

NO. 39012-4-II

COURT OF APPEALS
DIVISION II

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON
BY:  ATTORNEY

STATE OF WASHINGTON, RESPONDENT

v.

NATALIE RAY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James Orlando

No. 07-1-06270-1

Brief of Respondent

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

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7. Whether the defendant has demonstrated deficiency of counsel and prejudice thereby?

B. STATEMENT OF THE CASE.

1. Procedure

On December 17, 2007, the Pierce County Prosecuting Attorney (State) charged Natalie Ray (the defendant) with one count of assault of a child in the first degree. CP 1. On December 10, 2008, the case was assigned for trial to Hon. James Orlando. 1 RP 10.

The defendant filed motions to suppress physical evidence and statements. CP 133-139. The court conducted pre-trial hearings regarding the motions under CrR 3.6 and 3.5, and regarding competence of N.D.¹, the child victim (victim). After hearing the victim testify, the court found him competent to testify. 1 RP 105, CP196. After hearing evidence and argument, the court ruled that the statements and the evidence were admissible and denied the defendant's motions to suppress. 2 RP 180, 194; CP 189, 192-193.

The trial proceeded to evidence before the jury. After hearing all the evidence, the jury found the defendant guilty of assault of a child in the first degree, as charged. CP 123.

¹ The child victim in this case was born 12/26/2001. 4 RP 492. In respect for his privacy, he will be referred to by his initials, or as "the victim".

On March 13, 2009, the court sentenced the defendant to 110 months in prison. CP 150. The defendant filed a timely notice of appeal on the same date. CP 165.

2. Facts

On October 22, 2007, Sylvia Lewis, N. D.'s teacher at Edison Elementary School in Tacoma, decided to look at his back beneath his shirt. 6 RP 828. Earlier that day, the defendant had called the school to report that another child, K, had struck N. D. in the back with a jump rope. 6 RP 826. The defendant had previously claimed that the same child had stabbed N.D. with a stick. 6 RP 825.

Ms. Lewis saw a serious injury on N.D.'s back. 6 RP 828, Exh. 3. She decided to bring it to the attention of the principal, Renee Rossman. 6 RP 832, 766. Ms. Rossman had the school counselor, Ms. Kotas come into Rossman's office as a witness. 6 RP 767. They saw an X-shaped mark on the victim's back, along with several other bruises. 6 RP 771. Some of the bruises appeared recent and some older. 6 RP 771. Kotas thought the injuries were serious. 6 RP 818. They caused her to be concerned that the victim was being abused. 6 RP 819.

Coincidentally, two caseworkers from Child Protective services (CPS) arrived regarding an unrelated matter. 6 RP 774. Ms. Rossman had them look at the injuries also. 6 RP 775. They told Rossman to call the police immediately. *Id.*

Tacoma Police (TPD) officer O'Keefe arrived and also looked at the victim's injuries. 4 RP 484. Officer O'Keefe observed the multiple injuries on the victim's back. 4 RP 484. Officer O'Keefe also noted that the victim had a swollen jaw and a bruise on his forehead. *Id.* O'Keefe also observed that the victim appeared frail and small. *Id.* While O'Keefe spoke to the victim and asked him questions, the victim looked to Chris Dwyer before answering. 4 RP 488. When Officer O'Keefe purposely moved between them so that the victim could not see Dwyer, the victim looked around O'Keefe to see what the answer to the question should be. *Id.* O'Keefe then took the victim to Mary Bridge Children's Hospital for an examination. 4 RP 484.

Dr. Yolanda Duralde examined the victim at Mary Bridge Children's Hospital. 7 RP 934. She observed that the victim had a bruised forehead and extensive bruising on his back, both thighs, and across his buttocks. 7 RP 936. The X-shaped lesion depicted an injury from a belt, string, or jump rope. 7 RP 941. The victim also had bruising across his upper shoulder, close to his neck. *Id.* On his left buttock, the victim had a large, linear bruise. 7 RP 947. It looked like a loop and was consistent with being caused by a belt. 7 RP 948. The victim also had a bruise on his left arm. 7 RP 946. It appeared to be a grab-mark. *Id.*

Based on these observations and a review of the forensic interview, Dr. Duralde ordered a skeletal survey at radiology. 7 RP 954. X-rays showed that the victim had healing fractures in both arms. 7 RP 954. One

arm had a fracture of end of the humerus; the other had a mi-bone fracture of the radius. 7 RP 954. This type of fracture of the radius is typically caused by acute bending or twisting. 7 RP 954. The humeral fracture was nearly healed. 7 RP 963.

Dr. Duralde reviewed the victim's medical records. The records reflected that, in a previous examination a year earlier, the victim was in the fifth percentile for height and the tenth percentile for weight. 7 RP 959. The records showed that the victim had fallen off his growth curves. 7 RP 955. When she examined him, the victim was even smaller. 7 RP 959.

The victim in this case was only 5 years old when these events occurred. 4 RP 492. At a very young age, the victim had been removed from his mother's custody and care. 6 RP 695, 8 RP 980. The victim was eventually placed with Terry Dwyer, his mother's step-father. 6 RP 696. Terry Dwyer received money from DSHS to support the victim. 6 RP 706. Terry Dwyer was a truck driver for an oil recycling company. 6 RP 699. That job required him to often be away from home. *Id.* Because of this, Terry Dwyer's adult son, Chris, was primarily responsible for the victim's care. 6 RP 699, 701.

Chris Dwyer eventually moved to a house with the defendant. 6 RP 708. At that point, the victim went to live with them. 4 RP 504, 6 RP 708, 749, 7 RP 864, 904. Terry gave Chris and the defendant the DSHS money because the victim lived with them. 6 RP 707.

The defendant's children attended the same school as the victim. 6 RP 789. While the defendant's children always had paid-up lunch accounts, the victim's account was empty, despite the school notifying the defendant of the deficiency. 6 RP 788-789. At home, the defendant beat the victim with a coat hanger and other objects 4 RP 509, 519. The defendant and Chris Dwyer beat the victim with a belt on more than one occasion. 4 RP 510, 537, 541. Additionally, the defendant twisted the victim's arm. 4 RP 512.

C. ARGUMENT.

1. THE ELEMENTS OF ASSAULT OF A CHILD IN THE FIRST DEGREE, AS CHARGED, DO NOT REQUIRE A UNANIMITY, OR *PETRICH*, INSTRUCTION.

Ordinarily, the defendant must preserve an issue regarding a jury instruction by proposing an instruction or stating his objections at trial as CrR 6.15 requires. *See*, RAP 2.5(a). But, the appellate court may review for the first time on appeal a "manifest error affecting a constitutional right." RAP 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988).

A criminal defendant has the right to a unanimous jury verdict. *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). When the prosecution presents evidence of multiple acts of like misconduct, any one

of which could form the basis of a count charged, either the State must elect which of such acts the State is relying on for a conviction, or the court must instruct the jury to agree on a specific criminal act. 159 Wn. 2d at 511; *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). This assures that the unanimous verdict is based on the same act proved beyond a reasonable doubt. *Coleman*, 159 Wn.2d at 511-12.

- a. Assault of a child in the first degree, under the “substantial bodily harm and ...pattern or practice” prong does not require a *Petrich* instruction.

In this case, the state charged the defendant with assault of a child in the first degree under RCW 9A.36.120(1)(b)(ii)(A). CP 1. The State had to prove these statutory elements: (b) intentional assault; (ii) causing substantial bodily harm and previously engaging in a pattern or practice of (A) assaulting the child resulting in bodily harm that is greater than transient physical pain or minor temporary marks. This prong of the crime requires a course of conduct. It therefore permits the State to charge an entire episode of assaultive conduct as one count. *State v. Kiser*, 87 Wn. App. 126, 130, 940 P. 2d 308 (1997). The jurors must all find a principal act resulting in substantial bodily harm preceded by a pattern or practice of other assaultive acts. But it is not necessary for all jurors to agree on what act was the principal assault. *Id.*

The nature of this offense and the elements that the State is required to prove distinguish this type of case from most *Petrich*-type

unanimity issues. In *Petrich* and *State v. York*, 152 Wn. App. 92, 216 P. 3d 436 (2009), the respective defendants were charged with child rape. Child rape requires proof of one act of sexual intercourse with a child. *See, e.g.* RCW 9A.44.073(1). In each case, only one count was charged, but the evidence supported multiple acts. The jury was required to be unanimous as to which single act served as the basis of the conviction. Unlike the subsection of assault of a child charged in this case, in child rape cases, there is no “engaged in pattern or practice” element requiring proof of multiple acts.

The facts and evidence in the present case are similar to those in *Kiser*. In *Kiser*, while baby-sitting the victim, the grandmother noticed the infant was bruised and scratched. When the mother took the child home that night, she noticed his leg was swollen and he had a fever. The next day, she took the child to the doctor. The doctor noticed signs of child abuse. X-rays revealed bone fractures in the arms, legs and ribs. Blood tests revealed blunt trauma to the liver. Later examination revealed that the child had a bite mark on his back. When first discovered, the mark was faint, but by the next day individual teeth marks appeared.

Several adults had access to the child. The defendant, the father of the infant victim, lived with the victim’s mother, her sister, and another adult. The grandmother baby-sat the child. A forensic odontologist examined the bite mark, and took dental impressions of the grandmother, the mother, Kiser, and the housemate. The examination ruled out the

grandmother and roommate. The examination showed that the parents were both consistent with the bite mark, but Kiser matched more closely.

Here, as in *Kiser*, the State relied on the testimony establishing the defendant's access to the child at relevant time periods, medical evidence, and the expert's testimony about the observed external injuries. Both cases had evidence of previous assaults that resulted in fractures.

In *Kiser*, the Court of Appeals identified a potential problem for juror unanimity under this statute if the evidence discloses more than one distinct episode of assaultive conduct during an extended charging period. 87 Wn. App. at 130. But, despite 5 possible assailants and opportunities over a period of months, the Court found that these circumstances did not require a *Petrich* instruction. *Kiser*, 87 Wn. App., at 130. It is worth noting that in *Kiser*, identification of the assailant was almost completely circumstantial. The evidence in the present case was even stronger; in addition to the circumstantial evidence, the victim testified, identifying the defendant as the perpetrator.

In *Kiser*, the Court observed: “There is nothing to suggest that the State's proof or Kiser's defenses were different with respect to any particular segment of the charging period.” *Id.* The same is true in the present case. The circumstances did not raise the possibility of different defenses as to different episodes. *See Kiser*, at 130. The defendant here consistently maintained that the victim never lived with her; and she never hit him.

b. The court's failure to give a *Petrich* instruction was harmless error.

The failure to give a required unanimity instruction is subject to a harmless error analysis. *See, State v. Kitchen*, 110 Wn.2d 403, 756 P. 2d 105 (1988). It will be deemed harmless only if no rational juror could have a reasonable doubt as to any of the incidents alleged. *Coleman*, 159 Wn.2d at 512 (citing *Kitchen*, 110 Wn.2d at 411-12).

This harmless error test turns on whether a rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt. *Kitchen*, at 405-406. In *State v. Camarillo*, the Court described the inquiry this way:

Our task is to determine whether a rational trier of fact could have a reasonable doubt as to whether any of the incidents did not establish the crime. In other words, whether the evidence of each incident established the crime beyond a reasonable doubt.

115 Wn.2d 60, 71, 794 P. 2d 850 (1990).

Many of these unanimity instruction cases, such as *Petrich*, *Kitchen*, and *Camarillo*, involved multiple acts or incidents of sex crimes. Typically, these incidents occurred over a period of time on different dates, or the dates were uncertain. The rationale for giving such an instruction in cases involving multiple acts stems from possible confusion

about which particular act a jury has used to determine a defendant's guilt, where the evidence shows multiple commissions of a single type of crime.

The crime here did not involve multiple incidents, but possibly more than one recent felony assault. The State presented evidence of a single offense involving a course of assaultive behavior, with possibly more than one recent principal assault.

Even if the present case is properly characterized as involving multiple acts, any error resulting from the trial court's failure to instruct the jury on unanimity was harmless. The overwhelming evidence supports the jury finding, beyond a reasonable doubt, that the defendant committed the principal assault which caused substantial bodily harm.

The victim was only 5 years old at the time. He identified the defendant as the person who beat him with an object, causing the injuries to his back. Numerous adults at the victim's school saw his injuries. The teacher, Ms. Lewis (6 RP 828); principal Rossman (6 RP 771), vice principal Johnston (5 RP 674); counselor Kotas (6 RP 819); were all alarmed at the severity of the injuries. They noted that the injuries looked recent. The evidence showed that K, who was a small boy, even smaller than the victim (6 RP 772) could be eliminated as the cause of the injuries (5 RP 672, 674).

Dr. Duralde also testified that the injuries were fairly recent, and required a significant amount of force. 7 RP 942, 945. Both of the victim's arms had been broken, at different times, and untreated. 7 RP 954, 962.

The evidence showed that the defendant had the most opportunity and access to the victim. N.D., the victim, (4 RP 504), Terry Dwyer (6 RP 708), Lisa Mundt (6 RP 749), and Marlene Berry (7 RP 883) all testified that the victim lived with the defendant. The investigation by Detectives Ellis and Wade (5 RP 621-622 659) corroborated this.

Most damning, the victim specifically identified the defendant as his assailant. 4 RP 509-519. In the forensic interview with Kim Brune, he had also said that his school-mate, K, had struck him. Exh. 1. However, in the second interview (Exh. 2) and in court, the victim identified the defendant. The victim testified that she assaulted him with a coat hanger and a belt more than once. 4 RP 509-510. He also testified that she had previously twisted his arms. 4 RP 511-512.

While the defendant may wish to re-argue the weight of the evidence and witness credibility, those have already been determined by the jury. It is not an issue for the appellate court. *See, State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The jury clearly rejected the assertions of the defendant and Chris Dwyer that the victim did not live with them and that the defendant never beat anyone, let alone the victim.

The jury, in order to return the verdict it did, must have believed that the defendant committed the recent intentional assaults which both resulted in substantial bodily harm. Therefore, whether the jury believed that the recent beatings resulting in the welts and bruises were one event or more, the findings satisfied the requirement of the principal assault.

2. THE TRIAL COURT DID NOT ERR IN ADMITTING THE DEFENDANT'S STATEMENTS TO POLICE.

a. If error, it is harmless error.

The State does not concede that the trial court erred in admitting the defendant's statement. *See*, argument *infra*. However, the defendant's own trial testimony extensively affirmed the same statement. Therefore, admission of the statement was harmless. A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *State v. Guloy*, 104 Wn. 2d 412, 425, 705 P. 2d 1182 (1985).

In the present case, the court admitted the defendant's brief statement that she did not beat her children. Consistent with this, at trial, the defendant denied all the State's allegations. Her defense was twofold: a) the victim did not live with the defendant (9 RP 1272)(and therefore, the defendant did not have the access or opportunity to assault the victim as others did), and b) the defendant never struck the victim, even in discipline. To the contrary, she portrayed herself as a loving, adult concerned for the victim's welfare. 9 RP 1308, 1309.

The defendant testified in the trial. As she told the detectives, she testified that she did not beat her kids. 9 RP 1303, 1329. She did not believe in corporal punishment and did not use it in her home. 9 RP 1302-1303. She specifically denied striking the victim. 9 RP 1304-1305. She

denied even seeing the injuries on the victim's back, let alone putting them there. 9 RP 1344.

In view of the defendant's testimony and the defense strategy of denial of all that the State alleged, the defendant's brief statement to the detectives was cumulative and insignificant. Absent her statement to police, the jury would have reached the same verdict.

b. Admission of the statement was not error.

State agents must give Miranda warnings before custodial interrogations. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966). However, volunteered statements made to police are not barred by the Fifth Amendment. *Miranda*, 384 U.S., at 478.

"[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response." *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L.Ed.2d 297 (1980); *see also, State v. Sargent*, 111 Wn.2d 641, 650, 762 P.2d 1127 (1988). The determination of whether there was "interrogation" focuses primarily upon the perceptions of the suspect, rather than the intent of the police. That is because the *Miranda* safeguards were designed to vest the suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. *Innis*, at 301. However, the

Supreme Court went on to recognize that, “since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response”. *Innis*, at 301-302.

The facts in the present case compare favorably with *Innis* and several Washington cases where the Court held that police statements and even questions were not “interrogation”. *Innis* itself held that the police behavior there was not “interrogation”. There, police had arrested Innis for the robbery and murder of a cab driver. Innis had used a sawed-off shotgun in the crime. When police arrested him, Innis did not have the shotgun. As police drove Innis to the police station, in Innis’ presence, one officer spoke to another officer, saying that there was a school for handicapped children nearby and that it would be unfortunate if one of those children found the shotgun and got injured. 446 U.S., at 294-295. Innis interrupted them and said he would show them where the shotgun was. He subsequently led police to the gun. *Id.*, at 295. Even under the new test articulated in this landmark case, the Supreme Court held that this was not interrogation. *Id.*, at 302.

Even where police have seemingly accused a defendant, Courts have held the officers would not have known that the statement would

elicit an incriminating response. In *State v. Breedlove*, 79 Wn. App. 101, 900 P. 2d 586 (1995), the defendant had been arrested for murder. While being transported to the Pierce County jail, he asked the detective driving the car what city they were in. The detective told Breedlove “he was in Tacoma where he had killed somebody....” 79 Wn. App., at 112. The Court held that the detective could not have known that his statement would elicit an incriminating response, and that the detective's statement therefore was not interrogation. *Id.*, at 113.

In *State v. Webb*, 64 Wn. App. 480, 824 P. 2d 1257 (1892), police arrested the defendant for entering and vandalizing his ex-girlfriend's apartment. The officer advised him of his rights and Webb asked to see an attorney.

Webb asked what crime he was charged with. The officer told him he was being charged with burglary. While being booked, Webb asked the officer “if all this is necessary.” The officer responded: “You're damn right this is necessary. You went in and vandalized Sheryl's apartment.” Webb stated, “But the stuff I damaged was mine too.” The Court of Appeals held that the officer could not have known that his alleged statement would elicit an incriminating response from Webb, and that Webb's statement was not induced by improper custodial interrogation. *Id.*, at 486.

In a hectic arrest situation, an officer's pre-Miranda questions are not necessarily interrogation, nor inadmissible. In *State v. Richmond*, 65 Wn. App. 541, 828 P. 2d 1180 (1982), police responded to a report of a stabbing. When the officer arrived at the address he had been given, he heard a woman screaming inside the apartment. He knocked on the door, and, when there was no response, he forced the door open and went inside. As he entered the bedroom, he saw Richmond assaulting a woman. The officer pulled his gun and told Richmond to freeze.

The officer then asked Richmond and the woman who had called the police. They stated that they did not know but they thought it might have been the other person in the apartment. The officer asked where this other person was and Richmond pointed and stated that he was down the hallway. The officer went down the hallway and found a dead man lying in a pool of blood in the bathroom. Defense counsel moved to suppress Richmond's statements in response to the arresting officer's questions, arguing that they were inadmissible as they were not preceded by a *Miranda* warning.

The Court of Appeals held that the officer's questions did not fall within the definition of interrogation as the questions were not such that the officer should have known were reasonably likely to elicit an incriminating response from Richmond. 65 Wn. App., at 545.

In *State v. Godsey*, 131 Wn. App. 278, 127 P. 3d 11 (2006), a police officer asked the defendant a question post-*Miranda*. Godsey fought with police arresting him for a warrant. Police advised him of his rights. On the way to jail, Godsey said to the officer “you are going to pay for this”. *Id.*, at 283. The officer asked him if he was threatening the officer. Godsey responded “ [t]ake it for what you want, but I know where you and a lot of other cops live.” *Id.* The court of Appeals found that the question asking Godsey if his statement was a threat was a “neutral inquiry” and not interrogation. 131 Wn. App. at 285.

- c. The standard of review is “clearly erroneous”.

A trial court's determination that the defendant's statement was not the product of custodial interrogations subject to *Miranda* is factual and the appellate court reviews that decision under a “clearly erroneous standard.” *State v. Walton*, 64 Wn. App. 410, 414, 824 P. 2d 533 (1992). Under a clearly erroneous standard, the Court will not overturn a finding of the lower court unless it is “left with a definite and firm conviction that a mistake has been committed.” *State v. Denney*, 152 Wn. App. 665, 671, 218 P. 3d 633 (2009); *see also*, *State v. Handley*, 54 Wn. App. 377, 380, 773 P.2d 879 (1989).

The defendant asserts that the “clearly erroneous” standard is no longer good law in Washington. App. Br., at 41. She argues that the federal case *State v. Walton* relies on, *U.S. v. Booth*, 669 F.2d 1231 (9th

Cir. 1981), was overruled by *U.S. v. Poole*, 794 F. 2d 462 (9th Cir. 1986); see also *U.S. v. McConney*, 728 F. 2d 1195 (9th Cir. 1984) (en banc)(abrogated on other grounds by *Pierce v. Underwood*, 487 U.S. 552, 108 S. Ct. 2541, 101 L.Ed.2d 490 (1988)). This is both too broad a characterization of *Poole*, and not the end of the enquiry for Washington courts.

Washington appellate courts, and specifically this Court, have maintained the “clearly erroneous” standard. Although presumably aware of *Poole* and *McConney*, as recently as 2009 in *Denney*, this Court used this standard of review, citing *Walton. Denney*, 52 Wn. App. at 671. In the same opinion, the Court discussed the holding of *Booth*, with approval. *Denney*, at 671-672.

Here, the trial court’s Findings are supported by substantial evidence. Detectives Ellis and Wade testified that they went to the defendant’s home to arrest her for outstanding bench warrants and to place her children into protective custody. 1 RP 25, 2 RP 112. The placement of the children was based upon the recent interview with the victim. 1 RP 23, 2 RP 111.

The detectives both testified that the defendant was upset and crying. 1 RP 27, 2 RP 114. The detectives informed the defendant of why she was being arrested and that her children were being placed into protective custody. 1 RP 27, 2 RP 114. Det. Ellis asked the defendant regarding the whereabouts of Chris Dwyer. 1 RP 29. Det. Ellis tried to

calm the defendant, so the detective could explain what was going on. 1 RP 25, 27, 28, 2 RP 114. The defendant made the spontaneous statement that she did not hit her kids. 1 RP 30.

They orally advised the defendant of her Miranda rights. 1 RP 29, 2 RP 114, 115. The detectives did not question the defendant about her role or the allegations until after advising her of her *Miranda* rights. 1 RP 32, 2 RP 117-118.

In light of the court's conclusions regarding the disputed facts, the court obviously did not find the defendant credible. CP 188. The court's findings and conclusions were not clearly erroneous.

3. WHERE THE PROSECUTOR'S ARGUMENT WAS PROPER, OR WAS NOT FLAGRANT OR ILL-INTENTIONED AS TO BE INCURABLE BY INSTRUCTION, THE DEFENDANT WAIVES THE ISSUE ON APPEAL WHEN SHE FAILED TO OBJECT AT TRIAL.

- a. The defendant has the burden to show prosecutorial misconduct and prejudice.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 570 (1995), citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

b. Request for mistrial regarding witness reference to warrants.

This court reviews the refusal to grant a mistrial for abuse of discretion. *State v. Greiff*, 141 Wn.2d 910, 921, 10 P.3d 390 (2000). A mistrial is only appropriate when the defendant was so prejudiced that only a new trial can ensure a fair trial. *State v. Whitney*, 78 Wn. App. 506, 515, 897 P.2d 374 (1995). To determine whether an error was prejudicial enough to warrant a mistrial, the Appellate Court examines “(1) the seriousness of the irregularity; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it.” *Greiff*, 141 Wn.2d at 921. The Appellate Court upholds a trial court's decision to deny a mistrial motion unless the irregularities, when viewed in the context of all the evidence, so tainted the entire proceeding that the defendant was denied a fair trial. *State v. Bluehorse*, 159 Wn. App. 410, 248 P. 3d 537 (2011).

Here, defense counsel objected to the question and the court acted:

[PROSECUTOR]: What’s the purpose of having a patrol unit back you up?

[DET. ELLIS]: For one, we knew Natalie had some warrants.

[DEFENSE COUNSEL]: Objection, move to strike. Have another motion, your honor.

[THE COURT]: I will sustain the objection and strike the last response.

5 RP 611.

Later, during a discussion outside the presence of the jury on a different topic, the court raised the issue of the bench warrant reference. 5 RP 638. Defense counsel moved for a mistrial, or in the alternative, a limiting instruction. *Id.* The court said that it would consider a limiting instruction. At that point, it became defense counsel's decision whether to draft an instruction, or to rest on the court's direction to strike the answer, and let the exchange pass as inconsequential. The jury was later instructed not to consider any evidence that was not admitted. CP 95.

In the present case, the court granted the appropriate remedy. It struck the evidence and later instructed the jury. The reviewing court presumes the jury followed the court's instructions. *State v. Warren*, 165 Wn.2d 17, 29, 195 P.3d 940 (2008). The defendant does not demonstrate that this answer was an incurable error requiring a new trial.

- c. The prosecuting attorney did not make a "false choice" argument, requiring jurors to find that the victim lied.

Defense counsel did not object to the instances of misconduct in closing argument alleged in this appeal. Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so "flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition

to the jury.” *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997) citing *Gentry*, 125 Wn.2d at 593-594.

In order to establish prosecutorial misconduct, a defendant must prove that the prosecutor's conduct was improper and that it prejudiced his right to a fair trial. *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004) (citing *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003)). A defendant can establish prejudice only if there is a substantial likelihood that the misconduct affected the jury's verdict. *Carver*, at 306.

A prosecutor's comments during closing argument are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *Id.* In evaluating whether prejudice has occurred, a court must examine the context in which the statements were made, including defense counsel's argument. Therefore, defense counsel's conduct, as well as the prosecutor's response, is relevant. *State v. Ramirez*, 49 Wn. App. 332, 337, 742 P.2d 726 (1987).

It is not improper for counsel to argue inferences and conclusions from testimony and evidence given in a trial. A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. *See, State v. Boehning*, 127 Wn. App. 511, 111 P.3d 899 (2005). When the prosecutor's remarks are viewed in the context of the arguments of both parties, and the evidence, the prosecutor's argument was not improper, nor misconduct. His argument did not deprive the defendant of a fair trial.

It is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken. *State v. Fleming*, 83 Wn. App. 209, 921 P. 2d 1076 (1996); *see also, State v. Casteneda-Perez*, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991). Such an argument misstates the law and improperly shifts the burden of proof. *Fleming*, at 213.

Counsel for each side are going to argue the credibility of witnesses. It is neither improper nor misconduct for the prosecuting attorney to argue that the complaining witness is credible and is telling the truth. The prosecutor has reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility. *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006). The prosecutor may argue an inference of credibility if it is based on the evidence. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). Here, the prosecutor argued the evidence, reasonable inferences, and underscored the veracity of the victim's testimony, all of which was proper. The prosecutor did not argue or tell the jury that, in order to acquit, it had to find that the victim had lied.

- d. The prosecutor's argument regarding a "just verdict" was not improper.

In his closing argument in this case, the prosecutor said:

The role of the jury is to reach a verdict. A just verdict. "Veredictum" comes from the old latin word. Basically it means seeking the truth.

11 RP 1532.²

In a recent case, this Court has found a "just verdict" argument proper. *See, State v. Anderson*, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009). The same decision found a "veredictum" "speak the truth" argument to be improper. *Id.* However, unlike the argument in *Anderson*, the prosecutor in the present case did not ask the jury to "declare the truth" or to "solve the case." *Cf., Anderson*, at 429.

- e. The prosecutor did not imply that additional evidence existed.

Here, part of defense counsel's argument was critical of the investigation. He argued that it was incomplete. He argued that no one asked the victim who hit him on the back. 11 RP 1573-1574. He pointed out that there was no forensic evidence, such as DNA from the cord found

² The prosecutor was mistaken in his latin translation. In fact, the word *verdict* comes from two Latin words: *vere*, meaning "truly;" and *dictum*, meaning "something said." So, a verdict is something "truly said." Webster's Third New International Dictionary (unabridged) 2002.

at the defendant's home. 11 RP 1579. He argued that the police stopped investigating once they arrested the defendant; that they failed to continue the investigation with Terry Dwyer and the victim's father, Tulio. 11 RP 1580-1581.

Even if improper, a prosecutor's remarks that are in direct response to a defense argument are not grounds for reversal as long as the remarks do not "go beyond what is necessary to respond to the defense and must not bring before the jury matters not in the record, or be so prejudicial that an instruction cannot cure them." *State v. Dykstra*, 127 Wn. App. 1, 8, 110 P.3d 758 (2005).

In rebuttal, the prosecutor responded that the interview technique used by the child interviewer avoided questions that suggested answers. 11 RP 1614. He pointed out that police did not stop investigating. Police contacted other family members and interviewed Terry Dwyer. 11 RP 1617. The prosecutor did say "based on that information, Terry Dwyer isn't charged with these crimes." 11 RP 1618. This statement referred to the detectives' testimony that, after arresting the defendant, they interviewed Terry Dwyer and Lisa Mundt. The statement was part of the rebuttal of the defense argument that police had stopped investigating and the implication that Terry Dwyer or someone else was responsible for the crime. It was also an argument to focus on the person who was charged, the defendant.

- f. The prosecutor's argument regarding witness demeanor was proper.

When arguing the credibility of witnesses, the prosecutor may draw the jury's attention to the demeanor of witnesses while testifying, including the defendant. *See, State v. Johnson*, 113 Wn. App. 482, 492, 54 P. 3d 155 (2002). The jury was properly instructed in the present case regarding witness demeanor. The court instructed them that in determining a witness' credibility, they were permitted to consider "the manner of the witness while testifying" (CP 96).

In this case, the prosecutor pointed out the defendant's demeanor in the context of arguing her credibility. 11 RP 1537-1540. He did point out that the defendant wept. 11 RP 1537, 1539. Defense counsel objected to the instance, asserting that it called for an opinion by the prosecutor. 11 RP 1539. If the statements were improper, since objection was lodged, the Court determines whether there was a substantial likelihood that the statements affected the jury. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

4. THE DEFENDANT CANNOT DEMONSTRATE
THAT TRIAL COUNSEL WAS DEFICIENT, NOR
THAT A DEFICIENCY PREJUDICED HER.

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S.

668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also Strickland*, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); *Thomas*, 109 Wn.2d at 226. Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689.

A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336. A defendant must demonstrate both prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d at 225-26.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different." *Strickland*, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

Here, although defense counsel did not request a *Petrich* instruction; as argued above, one is not required for assault of a child in the first degree as charged in the present case. Defense counsel's strategy was to point out that other persons, such as Terry Dwyer or the victim's father, Tulio, had access to the victim and could have been the perpetrator. Therefore, counsel's actions were not deficient. The evidence shows that the trial result would likely have been the same even if counsel had requested the *Petrich* instruction.

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D. CONCLUSION.

The trial court heard testimony and argument regarding the circumstances and admissibility of the defendant's statements to police. The court's ruling was supported by the law and evidence. At trial, the parties properly argued the law and evidence to the jury. The defendant received a full, fair trial after which the jury found her guilty as charged. For the reasons argued above, the State respectfully requests that the judgment be affirmed.

DATED: April 15, 2011.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

Thomas C. Roberts for
Thomas C. Roberts 35453
Deputy Prosecuting Attorney
WSB # 17442

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his 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.

4/15/11 *[Signature]*
Date Signature