

FILED

FEB 18 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 28668-1-III

STATE OF WASHINGTON

COURT OF APPEALS - DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

OLGA V. SHVED,

Appellant.

**APPEAL FROM THE SUPERIOR COURT FOR
FRANKLIN COUNTY**

BRIEF OF RESPONDENT

**SHAWN P. SANT
Prosecuting Attorney**

**by: Frank W. Jenny, #11591
Deputy Prosecuting Attorney**

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Pasco, WA 99301
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B. RESPONSE TO STATEMENT OF THE CASE

Olga V. Shved (hereinafter defendant) was found guilty by jury verdict on November 17, 2009, of Assault of a Child in the First Degree, committed between February 4, 2006 and June 16, 2006. (CP 5). Judgment and Sentence was entered on December 8, 2009. (CP 5-20). Defendant now appeals. (CP 3-4).

Defendant's summary of the testimony presented at the trial is substantially correct as far as it goes. However, the State would make the following additions, corrections, and amplifications.

Detective Chris Lee responded to Kadlec Hospital on the night of June 16, 2006, at the request of hospital personnel as a result of unexplained injuries to an infant child, Ella Shved. (RP 10-11). Injuries to the child included several skull fractures, a contusion, broken arms, broken leg, four broken ribs, scrapes on the back of the throat, and scratches from the top of the head to the bottom of the feet. (RP 10-11). It was necessary to transfer the child to Sacred Heart in Spokane for further treatment. (RP 11).

Detective Lee spoke to defendant, the child's mother, with the assistance of an interpreter. (RP 14). Defendant showed very

little emotion when told of the nature of the injuries. (RP 14). Defendant initially denied any knowledge of any injuries but then went through a series of explanations as to how the injuries could have occurred. She initially said she was giving the child a bath in an infant tub inside an adult tub; the child slipped from her grasp when being lifted out of the tub and fell into the adult tub. (RP 15). Over time, her story changed from having dropped the child from a standing position to dropping her from two to three feet off the ground. (RP 15). Defendant described two different bathtub incidents where the child was dropped; in the first incident, the child landed on her back and side. (RP 15-16). Defendant's version of the time of the incidents varied greatly during the interview. (RP 19).

Defendant initially denied any knowledge of the child having a broken arm or leg. (RP 16). She later suggested when giving the child a bath, she may have pulled her arms and dropped her on her legs. (RP 15). When asked why she did not take the child to the hospital at that time, defendant replied that the child appeared fine and did not have any outward appearance of injuries. (RP 17).

Defendant said there were two separate occasions when the child hit her cheek within a stroller, causing bruising. (RP 18). The last incident was about a month prior to June 16, 2006. (RP 18).

Defendant claimed the child had inflicted the scratches on herself. (RP 19). Defendant said she would commonly pick off the child's scabs in the belief it would make the injuries heal faster. (RP 20). Defendant had clipped the child's nails two weeks prior to the interview. (RP 20).

Defendant explained the incident causing the child to be brought to the hospital by saying she was feeding the child with a dropper; she forced the dropper to the back of her throat and released the water, causing the child to gasp and choke. (RP 21).

Defendant had earlier told Officer Raul Cavazos that her husband worked and she was the one who took care of the children. (RP 112). Defendant said she was the child's primary caregiver. (RP 22). She bathes and cleans the child and changes her diapers; she receives no help with that. (RP 22). The child's father only rarely handled the child at night. (RP 22). Defendant specifically denied the father could have caused the injuries, as he has very little interaction with the child. (RP 23). Defendant's mother (the child's grandmother) had babysat the child for an

estimated total of four hours during the child's four-month life. (RP 22).

Mecheslav Piskorskiy is defendant's father. (RP 179). In addition to his daughter, the defendant, he has two sons: Vadim, age 21 at the time of trial, and Alexander, then age 10. (RP 180). Their house has four bedrooms and Vadim has his own room. (RP 180). Their house did not have a crib for the baby. (RP 181). He only saw Ella Shved a few times: when she was born and a couple of times when they visited. (RP 182). Ella was occasionally left at their home when defendant provided care for her husband's parents. (RP 182). He was at work when that happened. (RP 182). He had never held Ella. (RP 183).

Defendant's mother, Natalya Dologan, testified that Ella was born on February 4, 2006. (RP 286). She would sometimes have Ella in her home when defendant worked as a caregiver for her mother-in-law. (RP 290). Her son, who had been hospitalized with schizophrenia, returned home on May 3, 2006. (RP 291). She said she continued to babysit Ella. (RP 292). The only times she would leave Ella alone were when she took out the trash, cleaned the porch, or did the laundry on the second floor. (RP 292). The longest time she ever left Ella alone was five minutes, when she did

laundry; at other times, two to three minutes. (RP 293). There was no crib in the house, so Ella slept in her arms or in a car seat. (RP 293-94). She could not roll over or crawl around. (RP 294). Vadim would only be alone in the house with Ella when she did a “quick back and forth” and was never left to babysit Ella. (RP 295). There were only five or six times when Vadim was alone in the house with Ella. (RP 297). She never saw Vadim touch Ella. (RP 297). Whenever she was away from the immediate presence of Ella, she was always within ear shot and could hear if she cried. (RP 295-96). She did not see any injuries to Ella other than a few scratches that she did to herself. (RP 320). When Ella cried, she would stop crying as soon as she picked her up and held her. (RP 318). She was aware that defendant put make-up on Ella’s face to “dry bruises.” (RP 334). On questioning from the prosecutor, the following exchange occurred:

Q: You testified that Vadim was aggressive. And you testified that Vadim was dangerous. Is that right?

A: Yes.

Q: Why did you leave him alone with the baby?

A: It was for a short time. It was not for a long time.

(RP 335). She was later recalled, at which time she testified:

Q: You testified today that it was unsafe to leave baby Ella with Vadim; is that correct?

A: Yes.

Q: When you were here before, you said you weren't concerned about it.

A: What I said, I just stepped out for two to three minutes. But I still was concerned.

(RP 494). In an earlier meeting with social worker Misty Ross, both Mr. and Mrs. Dologan were adamant that Vadim was never left alone with the baby. (RP 340).

Vadim was not released from the mental hospital until May 3, 2006. (RP 311, 471). He was also in custody for probation violations from May 26 to June 6, 2006. (RP 311, 324-25). As previously noted, Ella was taken to Sacred Heart on June 16, 2006. (RP 10-11).

Boris Shved was called as a witness and testified as follows:

Q: Mr. Shved, on June 16th Ella had two skull fractures on either side of her skull. Do you know what caused that?

A: No.

Q: Both of her arms were broken. Do you know what caused that?

A: No.

Q: Both of her legs were broken. Do you know what caused that?

A: I know everything that happened to her. And, no, I don't.

(RP 349). Asked if he knew anyone who could have done this to her, he replied "Vadim" (RP 349). He also testified that the only person besides him and defendant who ever babysat the child was defendant's mother, Natalya Dologan. (RP 349). He admitted testifying during a dependency proceeding that defendant's parents took care of Ella for only a few hours on two days. (RP 350). He figured four hours was the total time that Ella was cared for at the home of defendant's parents. (RP 351). Defendant wakes the children, feeds them breakfast, dresses them, cleans them, and puts them to sleep at night. (RP 355). He never babysat Ella by himself, was never alone with her, and never hurt her. (RP 368).

Mental Health Professional Samuel Geyer began seeing Vadim Dologan following his release from Eastern State Hospital in May of 2006. (RP 543). He was discharged from Eastern State because he was stable enough to not require confinement there. (RP 546). At the time, he was on prescribed medications designed to calm him down and keep him from being violent. (RP 548-49).

Dr. Daniel Joseph Lord-Flynn, licensed psychologist at Eastern State Hospital, examined defendant at her attorney's office in August of 2007. (RP 577). When interviewed regarding who could have possibly injured her daughter, Ella, she stated she did not believe her husband would have possibly harmed her daughter. (RP 595). She reported also there were only a very few occasions when members of her immediate family had provided even temporary care of the children. (RP 595). Of all those relatives, she described concerns only that her older brother had "temper problems"; she stated that her brother has been taking his medication and is fine. (RP 595-96). Finally, she stated she did not believe her brother would have had an opportunity to harm her children, and even if he did have a brief opportunity she did not believe he would have harmed Ella. (RP 596).

Vadim Dologan testified he gets along well with his sister, the defendant. (RP 707). He also got along fine with her daughter, Ella. (RP 707). He testified he never did anything to harm Ella. (RP 713). When he got out of Eastern State Hospital in 2006, he was taking his pills and felt fine. (RP 715-16). When he was in jail in May of that year, his mother brought him his pills both in the morning and the evening and he took them at that time. (RP 716).

Jail records confirmed he was given his medication. (RP 808) In the case of inmates with psychiatric diseases, the jail protocol requires that the medication be swallowed in the presence of jail personal and that the inmate's mouth be checked to make certain it was swallowed. (RP 808-09).

The emergency room physician, Dr. Jerry McLaughlin, indicated that the two skull fractures and the brain hemorrhages on Ella Shved were from hours old to a day old. (RP 49). The rest of the injuries were approximately two weeks old. (RP 49). The arm fractures were consistent with being caused by a pulling motion. (RP 50).

Nurse Polly Bothum King testified that Ella had a high pain score, which would be expected with any infant that comes in with broken bones. (RP 414). Ella remained at Kadlec Medical Center that night until they could get the medical helicopter to fly her to Spokane. (RP 419).

Ella Shved was examined by Dr. Deborah Harper at Sacred Heart Medical Center in Spokane in June of 2006. (RP 57). The child, who was born about two months prematurely, was four months old at the time. (RP 57). Her size was consistent with what

would be expected for a four-month-old who was born prematurely. (RP 97).

Dr. Harper testified that an infant could not get a skull fracture on both sides on its head and subdual hematomas (as Ella did) from a short fall into a bathtub. (RP 61). The injuries were not caused by a single impact, as they were on both sides of the head and different parts of the head. (RP 76). Her skull injuries required some impact and more than just shaking. (RP 60). Looking at the subdural hematomas on the CT-Scan, they were hours to days old. (RP 63). The injuries could not have been caused at childbirth, as they were not four months old. (RP 74). Some of the fractures were described as "mature", which is certainly more than ten days and usually considered more than a month or two old. (RP 82). The fractures, other than the skull fractures, were in the ballpark of two to six and possibly eight weeks old. (RP 84). Dr. Harper had no reason to believe the injuries were more likely caused by a man than a woman. (RP 98).

Dr. Harper opined that the injuries were caused by non-accidental trauma. (RP 76). Defendant made no objection to this opinion being expressed. (RP 76).

Social workers interviewed defendant and her husband, Boris. (RP 205). Boris stated defendant had dropped Ella once while she was bathing her and indicated it was about a foot from the floor. (RP 205). Defendant corrected him and made a gesture that it was about three feet off the floor. (RP 205). Defendant was later confronted with medical information that the skull fractures were on either side of the head and in different stages of healing. Defendant then changed her story to say maybe she dropped the child twice. (RP 211). Defendant and Boris seemed almost obsessed with their male child and expressed little interest in Ella, who at the time was in Sacred Heart with horrific injuries. (RP 205). During the time that social worker Misty Ross worked with defendant, she offered up several different theories about how the injuries happened to Ella:

One being that it happened - the injuries happened when she had surgery when she was pregnant with Ella. The other being that the injuries happened when Ella was born. The other being that the doctors, when Ella was taken by ambulance to the hospital, she said the doctors must have broken her bones then. And another one was that we were just lying, that there were no injuries and the Government was paying doctors to lie for us.

(RP 207). Both Boris and defendant stated that defendant was the primary caregiver for the children. (RP 210). Boris stated at first

that he had held Ella maybe five or six times. (RP 210). Defendant initially stated that Ella had been at her parents' home maybe four hours in her life. (RP 210).

Dr. Jerry McLaughlin, who saw Ella in the emergency room, testified without objection:

The description that Olga Shved gave me of how she was bathing the child, when I asked her about that, was that she was being bathed in the sink and that her head slipped and fell back on the sink. Those injuries cannot be consistent with that.

(RP 241). Ella also had newer injuries as well. (RP 241-42). Defendant was not able to provide any explanation for the injuries other than falling in the bathtub. (RP 247). Emergency room personnel noted make-up on Ella's face concealing the bruises. (RP 247). Dr. McLaughlin opined that the injuries to Ella were non-accidental. (RP 249-50). Defendant made no objection to this testimony. (RP 249-50).

Other facts will be developed from the record as they relate to individual issues.

C. RESPONSE TO ARGUMENT

- 1. WHEN LIBERALLY CONSTRUED, THE CHARGING DOCUMENT ALLEGES SUFFICIENT FACTS TO SUPPORT ALL ALTERNATIVES ON WHICH THE JURY WAS INSTRUCTED. EVEN IF IT DID NOT, ANY**

ERROR WAS HARMLESS AS DEFENDANT NEVER DISPUTED THAT THE CRIME WAS COMMITTED. WHILE THE STATUTORY CITATION IN THE INFORMATION IS INCORRECT, IT DID NOT CAUSE ANY PREJUDICE TO DEFENDANT.

Defendant took no exception to the jury instructions given by the court. (RP 831). Nonetheless, defendant argues for the first time on appeal that Instructions Numbered 6 and 7 introduced an “uncharged alternative means of committing the crime”, to-wit: that the victim suffered physical pain or agony equivalent to that produced by torture.

Case law has addressed the meaning of pain or agony that is the equivalent of that produced by torture. In State v. Brown, 60 Wn. App. 60, 802 P.2d 803 (1990) (disapproved of on other ground by State v. Grewe, 117 Wn.2d 211, 813 P.2d 1238 (1991) and State v. Chadderton, 119 Wn.2d 390, 832 P.2d 481 (1992)), the court found the term “torture” was one of common understanding. Id. at 66. While such terms do not require further definition, the court expressed approval of the trial court’s jury instruction which defined torture as “the infliction of severe or intense pain as punishment or coercion, or for sheer cruelty.” Id. at 65-66. In State v. Madarash, 116 Wn. App. 500, 514, 66 P.3d 682 (2003), involving

homicide by abuse, the court discussed with approval the definition of the word “torture” in *Webster’s Third International Dictionary* (1969) as “to cause intense suffering, inflict anguish on; subject to severe pain.” See also Comment to WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL (WPIC) 35.18, 11 WASHINGTON PRACTICE at 480-81 (3rd ed. 2008).

Instruction Numbered 6 stated:

A person commits the crime of assault of a child in the first degree if the person is eighteen years of age or older and the child is under the age of thirteen and the person: causes substantial bodily harm, and the person has previously engaged in a pattern or practice of either assaulting the child which has resulted in bodily harm that is greater than transient physical pain or minor temporary marks, or causes the child physical pain or agony that is equivalent to that produced by torture.

(CP 33). Instruction Numbered 7, the “to convict” elements instruction, stated:

To convict the defendant of the crime of assault of a child in the first degree, each of the following four elements must be proved beyond a reasonable doubt:

- (1) That between the dates of February 4th, 2006, and June 16, 2006, the defendant intentionally assaulted E.S. (DOB: 02/04/06) and caused substantial bodily harm;
- (2) That the defendant was eighteen years of age or older and E.S. (DOB: 02/06/06) was under the age of thirteen;

- (3) That the defendant had previously engaged in a pattern or practice of
- (a) assaulting E.S. (DOB: 02/06/06) which had resulted in bodily harm that is greater than transient physical pain or minor temporary marks; or
 - (b) causing E.S. (DOB: 02/06/06) physical pain or agony that was equivalent to that produced by torture; and
- (4) That all of these acts occurred in the State of Washington.

If you find from the evidence that elements (1), (2), and (4) and either (3)(a) or (3)(b), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as which of alternatives (3)(a) or (3)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one of the alternatives has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), or (4), then it will be your duty to return a verdict of not guilty.

(CP 34-35). During deliberations on November 17, 2009, the jury requested in writing clarification of the above instruction:

#3 of instructions [obviously referring to element (3) of the "to convict" Instruction Numbered 7] – Do we have to choose "A" or "B" for 1st degree[?]

(CP 22). The trial court responded in writing at 1:40 p.m. on November 17, 2009:

A careful reading of instruction #7 should provide your answer.

(CP 22). Even after the jury made this specific inquiry, there is nothing in the record indicating the defendant voiced any objection to the instructions or requested any modification of the instructions.

RCW 9A.36.120(1) provides:

A person eighteen years of age or older is guilty of the crime of assault of a child in the first degree if the child is under the age of thirteen and the person:

- (a) Commits the crime of assault in the first degree, as defined in RCW 9A.36.011, against the child; or
- (b) Intentionally assaults the child and either:
 - (i) Recklessly inflicts great bodily harm; or
 - (ii) Causes substantial bodily harm, and the person has previously engaged in a pattern or practice either of (A) assaulting the child which has resulted in bodily harm that is greater than transient physical pain or minor temporary marks, or (B) causing the child physical pain or agony that is that is equivalent to that produced by torture.

The case was tried under the First Amended Information dated April 22, 2009 and filed April 30, 2009, which alleged in pertinent part:

That the said OLGA V. SHVED in the County of Franklin, State of Washington, during the time intervening between the 4th day of February, 2006,

and the 16th day of June, 2006, then and there, being eighteen years of age or older and with intent to assault E.S. (DOB: 02/14/06), a child under the age of thirteen did intentionally assault the child and caused substantial bodily harm, and has previously engaged in a pattern or practice of assaulting the child which has resulted in bodily harm that is greater than transient physical pain or minor temporary marks. FURTHERMORE, pursuant to RCW 9.94A.533(3)(b), the defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance and/or pursuant to RCW 9.94A.533(3)(h) the current offense involved domestic violence, as defined in RCW 10.99.020, and/or one or more of the following was present: (1) the offense was part of an ongoing pattern of psychological, physical, or sexual abuse of 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).

“Normally, if no exception is taken to jury instructions, those instructions become the law of the case.” State v. Salas, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995). “However, an exception to the rule that a jury instruction must be excepted to exists in the case of manifest error affecting a constitutional right.” Id. (quotes omitted). To come within this exception, a defendant “must identify a constitutional issue and show how, in the context of the trial, the alleged error actually affected the defendant’s rights; it is this

showing of actual prejudice that makes the error 'manifest', allowing appellate review." State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (citations omitted). An error in instructing on an uncharged means of committing a crime may be harmless. State v. Nicholas, 55 Wn. App. 261, 273, 776 P.2d 1385 (1989).

The instant case is controlled by the rationale of this court's decision in State v. Grant, 104 Wn. App. 715, 17 P.3d 674 (2001). Grant involved a prosecution for driving while intoxicated in violation of former RCW 46.61.502 (1994). This court explained:

The citation contained the BAC readings and in the "Offenses" section read "RCW 46.61.502" and "DRIVING WHILE INTOXICATED." After both the State and Mr. Grant had rested their cases at trial, and during discussion of the jury instructions, Mr. Grant objected to the instruction that set forth the elements of the crime. This instruction included two alternatives found in the statute: driving a vehicle with an alcohol concentration of .10 or more within two hours of driving, former RCW 46.61.502(1)(a), or driving under the influence of or affected by intoxicating liquor, RCW 46.61.502(1)(b).

Id. at 717 (footnote omitted). The district court at first sustained the objection and limited the instruction to the "driving under the influence" alternative. Upon reconsideration, however, the district court reversed itself and instructed the jury on both alternative means of committing the crime. After being found guilty, the

defendant appealed to the superior court which reversed the conviction. This court granted discretionary review. Id. at 718.

This court noted that while the defendant had raised the “uncharged alternative” issue in the trial court, he did so at a stage of the proceedings where the State was unable to amend the charging document. Accordingly, the issue would be treated the same as if it had been raised for the first time on appeal. Id. at 720-21. The court stated: “In such a case we ask whether the necessary facts appear [in the charging document] in any form or can be found by a fair construction in the document; and, if so, whether the defendant can show that he or she was actually prejudiced by the inartful language.” Id. at 721 (citing State v. Phillips, 98 Wn. App. 936, 940, 991 P.2d 1195 (2000), which cited State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991)).

This court noted that in addition to alleging the defendant was “driving while intoxicated”, the charging document also contained his BAC readings. Id. at 721. As such, “Mr. Grant was clearly on notice that he faced that alternative as well as the ‘under the influence’ alternative of the crime.” Id. The superior court decision was reversed and the district court judgment and sentence was reinstated. Id.

Grant stands for the proposition that when an issue is raised for the first time on appeal that the jury was instructed on an “uncharged alternative” means of committing the crime, the charging document need only be found to have alleged sufficient facts to support the alternative in question. It need not have stated the legal conclusion to be drawn from those facts in the language of the statute.

In Grant, the charging document did not state that the defendant was “driving a vehicle with an alcohol concentration of .10 or more within two hours of driving” in the language of former RCW 46.61.502(1)(a) (1994). However, it did state that he drove a vehicle and his BAC readings were .149 and .152. Accordingly, the trial court properly instructed the jury on that alternative.

In the instant case, the charging document did not state that the defendant had previously engaged in a pattern or practice of “causing the child physical pain or agony that is equivalent to that produced by torture” in the language of RCW 9A.36.120(1)(b)(ii)(B). However, it did state that (1) the acts occurred between the 4th day of February, 2006, and the 16th day of June, 2006; (2) the victim was born in February, 2006; (3) the defendant had previously engaged in a pattern or practice of assaulting the victim resulting in

bodily harm greater than transient physical pain or minor temporary marks; (4) the victim was particularly vulnerable or incapable of resistance; and (5) there was an ongoing pattern of physical abuse of the victim manifested by multiple incidents over a prolonged period of time.

Under RCW 9A.36.120, the crime of Assault of a Child in the First Degree can be committed all the way up to the point where the victim turns 13 years of age. Whatever may be the case with an older child, there can be no doubt that when caused to an infant less than five months old, bodily harm greater than transient physical pain or minor temporary marks would cause physical pain or agony equivalent to that produced by torture.

Perhaps in a case involving a 12-year-old, it would be error to not expressly allege that such bodily harm caused pain or agony equivalent to that produced by torture, as a child of that age may have more tolerance of pain. But it defies common sense to suggest that would be the case with an infant. The alleged injuries would unquestionably produce severe pain, meeting the dictionary definition of torture. Moreover, while it is only necessary that the pain be the equivalent of that produced by torture and not that torture be the motive for the assaultive behavior, there would be no

possible reason to impose such pain on an infant other than for punishment or sheer cruelty.

A charging document need only be worded “so that a person of common understanding will know what acts constitute the criminal offense.” In re Pers. Restraint of Benavidez, ___ Wn. App. ___, ___ P.3d ___, 2011 WL 240696 (2011) (Citing RCW 10.37.052) (emphasis added). It is well established that “[t]he exact words of the statute need not be used if words conveying the same meaning are used to give reasonable notice to the defendant of the charge.” Id. (citing Kjorsvik, 117 Wn.2d at 108-09). This is especially true where, as here, the issue is raised for the first time on appeal:

When the issue is raised for the first time on appeal, the test asks: (1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language that cause a lack of notice. The first prong of the test looks to the face of the charging document itself and there must be some language in the document giving at least some indication of the missing element.

State v. Vangerpen, 125 Wn.2d 782, 788 n.10, 888 P.2d 1177 (1995). “Even missing elements may be implied if the language supports such a result.” State v. Campbell, 125 Wn.2d 797, 801,

888 P.2d 1185 (1995) (quoting State v. Hopper, 118 Wn.2d 151, 156, 822 P.2d 775 (1992)).

Here, the first prong of the test is met. There is some language in the document that gives at least some indication of the missing element: It is alleged that the victim was a four month old infant and the defendant previously engaged in a pattern or practice of assaulting the infant causing bodily harm that was greater than transient physical pain or minor temporary marks. It was further alleged that the victim was particularly vulnerable and there was an ongoing pattern of physical abuse of the victim manifested by multiple incidents over a prolonged period of time. Given the tender age of the victim, this language implies the injuries caused severe and intense pain to the victim, allowing inference of the missing element.

Previous case law supports the proposition that alleging the age of the victim in a charging document can imply a missing element. In State v. Hopper, 118 Wn.2d 151, 822 P.2d 775 (1992), the court stated:

The question, then, is whether all the elements were contained within the charging document, or could be found within its terms by fair construction. The allegation that the victim was a 3-year-old could easily be read to include the element of non-marriage.

Moreover, the defendant could not be said to have been prejudiced by the omission, since there was no possibility that he would offer as a defense that he was indeed married to the victim.

Id. at 158 n.2. Similarly, the allegation in this case that the victim was an infant less than five months old, coupled with the allegation of a pattern of non-minor injuries, could easily be read to imply that the victim suffered severe or intense pain. Moreover, the defendant could not be said to have been prejudiced by the omission, since there was no possibility that she would offer as a defense that the injuries were not extremely painful.

Defendant's reliance on State v. Olds, 39 Wn.2d 258, 235 P.2d 165 (1951) is misplaced. First, Olds long predates more recent case law requiring liberal construction of charging documents when an "uncharged alternative" issue is raised for the first time on appeal. In any event, Olds is clearly distinguishable. To use the modern-day terminology, the defendant in Olds was charged with theft and convicted of possessing stolen property. Merely from the allegation that the defendant originally stole the property, it could not be inferred he was the person who possessed and withheld it at a later time.

Unlike the situation in Olds, here there is no question the charging document alleges the acts of the defendant for which she was convicted: It expressly charges her with engaging in a pattern or practice of assaulting the victim. (CP 79). The only issue is whether the charging document adequately implies the effect of those acts. As explained above, it may be inferred the acts resulted in severe pain given the age of the victim and the nature of the injuries.

The second prong is also met, as defendant did not sustain actual prejudice from any inartful language in the charging document. The purpose of the rule requiring all essential elements to be alleged in the charging document is “to give notice of the nature and cause of an accusation against the accused so that a defense can be prepared.” Campbell, 125 Wn.2d at 801 (citing City of Auburn v. Brooke, 119 Wn.2d 623, 627-29, 836 P.2d 812 (1992). Accord, Grant, 104 Wn. App. at 718 (citing Phillips, 98 Wn. App. at 939, which cited Kjorsvik, 117 Wn.2d at 101-02). The “equivalent of torture” instruction clearly came as no surprise to the defense. First, defendant took no exception to the court’s instruction. (RP 831). Second, even when the jury specifically inquired about that alternative, defendant requested no modification of the instructions.

(CP 22). Third, the closing argument shows defendant was not prejudiced. The prosecutor's only reference to torture was at RP 871, where he stated:

Third element. The defendant had previously engaged in a pattern or practice of assaulting Ella which resulted in bodily harm that was greater than transient physical pain or minor temporary pain, or the other option, causing Ella physical pain or agony that was the equivalent of that produced by torture.

Consider the amount of fractures in the baby's body when you consider what's torture. Consider the amount of pain that that would cause.

(RP 875). Defendant readily acknowledged the severity and number of fractures, and indeed used that as the basis for her argument that only a mentally ill person would inflict such injuries:

Now, so with these, if you look at these fractures up on the skull, the rib cage, the arm and leg, ask yourself this: What type of person would inflict these injuries? What type of person would inflict this injury? Because the prosecutor would have you believe that Olga Shved is a monster. That's what he wants you to believe. That's what the Pasco Police want you to believe. That this is a monster that inflicted these injuries.

But they have no proof because Olga Shved has been assessed by Dr. Lord-Flynn. Is she a risk to society? No. Is she violent? No. Is she mentally ill? No.

But who is? Who is this monster? Who is the white elephant? Who is capable of inflicting these types of injuries? Vadim Dologan. Did he have the

opportunity? Yes, he did. And on more than one occasion.

Vadim Dologan, as you heard Mr. Geyer and his DSM profile -- he's schizophrenic, ADHD, has extremely low empathy -- that means feeling for others -- no impulse control. And he is capable of harming an infant between the time he was released on June 16 when I asked him that question? More probably than not. What did he say? What did he say? Not what Mr. Dickerson put up on the screen there. He said, yes, he was physically capable. He was out of control.

Now, compare Olga to her brother Vadim. Does it make sense that she would do anything? Is there any evidence that there was anything bad going on in their marriage at this time? That they were having financial difficulties? No. That there was domestic violence? No. He even did a criminal history check of her. None.

So the nature of the injuries, in and of itself, speak to the nature of the type of person who would commit this crime. And that type of person is no longer in this courtroom. You saw a brief glimpse of him -- not as he was on June 16th, 2006, but after he was stabilized on his medications in July. . . .

(RP 875-76)

We could have a whole bunch of other suspects such as Mecheslav, Boris and everybody, but it doesn't add up. The only person that this adds up to is Vadim Dologan.

(RP 884-85). Defendant was not only aware of the injuries alleged in her case, it was essential to her own defense that they be severe enough to cause physical pain or agony equivalent to that produced

by torture. This enabled her to argue that only a mentally ill person would inflict such injuries. As previously noted, defendant cannot be said to have been prejudiced by the omission since there was no possibility she would offer as a defense that the victim did not suffer severe and intense pain. See Hopper, 118 Wn.2d at 158 n.2. On the contrary, defendant argued that “the nature of the injuries, in and of itself, speaks to the nature of the type of person that would commit this crime,” and that Vadim Dologan was a “monster” who was “capable of inflicting these types of injuries.” (RP 876).

Defendant further argues at page 46 of her brief that “[t]he State charged Ms. Shved specifically under RCW 9A.36.120(1)(b)(ii)(**A**).” (Bold emphasis added.) Actually, the First Amended Information cited to “RCW 9A.36.120(1)(b)(ii)(**a**).” (CP 79) (Bold emphasis added.) This citation is to a non-existent statute, as RCW 9A.36.120(1)(b)(ii) does not contain a lower-case “a” in parenthesis; the only letters in parenthesis in that subparagraph are an upper-case “A” and an upper-case “B”. As quoted above, RCW 9A.36.120(1)(b)(ii) reads:

Causes substantial bodily harm, and the person has previously engaged in a pattern or practice either of
(A) assaulting the child which has resulted in bodily

harm that is greater than transient physical pain or minor temporary marks, or (B) causing the child physical pain or agony that is equivalent to that produced by torture.

While the statutory citation in the First Amended Information is error, it is not reversible. Criminal Rule (CrR) 2.1(a)(1) provides in pertinent part:

The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation, or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice.

(Emphasis added.) In Hopper, the Supreme Court relied on CrR 2.1(b) in finding no reversible error occurred where an information cited only to a statute that had not yet taken effect at the time the crime was committed. Hopper, 118 Wn.2d at 159-60. In the instant case, the defendant sustained no prejudice from the erroneous statutory citation for the same reasons she was not prejudiced by the language of the information. As explained above, (1) the defendant took no exception to the jury instructions; (2) she did not request any modification of the instructions even when the jury inquired about the alternative in question; and (3) her own defense depended on the nature of the injuries, which, she argued, were

such that they would only be inflicted by a mentally ill person. See RP 876. (“So the nature of the injuries, in and of itself, speak to the nature of the type of person that would commit this crime.”) There was no possibility that she would offer as a defense that the pattern of injuries did not cause severe pain or agony to the victim.

Even if the jury was instructed on an uncharged means of committing the crime (which the State denies, but nonetheless) such error may be harmless. Nicholas, 55 Wn. App. at 273. The court recessed at 4:00 p.m. on November 16, 2009, following closing arguments. (RP 897). At 1:40 p.m. on November 17, 2009, the court responded to a jury inquiry by referring back to Instruction Numbered 7. (CP 22). Since there were no further inquiries from the jury, it is reasonable to infer the response adequately clarified matters and the jury was not confused. Defendant did not dispute that the charged crime was committed; she only denied that she was the one who did it. As previously noted, defense counsel argued in closing argument: “So the nature of the injuries, in and of itself, speak to the nature of the type of person that would commit this crime.” (RP 876). Accordingly, any error in the unchallenged jury instructions had no effect on the verdict.

2(a). ANY FAILURE OF THE “DEFINITIONAL INSTRUCTION” TO INCLUDE ALL ELEMENTS WAS HARMLESS AS THE “TO-CONVICT” INSTRUCTION REQUIRED THE JURY TO FIND EVERY ELEMENT BEYOND A REASONABLE DOUBT IN ORDER TO RETURN A GUILTY VERDICT.

As previously noted, defendant took no exception to the jury instructions given by the trial court. (RP 831). She nonetheless argues for the first time on appeal that Instruction Numbered 6, the “definitional” instruction, failed to include the element that the defendant “intentionally assaulted” the child. (CP 33). She admits the element is included in Instruction Numbered 7, the “to-convict” instruction. (CP 34).

“[I]nstructions must be considered as a whole, and if, when so considered, they properly state the law and include all the elements which constitute the crime charged, they are sufficient, even though some one of them may omit some essential part.” State v. Hartley, 25 Wn.2d 211, 224, 170 P.2d 333 (1946) (citations omitted). However, the “to-convict” instruction “must contain all of the elements of the crime because it serves as a ‘yardstick’ by which the jury measures the evidence to determine guilt or innocence.” State v. Lorenz, 152 Wn.2d 22, 31, 93 P.3d 133 (2004) (quoting State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d

1000 (2003). While a “to-convict” instruction is mandatory, “[t]here is no legal requirement that an instruction separately defining an offense be given.” Comment to WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL (WPIC) 4.24, 11 WASHINGTON PRACTICE at 109 (3rd ed. 2008). “The decision of whether to give a separate definition instruction is discretionary with the trial judge.” Id. Even the failure to include an essential element in the “to-convict” instruction is subject to harmless error analysis when the element is contained in a definitional instruction. DeRyke, 149 Wn.2d at 912 (citing State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002)). Since the failure to include an element in a mandatory “to-convict” instruction may be harmless where it is found in a non-mandatory instruction, it certainly follows that the failure to state an element in a non-mandatory instruction may be harmless where it is set forth in the mandatory “to-convict” instruction.

In the instant case, it is undisputed that the “to-convict” instruction contained all essential elements of the crime. That instruction also informed the jury that to convict the defendant of Assault of a Child in the First Degree, each of those elements must be proved beyond a reasonable doubt. (CP 34). The jury was further advised that if it had a reasonable doubt as to any one of

those elements, it had a duty to return a verdict of not guilty. (RP 35). A jury has a right to regard the “to-convict” instruction as a complete statement of the law. State v. Mills, 154 Wn.2d 1, 8, 109 P.3d 415 (2005). Defendant cites no authority suggesting failure to include an element in a “definitional” instruction is harmful in the face of such a “to-convict” instruction. Moreover, defendant’s failure to raise the issue at a time when the instruction could have been corrected places the burden on her to show actual prejudice from even constitutional error in the instructions. Salas, 127 Wn.2d at 182; McFarland, 127 Wn.2d at 333. She has failed to do so.

2(B). THE JURY WAS PROPERLY INSTRUCTED ON THE DEFINITION OF “ASSAULT” IN THE LANGUAGE OF WPIC 35.50. IN ANY EVENT, ANY ERROR WAS INVITED AS DEFENDANT RELIED ON THE SAME DEFINITION IN HER OWN PROPOSED INSTRUCTIONS.

While all elements of the crime must be included in the “to convict” instruction, an element may be expressed in general terms in that instruction and more fully defined in a separate instruction. State v. Lorenz, 152 Wn.2d 22, 35, 93 P.3d 133 (2004). The policy behind this practice is that the inclusion of definitions would result in lengthy “to-convict” instructions and potentially confuse the jury. Id. Here, the term “assault” was defined for the jury in Instruction

Numbered 8, using the applicable bracketed language from WPIC

35.50:

An assault in an intentional touching or striking of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

(CP 36). The jury was further given Instruction Numbered 11, which stated: "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime." (CP 39). This instruction was in the language of WPIC 10.01.

Subject only to constitutional constraints, the Legislature has the power to define what conduct constitutes a crime. In re Pers. Restraint of Davis, 142 Wn.2d 165, 172, 12 P.3d 603 (2000). RCW 9A.36.120(1) is one of several Washington statutes that criminalize "assault". While the term "assault" is not further defined, courts recognize that legislative bodies enact statutes "against the backdrop of the common law". United States v. Paoello, 951 F.2d 537, 541 (3rd Cir. 1991) (citing United States v. Bailey, 444 U.S. 415 n.11, 100 S. Ct. 624, 62 L. Ed. 2d 575 (1980)). Thus, it may be inferred that in using the word "assault", the Legislature intended to

incorporate the common law definition of that term. See also State v. David, 134 Wn. App. 470, 482-83, 141 P.3d 646 (2006) (criminal statutes that rely on the common law to define elements do not violate separation of powers doctrine).

“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 inflicting that harm.” State v. Madarash, 116 Wn. App. 500, 513-14, 66 P.3d 682 (2003) (quotes, some brackets, and citations omitted). All three alternatives are available in brackets in WPIC 35.50.

Defendant cites State v. Byrd, 125 Wn.2d 707, 887 P.2d 396 (1995) and State v. Eastmond, 129 Wn.2d 497, 919 P.2d 577 (1996). The defendant in Byrd was charged with assault by the third method, intentionally putting another in reasonable apprehension of harm. The instruction in that case was found to not fully convey the common law definition of assault, as it did not specify the act must be done with intent to create apprehension and fear of bodily injury. Byrd, 125 Wn.2d at 713. The defendant in

Eastmond was charged with assault by the first method, an attempt, with unlawful force, to inflict bodily injury on another. In that case, the instruction was not consistent with the common law definition of assault as it did not require intent to inflict bodily injury. Eastmond, 129 Wn.2d at 503.

However, defendant neglects to mention that Byrd and Eastmond are discussed in the official comment to WPIC 35.50. 11 WASHINGTON PRACTICE, at 549 (3rd ed. 2008). As indicated in the comment, the problems addressed by Byrd and Eastmond are remedied by the current version of WPIC 35.50. Indeed, Byrd and Eastmond themselves acknowledge the amendments to WPIC 35.50 that occurred subsequent to the trials in those cases. Byrd, 125 Wn.2d at 710-11 n.2; Eastmond, 129 Wn.2d at 500.

In any event, in the instant case the jury was only instructed on the second method of committing assault (i.e., battery). Defendant cites no authority suggesting Instruction Numbered 8 or WPIC 35.50 (2008) does not accurately describe the common law definition of assault. Since the Legislature enacted RCW 9A.36.120(1) against the backdrop of the common law, the trial court had no authority to instruct in any other manner.

Consistent with the common law, the jury was able to conclude an assault occurred only upon finding there was a touching or striking of another person, done with unlawful force and with the objective or purpose of doing an act which constituted a crime, which a reasonable person would find harmful or offensive. Contrary to what defendant suggests, accidentally dropping the child would not suffice because (1) it would be a dropping, not a touching or striking, (2) it would not be done with unlawful force, and (3) it would not be done with an objective or purpose of doing an act which constituted a crime.

Moreover, the Washington Supreme Court has expressed a strong preference for the use of pattern instructions. While stopping just short of making the WPICs mandatory in all case, the court stated in State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007):

Washington has adopted pattern jury instructions to assist trial courts. Our pattern instructions are drafted and approved by a committee that includes judges, law professors, and practicing attorneys. ...

[P]attern instructions generally have the advantage of thoughtful adoption and provide some uniformity in instructions throughout the state.

Id. at 305-06. Defining “assault” in any manner other than delineated in WPIC 35.50 would have been a perilous experiment on the part of the trial court.

Finally, the “invited error” doctrine precludes review of instructional language requested by the defendant. State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999). Instruction Numbered 13 was proposed by the defense and given at the request of the defense. (RP 871-72). That instruction was the “to-convict” instruction for the lesser included crime of Assault in the Fourth Degree and included the element that “the defendant assaulted Ella Shved”. (CP 41). Since the defendant did not propose any alternative definition of “assault”, this instruction incorporated the definition of that term found in Instruction Numbered 8. (CP 36). Thus, any error was invited.

3. THE CONVICTION IS SUPPORTED BY SUFFICIENT EVIDENCE.

The law of sufficiency of evidence is well settled. The test is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. State v. Rangel-Reyes, 119 Wn. App. 494, 499, 81 P.3d 157 (2003). “All reasonable inferences

from the evidence must be drawn in favor of the State.” State v. Trout, 125 Wn. App. 403, 409, 105 P.3d 69 (2005). The jury can infer the specific criminal intent of the defendant where it is a matter of logical probability. Id. The reviewing court will defer to the trier of fact’s resolution of conflicting testimony, evaluation of witness credibility, and generally its view of the persuasiveness of the evidence. Id. Even uncontradicted testimony may be rejected by the trier of fact. State v. Hendrickson, 46 Wn. App. 184, 190, 730 P.2d 88 (1986).

“The elements of a crime may be established by either direct or circumstantial evidence, and one type of evidence is no more or less valuable than the other.” Rangel-Reyes, 119 Wn. App. at 499. Accordingly, circumstantial evidence need not be inconsistent with every possible hypothesis tending to establish innocence in order to be sufficient to support a criminal conviction. Rangel-Reyes, 119 Wn. App. at 499 n.1; State v. Zunker, 112 Wn. App. 130, 135, 48 P.3d 344 (2002).

A claim of insufficiency admits the truth of the State’s evidence and all inferences that can reasonably be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A reviewing court may not weigh the evidence, but instead

must look for a sufficient quantum of evidence for a rational trier of fact to find guilt beyond a reasonable doubt. State v. Coleman, 54 Wn. App. 742, 747, 775 P.2d 986 (1989). In light of comments made by the trial judge that he “personally would have difficulty finding the defendant guilty on the presented facts,” the Coleman court found the following passage from State v. Randecker, 79 Wn.2d 512, 787 P.2d 1295 (1971) to be particularly significant:

The fact that an appellate court may conclude the evidence is not convincing, or may find the evidence hard to reconcile in some of its aspects, or may think some of the evidence appears to refute or negate guilt, or to cast doubt thereon, does not justify the court’s setting aside the jury’s verdict.

Coleman, 54 Wn. App. at 747 (quoting Randecker, 79 Wn.2d at 517-18). As the Washington Supreme Court has further explained:

Just because there are hypothetical alternative conclusions to be drawn from the proven facts, the fact finder is not lawfully barred against disregarding one possible inference when it concludes such inference unreasonable under the circumstances. . . . An essential function of the fact finder is to discount theories which it determines unreasonable because the finder of fact is the sole and exclusive judge of the evidence, the weight to be given thereto, and the credibility of the witnesses.

State v. Bencivenga, 137 Wn.2d 703, 708-09, 974 P.2d 832 (1999).

In the instant case, the conviction is clearly supported by sufficient evidence. The trial prosecutor summed it up well in

responding to defendant's motion to dismiss at the close of the

State's case:

There has been almost excessive testimony as to the injuries received by baby Ella. There has been an absolute certainty that this is the result of child abuse.

The remaining question for the jury to ask themselves is who did it? And there is always going to be somebody else - - or almost always going to be somebody else the defense can point their finger to. Somebody else that may have had access.

But, Your Honor, the evidence before the Court right now is that both Olga and Boris Shved, when initially interviewed, indicated that Olga had custody of the baby, with the exception of two to three visits to her mother's house where her mother had custody of the baby, for a total period of close to four hours. That has been their statements, their initial statements. Statements have changed over time.

The evidence also shows that Natalya Dologan indicated that, when she spoke with Misty Ross, that she, when the baby was in her custody, never was left alone with anyone. Of course, her testimony has been different, now.

. . . Her initial statement was that Vadim had no access to that baby by himself, outside her supervision.

Mech Piskoskiy testified that he hardly ever saw the baby. He saw the baby when it was in the hospital. He saw the baby when he would visit the home of Boris and Olga.

Boris testified that he hardly ever did anything with the children, and he did it when Olga was home. He

never cared for the children. He would occasionally give them a snack, I think he said.

The testimony is, Your Honor, and the evidence shows that Olga Shved had sole custody and care of this child - - almost exclusive care of this child for the duration of its life.

Based on that, Your Honor, it's clear that a rational trier of fact viewing the evidence - - direct and circumstantial - - in the light most favorable to the State could find the defendant guilty.

(RP 532-33).

In its underlying facts, the instant case is strikingly similar to State v. Norlin, 134 Wn.2d 570, 951 P.2d 1131 (1998). In Norlin, doctors discovered 3-month-old Nicholas with a severe head injury. The defendant said it was caused by a fall from a couch. X-rays, however, revealed fractures in an arm, an ankle, and two ribs, all occurring within a 3-week period before the x-rays. A doctor testified this "constellation" of injuries was "difficult to explain in any way other than maltreatment or abuse." Id. at 574.

Although up to seven other people had cared for the baby at various times before the head injury, Mr. Norlin provided a major portion of his care. The defendant admitted causing a bruise on his back and a red mark over his eye, and that the child had fallen and injured himself at least four times while in his care. Id. at 575.

Furthermore, there was no evidence at trial that any other person had been alone with Nicholas when these incidents occurred. Neither was there evidence of any other incidents that could have caused the arm, ankle, and rib injuries testified to by the physicians.

Id. at 583.

Defendant attempts to distinguish Norlin on the basis that Vadim Dologan was in the house when the victim was being babysat by her grandmother, Natalya Dologan. Brief of Appellant, at 59-60. However, if Vadim Dologan was believed to be dangerous, he would not have been left alone with the baby. The trial prosecutor hit the nail on the head during his examination of Natalya Dologan:

Q: You testified that Vadim was aggressive. And you testified that Vadim was dangerous. Is that right?

A: Yes.

Q: Why did you leave him alone with the baby?

A: It was for a short time. It was not for a long time.

(RP 335). She was later recalled, at which time she testified:

Q: You testified today that it was unsafe to leave baby Ella with Vadim; is that correct?

A: Yes.

Q: When you were here before, you said you weren't concerned about it.

A: What I said, I just stepped out for two to three minutes. But I still was concerned.

(RP 494). In an earlier meeting with social worker Misty Ross, both Natalya Dologan and her husband were adamant that Vadim was never left alone with the baby. (RP 340).

Even by Natalya Dologan's own testimony, the baby was never out of her sight except when she was doing momentary household tasks like taking out the trash or putting the laundry in the washer. (RP 293, 295). Even when she could not see the baby, she was within hearing distance. (RP 295-96). In short, common sense dictates that Vadim would not have been given an opportunity to harm the baby, and even by Natalya's own testimony he was not given such an opportunity. In order for the baby's injuries to have been caused by Vadim, he would have had to inflict them on multiple occasions and his mother, Natalya, would have immediately known it had happened. As explained by the trial prosecutor in closing argument:

Dr. McLaughlin, same thing with pain. Baby is gonna cry when its bones are broken. Just like you or I would. That's painful and that's gonna make the baby cry. Doesn't necessarily mean that they're gonna cry for days afterwards. Dr. McLaughlin placed the long bone fractures between two and six weeks old. And even possibly up to 90 days, which would

put those long bone or at least some of those long bone fractures shortly after Ella was released from the hospital.

He testified that the different fractures, the skull fractures, the fractured arms, the fractured ribs, the fractured legs, occurred on at least three different occasions and there was possibly a fourth occasion where the head was injured again.

(RP 852-53). By Natalya Dologan's own testimony, baby Ella always stopped crying as soon as she was picked up and held. (RP 318). She never saw any injuries on the baby except for self-inflicted minor scratches. (RP 320). And she never saw Vadim touch baby Ella. (RP 297).

Defendant admitted at trial there were no plausible third-party suspects besides Vadim Dologan. Defense counsel stated in closing argument:

We could have a whole bunch of other suspects such as Meceslav, Boris and everybody, but it doesn't add up. The only person that it adds up to is Vadim Dologan.

(RP 884-85).

Finally, defendant made the decision to call Vadim Dologan as a witness at trial. He testified he never did anything to harm baby Ella. (RP 713). As with all testimony, the jury was entitled to believe it. Defendant's own trial strategy precludes any argument

on appeal that the conviction is not supported by sufficient evidence.

4. THE TRIAL COURT'S EVIDENTIARY RULINGS WERE PROPER.

Decisions involving the relevance of evidence require the exercise of judicial discretion in drawing lines. State v. Wilmoth, 31 Wn. App. 820, 823-24, 644 P.2d 1211 (1982). Defendant's discussion of third-party perpetrator evidence at pages 60-71 of her brief is largely irrelevant in light of her statement of the case at pages 24-37 of her brief, which shows the trial court was actually quite lenient in allowing defendant to introduce evidence which she claimed tended to show Vadim Dologan committed the crime. This included not only evidence of his mental health and observations of his behavior during the relevant time period, but even statistical evidence that he was more likely to be a child abuser based on his gender, age and history of substance abuse (testimony that a prosecutor would certainly never be allowed to present). The only place the trial court drew the line was when it came to evidence of fourth degree assaults committed against adults and his mental health at times not relevant to this case. "Such line drawing lies

within the discretion of the trial court in its determination of the relevance of evidence.” Wilmoth, 31 Wn. App. at 824.

In essence, defendant wanted to be able to argue that “since Vadim Dologan has committed fourth degree assaults against adults, he must have committed this first degree assault of a child.”

Such a defense runs afoul of ER 404(b), which provides;

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Before admitting evidence under ER 404(b), the trial court must (1) find by a preponderance of the evidence that the acts probably occurred, (2) identify the purpose for which the evidence will be admitted, (3) find the evidence materially relevant to that purpose, and (4) balance the probative value of the evidence against any unfair prejudicial effect. State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002).

An appellate court may refuse to consider an argument for the admission of evidence that was not made in the trial court. State v. Negrin, 37 Wn. App. 516, 526, 681 P.2d 1287 (1984); State v. Jordan, 39 Wn. App. 530, 539-40, 694 P.2d 47 (1985). In this

appeal, defendant attempts to create an elaborate theory (not presented to the trial court) that Vadim Dologan's prior assaults against adult family members led to his hospitalization, which somehow gave him a motive to assault his infant niece. Brief of Appellant, at 69-70. First, defendant points to nothing in the record to suggest Vadim Dologan's family members were responsible for his hospitalizations, that his commitment to the mental facility resulted from assaults against family members, or that he bore any ill will toward his family. Second, the only conceivable motive for revenge would be his family's efforts to get him hospitalized, not the assaults.

In State v. Heib, 39 Wn. App. 273, 639 P.2d 145 (1984), *rev'd on other grounds*, 197 Wn.2d 97, 727 P.2d 239 (1986), a prosecution for the murder of a child, evidence was admitted of the defendant's prior assaults against the child and her sister. The court stated:

Our Supreme Court has defined the word "motive" to mean "an inducement, or that which tempts the mind to indulge [in] a criminal act." . . . It is difficult to ascertain how the prior assaults . . . could be a motive or inducement for the later assaults. . . . There is no contention that the last assault was carried out in order to conceal the prior crimes. The earlier assaults had no logical relevance to [defendant's] motive for the last assault.

Id. at 282-83. See also State v. Sargent, 40 Wn. App. 340, 698 P.2d 598 (1985) (in prosecution for murder, it was error to admit evidence that defendant had hit his wife during an argument eight months before the killing; the appellate court rejected the State's argument that the evidence was admissible to prove motive); State v. Bowen, 48 Wn. App. 187, 738 P.2d 316 (1987) (in a prosecution of physician for taking indecent liberties with a patient, two previous incidents involving other patients had no tendency to show a motive for the crime charged and should not have been admitted). The rationale of these cases applies here. Vadim's Dologan's prior fourth degree assaults against adults provide no motive for him to have committed the current first degree assault of the child.

For the same reason there is no merit to defendant's argument that the existence of a motive tends to identify Vadim Dolgan as the perpetrator. Simply put, his prior fourth degree assaults against adults are not a motive at all. Nor are they a "signature", as they do not resemble the current crime in any way.

Defendant notes an objection was sustained to asking Mecheslav Piskoskiy whether his stepson, Vadim Dologan, "ever commit[ed] any acts of violence during this period?" (RP 472).

However, no offer of proof was made regarding any acts of violence to which this witness could have testified. The only offer proof regarding this witness (identified in defendant's memorandum as Mecheslav Dologan) makes no reference to observing acts of violence by Vadim Dologan. (CP 62). It is unknown what acts, if any, he may have observed. Without such an offer of proof, it is impossible to determine on appeal whether the testimony would have met the ER 404(b) criteria. ER 103(a)(2); State v. Negrin, 37 Wn. App. 516, 525-26, 681 P.2d 1287 (1984); State v. Smith, 130 Wn.2d 215, 226, 922 P.2d 811 (1996).

Without citation to authority, defendant argues that Vadim Dologan's prior assaults gave him a motive to lie about having committed the current assaults, because he feared going back to the mental hospital. This is akin to saying that the State should be able to introduce evidence that a defendant is on probation, as it gives him a motive to lie about having committed the current crime. In any event, it is the prior hospitalizations, not the prior assaults that would have given Mr. Dologan any fear of rehospitalization. The fact of his recent prior hospitalization was fully established.

Defendant vaguely suggests that during earlier hospitalizations Vadim Dologan expressed a "hatred of females",

but neither relates it to his mental health at the time of the crime nor explains how it would provide a motive to assault an infant.

Defendant was able to introduce testimony that Detective Lee observed Vadim Dologan punch his eight-year-old brother. (RP 44). This was emphasized in closing argument. (RP 887). Defendant was also able to fully explore Vadim Dologan's mental health at the time the crime was committed. See Brief of Appellant, at 24-37. This was also discussed in closing argument. (RP 876).

In Wilmoth, a prosecution for rape, the defendant was allowed to present evidence of the victim's state of mind on the night of the incident but was not permitted to explore such matters too extensively. The court stated: "Since the complainant's distraught state of mind was established, we see little that could have been accomplished by a further pursuit of these questions." Wilmoth, 31 Wn. App. at 824. In the instant case, defendant was able to show Vadim Dologan's mental condition during the relevant time frame and his assault of his eight-year-old brother. Defendant fails to show what more she could have accomplished by going into his mental health at other times and his fourth degree assaults against adults. There was no error.

5. THE PROSECUTOR'S CLOSING ARGUMENT WAS APPROPRIATE.

Defendant next challenges the prosecutor's closing argument. However, the argument was proper in all respects. As stated in City of Seattle v. Arensmeyer, 6 Wn. App. 116, 491 P.2d 1305 (1971):

[C]ounsel must be allowed some latitude in the discussion of their causes before the jury, and if they are not permitted to draw inferences or conclusions from the particular facts in evidence it would be impossible for them to make an argument at all. The mere recital of facts already before the jury is not an argument. There must be some reason offered for the purpose of convincing the mind, some inference drawn from facts established or claimed to exist, in order to constitute an argument.

Id. at 121 (quoting Sears v. Seattle Consol. St. Ry., 6 Wash. 227, 233, 33 P. 389 (1893)).

Defendant relies exclusively on State v. Kassahun, 78 Wn. App. 938, 900 P.2d 1109 (1995). The defendant in Kassahun was charged with shooting Jesse Walker on a store parking lot owned by the defendant. Prior to trial, the defendant attempted to obtain discovery from police of Walker's gang membership and activity and that of some of the witnesses who were on the parking lot at the time of the shooting. The State objected to the discovery request and successfully moved to exclude all reference to gang

membership and activity on the part of Walker and the witnesses. During closing argument, the prosecutor said: “[Kassahun] tried to paint a picture of lawless gangs taking over and running the show in the parking lot, everywhere, but where was the evidence of that?”

The court’s entire discussion of this issue was as follows:

Having prevailed by motion in limine in its effort to preclude Kassahun from discovering objective evidence of Walker’s gang membership and gang activities and that of some of the witnesses who were in the parking lot at the time of the shooting, it was misconduct for the prosecutor in imply in argument to the jury that Kassahun was being untruthful because he failed to offer objective evidence to support his belief that his business was being overrun by gangs. The trial court erred in overruling Kassahun’s objection to this argument. Because we are reversing on other grounds, we need not analyze whether this misconduct and the trial court error prejudiced Kassahun’s right to a fair trial. We simply direct that the misconduct not be repeated at the new trial.

Id. at 952. In other words, the prosecutor first persuaded the trial court that gang evidence was irrelevant, and then argued to the jury that the defendant should not be believed because he failed to introduce any gang evidence.

Defendant’s reliance of Kassahun is misplaced. First, the prosecutor’s motion in limine in the instant case was substantially denied. (RP 406-07). Defendant was permitted to introduce the vast majority of her proposed evidence that she claimed suggested

Vadim Dologan had committed the crime. See Brief of Appellant, at 24-37.

Second, even without the motion in limine, defendant had a burden to show her evidence met the criteria for admission under ER 404(b). See Kilgore, 147 Wn.2d at 297. To the extent any evidence was excluded, such exclusion resulted from the provisions of ER 404(b) and not any action on the part of the prosecutor.

Third, unlike in Kassahun, the prosecutor's closing argument made no reference to absence of evidence of the few matters that were excluded (such as Vadim Dologan's prior fourth degree assaults against adults).

The only references in any way touching on Vadim Dologan's violent nature were the following. First, the prosecutor stated:

Take note of Vadim's behavior when he was on the stand. It was apparent that he had some twitches and some odd smiles. But in a very uncomfortable setting, when he is cornered, did he loose it? Did he get upset? Did he get angry? Did he get defensive? Did he get violent? No, he was cooperative. He answered the questions as best he could.

(RP 859). This was solely a reference to his behavior in the courtroom. It did not describe his behavior at any other time. There was nothing improper about this argument.

The prosecutor continued by reviewing the testimony of psychologist Samuel Geyer:

Expert testimony. There have been a number of expert witnesses that have testified. First of all, Mr. Geyer. He testified that Vadim was well medicated and controlled, as controlled as possible, prior to his incarceration in Franklin County at the end of May, first part of June.

Remember, he got out May 3rd from Eastern and goes into Franklin County a month later. He testified that after Vadim got out of jail, that he became agitated. No other change, he was just agitated. He never saw Vadim being physically violent. We have no testimony to that effect.

Remember that Natalya testified that Vadim never left the house. Always in the house. But Mr. Geyer saw Vadim walking around on at least a couple occasions during the daytime. So he wasn't always at home.

Mr. Geyer testified that in Vadim's condition prior to him going to jail, that he would have known that it was not okay to hurt a baby. I think it was his opinion that not so much after he got out because he decompensated, I think it was the word. His meds had been a little screwed up when he as in jail. He hadn't quite got everything that he needed.

Importantly, Mr. Geyer can't say if Vadim did it. He can't say if Olga did it. He can't say who did it. He doesn't know. In fact, he said anyone is capable of

doing it. You have to look to the evidence to see who did it.

He also said that anger does not equal violence. He said Vadim was occasionally angry, but he could talk Vadim down, and that Vadim was not violent.

(RP 859-60). This argument merely repeated the testimony of defendant's own expert witness and related solely to Vadim Dologan's mental state during May-June, 2006. Notably, the only assaultive act he was seen to commit during that time period (hitting his eight-year old brother) was admitted into evidence and discussed during the defense closing. (RP 44, 887). Again, the argument had nothing to do with his behavior at other times and places.

Finally, the prosecutor discussed the testimony of Dr. Mark

Mays:

Dr. Mays. Keep in mind Dr. Mays is a paid witness for the defense. No idea who committed this crime. He has no idea. He only spoke to the defendant.

He also pointed out that the HCR-20 test that he uses to determine probability that a male is more likely to commit an act of violence, he said that there is no distinguishing in the HCR-20 between age of the victim or any other factors. It just lumps everybody in as offenders and victims. There is no consideration as to who might be more likely to assault a baby, who might be more likely to assault an older person, and so on and so forth. I asked him. I said isn't that all just statistics and probabilities? And he said, exactly.

Now, I ask the Court's forgiveness, but I found a quote applicable here when you consider the testimony of Dr. Mays. Mark Twain in his autobiography said there are three kinds of lies. There are lies. There are damn lies. And there are statistics. That's all this is is the statistics. It means nothing.

(RP 862). This argument merely questioned the value of statistical evidence. It had nothing to do, for example, with whether prior fourth degree assaults against adults would be relevant. Once again, the argument was completely proper.

While the prosecutor briefly revisited the matter in rebuttal closing, this was in response to the defense counsel's argument. Even remarks of the prosecutor that would otherwise be improper are not grounds for reversal where they are in reply to defense counsel's statements, unless the remarks are so prejudicial that an instruction would not cure them. State v. Swan, 114 Wn.2d 613, 663, 790 P.2d 610 (1990); State v. Jones, 71 Wn. App. 798, 809, 863 P.2d 85 (1993). Defense counsel stated in closing argument:

Vadim Dolgan, as you heard Mr. Geyer and his DSM profile - - he's schizophrenic, ADHD, has extremely low empathy - - that means feeling for others - - no impulse control. And is he capable of harming an infant between the time that he was released on June 16th when I asked him that question? More probably than not. What did he say? What did he say? Not what Mr. Dickerson put up on

this screen there. He said, yes, he was physically capable. He was out of control.

(RP 876). Defense counsel continued:

[Mr. Geyer] said that Eastern State released [Vadim Dologan] on an LRA - - Least Restrictive Alternative. Now, the prosecutor tried to question him saying they don't make mistakes. He wouldn't have been violent, would he? What did Mr. Geyer tell you? They make mistakes. They release them for financial considerations, as well as psychological considerations. And they released him.

Now, he started on his meds. He was started on his meds during that time period. Okay? After May 3rd. But then they were stopped because he was thrown into the Franklin County Jail on a ten-day probation violation. And during that time period, he was not given, what? Clozapine, antipsychotic medication to stop his hallucinations and anger. Instead, he was only given one. And without that necessary two-part medication, he went over the edge. He became psychotic. In fact, that is how he described him when he got out of jail, psychotic.

(RP 878-79). Defense counsel further stated:

What type of person would do that? A mentally ill person. Vadim Dologan. He might have even done it when he slammed her head against the wall - - not because he was necessarily even angry - - although he was angry. Not because he was necessarily violent - -because he was violent. Simply because he had no impulse control. He could not control himself.

(RP 891). Defense counsel concluded on this topic:

Does [Vadim Dolgan] have a motive? You bet. He's angry, violent, and psychotic. There is not a better

motive than that. Motive means a reason to commit the crime.

(RP 892).

The prosecutor briefly responded to this line of argument in rebuttal closing:

Ladies and gentlemen, it's easy to find a scapegoat in any case. It's easier to say, oh, somebody else had the opportunity. As you heard in the testimony, all of us are capable of doing something like this. You also heard that Vadim is not a violent person. He has some erratic behavior. He is agitated. But that doesn't mean that he is a violent person or that he hurt a baby. There is no evidence of that.

(RP 893). This was just a normal debate between attorneys on the conclusions to be drawn from the evidence as to Vadim Dologan's mental state in May-June, 2006. It was completely unrelated to his behavior or status at any other time. There was nothing improper done by either counsel.

Another way in which Kassahun is distinguishable from the instant case is that in Kassahun the defendant made an objection to the argument which the trial court overruled. See Kassahun, 78 Wn. App. at 952. In our case, there was no objection raised to the relevant portions of the prosecutor's argument. (RP 859-60, 862, 893). "The absence of an objection by defense counsel strongly suggests that the argument in question did not appear critically

prejudicial to an appellant in the context of the trial.” State v. McKenzie, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006) (emphasis original; citation and quotes omitted). Or as this court has put it, “the fact that defense counsel did not object to the prosecutor’s argument suggests that it was of little moment in the trial.” State v. Mungia, 107 Wn. App. 328, 337-38, 26 P.3d 1017 (2001) (citation and quotes omitted). Here, defendant’s trial counsel correctly perceived there was no improper argument.

Where the defense fails to object to an improper comment by the prosecutor, the error is considered waived unless the comment was so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury. McKenzie, 157 Wn.2d at 52. Even if an improper argument was made, it was not so flagrant that it could not have been cured. Moreover, as in McKenzie, the jury was instructed that the attorneys’ arguments are not evidence and should be disregarded when not supported by the evidence or the law in the court’s instructions. (Instruction No. 1, CP 27). See McKenzie, 157 Wn.2d at 57 n.3. The jury is presumed to have followed this instruction. Wilmoth, 31 Wn. App, at 824-25.

**6. THE TRIAL COURT PROPERLY ADMITTED
DEFENDANT'S STATEMENTS.**

Defendant next challenges the trial court's ruling following a hearing pursuant to CrR 3.5 to allow admission of her statements to Officer Raul Cavazos and Detective Chris Lee. However, the trial court correctly found these statements to be admissible.

The State has the burden to establish by a preponderance of the evidence that a defendant's statements to police were voluntary. State v. Earls, 116 Wn.2d 364, 379, 805 P.2d 211 (1991). In the case of custodial interrogation, police must advise a person of his or her constitutional rights before questioning. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). This warning must advise the person of the right to remain silent; that any statement may be used against him or her; that the person may confer with an attorney; and that if the person is unable to afford an attorney, he or she is entitled to have one appointed without charge. Id.

In determining if a person was in custody, whether he or she was free to leave is not the relevant question; rather, a person is in custody when his or her freedom of action is curtailed to a degree

associated with formal arrest. City of College Place v. Staudenmaier, 110 Wn. App. 841, 848-49, 43 P.3d 43 (2002).

A person may waive the right to remain silent so long as the waiver is made knowingly, intelligently and voluntarily. State v. Davis, 73 Wn.2d 271, 282, 438 P.2d 185 (1968). In the context of custodial interrogation, a statement is voluntary and admissible if it is made after advisement of rights and a knowing, intelligent, and voluntary waiver of those rights. State v. Aten, 130 Wn.2d 640, 663, 927 P.210 (1996).

A language barrier does not preclude a valid waiver of Miranda rights. The waiver of Miranda rights by a person with such a barrier is valid if the advisement of rights is made in the person's native language and the person claimed to understand the rights. State v. Teran, 71 Wn. App. 668, 672-73, 862 P.2d 134 (1993). The translation need not be perfect; it is sufficient that the defendant understands that he or she does not need to speak to the police and any statements he or she makes may be used against him or her. Id. A waiver may be inferred where the record reveals the defendant understood his or her rights and volunteered information after reaching such understanding. Id. No particular language is required to advise a suspect of Miranda rights; the

language need only be sufficient to convey the substance of the rights. State v. Koopman, 68 Wn. App. 514, 520, 844 P.2d 1024 (1992).

Here, the record of the CrR 3.5 hearing conducted on May 19, 2009, clearly shows defendant's statements were voluntary.

The initial statements were made to Officer Raul Cavazos, who responded to the emergency room when medical personnel advised of a possible child abuse situation. (RP 5). He briefly spoke to defendant after escorting her from the emergency room to a room across the hall. (RP 9). She was not placed under arrest and the officer had no probable cause to arrest her. (RP 9). She was not detained in any way by the officer. (RP 9). The officer attempted to gain only general information pending arrival of a detective. (RP 9). While he advised defendant that she could not go back into the emergency room because the child was in protective custody, he did not tell her that she had to remain in the room across the hall. (RP 9-10). Defendant did not appear confused or disoriented. (RP 12). She appeared to understand all requests and statements made. (RP 12). The lights were on and the door was open. (RP 13). No promises of any kind were made to her. (RP 13-14). The statements to Officer Cavazos were

obviously non-custodial and were voluntarily given. The trial court's ruling regarding statements to Officer Cavazos (CP 52-53) was correct in all respects.

The trial court should also be affirmed in its decision to admit statements to Detective Lee. The trial court found defendant was in custody at the time she was questioned by Detective Lee. (RP 106). However, a trial court decision may be affirmed on any basis. RAP 2.5(a); City of Sunnyside v. Lopez, 50 Wn. App. 786, 794 n.6, 751 P.2d 313 (1988). The record provides no basis for finding defendant was in custody.

Detective Lee initially contacted defendant in the emergency room where her child was being treated; he directed or guided her to Suite 17 where questioning could take place in a more comfortable setting. (RP 33, 48). Even when a person is being detained, moving the person a short distance to make the investigation more convenient does not convert the encounter into custodial interrogation. State v. Lund, 70 Wn. App. 437, 447-48, 853 P.2d 1379 (1993). Detective Lee never indicated to defendant that she was not free to leave. (RP 37). At the conclusion of the interview, Detective Lee walked defendant out to the hospital lobby where she was picked up by her husband and taken home. (RP

45). A reasonable person in defendant's position would not believe she was restrained to a degree associated with a formal arrest.

In any event, as noted by the trial court, it ultimately makes little difference whether defendant was in custody as she was fully advised of the Miranda warnings. (RP 101).

Detective Lee was called out of bed to respond to the hospital. (RP 31). After his initial contact in the emergency room, he entered Suite 17 where the defendant and the interpreter had been directed. (RP 34). He initially ascertained the credentials of the interpreter, who was already there at the request of the hospital. (RP 35-36). He then asked the defendant whether she understood the English language. (RP 36). She said she understood a little English but primarily used the interpreter to communicate with him. (RP 36).

Defendant told Detective Lee that "the doctor explained to her that there was going to be an investigation done due to the broken bones of the child." (RP 36). Detective Lee first got defendant to sign a medical release, which she willingly did. (RP 36-37). When his focus turned to a criminal investigation, he advised defendant of her constitutional rights. (RP 38). Detective Lee is familiar with those rights from his years of training and

experience as a police officer, and has advised persons of those rights many times. (RP 30-31). He did so by use of a card he carried with him; while the card he had with him at the hearing was not the same one he used at the interview, the two cards contained the same rights. (RP 39-40). The card listing the rights of which defendant was advised was admitted as exhibit one. (RP 40). He advised defendant of each of the rights through the interpreter. (RP 40). Defendant acknowledged she understood each of the rights individually, usually responding before the interpreter was finished. (RP 41). She affirmatively indicated she was willing to waive her rights and speak with Detective Lee. (RP 41). No threats or promises were made to her. (RP 42). She exhibited a calm and unemotional demeanor. (RP 42).

The interpreter, Oksana Rakhmestryuk, works for an interpreting service that contracts with the hospital. (RP 61). She is certified by the State of Washington as a Russian interpreter for medical and social purposes. (RP 61). She was required to pass oral and written examinations to become a certified interpreter. (RP 62). Russian is her native language. (RP 62). When interpreting for the two police officers, she correctly translated to the best of her ability. (RP 68-69).

Defendant complains that the interpreter was not certified for court purposes. The Legislature has mandated the provision of a “qualified” or “certified” interpreter for any legal proceeding where a litigant is unable to understand English. RCW 2.43.010, .030. A “qualified interpreter” is one who is “able readily” to translate English for non-English speaking persons and to translate the statements of non-English speaking persons into English. RCW 2.43.020(2). A “certified interpreter” is one who is certified by the office of the administrator of the courts. RCW 2.43.020(4). A “legal proceeding” is “a proceeding in any court in this state, grand jury hearing, or hearing before an inquiry judge, or before [an] administrative board, commission, agency, or licensing body of the state or any political subdivision thereof.” RCW 2.43.020(3). A police interrogation prior to the initiation of criminal charges is clearly not a “legal proceeding”. Thus, a qualified or certified interpreter was not required. Miranda warnings by their nature are designed to be understood by lay persons and do not include technical legal terms. Whether a defendant has been properly advised of his or her rights is a question of fact. State v. Prater, 77 Wn.2d 526, 534, 463 P.2d 640 (1970). The trial court’s factual determination will be upheld if supported by substantial evidence.

State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Here, Detective Lee read the rights from a standard-issue card and the interpreter, a person of obvious ability to translate between English and Russian, interpreted what he said to the best of her ability. The trial court's finding that defendant was properly advised of her rights is clearly supported by substantial evidence.

Defendant also claims the record does not reflect she was advised of her rights before questions were asked. This is not true. At RP 53, the following occurred during questioning of Detective Lee:

Q: Did you read her constitutional rights before you presented her with that medical release?

A: No.

Q: Did you inform her at any time that you could obtain a search warrant for those medical records rather than have her sign a release?

A: No.

Q: Could you have?

A: Yes.

Q: So then you began questioning Ms. Shved at that time?

A: Yes.

Q: After you had her sign the release?

A: And advised her of her constitutional rights.

The record clearly shows that defendant was advised of her constitutional rights after she had signed the release for medical records but before Detective Lee began questioning her.

Defendant also claims the trial court judge “shifted the burden of proof” when he observed in his oral opinion:

The interpreter indicated as I recall her testimony that the defendant was confused when the rights were read. Nothing was ever gone into that with the defendant. While her confusion could have been why am I being read my rights. That could have been the confusion.

(RP 106). Defendant fails to appreciate that the judge at a CrR 3.5 hearing acts as a trier of fact. State v. Alferez, 37 Wn. App. 508, 510, 681 P.2d 859 (1984). A trier of fact is free to accept or reject any testimony presented, or to decide what weight, if any, to give it. State v. Ellis, 136 Wn.2d 492, 521, 963 P.2d 843 (1998). Even uncontradicted testimony may be rejected by the trier of fact. Hendrickson, 46 Wn. App. at 190. When a trier of fact chooses to accept testimony supporting one theory and reject other testimony, it has nothing to do with shifting the burden of proof. Here, the trial

court understandably discounted testimony suggesting defendant may have been confused in light of defendant's own testimony. Defendant's principal contention was that she was told by Detective Lee that she would be arrested if she refused to give a statement (hardly a claim of confusion). (RP 94-95). The trial court was not required to believe this testimony and obviously did not.

In any event, statements in a trial court's oral opinion cannot form the basis for an assignment of error on appeal. See Hendrickson, 46 Wn. App. at 192 (judge in paternity action allegedly considering irrelevant matters by expressing concern for child); In re Clark, 26 Wn. App. 832, 837-39, 611 P.2d 1343 (1980) (judge in action to terminate parental rights stated he lived in same small town as child and had observed child in church). As in Hendrickson and Clark, the judge here was merely explaining his ruling and the comments were not central to the court's judgment.

Defendant states in footnote 7 on page 13 of her brief: "The prosecutor acknowledged the detective may have been 'unprepared.' VRP 100." What the trial prosecutor actually said during argument was:

Detective Lee showed up in the middle of the night responding from his home. I'm guessing maybe a little unprepared to deal with a case of this nature.

(RP 100). The trial prosecutor merely observed that since the detective had gotten out of bed in the middle of the night, he was probably not prepared for the shock of seeing a four-month old infant so severely injured that she had to be transferred to Spokane. The prosecutor was not suggesting the detective was unable to deal with the situation or was unprepared for the CrR 3.5 hearing.

Interestingly enough, during the jury trial defendant's own attorney emphasized that Detective Lee advised defendant of her Miranda rights, that defendant waived those rights, and that defendant did not "in police jargon, 'lawyer up'." (Trial RP 36-37). The testimony presented by the defense at pages 36-37 of the trial transcript is exactly correct and cannot be reconciled with the position defendant is taking in this appeal.

7. EXPERT TESTIMONY THAT INJURIES WERE NON-ACCIDENTAL (OR DELIBERATE) IS PROPER.

Finally, defendant briefly argues at 82 that expert testimony characterizing the victim's injuries as non-accidental was improper as that was an ultimate fact to be determined by the jury. First, defendant makes no showing that she preserved the issue in the

trial court. Second, such testimony is clearly proper. As stated in

State v. Mulder, 29 Wn. App. 513, 629 P.2d 462 (1981):

[Doctors may testify] with reasonable probability that a particular injury or group of injuries to a child is not accidental or is not consistent with the explanation offered therefor but is instead the result of physical abuse by a person of mature strength. . . .

[Testimony by a physician that injuries were non-accidental] does not, of course, necessarily indicate any wrongdoing by a particular defendant. Evidence still must be produced to establish that it was the defendant who caused the injuries in question. The trier of fact still must determine the weight to be given the expert's testimony.

Id. at 515-16 (citation omitted). As further stated in State v.

Toennis, 52 Wn. App. 176, 758 P.2d 539 (1988):

We agree with the court in Mulder that a qualified physician may testify that within reasonable probabilities, a particular injury or group of injuries to a child is not accidental or is not consistent with the defendant's explanation, but is instead consistent with physical abuse by a person of mature strength. Mulder, 29 Wn. App. at 515. Although it has been argued that this testimony usurps the function of the jury, we disagree. The jury must still decide whether the particular injury in question was caused by the defendant. Mulder, 29 Wn. App. at 516.

Id. at 185. See also Norlin, 134 Wn.2d at 585-86 (Talmadge, J., concurring). Notably, there was no usage in this case of arguably inflammatory terms like "battered child syndrome".

Along the same lines, a physician may also express an opinion that injuries were deliberately inflicted. As stated in State v. Baird, 83 Wn. App. 477, 922 P.2d 157 (1996):

Under the circumstances of this case, the doctors' statements that the cuts to [the victim] were deliberate were permissible opinions. The doctors did not tell the jury what result to reach. Their opinions did not rely upon a judgment about the defendant's credibility, but rested upon their experience and training and treatment of [the victim's] injuries. The fact that the opinions support the jury's conclusion that Baird was guilty does not make them improper opinions on guilt.

Id. at 485-86. See also Norlin, 134 Wn.2d at 575 (physician testified that "[t]his constellation of injuries you would not expect to see except in a child who has sustained child abuse, who has been an inflicted injury victim").

Moreover, for purposes of the rule that an expert may not give an opinion on an ultimate issue of fact in a criminal trial, a trial court has broad discretion on the question of what constitutes an ultimate issue of fact. State v. Nelson, 152 Wn. App. 755, 767, 219 P.3d 100 (2009). The rule against admitting opinion testimony as to a criminal defendant's guilt is not necessary violated by testimony couched in terms of a statutory element of an offense. Id. at 767-69. Expert testimony that pulls together desperate pieces of evidence into a coherent picture for the jury without

expressing an opinion on the ultimate issue of the defendant's guilt does not invade the province of the jury; such testimony is classic expert opinion testimony that the jury is free to accept or reject. Id. In the instant case, no showing has been made that the trial court abused its discretion in admitting expert testimony.

CONCLUSION

On the basis of the arguments set forth above, it is respectfully requested that the conviction of Olga V. Shved for Assault of a Child in the First Degree be affirmed.

Dated this 17th day of February, 2011.

Respectfully submitted,

SHAWN P. SANT
Prosecuting Attorney

By: 
Frank W. Jenny
WSBA #11591
Deputy Prosecuting Attorney

AFFIDAVIT OF MAILING

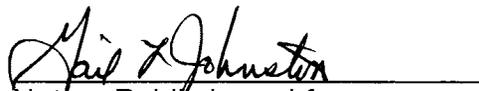
STATE OF WASHINGTON)
) SS.
County of Franklin)

COMES NOW Deborah L. Ford, being first duly sworn on oath, deposes and says:

That she is employed as a Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity. I hereby certify that on the 17th day of February, 2011, a copy of the foregoing was delivered to Olga Shved, Appellant, 336514, 9601 Bujacich Road N. W., Gig Harbor WA 98332-8300 and to Lenell Nussbaum, opposing counsel, 2003 Western Avenue, Suite 330 Seattle, Washington 98121-2161 by depositing in the mail of the United States of America a properly stamped and addressed envelope.



Signed and sworn to before me this 17th day of February, 2011.



Notary Public in and for
the State of Washington,
residing at Pasco
My appointment expires:
September 9, 2014

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