

NO. 46311-3-II

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

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STATE OF WASHINGTON,

Respondent,

v.

BERNARDO MONCADA,

Appellant.

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

The Honorable Robert Lewis, Judge

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BRIEF OF APPELLANT

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A. INTRODUCTION

Bernardo Moncada was acquitted of second degree child assault after spanking his nine year old son with a belt for throwing a tantrum because he refused to eat his dinner. However, improperly admitted child hearsay and several instances of prosecutorial misconduct prejudiced the outcome of Moncada's trial and resulted in a conviction for third degree child assault. This conviction must accordingly be reversed.

In addition, the trial court imposed a 12-month term of community custody, which exceeds the six-month statutory maximum for first-time offenders. Remand for correction of this error is required.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting child hearsay.
2. Prosecutorial misconduct denied appellant a fair trial.
3. The trial court lacked authority to impose a term of community custody that exceeded the statutory maximum.

Issues Pertaining to Assignments of Error

1. Only certain types of out-of-court statements by children are admissible under RCW 9A.44.120. This includes a statement by a child "describing any act of physical abuse of the child by another that results in substantial bodily harm." When the child's injuries did not

amount to substantial bodily harm, did the trial court err in admitting two prejudicial statements of child hearsay?

2. Did the prosecutor violate the trial court's in limine exclusion of other alleged instances of appellant's use of physical discipline and was that misconduct prejudicial when it suggested appellant's propensity for excessive discipline?

3. Where the State bore the burden to prove that appellant's use of force did not constitute reasonable parental discipline, did the prosecutor's contrary closing argument improperly shift the burden of proof and prejudiced appellant?

4. Did the prosecutor encourage a verdict based on passion and prejudice when he played into the jurors' fears by inviting them to speculate how far appellant would have gone if his son did not finally eat his dinner?

5. Did cumulative prosecutorial misconduct deny appellant a fair trial?

6. Under the first-time offender statute, RCW 9.94A.650, the trial court may impose only six months of community custody unless treatment is ordered. Did the trial court err when it imposed 12 months of community custody and did not order appellant to undergo any treatment?

C. STATEMENT OF THE CASE

Bernardo Moncada was acquitted of second degree assault of a child. CP 62. This appeal arises from his conviction for third degree assault of a child. CP 82-83.

1. Substantive Facts

Moncada's son, R.B., lives with his mother, Jessica B.<sup>1</sup> RP 116-17. R.B. has attention deficit hyperactivity disorder (ADHD). RP 164. This leads to behavioral problems that make R.B. hard to manage. RP 163-65. Specifically, R.B. is strong-willed, difficult to control, and often throws tantrums both at school and at home. RP 163-64, 220. R.B. takes medication to manage his ADHD. RP 164.

Even though R.B. did not see his father often, Jessica called Moncada for help disciplining him. RP 135, 156-57, 220. Moncada often asked Jessica if he could spend more time with R.B. and have R.B. live with him during summer vacations. RP 218-20. In February 2013, when R.B. was nine, Jessica finally allowed R.B. to stay with his father for a long weekend. RP 134-37.

On February 16, Jessica drove R.B. from their home in Lebanon, Oregon, to Moncada's home in Vancouver, Washington. RP 135-39.

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<sup>1</sup> This brief refers to Jessica by her first name to avoid confusion.

Jessica did not send any medication with R.B., even though she knew R.B. was more difficult when he did not take his medication. RP 165.

For dinner that night, Moncada served R.B. and his four other children macaroni and cheese. R.B. started throwing a tantrum, “yelling and screaming and crying” because he refused to eat the macaroni. RP 204-05, 222. R.B. pushed his food away, yelling at Moncada “I don’t want to eat that stuff. You can’t make me.” RP 222. Moncada did not raise his voice, but instead crouched down next to R.B. and explained to him why it was important to eat. RP 205-06, 222-23. But R.B. refused to eat, continuing to scream and yell at both his siblings and Moncada. RP 205, 222-23.

About 20 minutes into the tantrum, Moncada warned R.B. calmly that he would have to spank him if R.B. did not stop yelling and eat. RP 206, 223. Moncada explained to R.B., “this isn’t the right behavior. This isn’t the way we act. You’re the older brother. Everybody wants to look up to you. You need to calm down or Daddy’s going to spank you.” RP 223.

When R.B. still refused, Moncada took him to the bathroom for a spanking. RP 223. Moncada used the soft side of his belt to spank R.B. on the buttocks three times. RP 223-24. He did not spank R.B. with his hand, because he has “a very large hand.” RP 224. Moncada asked R.B. to take three bites of his macaroni, or he would get another spanking. RP 224. R.B. continued to cry while Moncada spanked him. RP 207, 224-25.

Back at the table, Moncada put a spoon up to R.B.'s mouth to try to convince him to take a bite of the macaroni. RP 239. But R.B. still refused to eat and "continued with the tantrum." RP 225. Moncada took R.B. to the bathroom for another spanking: three times on the buttocks with the soft side of his belt. RP 225-26. This happened around three or four times total.<sup>2</sup> RP 209, 226-27. Moncada stayed calm and never raised his voice. RP 208, 226-27. He admitted he noticed R.B.'s buttocks getting red during the spankings. RP 228. But R.B. finally agreed to eat. RP 227. When he did, R.B. told Moncada that he actually liked the macaroni. RP 210, 227.

R.B. said the spankings hurt when they happened. RP 120-123. However, his bottom did not hurt later that night when he went to bed and did not hurt the next day. RP 123, 130-31. Nor did his bottom hurt on the three to four hour car ride back to his mother's home. RP 130-31, 160. When Jessica talked to R.B. on the phone the night of the spanking, R.B. was homesick but otherwise did not say anything was wrong. RP 139, 158.

Jessica picked up R.B. from Moncada's on February 18. RP 150. When she gave R.B. a bath that night, she noticed some red marks and bruising on R.B.'s right buttock. RP 141-42. Jessica asked R.B. what

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<sup>2</sup> Detective Jason Hafer testified that Moncada told him there were seven trips to the bathroom for spankings. RP 184. Moncada clarified that he misspoke and meant to say "several" when he talked with Hafer. RP 226. Moncada's wife said Moncada and R.B. went to the bathroom three or four times. RP 209. R.B. testified he remembered going to the bathroom only twice for a spanking. RP 122.

happened and he said Moncada hit him with a belt. RP 141-42. Jessica called R.B.'s doctor, who said there was no need to bring him in because there was no broken skin. RP 143, 162-63. Jessica asked R.B. if he wanted ice, but he declined because he was "fine." RP 162-63.

Jessica took one photo the day she noticed the bruise. RP 144-45; Ex. 4. She took two more photos after she called the police and they instructed her to use a measuring tape for perspective. RP 144; Ex. 3, 6. These two photos were taken before the bruising faded. RP 145. One shows some red marks and a bruise around one to two inches in size on R.B.'s right buttock. Ex. 3; RP 144-45. The other shows slight bruising and redness on R.B.'s left buttock. Ex. 6; RP 144-45. The red marks disappeared after about five days and the bruises faded after seven days. RP 163. R.B. never complained about his bottom hurting and never showed any signs of it hurting. RP 163, 211.

Detective Jason Hafer investigated the spanking incident and called Moncada to discuss it. RP 20-22. Moncada agreed to meet for an interview at the Clark County Children's Justice Center. RP 21-22. Moncada admitted he spanked R.B. with the soft side of his belt for throwing a tantrum and not eating his macaroni. RP 184. On March 11, child forensic interviewer Amanda Kauffman also interviewed R.B., in which R.B.

described the spanking incident in detail. RP 181; Ex. 1. This interview was recorded on video. Ex. 1.

2. Procedural History

The State charged Moncada with second degree assault of a child. CP 3. The information alleged that Moncada intentionally assaulted R.B. and “thereby recklessly inflicted substantial bodily harm,” contrary to RCW 9A.36.130(1)(a) and 9A.36.021(1)(a). CP 3.

On the eve of trial, the State moved to amend the information, adding a charge of third degree assault of a child. RP 5. The State alleged two alternative means:

(d) With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm; or

....

(f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.

RCW 9A.36.031(1)(d), (f); CP 5. The trial court granted the motion over Moncada’s opposition. RP 6-9.

The trial court held a pretrial CrR 3.5 hearing to consider the admissibility of Moncada’s statements to Detective Hafer. RP 19. The court

admitted the statements, concluding they were voluntary and the interview was not custodial interrogation.<sup>3</sup> RP 51-52.

The trial court also held a pre-trial hearing and made a provisional ruling on the admissibility of R.B.'s child hearsay statements. RP 99-103. Specifically, the court admitted R.B.'s statement to his mother that Moncada hit him with a belt. RP 99-101. It also admitted R.B.'s videotaped interview with Kauffman. RP 102. However, the court conditioned admission of these statements on the State producing sufficient evidence "that the injuries at least arguably resulted in substantial bodily harm as defined by law."<sup>4</sup> RP 101. The court explained, "I do not find that the photos, in and of themselves, would allow me to make that finding." RP 101.

After Jessica testified at trial about R.B.'s statements, but before the State played R.B.'s videotaped interview, the court made its final child hearsay ruling. RP 172-73. The court found "the evidence is sufficient to, at least preliminarily, meet the State's burden of showing a temporary, but substantial disfigurement through the bruising that's demonstrated in the photos and that was described by the second witness in the case, Jessica

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<sup>3</sup> CrR 3.5(c) requires the trial court to enter written findings of fact and conclusions of law. The trial court did not do so here, instead issuing an oral ruling.

<sup>4</sup> "Substantial bodily harm" is statutorily defined as "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.04.110(4)(b).

[B.]” RP 173. The State then played the video during Detective Hafer’s testimony.<sup>5</sup> RP 192.

After the State rested, defense counsel moved to dismiss all three charges. RP 195-97. The court denied the motion as to second degree child assault, as well as one alternative means for third degree child assault—that the belt was used as a weapon likely to produce bodily harm. RP 198-99. However, the court granted the motion and dismissed the other alternative means for third degree child assault—that the bodily harm was accompanied by substantial pain. RP 199.

The defense then presented testimony from Rachel Lamon, Moncada’s wife, who was present during the spanking incident. RP 203. Moncada also testified. RP 217.

The court instructed the jury on the lesser included charge of fourth degree assault. CP 53-55. It also instructed the jury that physical discipline of a child is a defense to assault. CP 56. This instruction specified:

The physical discipline of a child is lawful when it is reasonable and moderate, and is inflicted by a parent or guardian for purposes of restraining or correcting the child.

....

The State bears the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence

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<sup>5</sup> The State agreed to play the first 20 minutes and 26 seconds of the video, stopping it at 11:44:27. RP 111; Ex 1.

of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 56.

At 4:55 p.m., the jury sent out a question, “What is the definition of substantial bodily harm?” CP 61; RP 293. However, without receiving an answer from the court, the jury found the definition in the jury instructions and reached a verdict shortly thereafter. RP 293. The jury acquitted Moncada of second degree child assault, but found him guilty of third degree child assault. CP 62-63. It did not return a verdict on the lesser included fourth degree assault charge. CP 64.

Moncada has no prior felony history. CP 67. The court sentenced him to 30 days confinement and 30 days work release under the first-time offender statute, RCW 9.94A.650. CP 68. The court also imposed 12 months of community custody and ordered Moncada to attend parenting classes. CP 69-70. Moncada timely appealed. RP 82.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN ADMITTING CHILD HEARSAY WHEN THE CHILD’S INJURIES DID NOT AMOUNT TO SUBSTANTIAL BODILY HARM.

The trial court admitted two child hearsay statements, concluding that the State put forth sufficient evidence of substantial bodily harm. First, the court admitted R.B.’s statement to his mother a couple days after the

incident that “daddy hit me with a belt.” RP 99-101, 173. Second, the court admitted R.B.’s videotaped interview with the Kauffman. RP 101-02, 173. This was error, because the small bruises on R.B.’s buttocks did not amount to substantial bodily harm.

RCW 9A.44.120 regulates the admissibility of child hearsay. Certain out-of-court statements by children are admissible only if the “court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability.” RCW 9A.44.120. Courts consider nine factors when evaluating the reliability of child hearsay. State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984).

RCW 9A.44.120 also limits the types of statements by children that may be admissible. They are:

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule.

RCW 9A.44.120 (emphasis added).

A trial court’s decision to admit child hearsay is reviewed for abuse of discretion. State v. Borboa, 157 Wn.2d 108, 121, 135 P.3d 469 (2006). A trial court abuses its discretion when its decision is manifestly unreasonable

or based on untenable reasons or grounds. Id. An abuse of discretion also occurs when the trial court applies the wrong legal standard or bases its ruling on an erroneous view of the law. State v. Hudson, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009).

a. Small bruises on a child's buttocks are not substantial bodily harm.

“Substantial bodily harm” includes “bodily injury which involves a temporary but substantial disfigurement.”<sup>6</sup> RCW 9A.04.110(4)(b). By contrast, “bodily harm” means “physical pain or injury, illness, or an impairment of physical condition.” RCW 9A.04.110(4)(a). Substantial bodily harm involves greater injury than bodily harm.

“Substantial” is not defined by statute. However, the Washington Supreme Court recently held that the “term ‘substantial’ . . . signifies a degree of harm that is considerable and necessarily requires a showing greater than an injury merely having some existence.” State v. McKague, 172 Wn.2d 802, 806, 262 P.3d 1225 (2011). Though the court declined to limit the meaning of “substantial” to one particular dictionary definition, it approved of the definition ““considerable in amount, value, or worth.”” Id. (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2280

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<sup>6</sup> It also includes bodily injury that “causes a temporary but substantial loss or impairment of the function of any bodily part or organ” or “causes a fracture of any bodily part.” RCW 9A.04.110(4)(b). The trial court admitted the child hearsay based on the disfigurement definition of substantial bodily harm. RP 173.

(2002)). In McKague, a concussion, facial bruising and swelling lasting several days, along with severe lacerations to the face, head, and arm, met this definition of substantial. Id.

In so holding, the McKague court refused to adopt the definition of “substantial” articulated by the Court of Appeals: ““something having substance or actual existence.”” Id. at 805-06 (quoting State v. McKague, 159 Wn. App. 489, 502 n.7, 246 P.3d 558 (2011)). The court rejected this overly broad definition because it “would make practically any demonstrable impairment or disfigurement a ‘substantial’ injury regardless of how minor.” Id. at 806. This court should also avoid stretching the term so broadly here.

In State v. Ashcraft, decided well before McKague, the court held that the “presence of the bruise marks indicates temporary but substantial disfigurement.” 71 Wn. App. 444, 455, 859 P.2d 60 (1993). Read out of context, this language is exceedingly broad.

However, the facts of Ashcraft do not permit a categorical rule that bruising constitutes substantial bodily harm. There, the child had adult-sized bite marks on her body, as well as extensive bruising consistent with being hit by a shoe with a rigid sole, a cord or rope, and a belt or ruler. Id. at 449. In addition, a witness testified that she saw the accused swing a shoe and a stick at the child. Id. at 450. The child’s day care provider testified that the child arrived once with bruises on her face. Id.

Similarly, in State v. Brown, the child's injuries were substantial where there was "massive bruising and damage . . . with bright red colorings, swollen tissue and blue marks across the full width of the buttocks." 60 Wn. App. 60, 62, 67-68, 802 P.2d 803 (1990) (quoting trial testimony), overruled on other grounds by State v. Grewe, 117 Wn.2d 211, 813 P.2d 1238 (1991). A significant amount of force was used to cause the injuries and some of the marks came from a belt buckle. Id. at 67.

Applying the rule of Ashcraft so broadly as to encompass all bruising is also inconsistent with McKague. The mere existence of an injury is not enough; it must be "considerable in amount, value, or worth." McKague, 172 Wn.2d at 806. Otherwise, every bodily harm would give rise to second degree assault. This would render the term "substantial" meaningless and completely subsume third degree assault. Id.

Indeed, the Court of Appeals recently clarified Ashcraft, holding that "serious bruising can rise to the level of 'substantial bodily injury' if the State produces sufficient evidence of temporary but substantial disfigurement." State v. Hovig, 149 Wn. App. 1, 13, 202 P.3d 318 (2009) (emphasis added). In Hovig, a four-month old baby had bite marks and bruising covering his entire right cheek that lasted seven to 14 days. Id. at 5, 13. This was sufficient to constitute substantial bodily harm. Id. at 13.

The bruising and redness here did not amount to substantial bodily harm. The bruise on R.B.'s right buttock was about one to two inches in size with some redness. Ex. 3; RP 144-45. The bruise on his left buttock was even smaller. Ex. 6; RP 144-45. The redness faded after five days and the bruising faded after seven days. RP 163. R.B. did not experience any pain after the spankings, there was no broken skin, and R.B. told his mother he was "fine." RP 123, 130-31, 143, 160-63. This is not "serious bruising." Hovig, 149 Wn. App. at 13. R.B.'s injuries are minor compared to those in Ashcraft (severe bruising by various instruments, as well as bite marks), Brown (massive bruising, swelling, and marks covering the child's entire buttocks), and Hovig (a bruise and bite marks covering the baby's entire cheek that lasted one week to two weeks). By contrast, the injuries in those cases resulted in disfigurement that was "considerable in amount, value, or worth," as required by McKague.<sup>7</sup>

Although R.B. testified the spankings hurt when they happened, RP 120-23, this simply falls within the definition of "bodily harm" as "physical pain or injury." RCW 9A.04.110(4)(a). Under McKague, the mere

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<sup>7</sup> In State v. Atkinson, the court held that it was not error to instruct the jury on the dictionary definition of disfigurement: "that 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." 113 Wn. App. 661, 667-68, 54 P.3d 702 (2002) (quoting clerk's papers). The court emphasized that the defense could still argue the disfigurement was not substantial. Id. at 668. The trial court here refused to give the disfigurement instruction from Atkinson. RP 246-48.

existence of a visible injury does not mean it is substantial. There must be a line between bodily injury and substantial bodily injury.

And, perhaps most significantly, the jury found Moncada not guilty of second degree child assault. CP 62. The facts indicate that the jury acquitted because it did not find the bruising sufficient to constitute substantial bodily harm. At 4:55 p.m., the jury sent out a question, “What is the definition of substantial bodily harm?” CP 61; RP 293. However, without receiving an answer from the court, the jury found the definition in the jury instructions and acquitted on second degree child assault shortly thereafter. RP 293. This is highly probative that the jury did not consider the small bruises to be substantial disfigurement.<sup>8</sup>

The trial court here ultimately admitted the child hearsay based on Ashcraft’s overly broad statement that the “presence of the bruise marks indicates temporary but substantial disfigurement.” 71 Wn. App. at 455; RP 172-73. But Ashcraft cannot be read in a vacuum, without attention to its facts. Ashcraft must also be read in light of McKague, which requires considerable injury. The trial court’s failure to do so was an error of law. Furthermore, there is insufficient evidence of substantial bodily harm. The trial court accordingly abused its discretion in admitting the child hearsay.

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<sup>8</sup> In response, the State may claim that little can be gleaned from the jury’s rejection of the State’s second degree assault charge. However, the jury’s question and quick decision after finding the definition belie such an argument.

b. The erroneously admitted child hearsay prejudiced the outcome of Moncada's trial.

A conviction must be reversed when evidentiary error results in prejudice. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). An evidentiary error is prejudicial if, within reasonable probabilities, it materially affected the trial's outcome. Id.

The child hearsay—the videotaped interview, in particular—prejudiced the outcome of Moncada's trial. At trial, R.B.'s testimony was limited and his memory of the spanking was somewhat hazy. See, e.g., RP 121-23, 128-30. In the interview, however, he described the incident in more detail. R.B. told Kauffman he screamed during the spanking because it hurt. Ex. 1 at 12:00. He said he kicked and thrashed his feet as Moncada bent him over the bathtub to spank him. Ex. 1 at 14:50, 16:45. R.B. also described the bruising in more detail. Ex. 1 at 12:00, 14:30, 7:15. This was all highly prejudicial, because it added to the State's theory that this was not reasonable physical discipline.

The prejudicial impact of the video was most apparent during the prosecutor's closing: "I would argue that video is compelling evidence." RP 272. The prosecutor relied on the video to establish facts and bolster R.B.'s credibility:

These are credible answers by a little kid a month after it happened. I would argue that evidence is strong

evidence in the State's favor. And, again, these were non-leading questions, as Detective Hafer talked about. Open questions, tell me about the belt. Tell me about this, tell me about that. And [R.B.] gave all kinds of compelling details about this.

RP 272-73. This demonstrates how critical R.B.'s hearsay was for the State's case.

Because the inadmissible child hearsay was a key component of the State's case, there is a substantial likelihood that it materially affected the outcome of Moncada's trial. This court must accordingly reverse and remand to the trial court with instructions to exclude the child hearsay.<sup>9</sup>

## 2. FLAGRANT PROSECUTORIAL MISCONDUCT VIOLATED MONCADA'S RIGHT TO A FAIR TRIAL.

Several instances of prosecutorial misconduct denied Moncada a fair trial. Specifically, the prosecutor violated the court's ruling in limine by eliciting testimony from R.B. about another act of physical discipline. In closing, the prosecutor improperly argued that Moncada needed to prove reasonable physical discipline, even though the State bore the burden to prove its absence. The prosecutor also invited the jury to speculate about what Moncada would have done if R.B. did not give in and eat his macaroni. And, even if each instance of misconduct standing alone does not warrant reversal, the combined effect does.

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<sup>9</sup> Furthermore, if this court determines a new trial is necessary for any reason, the child hearsay must be excluded on remand, because Moncada can only be retried on third degree child assault.

Prosecutors are officers of the court and have a duty to ensure that an accused person receives a fair trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). When there is a substantial likelihood that improper comments affected the jury's verdict, the accused's rights to a fair trial and to be tried by an impartial jury are violated. U.S. CONST. amend. XIV; WASH. CONST. art. 1, §§ 3, 22; State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Reversal is required, even without defense objection, when the prosecutor's misconduct is so flagrant and ill intentioned that no curative instruction could have erased the prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

- a. The prosecutor violated the trial court's ruling in limine excluding other acts of physical discipline.

The trial court ruled in limine to exclude ER 404(b) evidence of other instances where Moncada used physical discipline with his children. RP 16-17. In deliberate disregard for this court order, the prosecutor elicited testimony from R.B. about another spanking incident the same night as the belt spanking. RP 123-24. This was highly prejudicial because it suggested Moncada's propensity to use excessive physical discipline.

ER 404(b) bars admission of "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in

conformity therewith.” “This prohibition encompasses not only prior bad acts and unpopular behavior but any evidence offered to ‘show the character of a person to prove the person acted in conformity’ with that character at the time of a crime.” State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (emphasis in original) (quoting State v. Everybodytalksabout, 145 Wn.2d 456, 466, 39 P.3d 294 (2002)).

“A prosecutor has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider.” State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). It constitutes flagrant, prejudicial misconduct when a prosecutor violates an in limine ruling. State v. Smith, 189 Wash. 422, 428-29, 65 P.2d 1075 (1937); State v. Stith, 71 Wn. App. 14, 22-23, 856 P.2d 415 (1993).

In Smith, the trial court ruled in limine that the prosecutor could not ask Smith about his discreditable discharge from the military because of its potentially prejudicial impact on the jury. 189 Wash. at 428. Despite this ruling, the prosecutor cross-examined Smith about it. Id. Defense counsel did not object. Id. at 428-29. The court held that the questioning was both “highly prejudicial” and, “in view of the deliberate disregard by counsel of the court’s ruling, prejudice must be presumed.” Id. at 428-49. The court further explained: “The fact that the question was not objected to is not controlling. It may well be that an objection to such a question, even though

sustained, is more damaging to a defendant's case than almost any answer could be." Id. at 429. Thus, the court reversed and remanded for a new trial. Id.

Similarly, in Stith, the prosecutor argued in closing that Stith "was just coming back and he was dealing again." 71 Wn. App. at 21. This suggested Stith had prior drug-related convictions, despite the court's in limine exclusion of any such evidence. Id. at 22. Defense counsel objected and the court gave curative instructions. Id. Nevertheless, the appellate court concluded the misconduct was "so prejudicial" that "[o]nce made, such remarks cannot be cured." Id. at 22-23. A new trial was necessary. Id. at 23.

In Fisher, the trial court allowed admission of physical abuse evidence only if defense counsel made an issue of the alleged victim's delayed reporting. 165 Wn.2d at 747. However, the prosecutor first mentioned physical abuse in his opening statement and then introduced evidence of it during direct examination. Id. Defense counsel did not raise an issue of delayed reporting. Id. The court held:

The prosecuting attorney thus contravened the trial court's ruling by impermissibly using the physical abuse evidence to demonstrate Fisher's propensity to commit crimes. Using the evidence in such a manner after receiving a specific pretrial ruling regarding the evidence clearly goes against the requirements of ER 404(b) and constitutes misconduct.

Id. at 748-49. The misconduct denied Fisher a fair trial and required reversal. Id. at 749.

Significantly, the Fisher court noted that “given the nature of the misconduct and the fact that the prosecuting attorney was well aware of the trial court’s ruling and Fisher’s standing objection, we do not believe that any limiting instruction could have neutralized the prejudicial effect.” Id. at 748 n.4. In other words, failure to object is not controlling when the State deliberately disregards a pretrial order and any objection is “likely more damaging than almost any answer.” State v. Weber, 159 Wn.2d 252, 271, 149 P.3d 646 (2006) (quoting State v. Sullivan, 69 Wn. App. 167, 173, 847 P.2d 953 (1993)).

Defense counsel moved in limine to exclude ER 404(b) evidence of other instances where Moncada used physical discipline with his children. CP 7-8, RP 14-16. The State agreed to this limitation and said “[w]e don’t feel we need to get into it to prove our case.” RP 16. The court accordingly ruled that “in the State’s case-in-chief initially, I would say it’s not a permissible line of inquiry. If at some point you think the door has been opened, you want to inquire on it, let me know and we’ll take a recess and see where we’re at.” RP 17-18. Only Moncada was allowed “to open the door either through cross-examination or some other testimony.” RP 17.

The court further instructed the State to “tell your witnesses that we’re not going to get into other discipline.” RP 17.

The State called R.B. as its first witness. RP 115. During direct, the prosecutor asked, “And do you remember anything else about your dad with the belt?” RP 123. R.B. responded, “It was one with the belt, one with the slipper, and I can’t remember the rest.” RP 123. The prosecutor proceeded:

Q. What happened with the slipper?

A. I can’t remember, but it was the same as [the] belt.

Q. So did he hit you on the butt with the slipper?

A. Yes.

Q. And was that after the belt?

A. Yes.

Q. Why did he hit you on the butt with the slipper?

A. Because my brothers were talking when it was bedtime.

Q. Okay. So that wasn’t in the bathroom?

A. Well, yes, it was. But it wasn’t -- they weren’t talking while I was in the bathroom.

Q. And that was after the macaroni?

A. Yes.

RP 124. Defense counsel did not object. RP 124.

The prosecutor pursued this line of questioning in direct violation of the trial court's ruling in limine. R.B. admittedly mentioned the slipper first. However, the prosecutor should have not followed up on the comment. Or, the prosecutor could have asked for a recess to question R.B. about the slipper outside the jury's presence—just as the trial court directed. RP 17-18. The trial court would have almost certainly excluded the testimony. Instead, the prosecutor continued to question R.B. about the slipper, even after he established it was a separate incident. This violates ER 404(b) and demonstrates deliberate disregard for the court's ruling in limine.

Given this deliberate disregard, prejudice should be presumed under Smith. Regardless, the prejudice is obvious. The prosecutor's questioning suggested that Moncada disciplined R.B. excessively. The slipper incident is particularly egregious, because it came right after of the belt spanking. And Moncada seemingly spanked R.B. with a slipper for something R.B. did not do. This cast the reasonableness of the belt spanking into considerable doubt, undermining the physical discipline defense. The evidence unfairly made Moncada seem like a child abuser, not just a disciplinarian. This is undoubtedly why the trial court excluded other incidents of physical discipline.

This is a prime example of when an objection would be more damaging than almost any answer R.B. gave. If defense counsel objected, it

would have called the jury's attention to the slipper incident and further emphasized it. An objection would have left the jury wondering just how many other times Moncada physically disciplined R.B. that weekend. This is analogous to Stith and Fisher, where the prosecutors brought out evidence suggesting the defendants' propensity to commit crimes. Here, the prosecutor elicited testimony suggesting Moncada's propensity to use excessive physical discipline with R.B. No instruction could have cured the resulting prejudice; "[t]he bell once rung cannot be unring." State v. Trickel, 16 Wn. App. 18, 30, 553 P.2d 139 (1977).

The prosecutor disregarded the court's order excluding other acts of physical discipline. This resulted in significant prejudice to Moncada. Under Smith, Stith, and Fisher, reversal and remand for a new trial is required.

- b. The prosecutor engaged in impermissible burden-shifting when he argued in closing that Moncada could not assert the defense of physical discipline.

In closing, the prosecutor argued that Moncada could not assert the defense of physical discipline. But Moncada did not bear the burden of proving the defense; the State bore the burden of disproving it. Therefore, the prosecutor's comments impermissibly shifted the burden of proof to Moncada. This was flagrant and ill-intentioned misconduct that prejudiced the outcome of Moncada's trial.

A defendant has no duty to present evidence. State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996). The State bears the entire burden of proving each element of its case beyond a reasonable doubt. Id. Thus, Washington courts hold that “[s]hifting the burden of proof to the defendant is improper argument, and ignoring this prohibition amounts to flagrant and ill intentioned misconduct.” In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 713, 286 P.3d 673 (2012).

Physical discipline of a child is lawful “when it is reasonable and moderate and is inflicted by a parent, teacher, or guardian for purposes of restraining or correcting the child.” RCW 9A.16.100. Like self-defense, physical discipline is a negating defense, because it constitutes lawful force. State v. Bennett, 42 Wn. App. 125, 128-29, 708 P.2d 1232 (1985); see also State v. Jordan, 180 Wn.2d 456, 465, 325 P.3d 181 (2014). This means the absence of physical discipline is an element of the crime the State must prove beyond a reasonable doubt. Bennett, 42 Wn. App. at 128-29; Jordan, 180 Wn.2d at 465. In other words, the State bears the burden of proving the force used was unlawful. The jury was properly instructed to this effect. RP 261-62; CP 56; 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 17.07 (3d ed. 2008).

In closing, the prosecutor addressed the physical discipline defense. RP 270-71. For part of this, the prosecutor argued the force used was not

reasonable or moderate, pursuant to the State's burden of proof. However, the prosecutor also stated:

I would argue that the defense cannot assert this defense in this case . . . I would also argue they can't use the defense because the discipline used here was not reasonable and it was not moderate . . . I would argue that based on this case, based on the evidence you heard, the defense cannot assert that.

RP 271. This argument impermissibly shifted the burden of proof away from the State onto Moncada. Such burden shifting constitutes flagrant and ill-intentioned misconduct under well-established case law.

Defense counsel did not object, so the trial court did not give a curative instruction. However, even where the court gives a curative instruction, a prosecutor's "misstatement about the law and the presumption of innocence due a defendant, the 'bedrock upon which [our] criminal justice system stands,' constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights." State v. Johnson, 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010) (quoting State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007)).

Here, the prosecutor's burden shifting went to the very heart of the case: whether Moncada used reasonable and moderate force. A prosecutor's improper comments are particularly prejudicial when they strike directly at the defense theory. Reed, 102 Wn.2d at 147-48. The prosecutor here did not

simply argue that Moncada used excessive force. He argued that Moncada could not even assert physical discipline. This cut the legs out from underneath the legitimate defense theory and reduced the State's burden to prove all elements of the crime beyond a reasonable doubt. It was prejudicial.

Because the prosecutor's flagrant and ill-intentioned burden shifting caused enduring, incurable error, Moncada's trial was unfair and his conviction must be reversed.

- c. The prosecutor encouraged the jury to convict based on the fear of what Moncada would have done if R.B. did not back down.

The prosecutor's closing also invited the jury to speculate about what Moncada would have done if R.B. did not give in and eat his macaroni. RP 274. This played into the jury's fear and encouraged a guilty verdict based on facts not in evidence. No objection could have erased this inflammatory hypothetical scenario from the jurors' minds.

Inflammatory appeals to the passion and prejudice of the jury are improper, as are arguments based on facts not in the record. Belgarde, 110 Wn.2d at 507-08. A prosecutor's latitude in closing argument is limited to arguments "based only on probative evidence and sound reason." Glasmann, 175 Wn.2d at 704 (quoting State v. Casteneda-Perez, 61 Wn. App. 354, 363, 810 P.2d 74 (1991)).

It is misconduct for the State to play on the jury's fear with hypothetical scenarios. State v. Russell, 125 Wn.2d 24, 89, 882 P.2d 747 (1994). In Russell, the prosecutor speculated that the defendant would go to California, find more "naïve, trusting, foolish young people," and kill them. Id. The court described the prosecutor's remarks as "egregious."<sup>10</sup> Id. However, the court declined to reverse because the comment was not likely to inspire revulsion under the facts of Russell's case. Id. Additionally, defense counsel used the comment in his own closing, weakening the argument that it denied the Russell a fair trial. Id.

By contrast, the court in State v. Pierce held that the prosecutor's inflammatory appeal to the jury's emotions could not be overcome by a curative instruction. 169 Wn. App. 533, 555-56, 280 P.3d 1158 (2012). There, the prosecutor presented fictitious first-person narratives of what the defendant and the victims were thinking before and during the murders. Id. at 542, 553. A third improper argument was not objected to: "[n]ever in their wildest dreams . . . or in their wildest nightmare' would the Yarrs have expected to be murdered on the day of the crime." Id. at 555 (quoting RPs).

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<sup>10</sup> Other jurisdictions have also concluded that appeals to a jury's fear of "what would have happened" are improper. See United States v. Nobari, 574 F.3d 1065, 1077 (9th Cir. 2009) (court erred in not instructing jury to disregard prosecutor's reference to what would have happened if little boy had come out of McDonalds as defendants were being arrested); State v. Storey, 901 S.W.2d 886, 901-02 (Mo. 1995) (improper to refer to what brother might have done had he witnessed his sister being murdered); State v. Tyler, 346 N.C. 187, 206, 485 S.E.2d 599 (1997) (improper to refer to what defendant might have done to victim's child if child had caused a scene).

Despite the lack of objection, the court found this last remark improper and incurable in light of the other inflammatory arguments. Id. at 555-56. The court held the arguments were not relevant to Pierce's guilt and invited the jurors to place themselves in the victims' shoes. Id. at 555.

This case involves a similar appeal to the jury's fear based on a purely hypothetical scenario. Specifically, the prosecutor argued:

There's a million other things he could have done. Could have sat there, made [R.B.] wait him out, stare him down, do whatever. A lot of those options don't involve physically assaulting him until he is forced, until he eats, until he backs down. The defendant said, I wasn't going to back down. What happens if [R.B.] never eats that food? What happens if defendant is not going to back down?

RP 274. This argument invited the jury to speculate about how far Moncada would have gone if R.B. did not finally give in and eat. Would Moncada have continued to spank R.B. or done something even worse? The remarks were designed to inspire revulsion in the jury by implying that Moncada would stop at nothing. There was no way for defense counsel to counter this inflammatory image of what could have happened, of how far Moncada might have gone.

This argument inspired a verdict based on fear. It encouraged the jury to make a decision based on facts not in evidence. The outcome in this case should follow Pierce; Moncada's conviction must be reversed. 169 Wn. App. at 553-56.

d. Cumulative misconduct denied Moncada a fair trial.

Even if this court determines that the multiple instances of prosecutorial misconduct do not warrant reversal standing alone, the cumulative effect denied Moncada a fair trial. “[T]he cumulative effect of repetitive prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.” Glasmann, 175 Wn.2d at 707 (quoting State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011)).

The prosecutor here (1) elicited testimony from R.B. about another instance of physical discipline by Moncada, (2) shifted the burden of proving physical discipline, and (3) asked the jury to speculate about what would have happened if R.B. did not finally eat his macaroni. Each of these was prejudicial. Together they are even more so. Their combined effect deprived Moncada a fair trial. Reversal is required.

3. THE TRIAL COURT ERRED WHEN IT IMPOSED A TERM OF COMMUNITY CUSTODY THAT EXCEEDED THE STATUTORY MAXIMUM FOR FIRST-TIME OFFENDERS.

The trial court ordered Moncada to serve 12 months in community custody. CP 69. This term of community custody exceeds the six-month statutory maximum in RCW 9.94A.650(3).

A trial court may only impose a sentence that is authorized by law. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). A judgment and sentence is facially invalid when the court imposes a sentence longer than the statutory maximum. In re Pers. Restraint of Tobin, 165 Wn.2d 172, 176, 196 P.3d 670 (2008); see also In re Pers. Restraint of Coats, 173 Wn.2d 123, 135, 267 P.3d 324 (2011). The proper remedy in such a case is remand for correction of the error. Tobin, 165 Wn.2d at 176. Whether a court exceeded its statutory authority under the Sentencing Reform Act of 1981 (SRA) is an issue of law reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

The court here sentenced Moncada as a first-time offender because he had no prior felony history. CP 67-68. The SRA's first-time offender provision, RCW 9.94A.650, allows courts to waive a standard-range sentence. It also permits courts to impose only a short period of community custody. RCW 9.94A.650(3).

The version of the statute in effect at the time of the spanking incident specified: "The court may impose up to six months of community custody unless treatment is ordered, in which case the period of community custody may include up to the period of treatment, but shall not exceed one

year.” Former RCW 9.94A.650 (3) (2011) (emphasis added).<sup>11</sup> However, the court sentenced Moncada to “12 months in community custody (up to 12 months unless treatment is ordered, in which case the period of community custody may include up to the period of treatment but shall not exceed two years), under the supervision of DOC.” CP 69; RP 310.

The court also ordered Moncada to complete parenting classes. CP 70. The State may argue that parenting classes constitute treatment, thereby extending the community custody period to 12 months. This argument fails for two reasons.

First, parenting classes are not treatment under the SRA. RCW 9.94A.703 enumerates several discretionary conditions of community custody. Specifically, the court may order an offender to:

(c) Participate in crime-related treatment or counseling services; [or]

(d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.

RCW 9.94A.703(3)(c)-(d). Comparing these two provisions makes it clear that parenting classes fall within subsection (d) as a “rehabilitative program” or “affirmative conduct reasonably related to the circumstances of the offense.” Parenting classes are undoubtedly aimed at teaching Moncada

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<sup>11</sup> The current version of RCW 9.94A.650(3) specifies the same six-month community custody term.

more moderate methods of child discipline. Under the SRA, this is distinct from treatment or counseling.

This is corroborated by the judgment and sentence. Under the community custody section, the court ordered Moncada to (1) pay all court-ordered legal financial obligations and (2) attend parenting classes, as an “additional condition.” CP 69-70. However, the court did not order Moncada to “undergo available outpatient treatment for a period not to exceed two years, or inpatient treatment not to exceed the standard range for this offense.” CP 69. This indicates that the court did not consider parenting classes to be treatment. Therefore, the community custody term cannot be extended to 12 months, because no treatment was ordered. Six months is the maximum term of community custody the court can impose here.

Second, even if parenting classes constitute treatment, the community custody term may only “include up to the period of treatment.” RCW 9.94A.650(3). This language does not automatically extend the community custody period to 12 months if treatment is ordered. Rather, the community custody term may extend up to six months, plus the period of treatment, “but shall not exceed one year.” Id. The court here did not specify how long Moncada must attend parenting classes. Rather, the duration of parenting classes will be established by Moncada’s community corrections officer or parenting class facility. CP 80. It may very well be

that Moncada completes parenting classes within six months of his release from confinement. The community custody term therefore cannot be automatically extended to 12 months, even if parenting classes are treatment.

The court sentenced Moncada to a longer community custody term than is authorized by law. This renders the judgment and sentence facially invalid. This court must remand to the trial court for correction of the error.

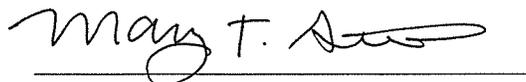
E. CONCLUSION

For the above stated reasons, this court should reverse and remand for a new trial. If this court reverses for any reason, the child hearsay must be excluded on remand, because Moncada can only be retried on third degree assault of a child. Remand is further required to correct the erroneous term of community custody.

DATED this 13<sup>th</sup> day of October, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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

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| STATE OF WASHINGTON | ) |                    |
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| Respondent,         | ) |                    |
|                     | ) |                    |
| v.                  | ) | COA NO. 46311-3-II |
|                     | ) |                    |
| BERNARDO MONCADA,   | ) |                    |
|                     | ) |                    |
| Appellant.          | ) |                    |

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13<sup>TH</sup> DAY OF OCTOBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X]     BERNARDO MONCADA  
          1040 SE COLUMBIA RIDGE  
          APT. #2  
          VANCOUVER, WA 98664

**SIGNED** IN SEATTLE WASHINGTON, THIS 13<sup>TH</sup> DAY OF OCTOBER 2014.

X *Patrick Mayovsky*

**NIELSEN, BROMAN & KOCH, PLLC**

**October 13, 2014 - 3:27 PM**

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Court of Appeals Case Number: 46311-3

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