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

STATE OF WASHINGTON,

Respondent,

v.

SAMUEL DAVID SCHMITTLER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 16-1-01607-1

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court erred in refusing to instruct the jury on the inferior degree offense of third degree assault of a child?

2. Whether counsel was ineffective for failing to object to three pieces of evidence that Schmittler claims were inadmissible evidence?

3. Whether the trial court violated the separation of powers doctrine by delegating supervision authority to the Department of Corrections?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Samuel David Schmittler was charged by information filed in Kitsap County Superior Court with second degree assault of a child, domestic violence, alleging assault of RRW with a date of birth of 1/13/07. CP 1-2. A first amended information added the aggravating circumstances of use of a position of trust in commission of the assault and particularly vulnerable victim. CP 35. A second amended information omitted the particularly vulnerable victim allegation. CP 39.

At the close of evidence, the defense announced its intention to submit a “lesser.” IRP 165. Although not in the clerk’s papers, the record

shows that the defense offered a third degree assault of a child instruction. 1RP 175. The trial court refused to give that instruction. 1RP 184. The trial court found that the evidence that would have to support only a finding of criminal negligence and it did not. Id.

The jury returned a verdict of guilty. CP 82. The jury responded affirmatively on both the domestic violence and use of position of trust special verdicts. CP 83.

Schmittler was sentenced within the standard range to 41 months. CP 113. As a condition of sentence, Schmitter was ordered to “[o]bey all laws and obey instructions, affirmative conditions, and rules of the court. DOC and CCO.” CP 117.

Schmitter timely appealed. CP 124.

B. FACTS¹

Schmittler has two stepsons, RW and DW. 1RP 27. Police came to Schmittler’s house due to a report about one of those children. 1RP 26-27. Schmittler admitted past corporal punishment of the children but claimed he had not done so recently. 1RP 29.

The biological father of RW and DW, Terry Warren, picked the

¹ All the testimony is included in the transcript labelled volume 1 and will be referred to as 1RP. Closing arguments are in volume 2 and are referred to as 2RP. Other transcripts will be referred to by date.

boys up on the afternoon of Christmas Eve. 1RP 52. SW reported that DW had fallen in the night. 1RP 54. Mr. Warren did not believe this report. 1RP 54. The next day, Mr. Warren “noticed that [RW’s] back was bruised with a handprint in the middle of it.” 1RP 54. Mr. Warren photographed the bruising. 1RP 55.

RW, 12 years old at the time of trial, recalled a day when he had to go to the hospital to see “what the marks were from.” 1RP 71. He recalled that when his father came to pick him up at Christmas time, Ray, the name RW used for Schmittler, said that he had fallen of the bed, but he had not. 1RP 72. What had happened is that RW did not finish his food in time and Schmittler took him in the back room, locked the door, and started spanking him. Id. RW accurately recalled that this happened on the night before Christmas. Id. Schmittler took RW’s pants down before the spanking. 1RP 73.

RW believed that he may have been spanked more than ten times. 1RP 74. RW said that the spanking “hurt a lot.” Id. It hurt for “the whole night.” Id. His mother saw the marks when RW was using the bathroom. 1RP 75. RW indicated that a die with numbers 1 through 20 was used to set the punishment he would receive. 1RP 76. He said that depending on the number rolled, either the parent or his brother would decide the type of punishment. Id.

The paternal grandmother took the boys on January 18. 1RP 99. At that time, several weeks after Christmas, she could still see that RW was “badly bruised.” 1RP 100. There were “blues and purples, and it looked like handprints.” Id. The bruising remained until the end of February or the beginning of March. Id. RW complained that the injuries hurt for a month. 1RP 101. During that time, RW was very sensitive to being touched. Id.

DW admitted that he did not see Schmittler spank RW on the occasion but said that he knew it happened because he “heard R. screaming.” 1RP 91. He recalled that when RW came from the room he appeared to be hurt. 1RP 92. RW was crying when he came out. 1RP 92.

When contacted, Schmittler showed the police a “punishment game” he used to decide how to punish the children. 1RP 29. The child in trouble would roll dice and the number would correspond to various punishments listed in a notebook. 1RP 30. For instance, if the child rolled a four, the punishment would be spanking. 1RP 31. Then, the parent would roll the die and if he got a six, the child would be spanked ten times. Id.

During contact with police, Schmittler claimed that RW may have been injured by falling out of bed. 1RP 32. Police interviewed RW and looked at his injuries. 1RP 35-36. RW was taken to the hospital. 1RP 36.

Photographs were taken of RW's buttocks and lower back. Id. Police observed "deep purple bruising, spanking his buttocks and up onto his back and lower back." Id.

Schmittler was re-contacted by police. 1RP 44. Police had seen and photographed the bruising on RW and asked Schmittler about it. 1RP 45; 1RP 115. Schmittler again denied having caused the bruising. 1RP 45; 1RP 116. For the second time, Schmittler said that he had stopped spanking because of a parenting plan. 1RP 46; 1RP 118. Police verified that said parenting plan did in fact prohibit corporal punishment. 1RP 47. Eventually, after approximately 10 minutes of conversation, Schmittler changed his story to having spanked the child "days before" but that spanking could not have caused the bruising. 1RP 46. At this time, Schmittler "broke down" and cried as he told the police he was upset with RW and spanked him. 1RP 150.

III. ARGUMENT

A. THE INFERIOR DEGREE INSTRUCTION OF THIRD DEGREE ASSAULT OF A CHILD WAS PROPERLY REFUSED WHERE THE EVIDENCE DID NOT SHOW THAT ONLY THAT INFERIOR DEGREE OFFENSE WAS COMMITTED.

Schmittler argues that the trial court erred in refusing to instruct the jury on an inferior degree of assault. This claim is without merit

because Schmittler has not established that the evidence proves that only the inferior degree offense was committed.

The standard of review when the trial court refuses to give jury instruction is two-tiered: if the refusal is based on a factual determination, the standard is abuse of discretion; if based on a legal conclusion, the standard is de novo. *State v. Schierman*, 192 Wn.2d 577, 651, 438 P.3d 1063 (2018) (internal citation omitted).

The jury should be instructed on an inferior degree offense if:

(1) the statutes for both the charged offense and the proposed inferior degree offense “proscribe but one offense”; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior degree offense.

State v. Classen, 4 Wn. App.2d 520, 540, 422 P.3d 489 (2018) citing *State v. Fernandez-Medina*, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000). Here, only the factual prong, number (3), need be considered because every degree of assault is a lesser degree of all higher degrees. *Fernandez-Medina*, 141 Wn.2d at 454-55. Thus the standard of review on Schmitter’s claim is abuse of discretion.

The factual prong of the test is satisfied if the evidence allows “a jury to rationally find the accused guilty of the inferior offense and acquit him of the greater.” *Classen*, 4 Wn. App.2d at 540 citing

Fernandez-Medina, 141 Wn.2d at 456. In other words, the defendant must establish that evidence supports a finding that he committed only the inferior degree offense. *Id.* citing *Fernandez-Medina*, 141 Wash.2d at 455 (*see* dissenting opinion of Ireland, J, 141 Wn.2d at 462, emphasizing that in inferior degree cases the defense must show that “only” the inferior degree offense was committed). This question is viewed in a light most favorable to Schmittler. 141 Wn.2d at 455-56. Finally, on the factual prong of the inferior degree analysis, the defendant’s theory of the case must be established; “it is not enough that the jury might disbelieve the evidence pointing to guilt.” *Fernandez-Medina*, 141 Wn.2d at 456.

The charge of second degree assault of a child under RCW 9A.36.130(1)(a) alleged that Schmittler intentionally assaulted RRW and recklessly inflicted substantial bodily harm. CP 1; CP 38.² The elemental instruction required proof beyond a reasonable doubt of second degree assault by a person eighteen or older against another thirteen years or younger. CP 71 (“to convict”). In turn, instruction 9 defined second degree assault as intentional assault with reckless infliction of substantial bodily harm. CP 72. Substantial bodily harm

² The second degree assault of a child statute refers to the general second degree assault statute, which provides that second degree assault may be committed if one “intentionally assaults another and thereby recklessly inflicts substantial bodily harm.” RCW 9A.36.021(1)(a).

was defined. CP 74. Thus to convict Schmittler, it must be proven that he “intended to do the act, the act was reckless, and the act resulted in an injury.” *State v. Cardenas-Flores*, 189 Wn.2d 243, 268, 401 P.3d 19 (2017).

As noted, inferior degree analysis is satisfied in that the assault statutes proscribe a single crime. The rub is in the mens rea element.

The definition of recklessness was given in instruction 13:

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that substantial bodily harm may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

When recklessness as to a particular result or fact is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly as to that result or fact.

CP 13; WPIC 10.03 (3rd ed., 2008).

Schmittler argues that the evidence proves third degree assault of a child to the exclusion of second degree assault of a child. RCW 9A.36.140(1) defines third degree assault of a child by reference to the definition of third degree assault under RCW 9A.36.031(1)(d) or (f). Subsection (f) provides that it is third degree assault when one “With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.”

The definition of criminal negligence provides that

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

RCW 9A.08.010(d). Criminal negligence is established by proof of acts that are intentional, knowing, or reckless. RCW 9A.08.010(d)(2). Recklessness is not shown by proof of criminal negligence. *Id.* This rule alone undercuts Schmittler's argument because he is required to show the only criminal negligence obtained on the evidence. But here, the jury found intentional and reckless conduct beyond a reasonable doubt. And, notably, Schmittler does not challenge the sufficiency of the evidence with regard to those mental states.

The fundamental difference of the two mental states is seen in the clause of the recklessness definition "knows of and disregards a substantial risk" and the clause of criminal negligence definition "'fails to be aware of a substantial risk.'" Here, there is no evidence that Schmittler's behavior was anything but intentional. In his own testimony he admitted that he spanked the child. 1RP 157. His admissions to police include that he was upset with the child when he spanked him. 1RP 150. Those admissions include an attempt to deflect the police by the assertion that the extant parenting plan

prohibit the kind of punishment alleged to have be applied. 1RP 28-29.

A finding of recklessness “depends on both what [the defendant] knew and how a reasonable person would have acted knowing [the] facts.” *State. V. Rich*, 184 Wn.2d 897, 904, 365 P.3d 746 (2016) quoting *State v. Graham*, 153 Wn.2d 400, 408, 103 P.3d 1238 (2005) (internal quotation omitted; alteration added). Thus recklessness has both a subjective and an objective components. *Id.* Where a punch to the face caused a broken jaw, recklessness is established if the puncher (1) intended to break the jaw, (2) knew the victim was particularly vulnerable to a broken jaw, or (3) knew of and disregarded the risk of breaking the jaw. *State v. Keend*, 140 Wn App. 858, 867, 166 P.3d 1268 (2007) review denied 163 Wn.2d 1041 (2008). Each permutation includes the actor’s knowledge of the resulting danger to the victim’s jaw from the punch

In distinction, the criminal negligence definition supposes a state of affairs where proof of such direct knowledge of the consequences of an assault is missing. The fundamental difference between the two mental states has long-been understood

Certainly the trier of fact should be able to tell the difference between conduct undertaken with the knowledge that the actor is creating a grave risk of danger to others, and conduct undertaken in “culpable”

ignorance of such danger.
State v. Burley, 23 Wn. App. 881, 884, 598 P.2d 428 (1979) review denied 93 Wn.2d 1002 (1979). It is the “culpable ignorance” that is the fundamental feature of criminal negligence.

In *State v. Gamble*, 137 Wn. App. 892, 907, 155 P.3d 962 (2007) (long procedural history involving *In re Personal Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981), there was an intentional assault. The question raised was the giving of a second degree manslaughter instruction in a first degree manslaughter prosecution. On the factual prong of the *Workman*³ test, the lesser offense instruction was rejected because the facts did not indicate culpable ignorance. 137 Wn. App. at 907. When a person is beaten, including kicking in the head, until they become unconscious, no reasonable jury could find a lack of awareness that death may result. *Id.* Moreover, the assailant “need not have been aware that [the victim’s] skull would break when [the assailant] intentionally punched him and knocked him to the concrete.” *Id.*

Similarly, in the present case, the record does not show, and certainly does not exclusively show, that Schmittler acted from a point of culpable ignorance. Schmitter acted intentionally and

³ *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978).

recklessly caused harm. He knew enough to know that hitting this small child may cause harm and he disregarded that knowledge. The third degree assault of a child instruction was properly rejected.

B. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO TWO INSTANCES OF CLEARLY RELEVANT TESTIMONY AND ONE INSTANCE OF HEARSAY THAT DID NOT AFFECT THE VERDICT.

Schmittler next claims that his counsel was ineffective for failing to object to certain evidence he claims was inadmissible. This claim is without merit because the parenting plan evidence and the grandmother's testimony were relevant and admissible. Sergeant Elton's hearsay remarks may have been, without a limiting instruction, improperly admitted but under the circumstances of this case that evidence was harmless..

To show ineffective assistance of counsel, Schmitter must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Schmitter must "overcome a strong presumption that counsel's performance was reasonable." *State v. Breitung*, 173 Wn.2d 393, 398, 267 P.3d 1012 (2011).

The performance prong of the test addressed as follows:

A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel

that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances."

In re Nichols, 151 Wn. App. 262, 272-73, 211 P.3d 462 (2009) (internal citation omitted).

"Where a defendant claims ineffective assistance of counsel for his trial counsel's failure to object, he must also prove that the decision not to object was not a legitimate trial tactic." *State v. Strange*, 188 Wn. App. 679, 688, 354 P.3d 917 (2015) *review denied* 184 Wn.2d 1016 (2015). Further, "[t]he decision whether to object is a classic example of trial tactics, and only in egregious circumstances will the failure to object constitute ineffective assistance of counsel." *Strange*, 188 Wn. App. at 688. It has long been recognized that

Counsel is not, at the risk of being charged with incompetence, obliged to raise every conceivable point, however frivolous, damaging or inconsequential it may appear at the time, or to argue every point to the court ... which in retrospect may seem important to the defendant;

...
State v. Lottie, 31 Wn. App. 651, 654, 644 P.2d 707 (1982) *review denied* 97 Wn.2d 1031 (1982), *quoting State v. Piche*, 71 Wn.2d 583, 590, 430 P.2d 522 (1967). A desire not to emphasize certain testimony may be a legitimate reason to not object. *See State v. McClean*, 178 Wn. App. 236, 248, 313 P.3d 1181 (2013) *review denied* 179 Wn.2d 1026 (2014). Finally, “[c]ounsel’s failure to object to evidence cannot prejudice the defendant unless the trial court would have ruled the evidence inadmissible.” *Id.*

“A defendant [arguing ineffective assistance] must affirmatively prove prejudice.” *State v. Classen*, 4 Wn. App.2d 520, 542, 422 P.3d 489 (2018) (alteration added). Prejudice in this context is a reasonable probability that the result of the trial would be different. *Id.* “The accused must show more than the errors having some conceivable effect on the outcome of the proceeding and counsel’s errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Classen*, 4Wn. App.2d at 543.

I. Parenting plan

Defense counsel did not err with regard to objections about reference to the parenting plan. Counsel was essentially stuck with that evidence because it was an admission by Schmittler that was advanced by

Schmittler himself in an attempt to deny his culpability when confronted by the police. It was admissible as admission by party opponent under ER 801(d)(2). It was admissible on the issue of Schmittler's state of mind; in particular, it was admissible as consciousness of guilt.

Schmittler admitted to police (1) that he had used corporal punishment on the boys in the past and (2) that he had ceased doing so because the parenting plan had prohibited it. 1RP 28-29. As a result of the parenting plan, Schmittler told the police, he had not used corporal punishment for weeks or months. 1RP 29. During his testimony, Schmittler admitted that he was responsible for the discipline of RW that led to this case. 1RP 156. He admitted that he "took down his pants and I spanked him." 1RP 157. This after twice telling police that he had not spanked the child and in doing so using the existence of the prohibition in the parenting plan to bolster his story.

The references to the parenting plan were references to Schmittler's own statements and were offered against him. Thus the admissibility requisites of ER 801(d)(2) are met. Schmittler used the existence of the parenting plan, its prohibition of corporal punishment, in an attempt to convince investigating police that he would not have done the assault. Thus the parenting plan reveals his state of mind regarding the assault.

Schmittler argues that the parenting plan was irrelevant and caused prejudice by allowing jurors to infer that he was a bad person for violating the plan. Brief at 19. In so arguing, Schmittler points to the admissibility of the evidence under ER 404(b). The evidence rule distinguishes evidence by its intended use. *See State v. Acosta*, 123 Wn. App. 424, 434, 98 P.3d 503 (2004). Evidence may not be used to show conformity with bad behavior but may be admitted for other purposes “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” *Id.* “These other purposes tend to establish the defendant’s state of mind at the time he or she committed the current offense.” 123 Wn. App. at 434 (internal quotation omitted).

ER 404(b) evidence must be relevant. *Acosta*, 123 Wn. App. at 434. Here Schmittler’s attempt to use the parenting plan as a reason why police should believe his denials plainly shows his state of mind. Moreover, the matter is the more relevant in that it shows Schmittler’s consciousness of guilt.

Evidence of “resistance to arrest, concealment, assumption of a false name, and related conduct are admissible if they allow a reasonable inference of consciousness of guilt of the charged crime.” *State v. Freeburg*, 105 Wn. App. 492, 497-98, 20 P.3d 984 (2001); *see also, State*

v. Messinger, 8 Wn. App. 829, 509 P.2d 382 (1973). To be admissible, the trier of fact must be able to reasonably infer the defendant's consciousness of guilt of the charged crime. *Freeburg*, 105 Wn. App. at 497-98. The probative value of such evidence "as circumstantial evidence of guilt depends upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged." *Freeburg*, 105 Wn. App. at 498. Fundamentally, this type of evidence requires evidence of volitional behavior by the defendant, not another person. *Freeburg*, 105 Wn. App. at 498.

In the present case, Schmittler himself raised the issue of the parenting plan prohibition by throwing it out to the police as a reason that they should believe that he had not done this crime. Taking the above formulation, it can be seen that (1) Schmittler used the parenting plan to deflect responsibility, (2) that this attempt was because of his need to avoid responsibility and thus shows his consciousness of guilt, (3) his consciousness of guilt was clearly with reference to the present case, and (4) his attempt to cover up what was done follows from his consciousness of guilt and allows a reasonable inference of actual guilt.

Under these facts, it would not have been an abuse of discretion for the trial court to overrule Schmittler's objection. Schmittler himself made the parenting plan a part of the story of this case. It was admissible on the issue of his state of mind. There was in no ineffective assistance on this point.

2. Grandmother's feelings

RW's grandmother, La Retta Gehr, testified about her contact with RW after the incident. She described his bottom as "very badly bruised." 1RP 100. She described the bruising as looking like a hand print. Id. She described how long the bruising lasted, comparing the healing to other wounds RW has had. Id. Ms. Gehr spoke of the pain the bruises caused RW. 1RP 101. She spoke of behavioral changes like RW being angry and lashing out and not wanting to be touched. Id.

On cross examination, defense counsel attacked RW's lack of external symptoms: lack of limping, normal playing, and going to school. 1RP 102.

On redirect, the state rebutted the defense attempt at establishing normalcy. 1RP 103. Ms. Gehr iterated her testimony about the appearance of the bruising. Id. She testified to the prominence of the bruises in that others had seen them. Id. Then, Ms. Gehr testified that the

appearance of the bruising caused her to be sad and want to take the hurt away. *Id.*

It was not ineffective to leave the grandmother's testimony without objection. Schmittler claims that an objection should have been lodged as to the last bit about the grandmother's feelings because it was irrelevant and meant to elicit passion and sympathy. Brief at 20. The testimony was relevant. Moreover, the emotional impact of that relevant evidence militates against objection that may tend to emphasize the evidence.

In *State v. McKague*, 172 Wn.2d 802, 262 P.3d 1225 (2011), the meaning of the word "substantial" in the phrase "substantial bodily harm" was considered and "substantial" was held to mean "considerable in amount value or worth." 806. Instruction 11 defining substantial bodily harm says

Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture to any bodily part.

Disfigurement means 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.

CP 74. This instruction is modified from WPIC 2.03.01, which instruction is verbatim the same as the first paragraph in instruction

11. The comment to WPIC 2.03.01 advises that “[t]he jury may be further instructed on the meaning of “disfigurement” using the definition from Black’s Law Dictionary.” The comment cites *State v. Atkinson*, 113 Wn.App. 661, 667–68, 54 P.3d 702 (2002) *review denied* 149 Wn.2d 1013 (2003). In that case, the Court held that it was not error to define “disfigurement” in the manner done in the second paragraph of instruction 11. 113 Wn. App. at 668.

The word “unsightly” is defined as “not pleasing to the sight.” <https://www.merriam-webster.com>. The word “misshapen” means “having an ugly or deformed shape.” *Id.* Further, to deform is to, *inter alia*, “spoil the looks of.” *Id.* The state had the burden of proving these conditions beyond a reasonable doubt. These are conditions having to do with beauty, symmetry, and appearance as the jury was instructed. Ms. Gehr’s alarm at the appearance of RW’s bottom was clearly relevant on the issue of substantial bodily harm.

Further, defense counsel had a situation where the evidence was being given under emotional circumstances. The case was about an assault on a small child. The person speaking was that small child’s grandmother. Her reaction to the substantial bodily harm done to RW is unsurprising. That reaction underlines and

serves to prove the appearance aspect of substantial bodily harm definition. No objection would have been sustained. And defense counsel would be well advised to go lightly with such an obviously emotional witness. There was no ineffective assistance on this point.

3. *Number of beatings*

Police Sergeant Elton testified as to his initial contact with this case. 1RP 115. In providing context for his actions, he relayed that another investigator had shown him photographs showing extensive bruising on RW's back, buttocks, and upper legs. *Id.* He testified that "Officer Donnelly had told me that [RW] had indicated he had been beaten like 30 times." *Id.* Elton went to interview Schmittler with this in mind. *Id.*

Schmittler asserts that this statement is inadmissible as hearsay and was prejudicial because it allowed an inference of recklessness. Brief at 18. In so doing, Schmittler asserts that the prosecutor used Sergeant Elton's "number" to show recklessness. *Id.*

First, the statement may be considered as not a statement of fact but a statement asserted to explain why the police were investigating Schmittler. But even if an out-of-court statement is

offered to explain its effect on the listener, it is not admissible unless it is relevant. *See State v. Edwards*, 131 Wn.App. 611, 614, 128 P.3d 631 (2006); *see also State v. Stamm*, 16 Wn.App. 603, 559 P.2d 1 (1976) (“Out-of-court statements are admissible to show a declarant's state of mind only if that state of mind is ‘relevant to a material issue in the cause.’”). This explanation cannot overcome the lack of relevance here. But had an objection been taken, the state would have responded that the testimony was not for the truth of the matter asserted but was only spoken to show why the officer did what he did. The trial court would not have abused its discretion by accepting that explanation and allowing the evidence. However, the state concedes that this process would likely have resulted in a limiting instruction.

On the issue of prejudice, the prosecutor did in fact remark that “He spanked [RW] 10, 20, 30 times.” 2RP 216. But the context is important. The prosecutor continued

Robert doesn't quite remember two years later just how many times. The defendant says at least three times. He doesn't remember either. Probably more.

But he spanked Robert enough times and so many times that bruise spread, not just on one concentrated area.

2RP 216. The prosecutor did not refer to Sergeant Elton's testimony. Nor did the prosecutor use Sergeant Elton's "number." The prosecutor was in fact highlighting the injuries, at once indicating that the exact number of hits is unknown but that Schmittler's assertion of three was not credible.

This argument is consistent with the victim's testimony. When initially asked if he remembered how many times he was spanked, RW said "no." He then advanced that it was "[m]ore than once." 1RP 74. He was asked "Was it more or less than ten?" Id. RW said "maybe more." Id. Thus the victim left the possibility of 10, 20, 30 swats.

Similarly, Schmittler, having a good reason to minimize, left the number of swats undetermined. He first admitted "at least three" swats. 1RP 157. But Schmittler did not recall the exact number. Id. In response to this three times testimony, the prosecutor sought and received an admission that Schmittler was upset. 1RP 161 ("I was a little upset, yeah."). Then, on redirect, Schmittler was asked "Were there any more than three?" and he responded "Possibly, but I don't remember." 1RP 163-64.

In this case, it was the injury that mattered. The actual number of times Schmittler hit RW is and will remain undetermined. Sergeant Elton's statement had little or no effect on the verdict as it was the result of the bruising that proved substantial bodily harm. Moreover, the actus

reus, the assaulting, was admitted by Schmittler.

The case included two very compelling pieces of evidence: (1) Schmittler's admission that he did spank RW on the alleged date, and (2) pictures of terrible bruising caused by the spanking. Add the proof that the assault caused pain and long-term disfigurement to RW and the weight of evidence of guilt becomes overwhelming.

The issue here is much like a confrontation issue. Thus in considering harmless error it is appropriate to consider whether Sergeant Elton's statement, and counsel's failure to object to it, was harmless if it is true beyond a reasonable doubt that a reasonable jury would reach the same result without the error. *State v. Smith*, 148 Wn.2d 122, 139, 59 P.3d 74 (2002). This determination is reached by considering the overwhelming untainted evidence test. *Id.* As noted, absent Sergeant Elton's remark, and any inferences that may be reasonably drawn therefrom, the evidence of guilt in this case is substantial.

As has been seen, the evidence of the actual number of times Schmittler swatted RW remains inscrutable. One intentional swat would have been sufficient to establish the "assaulted" element. Schmittler admits at least three intentional swats. There is no doubt, then, that the assault occurred. Next, substantial bodily harm was well-proven without

reference to the number of swats; it was clearly established by photographs and the reaction of people to those images. Schmittler would have been convicted absent any evidence as to how many times he struck RW. The injuries evince reckless infliction of substantial bodily harm in any event.

The failure to object here could have been based on the defense attorney's appreciation of the context type of testimony given by Sergeant Elton. But there is very little likelihood the offensive statement changed the verdict. If error to not object, the error was harmless.

C. THE TRIAL COURT SENTENCED SCHMITTLER AND THE DEPARTMENT OF CORRECTIONS WILL SUPERVISE HIM, EACH FULFILLING ITS STATUTORY RESPONSIBILITY WITHOUT ITRUDING ON THE POWERS OF ANOTHER BRANCH OF GOVERNMENT.

Schmittler next claims that the trial court erred by violating the doctrine of separation of powers by improperly delegating its judicial power to the Department of Corrections (DOC), an executive branch agency. This claim is without merit because although it may be correct that a court cannot abdicate its sentencing authority, the legislature has vested supervision authority in the executive branch.

First, Schmittler's condition of sentence have not been enforced

and are not, arguably, ripe. However, the present case involves a primarily legal challenge that does not require factual development and should be considered ripe. *See State v. Valencia*⁴ 169 Wn.2d 782, 786-90, 239 P.3d 1059 (2010).

Second, on this issue the standard of review is unclear and Schmittler does not address it. The standard of review of the imposition of sentence conditions is abuse of discretion. *Valencia*, 169 Wn.2d at 791-92. When applied to the constitutional issue of vagueness, abuse of discretion can be found in that an unconstitutional condition is manifestly unreasonable. 169 Wn.2d at 793. Similarly, the present issue should be reviewed for abuse of discretion; if the delegation to the DOC was unconstitutional, it is manifestly unreasonable for the trial court to have so ordered. However, the competing standard is that a question of the trial court's "statutory authority" to impose sentencing conditions is reviewed *de novo*. *State v. McWilliams*, 177 Wn. App. 139, 150, 311 P.3d 584 (2013) *review denied* 179 Wn.2d 1020 (2014).

Here, there was no abuse of discretion in that the trial court properly followed legislative direction. Moreover, *de novo* review will establish that the legislative direction did not violate the doctrine of separation of powers.

⁴ Also referred to in the cases as *Sanchez Valencia*. *See State v. Irwin*, 191 Wn. App.

The trial court ordered that Schmittler serve 18 months of community custody. CP 114. The trial court ordered that during that time Schmittler must abide “all conditions stated in the Judgment and Sentence. . .and other conditions imposed by the court or DOC during community custody.” CP 114. This command is echoed in the “supervision schedule” wherein Schmittler is ordered to “Obey all laws and obey instructions, affirmative conditions, and rules of the court, DOC and CCO⁵.” CP 117.

Further, Schmittler is ordered to abide several DOC controlled conditions. He must report as directed by a CCO. CP 117. His employment and education must be DOC approved. Id. His residence must be DOC approved. Id. The CCO may direct that he not consume alcohol. Id. Moreover, it is unsurprising that DOC will monitor Schmittler’s compliance with the trial court’s orders of affirmative acts, like to obey all laws, obey no-contact orders, remain in proscribed geographical areas, refrain from possession or use of controlled substances, notify of change of address, complete domestic violence perpetrator’s program, and complete a victim awareness program. Id.

These DOC functions are within the administrative power of DOC. The doctrine of separation of powers allows “some overlap” in the

644, 651, 364 P.3d 830 (2015).

⁵ Community Corrections Officer.

functions of the three branches of government. *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002). “The purpose of the doctrine [of separation of powers] is to prevent one branch of government from aggrandizing itself or encroaching upon the fundamental functions of another.” *Moreno*, 147 Wn.2d at 505 (internal quotation omitted). Thus

The question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.

Moreno, 147 Wn.2d at 505-06 quoting *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). In the present case, the trial court neither threatened its independence, or that of DOC, nor allowed DOC to invade the trial court’s prerogatives.

State v. Sansone, 127 Wn. App. 630, 641-42, 111 P.3d 1251 (2005) is instructive. There, Sansone challenged the trial court’s delegation to the DOC the power to define the word pornography where he was prohibited from possessing the same. The Court quoted long-standing Washington authority:

Sentencing courts have the power to delegate some aspects of community placement to the DOC. While it is the function of the judiciary to determine guilt and impose sentences, “the execution of the sentence and the application of the various provisions for the mitigation of punishment and the reformation of the offender are administrative in character and are properly exercised by an administrative body, according to the manner prescribed by the Legislature.”

Sansone, 127 Wn. App. at 642 quoting *State v. Mulcare*, 189 Wn.2d 625, 628, 66 P.2d 360 (1937). In the case, the Court of Appeals determined that the delegation of authority to define the word was improper. *Id.* Defining the word was not an administrative detail of supervision and since various CCO may disagree as to a definition, the delegation resulted in a failure to put Sansome on notice of the prohibited conduct. 127 Wn. App. at 643.

The Court of Appeals limited its *Sansone* holding by noting that if Sansome was in treatment, a therapist may be tasked with deciding what sort of materials he may peruse, saying “In such a circumstance, the prohibition is not necessarily static—it is a prohibition that might change as the probationer's treatment progressed, and is thus best left to the discretion of the therapist.” *Sansone*, 127 Wn. App. at 643. Thus the Court recognized both that delegation of many things is allowed and that supervision is a dynamic process.

The dynamic process of supervision underlies the DOC's legislatively created power to “assess the offender's risk of reoffense and may establish and modify additional conditions of community custody based upon the risk to community safety.” RCW 9.94A.704(2)(a); *See State v. Mcwilliams, supra*, 177 Wn. App. at 154. The statute constrains the discretion of DOC in that “The department may not impose conditions

that are contrary to those ordered by the court and may not contravene or decrease court-imposed conditions.” RCW 9.94A.740(6). That provision once again clearly contemplates the post-sentencing imposition of conditions by DOC. Finally, the statute grants the DOC limited judicial power in this context: “In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function.” RCW 9.94A.740(11)⁶.

The *McWilliams* Court considered a challenge much like the present one. There, *McWilliams* did not challenge a particular condition of sentence but challenged the phrase “Conditions per DOC; CCO.” 177 Wn. App. at 152. He claimed that this is an “impermissible delegation of the court’s statutory sentencing authority.” *Id.* The Court of Appeals cited the above quote (pp.7-8) from the *Sansone* case with obvious approval. Next, the court considered the statute, focusing on RCW 9.94A.704(2)(a), which allows the DOC to “establish or modify” conditions. *McWilliams*, 177 Wn. App. at 154. It was found that “the court's delegation of the specifics of community custody conditions to DOC was within DOC's authority set by *Sansone*.” *Id.* Thus it was held

⁶ **Quasi judicial.** A term applied to the action, discretion, etc. of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings, and draw conclusions from them, as a basis of their official action, and to exercise discretion of a judicial nature. *Black’s Law Dictionary*, 5th ed., West Pub., 1979.

that the provision complained of did not impermissibly delegate sentencing authority to the DOC.” Id.

Sentencing is a judicial function but executing that sentence is a DOC function. Courts typically do not engage in the direct supervision of offenders post-sentencing; that is DOC’s job. And in the doing of that job, there needs to be some flexibility. The statutory scheme provides that flexibility even though there may be some overlap of governmental functions. Further, the statutory scheme cabins the DOC’s discretion by not allowing it to go beyond or contradict the sentencing court. Finally, the statutory scheme allows DOC “quasi-judicial” discretion in doing its job. There is no error in the trial court’s order.

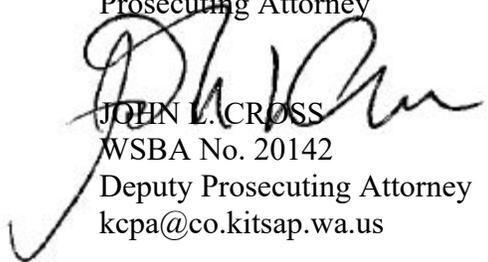
IV. CONCLUSION

For the foregoing reasons, Schmittler’s conviction and sentence should be affirmed.

DATED July 16, 2019.

Respectfully submitted,

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