

FILED  
Court of Appeals  
Division II  
State of Washington  
4/26/2019 10:55 AM

No. 52885-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Samuel Schmittler,**

Appellant.

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Kitsap County Superior Court Cause No. 16-1-01607-7

The Honorable Judge Melissa A. Hemstreet

**Appellant's Opening Brief**

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## **ISSUES AND ASSIGNMENTS OF ERROR**

1. The trial court violated Mr. Schmittler's Fourteenth Amendment right to due process by refusing to instruct on his theory of the case.
2. The trial court violated Mr. Schmittler's absolute statutory right to have the jury instructed on an inferior-degree offense.
3. The trial court erred by refusing to instruct jurors on third-degree assault of a child as an inferior degree offense of second-degree assault of a child.

**ISSUE 1:** An accused person is entitled to instruction on an inferior degree offense if the evidence shows that the person committed only that crime. Did the trial judge violate Mr. Schmittler's statutory and due process rights by refusing to instruct on third-degree assault of a child?

4. Mr. Schmittler was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
5. Mr. Schmittler's attorney provided ineffective assistance by failing to object to inadmissible testimony.

**ISSUE 2:** Defense counsel provides ineffective assistance by failing to object to inadmissible evidence absent a valid tactical reason. Was Mr. Schmittler denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel by his attorney's failure to object to inadmissible evidence that was highly prejudicial?

6. The sentencing court improperly delegated to DOC the authority to impose core conditions of Mr. Schmittler's community custody.
7. The trial court erred when it required Mr. Schmittler to obey unspecified "instructions, affirmative conditions, and rules" of the Department of Corrections and his CCO.

**ISSUE 3:** The separation of powers doctrine is violated when one branch of government impermissibly delegates its constitutionally-conferred powers to another branch. Did the sentencing court violate the separation of powers doctrine by allowing DOC and Mr. Schmittler's CCO to set core conditions of community custody?

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

At least slight evidence introduced at Samuel Schmittler's trial showed that he committed third-degree assault of a child rather than second-degree assault of a child. The trial court refused to instruct on the inferior degree offense, apparently believing that third-degree assault could not be predicated on an intentional act such as spanking. The trial court's refusal to instruct on the inferior-degree offense requires reversal of Mr. Schmittler's conviction and remand for a new trial.

Mr. Schmittler's attorney did not object when one officer testified that another officer had told him that the child "had indicated he had been beaten like 30 times." RP (7/11/18) 115. The prosecutor relied on this testimony in closing as the strongest proof that Mr. Schmittler recklessly inflicted substantial bodily harm. No hearsay exceptions applied. This and other errors by Mr. Schmittler's attorney deprived him of the effective assistance of counsel.

Instead of setting conditions of community custody, the trial court ordered Mr. Schmittler to obey unspecified "instructions, affirmative conditions, and rules of... DOC and CCO." This amounted to an improper delegation of the trial court's sentencing authority and violated the separation of powers doctrine.

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Samuel Schmittler lived with his girlfriend, their baby, and his girlfriend's two sons. RP (7/10/18) 68. He cared for the children when their mother went to work. RP (7/10/18) 70; RP (7/11/18) 158-159. The mother had custody at the time, and the father lived a couple blocks away. RP (7/10/18) 69; RP (7/11/18) 134.

The mother and father had been to court several times about the care and custody of the boys, who were aged 9 and 7.<sup>1</sup> RP (6/28/18) 47-48; RP (7/10/18) 58, 87, 96-97. The day after the father picked the boys up for Christmas, he noticed some bruising on his older son's back. RP (7/10/18) 54, 71. The father did not call the police; instead, authorities were notified by a coworker of the father's sister. RP (7/10/18) 25-26, 54-56.

Mr. Schmittler initially denied spanking R.W., but later acknowledged that he'd spanked the 9-year-old about three times. RP (7/10/18) 28-31, 44; RP (7/11/18) 137-138, 157.

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<sup>1</sup> This disagreement continued, and the boys were placed with their grandparents after this incident and remained there almost two years later. RP (7/10/18) 58, 65-67. In fact, in his testimony at Mr. Schmittler's trial on the assault charge, the younger boy told the jury that he was there to testify to determine if he would live with his father or his mother. RP (7/10/18) 83-87.

The State charged Mr. Schmittler with assault of a child in the second degree with special allegations of domestic violence and violation of a position of trust.<sup>2</sup> CP 3, 35, 38-39.

Attorney Michele Taylor did not appear in court for the trial set to start May 7, 2018. RP (5/7/18) 7-8. Another attorney covered the hearing that day for her, but was unable to explain her absence. RP (5/7/18) 7-10. The prosecutor noted that attorney Taylor had told her that Mr. Schmittler did not appear for their last appointment. RP (5/7/18) 7-10. The trial was reset. RP (5/7/18) 7-10.

Testimony began on July 10, 2018.<sup>3</sup> One key exhibit the State planned to offer was a notebook kept by the family that listed behaviors and consequences for the boys. RP (7/11/18) 137. Having been on the case at least three months and calling ready for trial, it became clear that Taylor had not reviewed this exhibit. RP (5/7/18) 7; RP (7/10/18) 7-8.

The arresting officer testified that Mr. Schmittler had told him that he was aware that corporal punishment was not allowed under a parenting

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<sup>2</sup> Another enhancement of particularly vulnerable victim was withdrawn. CP 39.

<sup>3</sup> On the day jury selection was set to start, Taylor told the court that Mr. Schmittler wished to fire her. RP (7/2/18) 5. Without asking Mr. Schmittler, she told the court that she had contacted the attorney that Mr. Schmittler wished to hire who told her she had not been hired. RP (7/2/18) 5. When Mr. Schmittler was asked, he said that he was ready to go to trial with his current counsel. RP (7/2/18) 5. This attorney also felt the need to make a record that the State's offer had been relayed to Mr. Schmittler, he'd rejected it, and the State had withdrawn it. RP (7/2/18) 6.

plan. RP (7/10/18) 46. Without objection from the defense, this officer also told the jury that he was able to “verify” that the order specifically names the children and prohibits corporal punishment. RP (7/10/18) 47. The State also brought out the corporal punishment term in the parenting plan through both the mother and the father. RP (7/10/18) 51; RP (7/11/18) 136. Taylor raised no objections to this testimony. RP (7/10/18) 46-47, 51; RP (7/11/18) 136.

Mr. Schmittler’s attorney did not give an opening statement until after the State rested its case. RP (7/10/19) 19. She also waived cross-examination of the father,<sup>4</sup> the younger boy, and two of the three investigating officers.<sup>5</sup> RP (7/10/18) 59, 95; RP (7/11/18) 130, 152.

Defense counsel did not object when one officer (Elton) testified about what he’d heard from another officer about a statement allegedly made by R.W. RP (7/11/18) 115. According to Elton, “Officer Donnelly had told me that [R.W.] had indicated he had been beaten like 30 times.” RP (7/11/18) 115.

No other witness testified to this figure or used the word “beaten.” R.W. himself could not remember the number of times he’d been spanked.

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<sup>4</sup> The father initially said that when he picked up the boys, they were in good spirits. RP (7/10/18) 52. He later said that his older son had seemed down when picked up. RP (7/10/18) 57. Even so, Mr. Schmittler’s attorney declined to bring out this inconsistency. RP (7/10/18) 59.

<sup>5</sup> Taylor did cross examine the alleged victim R.W. This challenge took two pages to transcribe (the direct exam covered 17 pages). RP (7/10/18) 63-82.

RP (7/10/18) 74. When asked to guess, he said “[m]ore than one,” or “[m]aybe” more than ten. RP (7/10/18) 74. Both Mr. Schmittler and R.W.’s brother put the number closer to three. RP (7/10/18) 88; RP (7/11/18) 157, 163-164.

R.W.’s younger brother told the jury that his older brother seemed hurt and was crying after the spanking. RP (7/10/18) 92. R.W.’s grandmother said that the bruise lasted over a month, and that R.W. told her it hurt for about that long as well. RP (7/10/18) 100-102. R.W. himself testified that the pain lasted “[p]robably the whole night.” RP (7/10/18) 74.

When she first saw the bruise, R.W.’s mother described it as “about the size of a half dollar, and it was light in color.” RP (7/11/18) 143. In fact, R.W. didn’t know he even had a bruise until his mother pointed it out to him. RP (7/11/18) 143.

Mr. Schmittler testified that he saw no marks right after spanking R.W. RP (7/11/18) 157-158. He later saw a round mark that was “maybe a light brown.”<sup>6</sup> RP (7/11/18) 158. This was “[m]uch different” from how it appeared in later photos. RP (7/11/18) 158.

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<sup>6</sup> He described the mark as “[a]bout half” the size of a baseball. RP (7/11/18) 161.

R.W.'s mother testified that R.W. bruises "[p]retty easily.". RP (7/11/18) 141. The State acknowledged in closing that the bruise "developed and darkened over time." RP (7/12/18 McAuliffe) 213.

The defense proposed jury instructions on the inferior degree offense of assault of a child in the third degree.<sup>7</sup> RP (7/11/18) 165-187. The trial judge denied the instruction, ruling that there was no factual basis for arguing that the harm was anything but intentionally inflicted. RP (7/11/18) 180-185.

The jury convicted Mr. Schmittler as charged. CP 95-96. After trial, Mr. Schmittler's trial attorney withdrew. RP (10/8/18) 2-15.

Because Mr. Schmittler showed that he had worked hard to learn from this incident, including completing multiple parenting classes, the court imposed a sentence within the standard range. RP (10/29/18) 28; CP 96-98, 112-113. One term of the judgment and sentence allowed the Department of Corrections and Mr. Schmittler's CCO to require compliance with unspecified "instructions, affirmative conditions, and rules." CP 117.

Mr. Schmittler timely appealed. CP 124.

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<sup>7</sup> The parties discussed the instructions, and the transcript makes clear that counsel submitted supplemental instructions addressing the issue. RP (7/11/18) 165-186. It does not appear that counsel filed her proposed supplemental instructions.

## ARGUMENT

### **I. THE TRIAL COURT VIOLATED MR. SCHMITTLER’S ABSOLUTE RIGHT TO INSTRUCTIONS ON AN INFERIOR DEGREE OFFENSE.**

Mr. Schmittler asked the court to instruct on third-degree assault of a child. The trial judge erroneously concluded that intentional actions such as spanking a child can not amount to third-degree assault. Mr. Schmittler was deprived of his absolute right to instruction on an inferior degree offense.

#### **A. Mr. Schmittler was entitled to instructions on third-degree assault of a child.**

An accused person is entitled to instruction on an inferior degree offense if there is evidence that the defendant committed only the inferior offense. *State v. Fernandez-Medina*, 141 Wn.2d 448, 453, 6 P.3d 1150 (2000); RCW 10.61.003. This test differs from the analysis courts use “when considering a request for a lesser included offense instruction.”<sup>8</sup> *Id.*

The evidence is viewed in a light most favorable to the instruction’s proponent. *Id.*, a 456. The right to instruction on an inferior or lesser offense is “absolute.” *State v. Parker*, 102 Wn.2d 161, 166, 683 P.2d 189 (1984).

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<sup>8</sup> However, the factual component of each test is the same; accordingly, cases addressing the factual component apply to both categories. *Fernandez-Medina*, 141 Wn.2d at 454-455.

The court must instruct on an inferior-degree offense if “even the slightest evidence” suggests that the person may have committed only the lesser offense. *Id.*, at 163-164. Here, there is at least slight evidence that Mr. Schmittler committed only third-degree assault of a child.

Assault of a child in the third-degree is an inferior-degree offense of the charged crime.<sup>9</sup> Conviction requires proof that the accused person, acting “[w]ith criminal negligence, cause[d] bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.” RCW 9A.36.031(f); RCW 9A.36.140.

Here, some evidence suggests that the child experienced bodily harm accompanied by substantial pain that extended for a period sufficient to cause considerable suffering. First, R.W. suffered “bodily harm” in the form of bruising. RP (7/10/18) 36. Second, he testified that “[i]t hurt a lot.”<sup>10</sup> RP (7/10/18) 74. Third, he went on to say that the pain lasted “[p]robably the whole night.”<sup>11</sup> RP (7/10/18) 74.

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<sup>9</sup> This is so because the assault statutes (RCW 9A.36.021 and RCW 9A.36.031) “proscribe but one offense” (assault), which “is divided into degrees.” *Fernandez-Medina*, 141 Wn.2d at 453 (internal quotation marks and citations omitted). The same is true of RCW 9A.36.130 and RCW 9A.36.140, the two statutes defining first and second-degree child assault.

<sup>10</sup> His brother testified that he heard R.W. screaming and crying, and that he looked hurt. RP (7/10/18) 91.

<sup>11</sup> According to his grandmother, R.W. complained of pain for a month after the incident. RP (7/10/18) 101.

Taken in a light that most supports the proposed inferior-degree instruction, these facts provide at least “the slightest evidence”<sup>12</sup> that Mr. Schmittler’s actions caused the kind of harm contemplated by the statute. *See, e.g., State v. Fry*, 153 Wn. App. 235, 241, 220 P.3d 1245 (2009). In *Fry*, pain from a punch in the face “lasted throughout the morning.” *Id.* The *Fry* court found this period sufficient to cause considerable suffering. *Id.*; *see also State v. Saunders*, 132 Wn. App. 592, 600, 132 P.3d 743 (2006) (“neck pain lasting for more than three hours” sufficient for conviction.)

There is also at least slight evidence showing that Mr. Schmittler committed *only* the inferior-degree offense. Second-degree assault requires the reckless infliction of substantial bodily harm; third-degree assault rests on the negligent infliction of harm accompanied by enduring pain that causes considerable suffering. *Compare* RCW 9A.36.021(1)(a) *with* RCW 9A.36.031(1)(f).

Here, when the facts are taken in a light most favorable to Mr. Schmittler, there is at least slight evidence that he acted negligently (as to the infliction of pain and suffering) rather than recklessly (as to the

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<sup>12</sup> *Parker*, 102 Wn.2d at 163-164.

infliction of substantial bodily harm). Because of this, the trial court should have instructed on the inferior-degree offense.

Recklessness is established when the actor knows of and disregards “a substantial risk that a wrongful act may occur,” where this disregard amounts to “a gross deviation from conduct that a reasonable person would exercise in the same situation.” RCW 9A.08.010(1)(c). The charged crime required proof that Mr. Schmittler was reckless as to the infliction of substantial bodily harm. RCW 9A.36.021(1)(a).

Criminal negligence requires proof that the defendant “fail[ed] to be aware of a substantial risk that a wrongful act may occur,” and that this failure “constitute[d] a gross deviation from the standard of care that a reasonable person would exercise in the same situation.” RCW 9A.08.010(1)(d). The inferior-degree offense required proof that he acted (at least) negligently as to the infliction of bodily harm accompanied by pain and suffering. RCW 9A.36.031(1)(f).

At least slight evidence shows that Mr. Schmittler did not act recklessly as to the infliction of substantial bodily harm.

First, some evidence shows that the spanking episode was brief. According to R.W.’s younger brother, “[b]oth of us got spanked three times.” RP (7/10/18) 88. Mr. Schmittler acknowledged a similar number. RP (7/11/18) 157, 163-164.

Second, the bruising did not appear immediately, and was not severe until after the passage of time. When the child's mother first saw the bruise, it was "about the size of a half dollar, and it was light in color." RP (7/11/18) 143. She did not consider taking him to see a doctor, because (at the time) the bruise didn't seem worse than other bruises he'd had from playing. RP (7/11/18) 143. The following day, R.W.'s father was concerned about the bruise, but not enough to call the police. RP (7/10/18) 25-26, 54-56.

R.W. was unaware that he even had a bruise when his mother pointed it out to him. RP (7/11/18) 143. Mr. Schmittler testified that he saw no marks right after spanking R.W. RP (7/11/18) 157-158. He later saw a round mark that was "maybe a light brown."<sup>13</sup> RP (7/11/18) 158.

The mark was "[m]uch different" from how it appeared in later photos. RP (7/11/18) 158. The change in the bruise can be explained by the fact that R.W. bruises "[p]retty easily," according to his mother. RP (7/11/18) 141. The State acknowledged in closing that the bruise "developed and darkened over time." RP (7/12/18)<sup>14</sup> 213.

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<sup>13</sup> He described the mark as "[a]bout half" the size of a baseball. RP (7/11/18) 161.

<sup>14</sup> Two different court reporters filed transcripts covering proceedings on July 12, 2018. Both sessions are cited using the date and court reporter.

These facts, when taken in a light most favorable to Mr. Schmittler, suggest that he did not know of and disregard the risk that R.W. would be substantially disfigured by the spanking. Accordingly, there is at least “the slightest evidence”<sup>15</sup> that he was not guilty of second-degree assault.

On the other hand, some evidence suggested that he acted with criminal negligence as to the infliction of harm accompanied by enduring pain and considerable suffering. One witness testified<sup>16</sup> that R.W. “had been beaten like 30 times.” RP (7/11/18) 115. The child’s brother testified that R.W. was “screaming” during the incident. RP (7/10/18) 91. This testimony provided at least the slightest evidence that he acted with criminal negligence as to the infliction of harm accompanied by enduring pain and considerable suffering.

Accordingly, when taken in a light most favorable to Mr. Schmittler, at least slight evidence shows that he committed only the inferior-degree offense.<sup>17</sup> The trial court should have instructed on third-degree assault of a child. *Fernandez-Medina*, 141 Wn.2d at 453, 456.

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<sup>15</sup> *Parker*, 102 Wn.2d at 163-164.

<sup>16</sup> Without objection, even though the testimony was inadmissible hearsay.

<sup>17</sup> This is true even if Mr. Schmittler acted intentionally, knowingly, or recklessly as to the infliction of the kind of pain and suffering required to sustain a charge of third-degree assault. *See* RCW 9A.08.010(2). A person who intends to cause such pain and suffering but

Due process requires the court to instruct on any defense theory that is supported by the evidence. U.S. Const. Amend. XIV; *State v. Torres*, 198 Wn. App. 864, 886, 397 P.3d 900 (2017), *review denied*, 189 Wn.2d 1022, 404 P.3d 486 (2017). The court’s failure to instruct on third-degree assault of a child violated Mr. Schmittler’s due process and statutory right to instruction on the inferior-degree offense. His conviction must be reversed, and the case remanded for a new trial. *Id.*, at 462.

B. The trial court erred as a matter of law when it rejected Mr. Schmittler’s request for instructions on third-degree assault of a child.

A trial court’s refusal to instruct on an inferior-degree offense involves the application of law to facts and is thus reviewed *de novo*. *State v. Corey*, 181 Wn. App. 272, 276, 325 P.3d 250 (2014). Here, the trial court erred as a matter of law by refusing to instruct on third-degree assault of a child.

According to the trial judge, “[t]he testimony here doesn’t support that the *act* was anything but intentional.” RP (7/11/18) 184 (emphasis added). This is irrelevant, because an intentional act can provide the basis for a third-degree assault conviction.

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does not know of and disregard the risk of substantial bodily harm is guilty of third-degree assault, not second-degree assault.

A person who intentionally assaults another and negligently causes the harm described in RCW 9A.36.031(1)(f) is guilty of third-degree assault. *See, e.g., Fry*, 153 Wn. App. at 237 (defendant properly convicted of third-degree assault after he intentionally punched his wife); *Saunders*, 132 Wn. App. at 600 (defendant properly convicted of third-degree assault after he intentionally threw his girlfriend against the wall and choked her); *State v. Robertson*, 88 Wn. App. 836, 839, 947 P.2d 765 (1997) (juveniles who intentionally punched and kicked another were properly convicted of third-degree assault).

Mr. Schmittler intentionally spanked R.W. However, as outlined above, at least “the slightest evidence”<sup>18</sup> showed that he did not recklessly inflict substantial bodily harm. At the same time, at least slight evidence showed that his intentional act (spanking R.W.) negligently caused bodily harm accompanied by enduring pain and resulting in considerable suffering. This slight evidence required the court to instruct on third-degree assault of a child. *Fernandez-Medina*, 141 Wn.2d at 453, 456.

The trial court erred as a matter of law by refusing to instruct on the inferior-degree offense. Mr. Schmittler’s conviction must be reversed and the case remanded for a new trial. *Id.*, at 462.

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<sup>18</sup> *Parker*, 102 Wn.2d at 163-164.

**II. MR. SCHMITTLER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY’S FAILURE TO OBJECT TO INADMISSIBLE EVIDENCE.**

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To obtain relief on an ineffective assistance claim, a defendant must show “that (1) his counsel’s performance fell below an objective standard of reasonableness and, if so, (2) that counsel’s poor work prejudiced him.”<sup>19</sup> *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010); *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Prejudice is established when there is a reasonable probability that counsel’s deficient performance affected the outcome of the proceeding. *State v. Lopez*, 190 Wn.2d 104, 116, 410 P.3d 1117 (2018). This “reasonable probability” standard is less than a preponderance; it requires only a probability sufficient to undermine confidence in the outcome. *Id.*

Counsel performs deficiently by failing to object to inadmissible evidence absent a valid strategic reason. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 64 (1998) (citing *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)). Reversal is required if an objection would

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<sup>19</sup> Ineffective assistance is an issue of constitutional magnitude that the court can consider for the first time on appeal. *Kyлло*, 166 Wn.2d at 862; RAP 2.5 (a)(3).

likely have been sustained and the result of the trial would have been different without the inadmissible evidence. *Id.*; *see also State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007), *aff'd on other grounds*, 165 Wn.2d 474, 198 P.3d 1029 (2009).

Here, defense counsel should have objected to three prejudicial pieces of evidence. Counsel's failure to object deprived Mr. Schmittler of the effective assistance of counsel.<sup>20</sup>

Defense counsel allowed Officer Elton to testify to inadmissible hearsay within hearsay. According to Elton, "Officer Donnelly had told me that [R.W.] had indicated he had been beaten like 30 times." RP (7/11/18) 115.

Because no objection was raised, the evidence was admitted without any limitation. *State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997). Counsel's deficient performance allowed jurors to consider the testimony for any purpose, including as substantive evidence of Mr. Schmittler's guilt. *Id.*

An objection "would likely have been sustained" because the testimony was inadmissible. *See Saunders*, 91 Wn. App. at 578. Under ER 805, "[h]earsay included within hearsay" is inadmissible unless "each part

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<sup>20</sup> There are other facts that raise additional questions about counsel's commitment to her client. These are outlined in the statement of the case, above.

of the combined statements conforms with an exception to the hearsay rule.” ER 805.

No hearsay exceptions exist in this case. R.W.’s statement to Donnelly is hearsay. Donnelly’s statement to Elton (conveying R.W.’s statement) is also hearsay. The testimony should have been excluded. ER 802; ER 805.

The evidence was highly prejudicial. No one else testified that Mr. Schmittler spanked R.W. “30 times.”<sup>21</sup> RP (7/11/18) 115. Both Mr. Schmittler and R.W.’s brother put the number closer to three. RP (7/10/18) 88; RP (7/11/18) 157, 163-164. R.W. testified that he could not remember the number of times he’d been spanked. RP (7/10/18) 74. When asked to guess, he said “[m]ore than one.” RP (7/10/18) 74. When pressed, he said it was “[m]aybe” more than ten. RP (7/10/18) 74.

The State relied on Elton’s number— that R.W. “had been beaten like 30 times”<sup>22</sup>— to show recklessness, an element of the charged crime. RP (7/12/18 McAuliffe) 216. According to the prosecutor, Mr. Schmittler “spanked [R.W.] 10, 20, 30 times.” RP (7/12/18 McAuliffe) 216. The prosecutor went on to argue that “his behavior in spanking Robert over

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<sup>21</sup> Elton is also the only witness who used the word “beaten” instead of a less-loaded word like “spanked.” RP (7/11/18) 115.

<sup>22</sup> RP (7/11/18) 115.

and over again repeatedly was a gross deviation from the conduct that a reasonable person would exercise in the same situation.” RP (7/12/18 McAuliffe) 217.

The inadmissible testimony provided the strongest evidence that Mr. Schmittler acted recklessly. The evidence was highly prejudicial and should have been excluded. Counsel’s failure to object deprived Mr. Schmittler of the effective assistance of counsel. *Saunders*, 91 Wn. App. at 578.

Counsel also failed to seek exclusion of evidence that a parenting plan prohibited corporal punishment. The testimony was admitted through multiple witnesses. RP (7/10/18) 29, 51; RP (7/11/18) 136.

The parenting plan evidence was not relevant: it had no tendency to prove any fact that was “of consequence to the determination of the action.” ER 401. Because the evidence was irrelevant, it should have been excluded, and counsel should have objected under ER 402.

The evidence was also inadmissible under ER 403. Any probative value was “substantially outweighed by the danger of unfair prejudice [and] confusion of the issues.” ER 403. Mr. Schmittler was not charged with violating a court order. Testimony that he violated a parenting plan provision painted him in a negative light. Furthermore, jurors received no guidance regarding the evidence. Some may have believed that Mr.

Schmittler's violation of a court order proved his guilt. Counsel should have objected to the evidence.

Counsel also should have objected when the prosecutor elicited testimony appealing to passion and prejudice. Instead of limiting questions to factual matters, the prosecutor asked R.W.'s grandmother about her feelings:

Q: [W]hile that bruising was still there, how would it make you feel?

A. I was very sad for Robert. I told him -- I'm sorry.

Q. I didn't mean to upset you, ma'am. I'm sorry.

A. If I could take the hurt away, I would. Everything that he's gone through –

RP (7/11/18) 103.

The grandmother's feelings about her grandson's bruises were not relevant. Her feelings had no tendency to prove or disprove any fact of consequence to the case. *See* ER 401. The questions were designed to elicit testimony appealing to passion and prejudice; any probative value was outweighed by the danger of unfair prejudice. The evidence should have been excluded under ER 402 and ER 403.

Elton's double hearsay claim that R.W. "had been beaten like 30 times," the repeated references to the parenting plan, and the grandmother's emotional testimony about her feelings on seeing R.W.'s bruises should not have been placed before the jury. Counsel had no strategic reason to allow the evidence to be introduced. Furthermore, if

counsel wished to avoid highlighting the improper evidence in the jury's presence, she could have sought an order *in limine* excluding it. She failed to do so. CP 28-29.

Mr. Schmittler was denied his Sixth Amendment right to the effective assistance of counsel. *A.N.J.*, 168 Wn.2d at 109-120. His conviction must be reversed and the case remanded for a new trial. *Kyllo*, 166 Wn.2d at 871.

**III. THE SENTENCING COURT VIOLATED THE SEPARATION OF POWERS BY DELEGATING TO THE DEPARTMENT OF CORRECTIONS THE AUTHORITY TO SET CORE CONDITIONS OF MR. SCHMITTLER'S COMMUNITY CUSTODY.**

The separation of powers doctrine is derived from the constitution's distribution of governmental authority into three branches. *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002). The doctrine serves to ensure that the "fundamental functions" of each branch remain inviolate. *Carrick v. Locke*, 125 Wn.2d 129, 134-135, 882 P.2d 173 (1994).

The state constitution vests the judicial power in the judiciary. Wash. Const. art. IV, §1. Sentencing is a judicial function. *State v. Sansone*, 127 Wn. App. 630, 642, 111 P.3d 1251 (2005).

Sentencing courts "may not delegate excessively." *Id.*; *see also United States v. Morin*, 832 F.3d 513, 516 (5th Cir. 2016); *United States v.*

*Melendez-Santana*, 353 F.3d 93, 101 (1st Cir. 2003), *overruled on other grounds by United States v. Padilla*, 415 F.3d 211 (1st Cir. 2005). In this case, the court did “delegate excessively”<sup>23</sup> when it required Mr. Schmittler to obey “instructions, affirmative conditions, and rules of... DOC and CCO.” CP 117.

Under the Sentencing Reform Act, courts are required to set conditions for any offender sentenced to community custody. RCW 9.94A.703. In setting conditions, a judge may require affirmative conduct (if reasonably related to community safety, the circumstances of the offense, and the offender’s risk of reoffending). RCW 9.94A.703(3)(d). The court may also impose “crime-related prohibitions.” RCW 9.94A.703(3).

The statute does not authorize the court to delegate these conditions to the Department of Corrections. Although the court must “[r]equire the offender to comply with any conditions imposed by the department under RCW 9.94A.704,” the statutory reference limits the court’s power to delegate. RCW 9.94A.703(1)(b); RCW 9.94A.704.

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<sup>23</sup> *Sansone*, 127 Wn. App. at 642.

Here, the court erroneously delegated to the Department of Corrections the power to require compliance with unspecified DOC “instructions, affirmative conditions, and rules.” CP 117.

These are core conditions of community custody that must be imposed by the sentencing court. RCW 9.94A.703(3). They are not “administrative detail[s] that could be properly delegated.” *Sansone*, 127 Wn. App. at 642.

By allowing DOC to set these conditions of community custody, the court abdicated its responsibility. *Id.* As a result, Mr. Schmittler was not “put on notice as to what would result in [him] being sent back to prison.” *Id.*, at 643. The improper delegations violated the separation of powers. *Id.* They must be stricken. *Id.*

### **CONCLUSION**

The trial court violated Mr. Schmittler’s right to present a defense and his statutory right to instruction on an inferior-degree offense. The court should have allowed the jury to consider the charge of third-degree assault of a child.

In addition, defense counsel’s unprofessional errors prejudiced Mr. Schmittler. Counsel should have objected to inadmissible evidence that

increased the likelihood of conviction and inflamed the passions and prejudices of jurors.

Finally, the trial court violated the separation of powers. The court improperly delegated to DOC and Mr. Schmittler's CCO the authority to set core conditions of community custody.

Mr. Schmittler's conviction must be reversed and the case remanded for a new trial. The lower court should be directed to instruct on the inferior-degree offense if the case is retried.

Alternatively, Mr. Schmittler's conditions of community custody must be vacated. The case must be remanded for a new sentencing hearing for imposition of proper conditions.

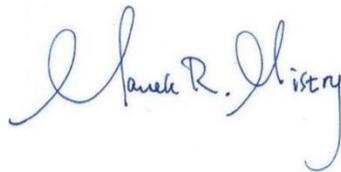
Respectfully submitted on April 26, 2019,

**BACKLUND AND MISTRY**



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Samuel Schmittler, DOC #411862  
Coyote Ridge Corrections Center  
PO Box 769  
Connell, WA 99326

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Kitsap County Prosecuting Attorney  
kcpa@co.kitsap.wa.us, rsutton@co.kitsap.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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

Signed at Olympia, Washington on April 26, 2019.



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**BACKLUND & MISTRY**

**April 26, 2019 - 10:55 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 52885-1  
**Appellate Court Case Title:** State of Washington v. Samuel David Schmittler  
**Superior Court Case Number:** 16-1-01607-1

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