access to and utilizing the diaper bag during the period from the 19th of September, 2006 through the 2nd of October, 2006.

CP 350-367. Even if the court finds that the bag was not abandoned, the findings of fact support the trial court’s conclusion that defendant had no reasonable expectation of privacy in the bag.

The bag was at the base of T.W.’s bed. RP 66, 89. It was open and had toys and clothes sitting on and within it. CP 350-367 (Finding of fact 14); RP 67, 89. The nurses had purchased the toys and clothes for

T.W., and were using the bag to store those items. CP 350-367 (Finding of fact 14); RP 67. The bag had been open to anyone who had entered T.W.'s room for two weeks. CP 350-367 (Finding of fact 14).

The detectives inventoried the bag before it was released from the hospital. CP (Finding of fact 15); RP 69. Detective Anderson's purpose in inventorying the bag was so she could establish a time frame of when certain items were in the bag, in case Ms. Wasageshik indicated later that something was missing. RP 69. Detective Berg also wanted to ensure that the nurses got their items back. RP 89-90.

Like the officers in *Kealey*, the detectives' search of the bag was reasonable under the circumstances. As the bag had been left for over two weeks in a public location, they had the duty to inventory the bag to ensure that Ms. Wasageshik and the nurses all received their property.

- c. If the court did err when it failed to suppress Ms. Maldonado's report, such error was harmless.

When trial court admits evidence that is a product of a warrantless search, the appellate court applies a harmless error analysis. *See, e.g., State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985); *State v. Garcia*, 140 Wn. App. 609, 627, 166 P.3d 848 (2007); *State v. Gocken*, 71 Wn. App. 267, 279 n. 10, 857 P.2d (1993). An error of constitutional magnitude is harmless if, beyond a reasonable doubt, the error did not contribute to the guilty verdict or that the untainted evidence is so

overwhelming it necessarily leads to guilt. *State v. Acosta*, 101 Wn.2d 612, 683 P.2d 1069 (1984).

Here, the only item seized from the bag was the report authored by Ms. Maldonado on September 14, 2006. Ex. 13<sup>7</sup>. The report indicates what time Ms. Maldonado changed T.W.'s diaper, when T.W. slept, and how much T.W. ate that day. Ex. 13. The report also indicated that Ms. Maldonado took T.W.'s temperature twice, what the temperature was both times, and that Ms. Maldonado gave T.W. Tylenol. Ex. 13.

Even if the trial court erred when it admitted the report, such error was harmless. The officers already knew of Ms. Maldonado and planned to interview her when they found the report in the diaper bag. RP 66. The report itself did not list any incriminating statements or lead the officers to any other evidence. Ex. 13. At trial, Ms. Maldonado had already testified from memory that T.W. had a fever and that she gave T.W. Tylenol per Ms. Wasageshik's instructions prior to reviewing the report she had written. RP 443-44. She refreshed her recollection using the report to testify to T.W.'s exact temperature. RP 448. Ms. Maldonado then testified that T.W. slept more than was usual for her and she also ate slower. RP 446-47. The exhibit was admitted at the close of Ms. Maldonado's testimony. RP 461. As the majority of the information contained within the report was before the jury through testimony prior to

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<sup>7</sup> A copy of the report has been attached as Appendix C.

its use or admission, the information was cumulative of properly admitted evidence and; therefore, was harmless beyond a reasonable doubt.

In addition, the State presented evidence from seven doctors who all opined that T.W.'s injuries were acquired as a result of child abuse or non-accidental trauma. RP 299, 425, 667, 775, 972, 1139, 1333. Defendant was the only person with T.W. when she was injured, his explanation for how she received those injuries was not reasonable, and he admitted that the force required to break a healthy baby's bones was excessive force to use against a two month old. Ex. 1; RP 1514-15, 1519. The jury deliberated approximately four and a half hours before returning guilty verdicts on both charges. RP 1626-1632. The admission of the report was harmless beyond a reasonable doubt because the State presented overwhelming untainted evidence to prove that defendant was guilty as charged.

3. THE STATE PRESENTED SUFFICIENT EVIDENCE FOR A REASONABLE FACT FINDER TO DETERMINE DEFENDANT COMMITTED THE CRIME OF ASSAULT OF A CHILD IN THE FIRST DEGREE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review

is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the

witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

*State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

Here defendant was convicted of two counts of assault of a child in the first degree. CP 232, 235. Under count I, the State was required to prove that defendant had engaged in a pattern or practice of assaulting a child, which resulted in bodily harm greater than transient physical pain or minor temporary marks. CP 201-231. Under count II, the State was required to prove that defendant recklessly inflicted great bodily harm on T.W. CP 201-231. The State presented sufficient evidence to support the jury's verdicts on both counts.

- a. There was sufficient evidence to prove a pattern or practice of assault.

To convict defendant of assault of a child in the first degree as charged in count I, the State had to prove beyond a reasonable doubt that:

- (1) That during the period between the 19th of July, 2006 and the 15th day of September, 2006, the defendant intentionally assaulted T.W. and caused substantial bodily harm;

(2) That the defendant was eighteen years of age or older and T.W. was under the age of thirteen;

(3) That the defendant had previously engaged in a pattern or practice of assaulting T.W. which had resulted in bodily harm that was greater than transient physical pain or minor temporary marks; and

(4) That the acts occurred in the State of Washington.

CP 201-231 (Jury instruction 12); RCW 9A.36.120(1)(b)(ii).

Washington courts have defined a “pattern” as “a regular, mainly unvarying way of acting or doing,” and a “practice” as “a frequent or usual action; habit; usage.” *State v. Madarash*, 116 Wn. App. 500, 514, 66 P.3d 682 (2003) (quoting *State v. Russell*, 69 Wn. App. 237, 247, 848 P.2d 743 (1993)).

Although no one directly witnessed defendant assaulting T.W., the circumstantial evidence in this case supports a conclusion that defendant assaulted T.W. on more than one occasion. T.W. was only two months old, and had only been in the care of her parents and Ms. Maldonado in that time. RP 201, 206. Neither defendant nor Ms. Wasageshik ever claimed that T.W. sustained her injuries while in either Ms. Wasageshik or Ms. Maldonado’s care. Ms. Wasageshik testified that defendant would get tense when T.W. would start “tantruming.” RP 216. While her testimony was generally hostile to the State, Ms. Wasageshik admitted that she would occasionally hear T.W. give a “high scream” when she was alone

with defendant. RP 220. When Ms. Wasageshik would come rushing in, defendant would tell her that T.W. was “tantruming” again. RP 220.

T.W. sustained numerous injuries, which doctors determined had happened at different times. Dr. Yeost testified that it is difficult to precisely date fractures, so it is common in the medical field to use ranges of dates. RP 632-33. T.W. sustained two fractures to her skull. RP 659, 700, 760, 1291. The fracture on the right side of her skull still exhibited swelling, causing Dr. Feldman to conclude it had occurred more recently than the fracture on the other side. RP 1299. T.W.’s fractured ribs showed various signs of healing, suggesting they occurred between two and four weeks prior to the x-rays. RP 1311. The CML’s in T.W.’s scapula and arm bones were dated as occurring within two weeks prior to the scans. RP 1314.

In addition, T.W. had indications of two different subdural hematomas as evidenced by their different colorings on an MRI. RP 663. The doctors concluded that the different colors indicated the presence of older bleeding in the same area as more recent bleeding. RP 411, 637-38, 663, 788, 1297-98; 1358.

The different ages of blood in T.W.’s skull and the different levels of healing in her injuries indicate that T.W.’s injuries related from two or more separate incidents. Given that T.W. was only two months old when she was admitted to the hospital, the various healing stages of her injuries suggest that she had been subjected to “a regular,” or “a frequent or usual

action” of abuse. The State presented sufficient evidence for a reasonable fact finder to conclude that defendant had engaged in a pattern or practice of assaulting T.W.

b. T.W.’s injuries reflected great bodily harm.

To convict defendant of assault of a child in the first degree as charged in count II, the State had to prove beyond a reasonable doubt that:

(1) That on or about the period between the 9th of September, 2006 and the 15th day of September, 2006, the defendant intentionally assaulted T.W. and recklessly inflicted great bodily harm;

(2) That the defendant was eighteen years of age or older and T.W. was under the age of thirteen; and

(3) That the acts occurred in the State of Washington.

CP 201-231 (Jury instruction 19); RCW 9A.36.120(1)(b)(i).

Great bodily harm is a “bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ[.]” RCW 9A.04.110(4)(c).

Here, Dr. Moore testified that T.W. was one of the “sickest children she has ever seen as an outpatient.” RP 287. T.W. was so sick she used the word “toxic” to describe her appearance: a word she uses in only the most extreme cases. RP 287. Dr. Moore was so concerned for T.W., that she called in the inpatient ward to come diagnose her immediately. RP 289.

Drs. Newman, Done, and Feldman all testified that T.W. could have died as a result of her spinal cord and brain stem injuries. RP 367-68, 974, 1303. Even Dr. Keller testified that injuries like T.W.'s, if left untreated could result in death. RP 902.

In addition, T.W.'s subdural hematoma was caused by the tearing of the bridging veins around her skull. RP 764. The bridging veins are the "outflow of the brain." RP 1331. Without those veins, the brain does not get the nutrients it needs. RP 1331. According to Drs. Joseph and Feldman, those veins will never be repaired. RP 765, 1331. Dr. Feldman also testified that the shaking action that severed T.W.'s bridging veins also affect the brain itself. RP 1329-30. A shaking action can cause different levels of the brain to move in different directions at different speeds, resulting in sheering forces within the brain itself. RP 1330. Finally, Dr. Feldman testified that two thirds of children who survive injuries like T.W.'s do not show impairment resulting from their injuries until they enter school and learning disabilities become more apparent. RP 1309.

Defendant claims that, because Dr. Moore did not suggest T.W. had to be taken to an emergency room, her life was clearly not in danger. *See* Appellant's Brief at 27-28. Defendant mischaracterizes the doctor's testimony. The question posed to the doctor was not whether or not T.W. should have been rushed to an emergency room by the parents instead of waiting for an appointment with her. The question she was asked was

upon seeing T.W., if she would have told the parents to take her to the emergency room or bring her to the clinic. RP 288. The doctor indicated that the emergency room was an acceptable treatment location for a child in T.W.'s condition. RP 288. She also stated that seeing a child as sick as T.W. at her clinic was appropriate because they had the right pediatric support. RP 288. Had Madigan lacked the appropriate support, T.W. would no doubt have been rushed to whatever hospital could have handled her life-threatening injuries.

Defendant would have this court believe that the jury "held great contempt for [defendant] and his alleged action on September 11th, and this caused them to overlook the necessary elements" of child abuse in the first degree. *See* Appellant's brief at 25. There was absolutely no evidence that the jury found defendant guilty on any reason except that evidence which was presented at the trial.

4. THE PROSECUTOR'S ARGUMENT FOR AN EXCEPTIONAL SENTENCE WAS PROPER WHERE THE JURY FOUND AN AGGRAVATING FACTOR BEYOND A REASONABLE DOUBT.

During a sentencing hearing, the court shall allow argument from the State, defense counsel, and the offender. RCW 9.94A.500(1). Under RCW 9.94A.537(6), if a jury, unanimously and beyond a reasonable doubt, finds one or more of the facts alleged by the State in support of an aggravated sentence, the court may sentence the offender for a term up to

the statutory maximum for the underlying crime. One aggravating factor that they jury may consider is that the defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance. RCW 9.94A.535(3)(b). “In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537.” RCW 9.94A.530(2).

A prosecutor is bound by a sentencing recommendation only when it has entered into a plea agreement. *See generally, In re Lord*, 152 Wn.2d 182, 94 P.3d 952 (2004); *State v. Sanchez*, 146 Wn.2d 339, 46 P.3d 774 (2002); *State v. Sledge*, 133 Wn.2d 828, 947 P.2d 1199 (1997). After a trial, the State may argue for sentence lengths based on offender scores, enhancements, and aggravating factors on any theory supported by law. *See, e.g., State v. Lewis*, 141 Wn. App. 367, 166 P.3d 786 (2007) (The State argued that the defendant should be sentenced under the Persistent Offender Accountability Act.); *State v. Wilson*, 136 Wn. App. 596, 150 P.3d 144 (2007) (The State argued that the defendant’s offenses were not the same criminal conduct.); *State v. Brown*, 128 Wn. App. 307, 116 P.3d 400 (2005) (The State argued that the defendant’s sentencing score should include out-of-state convictions.); *State v. Wilson*, 117 Wn. App. 1, 75 P.3d 573 (2003) (The State argued that the defendant’s criminal history justified the imposition of an exceptional sentence.); *State*

v. *Zatkovich*, 113 Wn. App. 70, 52 P.3d 36 (2002) (The State argued that the defendant's actions justified the imposition of an exceptional sentence). There is no authority for the theory that the State may not argue for an exceptional sentence based on a jury's finding of an aggravating factor following a trial.

Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992); *see also* RAP 10.3(a)(6) (providing that appellant's brief should contain "[t]he argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record").

Here, the jury found, beyond a reasonable doubt, that defendant knew or should have known "that T.W. was particularly vulnerable or incapable of resistance due to her extreme youth" for both counts. CP 234, 237. In his memorandum requesting a standard-range sentence, defendant conceded that the court had the authority to impose an exceptional sentence based on the aggravating factors found by the jury. CP 266-268. The State argued for an exceptional sentence based on the jury's finding of aggravating factors. *See* RP 1648-52. The court found, based on the jury's finding of aggravating factors, that it was authorized to impose an exceptional sentence outside of the standard range, and that

there were substantial and compelling reasons to justify an exceptional sentence. CP 368-371<sup>8</sup>. Specifically, the court found that:

T.W. was two months of age at the time of the assault; she was completely dependent on the defendant for warmth, food, hygiene and love; T.W. was completely defenseless at the time of the assaults; T.W. was incapable of escaping; T.W. was incapable of getting help. The defendant betrayed T.W.'s trust by inflicting multiple extraordinary injuries.

CP 368-371.

It should be noted that defendant has not challenged the jury's finding of aggravating factors in this case. Nor is he directly challenging the court's imposition of an exceptional sentence based on that finding. Rather, defendant relies entirely on *State v. Carreno-Moldenado*, 135 Wn. App. 77, 143 P.3d 343 (2006), for his contention that the prosecutor acted as a "proxy" for T.W. at sentencing by arguing for an exceptional sentence, thereby rendering his exceptional sentence invalid. *See* Appellant's brief at 30-31. Yet defendant failed to object to the prosecutor's argument at sentencing, he fails to direct this court to any specific portion of the State's argument that was improper, and, because he misreads the court's holding in *Carreno-Moldenado*, he cites no relevant authority which precludes the State from arguing for an exceptional sentence following a jury trial.

---

<sup>8</sup> A copy of the court's findings of fact and conclusions of law for exceptional sentence has been attached as Appendix D.

In *Carreno-Moldenado*, the State agreed to recommend a low-end, standard range sentence in exchange for the defendant's plea of guilty. 135 Wn. App. at 79-80. The defendant entered a plea and, at sentencing, the prosecutor gave a lengthy statement in which stated she was speaking on behalf of the victims and described how violent and heinous the defendant's acts were. *Id.* at 80-81. The victims were present in the courtroom, but they chose not to speak. *Id.* at 86. The court held that the prosecutor's statements undercut the terms of the plea agreement because they focused on potentially aggravating facts. *Id.* at 84. The court also held that, even if the prosecutor's statements were made on behalf of the victims, since the victims did not request such assistance, the remarks were unsolicited advocacy and contrary to the State's sentencing recommendation. *Id.* at 86-87.

Not only does *Carreno-Maldonado* not stand for defendant's proposition that the State acts improperly when it advocates for an exceptional sentence following a jury's finding of aggravating factors, but the facts in that case are entirely different. Here, defendant did not enter a plea. T.W. was not present and, even if she had been, at two years old would have been unable to make any statements to the court. The prosecutor limited her remarks to the aggravating factors found by the jury. Unlike the prosecutor in *Carreno-Maldonado*, the prosecutor's argument in the present case was not unsolicited advocacy that undercut a plea agreement.

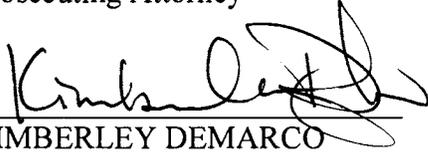
Because defendant does not cite to any relevant authority for his contention that the prosecutor acted improperly, this court should decline to review this issue. If the court does chose to hear the issue on the merits, defendant's argument still fails. The prosecutor's statements while arguing for an exceptional sentence were related to the particular vulnerability of T.W. *See* CP 286-340; RP 1649-52. This argument is entirely appropriate where the jury found the aggravating factor beyond a reasonable doubt.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this court to affirm defendant's convictions for two counts of assault of a child in the first degree.

DATED: JULY 16, 2009

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

  
KIMBERLEY DEMARCO  
Deputy Prosecuting Attorney  
WSB # 39218

COURT OF APPEALS  
DIVISION II

09 JUL 16 PM 4: 20

STATE OF WASHINGTON

BY ca  
DEPUTY

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LM delivery to the attorney of record for the appellant and appellant's attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7/16/16  
Date Signature

**APPENDIX "A"**

*Search Warrant, Filed 09/22/06*

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

IN COUNTY FILED  
COUNTY CLERK'S OFFICE  
A.M. SEP 22 2006 P.M.  
PIERCE COUNTY, WASHINGTON  
KEVIN STOKK, County Clerk  
BY: [Signature] DEPUTY

(Evidence Addendum)

STATE OF WASHINGTON )  
No. \_\_\_\_\_ )  
County of Pierce )

) ss. 06-1 50779-9  
)

COMES NOW, Detective Ray Shaviri #131/92-031, being duly sworn, under oath, deposes and says:  
That, between July 19th, 2006, and September 15<sup>th</sup>, 2006 in Pierce County Washington, felony to-wit: Assault of a child in the first degree a violation of R.C.W 9A.36 was committed by the act, procurement, or omission of another, and the following evidence is material to the prosecution of the above named felony, to-wit;

- 1) Documents showing dominion and control.
- 2) Measurements depicting the width of the bed in the master bedroom, the height of the bed mattress from the floor.
- 3) Measurements depicting the height of the black leather couch and love seat from the seat cushion to the floor and the width from the back rest to the front of the cushion. The couch and love seat are in the living room of the residence.
- 4) Interior and exterior photographs of the residence located at 11222 18<sup>th</sup> Avenue South #H104 in Tacoma, Washington.
- 5) Carpet and carpet pad sample from the master bedroom and living room.

Addendum to seize below listed evidence

- 6) A pink and white in color, infant sleeper clothing found by Det.Sgt. Teresa Berg in the garbage can in the apartment kitchen.

The above material is necessary to the investigation and or prosecution of the above described felony for the following reasons:

- 1) To obtain evidence of the above described felony.
- 2) To obtain the height and width of the bed the child fell from.

- 3) To obtain the height and width of the couch the child fell from.
- 4) To document the condition of the home.
- 5) To demonstrate who lives in the home and is in possession of the evidence.

### **PROBABLE CAUSE**

On 09/19/06 at about 1030 hours, Det. Sgt. Berg called me over the phone and informed me of a two month old child that was admitted into Madigan Army Hospital with injuries that appeared to be non accidental.

Det. Lynelle Kern, Det. Sgt. Berg and I responded to the hospital to investigate the case. While at the hospital we met CPS case worker Heather McLellan and Don Krager who is the family services advocate assigned to Ft. Lewis. We were all briefed by Dr. Robert J. Newman about the baby's injuries.

Dr. Newman told us that the two month old victim, Tehya Wasageshik, was admitted to the hospital on 09/15/06. Since then, X-rays taken of Tehya had determined that she had multiple rib fractures that had healed, a right humoral fracture and a partial skull fracture. Dr. Newman stated he had made both parents aware of the injuries and had also told them that the injuries were inflicted and not accidental.

I introduced myself to Tehya's parents, William Wasageshik and his wife Letitia Wasageshik who were with Tehya in her hospital room, and asked if I could speak to them individually. Both William and Letitia agreed to speak with me and William said he wanted to talk to us first. Det. Kern and I then spoke to William in a family room at the hospital located on the same floor of Tehya's room. I asked William if he would allow us to tape his statement to which he agreed.

William told us that he and his wife Letitia are both active duty Military and that they reside off of the military base at 11222 18<sup>th</sup> Avenue South in Parkland. He said Tehya was their only child and was born on July 19<sup>th</sup> 2006. Since Tehya was born, Letitia had stayed home on leave for the first six weeks, with William also staying home with Tehya and Letitia for the first two weeks after the birth. William said his work schedule was Monday through Friday and his hours are generally 0900 to 1700 with physical training at 0600.

William said Tehya was a very easy baby to watch since birth. He said she was fed on a schedule and that most times she woke up just once in the middle of the night. William said he noticed a change in Tehya last Tuesday which was 09/12/06. He said Tehya had a different cry which he described as high pitched and that her arms seemed to be unresponsive. I asked William if Tehya had ever been dropped and he said she fell off his

bed. William said the accident occurred on Tuesday 09/12 at about 0800 hours while he was still in bed with Tehya. He said Letita was at work and he had the day off. William said he was lying in the middle of his queen size bed with Tehya sleeping next to his right arm. I asked William give me an approximate distance between where Tehya was laying to the edge of the bed on her side. William said it was about his arms length. William said he must have fallen asleep and woke up to Tehya on the floor. He said Tehya jerks her neck which caused her to "catapult" off the bed on to the floor. I asked William if he thought it was possible for a two month old baby to roll off the bed on her own or as he said catapult off the bed. He said that was the only explanation he had for her injuries. I asked William if the child had ever had another accident and he said she had fallen off the couch when she was about 3 weeks old. William said he was in the kitchen cooking dinner and had placed 3 week old Tehya in a seated position on the couch in the area where the arm rest meets the back rest of the couch. He said Letita was also home at the time. William said Tehya must have jerked her head back and forth causing her to roll off the couch on the floor. He said he ran to pick Tehya up and his wife also came to her rescue. William told us that Letitia asked what had happened while he held Tehya to comfort her. William said he did not recall the actual sequence of events. He did not recall what he was cooking in the kitchen, where exactly his wife was, why his wife wasn't holding the baby and why the child was left unattended on the couch in his living room.

William said he and Letita were the only ones watching Tehya since her birth and he insisted that all of her injuries were caused by the two falls. When pressed about the extent of injuries and the impossibility of them being caused in that manner, William acknowledged the fact but offered no other explanation.

Next we spoke to Letita. She agreed to give us taped interview. Letita said the only two incidents that she knew of Tehya getting injured were when she was being watched by William. She said William called her last Tuesday and told her about the change in Tehya's condition. At approximately 1830 hours when Letita returned to the residence from work, she said William told her that Tehya had fallen off the bed while in his care. Letita said she thought that Tehya had fallen off the bed at about noon. (William told us she fell off the bed at about 0800)

Letita said Tehya first fell off the couch was when she was about 3 weeks old. Letita said she was at the store when the accident occurred. She said several hours after returning home William told her that he had placed Tehya on the couch and she had rolled off the couch to the ground. Letita said she was very concerned and immediately checked Tehya for bruises. I asked Letita to explain that and she said she took off all of Tehya's clothes and checked her entire body for bruising. I asked her why she thought it was necessary to check the child's entire body. Letita looked down and answered that she just wanted to make sure her baby was okay. I also asked Letita why William would tell us that she was home when Tehya fell off the couch. Letita started crying and said she didn't know but she was certain she wasn't home. She said she just wanted to ensure the baby wasn't bruised after the fall. She said when they had their days off together William hardly ever held the child. The child cried when William held her, but rarely cried when she held her. She said William told her that all the injuries to Tehya were caused by the two falls. Letita became very distraught during the interview and vomited at one point.

Additionally, Letita told Det. Kern and I that Tehya had never rolled off of anything or had any accidents when she was with her mother, and that the incidents only occurred while William was watching her.

Letita said they still own the same bedroom furniture and couch that Tehya allegedly fallen from. She described the couch as a black leather couch in the living room and their bed as one with a metal frame and the mattresses about 3 feet off the floor. Letita cried and displayed great emotion throughout the interview. William on the other hand displayed no emotion.

We told both Letita and William that Tehya was being placed into protective custody.

#### Probable cause for the Addendum

On 09/20/06 at about 0915 hours, I applied for and was granted a Superior Court Search Warrant for William and Letita's residence at 11222 18<sup>th</sup> Avenue South #H104 in Tacoma, Washington. During a search of the residence, Det. Berg found in plain view, a pink and white in color infant sleeper clothing in the garbage can located in the kitchen. The sleeper had what appeared to be blood stains on the front of it. I called Superior Court Judge Fredrick Fleming over the phone and explained the find to him. He told me that the mentioned infant sleeper clothing could be included in the items seized as a result of the search warrant service.

#### Property to be Searched

1. A light brown colored apartment with white trim addressed as 11222 18<sup>th</sup> Avenue South #H 104 in Tacoma, Washington.

#### Affiant's Training and Experience and Training and Experience

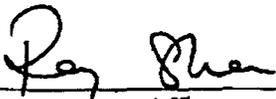
Your affiant has been a Commissioned Pierce County Deputy Sheriff since November of 1992. I graduated from the Washington State Basic Law Enforcement Academy and since June of 2001 been serving at the rank of Detective assigned to the Pierce County Sheriff's Sexual Assault Unit. I have written and served dozens of search warrants both as a Deputy assigned to the Special Investigations Unit and a Detective in this current assignment. I have received certified training sponsored by the Department of Juvenile Justice in Child Sexual Abuse Investigations, Responding to Missing and Abducted Children and Child Fatality Investigations. I have also received training sponsored by the Washington State Criminal Justice Training Commission in Child Homicide Investigations, Child Interviewing Techniques, Basic Homicide Investigations, Narcotics Investigations and Surveillance techniques. I have attended the Children's Justice Seminars in Washington State and in Dallas Texas.

I am a cross-designated United States Customs Officer through the Blue Lightning Program. In August of 2000, the Federal Bureau of Investigation sponsored your affiant and I graduated from their undercover and covert operations certification course in

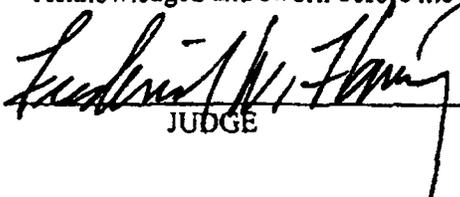
Quantico, Virginia. Based on my training and experience, I recognize the above listed items as being evidence of the above listed violation.

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It is important to the criminal prosecution of this case to show the height and width of the bed and couch the child fell from. The requested search is to establish that the injuries sustained by the child were not accidental but in fact inflicted the described locations and to further attempt to establish who had dominion and control over this material.

  
\_\_\_\_\_  
Affiant

Acknowledged and sworn before me on this 22<sup>nd</sup> of SEPT., 2006

  
\_\_\_\_\_  
JUDGE

IN COUNTY CLERK'S OFFICE

FILED  
A.M. SEP 22 2006 P.M.

PIERCE COUNTY, WASHINGTON  
BY: [Signature] County Clerk  
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE  
SEARCH WARRANT  
(EVIDENCE ADDENDUM)

STATE OF WASHINGTON )

SS

NO.

COUNTY OF PIERCE )

06-1 50779-9

THE STATE OF WASHINGTON TO THE SHERIFF OR ANY PEACE  
OFFICER OF SAID COUNTY:

WHERE AS, Det. Ray Shaviri #131/92-031 has this day made complaint on oath to the undersigned one of the judges of the above entitled court in and for said county that that between July19, 2006, and September 15<sup>th</sup>, 2006 in Pierce County, Washington, felony to-wit: Assault of a Child in the first degree, a violation of R.C.W 9A.36 was committed by the act, procurement, or omission of another, and the following evidence is material to the prosecution of the above named felony, to-wit;

- 1) Documents showing dominion and control.
- 2) Measurements depicting the width of the bed in the master bedroom, the height of the bed mattress from the floor.
- 3) Measurements depicting the height of the black leather couch and love seat from the seat cushion to the floor and the width from the back rest to the front of the cushion. The couch and love seat are in the living room of the residence.
- 4) Interior and exterior photographs of the residence located at 11222 18<sup>th</sup> Avenue South #H104 in Tacoma, Washington.
- 5) Carpet and carpet pad sample from the master bedroom.

ADDENDUM

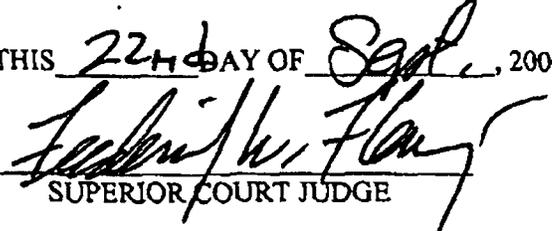
6) A pink and white in color, infant sleeper clothing found by Det.Sgt. Teresa Berg in the garbage can in the apartment kitchen.

NOW, THEREFORE, in the name of the State of Washington, you are commanded that within ten days from this date, with the necessary and proper assistance, you enter into and/or search the said house, person, place or thing; to-wit:

A light brown colored apartment addressed as 11222 18<sup>th</sup> Avenue South #H 104 in Tacoma, Washington.

And then and there diligently search for said evidence and if same, or evidence material to the investigation or prosecution of said felony or any part thereof, be found on such search bring the same forthwith before me, to be disposed of according to law. A copy of this warrant shall be served upon the person or persons found in or on said house or place and if no person is found in or on said house or place, a copy of this warrant shall be posted upon any conspicuous place in or on said house, place or thing, and a copy of this warrant and inventory shall be returned to the undersigned Judge or his agent promptly after execution.

GIVEN UNDER MY HAND THIS 22<sup>nd</sup> DAY OF Sept., 2006.

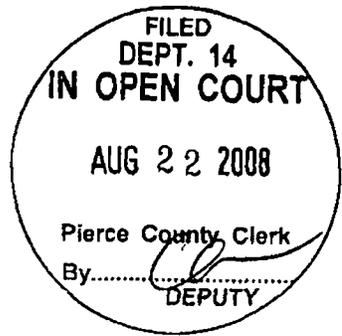
  
SUPERIOR COURT JUDGE

## **APPENDIX “B”**

*Findings and Conclusions on Admissibility of Evidence  
CrR 3.5 and 3.6*



06-1-04487-0 30393768 FNFCL 08-25-08



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 06-1-04487-0

vs.

WILLIAM FRANCIS WASAGESHIK, V,

FINDINGS AND CONCLUSIONS ON  
ADMISSIBILITY OF EVIDENCE CrR  
3.5 and 3.6

Defendant.

THIS MATTER having come on before the Honorable Susan K. Serko on the 14th day of April, 2008, and the court having rendered an oral ruling thereon, the court herewith makes the following Findings and Conclusions as required by CrR 3.5 and 3.6.

THE UNDISPUTED FACTS

1. On the 19<sup>th</sup> of September, 2006 at Madigan Medical Center, Pierce County Sheriff Detective Sergeant Teresa Berg, Detective Lynelle Kern (Anderson) and Detective Ray Shaviri contacted the defendant and his wife Letitia Wasageshik regarding their daughter T.W., who had been diagnosed by medical personnel as being a victim of non-accidental trauma. The detectives contacted the family in T.W.'s hospital room and requested to speak with both parents in order to gather some information regarding how T.W.'s injuries occurred. The defendant volunteered to speak with the detectives first.
2. Det. Ray Shaviri, Det. Kern and the defendant gathered in a hospital "family room" located on the same floor as T.W.'s hospital room. The "family room" contained a couch and a few

06-1-04487-0

1  
2 chairs. At approximately 1332 hours the detectives began a taped interview of the defendant.

3 The interview was completed at approximately 1423 hours.

- 4  
5 3. The purpose of the interview was to gain information regarding how T.W. was injured.
- 6  
7 4. The defendant was not advised of his Miranda Warnings at anytime during the interview.
- 8  
9 5. During the interview the defendant was not placed under arrest, put in handcuffs, or  
10 threatened by the detectives. The door of the "family room" was never locked during the  
11 interview.
- 12  
13 6. The defendant was free to end the interview at any time.
- 14  
15 7. Following the interview, Det. Shaviri left the "family room" and spoke with Det. Sgt. Berg  
16 in the hospital hallway.
- 17  
18 8. Det. Kern remained in the "family room" when the defendant left the room. The defendant  
19 approached Det. Shaviri. At the end of the interview, Det. Kern observed the defendant  
20 clinching his fist, breathing heavily, and he appeared very rigid and agitated. When the  
21 defendant left the room, Det. Kern heard the defendant tell Det. Shaviri, "[He] didn't know  
22 what he was talking about." The defendant demanded to know if Det. Shaviri was calling  
23 him "a liar."
- 24  
25 9. The defendant was subsequently informed he could leave the hospital. He was not placed  
26 under arrest at that time.
- 27  
28 10. The detectives proceeded to interview Letitia Wasageshik at the hospital. Following Letitia's  
interview she was informed that T.W. was going to be taken into protective custody.
11. Letitia was given the opportunity to say good-bye to T.W. and remove any items from  
T.W.'s hospital room. Det. Sgt. Berg and Det. Kern observed Letitia remove several personal  
items from the room. Letitia left behind a diaper bag.

06-1-04487-0

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12. On the 20<sup>th</sup> of September, 2006 Pierce County Sheriff Det. Ray Shaviri obtained a Superior Court Search Warrant permitting for the search of 11222 18<sup>th</sup> Avenue South, #H104 in Tacoma, Washington. The search warrant allowed law enforcement to search the defendant's residence for documents showing dominion and control, measurements depicting the width of the bed in the master bedroom, the height of the bed mattress from the floor, measurements of the height of the black leather couch and love seat in the living room of the residence; interior and exterior photographs of the residence and carpet and carpet pad samples from the master bedroom. See Attachment "A".
13. After obtaining the search warrant, on the 20<sup>th</sup> of September, 2006 law enforcement searched the defendant's residence. While at the residence, Det. Sgt. Teresa Berg observed in plain view a pink and white infant sleeper in the garbage can located in the kitchen area of the residence. The sleeper appeared to have bloodstains on it. Detective Shaviri telephoned Superior Court Judge Fredrick Fleming explaining the situation and requested an addendum to the warrant allowing for the seizure of the sleeper. Judge Fleming granted the addendum. The sleeper was subsequently taken into evidence.
14. On the 2<sup>nd</sup> of October, 2006 Det. Sgt. Berg and Det. Kern returned to Madigan to visit T.W. While in T.W.'s hospital room, they observed the diaper bag that Letitia left behind. The zipper of the bag was open and the nurses had been using the bag to store items that had been purchased by medical staff for T.W., including toys and clothes. From the 19<sup>th</sup> of September, 2006 through the 2<sup>nd</sup> of October, 2006 the diaper bag had been accessible by all who entered T.W.'s room.
15. On the 2<sup>nd</sup> of October, 2006 Letitia called the hospital and requested to retrieve the diaper bag. The detectives were made aware of her request and proceeded to document the items

06-1-04487-0

1  
2 that were in the bag. They also removed the items that medical personnel had purchased for  
3 T.W. The detectives discovered an "Infant Daily Report", authored by Julissa Maldonado,  
4 T.W.'s day care provider. The report documented T.W.'s feeding amounts on the 14<sup>th</sup> of  
5 September, 2006. The detectives took the Infant Daily Report into evidence.  
6

7 16. At the 3.5 and 3.6 hearing the defendant waived his right to have Det. Shaviri testify at the  
8 suppression hearings.

9 **THE DISPUTED FACTS**

10 1. There are no disputed facts.

11 **REASONS FOR ADMISSIBILITY OR INADMISSIBILITY OF THE EVIDENCE**

- 12 1. The court finds that it has personal and subject matter jurisdiction over this defendant and  
13 this case.  
14  
15 2. The court finds that all relevant events occurred in Pierce County in the State of Washington.  
16  
17 3. The court finds that Pierce County Sheriff Det. Sgt. Teresa Berg's testimony at the  
18 suppression hearing was credible.  
19  
20 4. The court finds that Pierce County Sheriff Det. Lynelle Kern's (Anderson) testimony at the  
21 suppression hearing was credible.  
22  
23 5. The court finds the defendant knowingly, voluntarily and intelligently waived the right to  
24 have Pierce County Sheriff Det. Ray Shaviri testify at the suppression hearing.  
25  
26 6. The court finds when the defendant was interviewed by detectives at the hospital on the 19<sup>th</sup>  
27 of September, 2006 the defendant was not placed under arrest at anytime during the contact.  
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29 7. The court finds during the interview the detectives did not engage in any conduct that would  
imply the defendant was in custody.

06-1-04487-0

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8. The court finds that during the interview, the defendant was free to end the interview at anytime and at no time did he request to end the interview.
  9. The court finds the tone of the interview was pleasant and voluntary.
  10. The court finds the defendant was clearly questioned by the detectives, however, he was not placed in custody and a reasonable person in the defendant's position would not believe his freedom of action was curtailed to the same extent as a formal arrest. Therefore, because the defendant was not subjected to a custodial interrogation, Miranda Warnings were not required.
  11. The court finds the defendant's statements to Det. Shaviri following the interview were non-custodial.
  12. The court finds all statements made by the defendant on the 19<sup>th</sup> of September, 2006 are admissible.
  13. The court finds there was a sufficient basis to issue the warrant and the addendum to the warrant. The detectives contacted the medical staff at Madigan and learned two month old victim, T.W. had multiple healed rib fractures, a right humoral fracture and a skull fracture. She was diagnosed as being the victim of non-accidental trauma. The detectives contacted T.W.'s parents, the defendant and Letitia Wasageshik. During the voluntary interview of the defendant he explained T.W.'s injuries were caused by a fall from the master bed onto the carpeted floor and a fall from the couch in the living room. Based on the interviews of Letitia and the defendant, those furniture items were still in the residence.
  14. The court finds there is a sufficient nexus between the defendant's residence and the crime of Assault of a Child in the First Degree against T.W. When admitted to the hospital, T.W.

06-1-04487-0

1 was 58 days old. During that short time, she had only resided at the listed address.

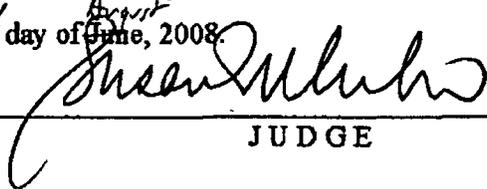
2 Furthermore, the defendant and Letitia were the primary caregivers for T.W.

3  
4 15. The court finds while law enforcement was serving the warrant on the defendant's residence  
5 they were lawfully in the residence. While in serving the warrant, Det. Sgt. Berg observed in  
6 plain view the pink and white sleeper in the trash can at the residence. The detective lawfully  
7 seized the sleeper following the addendum to the warrant.  
8

9 16. The court finds the search of the diaper bag at the hospital was lawful, as the diaper bag was  
10 abandoned when left at the hospital on the 19<sup>th</sup> of September, 2006.

11 17. The court finds the defendant did not have a reasonable expectation of privacy in the diaper  
12 bag, as evidence by several medical staff having access to and utilizing the diaper bag during  
13 the period from the 19<sup>th</sup> of September, 2006 through the 2<sup>nd</sup> of October, 2006.

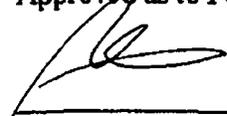
14  
15 DONE IN OPEN COURT this <sup>August</sup> 22<sup>nd</sup> day of ~~June~~ August, 2008

16   
17 \_\_\_\_\_  
18 JUDGE

19 Presented by:

20   
21 \_\_\_\_\_  
22 LORI KOOIMAN  
23 Deputy Prosecuting Attorney  
24 WSB # 30370

25 Approved as to Form:

26   
27 \_\_\_\_\_  
28 BRETT A. PURTZER  
Attorney for Defendant  
WSB # 17283

lak

FILED  
DEPT. 14  
IN OPEN COURT  
1 AUG 22 2008  
Pierce County Clerk  
By:   
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

FILED  
IN COUNTY CLERK'S OFFICE

(Evidence)

STATE OF WASHINGTON )  
No. \_\_\_\_\_ )

County of Pierce )

) ss.

A.M. SEP 22 2006 P.M.  
PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
BY AMJ DEPUTY

06-1 50779-9

COMES NOW, Detective Ray Shaviri #131/92-031, being duly sworn, under oath, deposes and says:

That, between July 19th, 2006, and September 15<sup>th</sup>, 2006 in Pierce County Washington, felony to-wit: Assault of a child in the first degree a violation of R.C.W 9A.36 was committed by the act, procurement, or omission of another, and the following evidence is material to the prosecution of the above named felony, to-wit;

- 1) Documents showing dominion and control.
- 2) Measurements depicting the width of the bed in the master bedroom, the height of the bed mattress from the floor.
- 3) Measurements depicting the height of the black leather couch and love seat from the seat cushion to the floor and the width from the back rest to the front of the cushion. The couch and love seat are in the living room of the residence.
- 4) Interior and exterior photographs of the residence located at 11222 18<sup>th</sup> Avenue South #H104 in Tacoma, Washington.
- 5) Carpet and carpet pad sample from the master bedroom and living room.

The above material is necessary to the investigation and or prosecution of the above described felony for the following reasons:

- 1) To obtain evidence of the above described felony.
- 2) To obtain the height and width of the bed the child fell from.
- 3) To obtain the height and width of the couch the child fell from.
- 4) To document the condition of the home.
- 5) To demonstrate who lives in the home and is in possession of the evidence.

---

PROBABLE CAUSE

On 09/19/06 at about 1030 hours, Det. Sgt. Berg called me over the phone and informed me of a two month old child that was admitted into Madigan Army Hospital with injuries that appeared to be non accidental.

Det. Lynelle Kern, Det. Sgt. Berg and I responded to the hospital to investigate the case. While at the hospital we met CPS case worker Heather McLellan and Don Krager who is the family services advocate assigned to Ft. Lewis. We were all briefed by Dr. Robert J. Newman about the baby's injuries.

Dr. Newman told us that the two month old victim, Tehya Wasageshik, was admitted to the hospital on 09/15/06. Since then, X-rays taken of Tehya had determined that she had multiple rib fractures that had healed, a right humoral fracture and a partial skull fracture. Dr. Newman stated he had made both parents aware of the injuries and had also told them that the injuries were inflicted and not accidental.

I introduced myself to Tehya's parents, William Wasageshik and his wife Letitia Wasageshik who were with Tehya in her hospital room, and asked if I could speak to them individually. Both William and Letitia agreed to speak with me and William said he wanted to talk to us first. Det. Kern and I then spoke to William in a family room at the hospital located on the same floor of Tehya's room. I asked William if he would allow us to tape his statement to which he agreed.

William told us that he and his wife Letitia are both active duty Military and that they reside off of the military base at 11222 18<sup>th</sup> Avenue South in Parkland. He said Tehya was their only child and was born on July 19<sup>th</sup> 2006. Since Tehya was born, Letitia had stayed home on leave for the first six weeks, with William also staying home with Tehya and Letitia for the first two weeks after the birth. William said his work schedule was Monday through Friday and his hours are generally 0900 to 1700 with physical training at 0600.

William said Tehya was a very easy baby to watch since birth. He said she was fed on a schedule and that most times she woke up just once in the middle of the night. William said he noticed a change in Tehya last Tuesday which was 09/12/06. He said Tehya had a different cry which he described as high pitched and that her arms seemed to be unresponsive. I asked William if Tehya had ever been dropped and he said she fell off his bed. William said the accident occurred on Tuesday 09/12 at about 0800 hours while he was still in bed with Tehya. He said Letitia was at work and he had the day off. William said he was lying in the middle of his queen size bed with Tehya sleeping next to his right arm. I asked William give me an approximate distance between where Tehya was laying to the edge of the bed on her side. William said it was about his arms length. William said he must have fallen asleep and woke up to Tehya on the floor. He said Tehya jerks her neck which caused her to "catapult" off the bed on to the floor. I asked William if he

thought it was possible for a two month old baby to roll off the bed on her own or as he said catapult off the bed. He said that was the only explanation he had for her injuries. ~~I asked William if the child had ever had another accident and he said she had fallen off the couch when she was about 3 weeks old.~~ William said he was in the kitchen cooking dinner and had placed 3 week old Tehya in a seated position on the couch in the area where the arm rest meets the back rest of the couch. He said Letita was also home at the time. William said Tehya must have jerked her head back and forth causing her to roll off the couch on the floor. He said he ran to pick Tehya up and his wife also came to her rescue. William told us that Letitia asked what had happened while he held Tehya to comfort her. William said he did not recall the actual sequence of events. He did not recall what he was cooking in the kitchen, where exactly his wife was, why his wife wasn't holding the baby and why the child was left unattended on the couch in his living room.

William said he and Letita were the only ones watching Tehya since her birth and he insisted that all of her injuries were caused by the two falls. When pressed about the extent of injuries and the impossibility of them being caused in that manner, William acknowledged the fact but offered no other explanation.

Next we spoke to Letita. She agreed to give us taped interview. Letita said the only two incidents that she knew of Tehya getting injured were when she was being watched by William. She said William called her last Tuesday and told her about the change in Tehya's condition. At approximately 1830 hours when Letita returned to the residence from work, she said William told her that Tehya had fallen off the bed while in his care. Letita said she thought that Tehya had fallen off the bed at about noon. (William told us she fell off the bed at about 0800)

Letita said Tehya first fell off the couch was when she was about 3 weeks old. Letita said she was at the store when the accident occurred. She said several hours after returning home William told her that he had placed Tehya on the couch and she had rolled off the couch to the ground. Letita said she was very concerned and immediately checked Tehya for bruises. I asked Letita to explain that and she said she took off all of Tehya's clothes and checked her entire body for bruising. I asked her why she thought it was necessary to check the child's entire body. Letita looked down and answered that she just wanted to make sure her baby was okay. I also asked Letita why William would tell us that she was home when Tehya fell off the couch. Letita started crying and said she didn't know but she was certain she wasn't home. She said she just wanted to ensure the baby wasn't bruised after the fall. She said when they had their days off together William hardly ever held the child. The child cried when William held her, but rarely cried when she held her. She said William told her that all the injuries to Tehya were caused by the two falls. Letita became very distraught during the interview and vomited at one point. Additionally, Letita told Det. Kern and I that Tehya had never rolled off of anything or had any accidents when she was with her mother, and that the incidents only occurred while William was watching her.

Letita said they still own the same bedroom furniture and couch that Tehya allegedly fallen from. She described the couch as a black leather couch in the living room and their bed as one with a metal frame and the mattresses about 3 feet off the floor.

Letita cried and displayed great emotion throughout the interview. William on the other hand displayed no emotion.

We told both Letita and William that Tehya was being placed into protective custody.

**Property to be Searched**

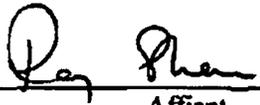
1. A light brown colored apartment with white trim addressed as 11222 18<sup>th</sup> Avenue South #H 104 in Tacoma, Washington.

**Affiants' Training and Experience and Training and Experience**

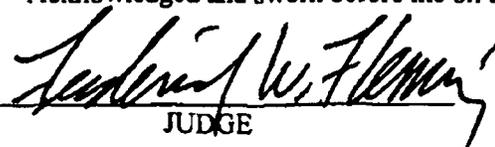
Your affiant has been a Commissioned Pierce County Deputy Sheriff since November of 1992. I graduated from the Washington State Basic Law Enforcement Academy and since June of 2001 been serving at the rank of Detective assigned to the Pierce County Sheriff's Sexual Assault Unit. I have written and served dozens of search warrants both as a Deputy assigned to the Special Investigations Unit and a Detective in this current assignment. I have received certified training sponsored by the Department of Juvenile Justice in Child Sexual Abuse Investigations, Responding to Missing and Abducted Children and Child Fatality Investigations. I have also received training sponsored by the Washington State Criminal Justice Training Commission in Child Homicide Investigations, Child Interviewing Techniques, Basic Homicide Investigations, Narcotics Investigations and Surveillance techniques. I have attended the Children's Justice Seminars in Washington State and in Dallas Texas.

I am a cross-designated United States Customs Officer through the Blue Lightning Program. In August of 2000, the Federal Bureau of Investigation sponsored your affiant and I graduated from their undercover and covert operations certification course in Quantico, Virginia. Based on my training and experience, I recognize the above listed items as being evidence of the above listed violation.

It is important to the criminal prosecution of this case to show the height and width of the bed and couch the child fell from. The requested search is to establish that the injuries sustained by the child were not accidental but in fact inflicted the described locations and to further attempt to establish who had dominion and control over this material.

  
\_\_\_\_\_  
Affiant

Acknowledged and sworn before me on this 20<sup>th</sup> of Sept, 2006

  
\_\_\_\_\_  
JUDGE



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

IN COUNTY FILED  
COUNTY CLERK'S OFFICE  
A.M. SEP 22 2006 P.M.  
PIERCE COUNTY, WASHINGTON  
KEVIN STOKR, County Clerk  
DEPUTY

(Evidence Addendum)

STATE OF WASHINGTON )  
No. \_\_\_\_\_ )  
County of Pierce )

) ss. 06-1 50779-9  
)

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Addendum to seize below listed evidence

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We told both Letita and William that Tehya was being placed into protective custody.

#### **Probable cause for the Addendum**

On 09/20/06 at about 0915 hours, I applied for and was granted a Superior Court Search Warrant for William and Letita's residence at 11222 18<sup>th</sup> Avenue South #H104 in Tacoma, Washington. During a search of the residence, Det. Berg found in plain view, a pink and white in color infant sleeper clothing in the garbage can located in the kitchen. The sleeper had what appeared to be blood stains on the front of it. I called Superior Court Judge Fredrick Fleming over the phone and explained the find to him. He told me that the mentioned infant sleeper clothing could be included in the items seized as a result of the search warrant service.

#### **Property to be Searched**

1. A light brown colored apartment with white trim addressed as 11222 18<sup>th</sup> Avenue South #H 104 in Tacoma, Washington.

#### **Affiant's Training and Experience and Training and Experience**

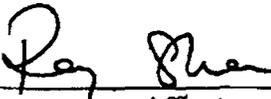
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I am a cross-designated United States Customs Officer through the Blue Lightning Program. In August of 2000, the Federal Bureau of Investigation sponsored your affiant and I graduated from their undercover and covert operations certification course in

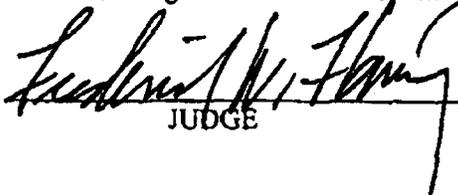
Quantico, Virginia. Based on my training and experience, I recognize the above listed items as being evidence of the above listed violation.

---

It is important to the criminal prosecution of this case to show the height and width of the bed and couch the child fell from. The requested search is to establish that the injuries sustained by the child were not accidental but in fact inflicted the described locations and to further attempt to establish who had dominion and control over this material.

  
\_\_\_\_\_  
Affiant

Acknowledged and sworn before me on this 22<sup>nd</sup> of SEPT., 2006

  
\_\_\_\_\_  
JUDGE

IN COUNTY FILED  
CLERK'S OFFICE

SEP 22 2006 P.M.

PIERCE COUNTY, WASHINGTON  
BY: [Signature] County Clerk  
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE  
SEARCH WARRANT  
(EVIDENCE ADDENDUM)

STATE OF WASHINGTON )

SS

NO.

COUNTY OF PIERCE )

06-1 50779-9

THE STATE OF WASHINGTON TO THE SHERIFF OR ANY PEACE  
OFFICER OF SAID COUNTY:

WHERE AS, Det. Ray Shaviri #131/92-031 has this day made complaint on oath to the undersigned one of the judges of the above entitled court in and for said county that that between July 19, 2006, and September 15<sup>th</sup>, 2006 in Pierce County, Washington, felony to-wit: Assault of a Child in the first degree, a violation of R.C.W 9A.36 was committed by the act, procurement, or omission of another, and the following evidence is material to the prosecution of the above named felony, to-wit;

- 1) Documents showing dominion and control.
- 2) Measurements depicting the width of the bed in the master bedroom, the height of the bed mattress from the floor.
- 3) Measurements depicting the height of the black leather couch and love seat from the seat cushion to the floor and the width from the back rest to the front of the cushion. The couch and love seat are in the living room of the residence.
- 4) Interior and exterior photographs of the residence located at 11222 18<sup>th</sup> Avenue South #H104 in Tacoma, Washington.
- 5) Carpet and carpet pad sample from the master bedroom.

ADDENDUM

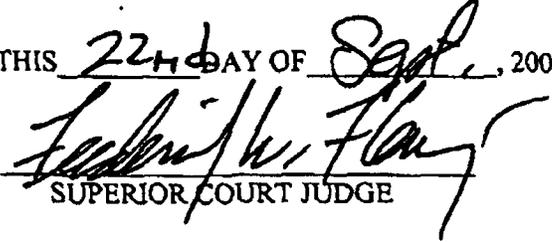
6) A pink and white in color, infant sleeper clothing found by Det.Sgt. Teresa Berg in the garbage can in the apartment kitchen.

NOW, THEREFORE, in the name of the State of Washington, you are commanded that within ten days from this date, with the necessary and proper assistance, you enter into and/or search the said house, person, place or thing; to-wit:

A light brown colored apartment addressed as 11222 18<sup>th</sup> Avenue South #H 104 in Tacoma, Washington.

And then and there diligently search for said evidence and if same, or evidence material to the investigation or prosecution of said felony or any part thereof, be found on such search bring the same forthwith before me, to be disposed of according to law. A copy of this warrant shall be served upon the person or persons found in or on said house or place and if no person is found in or said house or place, a copy of this warrant shall be posted upon any conspicuous place in or on said house, place or thing, and a copy of this warrant and inventory shall be returned to the undersigned Judge or his agent promptly after execution.

GIVEN UNDER MY HAND THIS 22<sup>nd</sup> DAY OF Sept., 2006.

  
SUPERIOR COURT JUDGE

# **APPENDIX “C”**

*Infant Daily Report*

# INFANT DAILY REPORT

Child Name Tehya Wasageshik

Date 9/14/06

## DIAPERING SCHEDULE

06:30 (dry)	10 _____	14 _____
07 _____	11:00 11:15 (pm)	15 3:15
08 _____	12 _____	16 _____
09 _____	13 _____	17 _____

Napping Schedule	Feeding	Schedule
When I Sleep today:	What I ate today:	When:
7:00 - 11 am	3 oz	6:45
12 - 3	4 oz	11:30
	5 oz	3:30

INFANT ACTIVITIES	
What we investigate today:	What we investigate today:
AM	PM

NOTE TO PARENTS: Took her temp. at 12:30 and it was 96.4. It was taken under the arm (add 2°). Temp. taken again under the arm at 3:30 and it was 97.5. (By adding the 2°, it was 99.5). I gave her tylenol at 4pm

Mood:            Happy            Fussy            Sleepy            Content

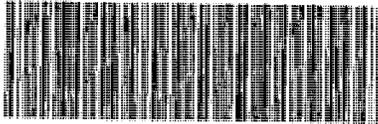
PLEASE BRING MORE DIAPERS \_\_\_\_\_  
 PLEASE BRING MORE WIPES \_\_\_\_\_

Jessica Maldonado  
 Child Care Provider Signature

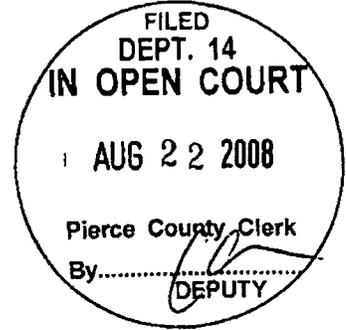
9/14/06  
 Date

## **APPENDIX “D”**

*Findings of Fact and Conclusions of Law  
for  
Exceptional Sentence*



06-1-04487-0 30393774 FNCL 08-25-08



**SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY**

**STATE OF WASHINGTON,**

**Plaintiff,**

**CAUSE NO. 06-1-04487-0**

**vs.**

**WILLIAM FRANCIS WASAGEHIK, V**

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW FOR  
EXCEPTIONAL SENTENCE**

**Defendant.**

**THIS MATTER came on for a jury trial beginning the 8<sup>th</sup> day of April, 2008, the Honorable Susan K. Serko, presiding. On the 12<sup>th</sup> day of May, 2008, the jury returned verdicts finding the defendant guilty as charged of two counts of Assault of a Child in the First Degree – Domestic Violence. For both counts, the jury also found beyond a reasonable doubt that an aggravating factor was present. Specifically, while committing the crimes the defendant knew or should have known T.W. was a particularly vulnerable victim or incapable of resistance due to extreme her youth.**

**At the defendant's sentencing hearing, the court heard from the State, the defense and the defendant. The court entered an oral ruling that the aggravating circumstances which were proven beyond a reasonable doubt at trial justified the imposition of an exceptional sentence above the standard range. Having imposed an exceptional sentence, the court now enters the following findings of fact and conclusions of law.**

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FINDINGS OF FACT

## I.

The defendant was convicted of two counts of Assault of a Child in the First Degree – Domestic Violence. For sentencing purposes the charges are treated as same criminal conduct and will be served concurrently. Assault of a Child in the First Degree is a class “A” felony, classified as a Most Serious Violent Offense, level XII. The maximum term is life. The defendant does not have any prior felony convictions. His offender score is zero and the applicable standard range is 93-123 months.

## II.

There is one aggravating factor in this case which was proven beyond a reasonable doubt at trial. The aggravating factor found by the jury beyond a reasonable doubt as to Counts I and II is set out in Findings of Fact III.

## III.

The defendant committed the crimes of Assault of a Child in the First Degree – Domestic Violence against T.W., while he knew or should have known T.W. was a particularly vulnerable victim or incapable of resistance due to her extreme youth. Under RCW 9.94A.535 (3)(b) this finding qualifies as an aggravating factor which allows the court to impose an exceptional sentence outside the standard range.

## IV.

Under RCW 9.94A.537, when a jury finds beyond a reasonable doubt that an aggravating factor exists, the court may impose up to the maximum term of confinement allowed for the underlying conviction if it finds, considering the purpose of this chapter, that the facts found are

06-1-04487-0

1  
2  
3 substantial and compelling reasons justifying an exceptional sentence. In determining the  
4 appropriate sentence, the court considered the purpose of the chapter, to include but not limited  
5 to the following: punishment, respect for the law, punishment for similar offenses, protecting the  
6 public, reduction of the risk to re-offend and holding the system accountable to the public.

## V.

7  
8 The court finds substantial and compelling reasons to impose an exceptional sentence  
9 outside the standard range. The factors most compelling include: T.W. was two months of age at  
10 the time of the assaults; T.W. was completely dependent on the defendant for warmth, food,  
11 hygiene and love; T.W. was completely defenseless at the time of the assaults; T.W. was  
12 incapable of escaping; T.W. was incapable of getting help. The defendant betrayed T.W.'s trust  
13 by inflicting multiple extraordinary injuries.  
14

## VI.

15  
16 After considering all the factors involved, the purpose of the RCW chapter 9.94A., the  
17 court finds the appropriate length sentence for the defendant's current convictions is 123 months  
18 (standard range sentence) plus 177 months (exceptional sentence) for a total of 300 months.  
19

## VII.

20  
21 The court finds that the presence of the aggravating factor justifies the exceptional  
22 sentence imposed.  
23

24 From the foregoing findings of fact, the court now enters the following conclusions of  
25 law:  
26  
27  
28

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CONCLUSIONS OF LAW

I.

The aggravating factor that was proved beyond a reasonable doubt at trial is a substantial and compelling reason that justifies the imposition of an exceptional sentence above the standard range.

II.

Defendant WILLIAM FRANCIS WASAGESHIK, V should be incarcerated in the Department of Corrections for a determinate period of 300 months on count one and count two. The sentences are to be served concurrently.

The court's oral ruling was given in open court in the presence of the defendant on the 13th day of June, 2008.

These findings of fact and conclusions of law were signed this 22nd day of August, 2008.

  
JUDGE SUSAN K. SERKO

Presented by:

  
LORI KOOIMAN  
Deputy Prosecuting Attorney  
30370

Approved as to Form:

  
BRETT A. PURTZER  
Attorney for Defendant  
17283

lak

FILED  
DEPT. 14  
IN OPEN COURT  
AUG 22 2008  
Pierce County Clerk  
By.....  
DEPUTY