

ORIGINAL

NO.42176 -3 -II

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION II

STATE OF WASHINGTON

Respondent,

v.

JACOB MEJIA,

Appellant.

COURT OF APPEALS
DIVISION II
12 JAN 23 AM 9:59
STATE OF WASHINGTON
BY  DEPUTY

BRIEF OF APPELLANT

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I. Assignment of Error

1. Trial counsel's failure to object to inadmissible evidence violated Mr. Mejia's right to effective assistance of counsel under the Washington Constitution, Article I, Section 22 and the Sixth Amendment to the United States Constitution.
2. Mr. Mejia was denied his right to effective assistance of counsel when trial counsel failed to request a limiting jury instruction addressing evidence of AMM's prior injury which may have been caused by Mr. Mejia.
3. Insufficient evidence was presented to convict Mr. Mejia of Assault in the First Degree or Criminal Treatment in the Second Degree as alleged in the information.
4. The trial court abused its discretion in sentencing Jacob Mejia to an exceptional sentence of three hundred months.

II. Issues Pertaining to Assignments of Error

1. Did trial counsel's failure to object to evidence of AMM's prior injury which was not the subject of the charges before the jury and would not have been admissible, violate Mr. Mejia's right to effective assistance of counsel under the Washington State Constitution, Article I, Section 22 and Sixth Amendment to the United States Constitution? (Assignment of Error No. 1)
2. Did trial counsel's failure to present a limiting instruction regarding AMM's prior injury, which was not the subject of the charged crimes, violate Mr. Mejia's right to assistance of counsel under the Washington State Constitution, Article I, Section 22 and Sixth Amendment to the United States Constitution? (Assignment of Error No. 2)
3. Whether sufficient evidence was presented to support a finding of guilt on the charges of Assault in the First Degree or Criminal Treatment in the Second Degree (Assignment of Error No. 3)
4. Whether the trial court abused its discretion in sentencing Jacob Mejia to a term of three hundred months which was one hundred forty months above the top of the applicable sentencing range (Assignment of Error No. 4)

III. Statement of the Case

A. Procedural History

Mr. Mejia was charged by way of second amended information of the crimes of assault in the first degree (count I) and criminal mistreatment in the second degree (count II) against his son AMM. RP 4-5, CP 5-8. Each count in the second amended information also included a special allegation that the crime was domestic violence. Id. The information also contained a special allegation for each count alleging Mr. Mejia knew or should have known AMM was a particularly vulnerable victim or incapable of resistance. Id. A jury trial was conducted before the Honorable Judge Mills. RP 1-1143. Mr. Mejia entered into a stipulation allowing the admissibility of statements he made to Officers Tufts and Detective Blankenship on November 18, 2008 and December 23, 2008. RP 140-141 The jury found Mr. Mejia guilty of all charges including the special allegations and aggravating factors. CP 57-61. Mr. Mejia was sentenced to an exceptional sentence of 300 months by Judge Mills. CP 111-121. This appeal timely follows. CP 122.

B. Facts

On December 22, 2008 Jacob Mejia was caring for his son, AMM. RP 868-869. AMM's mother, Sarah Tate was in the home with Jacob Mejia and AMM. RP 869. Jacob Mejia left AMM on the couch in the livingroom while he made himself a cup of coffee. RP 872-875. While Jacob Mejia was in the kitchen, he heard a thump and heard AMM crying. RP 875. Jacob Mejia

rushed into the livingroom and found AMM on the floor and the family dog Chewy was on the couch. RP 875. Both Jacob Mejia and Ms. Tate rushed to see what had happened, RP 875.

Jacob Mejia was concerned about AMM and called his mother for advice on how to handle the situation. RP 877-878. Ms. Mejia indicated she would be home very soon. RP 878. Jacob Mejia and Ms. Tate took AMM into their room and searched the internet for advice on what to do when a baby falls off a couch. RP 878-880. That evening Jacob Mejia noticed AMM started having seizures. RP 822. Jacob Mejia woke up his parents and took AMM to Harrison Hospital. RP 882.

A number of medical providers testified regarding both AMM's past and present medical conditions. The medical testimony started with Dr. Hrivnak, a pediatric neurologist who provided care to AMM commencing January 9, 2009. RP 143, 147-148. Dr. Hrivnak wrote a letter at the request of AMM's adoptive mother which outlined AMM's current diagnosis and a description of the ongoing care he will need. RP 150. Dr. Hrivnak described each diagnosis in detail. RP 150-158. Dr. Hrivnak also testified as to the effects the conditions will have on AMM's life and the prognosis for his future. RP 156-170. The letter containing this information was admitted into evidence without objection by defense counsel. RP171. Dr. Hrivnak also described the MRI images taken of AMM's brain. RP 174-185. The MRI images were admitted into evidence without objection of defense counsel.

RP 172-173. The images showed AMM had subdural hemorrhages, brain damage, and a right parietal skull fracture. RP 176, 179-181. Dr. Hrivnak told the jury she diagnosed AMM with physical abuse because his conditions in the absence of any adequate explanation for those conditions met the criteria for abuse. RP 163-164. Dr. Hrivnak also testified AMM's injuries were the result of either something striking AMM's head or AMM fell and hit something on the right side of his head. RP 189, 191.

Dr. Valrey, an emergency room physician at Harrison Hospital, also testified during the presentation of the State's case. RP 201-231 Dr. Valrey provided medical care to AMM on December 22, 2008 or December 23, 2008. RP 206. Dr. Valrey described the information presented in his treatment notes and the medical care provided to AMM in detail. RP 208-231. During his testimony Dr. Valrey also described AMM's medical history, specifically the humerus fracture found on November 18, 2008. RP 212. On December 23, 2008 AMM was sent to Mary Bridge Hospital because Harrison Hospital did not have the level of care AMM needed available. RP 224-226. The form generated to transfer AMM from Harrison to Mary Bridge Hospital via Airlift Northwest was admitted into evidence without objection by defense counsel. RP 225-226. Dr. Valrey testified his notes included a final diagnosis suggesting possible child abuse needed to be investigated. RP 224-228.

Dr. Duralde also testified during the presentation of the State's case. RP 260-390. Dr. Duralde is employed as the medical director of the child abuse intervention department of Mary Bridge Hospital. RP 261. Dr. Duralde testified she first met AMM in November 2008 for an evaluation of his arm fracture. RP 270. Dr. Duralde stated AMM was admitted to Mary Bridge Hospital and "worked up for possible abuse.". Id Dr. Duralde's report of treatment, diagnosis and opinion related to AMM's November injury was admitted into evidence without objection by defense counsel. RP 271. Dr. Duralde's assessment was that AMM's injury was consistent with Jacob's explanation and no findings of child abuse were made. RP 282. AMM's November injury did not appear to be an inflicted injury in Dr. Duralde's opinion. RP 282. She believe AMM's injury was accidental in nature. RP 282-283.

Dr. Duralde also saw AMM on December 28, 2008. RP 284. Dr. Duralde testified that AMM looked healthy an vigorous in November 2008 but looked totally different in December 2008. RP 289. Dr. Duralde examined AMM and testified in her opinion AMM "sustained a severe inflicted head injury".RP 301. Dr. Duralde also testified AMM's injury could not have been the result of a simple fall. RP 302. In Dr. Duralde's opinion AMM's injuries were more consistent with shaking an impact. RP 306. However, AMM did not have any signs of retinal hemorrhaging which is found in eighty five percent of cases where shaking of a child has occurred. RP 365.

Dr. Duralde also described a rib and clavicle fracture found during a skeletal survey of AMM on December 29, 2008. RP 330-331. In Dr. Duralde's opinion the rib fractures could not have resulted from the CPR performed on AMM. RP 335. Dr. Duralde also commented on the report of Dr. Barnes who was a defense expert in this matter. RP 336-339. Dr. Duralde was also allowed to offer a critique of Dr. Barnes without objection of defense counsel as follows: "...I know Dr. Barnes' work in the past, Dr. Barnes just really doesn't believe that child abuse ever exists". RP 339. Dr. Duralde also was allowed to critique another defense expert, Dr. Plunket. RP 340-341.

Dr. Duralde did acknowledge that a short fall could cause a skull fracture. RP 342. Dr. Duralde also acknowledged AMM's skull fracture could have been the result of a short fall. Id Additionally, as Dr. Duralde testified, it is possible for a subdural hematoma to occur from a short fall. Id Dr. Duralde also testified that it is not common for the type of brain injury found in AMM to be the result of short fall. RP 343. Dr. Duralde was allowed to testify without an objection from defense counsel that she "felt like this was inflicted trauma". RP 345.

Dr. Moore is employed as an emergency room physician at Harrison Hospital. RP 437. Dr. Moore treated AMM on November 18, 2008. RP 441. During his testimony Dr. Moore described the information contained in his report to the jury. RP 442-450. Dr. Moore diagnosed AMM with a fracture of

the humerus. RP 445. Dr. Moore also testified as to the radiologists interpretation of the x-ray taking during the course of treatment. RP 445-446. The radiologist found an "oblique fracture of the mid shaft of the humerus". RP 446. Dr. Moore contacted CPS to report AMM's injury. RP 448-449. Dr. Moore arranged for AMM to be transferred to Mary Bridge Children's Hospital for an evaluation by a pediatric orthopedic specialist. RP 450. No such specialist was available at Harrison Hospital. Id. Dr. Moore's testimony was presented without objection by defense counsel. RP 437-451. Dr. Moore's emergency room report (exhibit No. 23) was admitted into evidence without objection from defense counsel. RP 440.

Dr. Leen is employed as a radiologist. RP 525. Dr. Leen was involved in AMM's medical care and testified for the State. RP 525-540. During his testimony Dr. Lee described the images taken of AMM on November 18, 2008 which indicated AMM had an oblique fracture to the mid humerus. RP 529-530. Dr. Leen's medical report of November 18, 2008 was admitted into evidence without objection from defense counsel. RP 528-529. Dr. Leen was also involved in AMM's care in December 2008. RP 535-538. Dr. Leen testified the scan of AMM's brain showed one, possibly two subdural hematomas. RP 535. The scans also showed AMM had a skull fracture. RP 538. Dr. Leen's report regarding the care given to AMM in December 2008 was admitted into evidence as Exhibit No. 26 without objection of defense counsel. RP 528-529.

Dr. Spence is a pediatric hospitalist employed at Mary Bridge Children's Hospital. RP 576. Dr. Spence was involved in AMM's medical care on November 18, 2008 and testified for the State. RP 576-590. Dr. Spence's treatment notes were admitted into evidence without defense counsel objection as exhibit 28. RP 578. Dr. Spence described treating AMM for a left humerus fracture. RP 581-586. No other injuries were shown in the CT or skeletal scans. RP 585.

Dr. Lupu is employed as an intensive care pediatrician at Mary Bridge Hospital. RP 617. Dr. Lupu treated AMM in December 2008 and her treatment notes were entered into evidence as Exhibit No. 29 without objection from defense counsel. RP 619-620. Jacob Mejia provided a description of the events of December 2008 to Dr. Lupu. RP 622. Specifically Jacob Mejia told Dr. Lupu that he left AMM on the couch while he went to the kitchen for a cup of coffee. Id. While he was in the kitchen he heard a thump and found AMM on the floor and the family dog on the couch. RP 622. Dr. Lupu also described AMM's fractured humerus to the jury. RP 624. Dr. Lupu did not find any eye injuries or neck injuries on AMM. RP 634.

The final medical provider testifying during the presentation of the State's case was Dr. Al-Agba. RP 392-404. Dr. Al-Agba had provided medical care to AMM. Id. He was aware of the AMM's fractured left Humerus. RP 398.

Dr. Barnes is employed as a pediatric radiologist and pediatric neuroradiologist at Lucille Packer Children's Hospital in the Stanford University Medical Center in Palo Alto, California. RP 727. Dr. Barnes testified during the presentation of Jacob's case. RP 727-824. In his position Dr. Barnes reviews imaging examinations and confers with the treating physicians. RP 734. Dr. Barnes was the co-founder of the northern California Child Abuse Task Force. RP 729-730. His employment duties include reviewing cases involving suspected abuse or neglect. RP 731. Dr. Barnes consults for both prosecution and defense cases. RP 736. Dr. Barnes published an article in January 2011 reviewing falls that may produce imaging findings which in the past were deemed to be the result of abuse. RP 733.

Dr. Barnes reviewed imaging examinations of AMM's brain, chest and bones, medical records, reports of child protection services, pediatrician records and some police reports regarding the December 2008 injury. RP 734. Dr. Barnes produced a report of his findings. RP 738-739. Dr. Barnes concluded that the imaging was not conclusive and did not reveal whether the injury was accidental or non-accidental. RP 740. Additionally, the records excluded medical conditions which may predispose AMM to traumatic injury on an accidental or non-accidental basis. RP 740. In his words, "The imaging is not conclusive that this is child abuse". RP 740. Dr. Barnes also testified that short falls can produce the type of hemorrhage seen on AMM's CT scan.

RP 742. In Dr. Barnes' opinion the scans of AMM show "skeletal abnormalities of different timing that we really can't time to a specific time range or a specific event." RP 753. Dr. Barnes suggested the images show AMM may have suffered from a problem with his bones. RP 754. Dr. Barnes also testified reports have been made of falls at a distance less than alleged in this case which resulted in the type of brain injury seen in AMM. RP 770, 776. Additionally, the imaging of AMM suggests he suffered from a predisposing factor with his brain and his bones. RP 771.

Dr. Plunkett also testified during presentation of Jacob Mejia's case. RP 909-968. Dr. Plunkett is self employed as a consultant in forensic pathology almost exclusively on the topic of infant injury evaluation. RP 909. Dr. Plunkett reviewed reports regarding AMM's December 2008 injury and generated a report. RP 922-923. In Dr. Plunkett's opinion, AMM's injuries in December 2008 could have been caused either accidentally or intentionally. RP 924. Dr. Plunkett had been involved with studies of falls and the effect falls may have on a body. RP 928-930. The study he participated in, and co-authored the article detailing the study, was published. RP 929-930. Dr. Plunkett testified AMM's injuries could have originated from a fall off a couch as reported by Jacob Mejia. RP 938. Dr. Plunkett disagreed with Dr. Duralde's assertion that no reliable tests for determining thresholds for injuries from falls existed. RP 940. In Dr. Plunkett's opinion, the lack of retinal hemorrhage found on AMM indicates he did not have a rapid increase of

intracranial pressure. RP 942. The change in AMM's level of consciousness detected later in the evening was caused by an increase in AMM's intracranial pressure that took a long time to develop. RP 943. The lack of repaid increase of intracranial pressure was consistent with a low velocity impact rather than a high velocity impact which is consistent with Jacob Mejia's description of the fall from the couch. RP 943. In Dr. Plunkett's opinion AMM's injuries could have been accidental in nature. RP 946.

The prosecutor called Dr. Sugar to testify as a rebuttal witness. RP 974-1023. Dr. Sugar employed as a clinical professor of pediatrics, the medical direction of the Harborview Center for Sexual Assault and Traumatic Stress and a consultant for child abuse. PR 975. Dr. Sugar reviewed medical records, police reports, and a CPS report pertaining to AMM. RP 979-980. Dr. Sugar wrote a letter containing her opinions, conclusions, and findings made regarding her evaluation of AMM to Detective Blankenship. RP 980-981. The letter was admitted into evidence without objection of defense counsel. RP 981. Dr. Sugar was allowed to testify regarding her opinion of AMM's injuries. RP 981. In Dr. Sugar's opinion it is unlikely that all of the injuries found on AMM on December 23, 2008 resulted from a simple fall. RP 981. Dr. Sugar criticized Dr. Barnes' report. RP 985, 986, 1001.

Deputy Tufts is employed as a Deputy Sheriff with the Kitsap County Sheriff's Office and testified for the State in this matter. RP 491-496. Deputy Tufts was on duty on November 18, 2008. RP 491. he was dispatched to

Harrison Hospital to investigate possible child abuse. RP 492. Deputy Tufts described the explanation Jacob Mejia provided to him of the incident of November 18, 2008 in which AMM was injured. RP 494-495. Specifically, Deputy Tufts testified that Jacob Mejia told the Deputy that he swaddled AMM and to swaddle him he tucked AMM's arm behind AMM's back. RP 495. Defense counsel did not object to any of Deputy Tufts' testimony. RP 490-496.

Detective Blankenship testified on first on April 21, 2011 and completed her testimony on April 25, 2011. RP 497-523. Detective Blankenship described the account of the December 22, 2008 incident which Jacob Mejia reported to her. RP 497 - 499. Jacob Mejia told the Detective that he had placed AMM in the center of the loveseat and got up to make a cup of coffee. RP 497. While he was making coffee he heard a thud and ran back to the living room. Id. He saw AMM lying on his back on the living room floor. Id. Detective Blakenship went to the Mejia residence and experimented with attempting to convince the family dog to jump on the loveseat. RP 505-511. She also attempted to bump stuffed animals off the loveseat by sitting down on the loveseat in a forceful manner. Id. Detective Blakenship was unable to recreate the incident of December 22, 2008 as described by Jacob Mejia. Id. No objections were made by defense counsel during the Detective's testimony. RP 497-523.

Heather Lofgren is employed with Child Protective Services (CPS) as a family volunteer service worker. RP 541. Ms. Lofgren testified she received a referral to investigate possible child abuse on November 18, 2008. RP 544-545. Ms. Lofgren offered parenting classes and public health nurse services to Jacob Mejia. RP 546. Ms. Lofgren wrote up a safety plan with AMM's parents. RP 546-547. Ms. Lofgren found that AMM had been neglected. RP 547. Defense counsel did not object to Ms. Lofgren's testimony. RP 541-548.

Ms. Lofgren was involved with the Mejia family again in December 2008. Ms. Lofgren received a referral to CPS alleging AMM had been abused. RP 548. Ms. Lofgren described the account of the December incident as provided to her by Jacob Mejia. RP 550-551. Jacob Mejia told her that he left AMM on the couch while he made a cup of coffee. RP 550. He heard a thump and then heard AMM's cry. RP 550. He found AMM on the floor. Id. Jacob Mejia picked AMM off the floor. Id. Jacob Mejia later searched the internet on the house computer on the subject of babies falling off couches. RP 550-551. Ms. Lofgren participated in the unsuccessful attempts to recreate the events on the loveseat in the Mejia home. RP 553-556. Ms. Lofgren testified that Jacob told her it was not normal for a baby to be injured twice in a month and he wasn't the best caretaker for the child without objection of defense counsel. RP 551.

Kristl Pohl is employed as a detective with the Washington State Patrol. RP 591. She is assigned to the high tech crime unit. Id. Detective Pohl examined a computer obtained from the Mejia residence through a search warrant. RP 569. The examination showed the computer had been used to search for baby falls and head injuries. RP 606. The search was conducted on or before December 22, 2008 RP 613. A specific date of the search could not be pinned down. RP 609.

Ashley Mejia testified twice during the trial. She initially testified during the presentation of the State's case on April 25, 2011 and testified again during the presentation of the defense's case. RP 452-466, RP 707-717. Ashley Mejia resided with her parents Kim & Bernard Mejia, her brother Jacob Mejia, Sarah Tate, and AMM. RP 453. Ashley was at home on December 22, 2008. She was awoken that morning by the sound of AMM crying. RP 456. Ashley was told that AMM had fallen off the couch and was upset. RP 456. Ashley recalled seeing Jacob Mejia and Ashley were both upset. RP 465. AMM calmed down, stopped crying, and ate. Id. Ashley did not see anything unusual with AMM at that time. RP 712. It was not until 10pm that night when she noticed AMM's left foot, arm, and eye were twitching while he was eating. RP 456. Ashley did not notice anything unusual of AMM until 10pm. Id. Ashley also testified of the propensity of the family dog Chewy to lay on the loveseat in the living room of the residence. RP 459-460.

Sarah Tate testified twice during the trial as well. She initially testified during the presentation of the State's case on April 25, 2011 and a second time during the presentation of the defense's case. RP 467-488, 829-856. The prosecutor questioned Ms. Tate regarding AMM's arm injury on November 18, 2008 without objection from defense counsel. RP 469-474. Ms. Tate described the wedding she, Jacob Mejia and AMM attended days before. RP 471. AMM was passed around to people during the wedding. Id. Sarah recalled seeing Jacob Mejia swaddle AMM the morning of November 18, 2008. RP 472. Sarah noticed AMM's arm appeared to be bothering him later that day. RP 473. The prosecutor also asked Ms. Tate if she or Jacob Mejia took the parenting classes offered by CPS as a result of the November 18 incident. RP 474. The questions posed to Ms. Tate regarding the November 18 incident were not objected to by defense counsel. RP 469-474.

On the morning of December 22, Ms. Tate took a shower and played solitaire on the computer in the Mejia residence while Jacob Mejia cared for AMM. RP 475-77. While Ms. Tate played on the computer she heard a thump and AMM cry immediately after. RP 477, 838. She went into the living room immediately. Id. Jacob Mejia had arrived into the living room before she did. Id. Jacob Mejia was picking up AMM as she arrived into the room. Id. Ms. Tate noticed AMM was faintly crying and would not keep his eyes open. RP 477, 479. Ms. Tate and Jacob Mejia went to the computer and searched for information regarding infant falls. RP 479. Ms. Tate told Jacob

Mejia she wanted to take AMM to the hospital, but Jacob Mejia wanted to call his parents first to look at AMM, which he did. RP 480. Neither Jacob Mejia or Ms. Tate had a driver's license. RP 487. Kim and Bernard arrived home and thought AMM looked like he was fine. RP 480. Kim took over AMM's care when she arrived home. RP 482. AMM was not experiencing any seizures or breathing difficulties during the day. RP 844. Ms. Tate noticed AMM started to have seizures in the evening. RP 845-846. Ms. Tate observed the seizures and woke up Jacob. RP 846. Jacob woke up his parents to take them to the hospital. RP 846-847.

Bernard Mejia, Jacob Mejia's father, testified as well. RP 649-678. Defense counsel asked Bernard about the November 18, 2008 incident. 653-656. Bernard provided a detailed description of the incident including reciting Jacob Mejia's description of what had happened. *Id.* Bernard also discussed the CPS safety plan which was issued pursuant to the November 2008 incident. RP 671.

Bernard Mejia recalled observing AMM the morning of December 22. RP 661- 662. AMM was not crying but had a small bump on his head at the time Bernard saw him that morning. RP 661. AMM was not showing any other signs of injury. RP 662. Jacob Mejia woke up Bernard and Kim to take AMM to the hospital that evening. RP 666.

Kimberly Mejia also testified at the trial. RP 678-707. Defense counsel asked Ms. Mejia to describe the incidents surrounding AMM's

November 2008 injury. RP 686-688. Ms. Mejia was also questioned by the prosecution regarding Jacob Mejia's description of how the injury came about. RP 698. Ms. Mejia recalled Jacob phoned her around 12:30 on December 22, 2008. RP 689. Jacob reported that AMM fell of the couch and had been given some Tylenol. Id. Ms. Mejia told Jacob she was going to be home shortly thereafter. Id. When Ms. Mejia arrived home AMM was awake. RP 691. Ms. Mejia took care of AMM that entire day and evening from about 1pm until 9:30-10:00 pm. RP 691, 693. She did not see any obvious signs that something was wrong with AMM. Id. AMM ate normally that night. RP 691-692. Ms. Mejia recalled Jacob Mejia woke her and Bernard up between 11pm and 11:30pm. At that time Ms. Mejia observed AMM's eye twitching. RP 695.

IV. Argument

A. Jacob Mejia's right to effective counsel was violated. As a result of counsel's deficiencies, he did not receive a fair trial.

Claims of ineffective assistance of counsel are reviewed de novo. *State v. White*, 80 Wn.App 406, 410, 907 P.2d 310 (1995). Assertions of ineffective assistance of counsel are determined with the application of a two part test. To establish a claim of ineffective assistance of counsel a defendant must prove counsel's deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed2d 674 (1984); *In Re Personal Restraint of Rice*, 118 Wn.2d 876, 888,

828 P.2d 1086, *cert. denied*, 506 U.S. 958, 113 S.Ct. 421, 121 L.Ed.2d 344 (1992). To prove deficient performance, a defendant must prove the representation fell below an objective standard of reasonableness under professional norms and a reasonable possibility exists that but for counsel's error, the result would have been different. *State v. Rice*, 118 Wn.2d at 888-89. The Court starts with the presumption counsel's representation was effective. *State v. Hendrickson*, 129 Wn.2d.61, 77, 917 P.2d 563 (1996). To establish ineffective assistance of counsel for failure to object, the defendant must show the absence of a legitimate or tactical reason for not objecting, and that the trial court would have sustained the objection if it had been made, and the result of the trial would have differed if the evidence had not been admitted. *State v. Saunders*, 91 Wn.App 575, 578, 958 P.2d 364 (1998).

1. Defense counsel's failure to object to the admission of evidence of AMM's November 2008 injury was ineffective assistance of counsel. As a result of counsel's deficiencies, Mr. Jacob Mejia did not receive a fair trial.

Throughout the trial witnesses provided information, during both direct and cross examination regarding, the broken arm AMM sustained on November 18, 2008. Jacob Mejia was not charged with causing injury to AMM on November 18, 2008 although evidence was presented indicating Jacob Mejia caused AMM's injuries on that date. Defense counsel did not

object to or ask to strike any of the testimony regarding the November injury. The evidence of AMM's November injury should have been excluded under ER 404(b) and or under relevance grounds. The evidence of the injury caused by Jacob Mejia falls under the category of evidence of other bad acts, specifically an injury caused by Jacob Mejia to AMM in addition to the charged offenses. The evidence of the November injury is improper 404(b) evidence. Under ER 404(b).

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b)

The appellate court reviews the trial court's decision to admit evidence for an abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 202 P.3d 937 (2009). A trial court abuses its discretion when it bases its decision on manifestly unreasonable or untenable grounds. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967, *cert denied*, 528 U.S. 922 (1999). The trial court has discretion to determine relevancy of evidence. *State v. Demos*, 94 Wn.2d 733, 736, 619 P.2d 968 (1980).

ER 404(b) creates a presumption that evidence of other crimes, wrongs, or acts is inadmissible to prove character and show action in conformity therewith. ER 404(b). The trial court is to carefully consider whether proposed evidence sought for admission under ER 404(b) should

be allowed. The trial court is to determine whether the evidence of prior bad acts is relevant to prove an element of the crime charged or to rebut a defense. The trial court must begin with the presumption that evidence of prior bad acts is inadmissible. *State v. Scherner*, 153 Wn. App. 621, 225 P.3d 248, (2009), review granted, 168 Wn.2d 1036, 233 P.3d 888.

Case law has established a four part test to be used to determine if evidence is admissible pursuant to ER 404(b). The four part test includes the following: 1) the trial court must find by a preponderance of evidence that the misconduct occurred; 2) identify the purpose for which the evidence is sought to be introduced; 3) determine whether the evidence is relevant to prove an element of the crime charged; and 4) weight the probative value against the prejudicial effect of the evidence. *State v. Foxhoven*, 161 Wn.2d 168, 163 P.3d 786 (2007). The test for admissibility based on relevancy is established by case law. "Evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable." *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995).

The trial court must make a showing on the record weighing of whether the probative value of the prior bad acts outweigh its prejudicial impact. *State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995). The court must examine "...whether the evidence is relevant and necessary to prove an essential element ingredient of the crime charged." *State v. Lough*, 125

Wn.2d at 863. As mentioned above, the analysis must be made part of the record: "... a trial court must also determine on the record whether the danger of undue prejudice substantially outweighs the probative value of such evidence, in view of the other means of proof and other factors." *State v. Powell*, 126 Wn.2d at 264. If the proposed evidence is likely to create an emotional response in the jury rather than aid the jury in making a rational decision, there is a danger of unfair prejudice to the Defendant. *State v. Powell*, 126 Wn.2d at 264 citing *State v. Rice*, 48 Wn.App 7, 13, 737 P.2d 726 (1987) "In doubtful cases the scale should be tipped in favor of the defendant and exclusion of the evidence." *State v. Powell*, 126 Wn.2d at 264 quoting *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). The purpose of the rule is to prevent the state from suggesting that a defendant is guilty because he/she is a criminal-type of person who would be likely to commit the crime charged. *State v. Russell*, 154 Wn.App. 775, 225 P.3d 478, review granted, 169 Wn.2d 1006, 243 P.3d 1172 (2010). In the case of *State v. Dawkins*, 71 Wn.App 902, 863 P.2d 124 (1993), the court found defense counsel was ineffective for failing to object to ER404(b) evidence. As in the Dawkins case, trial counsel's failure to object constituted ineffective representation.

As previously argued in this brief, in order to prevail on a claim of ineffective assistance of counsel Jacob Mejia must establish counsel's performance was deficient. In this case counsel's failure to object to

evidence of AMM's November 2008 injuries was deficient because the evidence would have been excluded under ER 404(b) and or relevance grounds. Additionally, the erroneous admission of the evidence led to a conviction in this matter.

The evidence of November 2008 injury caused by Jacob Mejia to AMM is an uncharged crime of assault. This uncharged assault of November 2008 was not admissible evidence. In this case the witnesses were allowed to describe AMM's injuries and treatment AMM received on November 18, 2008 without objection of defense counsel. RP 441-451. The testimony regarding AMM's November injury was extensive. For example, Dr. Moore described the fracture of AMM's humerus discovered on November 18, 2008. RP 445. Dr. Moore's report and the radiologists reports regarding the fracture were all admitted without objection by defense counsel. RP 440-446. Ms. Tate was questioned by the prosecution regarding AMM's November 2008 injury without objection from defense counsel. RP 467-474. Defense counsel questioned Jacob regarding AMM's injury in November 2008. RP 862-868.

Dr. Valrey was allowed to refer to AMM's humerus fracture during his testimony without objection of defense counsel. RP 212. Dr. Duralde also discussed AMM's November 2008 injury including informing the jury AMM was "admitted and worked up for possible abuse." RP 270. Not only was Dr. Duralde allowed to describe AMM's injury and treatment in November 2008

without objection of defense counsel the medical report she created regarding the injury was admitted into evidence without objection by defense counsel as well. RP 271. Dr. Duralde's provided testimony of Jacob's description of swaddling AMM. RP 277-279. Dr. Duralde's description of Jacob's statements included a statement made by him indicating he was sorry for what had happened to AMM. RP 279. Dr. Duralde was allowed to describe her comparison of AMM's condition between November and December 2008 without objection from defense counsel. RP 289. Dr. Durald stated the difference in AMM's condition was troubling and his condition in December 2008 was poor. Id. Dr. Duralde also testified that AMM was healthy in November 2008 with the exception of his broken arm. RP 337. Defense counsel questions Dr. Duralde regarding the November 18, 2008 injury as well. RP 355-357.

Dr. Al-Agba mentioned AMM's fractured left humerus during his testimony without objection from defense counsel. RP 398. Dr. Leen was allowed to testify regarding AMM's fracture in November 18, 2008 without objection from defense counsel. RP 525-530. Dr. Spence was allowed to testify regarding AMM's November injuries without objection of defense counsel. RP 624.

Deputy Tufts was allowed to testify regarding his investigations into possible abuse against AMM on November 18, 2008 without objection from defense counsel. RP 490-496. Deputy Tufts described statements Mr.

Mejia made to the deputy regarding swaddling AMM without objection RP 495.

Ms. Lofgren, a volunteer service worker employed by CPS was also allowed to testify regarding AMM's injuries in November 2008 without objection by defense counsel. RP 541-548. Ms. Lofgren described recommendations given to AMM's parents as a result of AMM's injury in November 2008. Ms. Lofgren also testified her recommendations had not been followed. RP 547. Ms. Lofgren also testified she wrote up a safety plan for AMM and found that AMM had been neglected on November 18, 2008. All of this testimony was presented without objection by defense counsel. Ms. Lofgren was allowed to repeat her conversation with Jacob regarding both the November and December injuries without objection. RP 551.

The prosecutor discussed the November 18, 2008 injury in his closing argument. RP 1032-1033. In his closing, the prosecutor asserted that AMM left the hospital on November 18 2008 to return to an unsafe home. RP 1033. The prosecutor also argued in his closing that as a result of the November injury Jacob Mejia was hesitant to bring AMM to the hospital in December. RP 1042-1043. The prosecutor also argued that Jacob Mejia blamed others for AMM's November injury and was again blaming something else, the family dog, for the December 2008 injury. RP 1072-1073. In the State's rebuttal argument the prosecutor suggested to the jury the November 2008

incident was important to use to attack Jacob Mejia's credibility. RP 1112-1113.

The second test to show ineffective assistance of counsel is to demonstrate a reasonable possibility exists but for the error of counsel, the outcome of the trial would have been different. *State v. Rice*, supra. In this case the evidence shows that but for the admission of the improper evidence, Jacob Mejia would not have been found guilty of the charges. AMM's November injury was described again and again by the majority of the witness during the course of the trial. The jury heard Jacob Mejia was involved with AMM's injuries both in November and December 2008.

Reversal of the conviction is required. It is within reasonable probabilities that had the error not occurred the outcome of the trial would have been materially effected. *State v. Alams* 93 Wn.App. 754, 970 P.2d 367 (1999), *review denied* 138 Wn.2d 1014, 989 P.2d 1142.

The evidence suggested that Jacob Mejia abuses AMM and commits crimes against AMM. The evidence was prejudicial to Jacob Mejia and likely improperly suggested to the jury that Jacob Mejia was guilty of another assault against AMM that he was not charged with, therefore he was guilty of the crimes charged in the present case. The information goes to the character of Jacob Mejia and portrayed him in a negative fashion that must have influenced the jury. In closing argument the prosecutor argued the

statements Jacob Mejia made regarding the November injury destroy his credibility and believability in regards tot he December 2008 injury.

This is the type of evidence that ER 404(b) was designed to keep out of trial. The only real purpose of the evidence must be to create a presumption that Jacob Mejia has a propensity to injure AMM which would be in conformity with the current charges against him. This evidence is not admissible under 404(b). The evidence of AMM's prior injury is not relevant to an element of the offense Jacob Mejia was charged with. Assault first degree and criminal mistreatment in the second degree against AMM occurring on 12/22/2008 through 12/23/2008. Whether AMM was injured the month prior has no bearing on the whether Jacob Mejia assaulted or criminally mistreated AMM in December 2008. Ms. Lofgren investigated possible abuse of AMM and found AMM's injury arose through negligence rather than an intentional act. RP 548. Dr. Duralde determined the AMM's November 2008 injury was not an inflicted but was an accidental injury. RP 282-283. The evidence was not relevant and should have been excluded on the basis of relevancy.

Since no objection to the admission of the November injury was made, the tests required to determine if evidence is admissible under ER 404(b) were not conducted in this matter. The Court did not establish the purpose for which the evidence was admitted as required. The balancing test required for a 404(b) analysis would have weighed in favor of excluding

the evidence of the November injury. The evidence of the injury was highly prejudicial as it created an inference that Jacob Mejia repeatedly abused AMM. The evidence is not probative into the establishing the elements of the charged crimes. By the testimony presented, the November injury was the result of a negligent rather than intentional act. The evidence of the November injury was used to infer Jacob Mejia had a propensity to abuse AMM which is improper. The evidence had no probative value and was highly prejudicial.

The court did not engage in a balancing test weighing the probative value against the potential for prejudice as required by the rule. *Id.* The issue of whether AMM was injured on November 18, 2008 was not disputed at the time of trial. However, the Court did not make a finding that AMM's injury was caused by Jacob Mejia occurred by a preponderance of evidence which is required for the first prong of the ER 404(b) admissibility test as previously outlined. The trial court would not have admitted the evidence of AMM's November 18, 2008 injury. The evidence was presented to the jury by virtue of defense counsel's ineffective assistance. Defense counsel made no objection to the admissibility of AMM's November injury which was raised throughout the trial both through direct and cross examination.

No legitimate or tactical reasons existed for the failure to object to the evidence of the November injury. As argued above, the evidence of the injury would have been excluded from the trial if an objection had been made. The

evidence was not relevant to the elements of the charged crimes, and the evidence was highly prejudicial. The result of the trial would have been different if the evidence had been excluded. In this case medical experts testified AMM's injury in December 2008 may have resulted from a fall off a couch consistent with Jacob's consistent explanation of the injury. However, the evidence of the November 2008 injury, and the defendant's statements regarding that injury were used to destroy Jacob Mejia's credibility and create an inference Jacob Mejia has a propensity to abuse AMM. As a result of the presentation of the improper evidence Jacob Mejia was convicted. Also concerning is the trial court's discussion and apparent consideration of the November injury when issuing an exceptional sentence in this matter. RP 5/23/2011, 40-41.

Reversal of the convictions is required. It is within reasonable probabilities that had the error not occurred the outcome of the trial would have been materially effected. *State v. Alams* 93 Wn.App. 754, 970 P.2d 367 (1999), *review denied* 138 Wn.2d 1014, 989 P.2d 1142. In this case reversal is appropriate. The effect of the evidence of AMM's prior injury caused by Jacob Mejia was to undoubtedly suggest to the jury that Jacob Mejia repeatedly engaged in physically abusive behavior toward AMM and destroyed Jacob Mejia's credibility. In other words, the evidence tended to show Jacob Mejia had a propensity to physically abuse AMM. This evidence influenced the jury. Witnesses credibility was a key issue in this case.

Jacob Mejia's credibility was likely destroyed in the minds of the jury as the result of the questioning regarding AMM's November 2008 injury. In closing arguments the prosecutor suggested Jacob Mejia was a danger to AMM as shown by AMM's multiple injuries over a two month period. Those arguments must have had on the jury especially in this case where medical experts opined it was possible AMM's December injuries occurred as Jacob Mejia described.

2. Failure of trial counsel to request a limiting jury instruction to address testimony presenting regarding AMM's November injury was ineffective assistance of counsel.

The standard of review for claims of ineffective assistance of counsel and pertinent case law to be used to evaluate the claim are previously set forth in this brief and will not be repeated here.

If evidence of bad acts is admitted, a limiting instruction must be given to the jury. *State v. Foxhoven*, 161 Wn.2d 168, 163 P.3d 786 (2007). The jury did not receive an instruction on the proper use of this evidence. In this case no limiting instruction was given. Mr. Kibbe did not have any issues with the State's proposed jury instructions. RP 1024. Mr. Kibbe did not have any objections or exceptions with the jury instructions submitted to the jury. RP 1028. As previously argued, the evidence of AMM's November injury which had been caused by Jacob Mejia was evidence of a prior bad act and

falls with ER 404(b). A limiting instruction was necessary to emphasize to the jury the November incident was not to be used to determine whether Jacob Mejia committed the committed the charged he was accused of. Without that instruction the jury used the November incident to conclude Jacob Mejia abused AMM. The improper evidence is the kind of evidence which cannot be erased from juror's minds because it was "propensity" evidence under 404(b), highly prejudicial and likely to cause the jury to "prejudge" Jacob Mejia, which denied him the fair opportunity to defend against the State's case. See *Michelson v. United States*, 335 U.S. 469, 475-76, 69 S.Ct. 213, 93 L.Ed. 168 (1948). The case of *State v. Simpson*, 22 Wn.App. 572, 590 P.2d 1276 (1979) the appellate court reversed a conviction based on lack of a limiting jury instruction to address 404(b) issues.

In this matter the outcome of the trial would likely had been different if the jury had received the required instruction informing them they were not to use the testimony of AMM's prior injury to determine Jacob Mejia's guilt on the crimes charged. Without that instruction it is likely the jury used the testimony regarding AMM's November injury improperly.

B. The trial court violated Jacob Mejia's right to due process when it entered a judgement of conviction for offenses unsupported by substantial evidence.

The standard for examining a sufficiency of the evidence claim is outlined in the previous section and will not be repeated here. "Substantial evidence" in the context of a criminal case means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1979) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.,2d 227, 228 (1970)). Mere possibility, suspicion, speculation, conjecture or even a scintilla of evidence is not substantial evidence. *State v. Moore*, 8 Wn. App. 1, 499 P.2d 13 (1972).

1. The evidence presented was insufficient to support a finding of guilt on the charge of Assault in the first degree.

Jacob Mejia was charged with Assault in the first degree. The elements of that charge are set forth in RCW 9A.36.011 which states as follows:

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

- (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or
- (b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or
- (c) Assaults another and inflicts great bodily harm. RCW 9A.36.011

In this case substantial medical testimony was presented. The medical testimony indicated it was within the realm of possibilities AMM's

injuries could have been the result of an accident as described by Jacob Mejia. As indicated previously, Jacob Mejia repeatedly told individuals that on December 22, 2008 AMM fell off the couch. Admittedly some of the physicians testified the possibility of an accidental origin of the injuries was remote, the testimony showed AMM's December injury could have been accidental in nature. The evidence was not sufficient to establish Jacob Mejia intentionally committed the crime of assault in the first degree against AMM. The evidence supported a finding AMM's injuries were the result of an accident which could not support a conviction for assault in the first degree.

Dr. Hrivnak testified AMM December's injury could have been the result of either something hitting AMM's head or AMM fell and hit something with his head. RP 189,191, Dr. Valrey did not conclude AMM was the victim of abuse. RP 224-227, Dr. Duralde acknowledged AMM's December injury could have resulted from a short fall. RP 342, Additionally, neither neck or eye injuries were found on AMM which would have supported a finding AMM had been shaken. Furthermore, No retinal hemorrhaging, which is found in eighty five percent of cases where a child has been shaken. RP 365.

Dr. Barnes concluded that it is not possible to determine if AMM's injuries had a accidental or non-accidental origin. RP 740. In his words, "The imaging is not conclusive that this is child abuse". RP 740. Dr. Plunkett testified that it was impossible to determine whether AMM's injuries in December 2008 could have been caused either accidentally or intentionally.

RP 924. In Dr. Sugar's opinion it is unlikely, but not impossible, that all of the injuries found on AMM on December 23, 2008 resulted from a simple fall. RP 981.

2. The evidence presented was insufficient to support a finding of guilt on the charge of Criminal Mistreatment in the second degree.

Jacob Mejia was also charged with the crime of criminal mistreatment in the second degree. The elements for that offense are found in RCW 9A.42.030 which states as follows:

(1) A parent of a child, the person entrusted with the physical custody of a child or dependent person, a person who has assumed the responsibility to provide to a dependent person the basic necessities of life, or a person employed to provide to the child or dependent person the basic necessities of life is guilty of criminal mistreatment in the second degree if he or she recklessly, as defined in 9A.08.010 either (a) creates an imminent and substantial risk of death or great bodily harm, or (b) causes substantial bodily harm by withholding any of the basic necessities of life. RCW 9A.42.030

RCW 9A.08.010 defines recklessness as follows:

RECKLESSNESS. A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation. RCW 9A.08.010

In this case the prosecutor argued Jacob Mejia was guilty of the crime of criminal mistreatment in the second degree based on his failure to immediately take AMM to the hospital on December 22, 2008. RP 1066-1067. The evidence presented did not support a conviction for the charge of

criminal mistreatment in the second degree. AMM appeared to be fine after the fall. Ashley Mejia noticed that AMM was upset but calmed down, stopped crying and ate. RP 465. Nothing appeared unusual to Ashley Mejia at that time. RP 712. After AMM calmed down after the fall Ms. Tate saw nothing unusual with AMM until the evening. RP 844. Ms. Kimberly Mejia cared for AMM on December 22 2008 from 1pm to 10pm. RP 691, 693. During that time she did not see anything unusual with AMM. Id. Bernard Mejia did not see any signs of injury on AMM other than the bump on the back of his head. RP 662. Ms. Tate first noticed AMM was having seizures. RP 845-846. Upon this discovery Ms. Tate woke up Jacob who in turn woke up his parents to drive them to the hospital. When AMM exhibited signs of a serious injury he was taken for immediate treatment. Initially after the fall the parents found directions on the internet of how to handle the situation. They followed the instructions they were given. Additionally, Jacob Mejia called his mother for guidance and followed her instructions as well. Jacob Mejia took appropriate steps to address AMM's medical needs. No evidence was presented showing Jacob Mejia prevented Ms. Tate from taking AMM to the hospital. Both Jacob Mejia and Ms. Tate made the choice to wait and observe AMM to see if medical care was necessary. The evidence does not support a finding Jacob Mejia withheld medical treatment from AMM when faced with clear evidence such treatment was necessary nor does the evidence show Jacob Mejia acted in a reckless manner. The conviction for criminal

mistreatment in the second degree should be vacated as the evidence presented at trial does not support a conviction on that charge.

C. The trial court abused its discretion in ordering a sentence of three hundred months .

1. The failure to enter findings of fact and conclusions of law regarding an exceptional sentence denies Jacob Mejia his constitutional and statutory right to appeal and is a violation of statutory requirements.

Article 1 section 22 of the Washington State constitution guarantees the right to appeal “in all cases” The court has previously held the right to appeal is a fundamental right. *State v. Garcia-Martinez*, 88 Wn.App. 322, 327, 944 P.2d 1104 (1997) Whenever a court imposes an exceptional sentence, the trial court must set forth the reasons for that decision in written findings of fact. RCW 9.94A.535 The statute outlining appellate review of exceptional sentences is found in RCW9.94A.585 which states in pertinent part:

(2) A sentence outside the standard sentence range for the offense is subject to appeal by the defendant or the state. The appeal shall be to the court of appeals in accordance with rules adopted by the supreme court.

(3) Pending review of the sentence, the sentencing court or the court of appeals may order the defendant confined or placed on conditional release, including bond.

(4) To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record

which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

(5) A review under this section shall be made solely upon the record that was before the sentencing court. Written briefs shall not be required and the review and decision shall be made in an expedited manner according to rules adopted by the supreme court.

RCW 9.94A.585

“[F]or an action to be clearly excessive, it must be shown to be clearly unreasonable, i.e. exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would take. *State v. Ritchie*, 126 Wn.388,393,894 P.2d 1308 (1995) (citing *State v. Oxborrow*, 106 Wn.2d 525, 531, 723 P.2d 1123 (1986)). Without written findings of fact and conclusions of law, it is difficult to determine whether the exceptional sentence imposed by Judge Mills was based on untenable reasons or grounds. In this case the jury did find the aggravating factor of particularly vulnerability applied. However, Judge Mills mentioned other factors she considered in deeming whether an exceptional sentence was appropriate such as the lack of rehabilitation. Because the question of whether Judge Mills’ decision was based on untenable reasons becomes unreviewable, Jacob Meijja is denied meaningful appellate review.

This court should reverse the sentence and remand for resentencing. The sentencing court failed to follow requirements for properly sentencing Jacob Meijja. Findings of Fact and Conclusions of Law should have been

entered but were not. The Court did not satisfy the statutory requirements for the imposition of an exceptional sentence. The failure to enter written findings of fact normally requires remand for entry of findings. *In re Breedlove*, 138 Wn.2d 298, 311, 979 P.2d 417 (1999). The failure to enter findings justifies vacation of a sentence if it results in a complete miscarriage of justice. *Id.* In this case the sentence violated Mr. Mejia's constitutional right against cruel and unusual punishment therefore vacation of the sentence is warranted. This court should vacate and remand Jacob Mejia for resentencing.

2. The exceptional sentence imposed was clearly excessive

If this Court determines the record of the oral ruling of Judge Mills sufficient to allow a review of the exceptional sentence pursuant to RCW 9.94A.585(4) this Court should find that sentence imposed by Judge Mills was excessive. In this case the applicable standard range was 120 to 160 months on count one, assault in the first degree, and 13 to 17 months on count II, criminal mistreatment in the second degree. CP 112. Jacob Mejia was sentenced to 300 months on count one and 17 months on count two. *Id.* The sentence on the counts ran concurrently. CP 112-113. This sentence was excessive for the crime charged and was 140 months over the top end of the sentence range. Although the young age of AMM does make him particularly vulnerable the sentence of the trial court was excessive. Jacob Mejia consistently stated AMM fell off the couch. The medical testimony

showed to varying degrees that AMM's injuries could have been sustained as a result of the fall as Jacob Mejia described. Additionally there was not testimony indicated Jacob Mejia took any steps preventing Sarah Tate from taking AMM to the hospital. Both parents did some research of how to deal with a fall of an infant and consulted with family members. When it was clear AMM was having medical issues, the seizures, medical care was immediately sought.

It is concerning the trial court used AMM's November 2008 injury in determining an appropriate sentence. The trial court determined that Jacob Mejia attempted to excuse AMM's broken arm and should have thought about his ability to be a safe parent at that time. RP 5/23/2011, 41. The trial court used the incident as an indication Jacob could not be rehabilitated. RP 5/23/2011, 42.

In this case no one can say with certainty that AMM's injury in December 2008 could not have come from a fall as Jacob Mejia described. The medical experts did not agree with the degree of forces that would have been necessary to cause AMM's December injury. Additionally, retinal hemorrhages which occur in eighty five percent of children who are shaken were not present in this case. Given the doubt raised by the medical testimony, sentencing Jacob Mejia to a sentence 140 months above the standard range was excessive. This Court should vacate the sentence entered in this matter and remand for sentencing at the very least.

V. Conclusion

A review of the record of the proceedings in this matter shows that defense counsel was ineffective on a number of occasions. Jacob Mejia did not receive a fair trial as a result of the ineffective representation. Jacob Mejia respectfully requests this court to reverse the convictions entered against him in this matter for the reasons stated above

Respectfully submitted this 12 day of January , 2012.



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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY Ca
DEPUTY

NO. 42176-3-II

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION II

STATE OF WASHINGTON,

Respondent,

CERTIFICATE OF MAILING

v.

JACOB MEJIA

Appellant.

I, DIANE SYKES-KNOLL, declare under penalty of perjury under the laws of the State of Washington that the following statements are true and based on my personal knowledge, and that I am competent to testify to the same.

That on this day I had the Brief of Appellant. in the above-captioned case hand-delivered or mailed as follows:

Original Sent Electronically To:

Clerk of Court
coa2filings@courts.wa.gov

Copy of Motion for Continuance Hand Delivered To:

Randall Sutton
Kitsap County Prosecuting Attorney's Office
614 Division Street, MS-35
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Copy Mailed To:

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DOC #349594
Washington Corrections Center
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PO Box 900
Shelton, WA 98584

DATED this 12th day of January, 2012, at Port Orchard, Washington.



DIANE SYKES-KNOLL
Legal Assistant