

**NO. 49158-3**

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

STATE OF WASHINGTON, RESPONDENT

v.

LARRY LEE, JR., APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Michael E. Schwartz

No. 15-1-02250-6

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**Brief of Respondent**

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

1. Was sufficient independent evidence introduced to satisfy the prima facie standard of the corpus delecti rule where the prosecution proved that the care-dependent victim died as a result of having been deprived of the basic necessities of life by a caregiver?

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5. In light of the prosecutorial error standards, was the prosecution's conduct improper where the questions and arguments were consistent with the trial court's rulings and the evidence, where no prejudice has been shown, and where there has been no showing of flagrant and ill-intentioned conduct?

B. STATEMENT OF THE CASE.

1. *Trial Proceedings.*

On June 9, 2015, Appellant Larry John Lee (the “defendant”) was charged with second degree felony murder predicated on first or second degree criminal mistreatment. CP 1. Before trial the charged offense was amended to add a second count, first degree manslaughter. CP 32-33. The case proceeded to trial on May 31, 2016.

The May 31<sup>st</sup> trial date was preceded by a motion hearing on March 9, 2016. 03/09/2016 RP 4. The motions judge heard and ruled on a *Knapstad* motion pursuant to CrR 8.3(c). The supporting affidavits for the defendant’s motion included a declaration signed by the defendant and filed on February 23, 2016. CP 9-11. That declaration and two affidavits were marked for identification as trial exhibits but not admitted into evidence. CP 291-97.

The March 9<sup>th</sup> motion hearing included a continuance motion brought by the prosecution. 03/09/2016 RP 11, et. seq. The motions department denied the motion but did not indicate that the parties were precluded from bringing further continuance motions if circumstances changed. 03/09/2016 RP 15-16.

The next scheduled trial date was set before the criminal presiding judge. 03/24/2016 RP 3, et. seq. The presiding judge was advised (1) that one of the prosecutor’s had been assigned to another department for a trial, (2) that the conflicting trial had precedence because the other defendant

was in custody, and (3) that the defense did not object to the proposed May 31, 2016, trial date. 03/24/2016 RP 4-6. The trial was thereupon continued to May 31<sup>st</sup>. CP 42.

Trial commenced on May 31<sup>st</sup> with a CrR 3.5 hearing. 1 RP 4-6. The state called twelve trial witnesses, including the victim's sister, emergency department medical treatment providers, the medical examiner and a geriatric care expert witness. CP 333, Witness Record. The defendant called two witnesses, both of whom were relatives of the defendant. *Id.* The testimony stretched over three court days with closing arguments taking place on June 13, 2016. *Id.* 6 RP 742, et. seq.

On June 15, 2016, the defendant was found guilty as charged of both crimes, and of the exceptional sentence allegations. CP 243-46, 331-32. Sentencing was set for June 30, 2016. CP 310-23.

## 2. *Statement of Facts.*

At trial the prosecution's evidence included a brief life history of the victim as a dependent, developmentally delayed adult. The victim's sister, Judith Barber, testified that the victim was 59 years old, that he had been developmentally delayed as a child and throughout adulthood, and that he lived in care facilities all his life. 3 RP 351-55. The most recent facility was a facility initially operated by the defendant and his wife called the Lee Family Home. 3 RP 355-56. Ms. Barber testified that the victim needed help with "the things that he had always needed assistance with, you know, like somebody had to bring him his food. He could dress

himself and feed himself and those sorts of things, and toilet himself, but somebody always needed to kind of remind him, you know, like, George, it's time to take a shower. George have you brushed your teeth today? Time to get dressed.” 3 RP 357. And in particular she testified that the victim needed assistance with medical appointments and that it was either the defendant or his wife who assisted the victim. 3 RP 357-64.

Ms. Barber saw the victim two months before his death and did not note any concerns about the care that he was receiving at that time. 3 RP 363-64. By that time the defendant was the sole caregiver because the defendant and his wife had separated. 3 RP 358-60. The defendant's wife had been the licensee of the adult family home until the separation, but the defendant continued as caregiver under an informal, state approved arrangement. 5 RP 612-22, CP 291-297, Exhibits 89, 91.

The social worker assigned to the victim's case assessed the defendant's ability to provide care in February 2015, three months before the victim's death. *Id.* During the assessment she and the defendant negotiated a reimbursement rate that would have allowed payment for three hours of care per day. 5 RP 622-27. She also obtained the defendant's signature thereby approving the transfer of the victim's care to the defendant. 5 RP 630.

The defendant served as the victim's sole caregiver after the separation from his wife during the first five months of 2015. On May 15, 2015, emergency medical aid was dispatched to the defendant's home. 3

RP 323 et. seq. The victim's condition was dire and included extremely low blood sugar, massive infection from pressure sores and extremely filthy conditions including urine and feces soaked bedding. 3 RP 324-28. Emergency treatment was started and the victim was transported on an emergency basis to the hospital. 3 RP 329-37. The emergency crew's visual and olfactory observations conveyed what would have been obvious to anyone: "[The smell] was very strong. It was very notable to the point where I asked, you know, what's going on with this patient." 3 RP 326.

At the hospital, shortly after the victim had been removed from the defendant's care, the odor was described as "atrocious". 3 RP 417. The odor was the smell of a "dead, decaying body . . ." *Id.* The victim's condition was beyond the ability of the medical providers to provide anything except comfort care. 4 RP 484-85. The infectious disease doctor testified that "all the antibiotics in the world wouldn't help this." *Id.* The victim's injuries included "stage 4" pressure ulcers which were described as so deep that "you actually have bone exposed. There is lots of dead tissue." 3 RP 415, 440. The massive infection, contamination from feces and urine, and dead and decaying tissue led to "sepsis", that is bacterial blood poisoning and ultimately to death. 4 RP 518-20. The medical providers also noted, and described for the jury that bruising on the victim's chest area was consistent with use of a restraints. 3 RP 430-33. It should also be noted however that the medical examiner referenced the marks in his report as from elastic from undergarments. 4 RP 524.

At the conclusion of the trial, the court submitted the case to the jury on the two charged counts, and on lesser included second degree manslaughter. CP 247-288. The court also submitted a special verdict interrogatory to clarify which of the two predicate offenses formed the basis for the conviction of second degree felony murder. CP 244-46, 331-32. Thus, the defendant was convicted of felony murder predicated on second degree criminal mistreatment. CP 331-32. The jury hung on first degree criminal mistreatment. *Id.*

At sentencing the manslaughter was dismissed for double jeopardy reasons and the defendant was sentenced for the second degree murder. CP 310-330, 334. The defendant was sentenced within the standard range (not above the range as was authorized by a special verdict [CP 244]) to 220 months in prison. CP 310-330, p. 5 of 11. This appeal was timely filed the same day as the sentencing.

C. ARGUMENT.

The defendant included a cumulative error assignment of error. Under the cumulative error doctrine, a defendant may be entitled to relief if a trial court were to commit multiple, separate harmless errors. *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010). In such cases, each individual error might be deemed harmless, whereas the combined effect could be said to infringe on the right to a fair trial. *Id.* citing *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006), and *State v. Hodges*, 118 Wn. App. 668, 673–74, 77 P.3d 375 (2003). “The doctrine does not

apply where the errors are few and have little or no effect on the outcome of the trial.” *Id.* at 819-20.

The first requirement for cumulative error is multiple, separate harmless errors. As will be shown below, the errors alleged in this case should not be considered error, harmless or otherwise. Thus, the defendant’s cumulative error assignment is without support. In the event one or the other of the defendant’s alleged errors were to have arguable validity but be deemed harmless, the defendant still will not have satisfied his burden of showing that this was an unfair trial. For these reasons, the cumulative error assignment should be rejected.

1. SUFFICIENT EVIDENCE WAS INTRODUCED TO SATISFY THE PRIMA FACIE STANDARD OF THE CORPUS DELECTI RULE WHERE THE VICTIM DIED AS A RESULT OF HAVING BEEN DEPRIVED BY A CAREGIVER OF THE BASIC NECESSITIES OF LIFE INCLUDING NUTRITION AND MEDICAL CARE.

The *corpus delicti* rule arose out of judicial distrust of confessions and incriminating statements. *State v. Aten*, 130 Wn.2d 640, 656-57, 927 P.2d 210, 219 (1996). Courts feared that confessions would be accepted by juries even if there was evidence that the statements were involuntary, coerced, untruthful or otherwise unreliable. *Id.*, *City of Bremerton v. Corbett*, 106 Wn.2d 569, 576, 723 P.2d 1135 (1986). The core of the rule is that a defendant’s confession by itself is insufficient to establish the *corpus delicti* of a crime. *State v. Aten*, 130 Wn.2d at 655-56. Instead there must be independent evidence of the *corpus delicti* before the

defendant's statements may be admitted. *Id.*, ***State v. Brockob***, 159 Wn.2d 311, 328, 150 P.3d 59 (2006) (The state must present evidence "independent of the incriminating statement that the crime . . . actually occurred.").

A number of limitations have been articulated that prevent the rule from leading to injustice. First, the quantum of proof that satisfies the independent evidence requirement is quite low. ***City of Bremerton v. Corbett***, 106 Wn.2d 569, 574-75, 723 P.2d 1135, 1138 (1986). "The independent evidence need not be sufficient to support a conviction or even to send the case to the jury. . . Nor is it necessary that the evidence exclude every reasonable hypothesis consistent with [the crime]. 'Prima facie', in this context, means only that there be evidence of sufficient circumstances which would support a logical and reasonable inference" that the crime was committed. *Id.* at 578-79, citing ***State v. Fellers***, 37 Wn. App. 613, 615, 683 P.2d 209 (1984), and ***State v. Fagundes***, 26 Wn. App. 477, 484, 614 P.2d 198, 625 P.2d 179, *review denied*, 94 Wn.2d 1014 (1980).

In addition to the low threshold of proof, proper analysis of a *corpus delicti* issue requires application of several evidentiary presumptions. "In assessing whether there is sufficient evidence of the *corpus delicti*, independent of a defendant's statements, this Court assumes the truth of the State's evidence and all reasonable inferences from it in a light most favorable to the State." ***State v. Aten***, 130 Wn.2d 640, 658, 927

P.2d 210, 219 (1996). Furthermore, “Proof of the identity of the person who committed the crime is not part of the *corpus delicti*, which only requires proof that a crime was committed by someone.” *City of Bremerton v. Corbett*, 106 Wn.2d at 574.

With the foregoing in mind, analysis of the *corpus delicti* issue in this case is straight forward. Setting aside for the moment the question of identity, that is whether the defendant was the victim’s caregiver at the time of his death, the state introduced evidence that the victim spent his entire life being taken care of by caregivers who were paid out of his disability benefits. 3 RP 360, 369, 371-73. 4 RP 497-99, 503. This was even noted by the medical examiner who observed that at the time of his death as a result of “developmental delay” the victim was “unable to care for himself adequately.” 4 RP524. He lived for over sixty years with the assistance of caregivers. 3 RP 351-53. Thus, there was an abundance of evidence that the victim’s basic necessities of life were abruptly withheld from him by his final caregiver. In short, a caregiver or caregivers acted or omitted to act by withholding those necessities and that was more than sufficient prima facie evidence of a criminal act.

The term “basic necessities of life” was defined by unchallenged jury instructions. CP 247-48, Instruction 15. They included “health-related treatment or activities, hygiene” and “medically necessary health care”. *Id.* In view of the putrid odor and malodorous, bone-deep infections that were allowed to fester to the point where even emergency

medical treatment could not save the victim, there can be no doubt that the acts or omissions of a caregiver were a proximate cause of the victim's death. CP 247-48, Instruction 24. Such indifference to another man's physical condition and suffering displayed a level of inhuman indifference that was surely sufficient to satisfy the prima facie quantum of proof for purposes of *corpus delecti*.

The acts or omissions that caused the pressure sores are one of the elements of the crime. The mental state is the other. The mental state at issue here is criminal negligence which was defined for the jury by an unchallenged instruction. CP 247-48, Instruction 29. Again, setting aside the issue of identity, it is inconceivable that a care giver could fail to be aware of another human being's needs to the extent that they were disregarded in this case without having acted with criminal negligence. The state need only have proved that the victim's caregiver's conduct was "a gross deviation" from conduct that a reasonable person would exercise in the same situation. *Id.*

The smell alone that so overpowered the emergency department medical professionals was more than sufficient evidence of gross deviation. The victim's infection had been allowed to develop without medical aid having been called for. The caregiver omitted to provided hygiene and medical treatment until it was too late, and thus, can be said to have withheld several basic necessities of life with criminal negligence.

Although it is not critical to the *corpus delecti* analysis, there was a wealth of supporting evidence of identity. That evidence includes the meager treatment attempted. There was no evidence that anyone other than the defendant served as caregiver at the time of the victim's death. Thus, there was no one but the defendant to have put the paper towels in the wounds. The hospital staff found the paper towels and Neosporin. This is evidence of knowledge of the infection and gross deviation in responding to it. Coupled with the depth of the wounds and the overwhelming smell of decaying and rotting flesh, the paper towels were powerful evidence that the victim's critical medical state was disregarded in favor of an obvious attempt at a home remedial measures.

It should also be noted that the defense argument based on duty was belied by the evidence. The defendant posited that after a life-time of having been cared for by caregivers, the victim abruptly no longer needed a caregiver and thus transitioned to a mere room and board tenant. This is absurd. Even though the defendant had been one of the victim's caregivers a few short months before when he and his wife operated the licensed facility together, the argument is made that the victim suddenly developed the ability to function independently and thus became a mere tenant. No evidence supported such a theory.

There was also evidence that the remedial measures undertaken by the defendant were a cover up. In addition to attempting home remedy measures against massive, life-threatening infection, the victim's bedding

was removed before the police were able to investigate. The removal was powerful evidence of guilty knowledge; the defendant as caregiver attempted to bleach away evidence of the obvious life threatening infection that had been disregarded until it was too late.

The defendant's opening brief suggests that *corpus delecti* requires a showing that the defendant was the criminal agent. This is incorrect. The *corpus delecti* in a homicide case requires proof of "(1) the fact of death and (2) a causal connection between the death and a criminal act." *State v. Aten*, 130 Wn.2d at 655. The perpetrator's identity is not part of the corpus delicti. *State v. Angulo*, 148 Wn. App. 642, 646, 200 P.3d 752, 754 (2009), citing *State v. Meyer*, 37 Wn.2d 759, 763, 226 P.2d 204 (1951). Thus the uncontroverted evidence is more than sufficient for *corpus delecti* purposes where (1) the victim was a dependent, mentally challenged man who spent his entire adult life being cared for by caregivers, (2) and was abruptly deprived of "health-related treatment or activities, hygiene" and "medically necessary health care" [CP 247-48, Instruction 15] that would have prevented or successfully treated the fatal, massive pressure sores, and (3) who died as a result of an "act or omission" that "was a proximate cause of the resulting death." CP 247-48, Instruction 20.

The defendant's brief also appears to argue that death from a natural process is insufficient to support a criminal charge. This of course ignores that a caregiver's purpose is to prevent all manner of so-called

natural deaths. One could make the same argument about a case in which a caregiver withheld food or water and thus caused a “natural death” by starvation or dehydration. It is absurd to suggest that a natural process of the body such as infection absolves a caregiver of responsibility for a man’s death such as happened here.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING A CONTINUANCE WHERE THE PROPOSED TRIAL DATE WAS AGREED TO BY THE DEFENDANT, AND WHERE THE CONTINUANCE WAS NECESSITATED BY A CONFLICTING TRIAL FOR THE PROSECUTION AND UNAVAILABILITY OF THE PRIMARY PROSECUTION EXPERT WITNESS.

As to this assignment of error, the defendant did not include the verbatim report of the transcript from the continuance motion that is at issue. Review of that transcript shows that the defendant not only did not object to the continuance but agreed to the proposed trial date. 03/24/2016 RP 4. Moreover as a result of not having completed the record on this issue, the defense also overlooked that at the time the presiding judge ruled, he had conferred with the other trial department to which half of the prosecution team was already assigned for trial, and took into account the custody status of the two cases. 03/24/2016 RP 4-6. In short, there is very little factual support for this assignment of error.

Under the time for trial rule, continuances may be granted thereby creating an excluded period. CrR 3.3(e)(3) and (f) (2). A valid continuance may be granted where “such continuance is required in the

administration of justice and the defendant will not be prejudiced in the presentation of his or her defense.” *Id.* At the outset it is important to note that the defendant does not allege prejudice, and thus there is no claim that the second requirement of the rule was not met. The sole question is whether the first requirement was met.

The decision to grant a continuance is reviewed for abuse of discretion. *State v. Downing*, 151 Wn.2d 265, 274, 87 P.3d 1169, 1173 (2004) (“While reasonable minds may differ, we cannot say that the trial court’s determination that the maintenance of orderly procedure outweighed the reasons favoring a continuance, such as surprise and due diligence, was manifestly unreasonable.”). A number of circumstances have been held to satisfy the CrR 3.3 standards for a valid continuance. They include the following: (1) “Unavailability of a material prosecution witness . . .” *State v. Torres*, 111 Wn. App. 323, 329-30, 44 P.3d 903, 905 (2002), citing *State v. Day*, 51 Wn. App. 544, 549, 754 P.2d 1021 (1988). (2) “Scheduled vacations of counsel justify a continuance. Scheduled vacations of investigating officers are also good cause. This is necessary to preserve the dignity of officers who would otherwise never be able to plan a vacation.” *Id.*, citing *State v. Selam*, 97 Wn. App. 140, 143, 982 P.2d 679 (1999), and *State v. Grilley*, 67 Wn. App. 795, 799, 840 P.2d 903 (1992). (3) “When a prosecutor is unavailable due to involvement in another trial, a trial court generally has discretion to grant the State a continuance unless there is substantial prejudice to the defendant in the

presentation of his defense.” *State v. Chichester*, 141 Wn. App. 446, 454, 170 P.3d 583, 586 (2007), citing *State v. Raper*, 47 Wn. App. 530, 535, 736 P.2d 680 (1987), and *State v. Jones*, 117 Wn. App. 721, 728–29, 72 P.3d 1110 (2003).

In this case the discretion exercised by the trial court was quite reasonable. At the time of the court’s ruling one of two co-counsel assigned to the case was already in trial on another case. This alone would have justified the continuance. 03/24/2016 RP 3-4. It should be noted that the motions judge who denied the initial continuance motion could not have known for sure that the prosecutor would have actually started the trial when he denied the continuance. The presiding judge who heard the second motion was faced with changed circumstances and appropriately weighed those circumstances rather than rubber-stamping the prior ruling. This supports rather than undermines a proper exercise of discretion.

The presiding judge’s ruling no doubt took into account fairness and the equitable circumstances brought to his attention. The court’s ruling accounted for the prejudicial effect of ordering the state (1) to proceed to trial with a member of its trial team missing; and (2) without the benefit of testimony from its retained expert witness. 03/24/2016 RP 3-4, CP 34-38. Had the court ordered the trial to start on March 31<sup>st</sup> the effect would have been suppression of the state’s primary expert witness in a case where expert testimony was crucial. One can only imagine the

outcry had the presiding judge ordered the two-lawyer defense team to proceed to trial with half of the team missing and without an expert witness. Considering the universe of possible reasons offered for a criminal continuance, these were among the more valid. They were further supported by the lead detective having been scheduled to be on vacation during the scheduled trial date. CP 34-38. In short, the trial judge should not be gainsaid for having determined that these reasons were sufficient.

In addition to weighing the merits of this continuance versus other continuances the presiding judge in this case also had good reason to be concerned about fairness in light of the unique circumstances of this case. The state's motion had advised the court: "Dr. Kathryn Locatell is a forensic geriatrician, a clinical professor at UC Davis School of Medicine, and a nationally recognized expert on elder abuse and pressure ulcer cases. The State consulted Dr. Locatell prior to filing charges in this case and she authored a report detailing her opinion and findings. Dr. Locatell is unavailable due to trials in other jurisdictions until the week of June 6th." CP 34-38.

The presiding judge could not help but be concerned about fairness. Had he forced the prosecution to proceed to trial with half a trial team and without its primary expert witness he would have effectively suppressed the state's primary expert witness. If the shoe had been on the other foot, if the defense had sought a continuance in order to secure the

attendance of its primary expert, would any court have considered it appropriate to deny the continuance where there was no prejudice to the other side? It is difficult to imagine a valid exercise of discretion where the effect would be to suppress a party's most important evidence.

The unstated implication in this assignment of error is that suppression of the state's evidence would have benefited the defendant. The defendant stood to have the state's primary expert suppressed without having to litigate a suppression motion. The defendant had the state in a bind after the first continuance motion. However, while it may be said the motions judge did not abuse his discretion, it should also be acknowledged that the presiding judge likewise did not abuse his discretion. There is no reason both of these decisions cannot be deemed reasonable. Each judge ruled after considering the particular circumstances before him. The defendant should prevail on this issue only if no judge would have seen it the same as the presiding judge. Otherwise this issue was resolved by a perfectly lawful exercise of discretion.

It should also be noted that the continuance from March 31 to May 31 did not violate the time for trial rule. The order entered by the presiding judge correctly noted that the expiration date under the time for trial rule was July 1. CrR 3.3(b)(5). Thus, the trial actually started with thirty days left on the time for trial clock. This too is support for the appropriate exercise of discretion by the presiding judge.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY PERMITTING TESTIMONY FROM A MEDICAL WOUND CARE SPECIALIST WITH OVER 24 YEARS EXPERIENCE WHOSE QUALIFICATIONS WERE UNCHALLENGED, AND THAT WAS BASED ON HER DIRECT OBSERVATIONS OF THE VICTIM.

Under ER 702, an expert qualified “by knowledge, skill, experience, training, or education” may be permitted to offer testimony that includes “scientific, technical, or other specialized knowledge” if it “will assist the trier of fact to understand the evidence or to determine a fact in issue. . . .” In particular types of cases, “notably personal injury and medical malpractice, expert medical testimony is held to a specific standard - one of reasonable medical certainty. . . .” Teglund, *Courtroom Handbook on Washington Evidence*, § 702:8, p. 331-32, (2016-17 ed.), citing *Carlos v. Cain*, 4 Wn. App. 475, 481 P.2d 945 (Div. 1 1971) and *O'Donoghue v. Riggs*, 73 Wn. 2d 814, 440 P.2d 823 (1968). This is because medical experts for the plaintiff in such cases “must be prepared to testify that a party's condition or injuries ‘more likely than not’ were caused by” a particular condition. *Id.* But the reason for the more likely than not requirement in such cases “is not based upon Rule 702. Rule 702 itself does not require any particular degree of certainty for admissibility.” *Id.*

In cases not involving a particular degree of certainty, a trial court’s admission of expert opinion testimony is reviewed for an abuse of discretion. *State v. Baity*, 140 Wn.2d 1, 9–10, 991 P.2d 1151, 1156

(2000)(“We review the trial court's decision to admit or reject expert opinion testimony under ER 702 and ER 703 under an abuse of discretion standard.”). See also *State v. Weaville*, 162 Wn. App. 801, 824, 256 P.3d 426, 438 (2011) (The trial court's decision to admit the evidence is reviewed for abuse of discretion.), citing *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), *In re Detention of Coe*, 175 Wn.2d 482, 492, 286 P.3d 29, 33–34 (2012), and *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). Under this standard a trial court’s discretion is not abused if admission of the evidence is “debatable”, but only if “it is exercised on untenable grounds or for untenable reasons.” *In re Detention of Coe*, 175 Wn.2d at 491-92, quoting *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

A trial court's evaluation of a proposed expert witness's qualifications is likewise reviewed for abuse of discretion. *State v. Perez*, 137 Wn. App. 97, 151 P.3d 249 (2007). “Practical experience is sufficient to qualify a witness as an expert.” *State v. Weaville*, 162 Wn. App. at 824, citing *State v. Ortiz*, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992). In *Weaville* Division One reviewed the testimony from a forensic toxicologist that was disputed by a defense pharmacological expert. The *Weaville* court reasoned that “[the forensic toxicologist’s] degree in chemistry and forensic science, rather than specifically in ‘human physiology,’ did not render her unqualified to testify as she did. Although [she] did not have a degree in pharmacology, unlike the expert witness for

the defense, that fact goes to the weight of [her] testimony rather than to her qualifications to give such testimony.” *State v. Weaville*, 162 Wn. App. at 824-25.

The defense argument in this case is similar to the unsuccessful argument in *Weaville*. Here, Ms. Burnam was part of the treatment team that tried valiantly to save the victim’s life. Unfortunately, her efforts were unsuccessful after his too-late admission to the hospital for life-threatening wounds. 3 RP 416-18. Ms. Burnam’s credentials included more than 24 years’ experience in the prevention, diagnosis and treatment of wounds of all types in both hospital and care facility settings. *See* 3 RP 403-16. Prior to describing her findings, she provided a summary of her qualifications and those qualifications were explicitly acknowledged as sufficient to qualify her as an expert by the defense which said, “I have no objection.” 3RP 416.

Ms. Burnam provided detailed testimony of her observations of the victim’s fatal and non-fatal wounds. The fatal pressure sore wounds were described at length using visual aids and photographs. 3 RP 412-16, 421-30. During her testimony about the pressure sores, Ms. Burnham’s attention was also directed to trial exhibit 35A which depicted the victim’s chest and in particular marks “caused from a mechanical device.” 3 RP 431. Over two objections, one for “speculation” and the other for “not responsive”, Ms. Burnam testified that from her observation, “There was some mechanical force or something around there that caused that

pressure. I knew -- it is very unusual that it is below the breast. In my investigations, and I've done a lot of investigations in a nursing home environment, and typically when a strap . . . When there is deep tissue injury like this that is on the front underneath of a breast, my experience is it comes from a strap or some sort of damage around the waist.” *Id.* It should be noted that neither objection preserved the issue sought to be argued here, that is the proper scope of a medical expert’s testimony. *See State v. Ford*, 137 Wn.2d 472, 488, 973 P.2d 452, 460 (1999)(“Moreover, a general objection with respect to a trial court decision is insufficient to preserve a specific issue for review.”), *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182, 1189 (1985) (“An objection which does not specify the particular ground upon which it is based is insufficient to preserve the question for appellate review.”), citing *State v. Boast*, 87 Wn.2d 447, 553 P.2d 1322 (1976).

Consistent with ER 703, Ms. Burnam discussed the “facts or data” that was “perceived by or made known” to her “at or before the [trial]” that indicated that the marks were consistent with restraints. 3 RP 432. She noted that the marks were suggestive of restraints, “[b]ecause it's above the line of the pants. Sometimes they will be caused from briefs, pants, things like that, down around the waist. But the fact that it's only on the front, not on the side, and it's so far up, it's suspicious.” *Id.*

The primary argument offered by the defense is that Ms. Burnam’s testimony should have been disallowed because the medical examiner

offered a different opinion. As in *Weaville*, to the extent that there was disagreement, it “goes to the weight of [her] testimony rather than to her qualifications to give such testimony.” *State v. Weaville*, 162 Wn. App. at 824-25. Moreover, the contradictory testimony from the medical examiner included no detail. 4 RP 524-25. The medical examiner was (1) asked about his report rather than asked to view a photo, (2) he answered a single question about the marks and did not elaborate, (3) he was not asked about medical restraints as a possible cause, and (4) he was not asked about how marks from an elastic waist band could leave marks on the victim’s chest and not on all sides of his body. *Id.* The jury was instructed that it was the judge of the credibility of the expert witnesses. CP 247-88, Instruction No. 5. The jury thus had the right to weigh the credibility of the two opinions rather than accept one or the other. This is the very definition of testimony that “will assist the trier of fact to understand the evidence or to determine a fact in issue. . . .” ER 702.

The defendant sought to bolster his argument on this issue by citing child abuse cases from Oregon. In Washington there are a number of restrictions on expert testimony in child sex abuse cases. See *State v. Kirkman*, 159 Wn.2d 918, 930, 155 P.3d 125, 132 (2007)(“Dr. Stirling’s statement that A.D.’s account was ‘clear and consistent’ does not constitute an opinion on her credibility.”), *State v. Carlson*, 80 Wn. App. 116, 125, 906 P.2d 999, 1004 (1995) (“Washington law has never recognized the ability of a doctor or other expert to diagnose sexual abuse

based only on the statements of an alleged victim.”), and *State v. Jones*, 71 Wn. App. 798, 819, 863 P.2d 85, 98 (1993) (“Because the use of testimony on general behavioral characteristics of sexually abused children is still the subject of contention and dispute among experts in the field, we find that its use as a general profile to be used to prove the existence of abuse is inappropriate. However, we agree with the current trend of authority that such testimony may be used to rebut allegations by the defendant that the victim's behavior is inconsistent with abuse.”). These restrictions are the result of the unique character of child sex abuse where the scope of expert testimony must be balanced against the jury’s right to determine credibility. *Id.*

According to the two cases relied upon by the defense, Oregon has adopted restrictions similar to Washington in child abuse cases. In the *Southard* case the Oregon Supreme Court adopted the same rule applied in *Carlson*, saying “The only question on review is whether a diagnosis of ‘sexual abuse’ -*i.e.*, a statement from an expert that, in the expert's opinion, the child was sexually abused-is admissible in the absence of any physical evidence of abuse. We hold that . . . diagnosis does not tell the jury anything that it could not have determined on its own, the the diagnosis is not admissible under OEC 403.” *State v. Southard*, 347 Or. 127, 142, 218 P.3d 104, 113 (2009). The *Sanchez-Alfonso* case stands for a similar restriction in physical abuse cases. The *Sanchez-Alfonso* court held that a physician’s opinion about the identity of a child’s abuser was

not a proper expert opinion. *State v. Sanchez-Alfonso*, 352 Or. 790, 801, 293 P.3d 1011, 1019 (2012) (“[The physician] did not establish that she was qualified to identify the perpetrator of inflicted injury.”). What these cases do not stand for is that a medical expert whose credentials were not challenged may not testify on a subject matter that is based on her personal examination and treatment and on physical findings of injury.

Child abuse cases involve distinct issues that make them readily distinguishable from this case. Here there was a wealth of evidence of injury including photographs. This case bears no relation to this Court’s *Carlson* case or to Oregon’s *Southard* case, both of which involve the common circumstance in child sex abuse cases where lack of any visible physical injury is commonplace. The evidence in this case was properly admitted under the abuse of discretion standard and that standard was not violated by Ms. Burnam’s testimony.

4. CONSIDERING THE ENTIRETY OF THE RECORD THE DEFENDANT’S TRIAL COUNSEL’S PERFORMANCE DID NOT FALL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS WHERE HE AGGRESIVELY PURSUED THE ONLY VIABLE DEFENSE TRIAL STRATEGY.

To prevail on an ineffective assistance of counsel claim a defendant must prove that his trial counsel’s performance was deficient, and that deficiency prejudiced the defense. *State v. Garret*, 124 Wn.2d 504, 518, 881 P.2d 185 (1994), citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A trial attorney’s

counsel can be said to be deficient when, considering the entirety of the record, the representation fell below an objective standard of reasonableness. *State v. McFarland*, 137 Wn.2d 322, 335, 880 P.2d 1251 (1995).

“Strickland begins with a strong presumption . . . counsel’s performance was reasonable.” *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011), citing *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). “To rebut this presumption, the defendant bears the burden of establishing the absence of any conceivable legitimate tactic explaining counsel’s performance.” *Id.* at 42, citing *State v. Richenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). *State v. Piche*, 71 Wn.2d 583, 590, 430 P.2d 522 (1967), *cert denied*, 390 U.S. 912, 88 S. Ct. 838, 19 L. Ed. 2d 882 (1968).

The reasons for appellate deference to trial counsel are rooted in the Sixth Amendment itself. It has been recognized that if mandatory rules for the conduct of criminal trials were to be established, the independent judgment relied upon by defense counsel would necessarily be eroded:

[T]he Strickland standard must be applied with scrupulous care, lest ‘intrusive post-trial inquiry’ threaten the integrity of the very adversary process the right to counsel is meant to serve. . . Even under de novo review, the standard for judging counsel’s representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and

with the judge. It is “all too tempting” to ‘second-guess counsel's assistance after conviction or adverse sentence.’ ”

*Harrington v. Richter*, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (citation omitted), quoting *Strickland v. Washington*, 466 U.S. 668, 689-90, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The Washington Supreme Court has stressed the same reasons for deference to trial counsel’s judgment: “The Court did not set out detailed rules for reasonable conduct because ‘[a]ny such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions’ . . . Courts must be highly deferential.” *In re Personal Restraint of Stenson*, 142 Wn.2d 710, 742, 16 P.3d 1, 18 (2001), quoting *Strickland v. Washington*, 466 U.S. at 689.

When evaluating an ineffective assistance argument, the utmost deference must be given to counsel’s tactical and strategic decisions. *In re Personal Restraint of Elmore*, 162 Wn.2d 236, 257, 172 P.3d 335 (2007), citing *Strickland v. Washington*, 466 U.S. at 689. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Where an ineffective assistance claim is premised on failure to call witnesses, “The defendant has the heavy burden of showing, after a review of the entire record. . . that counsel's performance fell below the objective standard of reasonableness after considering all surrounding circumstances.” *State v. Sherwood*, 71 Wn. App. 481, 483, 860 P.2d 407 (1993) (citations

omitted), citing *State v. Allen*, 57 Wn. App. 134, 140, 787 P.2d 566 (1990), *State v. Mak*, 105 Wn.2d 692, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986).

A fair assessment of trial attorney performance requires “every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland v. Washington*, 466 U.S. at 689. “There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.” *Id.* at 690. The defendant bears the burden of establishing the absence of any “conceivable” legitimate strategy or tactic explaining counsel’s performance to rebut the strong presumption that counsel’s performance was effective. *State v. Grier*, 171 Wn.2d 17, 42 246 P.3d 1260 (2011).

In this case, the defendant postulates five bases for his ineffective assistance of counsel claim. Three of them, namely (1) the argument related to the defendant’s affidavit submitted in support of his *Knapstad* motion, and (2) the reference to insufficient counseling concerning plea bargaining, and (3) the alleged failure to call the victim’s physician as a defense witness are not supported by the record. The affidavit was not an admitted trial exhibit and thus had no impact on the trial. CP 291-97, p. 7. As to plea negotiations, the record is devoid of any reference to any such negotiations. The defendant has not identified any plea offers that were

made and not accepted, much less any that should have been accepted. In fact the record actually suggests that plea negotiations did not occur because the defendant was re-arraigned just before the *Knapstad* motion and gave no hint of any desire to plead to lesser charges. March 9, 2016, RP 3.

The failure to call the victim's primary care physician is likewise not supported by the record. The defendant does not point to anything in the record summarizing what the physician might have testified about. He hints that the physician would have testified that the victim had an appointment two weeks before his death. Accepting this at face value, the defendant seems to suggest that his case would have benefited from a witness who would have confirmed that the defendant did nothing to help the victim, even to the extent of assisting him to see his primary care physician. Seen in this light, the defense attorney's decision not to call the primary care physician was a credit to his defense of the defendant.

The defendant's primary argument is that trial counsel supposedly overestimated the strength of the landlord tenant defense. This argument is no more persuasive than the first three. The defendant is not the first criminal defendant to have had limited options when it came to trial strategy. A defendant who fires a dozen shots at an unarmed man might be said to have a weak self-defense claim. But self-defense may nevertheless be the defendant's best option. So too in this case the defendant was the only possible person providing caretaking services to

the victim at the time of his death. The defendant did not have the option of pointing at another suspect. His only viable defense was to persuade the jury that the victim was not in his care.

Defense counsel cannot be faulted for pursuing the best available defense. Ineffective assistance of counsel is not judged by hindsight. “Finally, ‘[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.’ ” *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260, 1269 (2011) quoting *Strickland v. Washington*, 466 U.S. at 689.

In his arguments in this appeal the defendant does not identify an alternative trial strategy that was not pursued. In fact he tacitly suggests that the landlord tenant defense was the best he could do because he also suggests that there was other evidence (the primary care physician) that could have been offered to support it. This of course begs the question as to whether the other evidence would have helped or hurt. Where the evidence would have undermined the defendant’s case, trial counsel should not be faulted for not introducing it.

The insurmountable problem for the defendant in an ineffective assistance claim in this case is that it was beyond dispute that the victim required the services of a caregiver. The defendant’s guilt was established

because he was the final caregiver and he utterly failed to provide the basic necessities of life. This circumstance cannot be laid at the feet of his trial counsel; it was what the defendant did and did not do that established his guilt.

5. PROSECUTORIAL ERROR IS NOT ESTABLISHED WHERE THE PROSECUTOR'S CONDUCT WAS NOT IMPROPER, WHERE THERE WAS NO PREJUDICE AND WHERE NOTHING THE PROSECUTOR DID CAN BE SAID TO HAVE BEEN FLAGRANT AND ILL-INTENTIONED.

Prosecutorial error<sup>1</sup> may be premised on improper closing argument or on occurrences during trial. *State v. Lindsay*, 180 Wn. 2d 423, 326 P.3d 125 (2014). The standard to be applied is: “(1) whether the

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<sup>1</sup> ‘Prosecutorial misconduct’ is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial.” *State v. Fisher*, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Recognizing that words pregnant with meaning carry repercussions beyond the pale of the case at hand and can undermine the public’s confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association’s Criminal Justice Section (ABA) urge courts to limit the use of the phrase “prosecutorial misconduct” for intentional acts, rather than mere trial error. See American Bar Association Resolution 100B (Adopted Aug. 9-10,(2010), <http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf> (last visited April 27,2017); National District Attorneys Association, Resolution Urging Courts to Use “Error” Instead of “Prosecutorial Misconduct” (Approved April 10 2010), [http://www.ndaa.org/pdf/prosecutorial\\_misconduct\\_final.pdf](http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf) (last visited April 27,2017).

A number of appellate courts agree that the term “prosecutorial misconduct” is an unfair phrase that should be retired. See, e.g., *State v. Fauci*, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), review denied, 2009 Minn. LEXIS196 (Minn., Mar. 17, 2009); *Commonwealth v. Tedford*, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa.2008). In responding to appellant’s arguments, the State will use the phrase “prosecutorial error.” The State urges this Court to use the same phrase in its opinions.

prosecutor's comments were improper; and (2) if so, whether the improper comments caused prejudice.” *Id.* at 431, citing *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). Furthermore when the alleged misconduct did not prompt an objection, the standard is even more stringent: “The ‘failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.’ ” *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43, 46 (2011), quoting *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *State v. Emery*, 174 Wn.2d 741, 760-61, 754, 278 P.3d 653 (2012).

When it comes to closing argument, "A prosecutor can certainly argue that the evidence does not support the defense theory." *State v. Lindsay*, 180 Wn.2d at 431. Furthermore, the prosecutor is permitted latitude to argue the facts in evidence draw reasonable inferences from the evidence and express those inferences to the jury. *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997), citing *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991), *cert. denied*, 523 U.S. 1008 (1998) and *State v. Fiallo-Lopez*, 78 Wn. App. 717, 726, 899 P.2d 1294 (1995). A prosecutor may also argue (1) credibility of witnesses, *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (A prosecutor may draw an

inference from the evidence as to why the jury would want to believe a witness.), and (2) the meaning of the jury instructions but must not misstate the law, *State v. Allen*, 182 Wn.2d 364, 373-74, 341 P.3d 268, 273 (2015) citing *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008).

In this case two of the complained of instances of alleged prosecutor error occurred during closing argument, and one occurred during the trial. The two closing argument allegations were not only not objected to, but were also wholly consistent with the trial evidence. One of those allegations was related to the admitted in-life photo. *See* CP 291-97, Trial Exhibit 51. The complained of exhibit went to the jury as part of the evidence the jury was to consider. The defendant argues that the prosecutor's display of the exhibit during closing argument was error. Yet he identifies no reference to the photo in the prosecutor's comments. He suggests that the mere display of an admitted exhibit to the jury should be viewed as error. No authority supports the notion that a prosecutor may not refer to an admitted exhibit during closing argument. Nor is any authority provided suggesting that when a prosecutor does not mention the exhibit, that the failure to mention it is error. This complained of instance of alleged error is not well taken.

The other allegation from the closing argument was the prosecutor's discussion of testimony from witness Cynthia English. The prosecutor referred to Ms. English twice, both times without objection and both times with an accurate paraphrase of her testimony. *See* 6 RP 748 and 765. Ms. English testified about how she conducts vulnerable adult assessments. 5 RP 609-616. She explained how she obtains information from both the client and the caregiver both in licensed 24 hour adult family homes and in so-called informal care settings such as in this case. *Id.* She also testified about the assessment she did with the victim and the defendant in February three months before the victim's death. *See* 5RP 616, et. seq. The trial court admitted a copy of her assessment as an exhibit. CP 291-97, Trial Exhibit 89.

Ms. English testified specifically about the February meeting with both the victim and the defendant and what she sought from each of them:

A. We would talk. He liked history, car books. He had magazines. A lot of magazines. He was kind of like a teenager, that kind of mentality. Sometimes he was grumpy, sometimes he wasn't. He was a fun person to be around. We would talk about -- he wasn't really interested in talking about medications or anything like that. We would talk about normal stuff, what are you doing today, what do you like to do. Have you played any games lately. Shoot the breeze. Not necessarily what kind of care are you getting. I talk about that with the caregiver.  
5 RP 617-18.

In light of Ms. English's testimony the prosecutor can hardly be accused of exaggeration when she discussed the testimony. The prosecutor said:

The defendant was supposed to be a caregiver. Judy Barker entrusted the defendant to provide the care for her little brother, George. George was described by Cynthia English as being sometimes like a teenager. You heard the defendant's mother say that when you asked him how he was doing, he would say he was fine and dandy like sugar candy.  
6 RP 765.

This paraphrase of Ms. English's testimony was no exaggeration. Nor was anything else the prosecutor said about the evidence. Ms. English no doubt undermined the defendant's I-was-just-a-landlord defense but there was no misconduct in discussing her testimony in closing argument. No case of prosecutorial error can be substantiated where the prosecutor referred to admitted exhibits and admitted testimony during closing argument.

For similar reasons a case for prosecutorial error cannot be made where the court admitted testimony over a defense objection. During the testimony of the wound care nurse, the defendant objected to a particular question. 3 RP 418. The court sustained the objection but outside the jury's presence clarified the scope of its ruling, saying, "A comparison may be made, but only insofar as it assists the witness in determining the extent of the injury, or what treatment she needed to do. It cannot be used simply for comparison sake. Okay. So if utilizing this testimony, you

know, assists this witness in saying that, you know, whatever it is the opinion you want to get from her, and that opinion is admissible, that's okay." 3 RP 419. The testimony resumed and no further objections were interposed. 3 RP 421, et. seq.

The defense argument is that the prosecution did not abide by the court's clarified ruling. This position is undermined by the lack of further objections; it can be reasonably inferred that trial counsel did not see any further objectionable questions. This can be seen most readily in the complained of testimony from the infectious disease physician who testified (without objection) consistent with the court's ruling as follows:

Despite maximum support of his blood pressure with what we call pressors, he could barely maintain his blood pressure. He was on the ventilator. He had wounds that were the worst I had ever seen in my life, and I didn't think that those were survivable. In addition, when he came in as part of doing my assessment, I read the whole chart. And when he came in his blood sugar in the fields paramedics noted was 12, and that's pretty much incompatible with life. 4 RP 484.

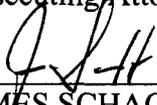
The defense claim that the prosecution failed to abide by the trial court's ruling is not well taken. The prosecution exhibited the utmost professionalism by obtaining clarification and then conducting her examinations consistently with the court's expectations. This is not prosecutorial error much less error that could be deemed so flagrant and ill-intentioned that an objection or limiting instruction would have been to no avail. This assignment of error should be denied.

D. CONCLUSION.

For the foregoing reasons the state respectfully requests that the defendant's conviction be affirmed.

DATED: Tuesday, May 02, 2017.

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
\_\_\_\_\_  
JAMES SCHACHT  
Deputy Prosecuting Attorney  
WSB # 17298

Certificate of Service:

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

5.3.17 Theresa Ka  
Date Signature

**PIERCE COUNTY PROSECUTOR**  
**May 03, 2017 - 2:01 PM**  
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