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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

NO. 28668-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

OLGA SHVED,

Appellant.

FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR FRANKLIN COUNTY

The Honorable Vic L. VanderSchoor, Judge

REPLY BRIEF OF APPELLANT

LENELL NUSSBAUM
Attorney for Olga Shved

Market Place One, Suite 330
2003 Western Ave.
Seattle, WA 98121
(206) 728-0996

TABLE OF CONTENTS

A. STATEMENT OF CASE IN REPLY 1

1. Olga or Vadim? 1
2. Vadim's Violence 1
3. Timing of Injuries 2

B. ARGUMENT IN REPLY 3

1. THE INSTRUCTIONS WERE CONSTITUTIONALLY ERRONEOUS FOR PERMITTING A VERDICT ON A CRIME OR ELEMENTS THAT WERE NOT CHARGED. . . 3

a. Givens v. Housewright 6
b. Gautt v. Lewis 8
c. The State's Arguments Do Not Prevail. 13

i. The error is manifest affecting a constitutional right. . . 13

ii. Even a liberal construction does not make "bodily harm greater than transient physical pain or minor temporary marks" the same as "physical pain or agony equivalent to that produced by torture." . . 15

iii. The error was not harmless beyond a reasonable doubt. 20

iv. The prosecutor emphasized the element of torture for the jury in argument and PowerPoint. 21

v. The jury inquiry demonstrates prejudice. . 22

TABLE OF CONTENTS (cont'd)

2. THE INSTRUCTIONS FAILED TO INCLUDE IN THE DEFINITION OF ASSAULT THE ESSENTIAL ELEMENT OF SPECIFIC INTENT TO HARM OR INTENT TO CAUSE FEAR OF BEING HARMED. 23

a. The WPICs Do Not Prevail Over Appellate Court Opinions. . . 24

b. The State Proposed the Erroneous Instructions. This Was Not Invited Error. 26

3. WHEN CONSIDERED AGAINST THE PRESUMPTION OF INNOCENCE, THE EVIDENCE IN THIS CASE WAS CONSTITUTIONALLY INSUFFICIENT TO SUPPORT THE CONVICTIONS. 27

a. The Standard of Review for Sufficiency of the Evidence Must Encompass the Presumption of Innocence. 27

b. The State's Evidence Was Insufficient to Overcome the Presumption of Innocence. . . 30

4. IT WAS CONSTITUTIONAL ERROR TO EXCLUDE EVIDENCE OF THE OTHER SUSPECT'S MOTIVE AND IDENTITY. . . 32

a. Evidence of a Third Party Perpetrator 32

b. Evidence of Motive 37

5. THERE WAS NO EFFECTIVE WAIVER OF MIRANDA RIGHTS. 38

6. REMAINING ISSUES 39

TABLE OF AUTHORITIES

WASHINGTON CASES

Auburn v. Brooke,
119 Wn.2d 623, 836 P.2d 212 (1992) 4

In re Benavidez,
___ Wn. App. ___, ___ P.3d ___
(No. 28443-3-III, 2/15/2011) 12

State v. Bowen,
48 Wn. App. 187, 738 P.2d 316 (1987) 33

State v. Byrd,
125 Wn.2d 77, 887 P.2d 396 (1995) 23-26

State v. Campbell,
125 Wn.2d 797, 888 P.2d 1185 (1995) 4

State v. Castle,
86 Wn. App. 48, 935 P.2d 656,
review denied, 133 Wn.2d 1014 (1997) 24

State v. Eastmond,
129 Wn.2d 497, 919 P.2d 577 (1996) 23-26

State v. Fernandez-Medina,
141 Wn.2d 448, 6 P.3d 1150 (2000) 21

State v. Grant,
104 Wn. App. 715, 17 P.3d 674 (2001) . 4, 18, 19

State v. Green,
94 Wn.2d 216, 616 P.2d 628 (1980) 27, 28

State v. Heib,
39 Wn. App. 273, 639 P.2d 145 (1984),
reversed on other grounds,
197 Wn.2d 97, 727 P.2d 239 (1986) 33

State v. Hickman,
157 Wn. App. 767, 238 P.3d 1240 (2010) 39

State v. Hopper,
118 Wn.2d 151, 822 P.2d 775 (1992) 4

TABLE OF AUTHORITIES (cont'd)

WASHINGTON CASES (cont'd)

State v. J.P.,
149 Wn.2d 444, 69 P.3d 318 (2003) 16

State v. Kjorsvik,
117 Wn.2d 93, 812 P.2d 86 (1991) 4

State v. McCarty,
140 Wn.2d 420, 998 P.2d 296 (2000) 20

State v. Nguyen,
165 Wn.2d 428, 197 P.3d 673 (2008) 14, 15, 19, 20

State v. Nicholas,
55 Wn. App. 261, 776 P.2d 1385 (1989) 22

State v. Olds,
39 Wn.2d 258, 235 P.2d 165 (1951) 14

State v. Peterson,
133 Wn.2d 885, 948 P.2d 381 (1997) 16

State v. Powell,
126 Wn.2d 244, 893 P.2d 615 (1995) 38

State v. Recuenco,
163 Wn.2d 428, 180 P.3d 1276 (2008) 5, 16

State v. Sargent,
40 Wn. App. 340, 698 P.2d 598 (1985) 33

State v. Suttle,
61 Wn. App. 703, 812 P.2d 119 (1991) 37

State v. Thomas,
150 Wn.2d 821, 83 P.3d 970 (2004) 34

State v. Vangerpen,
125 Wn.2d 782, 888 P.2d 1177 (1995) 4, 13

State v. Wilmoth,
31 Wn. App. 820, 644 P.2d 1211 (1982) . . . 32, 33

TABLE OF AUTHORITIES (cont'd)

OTHER JURISDICTIONS

Chambers v. Mississippi,
410 U.S. 284, 93 S. Ct. 1038,
35 L. Ed. 2d 297 (1973) 34

Chapman v. California,
386 U.S. 18, 17 L. Ed. 2d 705,
87 S. Ct. 824 (1967) 7

Coffin v. United States,
156 U.S. 432, 39 L. Ed. 481,
15 S. Ct. 394 (1895) 28, 30

Cole v. Arkansas,
333 U.S. 196, 68 S. Ct. 514,
92 L. Ed. 644 (1948) 5

De Jonge v. Oregon,
299 U.S. 353, 57 S. Ct. 255,
81 L. Ed. 278 (1937) 5

Gautt v. Lewis,
489 F.3d 993 (9th Cir. 2007),
cert. denied, 552 U.S. 1245 (2008) 8-13

Givens v. Housewright,
786 F.2d 1378 (9th Cir. 1986) 6-8, 13, 17, 20, 22

Griffin v. United States,
502 U.S. 46, 112 S. Ct. 466,
116 L. Ed. 2d 371 (1991) 22

Hagner v. United States,
285 U.S. 427, 52 S. Ct. 417,
76 L. Ed. 861 (1932) 3

Holmes v. South Carolina,
547 U.S. 319, 126 S. Ct. 1727,
164 L. Ed. 2d 503 (2006) 34-36

In re Winship,
397 U.S. 358, 25 L. Ed. 2d 368,
90 S. Ct. 1068 (1970) 27, 28

TABLE OF AUTHORITIES (cont'd)

OTHER JURISDICTIONS (cont'd)

Jackson v. Virginia,
443 U.S. 307, 61 L. Ed. 2d 560,
99 S. Ct. 2781 (1979) 27, 28

McKinley's Case,
33 State Tr. 275 (1817) 28

United State v. Crosby,
75 F.3d 1343 (9th Cir. 1996) 34-36

United States v. Armstrong,
621 F.2d 951 (9th Cir. 1980) 34

Washington v. Texas,
388 U.S. 14, 87 S. Ct. 1920,
18 L. Ed. 2d 1019 (1967) 34

STATUTES AND OTHER AUTHORITIES

California Penal Code 12022.53(d) 9-11

California Penal Code § 12022.53(b) 9-11

Constitution, art. 1, § 3 . . . . . 14, 27

Constitution, art. 1, § 32 27

CrR 2.1(a)(1) 14

Nev. Rev. Stat. 200.030 6

RCW 9.94A.535(3)(b) 17

RCW 9.94A.535(3)(h) 18

RCW 9A.36.011 17

RCW 9A.36.120(1)(a) 17

RCW 9A.36.120(1)(b)(i) 17

RCW 9A.36.120(1)(b)(ii)(A) 4, 11, 17

TABLE OF AUTHORITIES (cont'd)

STATUTES AND OTHER AUTHORITIES (cont'd)

RCW 9A.36.120(1)(b)(ii)(B) 11-13, 17

United States Constitution, amend. 5 27

United States Constitution, amend. 6 . 5, 14, 33

United States Constitution, amend. 14 . 5, 14, 27, 33

Wigmore, Evidence in Trials at Common Law, (Tillers rev. 1983) 36

WPIC 35.50 24

A. STATEMENT OF CASE IN REPLY

1. Olga or Vadim?

This case involves a mother with no history of anger or violence, with a healthy and well-bonded three-year-old, with an immaculate home and loving husband, convicted of brutally and repeatedly attacking her infant daughter for no apparent reason, to cause multiple bone fractures. The State had no evidence she did these acts. It only had no other explanation for the injuries.

The police did not investigate Olga Shved's psychotic and violent brother, who had sporadic access to the infant and a motive to harm her. When the defense offered this evidence, the State sought to exclude it.

The State now relies on Vadim's own testimony at trial, Resp. Br. at 10-11, 47 -- although he clearly contradicted undisputed reality: he has no mental problem, he does not have schizophrenia, his doctors and therapists have not talked to him about problems with his head, his mother did not care for the baby. App. Br. at 28; RP 705-15.

2. Vadim's Violence

The offer of proof included: Vadim Dologan was committed to Eastern State Hospital for the

third time after assaulting someone in his group home. This commitment was a result of his violence. If he had not been violent, he could have been managed in the group home. Because of his violence, he could not return to the group home after he was released from the hospital. CP 60; App. Br. at 29-31.

The court did not merely limit evidence about Vadim to a relevant time period. It also excluded evidence of his violence during May and June, 2006, clearly the time within which the baby was hurt. RP 472-73, 492-95; App. Br. at 29-31.

Furthermore, since the court admitted the expert testimony of Dr. Mays, Vadim's history of violence was especially relevant to show how precisely his characteristics fit those at a high risk to abuse an infant. RP 670-76.

The prosecutor then argued to the jury that "Vadim was never physically violent." Occasionally angry, "but not violent." He repeated it in argument and in his PowerPoint slides. RP 859; CP 127, 140; App. Br. at 40.

3. Timing of Injuries

The State focuses on some of the doctors' testimony as to timing of the injuries. Resp. Br.

at 11-12. They expanded their testimony on this point considerably on cross-examination.[1] See App. Br. at 9 and n.5.

The State claims Ms. Shved told the detective the baby appeared fine and had no outward appearance of injuries. Resp. Br. at 4; RP 17. It notes Natalya Dologan also saw no injuries except a few scratches the baby caused herself. Resp. Br. at 7; RP 320. But Dr. Harper testified that even a doctor could not tell by looking at the child in an examination that these fractures existed. RP 73-74.

B. ARGUMENT IN REPLY

1. THE INSTRUCTIONS WERE CONSTITUTIONALLY ERRONEOUS FOR PERMITTING A VERDICT ON A CRIME OR ELEMENTS THAT WERE NOT CHARGED.

Appellant does not challenge the information as being erroneous or constitutionally insufficient to charge **any** crime. See Hagner v. United States, 285 U.S. 427, 430, 52 S. Ct. 417, 76 L. Ed. 861 (1932) ("the contention is that the indictment charges **no** offense" within the jurisdiction)

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[1] "[T]he greatest legal engine ever invented for the discovery of truth." Kentucky v. Stincer, 482 U.S. 730, 736, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987).

(emphasis added), cited with approval in State v. Kjorsvik, 117 Wn.2d 93, 104, 812 P.2d 86 (1991).

> If a charging document does not on its face state **an** offense, the document is unconstitutional and must be dismissed without prejudice to the State's right to recharge.

State v. Vangerpen, 125 Wn.2d 782, 791, 888 P.2d 1177 (1995) (emphasis added).[2] She agrees the information in this case charged her with assault of a child in the first degree under RCW 9A.36.120(1)(b)(ii)(A) and its elements.

Rather, she assigns error to the court instructing the jury on an additional crime that was not charged in the information.

> The State has the authority and responsibility for bringing charges against a person. In that regard, the State possesses wide discretion to choose the charges it wants to pursue, if any.
>
> Our cases have required the State to include in the charging documents the essential elements of the crime alleged. ... The essential elements rule requires a charging document allege facts supporting every element of the offense and identify the crime charged. ... "Elements" are the facts that the State must prove beyond a reasonable doubt to establish that the defendant committed

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[2] Accord: State v. Campbell, 125 Wn.2d 797, 888 P.2d 1185 (1995); Auburn v. Brooke, 119 Wn.2d 623, 836 P.2d 212 (1992); State v. Hopper, 118 Wn.2d 151, 155, 822 P.2d 775 (1992); State v. Grant, 104 Wn. App. 715, 718-19, 17 P.3d 674 (2001).

> the charged crime. ... The purpose of the essential elements rule is to provide defendants with notice of the crime charged and to allow defendants to prepare a defense.

State v. Recuenco, 163 Wn.2d 428, 433-34, 180 P.3d 1276 (2008) (citations omitted).

Stating the essential elements of the charge is required by the sixth and fourteenth amendments of the United States Constitution.

"Conviction upon a charge not made would be sheer denial of due process." De Jonge v. Oregon, 299 U.S. 353, 57 S. Ct. 255, 81 L. Ed. 278 (1937).

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. ... It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.

Cole v. Arkansas, 333 U.S. 196, 201, 68 S. Ct. 514, 92 L. Ed. 644 (1948); U.S. Const., amends. 6, 14. Under these constitutional provisions, the Ninth Circuit has reversed state convictions in habeas proceedings in cases analogous to this one.

a. Givens v. Housewright

Givens v. Housewright, 786 F.2d 1378, 1379 (9th Cir. 1986), presents a case stunningly similar to this one. The United States Court of Appeals reversed a state court conviction for murder because the trial court instructed the jury on murder by torture as an alternative means when the information did not charge murder by torture.

The state of Nevada charged Givens with first degree murder. The information stated that Givens,

> without authority of law and with malice aforethought, wilfully and feloniously killed VICKIE LYNN FRIERSON, a human being, by striking [her] about the head and body with his fists.

786 F.2d at 1380. It cited Nev. Rev. Stat. 200.030, which provided in relevant part:

> *Degrees of murder; penalties.*
> 1. Murder of the first degree is murder which is:
> (a) Perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing; ... .

At the close of evidence, the court instructed the jury on murder by torture as well as general willful, deliberate, and premeditated murder. Defense counsel timely objected to this instruction, a fact not present here. Nonetheless, the Ninth Circuit observed:

> The brief factual recitation in the information, while sufficient to provide notice of a charge of ordinary first-degree murder, does not suggest the special elements of murder by torture. ... Nor does the information's mere citation to a statutory section which defines the degrees of murder -- and identifies murder by torture as one type of first-degree murder -- provide adequate notice of the charge.

Givens, 786 F.2d at 1381.

> Because the error is of constitutional magnitude, we may affirm only if we find the error harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967).
>
> We cannot say that this error was harmless beyond a reasonable doubt. ... [T]he murder by torture instruction to the jury cannot be dismissed as tangential. On the contrary, the prosecutor relied heavily on the theory of murder by torture. In final argument, he described the instruction as "so important" that he reread it to the jury. He repeatedly emphasized the cruel nature of the crime ... .
>
> Nor can we say that the error made no difference on the ground that there is evidence from which the jury could have concluded beyond a reasonable doubt that Givens committed general willful, deliberate, premeditated murder. We do not know whether the jury did so or instead decided the case based upon murder by torture.

Id.

In Givens, as here, the State alleged the elements of one method of committing the charged crime, and did not allege the elements of another

method. In Givens, the State cited the statute that actually contained the "torture" element -- unlike here, where the State explicitly cited a different subsection. As here, the prosecutor relied heavily on the theory of torture in closing arguments. And, as here, the jury's verdict did not distinguish the elements on which it was based.

As in Givens, the United States Constitution requires reversal of this conviction.

b. Gautt v. Lewis

Lest this court conclude the absence of an objection is determinative, the Ninth Circuit reached the same result when trial counsel, as here, did not object in Gautt v. Lewis, 489 F.3d 993 (9th Cir. 2007), cert. denied, 552 U.S. 1245 (2008).

Mr. Gautt shot and killed Samantha Fields. He threatened her with a gun when he claimed it discharged accidentally. Under California law, the State charged Mr. Gautt with murder and possession of a firearm by a felon. It also charged sentencing enhancements:

> ... the crime of MURDER, in violation of PENAL CODE SECTION 187(a), a Felony, was committed by DARRELL ANTHONY GAUTT, who did unlawfully, and with

> malice aforethought murder SAMANTHA *FIELDS, a human being*. ...
>
> It is further alleged that in the commission and attempted commission of the above offense, the same defendant... personally used a firearm(s), to wit: HANDGUN, within the meaning of Penal Code sections 1203.06(a)(1) and 12022.5(a)(1) ....
>
> It is further alleged that said defendant... **personally used** a firearm, a handgun, within the meaning of Penal Code sections 12022.5(a)(1) and 12022.53(b).

Gautt, 489 F.3d at 1006 (court's emphasis). The information made no reference to section 12022.53(d).

Section 12022.53(b) adds ten years to a sentence upon proof that a person committed a specified felony and *personally used a firearm* in committing that felony. The firearm need not be operable or loaded. Section 12022.53(d) provides an enhancement of 25 years to life upon proof that the person committed one of the same specified felonies, and *intentionally and personally discharged a firearm and proximately caused great bodily injury* to any person other than an accomplice. Gautt, 489 F.3d at 998-99.

The trial court's jury instructions cited section 12022.53(b), but listed the elements unique to section 12022.53(d): personally discharged a firearm, proximately causing a death, and

intentionally firing it. Id. at 999-1000. "Neither party objected to this instruction." Id. at 999 n.5.

The verdict form reflected the jury's finding that the defendant

> personally discharged a firearm in the commission of the crime of MURDER that porximately [sic] caused the death of Samantha Fields, within the meaning of Penal Code Sections 12022.5(a)(1) and 12022.53(b).

Id. at 1000-01. The trial court imposed a sentence enhancement based on section 12022.53(d): 25 years to life. The Ninth Circuit granted habeas relief.

The Ninth Circuit compared the charge in the information to the elements in the jury instructions and verdict.

> So the information cited only section 12022.53(b), not section 12022.53(d), *and* recited section 12022.53(b)'s defining element -- that Gautt "personally used a firearm." It did not mention either section 12022.53(d) or that section's separate and distinct elements, not required for conviction under section 12022.53(b) -- namely, that Gautt "intentionally and personally discharged a firearm and proximately caused great bodily injury." Therefore, the information did not provide any notice whatsoever of the enhancement ultimately applied.
>
> This is not a situation, in other words, in which the numerical citation was incorrect but the verbal description of the crime corresponded to the crime of which the defendant was convicted. Nor

> is this a situation in which citation to one statute necessarily encompassed another lesser-included offense, thus sufficiently putting the defendant on notice of the need to defend against both statutes. ...
>
> Nor did any other language in the information sufficiently put Gautt on notice of a charge under section 12022.53(d). The information, for example, *contains no suggestion of* "proximate causation." Further, the words "personally used" do not subsume section 12022.53(d)'s "personal[] discharge[]" element, since Gautt could have "personally used" his handgun without ever firing it.

Gautt, 489 F.3d at 1006-07. The court further rejected an argument that "malice aforethought" gave notice of "intentionally and personally discharging." Id. at 1007.

> In sum, Gautt was charged with a violation of section 12022.53(b), carrying a ten-year enhancement, but convicted of a violation of section 12022.53(d), requiring proof of three additional elements and carrying a twenty-five-year-to-life enhancement. Gautt's constitutional right to be informed of the charges against him was violated by this stark discrepancy between the crime charged and the crime of conviction.

Id. at 1008.

Here, as in Gautt, the information cited only RCW 9A.36.120(1)(b)(ii)(A), not (b)(ii)(B), *and* it recited (b)(ii)(A)'s defining elements -- a previous pattern or practice of "assaulting the

child which has resulted in bodily harm that is greater than transient physical pain or minor temporary marks." The information did not mention either 9A.36.120(1)(b)(ii)(B)[3] or that section's "separate and distinct elements" not required for conviction under the charged section -- namely a previous pattern or practice "causing the child physical pain or agony that is equivalent to that produced by torture."

As in Gautt, "this is not a situation ... in which the numerical citation was incorrect but the verbal description of the crime corresponded to the crime of which the defendant was convicted."[4] Id., 489 F.3d at 1007. Nor is it a situation in which the defendant was convicted of a lesser included offense of that charged.

Nor was the charging document "internally inconsistent and contradictory on its face," alleging one crime's title and citation but another

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[3] Appellant will not dignify with a response the State's claim that by using a lower-case (a) instead of an upper-case (A) it did not charge under this subsection. Resp. Br. at 30-31.

[4] See, e.g., In re Benavidez, ___ Wn. App. ___ (No. 28443-3-III, 2/15/2011); Resp. Br. at 24.

crime's elements. Vangerpen, supra, 125 Wn.2d at 792.

Nor did any other language in the information sufficiently put Ms. Shved on notice of the charge under RCW 9A.36.120(1)(b)(ii)(B). It contains no suggestion of "agony" or "torture." The element of "bodily harm that is greater than transient physical pain or minor temporary marks" does not subsume (b)(ii)(B)'s "physical pain or agony that is equivalent to that produced by torture," since a person could have caused the former without achieving the latter.

This stark discrepancy between the crime charged and the crime presented to the jury and included in its verdict violated Ms. Shved's constitutional right to be informed of the charge against her.

c. The State's Arguments Do Not Prevail.

These federal cases refute the State's argument.

i. The error is manifest affecting a constitutional right.

As Givens and Gautt demonstrate, the court's erroneous instructions were manifest and affected a fundamental constitutional right: the due process

right to be tried and convicted only of the crime actually charged. U.S. Const., amends. 6, 14; Const., art. I, § 3.

The constitutional guarantee of due process prevails over court rules. Resp. Br. at 31 (citing CrR 2.1(a)(1)).

Both these federal cases are recent enough to calm the State's concerns that State v. Olds, 39 Wn.2d 258, 235 P.2d 165 (1951), is somehow out of date. Resp. Br. at 26-27; App. Br. at 42-45. See also State v. Nguyen, 165 Wn.2d 428, 434, 197 P.3d 673 (2008) (citing Olds with approval).

Nguyen also is helpful to this case. In Nguyen, the State charged the defendant with DUI. At a bench trial, the State urged the court to find Nguyen guilty of being in physical control as an "included" offense of DUI. The trial court did so.

> If, as Ms. Nguyen contends, physical control while under the influence is not an included offense of DUI, then she was unconstitutionally convicted of a crime. Under article I, section 22 of the Washington State Constitution, it is error to try and convict a defendant of a crime that is not charged. ... The error if it occurred, would constitute manifest error affecting a constitutional right, and due to the nature of this error the prejudice is clear.

Nguyen, 165 Wn.2d at 434 (citations omitted). The Supreme Court thus agreed the issue could be raised for the first time on appeal. It did not apply any "liberal construction" to the charge. It concluded that all the elements of being in physical control of a vehicle while intoxicated are legally included in the offense of DUI and affirmed the conviction.

ii. Even a liberal construction does not make "bodily harm greater than transient physical pain or minor temporary marks" the same as "physical pain or agony equivalent to that produced by torture."

A legally insufficient charging document that charges no crime is a different issue than being tried and convicted for a crime not charged. The State claims this Court should "liberally construe" the information to find a charge under the "torture" prong. Resp. Br. at 14 et seq. The courts reject a "liberal construction" when the challenge is to *what* was charged, not whether *anything* was charged.

> Curiously, the dissent erroneously analyzes the issues in this case by discussing the lack of objection to the information and the liberal standard applicable to postverdict challenges. ... As noted above, there is no error in the information at all; the State alleged that the defendant was armed with a deadly weapon where it could have alleged

> a firearm enhancement or not sought any enhancement at all. That was the choice of the State at the time it filed the information.

Recuenco, 163 Wn.2d at 436. Here too, the State alleged the crime under one prong of the statute when it could have alleged any of the other prongs as well or instead.

The State argues this Court can find the elements of "physical pain or agony equivalent to that produced by torture" contained in the language "bodily harm greater than transient physical pain or minor temporary marks." Resp. Br. at 23. But see State v. Peterson, 133 Wn.2d 885, 890-91, 948 P.2d 381 (1997) (assault 1° requiring "great bodily harm" does not include assault 2° element of "torture").

The normal use of language belies this argument. "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). If the language of one statutory prong subsumed the other, this Court would have to conclude the Legislature had specified the two different phrases with no

separate meaning -- rendering one of them meaningless or superfluous.

Givens clearly demonstrates that here, as there, the State knew how to charge the specific crime and sentencing enhancements it wished to charge. The State chose the language of and citation to RCW 9A.36.120(1)(b)(ii)(A). In doing so, it chose not to charge under the other prongs of the statute, omitting both the language and the citations for those alternatives: i.e., RCW 9A.36.120(1)(a) (committing assault 1° as defined in RCW 9A.36.011 against a child); RCW 9A.36.120(1)(b)(i) (recklessly inflicting great bodily harm);[5] and RCW 9A.36.120(1)(b)(ii)(B) (a previous pattern or practice causing the child physical pain or agony that is equivalent to that produced by torture).

Although the court did not instruct on them, CP 25-46, the prosecutor also alleged two aggravating factors: the defendant knew the victim was particularly vulnerable, citing RCW

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[5] Interestingly, the State charged this element alone in the original information. CP 94-95. The case was tried on the First Amended Information, which abandoned this theory, adopting instead 9A.36.120(1)(b)(ii)(A) and adding two aggravating factors. CP 79-80.

9.94A.535(3)(b); and RCW 9.94A.535(3)(h), the offense involved domestic violence and:

> (1) the offense was part of an ongoing pattern of psychological, physical, or sexual abuse or the victim manifested by multiple incidents over a prolonged period of time and/or (2) the offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

CP 79-80. These aggravating factors would never be "interpreted" to include "the offense occurred within sight or sound of the victim's or the offenders' minor children under the age of eighteen years," although the statute includes that option. RCW 9.94A.535(h)(ii). Nor can the crime charged here be interpreted to include the uncharged elements of that statute.

State v. Grant, 104 Wn. App. 715, 17 P.3d 674 (2001), does not rescue the constitutional error here. Resp. Br. at 20-22. In Grant, the State charged the defendant with "DRIVING WHILE INTOXICATED," citing only the general statute of former RCW 46.61.502. Although that statute had three subparagraphs defining alternative means of committing the crime, the citation did not specify either a subparagraph or the elements of any of the three alternatives. Grant, 104 Wn. App. at 716.

The trial court instructed on two of the prongs. The defense took exception.

The Court of Appeals concluded the general charge was sufficient to put the defendant on notice of all the methods of committing the offense. It held the State was not required to elect between alternative means of committing a crime in a charging document. Grant, 104 Wn. App. at 720.

It is not clear how Grant would hold up against the Ninth Circuit cases cited above. In any event, it is distinguishable. The State in Grant charged a general crime both by citation and general elements, without specifying a method of committing it. See also Nguyen, supra (holding DUI also included the charge of physical control).

Here, in contrast, the State clearly specified both the citation and elements of a specific method of committing assault of a child in the first degree. Having done so, it did not charge any other methods of committing the same crime. It made a choice. It cannot now claim it charged something else as well.

iii. The error was not harmless beyond a reasonable doubt.

This constitutional error requires reversal unless the State can show it was harmless beyond a reasonable doubt. Givens, supra.

The State argues any error is harmless because the defense theory was that someone else hurt the child. But,

> it is error to try and convict a defendant of a crime that is not charged. ... The error, if it occurred, would constitute manifest error affecting a constitutional right, and due to the nature of this error the prejudice is clear.

Nguyen, 165 Wn.2d at 434.

Even if the court applies the analysis for a charging document that charges **no** crime, it cannot reach the question of prejudice unless there is some language in the document, however inartful, relating to the necessary elements. State v. McCarty, 140 Wn.2d 420, 426, 998 P.2d 296 (2000) (reversing conviction for insufficient charge although challenged for first time on appeal).

The defendant's plea of not guilty put in issue "every element of the crime charged." The State retained the burden of proving every element of "the" crime beyond a reasonable doubt. CP 30.

The jury was not restricted to one theory of defense. The court also instructed on the lesser included offense of assault in the fourth degree.[6] CP 42-44. The State did not take exception to these instructions. RP 831. See also State v. Fernandez-Medina, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000) (in trial for assault 1, where defense argued alibi, still reversible error not to instruct on assault 2). Thus the jury had to consider the specific elements of the charge.

iv. The prosecutor emphasized the element of torture for the jury in argument and PowerPoint.

The State claims there was no prejudice because the prosecutor made only a single reference to "torture." Resp. Br. at 28. While he may have said the word only once, he also projected it more than once for the jury in his PowerPoint presentation to reinforce his argument. CP 129-30, 136. App. Br. at 40-41.

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[6] Defense counsel specifically did not propose instructions on assault of a child in the second degree and third degree only because he believed they were not permitted under State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978), given the crime charged in this case. RP 828-30.

v. The jury inquiry demonstrates prejudice.

The jury inquired specifically about the charged elements and the uncharged elements, asking whether all twelve had to agree to one prong or the other. CP 22; App. Br. at 46-47. The court instructed they did not. As in Givens, supra, the verdict did not specify whether the jury was unanimous on one or the other element. As in Givens, this conviction must be reversed.[7]

When jury instructions incorporate an invalid legal basis, the resulting verdict must be reversed:

> When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error.

Griffin v. United States, 502 U.S. 46, 59, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991). Here the jury was intelligent enough to ask. The court's instructions permitted the error.

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[7] Thus this case is different from State v. Nicholas, 55 Wn. App. 261, 272-73, 776 P.2d 1385 (1989) (Resp. Br. at 19-20), where the court found the jury's special verdict that the defendant was armed with a deadly weapon at the time of the crime demonstrated a unanimous verdict on the charged element of robbery 1°, and so the conviction did not rest on the uncharged element erroneously included in the instructions.

2. THE INSTRUCTIONS FAILED TO INCLUDE IN THE DEFINITION OF ASSAULT THE ESSENTIAL ELEMENT OF SPECIFIC INTENT TO HARM OR INTENT TO CAUSE FEAR OF BEING HARMED.

The State accurately describes the three ways of committing assault:

> At common law, an assault could be committed in three ways: (1) an attempt, with unlawful force, to inflict bodily injury upon another [attempted battery]; (2) an unlawful touching **with criminal intent** [battery]; and (3) intentionally putting another in reasonable apprehension of harm whether or not the actor intends to inflict or is incapable [of] inflicting that harm.

Resp. Br. at 37.

The State agrees State v. Byrd, 125 Wn.2d 77, 887 P.2d 396 (1995), and State v. Eastmond, 129 Wn.2d 497, 919 P.2d 577 (1996), required something more specific than an intentional assault. Resp. Br. at 37-38. Both cases required the intent to inflict bodily injury or the intent to cause apprehension and fear of bodily injury.

The State agrees this case required proof of an "unlawful touching with criminal intent." It disagrees that the "criminal intent" required is the same intent required in Byrd and Eastmond.

Contrary to the State's assertion, appellant cited significant authority, not merely "suggesting," but holding that the common law

definition of assault requires this specific criminal intent. Resp. Br. at 38. See Brief of Appellant at 48-55.

a. The WPICs Do Not Prevail Over Appellate Court Opinions.

The State claims the WPIC 35.50 and its comment demonstrate that the pattern instruction used in this case is correct as amended since the decisions in Byrd and Eastmond. Resp. Br. at 38.

The WPICs are neither conclusive holdings on the law, nor "mandatory" on trial courts.[8] They specifically failed to address the "criminal intent" required for assault by battery.

In Byrd, the former pattern instruction "unconstitutionally relieved the State of its

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[8] State v. Castle, 86 Wn. App. 48, 935 P.2d 656, review denied, 133 Wn.2d 1014 (1997), shows how the Washington Pattern Jury Instructions may be modified or improved.

> Judge Patricia Aitken, a very able and respected trial judge who has for many years chaired the Washington Pattern Jury Instruction Committee, indicated she has "long been dissatisfied" with the usual pattern instructions on reasonable doubt. She gave instead an instruction nearly identical to one proposed by the Federal Judicial Center.

Id. at 51. The Court of Appeals approved the instruction used and affirmed the conviction. A concurring judge concluded the instruction used was preferable to the pattern instruction. Id. at 62-63 (Agid, J., concurring).

burden of proving" an element of the crime. Id., 125 Wn.2d at 708. Neither Byrd nor Eastmond involved the "consummation of an assault," as this case does. Byrd, 125 Wn.2d at 712 n.3; Eastmond, 129 Wn.2d at 500. Yet both held the common law required the same "criminal intent" for assault.

The Supreme Court rejected the same arguments the State raises here. See Eastmond, 129 Wn.2d at 502 (manifest constitutional error; instructions as a whole did not cure the deficiency).

> Contrary to the State's assertions, Instruction 6, requiring a finding "the defendant intentionally assaulted," and Instruction 8, defining "intent," afford no further indication of the essential specific intent element.

Id.; Byrd, 125 Wn.2d at 714-15; App. Br. at 50.

Instructions on an undefined "unlawful force," and "intent" meaning intending "a result that constitutes a crime," lead jurors in a circle. If injury or pain results from an intentional touching, is it a "crime"? Does that result then make the intent "criminal"? And if the touching results in a crime, isn't the force used "unlawful"?

The State offers no explanation why, if the civil tort of battery requires this element of

specific intent, the crime of assault involving battery should not require at least the same mens rea. See App. Br. at 52-53 and cases cited there.

b. The State Proposed the Erroneous Instructions. This Was Not Invited Error.

Nor was this error invited. The State proposed instructions Nos. 6, 7, and 8. See Supplement Clerk's Papers (Subno. 221; Plaintiff's Proposed Instructions 6, 7, and 8). This record does not reflect that defense counsel requested any of these instructions to which appellant takes exception.[9] The defense did propose the court's instructions 12 and 13. RP 828-30. She does not challenge those instructions on this appeal.

For the same reasons the instructions in Byrd and Eastmond were constitutional error, the instructions here failed. They require reversal of the conviction.

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[9] The State's citation to the record to support its claim, RP 871-72, refers to the prosecutor's closing argument. Resp. Br. at 40.

3. WHEN CONSIDERED AGAINST THE PRESUMPTION OF INNOCENCE, THE EVIDENCE IN THIS CASE WAS CONSTITUTIONALLY INSUFFICIENT TO SUPPORT THE CONVICTIONS.

a. The Standard of Review for Sufficiency of the Evidence Must Encompass the Presumption of Innocence.

> *A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.*[10]

Due process[11] requires the appellate court to review whether the evidence presented at trial was constitutionally sufficient to support a conviction. The test is frequently stated as:

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). This review is

> necessary to protect the constitutional standard of reasonable doubt. ... [A] lesser standard would fail 'to supply a

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10 Constitution, art. 1, § 32.

11 U.S. Const., amends. 5, 14; Const., art. 1, § 3.

> workable or even a predictable standard for determining whether the due process command of Winship has been honored.'

Green, 94 Wn.2d at 221; quoting Jackson v. Virginia, 443 U.S. at 320.

This mantra's incantation, however, omits the essential starting point for the analysis: the presumption of innocence.

> The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.

Coffin v. United States, 156 U.S. 432, 453, 39 L. Ed. 481, 15 S. Ct. 394 (1895).

> [T]his presumption is to be found in every code of law which has reason and religion and humanity for a foundation. It is a maxim which ought to be inscribed in indelible characters in the heart of every judge and juryman ... . To overturn this, there must be legal evidence of guilt, carrying home a degree of conviction short only of absolute certainty.

Id. at 456, quoting McKinley's Case, 33 State Tr. 275, 506 (1817).

In Coffin, the trial court instructed the jury the burden of proof was beyond a reasonable doubt. But it declined to instruct on the presumption of innocence. The United States Supreme Court concluded the presumption of innocence is a concept

separate and distinct from proof beyond a reasonable doubt. It is, in fact, evidence provided by the law in favor of the defense.

> Now, the presumption of innocence is a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted, unless he is proven to be guilty. ...
>
> ...
>
> The fact that the presumption of innocence is recognized as a presumption of law, and is characterized by the civilians as a presumptio juris, demonstrates that it is evidence in favor of the accused. For, in all systems of law, legal presumptions are treated as evidence giving rise to resulting proof, to the full extent of their legal efficacy.
>
> Concluding, then, that **the presumption of innocence is evidence in favor of the accused, introduced by the law in his behalf**, let us consider what is 'reasonable doubt.' It is, of necessity, the condition of mind produced by the proof resulting from the evidence in the cause. It is the result of the proof, not the proof itself, whereas **the presumption of innocence is one of the instruments of proof, going to bring about the proof from which reasonable doubt arises**; thus one is a cause, the other an effect. To say that the one is the equivalent of the other is therefore to say that legal evidence can be excluded from the jury, and that such exclusion may be cured by instructing them correctly in regard to the method by which they are required to reach their conclusion upon the proof actually before them; in other words, that the exclusion of an important element of proof can be justified by correctly instructing as to the proof admitted.

Coffin, at 460 (emphases added).

The appellate court must review the sufficiency of the evidence in order to protect the constitutional due process guarantees of **both** the presumption of innocence and proof beyond a reasonable doubt. The standard of review, therefore, also must encompass the evidence for the defense that is inherent in the presumption of innocence.

b. The State's Evidence Was Insufficient to Overcome the Presumption of Innocence.

The State relies on Natalya Dologan's testimony that her psychotic son, Vadim Dologan, had very little access to the baby. She agreed she did not "leave" the baby in "his care;" she did not "give him" an opportunity to harm the baby. Resp. Br. at 46. Nonetheless, she testified there were several occasions when she stepped away from the baby, and returned to find the baby crying and Vadim leaving. RP 291-93, 296-98, 317-19, 326-333, 488-95. See App. Br. at 26-28.

Just like the doctors and Olga, Natalya detected no significant injury to this infant.[12] See App. Br. at 4-11.

The State claims the family's "stories changed" over time. It is true, initially this family had no reason to believe any of them had hurt the baby. Olga and Boris took her for regular well-baby check-ups. Three weeks before Olga called an ambulance, the doctor said the child was fine, including her musculo-skeletal condition. She was not fussy, there was no sign of pain. RP 626-32; App. Br. at 6-7.

Certainly Olga believed the baby was safe with her mother, Natalya; that she would prevent Vadim from hurting the baby. And so she honestly had no reason to believe Vadim had hurt the baby when the authorities began questioning her.

The "changing" stories thus demonstrate a greater consideration of possibilities, not

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[12] Dr. Harper testified babies don't always appear fussy even if they are in pain from broken bones. Even a doctor could not tell by looking at the child in an examination that these fractures existed. RP 72-74. One nurse attending the child said she had been calm throughout the evening in the emergency room, not really crying. RP 418. Another said she calmed when Olga held or fed her, RP 515.

deception. These are the natural changes that come with repeated questions and expanded investigation.

4. IT WAS CONSTITUTIONAL ERROR TO EXCLUDE EVIDENCE OF THE OTHER SUSPECT'S MOTIVE AND IDENTITY.

a. Evidence of a Third Party Perpetrator

The entire prosecution was based on the theory that no one else could have hurt this child. It focused on Ms. Shved only after a process of elimination, not because of any direct evidence implicating her. The police failed to investigate Vadim or Natalya's access to the child. When the defense sought to present the evidence the police had not obtained, the State sought to exclude it.

Yet the State fails to address the cases on the admissibility of evidence of another suspect. Resp. Br. at 48-53. See App. Br. at 61-71.

The State cites State v. Wilmoth, 31 Wn. App. 820, 644 P.2d 1211 (1982), to support its argument that the court had the discretion to exclude evidence. Resp. Br. at 48-49, 53. In Wilmoth, the defendant was charged with first degree rape; he claimed consent. The court excluded evidence that the 18-year-old complaining witness had consented

to having sex with others. Wilmoth is not relevant to this case.

The State's reliance on State v. Heib, 39 Wn. App. 273, 639 P.2d 145 (1984), *reversed on other grounds*, 197 Wn.2d 97, 727 P.2d 239 (1986), is even more curious. It also was not a case involving an "other suspect." Only one member of the Court of Appeals supported the statements in the lead opinion. Id., at 284 (Callow, J., concurring in result only; Williams, J., dissenting). And it ultimately reversed the conviction for violation of the right of confrontation.

Similarly, State v. Sargent, 40 Wn. App. 340, 698 P.2d 598 (1985), and State v. Bowen, 48 Wn. App. 187, 738 P.2d 316 (1987), did not involve evidence of another suspect. Rather they involved evidence of the defendant's own prior bad acts, which required balancing under ER 403.

Evidence that someone else committed the crime presents a distinct constitutional right to present a defense and to call witnesses within the right to due process.

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees

> criminal defendants "a meaningful opportunity to present a complete defense." ... This right is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'"

Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006).

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004); Washington v. Texas, 388 U.S. 14, 17-19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

> Fundamental standards of relevancy, subject to the discretion of the court to exclude cumulative evidence and to insure orderly presentation of a case, require the admission of testimony which tends to prove that a person other than the defendant committed the crime that is charged.

United State v. Crosby, 75 F.3d 1343, 1347 (9th Cir. 1996); United States v. Armstrong, 621 F.2d 951, 953 (9th Cir. 1980); Chambers v. Mississippi,

410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

The Holmes Court held that where the defense did not concede the credibility or reliability of the state's evidence, the defense was entitled to present evidence that the other suspect was in the neighborhood the morning of the crime and had made inculpatory statements. This was the holding, although the other suspect denied making the statements and provided an alibi. Holmes, 547 U.S. at 330. "Nor has the State identified any other legitimate end that the [state evidentiary] rule serves." Id. at 331.

In United States v. Crosby, supra, the defendant was charged with assaulting his girlfriend. Her memory of the event was not reliable. The defense sought to admit evidence that her husband, Hoskie, had assaulted her before, had beaten Crosby recently, and was in the general area the night she was beaten. The court reversed the conviction for excluding this evidence. "The Hoskie evidence was also significant because there was so little direct evidence of what actually happened." Id. at 1347.

> The central question here was "Who beat Dorothy?" Because the government did not contend that Crosby and Hoskie acted in concert, inculpating Hoskie would have tended to exculpate Crosby. The excluded evidence could thus have caused the jury to develop a reasonable doubt by suggesting that someone other than the defendant was in a position to have beaten Dorothy, that a competent investigation might have identified that person, and that Dorothy was lying when she pointed the finger at Crosby. In such circumstances we are guided by the words of Wigmore:
>
> > If the evidence [that someone else committed the crime] is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt.

Crosby, 75 F.3d at 1349, citing 1A John Henry Wigmore, Evidence in Trials at Common Law § 139 (Tillers rev. 1983).

As in these cases, the central question at trial was, "Who hurt the baby?" As in Crosby, the State did not suggest Olga and Vadim acted in concert. As in Holmes, the defense did not concede the credibility or reliability of the state's evidence, but challenged it as misconstrued and misunderstood. As in both cases, Vadim's prior violence against his mother, Olga, and other females, could have led the jury to believe Vadim

acted violently, contrary to the State's closing argument, and to doubt that Olga hurt her baby daughter.

b. Evidence of Motive

The court admitted evidence that Olga had no violence in her background as relevant. It was equally relevant that Vadim had a history of violence and hostility toward females. The jury was entitled "to compare the motives of two *known* potential suspects." State v. Suttle, 61 Wn. App. 703, 711-12 & n.9, 812 P.2d 119 (1991) (court's emphasis); App. Br. at 71. It was constitutional error to exclude it.

> [M]otive goes beyond gain and can demonstrate an impulse, desire, or any other moving power which causes an individual to act. ...[T]his court defined motive as: Cause or reason that moves the will ... An inducement, or that which leads or tempts the mind to indulge a criminal act. ... the moving power which impels to action for a definite result ... that which incites or stimulates a person to do an act. ... The sixth edition of Black's reads substantially the same, distinguishing between motive and intent: "Motive" is said to be the moving course, the impulse, the desire that induces criminal action on part of the accused; it is distinguished from "intent" which is the purpose or design with which the act is done, the purpose to make the means adopted effective.

State v. Powell, 126 Wn.2d 244, 260, 893 P.2d 615 (1995).

The Constitution may offer protections to a criminal defendant that restrict what evidence the State can offer. In contrast, the Constitution guarantees an accused the right to present a defense. This guarantee required the court to admit the evidence against Vadim in this case, even if the State would not be able to admit it against Vadim when prosecuting him. Resp. Br. at 52.

Vadim was prosecuted and convicted of a crime for assaulting Olga. RP 311-12, 335-36. Contrary to the State's argument, Vadim's family made efforts to have him hospitalized after he was released from Eastern State Hospital. RP 329; App. Br. at 26. His resentment for their efforts was a motive to harm the child most precious to them.

5. THERE WAS NO EFFECTIVE WAIVER OF MIRANDA RIGHTS.

The State urges this Court to affirm based on rejecting the trial court's finding that Ms. Shved was in custody when Detective Lee questioned her. Resp. Br. at 66; VRP 106. Yet it argues the judge at a CrR 3.5 hearing acts as a trier of fact, who is free to accept or reject any testimony

presented, or to decide what weight, if any, to give it. Resp. Br. at 71.

The trial court, as the trier of fact, found that Ms. Shved was in custody and not free to leave when Detective Lee questioned her. In doing so, it likely accepted Ms. Shved's and the interpreter's testimony and rejected the Detective's testimony.

Although this Court can affirm on any legal basis, it is not free to change the trier of fact's resolution of conflicting evidence. It should decline the State's suggestion.

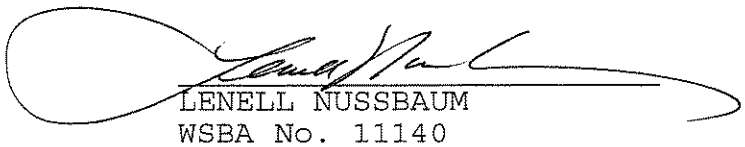
In addition to the authority cited in Brief of Appellant at 75-82, appellant notes State v. Hickman, 157 Wn. App. 767, 238 P.3d 1240 (2010), reversing a conviction for giving Miranda warnings only after eliciting incriminating evidence.

6. REMAINING ISSUES

For any issues not specifically address in this Brief, appellant respectfully relies on the Brief of Appellant and authorities there cited.

DATED this 23d day of March, 2011.

Respectfully submitted,



LENELL NUSSBAUM
WSBA No. 11140
Attorney for Olga Shved