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NO. 53563-7-II

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

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STATE OF WASHINGTON,

Respondent,

v.

RANDY KARN,

Appellant.

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

The Honorable Gregory M. Gonzales, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State failed to prove second degree criminal mistreatment as charged in counts V, VI, and VII.

2. The court relied on inapplicable aggravating factors in imposing the exceptional sentences.

Issues pertaining to assignments of error

1. Where the record contains no evidence that appellant recklessly created a risk of great bodily harm or death or recklessly caused substantial bodily injury by withholding basic necessities of life from his children, must the convictions for second degree criminal mistreatment be dismissed?

2. Where the court relied on aggravating factors which inhered in the charged offenses and which were unsupported by the record, is remand for resentencing required?

B. STATEMENT OF THE CASE

Appellant Randy Karn and his wife Mindie Karn have nine children. RP 698, 700. The Karns were charged with criminal mistreatment as to the seven youngest children, who were minors in September 2014. Mindie Karn pleaded guilty to the charges against her, and Randy Karn proceeded to trial on charges of first degree criminal

mistreatment as to NK and TK and second degree criminal mistreatment as to AK, RoK, JK, RuK, and KK. RP 1971; CP 61-66; RCW 9A.42.020(1); RCW 9A.42.030(1). The charge relating to AK was dismissed for lack of evidence. RP 1898.

At trial, the State presented evidence that the Karns lived in a three bedroom house. The parents shared the master bedroom, the three girls slept in one bedroom, and the six boys shared the third bedroom. RP 701. There was not a separate bed for each child, so the children sometimes shared beds or slept on the floor or in the living room. RP 703, 712. There were two bathrooms in the house. The one in the hallway was unusable for several months, and the whole family had to use the master bath. RP 716-18. The younger children attempted to use hall bathroom despite the clogged toilet, causing the toilet to overflow. Karn eventually replaced the toilet. RP 717.

The house and yard were not clean. RP 934. There were sometimes rusty nails or broken glass in the backyard. RP 745-46. The family dog was allowed to urinate and defecate indoors and sometimes it was hours before the mess was cleaned up. RP 776, 935. While the hall bathroom was unusable the boys had a habit of punching holes in their bedroom wall and urinating in them. RP 710. There was a cockroach problem for a

while, but Karn paid the two oldest boys to exterminate them. The family learned not to leave food out after that experience. RP 774-75.

The children had irregular meals, often eating only once or twice a day. RP 723, 971-72. Mindie Karn was primarily responsible for grocery shopping and feeding the children while Karn worked, but she did not always buy enough food. RP 725, 786-87, 992. The two older boys talked to Karn about the issue, and the parents agreed to let them take over the shopping and cooking for a while. RP 726-27, 838-39, 1039. Karn had most of his meals at work and rarely ate with the family, although he drank alcohol when he was home. RP 734, 794, 994, 997. There was a locked cabinet in the master bedroom with food items such as coffee beans and chocolate. The children were not allowed to open that cabinet. RP 718, 733, 974, 1106.

The parents did not supervise the children's hygiene. The children bathed, brushed their teeth, and wore clean clothes infrequently. RP 711, 770-71, 934. There was always toothpaste, soap, and laundry detergent available in the house, however. RP 772, 852.

The children did not go to school. RP 735, 935, 974. Although Mindie Karn did not want the children in school because she was afraid for their safety, she made inconsistent efforts to homeschool them. RP 736-37, 988, 1109.

The children did not receive regular medical care, and they were not vaccinated. RP 744-45. They usually relied on home treatment if sick or injured around the house, but if they were seriously injured Karn took them to the doctor. RP 747, 754, 763, 1000, 1035-36.

The family went on some camping trips and excursions, and they attended some family reunions, but when they were home the children were expected to stay in the yard. RP 741-742. Until the family started attending church in 2013, the children had little contact with anyone outside the extended family. RP 741, 801, 935-36, 978.

The older children attended a summer camp with their church group in 2013 and 2014. RP 1151. In 2014, someone at camp noticed TK's spine appeared curved and expressed concern. RP 1022, 1112. TK told his parents, and they took him to a chiropractor on August 4, 2014. RP 1112, 1494. The chiropractor ordered x-rays, which indicated TK had scoliosis. RP 1498-99. She then referred TK to a specialist and arranged an appointment for him, explaining that TK's scoliosis was advanced beyond the point that she could treat it. RP 1499, 1502. The family went on a previously planned camping trip instead of taking TK to his appointment, which the parents intended to reschedule. RP 2042-43. When the chiropractor learned that the parents did not take TK to the appointment, she called CPS. RP 1503.

A social worker went to the Karn home and left a business card asking the parents to call. Karn called and scheduled an appointment, and the parents and TK met with the social worker on August 28, 2014. RP 1061-62. On September 6, the social worker went to the home to meet the rest of the children. RP 1063. She saw NK, who was extremely thin and seemed to be in medical danger, and she made the decision to take him to the hospital. RP 1063-64. All the minor children received medical evaluations and were removed from the home. RP 1077.

The State presented testimony about each of the children at trial. NK was 16 years old when the children were removed from the home, and he weighed only 80 pounds. RP 927, 929. He was hospitalized, suffering from severe asthma, respiratory distress, chronic protein malnutrition, and refeeding syndrome. RP 1529. Refeeding syndrome occurs when the body has not had access to calories for a long period of time and cannot handle certain electrolytes once calories are introduced. RP 1530. Someone who is malnourished for an extended time is at risk for refeeding syndrome as soon as they start eating adequate calories. RP 1570.

NK reported that he drank a lot of coffee and he did not eat much, and he appeared to be chronically malnourished. RP 1786. The physician who treated NK during his hospitalization testified that refeeding syndrome is rare and only happens in cases of severe malnutrition. The

body becomes depleted and breaks down other parts of the body for energy. RP 1787. It can lead to heart failure and be fatal if not treated correctly. RP 1790. After his hospitalization, NK was diagnosed with rickets resulting from inadequate nutrition. RP 1531, 1533. He continued to have intestinal issues for a year. RP 1367.

NK had had breathing problems for more than two years before he was removed from the home. RP 932. He was prescribed an inhaler and nebulizer, which proved helpful in treating his asthma. RP 1368. NK developed seizures in 2016, but the cause could not be identified. RP 1538. In addition, NK was evaluated by a pediatric neuropsychologist and diagnosed with mild intellectual disability and adjustment disorder with anxiety. RP 1593. Due to these conditions he will require ongoing support accessing medical care and educational opportunities, and with day to day functioning. RP 1594.

TK was 13 when the children were removed from the home. RP 1096. He had fairly advanced scoliosis, with a curvature of 73 degrees, which doctors discovered was caused by a tumor on his spine. RP 1114, 1655. He had surgery to remove the tumor, then two surgeries on his spine. RP 1114, 1331. There was nerve damage to his right hand, and his right arm had atrophied and probably won't regain strength. RP 1115-16,

1333. One of TK's lungs did not develop properly due to the curvature of his spine, and he had only about 43% lung function. RP 1118.

RoK was 12 years old when she was removed from the home. RP 968. She has been diagnosed with an eating disorder. When her anxiety rises she will refuse food, and when she eats she throws up. RP 1435. Eating disorders can be associated with inadequate access to food in the past. RP 1528.

RoK was diagnosed with a mild intellectual disability and chronological processing disorder and will need ongoing support. RP 1585, 1594. The neuropsychologist who diagnosed RoK's developmental disability could not identify the specific cause. RP 1616. She listed potential risk factors as alleged neglect, a possible familial pattern of developmental disabilities, home environment, and lack of educational opportunities. RP 1617. In addition, RoK has been diagnosed with an anxiety disorder related to traumatic distress, for which she was prescribed medication. RP 1455, 1475, 1482. RoK has mild scoliosis, treated with monitoring and exercise. RP 1524.

JK was 9 years old when he was removed from the home. RP 867. He was examined by a psychiatrist because he appeared intellectually handicapped and had severe behavioral difficulties. RP 870-71. His caregiver testified he was challenging and had to be monitored at close

range at all times. RP 1705-06. JK could be aggressive and was prone to self-harm. RP 1707-08. He would also eat to the point of throwing up. RP 1712.

JK was initially diagnosed with post-traumatic stress disorder and probable attention deficit disorder, with some obsessive compulsive traits, and a mild intellectual impairment. RP 872. JK was later diagnosed with autism spectrum disorder. RP 892. Eventually, genetic testing was done, which showed microchromosome deletion. RP 898. The symptoms of JK's genetic disorder include attention deficit, aggression, and impulsivity, the same symptoms noticed in his initial psychiatric exam. RP 899. The symptoms can be controlled somewhat with medication, but JK will always require round the clock specialized care to function. RP 900-02. He was placed in a rehabilitative services home which provided the kind of safety measures he needs. RP 1376.

JK's doctor testified that his genetic abnormality is significant. He could not say JK's presentation was significantly based on past abuse as opposed to the expected outcome of his chromosome deletion. RP 912-13. He felt it was likely that earlier intervention would have helped him be farther along than he is now, however. RP 915. He felt JK had PTSD in addition to the genetic disorder, and his food hoarding and gorging could be the result of PTSD caused by lack of nutrition and neglect. RP 895, 915.

JK's psychiatrist gave the opinion that JK's major behavioral issues would have been obvious to lay person and would have been caught at well-child checkup. RP 904-05.

RuK was 5 years old when she was removed from the home. RP 1247. She did not know how to wash herself or brush her teeth. RP 1248, 1250. RuK inhaled her food and was prone to impulsive behaviors and rages. RP 1248, 1252. She was seen by a pediatrician in October 2014. She showed some delays in developmental milestones, but her height and weight were normal, and the physical exam was normal. RP 1290-91. She made huge strides within the first year in foster care. RP 1378.

RuK saw a pediatric psychiatrist November 2015 through summer 2016. RP 1307-08. She had a history of concerning behaviors, including aggression, self-harm, and difficulty adjusting. RP 1308. She was diagnosed with PTSD, depressive disorder, and mood regulation disorder. RP 1312. The psychiatrist testified that inadequate food, unsafe housing, and lack of medical treatment could cause PTSD. RP 1215. Moreover, a genetic vulnerability coupled with environmental trauma could create a greater risk of long term psychiatric problems. RP 1319. No brain scan or genetic testing was done on RuK, however. RP 1320.

RuK's current foster parent testified that when RuK was first placed with her three years earlier, she would often eat too much and

seemed concerned where her next meal was coming from. RP 1337. RuK still has some anxiety about mealtime and has meltdowns if she gets hungry between meals. RP 1338-39. She still needs supervision with showering and brushing her teeth. RP 1341.

KK was 3 years old when removed from the home. RP 1247. He was seen by a pediatrician in October 2014. Although some developmental milestones were delayed, his height and weight were normal and his physical exam was normal. RP 1293-94. He caught up on most of his developmental milestones within the next couple of years. RP 1294.

KK's first foster mother testified that he did not know how to wash himself at first. RP 1248. He remained with her for two years. RP 1253. His current foster parent testified that KK still did not know how to bathe when he was placed with them in March 2016. RP 1340, 1348. At some point KK had trouble urinating, and he was diagnosed with phimosis, damage to the foreskin caused by lack of proper hygiene. RP 1341-42, 1810. The steroidal cream treatment did not resolve the problem and KK had to be circumcised. RP 1341-43.

There was no evidence when the phimosis developed. Neither the foster parent with whom KK was placed for the first two years nor the

doctor who saw him regularly through May 2017 testified that KK had this condition during that time. RP 1293-95.

Doctor Aimee Gerrard-Morris, a pediatric neuropsychologist, evaluated RoK and NK and diagnosed mild intellectual disabilities. RP 1584, 1587. She testified that childhood maltreatment can be particularly harmful to the developing brain. RP 1597. Ultimately, chronic overproduction of stress hormones affects how different brain structures develop and function. RP 1597-98. The implications include lower intellectual function, achievement difficulties, and memory challenges. RP 1608-09. Gerrard-Morris characterized this type of neurodevelopmental disorder as a physical injury because it affects the underlying physical functions of the brain. RP 1619-20.

Suzanne Duvall, a pediatric neuropsychologist who evaluated TK, testified that early exposure to trauma can have a long-term impact on stress response and affect recognition, emotional regulation, and attachment. She testified that research supports the theory that neurobiological changes can be related to early chronic stress, which can impact brain development and function. RP 1676-77.

A pediatrician testified that lack of adequate nutrition can affect a child's growth and development, and children with failure to thrive can have lower cognition. RP 1800. Children who are not vaccinated lack

protection against dangerous viruses. RP 1800-01. Uncleaned cuts can lead to bacterial infection which if untreated could cause sepsis and potentially be fatal. RP 1803-05. Stepping on a rusty nail could cause tetanus in a child who has not been vaccinated. RP 1805-06. And exposure to feces risks infection. RP 1806-07.

Karn testified that before he started working the graveyard shift he did the majority of the grocery shopping for the family, but Mindie took over when his schedule changed. RP 2022. The older children knew how to prepare breakfast, and Mindie was responsible for lunches. RP 2021-23. Karn sometimes cooked dinner for the family, although not as often once his schedule changed. But there was always sufficient food for the whole family at dinner. RP RP 2025-28. His biggest priority was providing food for his family, and the pantry was stocked with food to which the children had access. RP 2159-60.

Karn explained that the toilet in the hall bathroom was clogged for a matter of weeks, not months as the children described. When he was initially unsuccessful fixing it, he attempted to disinfect the area and then locked the door until he could replace the toilet. RP 2031-32. He was unaware that the boys had taken to urinating in the wall during that time. RP 2033. The master bathroom remained usable and available to the whole family. RP 2033.

When TK told them a friend at camp had said he had scoliosis, they took TK to the chiropractor. RP 2040. After x-rays were done the chiropractor said TK needed to see a specialist, and she set up an appointment for them. RP 2041. Although the appointment conflicted with a planned family camping trip, Karn was willing to forego those plans take TK to the appointment, but Mindie wanted to go camping. RP 2042. Karn called to reschedule the appointment, but the children were removed from the home before the rescheduled date. RP 2043.

Karn acknowledged that he and Mindie were aware JK was different, and he was always a behavioral challenge. RP 2119-20. Karn testified that CPS had investigated the family once before because JK kept running out of the yard. Karn built a fence around the yard so the children could play in it securely. RP 2048-49.

During their marriage Karn had always thought Mindie was shy and reserved but did not think she had mental health or developmental issues. RP 2115. He relied on her to schedule and take the children to medical appointments because she was home with the children during the day while he worked outside the home. RP 2113. His opinion about his wife's capabilities changed, however, as a result of evaluations done after the children were removed. RP 2115-16. He now understands that she processes information more slowly than most people. RP 2152.

The jury returned guilty verdicts on all counts. CP 180-85. It found by special verdict that the State had proven both alternative means as to the second degree criminal mistreatment charges. CP 192-95. The State alleged that the offenses involved deliberate cruelty, domestic violence and part of ongoing pattern of abuse involving multiple victims or multiple incidents over a prolonged period, use of a position of trust, a destructive and foreseeable impact on persons other than the victim, and as to JK, that the victim was particularly vulnerable. CP 61-66. The jury found by special verdict all aggravating circumstances alleged by the State. CP 196-207. The court imposed exceptional sentences totaling 247 months. CP 227-28. It entered findings of fact and conclusions of law in support of the sentence, stating that the aggravating factors found by the jury “taken together or considered individually, constitute substantial and compelling reasons to impose the exceptional sentence.” CP 262-63. The court stated it would impose the same sentence if only one of the aggravating factors was valid. *Id.*

C. ARGUMENT

1. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE SECOND DEGREE CRIMINAL MISTREATMENT CHARGES IN COUNTS V, VI, AND VII.

The burden of proving the essential elements of a crime unequivocally rests on the prosecution. *In re Winship*, 397 U.S. 358, 364,

90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Proof beyond a reasonable doubt of all essential elements is an “indispensable” threshold of evidence the State must establish to garner a conviction. *Winship*, 397 U.S. at 364. Therefore, as a matter of state and federal constitutional law, a reviewing court must reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); *State v. Chapin*, 118 Wn.2d 681, 826 P.2d 194 (1992); *State v. Green*, 94 Wn. 2d 216, 616 P.2d 628 (1980).

Karn was convicted of second degree criminal mistreatment of JK, RuK, and KK under Former RCW 9A.42.030(1), which provides that

(1) A parent of a child ... is guilty of criminal mistreatment in the second degree if he or she recklessly ... either (a) creates an imminent and substantial risk of death or great bodily harm, or (b) causes substantial bodily harm by withholding any of the basic necessities of life.

Thus, to convict Karn, the State had to prove that he recklessly (a) created an imminent and substantial risk of death or great bodily harm, or (b) caused substantial bodily harm, by withholding a basic necessity of life as

to JK, RuK, and KK. RCW 9A.42.030(1)<sup>1</sup>; CP 61-66. Basic necessities include “food, water, shelter, clothing, and medically necessary health care, including but not limited to health-related treatment or activities, hygiene, oxygen, and medication.” RCW 9A.42.020(1).

Although Karn testified to the contrary, the State presented evidence from which the jury could find he failed to provide his children with basic necessities. The State’s evidence did not establish that by doing so he recklessly created an imminent and substantial risk of death or great bodily harm or that he recklessly caused substantial bodily harm to any of these three children, however.

Both great bodily harm and substantial bodily harm involve bodily injury. Bodily injury is defined as “physical pain or injury, illness, or an impairment of physical condition.” RCW 9A.42.010(2)(a). By definition,

“Substantial bodily harm” means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part;

RCW 9A.42.010(2)(b); and

“Great bodily harm” means bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily part or organ.

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<sup>1</sup> The criminal mistreatment statute was amended in 2017 to require a showing of criminal negligence rather than recklessness, but Karn was charged under the prior version of the statute.

RCW 9A.42.010(2)(c). The State's theory was that JK, RuK, and KK all sustained substantial bodily harm and were at risk of great bodily harm or death. RP 2303-04, 2307.

As to KK, the State argued that the specific bodily harm he suffered was phimosis. RP 2306. The evidence showed that this condition, scarring to his foreskin which impaired his ability to urinate, was caused by lack of adequate hygiene. RP 1341-42, 1810. While KK's first foster mother testified that KK did not know how to wash himself at first, he was only 3 years old when he was removed from Karn's care in September 2014 and would not be expected to bathe without supervision at that age. RP 1247-48. The foster parent with whom KK was placed in March 2016 testified that at some point she took KK to the doctor because he was having difficulty urinating. RP 1341-42. But there was no evidence of phimosis in the two years he spent in his first foster home. Nor did the pediatrician who saw KK regularly through May 2017 provide evidence of phimosis during that time. RP 1293-95. The evidence does not establish that KK developed phimosis as a result of anything Karn did, and it cannot support a conviction for criminal mistreatment.

The State presented no evidence of bodily injury to RuK. She was of normal height and weight when she was removed from the home, and her physical exam was normal. RP 1290-91. There was testimony that she

did not know how to wash properly, and she still needed supervision at the time of trial, but there was no evidence that her hygiene inadequacies caused any physical pain, injury, illness, or impairment. RP 1248, 1341; RCW 9A.42.010(2).

There was evidence that RuK was diagnosed with PTSD, depressive disorder, and mood regulation disorder, which could have resulted from a lack of basic necessities. RP 1215, 1312. RuK also had persistent anxiety around eating. RP 1337-39. None of these mental health conditions constitute bodily injury, however. The statutory definition of bodily injury includes only physical illnesses, not mental illness. *State v. Van Woerden*, 93 Wn. App. 110, 117, 967 P.2d 14 (1998), *review denied*, 137 Wn.2d 139 (1999).

In *Van Woerden*, the appellants were charged with criminal mistreatment based on allegations that because they withheld basic necessities from children in their care, the children developed post-traumatic stress disorder. *Id.* at 112. Interpreting the statutory definitions, this Court concluded that mental illnesses cannot be considered bodily injury. *Id.* at 118. The Court specifically addressed PTSD and held that, even though PTSD can have measurable neurobiologic or chemical effects on the brain, it does not meet the definition of bodily injury because it is foremost the impairment of a mental condition. *Id.* at 118-19.

Under this authority, RuK's PTSD, depression, mood disorder, and anxiety do not meet the definition of bodily injury. Although they may have impact on her bodily functioning, they are impairments of a mental condition. Thus, this evidence does not establish substantial bodily injury.

The State also argued that both RuK and KK had developmental disabilities which constituted bodily harm. RP 2304-06. It relied on testimony from neuropsychologist Gerrard-Morris that NK's and RoK's intellectual disabilities were physical injuries, because the underlying physical function of the brain was impacted. RP 1619-20.

There was no evidence that RuK or KK were diagnosed with intellectual disabilities, however. While both children had some delays in achieving developmental milestones when they were first removed from the home, they both quickly caught up once they were in foster care. RP 1290-91, 1293-94, 1378. The State's attempt to equate these temporary developmental delays with the cognitive developmental disabilities diagnosed in NK and RoK is not supported by the evidence. Dr. Gerrard-Morris testified that intellectual disabilities are longstanding because they result from a change in the way the brain develops. RP 1613, 1619-20. There was no evidence either RuK or KK suffered longstanding impaired brain function.

Next, there was insufficient evidence that JK sustained substantial bodily harm as a result of the withholding of basic necessities. The evidence showed that JK has a genetic disorder which manifests in attention deficit, aggression, and impulsivity. RP 899. He also has PTSD, which could be the result of lack of nutrition and neglect. RP 895, 915. While there was evidence JK might have been farther along in managing his behavior with earlier intervention, he would always require specialized care due to his genetic disorder. RP 900-02, 915. JK's doctor could not say that his presentation was the result of past abuse as opposed to the expected outcome of his significant genetic anomaly. RP 912-13. The evidence was not sufficient to establish that Karn recklessly caused JK substantial bodily harm by withholding basic necessities.

The State also argued that these children were at imminent and substantial risk of great bodily harm or death. RP 2307. It argued that since withholding medical treatment resulted in refeeding syndrome in NK and severe scoliosis in TK, the other children were at risk for serious health issues as well. RP 2308.

This argument is purely speculative. The evidence showed that refeeding syndrome is rare and only occurs in people who are severely and chronically malnourished. RP 1787. There was no evidence that any of the other children were malnourished. In fact, medical exams showed that

they were of normal height and weight when they were removed from the home. RP 1290-91, 1293-94. There was evidence that the children had issues around food, including gorging, hoarding, and anxiety. RP 1337-39, 1712. But there was no evidence connecting these issues to refeeding syndrome, nor was there evidence that eating disorders constitute bodily injury.

The trial court allowed evidence of eating issues based on its interpretation of *State v. Mitchell*, 169 Wn.2d 437, 237 P.3d 282 (2010). RP 1649, 1894, 1898-1900. In that case, a four year old child was removed from the home when he was found to be severely malnourished and underweight. Once he was in the hospital he hoarded food and tried to hide it from hospital staff. *Mitchell*, 169 Wn.2d at 441-42. Because the defendant was not the child's parent, the Supreme Court addressed the question of whether a child with a disability could be a dependent person under the statute. *Id.* at 444. The court noted that the child was disabled due to his physical and mental condition. *Id.* The *Mitchell* case did not address the question of whether an eating disorder is a bodily injury.

In *Van Woerden*, however, this Court held that mental illness, or an impairment of a mental condition, even one that has physiological impacts, is not bodily injury and cannot be the basis of a conviction for criminal mistreatment. *Van Woerden*, 93 Wn. App. at 119. The State

presented no evidence which would distinguish the eating issues the children had from PTSD in this respect.

Even if it could be inferred that a child with food issues or an eating disorder might be at risk of developing refeeding syndrome, the evidence here does not establish criminal mistreatment. Under the statute, the risk of great bodily harm must be imminent and substantial, not theoretical or speculative. RCW 9A.42.030(1)(a). The evidence showed that NK ate less than the other children, often choosing to drink coffee instead of eat. RP 1786. His chronic malnourishment led to his refeeding syndrome. Unlike NK, these children were of normal height and weight. There was no evidence they were in imminent danger of similar bodily harm.

The State's argument that the children were at risk of great bodily harm due to the conditions of the home was equally speculative. There was evidence that injuries from glass or rusty nails could get infected if untreated. RP 1803-05. But the evidence showed that Karn treated his children's injuries, including taking them to a doctor if home remedies proved ineffective. RP 747, 754, 763, 1000, 1035-36. The evidence does not establish that the children were in imminent and substantial risk of great bodily harm or death due to the conditions of the home.

The State has the burden of proving every element of the charged crime beyond a reasonable doubt. *Winship*, 397 U.S. at 364. Because there is no evidence that JK, RuK, or KK sustained substantial bodily harm or was in imminent and substantial risk of great bodily harm or death, the State did not meet its burden. RCW 9A.42.030(1). The convictions of criminal mistreatment as to these three children must be reversed and the charges dismissed.

2. THE AGGRAVATING FACTORS DO NOT SUPPORT THE EXCEPTIONAL SENTENCES IMPOSED IN THIS CASE.

Under RCW 9.94A.535, “[t]he court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.” Unless the defendant waives a jury or stipulates to aggravating factors, findings supporting aggravated sentences, other than the fact of a prior conviction, must be determined by a jury beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 304-05, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); RCW 9.94A.535; RCW 9.94A.537.

An exceptional sentence is subject to review as set forth in RCW 9.94A.585(4). That statute provides as follows:

To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

RCW 9.94A.585(4).

The court below imposed exceptional sentences based on the following aggravating factors found by the jury: (1) deliberate cruelty; (2) domestic violence offenses which were part of an ongoing pattern of abuse of multiple victims in multiple incidents over a prolonged period of time; (3) use of a position of trust to commit the offense; (4) the offense involved a destructive and foreseeable impact on persons other than the victim; and as to JK, (5) the victim was particularly vulnerable. CP 196-207; RCW 9.94A.535(3)(a)(b)(h)(n)(r).

The defense argued that none of these aggravating factors supported an exceptional sentence because they were inherent in the charged crimes. CP 210-15; RP 2443. An exceptional sentence is not justified if it is based on factors necessarily considered by the Legislature in establishing the standard sentence range. *State v. Law*, 154 Wn.2d 85, 95, 110 P.3d 717 (2005). “Exceptional sentences are intended to impose additional punishment where the particular offense at issue causes more damage than that contemplated by the statute defining the offense.” *State*

*v. Davis*, 182 Wn.2d 222, 229, 340 P.3d 820 (2014). The appellate court reviews the meaning and applicability of a statutory aggravating factor as a matter of law. *Id.*

To support an exceptional sentence based on deliberate cruelty, the defendant's conduct must be of the type not usually associated with the commission of the offense in question. *State v. Rotko*, 116 Wn. App. 230, 244, 67 P.3d 1098 (2003). The State argued that Karn's conduct was deliberately cruel because he withheld food from his children, even though he had the means to provide it. RP 2318. Karn was convicted of criminal mistreatment. By definition, criminal mistreatment involves the withholding of basic necessities of life by a parent from his or her child, when that withholding causes substantial or great bodily harm or creates the risk of great bodily harm or death. RCW 9A.42.020(1); RCW 9A.42.030(1). It is a defense to the crime that the parent made reasonable efforts to obtain assistance but was financially unable to provide basic necessities. RCW 9A.42.050. Thus the crime as defined by the Legislature necessarily includes the conduct relied on by the State to establish this factor. The record does not establish deliberate cruelty, and that factor does not justify an exceptional sentence.

Next, the position of trust aggravating factor cannot support the exceptional sentence because that factor inheres in the offense. Criminal

mistreatment can be committed only by “[a] parent of a child, the person entrusted with the physical custody of a child or dependent person, a person who has assumed the responsibility to provide a dependent person the basic necessities of life, or a person employed to provide the child or dependent person the basic necessities of life.” RCW 9A.42.020(1); RCW 9A.42.030(1). Such persons necessarily occupy a position of trust, and any person who commits criminal mistreatment necessarily abuses that trust. *See State v. Creekmore*, 55 Wn. App. 852, 783 P.2d 1068 (1989), *abrogated on other grounds by In re Personal Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002) (exceptional sentence based on abuse of trust following conviction for felony-murder based on assault and criminal mistreatment upheld as to predicate offense of assault only because criminal mistreatment “presumes a breach of parental or custodial trust.”). Because criminal mistreatment can be committed only by a person who abuses a position of trust, that factor was necessarily considered by the Legislature when it established the standard sentence range for the offense. This factor cannot justify an exceptional sentence as a matter of law.

The court also relied on the jury’s finding that the offense involved a destructive and foreseeable impact on persons other than the victim. For this factor to support an exceptional sentence the impact on others must be

of a destructive nature not normally associated with the offense in question. *State v. Jackson*, 150 Wn.2d 251, 274, 76 P.3d 217 (2003). Webster’s dictionary defines “destructive” as “tending to impair, damage, or wreck.” Webster’s Third New International Dictionary 615 (2002). It defines “impact” in this context as meaning a “force producing change,” and lists “shock” as a synonym. *Id.* at 1131. “From these definitions, the aggravating factor of a ‘destructive impact’ on persons other than the victim clearly involves some type of shock so forceful in nature that it causes a damaging impact on the life or lives of those individuals.” *See State v. Kalac*, Cause No. 80643-2-I (April 13, 2020) (Unpublished opinion cited pursuant to GR 14.1).

This factor has been applied when violent crimes are committed in the presence of children. *See State v. Johnson*, 124 Wn.2d 57, 73-76, 873 P.2d 514 (1994) (drive-by shooting adjacent to elementary school in session); *State v. Cuevas–Diaz*, 61 Wn. App. 902, 905, 812 P.2d 883 (1991) (children in home traumatized by attack on mother). Where the community impact is of the type expected with the type of offense, however, the aggravating factor does not apply. *See State v. Way*, 88 Wn. App. 830, 834, 946 P.2d 1209 (1997) (shooting on college campus which had psychological impact on witnesses not sufficiently set apart from other murder committed in public place to justify exceptional sentence).

There is simply no evidence in this case of a shock so forceful it caused damage to the lives of people other than the children. The State argued that because the children required foster care and long term support, Karn's actions had a destructive impact on society at large and the foster parents who took them in. RP 2322-23. But there was no evidence that the foster parents' lives were destroyed by their contact with these children. Moreover, foster care and other services would be the expected result when parents are convicted of criminal mistreatment. *See Jackson*, 150 Wn.2d at 275 (Use of false abduction story to cover murder did not establish aggravating factor. When child goes missing and criminal activity is indicated, it is not unusual for resources to be expended in searching for missing person.) This factor does not support the imposition of an exceptional sentence.

Remand for resentencing is required, despite the court's assertion that it would impose the same sentence even if only one aggravating factor was valid. CP 262-63. As argued above, three of the counts must be dismissed for insufficient evidence. That reduces the offender score on the remaining counts. In addition, the court should consider the fact that three of the aggravating factors it relied on are invalid, and a fourth is no longer applicable because it only affected the charge as to JK, which must be dismissed for insufficient evidence.

D. CONCLUSION

The State failed to prove second degree criminal mistreatment as to JK, RuK, and KK, and those charges must be dismissed. In addition, the court relied on inapplicable aggravating factors in imposing the exceptional sentence. Remand for resentencing on the remaining counts is required.

DATED May 15, 2020.

Respectfully submitted,

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Certification of Service by Mail

Today I caused to be mailed copies of the Brief of Appellant  
Motion to Extend in *State v. Randy Karn*, Cause No. 53563-7-II as  
follows:

Randy Karn/DOC#417610  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

I certify under penalty of perjury of the laws of the State of Washington  
that the foregoing is true and correct.



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Catherine E. Glinski  
Done in Manchester, WA  
May 15, 2020

**GLINSKI LAW FIRM PLLC**

**May 15, 2020 - 11:09 AM**

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