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

STATE OF WASHINGTON, Respondent

v.

RANDY SCOTT KARN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-01154-3

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. The evidence concerning the children's brain development, post-traumatic stress disorder, and eating disorders due to the defendant's neglect and abuse is sufficient to prove second degree criminal mistreatment charges in counts V, VI and VII.**
- II. The court appropriately used evidence of aggravating factors in imposing the exceptional sentences.**

STATEMENT OF THE CASE

The Defendant is the biological father of nine children, seven of whom are the victims of criminal mistreatment in this case. RP 698. The defendant's wife, Mindie Karn, was also charged with criminal mistreatment and pled guilty. RP 1971. The defendant proceeded to trial on charges of first-degree criminal mistreatment of N.K. and T.K., and second-degree criminal mistreatment of A.K., Ro.K., J.K., Ru.K., and K.K. *Id.* The charge against A.K. was dismissed for lack of evidence. RP 1898. The defendant was found guilty of first-degree criminal mistreatment of N.K. and T.K., and second-degree criminal mistreatment of Ro.K., J.K., Ru.K., and K.K. CP 61-66.

The Defendant and his wife, Mindie Karn, are biological parents and sole caregivers of their nine children and resided in the same home as the victims. RP 700. The home had three bedrooms and two bathrooms. The Defendant and his wife shared the master bedroom and bathroom. The

family had nine children - six boys and three girls. RP 698. All the children shared one bathroom. One of the bedrooms was shared by all six boys and the other bedroom was shared by three girls. RP 701. Each of the children's bedrooms had two beds. As a result, the children would either have to share beds or sleep on the living room floor. The children would sleep on the floor of the bedrooms or the living room, because only a maximum of four out of the six boys could sleep in a bed each night. RP 703. There were also fights for blankets because there weren't enough to go around, and even if there were blankets available, they were often defecated on by the family dog. *Id.* There were also only one or two pillows available to the children. *Id.*

The home was not cleaned or maintained. There were holes in the wall, broken furniture, and rusty nails or broken glass in the backyard. RP 713, 745-746. At one point, the family had a dog they mostly kept inside that would defecate on the floor and on the children's belongings. RP 776. Due to the conditions in the house, there was a cockroach infestation. RP 774. When the children slept on the floor, cockroaches would crawl over them at night. *Id.* When the infestation became severe, the older children were required to take care of the infestation and sprayed poison all over the home, including on food in the kitchen, without any protective gear or guidance. RP 774-775. For many months the children's bathroom was in

disrepair. RP 718. The toilet became clogged and overflowed into the hallway but continued to be used. RP 710. Out of desperation the children also began defecating in the bathtub. RP 717. There were holes punched into the walls that some children would urinate into. RP 710. Some of the younger children were not toilet trained and would urinate on the floor. *Id.* The older siblings tried to prevent the younger ones from using the hallway bathroom to prevent further overflow, but the young children would find a way in because while the master bathroom was available to the children, it was shared between eleven people and the heavy traffic meant it was frequently unavailable. RP 717. Eventually, the older brothers had to clean the bathroom. *Id.* After months of the children defecating into the bathtub and urinating into the walls, after months of waste overflow into the hallway, and after months of living with horrendous smell, the toilet was eventually replaced. RP 717-18.

The younger children would not always have clean diapers. As a result, they would wear the same diapers for multiple days or go without diapers. RP 765-766. The children were not taught basic hygiene practices. RP 770-771. The children also did not have clean clothes and would regularly wear clothes that hadn't been washed in months. These dirty clothes were shared amongst the siblings, including underwear. RP 711. The children were not taken to the doctor for regular well-child

examinations or vaccinations. RP 744-745. None of the children ever went to the eye doctor or the dentist. RP 745. Even when the children were seriously injured or sick, they were not taken to the doctor. RP 747, 754. In particular, N.K. and T.K. had severe, untreated health conditions. N.K. was described by his siblings as having asthma attacks lasting an hour or two at least once a week. RP 755-756. The Defendant provided ineffective home remedies for N.K.'s asthma. *Id.* N.K. was severely malnourished and weighed only 80 pounds at 16-years-old. RP 690, 890. T.K. had a noticeable curvature of his spine. RP 1062. When his older siblings brought this up with the Defendant, the Defendant claimed it was because T.K. was only lifting weights with one arm. RP 1075. Eventually, the Defendant took T.K. to a chiropractor after being urged to do so by someone outside the household. RP 1022. When the chiropractor examined T.K. she was so alarmed she contacted Shriner's Hospital to arrange an emergency consultation with an orthopedic doctor. RP 1499. When the defendant and Ms. Karn did not take T.K. to the appointment at Shriner's she contacted C.P.S. RP 1503.

Food was often scarce or non-existent in the home. When food was available, the children would still not have three meals a day. RP 723. As a result, the children were all very thin. RP 1151. The refrigerator would often be empty as would the cupboards. A.K. recalled a three-day period

of “extreme, like hunger or starvation” and that he was debilitated on the floor along with another sibling. After begging for food, their mother went to get bread. RP 723-724. Typically, meals were not “required or checked on [...] you wouldn’t make sure that the siblings ate enough that day. That wasn’t a thought.” RP 724. In contrast, the Defendant ate outside the home most of his meals and kept a locked cupboard of food in his bedroom. RP 718. There was a second freezer in the home the Defendant also locked.

Up until the children began attending a local church in 2013, they were not allowed outside. RP 741. Prior to the family attending a local church, the only regular outings the children had were occasionally accompanying their mother to the grocery store or going to the rare family reunion. RP 741-742. The children would be coached for these events in order to disguise their neglect, such as being told which grade they should be in. CP 90-91. When the children were allowed to go outside, they were instructed to stay within the fenced yard for fear of neighbors or CPS seeing the children. RP 741, CP 91, 105. On occasions where the children left the yard, they were swiftly and severely disciplined. RP 742. In the summer, the children would walk and play barefoot in the yard and would step on glass and rusty nails putting them at risk of tetanus, which created a risk of great bodily harm. RP 745-746. The children were subjected to emotional and physical abuse. The defendant would discipline them,

including both emotional berating and corporal punishment, for hours on end in front of the other children if they broke the house rules, such as going to the store in an attempt to feed themselves. CP 92-94, 101. On one occasion J.K. was knocked unconscious and not taken to see a doctor, placing him in imminent and substantial risk of death or great bodily harm from a possible untreated concussion. CP 78. J.K. was described as a very difficult child by the defendant and has since been diagnosed with autism. CP 136. As such, he was subjected to the most beatings of any of the children. The defendant would go as far as to encourage the other children to beat J.K. CP 119.

The children were supposed to be homeschooled. RP 735-736. However, there was no schedule or curriculum to be followed. RP 736. When the older children asked to go to public school, the Defendant would not let them. RP 737-738. One of the children was so desperate for an education that he began teaching himself how to read at fifteen-years-old. RP 739. During the day it was not uncommon for the children to pace around the house for hours at a time. RP 752.

When the children were removed from the home there were psychological and physical injuries that had to be treated. N.K., who was sixteen years old and weighed 80 pounds when he was removed from the home, was diagnosed with severe asthma, respiratory distress, and re-

feeding syndrome due to severe malnutrition and starvation and was required to remain in the hospital for two weeks. RP 927, 1786. The physician who treated N.K. during his hospitalization testified that refeeding syndrome is rare and only happens in cases of severe malnutrition. RP 1787. Following his release from the hospital, he had to be re-admitted again due to the condition which involves the body becoming so depleted it 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, N.K. was diagnosed with rickets resulting from inadequate nutrition. RP 1531, 1533. He continued to have intestinal issues for a year. RP 1367. N.K. also required treatment for his asthma as he had suffered breathing problems for more than two years before he was removed from the home. RP 932. When N.K. was evaluated by a pediatric neuropsychologist, he was diagnosed with a mild intellectual disability and adjustment disorder along with anxiety. RP 1593. N.K. requires ongoing medical support as well as educational support, as the many years he suffered neglect has impacted his ability to function day-to-day. RP 1594. Finally, N.K. developed seizures in 2016, and while the cause cannot be pinned down, it is likely the result of living with the defendant. RP 1456-1457, 1538.

T.K., who was thirteen years old when he was removed from the home, was diagnosed with severe scoliosis and a tumor against his spine. RP 1096, 1114. He required high risk surgical intervention to remove the tumor, and two further surgeries on his spine. RP 1114. As a result of the seventy-three-degree curvature of his spine, T.K.'s lung capacity has diminished to 43%, he has nerve damage to his right hand, and unimprovable atrophy in his right arm. RP 1115-1116, 1118.

Ro.K. was twelve years old when she was removed from the home. RP 968. She has been diagnosed with an intellectual disability and chronological processing disorder for which she will require ongoing support. RP 1585,1594. She has also been diagnosed with an eating disorder stemming from her past inadequate access to food, wherein she becomes so anxious that she refuses food and when she does eat, she throws up. RP 1435. She has also been diagnosed with anxiety disorder and obsessive-compulsive disorder as a result of traumatic distress and has been prescribed medication. RP 1455, 1475. The neuropsychologist who diagnosed Ro.K.'s developmental disability listed factors such as neglect, home environment and lack of education as reasons for why Ro.K. developed these disorders. RP 1617. She has also required speech therapy since being removed from the home, due to the environment she lived in with the defendant. RP 1606-1607. Finally, Ro.K was also diagnosed with

scoliosis, which has progressed since she left the home but is being closely monitored in case bracing or surgical intervention is required. RP 1524.

J.K., who was nine years old when he was removed from the home, has been diagnosed with autism spectrum disorder and PTSD. RP 892, 915. J.K. is challenging and has to be monitored closely, especially as he was prone to self-harm. RP 1705-1708. His challenging behavior can be helped by medication, however. RP 900. J.K.'s doctor testified that it is likely that earlier intervention would have absolutely helped J.K. in his recovery. RP 915. Moreover, J.K.'s conditions would have been obvious to anyone, and definitely would have been diagnosed and treated in a well-child checkup. RP 904-905. J.K. also suffered an eating disorder wherein he would eat until he threw up, which is likely a result of PTSD caused by a lack of food. RP 895.

Ru.K. was five years old when she was removed from the home. RP 1247. She has been diagnosed with amblyopia, a condition of the eye, which can lead to blindness if left untreated. RP 2433. She has also been diagnosed with PTSD depressive disorder, and mood regulation disorder. RP 1312. This has led to concerning behavior, such as self-harm. RP 1308. Her psychiatrist testified that Ru.K.'s PTSD was caused by inadequate food, unsafe housing, and a lack of medical treatment. RP 1215. When Ru.K. left the Karn home she did not know how to wash herself or brush

her teeth. RP 1248, 1250. She still needs to be supervised while cleaning herself and brushing her teeth. RP 1341. She also had a difficult relationship with food where she would eat very quickly and was concerned where her next meal was coming from, and she still has anxiety about mealtime. RP 1337-1339.

K.K. was three years old when he was removed from the home. K.K. did not know how to wash himself when he left the home. RP 1248. Eventually, K.K was diagnosed with phimosis, which is damage to the foreskin caused by a lack of proper hygiene and leads to difficulty in urinating. RP 1341-1342. He had to be circumcised to resolve the problem. RP 1343.

The defendant was found guilty by jury verdict on all counts. The jury found that the State had proven both alternative prongs of second-degree criminal mistreatment charges, that the defendant created an imminent and substantial risk of death or great bodily harm and caused substantial bodily harm by withholding any of the basic necessities of life, only one of which is necessary for conviction. CP 180-185, 192-195. The State put forth several aggravating circumstances including the fact that the defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim, the defendant knew or should have known that the victim of the current offense was particularly

vulnerable or incapable of resistance, the offense involved domestic violence and was part of an ongoing pattern of psychological, physical, or sexual abuse, the defendant used his position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense, and the offense involved a destructive and foreseeable impact on persons other than the victim. CP 61-66. The jury found by special verdict the aggravating circumstances and the court imposed an exceptional sentence totaling 247 months. CP 227-228. The court held it would impose the same sentence if only one of the aggravating factors was met. CP 262-263. This appeal timely follows.

ARGUMENT

I. The evidence is sufficient to prove second degree criminal mistreatment charges in counts V, VI and VII.

Karn argues the evidence was not sufficient to prove him guilty beyond a reasonable doubt of Criminal Mistreatment in the Second Degree as charged in counts V, VI, and VII. However, when viewing the evidence in the light most favorable to the State, and taking all reasonable inferences from the evidence, it is clear that a reasonable juror could find Karn guilty of Criminal Mistreatment in the Second Degree based on the evidence the State presented at trial.

To determine whether the evidence is sufficient to sustain a conviction, appellate courts review the evidence in the light most favorable to the State and determine whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *State v. Engel*, 165 Wash.2d 582, 576 (2009). Moreover, all inferences that can be reasonably drawn from the evidence shall be drawn in the favor of the state. *State v. Finrow*, 66 Wash.2d 818 (1965); *State v. Siemion*, 54 Wash.2d 17 (1959); *State v. Coy*, 40 Wash.2d 112 (1952). “In determining whether the requisite quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case.” *State v. Jones*, 93 Wn.App. 166, 176, 968 P.2d 888 (1998). Substantial evidence exists when the record contains evidence of sufficient quantity to persuade a fair-minded, rational person that the declared premise is true. *Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 112, 937 P.2d 154, 943 P.2d 1358 (1997), cert. denied, 522 U.S. 1077, 139 L. Ed. 2d 755, 118 S. Ct. 856 (1998); *World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 387, 816 P.2d 18 (1991).

Here, a jury of rational and fair-minded people were instructed on the elements of the crime of Criminal Mistreatment in the Second Degree and were asked whether the State proved those elements beyond a reasonable

doubt. The State had to prove **either** the defendant (a) create[d] an imminent and substantial risk of death or great bodily harm **or** (b) caused substantial bodily harm by withholding any of the basic necessities of life. CP 167 – 169. The jury in this case was so convinced of the defendant’s mistreatment of his children that they convicted him on **both** means of committing Criminal Mistreatment in the Second Degree.

Criminal mistreatment in the second degree, RCW 9A.42.030., states:

(1) 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 to a dependent person the basic necessities of life, or a person employed to provide to the child or dependent person the basic necessities of life is guilty of criminal mistreatment in the second degree if he or she with criminal negligence, as defined in RCW 9A.08.010, either (a) creates an imminent and substantial risk of death or great bodily harm by withholding any of the basic necessities of life, or (b) causes substantial bodily harm by withholding any of the basic necessities of life.

Great bodily harm is defined as bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ. RCW 9A.04.110. Substantial bodily harm is defined as 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 of any bodily part.
RCW 9A.04.110.

The State overwhelmingly proved the elements of the crime of Criminal Mistreatment in the Second Degree as to victims JK, RuK, and KK beyond a reasonable doubt. Karn's behavior was proven to have created an imminent and substantial risk of death or great bodily harm and to have caused substantial bodily harm to his children as charged in Counts V, VI, and VII. The State proved this in multiple ways as discussed individually below. Karn's argument is without merit and his convictions should be affirmed.

A. THE IMPACTS TO THE VICTIMS' BRAIN DEVELOPMENT AND THE GENERAL NEGLECT FORMED A SUFFICIENT BASIS FOR KARN'S CRIMINAL MISTREATMENT CONVICTIONS.

Brain development is crucial to bodily function, and a substantial loss or impairment of the functions of the brain by maltreatment constitutes substantial bodily harm. These substantial losses or impairments take place particularly at the neurochemical and neuroendocrine level, and while these injuries may not be as noticeable as an external bruise, the effects are especially harmful to the developing brain as it is still under construction. RP 1597. Not only are these effects injurious to brain function, but they impact how brain structures are

developed; such damage to the brain could be permanent. RP 1598. As the Karn children's exposure to the defendant and the stressful environment he created increased as they grew older, so did their injuries. There is a clear correlation between the age of the children and the severity of their injuries, and so it comes as no surprise that the children's cases being contested by the defense are also the three youngest children with the least exposure to the defendant.

Stressful environments such as the Karn household where there were regular beatings, rat infestations, sewage overflow, amongst other stressors can lead to toxic overproduction of stress hormones and neurotransmitters released in the brain. RP 1597. This leads to excessive levels of cortisol or adrenaline which leads to hyperarousal, meaning that the brain is in constant fear mode. RP 1598. The weight of constant fear on a developing brain impedes learning ability, sleep, and motor control. *Id.* Therefore, even if the children had been afforded the opportunity to learn, attempts may have been unsuccessful because of their extremely stressful home environment.

The evidence produced at trial showed that J.K.'s brain development injuries are severe and permanent. There were no attempts made by the defendant to understand or manage J.K.'s genetic disabilities and when he was removed from the home, J.K. did not know basic motor

skills such as how to use utensils to eat. RP 894. Expert testimony was unanimous that if the defendant had taken J.K. to a standard child wellness check as early as two or three years old, J.K.'s genetic disability would have been diagnosed and he would have been referred to behavioral programming. RP 904, 905. Experts are also unanimous on the fact that earlier intervention would have provided immeasurable support to J.K. in his recovery and development, and the lack of early intervention has not only severely delayed J.K. in his recovery, but any future progress could be permanently affected by a lack of earlier intervention. RP 915. In fact, the actions of the defendant move beyond the negligence of not taking J.K. to a doctor – instead of asking a professional for help with J.K.'s behavior, the defendant would beat J.K. into submission and encourage the other children to beat J.K. as well. CP 95, 101. Not only is this clear and substantial risk of great bodily injury, but the damage done to J.K.'s brain is unknown and immeasurable. By depriving J.K. of healthcare, a basic necessity, the defendant caused J.K.'s brain development injuries.

Ru.K. has also suffered delayed development due to the mistreatment inflicted upon her by the defendant. When Ru.K. was removed from the home, she was small for her age and could not do many things a five-year-old would be expected to do. RP 1377. She had never taken a shower and was afraid to turn it on, meaning she required

supervised showers for years after leaving the Karn household. RP 1340-41. Ru.K. could not dress herself, she would urinate all around the house, and overall presented as a feral child. RP 1341, 1367-77. A troubling behavioral issue is Ru.K.'s temper tantrums, which her foster parent described as "huge meltdowns" triggered by food, school, and crowds. RP 1344-45. Unsurprisingly, while growing up in the Karn household, Ru.K. was deprived of food, never taken to school, and very rarely interacted with people outside of her home. This deprivation of basic necessities has led to Ru.K. having meltdowns "all day every day" after she was removed from the home. RP 1344-45. The link between Ru.K.'s meltdowns and the Karn household is further strengthened by the fact that her tantrums would get "exponentially worse" after seeing her parents. *Id.* Ru.K. had to go to occupational therapy, speech therapy, math and reading and social support in an effort to reach developmental expectations. RP 1346. Still, at ten years old, her foster parent evidenced Ru.K.'s brain injuries in that Ru.K. "really struggles with basic life functions" and that she is "very far behind in school." RP 1347.

At first blush, K.K. might look like he was lucky because by virtue of being the youngest sibling, he had the least exposure to the mistreatment of the defendant. However, as we have seen, crucial brain development starts at birth and continued until K.K. was removed from

the home at three-years-old. The impact of the defendant's mistreatment on K.K.'s brain is unknown as he was so young, but the expert testimony supports an understanding that there were developmental delays for K.K. due to the mistreatment. For example, K.K. had to be in speech therapy, and has long-standing anger issues. RP 1346-47. He was also "extremely dirty" when he was removed from the Karn household and he fought any form of bathing as he was so unfamiliar with it. RP 1378. Similarly to his siblings, he was also completely unfamiliar with using a toilet, and would urinate in his pants wherever he was sitting. RP 1379. The immediate threats to K.K.'s health were alarming. For example, K.K. was completely unvaccinated and played barefoot in a backyard filled with hazards such as glass and rusty nails, which put him in direct risk for contracting tetanus. RP 745-746. While K.K. may be able to have a more complete recovery from the Karn household because of his age, his foster parents still worried about his anger issues and are concerned they will "get him in trouble later." RP 1347.

As it stands, while the children's brain alterations and injuries cannot be seen with the naked eye, the children may never have normal brain functioning because of the chronic maltreatment they suffered at the hand of the defendant. RP 1598-1599. The constant state of fear they developed while living in the Karn household have led to intellectual

disabilities beyond PTSD that they may never recover from. RP 1612-1613. The injuries are sufficient to have proven substantial bodily harm and the risk of great bodily harm was inflicted by Karn's actions and neglect.

B. THE VICTIMS' PTSD DIAGNOSES ESTABLISHED SUFFICIENT EVIDENCE OF CRIMINAL MISTREATMENT.

Arguably the most serious injury to the children's brains is the post-traumatic stress disorders (PTSD) caused by the mistreatment by the defendant. PTSD is a neurological response to living through trauma that involves flashbacks to the trauma and can be physically debilitating. The defense alleges that because J.K., Ru.K. and K.K. suffer from PTSD, eating disorders, neurological delays, and various other mental health diagnoses, their injuries do not meet the definition of substantial bodily harm or the risk of great bodily harm. The defense relies heavily on *State v. Van Woerden*, 93 Wash.App. 110, 967 P.2d 14 (1998) which is a 22-year-old case that argues injuries the brain should not be included in the term 'bodily injury.' *Van Woerden* differs significantly from this case and its holding is meaningless and inapplicable given the advancement in the understanding of how PTSD, eating disorders, neurological delays and other mental health issues actually *physically* affect the brain. It is clear from the evidence presented by the State that Karn actually physically

injured his children by his neglect and abuse and that he created a risk of great bodily harm to them.

In *State v. Van Woerden*, the state filed second degree criminal mistreatment charges against the owners of the OK Boys Ranch following allegations involving the mistreatment of some of the residents. *Van Woerden*, 93 Wash.App. at 113. The State argued that there was physical and sexual violence at the Ranch wherein residents would assault other residents, and that the staff may have known about the violence but did not stop it. *Id.* The victims in this case were diagnosed with post-traumatic stress disorder (PTSD). *Id.* at 114. The state argued that the defendant's failure to protect the victims from the attacks of other residents was a withholding of shelter, which is a basic necessity of life, the deprivation of which led to great or substantial bodily harm in the PTSD diagnoses. *Id.* The defense argued that 1) the owners did not have "physical custody" of the boys; 2) that PTSD does not constitute great or substantial bodily harm; and 3) that their failure to supervise did not deprive the victims of a basic necessity of life. *Id.* at 115. The court found that PTSD did not constitute great or substantial bodily harm, and as such did not address the remaining issues. *Id.*

The court in *Van Woerden* goes to great lengths to distinguish harm to the brain from harm to the body. It rejects the idea that PTSD is a

bodily injury and thus, it cannot constitute bodily harm under the prongs of the Criminal Mistreatment statute because it was not a physical injury that resulted in the impairment of an organ (the brain). Rather, it is a series of traumatic experiences that then led to a mental condition which then impacted the functioning of the brain. *Id.* at 118. The court challenged the State to prove that PTSD is an impairment of a physical condition that causes an impairment to the functioning of the brain, not merely that PTSD impairs the functioning of the brain. *Id.* at 119. It is difficult to imagine a situation in which PTSD is an impairment of physical functioning before it impacts the brain, as it can be a response to a physical violation, for example, but PTSD itself begins in the brain. Requiring that the State prove PTSD is a physical impairment first, and an impairment in the brain second, is an impossible task by the very definition of post-traumatic stress disorder.

The case at hand is distinguishable from *Van Woerden* because of three crucial factors. First, there was debate in *Van Woerden* as to whether the camp counselors were responsible for the children by means of the statute. Second, finding that the owners were responsible, the children were only under their care for a short amount of time and then returned to their safe homes. Third, the counselors were being called into question not for an action they took that gave the children PTSD, but for inaction. Here,

there was no doubt that the defendant and his wife were solely responsible for the wellbeing of the children as they were their biological parents and lived with them for their whole lives. Moreover, the children were not merely exposed to abusive behavior for a short period of time and then sent home to a normal family life. Their abusive environment was the only life they knew. Finally, the victims in this case have PTSD because of both the actions and inactions of the defendant. Therefore, because of the drastically different experiences of the victims in these cases, a comparison between *Van Woerden* and the present case is unproductive. Following this comparison by an application of the *Van Woerden* case law to the case at hand is inappropriate.

Moreover, the *Van Woerden* case law is outdated, and the conclusion reached by the Court with regard to PTSD should be reexamined. Not only is the test for PTSD as a 'bodily injury' unworkable, but the very premise that a mental disorder or disability is not a physical injury even if it was in response to physical trauma is incorrect by current scientific standards. Dr. Gerrard-Morris testified at trial that there is physical injury involved in PTSD, particularly in the limbic structure of the brain but also with temporary effects on the cognitive system. RP 1619, 1625. Therefore, PTSD causes not only concrete physical changes that happen within the brain, but it is often in response to bodily injuries as

is understood by the *Van Woerden* court. The missing link is between a physical injury and the ensuing PTSD. Once this link is recognized by the courts, victims can seek justice for their PTSD and its disabling symptoms.

The criteria that a physical injury must be present is certainly met in the case at hand. Here, the defendant's actions directly impacted the victim's brains, thus causing them a bodily injury, and that injury has developed to affect other parts of their bodies. Therefore, it is not that the brain is causing these injuries, but rather the injury to the brain that is causing these injuries. The injury to the brain is not "mental or spiritual" as the court argues – it is a direct injury to an organ (the brain). The court concludes that bodily injury includes only physical illnesses, but fails to address how an injury to the brain is not a physical illness. "Thus, under the statute, the State must prove that PTSD is an impairment of physical condition that causes an impairment of the functioning of the brain, not merely that PTSD impairs the functioning of the brain" *Van Woerden*, 93 Wn.App. at 119. This requirement is met by Dr. Gerrard-Morris's testimony that PTSD causes actual physical damage to the brain and it is that damage that then causes the mental ailments.

While *Van Woerden* remains precedential in its standing on PTSD as a bodily injury in criminal law, other fields of law have accepted PTSD

as a bodily injury. *See Trinh v. Allstate Insurance Co.*, 109 Wash.App. 927, 37 P.3d 1259 (2002), *Greene v. Young*, 113 Wash.App. 746, 54 P.3d 734 (2002). These cases hold that when PTSD is accompanied by physical manifestations, it is a bodily injury. It is necessary for this court to allow criminal law cases to move beyond the decades-old understanding of PTSD demonstrated in *Van Woerden* and evolve in line with the current medical understanding of PTSD and other Washington case law.

Here, it is clear that the mistreatment, trauma, and resulting PTSD caused by Karn is impacting the children's everyday lives. For J.K., the defense argues that because he was born with a genetic disorder, any further damage to his brain should not be considered because his brain had abnormalities to begin with. Not only is this argument disturbing, but it is also factually incorrect. J.K.'s PTSD diagnosis is entirely separate to his genetic disorder and was caused by "severe neglect" suffered at the hands of the defendant. RP 890, 915. If J.K. had been removed from the care of the defendant earlier, he would still have his genetic abnormalities, but he would have progressed much farther in his recovery and he more than likely would not suffer from PTSD. J.K.'s PTSD presents dangerous behavioral issues that put him at substantial risk of great bodily harm, such as impulsively running into traffic and engaging in self-harm. RP 891, 896. At other times, such as when he is in trouble of any kind at his foster

home, he curls into a ball and cries, “Don’t hurt me. Don’t hurt me.” RP 873. Ru.K. was also diagnosed with PTSD, depressive disorder and mood regulation disorder. RP 1312. Her psychiatrist testified that Ru.K.’s PTSD was caused by inadequate food, unsafe housing, and a lack of medical treatment. RP 1215. Ru.K.’s PTSD has led to similarly dangerous behavior, such as self-harm and severe meltdowns. RP 1308, 1344. The trauma suffered by the Karn children caused incalculable injuries and scars, and one of those scars is PTSD. In some ways, PTSD is more damaging to the children than the actual physical harm caused during traumatic events, because it pulls them back to the traumatic event over and over, and they suffer the fear, anxiety, and humiliation for years to come.

C. THE VICTIMS’ EATING DISORDERS SATISFIED THE ELEMENTS OF CRIMINAL MISTREATMENT.

Some of the more concerning bodily harm and risk of bodily harm presented by the Karn children following their removal from their negligent and abusive household are their eating disorders. Due to the utter lack of food and nutrition they faced their entire lives leading up to their removal from the home, many of the children developed severe eating disorders during and following intervention.

J.K. presented concerning behavior surrounding food, such as eating to the point of becoming physically sick. RP 895. This bingeing & vomiting cycle is not only indicative of a complicated relationship with food, but it is also bad for the health of his stomach and teeth. Similarly to J.K., Ru.K. also has a volatile association with food, where she too would eat very quickly and in huge amount until she vomited. RP 1337-1339, 1377. Ru.K. also fostered severe anxiety around where her next meal was coming from, and around mealtime in general. *Id.* For example, Ru.K. also experiences periods of time where she would be hungry but couldn't "get the food to go down" due to her anxiety. RP 1339. Her anxiety is also spiked if she does not receive food when she wants it, which quickly leads to tantrums. RP 1339-1340. These extreme behaviors, ranging from bingeing and vomiting to not being physically able to swallow food and throwing tantrums for fear of never receiving another meal, are clearly the result of food deprivation. Furthermore, it is clear from the evidence of eating disorders and N.K.'s refeeding syndrome that Karn's actions and neglect caused all the victims a risk of great bodily harm, as they too were at risk of refeeding syndrome and further eating disorders, which greatly impact physical health.

The evidence presented at trial was more than sufficient to prove all the elements of criminal mistreatment concerning all the victims. When

the evidence is considered in the light most favorable to the State, and all the inferences that can be drawn are drawn in favor of the State, the evidence supports the jury's verdicts that criminal mistreatment against each victim was proven beyond a reasonable doubt. The jury's verdicts should be affirmed.

II. The aggravating factors support the exceptional sentence imposed in this case

Karn argues that the aggravating factors found by the jury in this case do not support the exceptional sentence imposed by the court because the aggravating factors were inherent to the crime committed. However, the court was well within its sentencing authority to impose an exceptional sentence based on the aggravating factors, and because of this, Karn's claim fails.

RCW 9.94A.535 states that "[t]he court may impose a sentence outside the standard sentence range for an offense if it finds [...] that there are substantial and compelling reasons justifying an exceptional sentence." These findings must be determined by a jury beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 304-305 (2004). The State put forth several aggravating circumstances to the jury in this case, including 1) the fact that the defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim; 2) the defendant knew

or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance; 3) the offense involved domestic violence and was part of an ongoing pattern of psychological, physical, or sexual abuse; 4) the defendant used his position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense; and 5) the offense involved a destructive and foreseeable impact on persons other than the victim. CP 61-66. The jury found by special verdict that all the aggravating circumstances were proven by the State. CP 196-207. Following those jury findings, the court imposed an exceptional sentence totaling 247 months. CP 227-228. The court held it would impose the same sentence if only one of the aggravating factors was met. CP 262-263.

The defense argues that these aggravating factors are inherent in the charged crimes, and therefore do not support an exceptional sentence. They argue that an exceptional sentence is not justified if it is based on factors necessarily considered by the Legislature in establishing the standard sentence range. Factors inherent in a crime are those that are necessarily considered by the Legislature in criminalizing certain behavior and do not distinguish a defendant's behavior from that inherent in all crimes of that type. *State v. Chadderton*, 119 Wn.2d 390, 396, 832 P.2d

481 (1992). The factors considered by the jury, and used by the trial court to sentence Karn are not inherent in the crime of criminal mistreatment.

Criminal mistreatment involves neglect, withholding the basic necessities of life, etc., but does not *necessarily* include malevolent and cruel behavior. It can involve simple neglect or inaction. The jury found that Karn manifested deliberate cruelty towards the victims in this case based on the individual facts involved here. But a defendant need not manifest deliberate cruelty in order to commit criminal mistreatment and therefore it is not inherent in the crime itself. The Legislature therefore did not consider deliberate cruelty to the victims in setting the standard range. It was therefore appropriately considered by the trial court in setting Karn's sentence. The same is true for the victims being particularly vulnerable or incapable of resistance. The variety of victims and statuses of victims possible for criminal mistreatment show that particular vulnerability amongst certain types of victims can still be present. Not every victim of criminal mistreatment is a young, non-verbal 3-year-old with no access to the outside world. Some are 17-year-old high school students whose parents withhold food, but who have access to school counselors, teachers, and fellow students. The children in the Karn household were particularly vulnerable due, for some, to their young age, and for all due to their isolation from the outside world.

Further – not all instances of criminal mistreatment are domestic violence offenses that involve an ongoing pattern of abuse. It is therefore not inherent in the crime and not something the Legislature considered in setting the standard range for the offense. Therefore, it was appropriately considered by the trial court in setting Karn’s sentence. The same is true for the last two aggravating factors found by the jury, that the defendant abused a position of trust and that the offense involved a destructive and foreseeable impact on persons other than the victim. These are not factors that are necessarily present in all possible ways to commit the crime of criminal mistreatment. They were therefore not necessarily considered by the Legislature in setting the standard range sentence for the offense.

The aggravating factors found by the jury were not inherent in the crime of criminal mistreatment. The trial court properly used them to sentence Karn to an exceptional sentence above the standard range. The trial court’s imposition of an exceptional sentence should be affirmed.

CONCLUSION

J.K., Ru.K., and K.K. lived in a house where the void left by a lack of basic necessities was filled by filth and danger. They and their siblings were living in stomach-churning conditions, not taken to the doctor even for severe health issues, were not afforded an education, and were exposed

to disturbing “discipline” practices. The long-lasting impact of the defendant’s mistreatment can be seen in the engendered risk to brain development, post-traumatic stress disorder diagnoses, and eating disorders. These injuries are more than sufficient to satisfy the threshold of substantial evidence, and therefore, this court should affirm the convictions of the trial court. Furthermore, the trial court had a sound factual basis in the jury’s findings of five aggravating factors to support its imposition of an exceptional sentence. The aggravating factors found by the jury were not inherent in the crime of Criminal mistreatment in the Second Degree and were appropriately presented to and found by the jury. Karn’s sentence should be affirmed.

DATED this 21st day of September, 2020.

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