

NO. 43930-1-II
(consolidated)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY A. TREBILCOCK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Michael Evans, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering Finding of Fact 34¹ to the extent that,

As a result of this withholding, A.T. suffered substantial bodily injury, to include very low body weight and growth stunting, and she was also placed at imminent risk and substantial risk of substantial bodily harm.

2. The trial court erred in finding, under Conclusion of Law 5 that Count III, Criminal Mistreatment in the Third Degree was proven beyond a reasonable doubt.

3. The evidence was insufficient to prove the elements of criminal mistreatment in the third degree.

4. As the evidence was insufficient, the trial court erred in entering a judgment against Mr. Trebilcock for Criminal Mistreatment in the Third Degree.

5. Mr. Trebilcock's criminal mistreatment in the third degree conviction infringed his Fourteenth Amendment right to due process.

6. The trial court did not have a lawful basis to order Mr. Trebilcock to obtain a substance abuse evaluation and complete recommended treatment as a condition of his misdemeanor probation.

¹ The Findings of Fact and Conclusions of Law are for the verdict. Supplemental Designation of Clerk's Papers, Findings of Fact, Conclusions of Law, and Verdict Following a Bench Trial (sub. nom 79).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Criminal mistreatment in the third degree requires proof that Mr. Trebilcock, acting with criminal negligence, either created an imminent risk of substantial bodily harm to A.T., or caused substantial bodily harm to A.T. The state failed to prove either. Did Mr. Trebilcock's conviction violate his Fourteenth Amendment right to due process because it was based on insufficient evidence?

2. Conditions of probation must be crime-related and have support in the record. As a condition of probation, the court ordered Mr. Trebilcock to have a substance abuse evaluation and complete recommended treatment. But nothing in the record suggests Mr. Trebilcock has a substance abuse problem. Did the trial court err in imposing the substance abuse evaluation condition of probation?

C. STATEMENT OF THE CASE

1. Procedural History

Jeffrey and Rebecca Trebilcock were charged and tried on thirteen counts of criminal mistreatment of their four adopted children. CP 1-8; RP Volumes 2A-11. The Trebilcocks waived jury. Supplemental Designation of Clerk's Papers, Waiver of Jury Trial (sub. nom. 33); RP 1 at 60-64. At the conclusion of the trial, the court dismissed all but Counts I and III for insufficient evidence. RP 11 at 2,630-35; CP 11, 12. The

court found Mr. Trebilcock and Mrs. Trebilcock guilty of criminal mistreatment in the first degree as to their adopted son J.T. and criminal mistreatment in the third degree for their adopted daughter A.T. Id.

The state pled and proved aggravating factors in support of an exceptional sentence. RP 11 at 2,635; CP 11. The court imposed a 60 month standard range sentence on Mr. Trebilcock's felony conviction. The court suspended half the 365-day misdemeanor sentence and put Mr. Trebilcock on probation for 24 months with specified conditions. CP 11, 14, 15; RP 11 at 2,725-32.

This appeal follows. CP 23.

The trial court filed its written findings and conclusions on the verdict on May 3, 2103. Supplemental Designation of Clerk's Papers, Findings of Fact, Conclusions of Law, and Verdict Following a Bench Trial (sub. nom 79).

2. Trial testimony.

a. The Trebilcocks have nine children.

Jeffrey and Rebecca Trebilcock enjoy a large family. They have four biological sons,² one adopted son, J.T.,³ and four adopted daughters, A.T.,⁴ N.T.⁵, T.T.⁶, and G.T.⁷ RP 10A at 2,344-45; RP 9B at 2,167. A.T.

² Dillon age 19, Adam age 17, Brandon age 23, and Shayne age 25

³14 years old

⁴ 12 years old

is J.T.'s biological sister. T.T., G.T., and J.T. are biological sisters born in Haiti. RP 9B at 2,176, 2,178, 2,180, 2,183. RP 10A at 2,345. J.T. and A.T. first came to the Trebilcock home as foster children in 2002, at ages five and three, respectively. RP at 10A at 2,416. N.T. arrived in early 2002. T.T. came to the home in late 2001. G.T. arrived in 2008. RP 10A at 2,416.

The Trebilcocks live on 35 acres in rural Cowlitz County. RP 2A at 197, 199; RP 9B at 2,169. They have a modest home. RP 2A at 197, 199. They keep goats, sheep, and chickens, and also have cats and dogs. RP 9B at 2,169. They have an orchard that produces plentiful fruit and a 6,000 square foot garden that produces a bounty of vegetables. RP 9B at 2,169-70. The children are home schooled by Mrs. Trebilcock and a tutor, Emily Haukaas. RP 4A at 755-57.

b. J.T. is examined in 2008.

In 2008, the Trebilcocks noticed J.T. was not growing. RP 6B at 1,371-72; RP 9A at 2,247; RP 10A at 2,362, 2,365. They were referred to Longview pediatrician Dr. Tolby. Dr. Tolby examined J.T. and recommended additional testing. The Trebilcocks followed through with the additional testing. RP 6B at 1,315, 1,333-36. Ultimately, it was

⁵ 12 years old

⁶ 11 years old

⁷ 10 years old

recommended that J.T. take growth hormones. RP 6B at 1,339. Mrs. Trebilcock consulted with J.T. J.T. decided he did not want to take the growth hormones. RP 10A at 2,367-69. At that time, J.T. was 47 inches tall and weighed 44 pounds. RP 6B at 1,322. Dr. Tolby testified that translated to the average height and weight of a 6 year-old. J.T. was 10 years old at the time. RP 6B at 1,322.

Dr. Tolby previously examined J.T. in 2003. RP 6B at 1,326. At that time, five year old J.T. was in the 35th percentile for weight and just above the 50th percentile for height compared to other children his age. RP 6B at 1,326-27. He weighed 46 pounds and was 45.5 inches tall.

Although J.T.'s size alarmed Dr. Tolby, he took no further action. RP 6B at 1,341-42.

c. J.T. is hospitalized in 2011.

On March 1, 2011, J.T. woke up late. He told his mother he was cold and it was hard to breathe. RP 10A at 2,376. J.T. testified he was weak, it hurt to move, and he fell down. RP 2B at 334-35. Mrs. Trebilcock called and got a same day appointment with a local pediatric clinic. RP 2A at 159-60, 174. J.T.'s condition alarmed the nurses at the clinic. RP 2A at 149-51,160-62. J.T. shivered. He was cold to the touch. He seemed small. It was difficult to take his temperature. RP 2A at 149,

160-62. A nurse gave him some juice and warm blankets and turned on a heater in the examination room. RP 2A at 163-64.

The pediatrician, Dr. Parrott, saw J.T. immediately. RP 2A at 151. J.T.'s hands and feet were freezing suggesting little blood flow. RP 2A at 177. There was lack of sound in J.T.'s bowels suggesting J.T. hadn't eaten in a long time. Id. at 178. She thought he looked malnourished. He weighed 49 pounds and was 50 inches tall. Id. 180.

What Dr. Parrott was concerned enough to call for an ambulance to transport J.T. across town to St. John's Hospital. RP 2A at 183.

Once at the hospital, emergency room physician Dr. Tredennick and various nurses resuscitated J.T. by giving him warm IV fluids and a Bair Hugger blanket.⁸ RP 7 at 1,523-30. When admitted to the hospital J.T.'s body temperature was 88 degrees. RP 3A at 398-409, 417. Dr. Tredennick thought J.T. looked starved ("cachetic"). Id. at 412. After adequate resuscitation, J.T. was transported by ambulance to Oregon Health and Science University (OHSU). Id. at 422. Although J.T. came to St. Johns's in critical condition he was quickly upgraded to serious condition. Id. at 429. Dr. Tolby later reviewed the medical records and opined that J.T. had been close to death when admitted to St. John's. RP 6B at 1,368.

⁸ This is the commercial name. The blanket blows warm air on the user.

A team of OHSU doctors, nurses, and dieticians worked with J.T. until his release on March 9. RP 3B at 538-53, 562-83; RP 4A at 703-34; RP 6A at 1,110-76; RP 7 at 1,503-20. During his stay, JT gained eight pounds. RP 3B at 579-80. He'd come to the hospital with severe eczema but that cleared up with the application of moisturizing and steroid creams. RP 6A at 1,147-49. Pediatrician Thomas Valanos could not find any medical explanation for J.T.'s small weight and height other than malnutrition and neglect. RP 6A at 1,131-1,139. He concluded J.T. simply was not receiving enough food. Id. at 1,139. Dr. Valvanos is board certified in the pediatric subspecialty of child abuse and neglect. He leads a team of nurses and dieticians referred to as "SCAN" (Suspected Child Abuse and Neglect). RP 6A at 1110.

d. The adopted children are evaluated after removal from the Trebilcocks' care.

Child Protective Services (CPS) used a court-authorized pick up order to remove J.T. from the Trebilcocks' care on March 4. RP 2A at 224. J.T. was put in foster care when he was release from the hospital. Id. CPS also used a court-authorized pick up order for the four girls and took them from the Trebilcocks' care on March 10. RP 2A at 230.

Over the next several months, a forensic interviewer affiliated with the Cowlitz County Prosecutor's Office interviewed each of the four girls

a number of times. RP 6B at 1,227-1,312. The girls also saw a pedestrian who monitored their height and weight. RP 4B at 861-870.

On March 11, Dr. Kenneth Wu saw A.T. A.T. was thin but well appearing. She weighed 51 pounds and 12 ounces and was 51 inches tall. Her body mass index was low and less than the third percentile for children her age. However, there were no gross abnormalities in her lab tests. Nothing obstructed her height and weight improving over time. RP 4B at 864-868. By May 25, 2011, A.T.'s weight increased to 70 pounds and she was 52 and $\frac{1}{4}$ inches tall. RP 5 at 1,035.

e. Prior to the childrens' removal, stay-at-home mom Mrs. Trebilcock cared for the childrens' day-to-day needs.

Mr. Trebilcock worked in the Longview School District warehouse Monday through Friday. He also picked up extra shifts on Saturday when available in order to bring extra money into the home. RP 9B at 2,166. On work days, he typically left home early, around 6:15 a.m., and returned home around 5 p.m. Id. at 2,168, 2,184.

While Mr. Trebilcock worked outside the home, Mrs. Trebilcock took charge of caring for the home and the children's needs to include their meals. RP 10A at 2,347-50.

f. The Trebilcocks followed a certain structure at home.

At trial, the Trebilcocks' biological children described a happy home where everyone pitched in and was treated equally. RP 8B at 1,940-63, 1,971-2,003; RP 9A at 2,016-2,040. The adopted children used different words to describe their lives with the Trebilcocks. All of them, except the youngest, G.T. had daily chores. If they did not do the chores or do them to their parents' satisfaction, they were disciplined with spanking, time out, standing outside on the porch, and food deprivation. RP 2B at 293-388; RP 3A at 461-530; RP 3B at 626-98; RP 4B at 884-909, 955-93.

The adopted children thought J.T. got in the most trouble and was treated the worst. RP 3A at 478; RP 3B at 640; RP 4B at 893, 961.

The oldest biological son, Shayne, denied saying this but a former co-worker of Shayne testified Shayne told her he was worried about J.T. and had given thought to raising J.T. in his home. RP 7 at 1,494.

J.T. wet his bed, sometimes several times a week. RP 2B at 298; RP 9B at 2,278. The Trebilcocks required J.T. to take the soiled sheets outside and soak them in a bucket before they were laundered in the washing machine. RP 9B at 2,195. Because J.T. soiled himself, he sometimes had to wear pull ups instead of underwear. RP 9B at 2,281.

J.T. frequently ate out of a large bowl referred to by him and others as a “trough.” RP 2B at 307-08. Per Mr. Trebilcock, J.T. liked the bowl and named it himself. RP 9B at 2,245. Another, darker interpretation was that that name was demeaning and suggested baser tendencies to eat like an animal or to be treated like an animal at meal time. RP 3A at 475; RP 3B at 645; RP 4B at 897.

At night, the Trebilcocks put a gate in front of J.T.’s bedroom door. The gate had bells on it. Mr. and Mrs. Trebilcock testified J.T. wandered at night and the bells let them know when J.T. was up and moving. Often, J.T. would startle other family members when they would wake up to find J.T. standing in their room. J.T.’s wandering also took him outside. To prevent that from happening, the Trebilcocks set up a motion sensor pointed at the kitchen and the porch door. RP 9B at 2,196, 2,204, 2,275; RP 10A at 2,357-58.

The children offered another interpretation of the motion sensor. Its purpose was to keep them out of the kitchen at night and away from the refrigerator so they would not steal food. RP 2B at 311-12; RP 3A at 472-73; RP 3B at 643-44. Mrs. Trebilcock explained she did not want the children to access the refrigerator because she kept medicine in it. RP 10A at 2,384.

g. Mrs. Trebilcock strived to keep her weight in check.

Mrs. Trebilcock traveled to Mexico for bariatric surgery. RP 10A at 2,488. By one account, she'd lost around 200 pounds in recent years. RP 4A at 766-67. She kept certain food that only she ate locked in a bathroom cupboard. RP 10A at 2,359. For about the last two years, she and the girls were on a mostly vegetarian, and sometimes vegan, diet. RP 8B at 1,966; RP 10A at 2,347.

h. Friends and family knew a happy, healthy Trebilcock family

Numerous witnesses testified for the Trebilcocks. RP 7B at 1,571-1,663; RP 8A at 1,667-87. These were people who knew them well. Id. Some were very frequent guests at the Trebilcock home. RP 7B at 1,595, 1,606. Their impression was the Trebilcocks were a happy family. RP 7B at 1,655. Food was plentiful. RP 7B at 1,606-07. Everyone was a hearty eater. RP 7B at 1,598-1,601. The children attended church and ate at church potlucks. RP 7B at 1,633, 1,637. The Trebilcocks hosted an annual Fourth of July picnic and barbeque at their home. 7B RP at 1,596, 1,638. Mr. Trebilcock and all the boys went to a friend's house each year to snack and watch the Super Bowl. RP 7B at 1,597, 1,647-48. The Trebilcocks helped a neighbor build a deck around his house taking much of a year to do so. J.T. helped and always seemed energized. There was

no sense that J.T. was eating less than the rest of the family. RP 7B at 1,575-82.

D. ARGUMENT

1. MR. TREBILCOCK’S CRIMINAL MISTREATMENT IN THE THIRD DEGREE CONVICTED VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE A.T. SUFFERED OR WAS AT IMMINENT RISK OF SUFFERING SUBSTANTIAL BODILY HARM.

The evidence is insufficient to convict Mr. Trebilcock of criminal mistreatment in the third degree. The conviction must therefore be vacated and the charge dismissed with prejudice.

a. Standard of Review

In reviewing challenged findings of fact following a bench trial in a criminal case, the court determines whether substantial evidence supports the findings. *State v. Mewes*, 84 Wn. App. 620, 622, 929 P.2d 505 (1997). Substantial evidence is that which is sufficient to persuade a fair-minded rational person of the truth of the findings. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Unchallenged findings of fact are viewed as verities on appeal. *Id.*; see also *State v. Alvarez*, 105 Wn. App. 215, 220, 19 P.3d 485 (2001). “Review is then limited to determining

whether the findings support the conclusions of law.” *Alvarez*, 105 Wn. App. at 220. Conclusions of law are reviewed de novo. *State v. Mendez*, 137 Wn.2d 208, 214, 870 P.2d 722 (1999).

b. The Due Process Clause of the Fourteenth Amendment protects against convictions based on insufficient evidence.

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Smith*, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Chapin*, 118 Wn.2d 681, 691, 826 P.2d 194 (1992); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). A challenge to the sufficiency of the evidence may be raised for the first time on appeal as manifest constitutional error. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983).

c. The evidence does not prove criminal mistreatment in the third degree.

Criminal Mistreatment in the Third Degree is defined at RCW 9A.42.035:

(1) A person is guilty of the crime of criminal mistreatment in the third degree if the person is the parent of a child, is a person entrusted with the physical custody of a child or other dependent person, is a person who has assumed the responsibility to provide to a dependent person the basic necessities of life, or is a person employed to provide to the child or dependent person the basic necessities of life, and either:

(a) With criminal negligence, creates an imminent and substantial risk of substantial bodily harm to a child or dependent person by withholding any of the basic necessities of life; or

(b) With criminal negligence, causes substantial bodily harm to a child or dependent person by withholding any of the basic necessities of life.

The specific meaning of substantial bodily harm is defined by statute:

(b) "Substantial bodily harm" means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part[.]

RCW 9A.20.010(2)(b).

A.T. suffered from none of those and was not at imminent risk of them either. She did not have any fractures. There was no temporary but substantial loss or impairment of any of her body parts or organs. In *State v. Atkinson*, the court approved an instruction defining temporary but substantial disfigurement as “[t]hat which impairs or injures the beauty, symmetry, or appearance of a person or thing; that which renders unsightly, misshapen, or imperfect, or deforms in some manner.” *State v.*

Atkinson, 113 Wn. App. 661, 667, 54 P.3d 702 (2002), *review denied*, 149 Wn.2d 1013 (2003).

The trial court did not echo *Atkinson's* definition in its written findings of fact on the verdict. In *Atkinson*, the victim suffered visible injuries including scrapes, bruises, and broken blood vessels causing blood to appear in the white of her eyes. *Id.* at 665-66. By contrast, the court here described A.T. as having “very low body weight and growth stunting.” Supp. Designation of Clerk’s Papers, Findings of Fact and Conclusions of Law Following a Bench Trial. In our culture, low body weight is often seen as a prized hallmark of glamour. And surely A.T. was not unsightly or deformed simply because she was not as tall as other girls her age.

d. Mr. Trebilcock’s conviction must be reversed.

Because the evidence was insufficient, Mr. Trebilcock’s conviction for criminal mistreatment in the third degree must be reversed and the charge dismissed. *State v. DeVries*, 149 Wn.2d 842, 853, 72 P.3d 748 (2003). The prohibition against double jeopardy forbids retrial after a conviction is reversed for insufficient evidence. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982).

2. THE TRIAL COURT HAD NO AUTHORITY TO IMPOSE A SUBSTANCE ABUSE EVALUATION AS A CONDITION OF MR. TREBILCOCK'S PROBATION.

a. Standard of Review.

Challenged probation conditions are reviewed for abuse of discretion. *State v. Valencia*, 169 Wn.2d 782, 791-792, 239 P.3d 1059 (2010).

b. The trial court can only impose crime related community custody conditions for which there is support in the record.

A superior court can impose a suspended or deferred sentence on a misdemeanor conviction. RCW 9.92.060; RCW 9.95.210(1)(a); *State ex rel. Woodhouse v. Dore*, 69 Wn.2d 64, 69, 416 P.2d 670 (1966). As part of the suspended sentence, the court may impose up to 24 months of probation with conditions. But such conditions must be reasonably related to the crime. *State v. Hall*, 35 Wn. App. 302, 308, 666 P.2d 930 (1983) (imposition of conditions of probation must have some logical connection with the ultimate objective of rehabilitation); *State v. Summers*, 60 Wn.2d 702, 707, 375 P.2d 143 (1962) (probation condition requiring defendant to pay child support for his own children unrelated to manslaughter conviction).

An important goal of sentencing is to provide an opportunity for rehabilitation of the defendant so that he or she can resume a productive role in the community. Probation is a means by which judges may provide defendants with this opportunity.

Roberts v. United States, 320 U.S. 264, 272, 64 S.Ct. 113, 117, 88 L.Ed. 41 (1943).

Although Mr. Trebilcock did not object to this condition, illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

The court imposed 365 days on Mr. Trebilcock's criminal mistreatment in the third degree conviction and suspended 183 days for 24 months on the condition he comply with certain conditions to include the following:

The defendant shall undergo an evaluation for treatment for...
[x] substance abuse... and fully comply with all recommended treatment.

CP 16.

c. Nothing in the record supports a finding that Mr. Trebilcock abused any substance abuse.

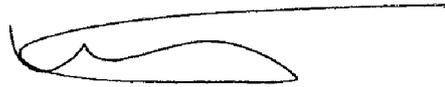
There was no evidence in the record Mr. Trebilcock drank alcohol, used or abused any substance, or that the same contributed in any way to the charges. The trial court abused its discretion in imposing the condition. The remedy is remand to strike the evaluation and treatment

condition. *State v. Land*, 172 Wn.App. 593, 605-606, 295 P.3d 782 (2013).

E. CONCLUSION

Mr. Trebilcock's criminal mistreatment in the third degree conviction should be reversed and remanded for dismissal. Alternatively, the court should remand to the trial court to strike the substance abuse evaluation condition from the probation requirements.

Respectfully submitted this 13th day of May 2013.



LISA E. TABBUT/WSBA #21344
Attorney for Jeffrey Trebilcock

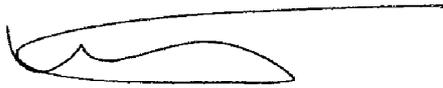
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I filed Appellant's Brief with: (1) Susan I. Baur, Cowlitz County Prosecutor's Office, at sasserm@co.cowlitz.wa.gov; (2) Backlund and Mistry at backlundmistry@gmail.com; (3) the Court of Appeals, Division II; and (3) I mailed it to Jeffrey A. Trebilcock, c/o Dillon Trebilcock, 160 Reid Lane, Longview, WA 98632.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed May 13, 2013, in Longview, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Jeffrey Trebilcock

COWLITZ COUNTY ASSIGNED COUNSEL

May 13, 2013 - 4:39 PM

Transmittal Letter

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Case Name: Statev. Jeffrey A. Trebilcock

Court of Appeals Case Number: 43930-1

Is this a Personal Restraint Petition? Yes No

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Petition for Review (PRV)

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Comments:

No Comments were entered.

Sender Name: Lisa E Tabbut - Email: **lisa.tabbut@comcast.net**

A copy of this document has been emailed to the following addresses:

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