

No. 33743-0-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

THE STATE OF WASHINGTON,

Respondent

v.

KELLI ANNE JACOBSEN,

Appellant

**ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY**

NO. 11-1-01250-0

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. Ms. Jacobsen received effective assistance of counsel as guaranteed by the Sixth Amendment of the United States Constitution.
- B. The trial court did not make errors such that a third trial is required.
- C. The Benton County Prosecutor's Office did not commit misconduct.
- D. Even if there was an error, it was not enough to reach the level of cumulative error, such that a new trial would be required.

II. STATEMENT OF THE CASE

On June 22, 2011, after living for just one year and a day, R.J.M. (DOB: 06/21/2010) died after suffering a traumatic brain injury while in the defendant's care. Adams¹ Report of Proceedings (RP) 375-76; 380; 382; 504; 741; 860. The treating physicians, forensic pathologists, and pediatricians who later examined R.J.M.'s medical records all concluded that R.J.M. died of abusive head trauma. Adams RP 640; 775; 842.

Earlier that day, Ms. Johnson, R.J.M.'s mother, left home while R.J.M. was still asleep, and started work at 7am. Adams RP 509; 560. The

¹ There were two jury trials in this matter. The first trial, which resulted in a mistrial from a hung jury, was transcribed by court reporter Joseph King and will be referenced "King

defendant, R.J.M.'s nanny, texted Ms. Johnson to inform her that R.J.M. woke up around 8:15 in the morning and was "very upset." Adams RP 507; 560; 667. Ms. Johnson, knowing that R.J.M. was teething, told the defendant to give him some Tylenol. Adams RP 561; 668. Amy Graves, the defendant's friend who spent the night at the house that night, left for work around 9:40am. Adams RP 1198.

The defendant texted a picture of R.J.M. napping to Ms. Johnson at 10:11am. Adams RP 561-62; 666. At 10:47am, the defendant texted Ms. Johnson to tell her that R.J.M. was on his last jar of fruit. Adams RP 668. Later during the investigation, Detective Jansen found an empty container of banana baby food in the Williams Street home, consistent with this statement. Adams RP 901.

Ms. Johnson took lunch around 11:20am and came home to burn a CD for a coworker and see R.J.M. Adams RP 567-69; 652. While she worked on her computer, R.J.M. bounced on her and gnawed on her shoulder. Adams RP 569. He played on his tool bench toy and used his little toy hammer. Adams RP 570-71. Knowing R.J.M. would fuss when she left, Ms. Johnson slipped out of the house around 11:50am and returned to work. Adams RP 571; 652.

RP." The second trial and the subject of the current appeal was transcribed by court reporter Patricia Adams and will be referenced "Adams RP."

At 12:14pm, the defendant called 911 to report that R.J.M. was unresponsive and the ambulance was dispatched to the home. Adams RP 283; 295. The defendant called for neighbor Maddison Gangl to get her mom, Danielle Sundwall,² to come over from next door to help. Adams RP 267; 1088. Upon arriving, the defendant passed R.J.M. to Danielle, who observed that R.J.M.'s breathing was "hard," his eyes had rolled back in his head, and he had a postage stamp-size mark in the center of his back. Adams RP 268-70. The defendant said that R.J.M. was at the edge of the carpet playing at his tool bench toy when he fell and hit his head. Adams RP 532 (identifies 16 as the tool bench toy); 1099.

Paramedic Randy Aust and EMT Steve Waite arrived at 12:17pm. Adams RP 295. The two observed R.J.M. was unresponsive and immediately returned to the ambulance and began lifesaving procedures via transport. Adams RP 285; 296. When Paramedic Aust first evaluated R.J.M., his pupils were equal and reactive to light. Adams RP 297. A minute or two into transport, R.J.M. began experiencing posturing-type motions and one pupil dilated. Adams RP 297. This indicated to Paramedic Aust that R.J.M. had some sort of intracranial pressure building up in his head. Adams RP 297.

² During the time between R.J.M.'s death and the trial, Ms. Sundwall was married and changed her name from Crawford to Sundwall. Adams RP 264.

The defendant accompanied R.J.M. to Kadlec in the ambulance and told EMT Waite that R.J.M.'s injuries were caused when he tripped while pushing his pop-pop toy. Adams RP 278; 285-86. Based on his training, EMT Waite did not find that statement credible and again asked her to explain how R.J.M. was injured. Adams RP 287. The defendant then told him R.J.M. had fallen off the top of the bubble part of his pop-pop toy, a height of approximately six inches. Adams RP 287.

When R.J.M. arrived at the hospital at 12:24pm, he was evaluated by Doctor Later, the Emergency Room physician, and Doctor Marsh, the pediatric hospitalist. Adams RP 378; 638. Dr. Later observed that R.J.M. was non-verbal, had no eye opening, no spontaneous purposeful movement, and was posturing. Adams RP 379. According to Dr. Later, these symptoms were indicative of brain trauma, typically occurring when the brain swells and herniates. Adams RP 380. Doctor Later asked the defendant what really happened because he did not believe R.J.M.'s injuries were consistent with a fall off of a pediatric walking toy. Adams RP 385. Dr. Later told the defendant that he was going to refer the case to Child Protective Services to investigate her for child abuse. Adams RP 387-88.

During the defendant's conversation with Dr. Later, Nurse Shelley Goldstein, the trauma nurse assigned to the case, heard the defendant say,

“Does this mean I’m gonna be in trouble?” Adams RP 1141. Nurse Carla May also heard the defendant ask, “What’s going to happen to me?” Adams RP 341. While R.J.M. was being evaluated, Nurse Goldstein overheard the defendant say, “I can’t believe I did this.” Adams RP 1131-32.

When the pediatric code was called, Melanie O’Brien, the Birthing Center Nurse Manager, also came down to the Emergency Department to assist. Adams RP 352; 354. She spoke with the defendant to find out a more complete story as to what had happened to R.J.M. Adams RP 359. The defendant told her that she was in the kitchen fixing lunch while R.J.M. was playing with a push toy. Adams RP 359. She heard a loud thud and returned to the living room to find him lying on the floor. Adams RP 359.

During this time, Gabriel Sims, the charge nurse in the Emergency Department, observed the defendant for signs she may need to be admitted. Adams RP 431; 440-41. He observed she had a calm demeanor and was not exhibiting any concerning symptoms, such as labored breathing, fidgeting or agitation, sweating, or pallor. Adams RP 440-41. Nurse May also observed the defendant acting calm and rational during her time in the Emergency Department. Adams RP 337.

Based on the initial exam of R.J.M., Dr. Marsh accompanied him to the computer-assisted topography (CT-Scan) to try and find the exact location of the brain trauma. Adams RP 382; 409; 639. Dr. Shawn Jones, a radiologist at Kadlec, read R.J.M.'s CT-Scan and found that there was an approximately 8-millimeter thick subdural hematoma on the right side of R.J.M.'s brain. Adams RP 406; 410-12. Given that Dr. Jones saw no fractures on the skull, he testified that the most likely cause of the brain bleed was abuse. Adams RP 412-13.

Dr. Marsh read the scans and observed that the left-sided subdural bleed was so significant it was pushing the brain to the right side, and that the brain was swollen. Adams RP 639-40. Dr. Marsh was also concerned because the external exam of R.J.M. did not reveal any trauma, which is a "classic" sign of abusive head trauma. Adams RP 640. Given Dr. Marsh's training and experience, he too found R.J.M.'s injuries inconsistent with the explanation that R.J.M. fell from a six-inch toy. Adams RP 641; 643. Dr. Marsh specifically noted that having a "story that does not match the injury" was also a sign of abusive head trauma. Adams RP 641.

Dr. Cheerag Upadhyaya, a neurosurgeon, responded to the pediatric code and attended R.J.M.'s CT-Scan. Adams RP 1107; 1109-10. Given the scan, R.J.M.'s rapid deterioration, and that R.J.M.'s other pupil

had dilated, Dr. Upadhyaya determined that a trauma craniotomy was required to try to save R.J.M.'s life. Adams RP 1112; 1115.

R.J.M. was rushed to the operating room and Dr. Upadhyaya performed the trauma craniotomy. Adams RP 1113. R.J.M.'s brain continued to swell and blood was coming along the entire extent of the sinus. Adams RP 1117. Surgical efforts were ultimately unsuccessful, and R.J.M. died on the operating table at 1:59pm. Adams RP 741; 1118-19.

Dr. Timothy S. Gormley, Jr., a radiologist also working at Kadlec, reviewed a comprehensive skeletal survey of R.J.M. to look for non-accidental trauma. Adams RP 416; 419. Dr. Gormley found a fracture at the lateral margin of the humerus, the outside arm bone, likely caused by rapid acceleration and deceleration or violent shaking motions. Adams RP 422-23. Absent some additional trauma, like a car accident or plane crash, this injury is considered a pathognomonic injury, or non-accidental trauma. Adams RP 422. Dr. Gormley also found another metaphyseal corner fracture on R.J.M.'s femur, the leg bone, which he considered a "stat-critical" injury, or an injury that could result in loss of life or limb. Adams RP 423-25.

R.J.M.'s body was also examined by forensic pathologist Dr. Daniel Selove, who performed three different autopsies to determine R.J.M.'s exact cause of death. Adams RP 722; 726. Dr. Selove found six

bruises, not from medical intervention, on the head and neck, which he determined were abnormal bruises for a one-year-old. Adams RP 740. He found four discolorations on R.J.M.'s spine, which he also concluded were abnormal because a single fall, as described by the defendant, would not account for the multiple bruises on different parts of his body. Adams RP 744-45.

Dr. Selove found small blood vessels in the neck area torn, likely caused by a severe whiplash type motion of the neck done in a shaking manner. Adams RP 758. In total, Dr. Selove counted 22 bruises he believed came from six or more impacts. Adams RP 750. Dr. Selove believed that this number of bruises was abnormal for a one-year-old and were likely caused because of what another person had been doing to R.J.M. Adams RP 752.

Dr. Selove also identified three fractures: two fractures on the left humerus and one on the left femur. Adams RP 765. Dr. Selove determined that the fracture to the upper humerus was likely two to four weeks old, with the lower humerus fracture likely two weeks old. Adams RP 768. He also determined that the femur fracture was approximately two to four weeks old. Adams RP 768.

Dr. Selove's final determination was that R.J.M.'s death was caused by recent non-accidental head trauma consistent with violent

shaking. Adams RP 774. Based on R.J.M.'s stomach contents, Dr. Selove determined that the injury most likely occurred between 10:45am and 12:15pm and did not occur prior to R.J.M. eating. Adams RP 776-77. Further, based on Ms. Johnson's testimony that at approximately 11:45am, R.J.M. was alert and coordinated, with active mental and physical abilities allowing him to play with his toy hammer, the injury likely happened after that activity. Adams RP 779.

On June 30, 2011, Sergeant Berger contacted Dr. Kenneth Feldman, a Board Certified Pediatrician and child abuse expert to consult on R.J.M.'s death. Adams RP 826; 830-31. Dr. Feldman reviewed R.J.M.'s primary care records, x-rays, CT-Scans, the records from the incident, and the autopsy and photographs taken as part of that procedure. Adams RP 831-33.

He determined that the number of bruises on R.J.M. and the placement of those bruises—the upper arm, the trunk, the ear, the jaw line—were “distinctly unusual” for a child who had yet to start walking. Adams RP 834. Based on the two previous fractures on R.J.M.'s arm and the one on his leg, caused by severe jerks on the limb or from jerk-twisting combination movements, Dr. Feldman determined that R.J.M. had been previously abused. Adams RP 839-40; 860.

He also agreed that R.J.M.'s death was due to abusive head trauma because of two major medical observations. Adams RP 860. First, R.J.M. had hemorrhages in the eye muscles and in the sheath of the optic nerve, which is typically seen in children who have suffered abusive head trauma. Adams RP 843; 860. Second, if R.J.M. had suffered a fall, as the defendant claimed, he would have presented with a skull fracture, a possible subdural right where the impact occurred, and possibly bruising on the brain at that same location. Adams RP 849. However, there was no impact site on R.J.M.'s scalp, there was bleeding over a large area on both sides of the head, and there was a subdural and subarachnoid bleeding around the spinal cord. Adams RP 850. These injuries indicated R.J.M. had suffered traumatic whiplash forces, consistent with shaking or being thrown down onto a soft surface. Adams RP 851; 856-57. Dr. Feldman determined that given the severity of his injuries, R.J.M. would likely have been knocked out or concussed at the time the injury occurred. Adams RP 853.

During the investigation, it was revealed that Ms. Johnson hired the defendant to watch R.J.M. when he was three months old because her maternity leave was ending and she needed to return to work at CH2M-HILL. Adams RP 503; 506-07; 511. Shortly after beginning her employment, the defendant had difficulty arriving at work on time. Adams

RP 508. In order to make sure she was not late for work, Ms. Johnson offered for the defendant to move into her home at 1314 Williams Street in Richland, Washington, which she did that very week. Adams RP 293; 509.

Over the next nine months, the defendant was R.J.M.'s primary caregiver during the weekdays, with Ms. Johnson resuming care at approximately 4:45pm after she returned from work. Adams RP 509-10. On occasion, Ms. Johnson would ask her mother, Carey Gavaert, or the defendant to watch R.J.M. during the evening. Adams RP 510; 512.

The investigation into R.J.M.'s death also included a review of the defendant's and Ms. Johnson's phone records and text messages. Adams RP 651; 653; 940.

The review found that the defendant frequently texted Ms. Johnson to inform her when R.J.M. had been injured:

On December 8, 2010, the defendant texted Ms. Johnson, "Sorry. I couldn't talk. It was just really . . . scary and he was choking. . . . And then I look at his arm and to top it off, I left a mark. That's the last thing I need you to see." Adams RP 688; 690.

On March 2, 2011, the defendant texted that R.J.M. "got his arm stuck in his high chair. . . . He hurt his little arm. It got really stuck. I

mean, he's fine now, but he was screaming. It was very stuck . . ." Adams RP 685.

On March 10, 2011, the defendant texted Ms. Johnson,

Don't let this ruin your day, but I have to tell you. [R.J.M.] just fell and landed on his caterpillar and got his upper thigh and bruised it. He's okay and only cried a minute -- a minute. . . . Put some ice on it, not directly on it, but it's definitely already bruising. But he is fine. He only cried a minute. I just have to tell you when it happens. No surprises.

Adams RP 681-83.

On June 1, 2011, the defendant texted Ms. Johnson that "[R.J.M.] fell and hit head and cheek and I'm pretty sure he will have a little bruise."

Adams RP 672-73.

The phone records also showed that throughout the defendant's employment, Ms. Johnson texted the defendant to ask why R.J.M. had certain bruises and marks on his body:

On October 7, 2010, Ms. Johnson texted, "Hey, I also noticed a tiny bruise on [R.J.M.]'s leg. Do you know what happened? Explain?" Adams RP 696-97. The defendant responded, "I noticed that when I gave him a bath. The only thing I can think of is when I put him in his car seat so he could play with his frog, I forgot to move the buckle." Adams RP 698. Ms. Johnson responded, "Nah, I don't think that would do it. LOL. Who knows. He's a baby. They do weird things." Adams RP 698.

On May 6, 2011 at 3:18pm, Ms. Johnson again texted about R.J.M.: “Did he bump his noggin’?” Adams RP 678. The defendant responded, “No, he didn’t. Does it look like it?” Adams RP 678. Ms. Johnson responded, “Ya. He has a little bruise. I am sure he hit it on a toy. LOL. His big old head hits everything.” Adams RP 678. On this occasion, Ms. Johnson also sent a picture message along with her text which showed redness above R.J.M.’s right eye. Adams RP 679.

On May 19, 2011, Ms. Johnson asked “What happened to [R.J.M.]’s cheek? There is a bruise.” Adams RP 673-74. The defendant responded, “I don’t know. He hasn’t got hurt at all, except his nose yesterday.” Adams RP 674.

During the defendant’s employment, Ms. Johnson also received a number of texts from her, including one on the day of R.J.M.’s death, noting that R.J.M. was “fussy.” Adams RP 560-61. In the past, Ms. Johnson had asked the defendant if R.J.M. was too much for her to handle given his fussiness; however, the defendant became a “little defensive” on the topic when she said “no.” Adams RP 561.

On the Saturday before R.J.M.’s death, on June 18, 2011, Ms. Johnson threw him a first birthday party. Adams RP 540. Ms. Johnson made him a cake and friends and family brought presents. Adams RP 540-41. R.J.M. had not yet begun walking on his own, but he had started

“cruising.” Adams RP 466-67. Cruising is when a child pulls himself up using a sturdy object, like a coffee table, to support his standing position and moves along that object. Adams RP 834-35. While playing at the party, R.J.M.’s tool bench toy fell over and hit him in the nose, causing it bleed. Adams RP 541. R.J.M. was comforted and he resumed normal activities; he ate his birthday cake, played with toys, and interacted with the family and friends at the party. Adams RP 492; 497; 541-42.

On June 21, 2011, the day before R.J.M.’s death, Ms. Johnson went to work and returned home around 4:45pm. Adams RP 545; 547. Ms. Johnson picked up R.J.M. and the two went to the skate park to meet her friends Johnny Roberts and T.J. Simon. Adams RP 545; 547. After visiting with these friends, Ms. Johnson returned home to prepare R.J.M. for bed. Adams RP 550. She changed his diaper, put on his pajamas, and fed him a bottle. Adams RP 551-53.

While Ms. Johnson was at the skate park, the defendant and her friend, Amy Graves, left to pick up an air conditioner at Wal-Mart. Adams RP 557; 1185. The two returned to the Williams Street house between 8:30 and 9pm to find Ms. Johnson home and in the process of putting a fussy R.J.M. down for the evening. Adams RP 555-57; 1186. After R.J.M. went to sleep, Ms. Johnson left to meet her friend, Johnny Roberts, leaving the defendant and Amy at the home to watch R.J.M.. Adams RP 558. Amy

and the defendant watched movies until Ms. Johnson returned between 2 and 2:30 in the morning, and then all three went to sleep. Adams RP 558-59; 1192. From the interviews, it was determined that R.J.M. successfully slept through the night until he awoke on the morning of his death. Adams RP 1255.

Following this investigation, the State filed an Information and a Motion for Arrest/Detention of the defendant on October 27, 2011, for Manslaughter in the First Degree with aggravating factors. CP 1-5. Attorney Scott Johnson was appointed to represent the defendant. Adams RP 32. On August 9, 2012, the parties stipulated to a release of evidence to be examined by defense expert Ray Grimsbo. CP 12-13. On September 6, 2012, the parties stipulated to a protective order for Ms. Johnson's hard drive, ensuring that none of the information related to her photography business would be disseminated to the public. CP 14-15.

On April 16, 2013, the defendant filed a Motion in Limine to exclude the State from offering evidence of alleged prior bad acts pursuant to ER 404(b). CP 22; 27-31. Both attorneys filed separate briefing with the court and gave some background on the issue at a hearing on April 22, 2013. King RP 47-48; CP 105-07. The court issued a ruling from the bench on April 23, 2012, stating, "The way I look at it is it's not really prior bad acts, and it's not really child abuse syndrome. It's just relevant

evidence, given the facts of this case.” King RP 196. Defense counsel rejected the State’s offer of a limiting instruction regarding this evidence, instead arguing that “I think if either side has evidence positively linking the prior injuries, they surely should be able to present that evidence.” King RP 197-98. During the trial, a sidebar was conducted and the court limited how far back the State could go in discussing these prior injuries. King RP 950-52.

During the first trial, defense counsel Johnson intended to call Dr. John Plunkett as an expert witness and admit a video of a child falling off of a walking toy, hitting her head, and later dying as a result. CP 91. On April 18, 2013, the parties entered into a Stipulated Protective Order to keep this video from being released to the public. CP 91-92. This expert witness did not testify and this evidence was never admitted. *See* King RP 1111-1350.

On April 22, 2013, defense counsel Johnson motioned the court to limit the testimony of Derek Johnson, R.J.M.’s grandfather. CP 102-04. The State did not object. King RP 19-20.

The defendant first stood trial from April 22 to May 7, 2013. King RP 3-1459. On May 10, 2013, the court declared a mistrial after the jury was unable to reach a unanimous verdict. King RP 1460; CP 225.

On October 24, 2014, defense counsel Johnson motioned the court to withdraw as counsel for the defendant. CP 232-34. A proper *Bone Club* hearing and an *in camera* review of the issue were conducted. Adams RP 17-32. The court granted defense counsel's motion and Mr. Silverthorn was later appointed to represent the defendant. Adams RP 32.

The defendant again stood trial from July 13 to July 28, 2015. Adams RP 3-10. During the trial on July 22, 2015, defense counsel Silverthorn made an ER 404(b) record outside the presence of the jury regarding evidence the State intended to admit regarding R.J.M.'s prior injuries. Adams RP 644-49. After review, the defense stipulated to the text messages discussing these injuries in a redacted form. Adams RP 648.

On July 29, 2015, the jury returned a verdict of guilty of Manslaughter in the Second Degree. Adams RP 1442. The jury also returned a special verdict determining that the defendant (1) knew or should have known that the victim was particularly vulnerable or incapable of resistance, and (2) that the crime involved a destructive and foreseeable impact on others than the victim. CP 267; Adams RP 1443.

Ms. Jacobsen was sentenced on September 3, 2015, to fifty-four months, and a legal financial obligation ("LFO") totaling \$121,569.95. CP 268-79; Adams RP 1494. Ms. Jacobsen filed a Notice of Appeal on September 3, 2015. CP 280. The trial court entered Findings of Fact and

Conclusions of Law relating to the sentence on October 8, 2015. CP 294-95. This appeal follows.

III. ARGUMENT

A. Defense counsel’s representation of Ms. Jacobsen was not ineffective because it did not fall below an objective standard of reasonableness.

The Sixth Amendment of the United States Constitution not only guarantees a defendant the right to counsel, but also the right to effective counsel. U.S. Const. amend. VI; *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970); *see also Cuyler v. Sullivan*, 446 U.S. 335, 344, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980) (inadequate assistance of counsel does not satisfy the Sixth Amendment). “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

In order to make a claim for ineffective assistance of counsel, the defendant must show (1) “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment,” and (2) “that the deficient performance prejudiced the defense.” *Id.* at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899

P.2d 1251 (1995). A defendant proves the counsel did not function in the manner guaranteed by the Constitution if the “representation fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 687-88. The objective standard of reasonableness is “simply reasonableness under prevailing professional norms.” *Id.* at 688. A defendant proves the defense was prejudiced by establishing that “based on the record developed in the trial court, [] the result of the proceeding would have been different but for counsel’s deficient representation.” *McFarland*, 127 Wn.2d at 337.

1. Defense counsel’s decision to stipulate to the ER 404(b) evidence of R.J.M.’s alleged prior injuries was not ineffective assistance of counsel.

In two parts of the defendant’s brief, the defendant alleges it was ineffective assistance of counsel to not adequately object to evidence of prior acts under ER 404(b). Br. of Appellant at 15, 21-36. The State will address both at this time.

The procedural history of the case shows defense counsel’s thorough approach to prior bad evidence. On April 16, 2013, the defendant filed a motion to exclude evidence of prior bad acts under ER 404(b) (CP 27-31) and cited numerous cases including *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995), and a case specific to child physical abuse, *State v. Harris*, 164 Wn. App. 377, 263 P.3d 1276 (2011).

On that same day, the State filed a separate motion to allow evidence of prior injury with an offer of proof and citing *State v. Norlin*, 134 Wn.2d 570, 951 P.2d 1131 (1998), which upheld the admissibility of a fractured arm, ankle fracture, and two rib fractures that all had occurred prior to the child's admission to the hospital.

On April 22, 2013, the State filed a response to the defendant's original motion to exclude prior injuries. CP 328-42. It further discussed *State v. Norlin* and also cited *State v. Mulder*, 25 Wn. App. 513, 629 P.2d 462 (1981), and *State v. Toennis*, 52 Wn. App. 176, 758 P.2d 539 (1988), cases that affirmed admission of prior injuries in child physical abuse cases. The State's motion also included an affidavit summarizing the prosecution interview of Dr. Plunkett, an expert defense witness, and information from Dr. Gormley, Dr. Selove, and Dr. Feldman. CP 341-42.

Later, on April 22, 2013, the defense responded to both the State's reply to the original defense motion in limine, and the State's separate motion to allow evidence of prior injuries. CP 126-27.

On April 22, 2013, the State responded to the defense argument that was based on *State v. Harris*. CP 343-44.

Following the extensive briefing by both parties, the court noted that it was actually a combined motion and that:

I'm not going to grant either one of your motions completely. The way I look at it is it's not really prior bad acts, and it's not really child abuse syndrome. It's just relevant evidence given the facts of this case. And I don't expect child abuse syndrome to be -- those words to be used at all. And I also think that the evidence of prior injuries are relevant to this, and they should be before the jury. The jury may make what they will of it, but I also think that a limiting instruction is probably appropriate that's been suggested by Mr. Miller, and I guess I'd ask Mr. Johnson, if given my ruling, he thinks it might be appropriate.

King RP 196-97.

The defendant has chosen not to appeal this decision by Judge VanderSchoor. Final decisions on motions in limine are preserved for appeal. *State v. Powell*, 126 Wn.2d 244, 893 P.3d 615 (1995).

In the second trial, the defendant's opening statement discussed the broad time that the defendant cared for R.J.M. Defense counsel stated, "And we get into, throughout the year, [R.J.M.] has got some difficulties with a couple of medical issues that will be discussed about, and some of the remedial measures that were used to aid in those difficulties led to fussiness and the like." Adams RP 254.

Prior to Detective Benson's testimony, the Deputy Prosecutor advised the court that based on defense counsel's opening, the State would introduce texts that deal with R.J.M.'s schedule and different dates and times on which he was fussy. Adams RP 645.

Defense counsel and Deputy Prosecutor Holland went through “a thousand pages of text messages” and agreed as to which texts would be admissible in a redacted format. Adams RP 648.

At the time defense counsel worked with the State to come to an agreement on which texts would be admitted, he was aware of the prior briefing in the present case that uniformly admitted evidence of prior injuries in child physical abuse cases. He also had a theory of the case as explained in his opening statement that the mother’s behavior created a reasonable doubt that someone other than the defendant inflicted the abusive head trauma. Adams RP 260.

The futility of objecting to evidence of prior injuries is shown by the Washington State cases that address this issue.

State v. Norlin, 134 Wn.2d 570, 584, 951 P.2d 1131 (1998), upheld the trial court’s admission of prior injury to the child. Its holding that to be admissible the State must connect the defendant to the prior injuries gives more reason to associate the prior injuries to the defendant’s texts.

In *State v. Mulder*, 29 Wn. App. 513, 516, 629 P.2d 462 (1981), the court affirmed a conviction for second degree murder and held it was not error for an expert to testify that the injuries were the result of “battered child syndrome.”

In *State v. Toennis*, 52 Wn. App. 176, 185, 187, 758 P.2d 539 (1988), the court affirmed a conviction for second degree murder. It held that the use of the term “battered child syndrome” was appropriate. It also affirmed the trial court’s admission of prior injuries against the child.

It would not be unreasonable for a skilled and experienced attorney to conclude that agreeing to a stipulation with the State in which the State agreed not to use many texts objected to would be preferable to a gamble on a contested hearing. Also, counsel may have considered that a hearing in the second trial could lead the trial court to reconsider its order prohibiting the State from mentioning “battered child syndrome.” It certainly does not rise to the level of ineffective assistance.

2. Defense counsel’s decision not to object for lack of foundation concerning an alleged expert opinion of Nurse Gabriel Sims was not ineffective assistance of counsel.

Defense counsel’s decision not to object to Nurse Gabriel Sims’s testimony was not unreasonable given that (a) Prosecutor Miller laid a proper foundation regarding the testimony, and (b) the failure to object was reasonable under prevailing professional norms.

First, Prosecutor Miller adequately laid foundation to ask Nurse Sims questions regarding emergency medicine:

Q: Can you tell us what education and training you received to be become a nurse.

A: I have an Associate's Degree of nursing. I before that I received an Associates of arts and science and a Bachelors in nursing.

Q: And how long have you been working as a nurse in the emergency department at Kadlec?

A: At this point, 13 years – 13 and a half.

Adams RP 432. Nurse Sims also testified that part of his training is with scientific “studies that show what kind of injuries happen with what kind of accidents.” Adams RP 436. From this foundation, it was not improper for Nurse Sims to testify that based on his training and experience it was not normal for a child to have the kind of head trauma R.J.M. had from a six inch to one foot fall. Adams RP 436.

Further, during the first trial, Nurse Sims was also called to testify and provided a similar explanation as to his training and education. King RP 378-79. At this time, the previous defense counsel also did not object when Nurse Sims testified that a child would usually have had to fall from above one foot to exhibit the type of symptoms R.J.M. was presenting. King RP 381. Given that effective assistance of counsel is based on professional norms, and both defense counsels acted in the same manner in each trial, failure to object to this witness cannot be ineffective assistance of counsel.

3. Defense counsel's failure to request WPIC 25.02 pertaining to probable cause was not ineffective assistance of counsel.

The defendant alleges that it was ineffective assistance of counsel to not request that WPIC 25.02, the proximate cause instruction, be given in this case. She raises this issue in two different parts of her brief, but the State is answering both parts in this section.

In order for the Court to determine that failure to request a jury instruction was ineffective assistance of counsel, the Court must find (1) that the defendant was entitled to that instruction; (2) "that counsel's performance was deficient in failing to request the instruction"; and (3) "that the failure to request the instruction prejudiced" the defendant. *In re Cross*, 180 Wn.2d 664, 718, 327 P.3d 660 (2014).

The only authority cited by the defendant as to why it should have been given is half of a sentence from the WPIC note on use. Br. of Appellant at 36. Just use of the full sentence contradicts the defendant's arguments. That sentence is "The first two paragraphs should be given in all homicide cases *in which there is an issue between defendant's act and the death of the decedent.*" (emphasis added). WPIC 25.02.

In the present case, there was no issue between the defendant's act and the death of R.J.M. Dr. Selove testified that the infliction of the injury that led to the death likely occurred between 10:45am and 12:15pm and

did not occur prior to R.J.M. eating or playing with his toy hammer.

Adams RP 776-77; 779.

In this case, there was no argument that something besides the defendant's infliction of head trauma cause R.J.M.'s death.

State v. Dennison, 115 Wn.2d 609, 801 P.2d 193 (1990), affirmed the trial court's refusal to give WPIC 25.02 as an instruction. The court found that the instruction was not appropriate in a felony murder case where the defendant argued that the decedent's felonious acts superseded the defendant's acts because "but for Dennison kicking open Yates' door and committing armed burglary, the decedent would not have entered Yates' house and been killed." *Dennison*, 115 Wn.2d at 625.

The "but for" rule applies in this case. "But for" the defendant's infliction of abusive trauma, R.J.M. would not have died.

4. Defense counsel's failure to object to the imposition of discretionary legal financial obligations was not an ineffective assistance of counsel.

The Washington Supreme Court has held that unpreserved errors in sentencing "may be raised for the first time upon appeal because sentencing can implicate fundamental principles of due process if the sentence is based on information that is false, lacks a minimum indicia of reliability, or is unsupported in the record." *State v. Jones*, 182 Wn.2d 1, 6,

338 P.3d 278 (2014). Although, “unpreserved LFO errors do not command review as a matter of right,” the appellate court does have the discretion to review LFO errors as it sees fit. *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015); RAP 2.5(a).

Recently, the Court of Appeals, Division II, reasoned that defense counsel, who does not object to LFOs during sentencing, is arguably deficient, given the Court’s decision in *Blazina*. *State v. Lyle*, 188 Wn. App. 848, 853, 355 P.3d 327 (2015). However, to show prejudice, the defendant must still establish that the proceeding would have turned out differently but for defense counsel’s deficient representation. *Id.*

Following the Court’s reasoning in *Lyle*, defense counsel in this case should have objected to the LFOs imposed in order to preserve the defendant’s right to appeal. And given that failure, counsel is arguably deficient. However, the defendant has not established that based on the record, an objection at the time of sentencing would have changed the outcome. Thus, defense counsel was not ineffective.

B. The trial court did not commit any error in this case, and even if it did commit an error, it was harmless.

While there may be errors made during a trial, if the error does not affect substantial rights, it should be disregarded. *U.S. v. Davila*, 133 S. Ct. 2139, 2143, 186 L. Ed. 2d 139 (2013). If an appellate court determines

the trial court made a constitutional error, it is harmless if the court is “convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.” *State v. Russell*, 125 Wn.2d 24, 94, 882 P.2d 747 (1994). If the trial court made a non-constitutional or evidentiary rule error, it is harmless if the error did not “materially affect[] the outcome of the trial.” *Id*; *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004).

1. The trial court did not commit an error when it instructed the jury with Instructions #9, #12, and #15.

The Washington Constitution provides that “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” Wash. Const. art. 4, § 16.

A statement by the court constitutes a comment on the evidence if the court’s attitude toward the merits of the case or the court’s evaluation relative to the disputed issue is inferable from the statement. The touchstone of error in a trial court’s comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury.

State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995) (internal citations omitted).

The defendant alleges that Jury Instructions #12 and #15 are comments on the evidence because the language “inflicted trauma or injury to [R.J.M.]’s head” was included. *See* CP 254; 257. That language

is not a comment on the evidence, but rather is used to clarify. In determining whether the defendant engaged in reckless or negligent conduct, the jury was instructed that “conduct” meant she had inflicted trauma or injury to R.J.M.’s head. As there was no dispute as to the cause of R.J.M.’s death, abusive head trauma, it was not an error to include that language in the instructions.

The defendant also alleges that Jury Instruction #9 “essentially tells the jury that Ms. Jacobsen committed prior assaults against [R.J.M.]” Br. of Appellant at 20. However, to be a comment on the evidence, there must be “some expression or indication from [the Judge] as to [his or her] opinion on the value of the evidence or the weight of it.” Adams RP 227. Instruction #9 does not do this. *See* CP 251. It is based on WPIC 5.30 *Evidence Limited as to Purpose*, and does not deviate at all from the suggested language. This WPIC is properly used to show “intent, to show a common scheme or plan, to rebut a claim of accident” WPIC 5.30. In this case, the evidence that R.J.M. had been abused prior to his death is used for that purpose, and thus, it was not an improper comment on the evidence.

2. The court did not violate *State v. Blazina* when it assigned the LFOs.

The Washington Supreme Court provided that when determining LFOs, “the record must reflect that the trial court made an individualized inquiry into the defendant’s current and future ability to pay.” *Blazina*, 182 Wn.2d at 838. In *Blazina*, the trial court had not considered the matter on the record, but had just included “boilerplate language” in the judgment and sentence document. It was this action which the Court determined was improper for determining LFOs.

Blazina is markedly different from this case. Here, the trial judge on the record specifically inquired of defense counsel whether the defendant was able to work when she was released from prison:

The Court: Mr. Silverthorn, your client is capable of employment; is that correct?

Mr. Silverthorn: Yes. When she gets out, yes.

Adams RP 1494. It was from this on-the-record inquiry that the trial court determined the defendant could pay the discretionary LFOs, and then imposed them on the defendant. Given this clear on-the-record discussion, the trial court followed the requirement set forth in *Blazina*.

Further, while defendant is correct that she will likely never be employed as a nanny again, the defendant is capable of work and will need to find employment when she is released from prison. Based on the

Washington State Department of Labor & Industries, the current minimum wage in the State is \$11.00 per hour, which equates to just under \$23,000 per year.³ While this is not a high salary, the court has not yet set the monthly payment the defendant will be required to pay, and it is unlikely the court would set a payment that would keep her from meeting her basic needs. Additionally, while an LFO over \$100,000 is a large sum, the defendant was convicted of negligently killing a child. It is not “ludicrous,” as the defendant claims, for her to be held accountable, and be required to pay restitution in the sum sought.

C. The Benton County Prosecutor’s Office did not commit misconduct.

The defendant makes various allegations of prosecutorial misconduct. The State will address each allegation separately, in light of the rule that for a claim of prosecutorial misconduct to succeed, the defendant must establish “that the prosecutor’s conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.” *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (internal quotations omitted). For this type of claim, the burden is on the defendant to prove that “there is a substantial likelihood [that] the instances of misconduct affected the jury’s verdict.” *Magers* at 191. A “failure to object to an improper remark constitutes a waiver of error unless the

³ <http://www.lni.wa.gov/WorkplaceRights/Wages/Minimum/>.

remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Russell*, 125 Wn.2d at 86.

1. First Allegation

The defendant first alleges error because Danielle Sundwall, Christopher Thelwell, and Tawney Johnson either testified differently or in more detail in the second trial than in the first. Br. of Appellant at 40-44. The defendant does not argue that any of the minor discrepancies were prejudicial nor does she cite any legal authority for this alleged error.

The minor nature is shown by the defense counsel’s failure to object or impeach on the alleged inconsistencies. It is also shown by the alleged inconsistencies themselves.

The defendant argues that in the first trial Danielle Sundwall said that the defendant handed R.J.M. to her while in the second trial that the defendant tossed him to her. King RP 755, l. 22, to RP 756. First, defense counsel misrepresents Ms. Sundwall’s testimony. She actually testified that the defendant “passed [R.J.M.] to me.” Adams RP 268. When she was later asked to describe how the defendant passed R.J.M., she answered, “Like a football toss.” Adams RP 268.

The defendant next contrasts Ms. Sundwall’s first trial testimony that Ms. Jacobsen may have been in shock. RP 766, ll. 4-17, with her

second trial testimony that the atmosphere in the house was wrong, Adams RP 270. However, the defendant only excerpted one sentence of the testimony. The full testimony was:

When I walked into the house, the whole atmosphere was wrong. There was no elevated voices. You know, panic? I really thought the phone call was to a family member or a friend. I would never have guessed it was a 911 phone call.

Adams RP 270, ll. 16-23.

Similarly, the defendant does not argue the defendant was prejudiced by Christopher Thelwell's second trial testimony that the defendant appeared emotionless with a blank look on her face. Adams RP 323. This testimony was consistent with the testimony of other witnesses regarding the defendant's demeanor at the time, such as Ms. Sundwall's impressions described above.

The defendant alleges error concerning Ms. Johnson's testimony in the second trial, regarding her prior texts with the defendant about R.J.M. being fussy, and details about her seeing R.J.M. at the hospital. However, there were no objections to this testimony. Further, the defendant does not argue that even if this instance was error, that it was proof of a substantial likelihood that it affected the jury's verdict.

2. Second Allegation

The defendant next alleges error in the State's questioning of Paramedic Steve Waite. Again, the defendant only cites part of the questioning. The full questioning was as follows:

[Mr. Miller:]

Q: And what did the defendant tell you when you asked her what happened?

A: She stated that he was pushing a pop-pop toy and tripped or fell over.

Q: And what was your reaction when she told you that?

A: Incredulity. I just did not believe that that was a credible story. I have four children of my own –

Mr. Silverthorn: I would object as to the comment on another potential witness's veracity or credibility of the story. That's for the jury to determine.

Mr. Miller: I think his answer was not her, in general, but that specific statement.

The Court: I will allow it.

By Mr. Miller:

Q: And so you found -- Tell me if I'm repeating things wrongly, but you found her answer incredulous based upon your training and as the father of four children?

A: Right. Children don't fall down and become unresponsive. That just doesn't happen.

Q: After you found her statement not being credible, did you ask her anything else? Or did you ask her again?

A: Yeah, I asked her -- I don't remember quite how I phrased it, but I tried to elicit another response of what really happened.

Q: And what did she say?

A: At that time, she said [R.J.M.] climbed up on top of the bubble part of the pop-pop toy -- like six inches -- and fell off of that.

Adams RP 286-87. Here, the primary purpose of Steve Waite's testimony about not finding the defendant's first statement credible was to explain why he tried to elicit another response of what really happened.

Further, the testimony regarding the credibility of the defendant's statement is admissible under *State v. Saunders*, 120 Wn. App. 800, 86 P.3d 232 (2004). In that case, the defendant alleged four occasions where the police officer gave opinion testimony, including one instance when he testified that there were a lot of inconsistencies in the defendant's statements. *Id.* at 811. The *Saunders* court found that the officer's testimony was permissible opinion testimony because it was based on inferences from the evidence. *Id.* at 812. Further, the court held that just because "an opinion encompassing ultimate factual issues *supports* the conclusion that the defendant is guilty [it] does not make the testimony an improper opinion on guilt." *Id.* (internal quotations omitted).

That is the case here. Steve Waite based his opinion that he needed the defendant to tell him "what really happened" on his inferences from the evidence, including his observations of R.J.M. and the defendant's statements. Adams RP 286-87.

3. Third Allegation

The defendant alleges error in the redirect questioning of Dr. Jones, the radiologist who did the CT-Scan, regarding the timing of R.J.M.'s fatal injury.

On direct, the State did not ask any questions about the timing of the injury. Adams RP 406-13. However, on cross the defendant asked Dr. Jones repeated questions about his prior testimony in the first trial where he did testify about timing. Adams RP 413-14. Dr. Jones acknowledged the prior testimony, and that the prior attorney had pushed the issue. Adams RP 413. Dr. Jones also testified that he was the wrong person to talk to, and that he would defer to the neurosurgeon and the pathologist for the timing issue. Adams RP 413-14.

The transcript shows that the purpose of the redirect was to show the jury the reason the State did not ask Dr. Jones questions about the timing of the injury, and quell any thought that the State was attempting to hide information:

Q: Just so I understand. The one time you testified, you testified it would be minutes to hours. And you're testifying, both today and back then, that other doctors would have a better expertise in determining the time. Is that correct?

A: Yeah. I think I probably, if I could go back and do that again, I would have said -- you know, I would have said I don't think I should answer that. I think that it

belongs in the realm of the pathologist or the neurosurgeon to quantify the time.

Q: And you and I actually discussed that when we met a couple weeks ago. Is that correct?

A: Yes.

Q: And we agreed and decided I would not even ask you that question; is that correct?

A: Yes.

Q: Did I keep my word?

A: Thank you.

Mr. Miller: I have . . . no further questions.

Adams RP 414-15. Contrary to the defendant's general citation to cases that deal with a prosecutor's expression of his own belief of guilt, Br. of Appellant at 46-47, the State clearly does not engage in this type of questioning during this redirect.

4. Fourth Allegation

The defendant alleges that the State's redirect of Dr. Selove amounted to commenting on the evidence and establishing the prosecutor's own credibility. Br. of Appellant at 47.

Defense counsel did object to this testimony at trial. After the State argued that defense counsel opened the door, the trial court allowed the questioning. Adams RP 806.

The trial court's ruling was correct as defense counsel did repeatedly ask Dr. Selove about where he got his information. Adams RP 781-92; 797. For example, defense counsel asked Dr. Selove if it was typical for him to receive emails from detectives asking for more

information as they tried to narrow the time frame for R.J.M.'s death. Adams RP 784-85. Later, defense asked if detectives sent reports of information provided by the defendant and her friend, Amy Graves, or if his information was all based on what the mother, Ms. Johnson, had told police. Adams RP 786.

Defense later posed a question about R.J.M.'s appetite followed up with questions about reports he had received. Adams RP 789-90. That was followed by more questions about what Richland police reports were sent to him and whether they included a report of the defendant's statement. Adams RP 791-92.

This was fair and effective cross examination by defense counsel. One impression from the cross exam was that Dr. Selove's opinion was shaped by the information given to him by the State and that the State was selective in what information it provided. By the same standard, it was appropriate for the State to ask Dr. Selove questions about how the State had approached him when asking questions regarding R.J.M.'s time of death and how the State had provided him with reports.

5. Fifth Allegation

The defendant alleges that during cross of Amy Graves, the State aligned himself with the jury when he asked Ms. Graves how she was treated by the Prosecutor in Judge's chambers and by the detectives who

interviewed her. Br. of Appellant at 49-50. The defendant's argument that the questioning was unnecessary is contradicted by the defense's direct exam of Ms. Graves.

The record of Ms. Graves's direct exam shows her answering detailed questions about the number of interviews, the length of interviews, and the manner of interviews by detectives and the prosecutor in chambers. Adams RP 1210-20. The very short cross on this issue was appropriate to rebut any inference of the State badgering Ms. Graves.

The defense alleges error to the following question by the State:

Q: Miss Graves, I understand. I'm trying not to be rude and trying not to be like a lawyer or whatever, but do you see why I might be asking myself? You certainly seemed to be sure of things this morning. And now, when you're being pinned down on how many nights, it's like all of a sudden your memory goes and you don't remember if it's once or twice.

Adams RP 1242-43.

The defense does not contest the gist of the question, and the record shows the accuracy of the question. Adams RP 1154-1221. During cross, Ms. Graves answered questions with "I can't remember," or similar answers, numerous times. Adams RP 1224, l. 14, l. 17; 1229, l. 16; 1233, l. 18; 1236, l. 7, l. 17; 1239, l. 15-16; 1242, l. 17-18. This was in dramatic contrast to her direct testimony where it does not appear that there were any times she answered that she did not remember.

Therefore, the questioning was proper as it was based on inferences from the record and was in the form of questioning, not expressing a personal opinion by the prosecutor.

6. Sixth Allegation

The defendant alleges that the State commented on the credibility of witnesses and cited excerpts of the State's closing argument concerning the testimony of Amy Graves and Tawney Johnson. Br. of Appellant at 52-54.

However, a "prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility on the evidence." *State v. Allen*, 161 Wn. App. 727, 746, 255 P.3d 784 (2011). "Prejudicial error will not be found unless it is "clear and unmistakable" that counsel [was] expressing a personal opinion." *Id.* A prosecutor's comments "must be reviewed in the context of the total argument, the issues in the case, . . . and the instructions given to the jury." *Id.*

Here, the challenged paragraphs about Ms. Graves's testimony are:

If there was ever a contest for the most changes in a statement and testimony, Amy Graves would be a good candidate to win the national competition.

...

It's almost as if Amy Graves forgot that when you come up here to that witness stand, you take an oath to tell the truth.

A somewhat cavalier attitude of changing stories and changing testimonies.

Adams RP 1363; 1368. These paragraphs were followed by detailed discussions based on specific examples of changes and contradictions within Ms. Graves's testimony. Adams RP 1363-68.

The State's closing argument should be viewed on the basis of the six and a half pages of transcript devoted to Ms. Graves's testimony and not just the two paragraphs cited above. The totality of the argument shows that it was based on the evidence and reasonable inferences in it. It also shows that the prosecutor never expressed his personal opinion.

Likewise, the challenged part of the argument concerning Ms. Johnson's testimony did not constitute vouching for her testimony. Instead, the argument met the test from *Allen*, and it was proper because it was based on the evidence presented at trial rather than personal opinion.

Even the defense excerpt of the challenged argument ends with the State telling the jury, "you're gonna have to evaluate her credibility" Adams RP 1373. Further, the State's argument includes a reminder to the jury that credibility determinations are its responsibility:

Members of the jury, this is why we have trials. Tawney Johnson took the stand. Yes. And she was cross-examined. And she had to answer questions about her drinking. But you saw her demeanor. You saw and heard the testimony from other witnesses about their observations of her demeanor. And you heard the testimony from her parents

who came and saw [R.J.M.] in these circumstances. And it's up to you, the jury -- and that's one of the Instructions you got -- it's up to the jury to evaluate the demeanor and credibility of Tawney Johnson.

Adams RP 1372. As the court noted in *Allen*, it is important to look at the entire context of the argument. Here, the prosecutor reminded the jury that it was its job to judge the credibility of witnesses and then outlined which evidence could support the jury's conclusion that the witness was credible. Thus, the argument was not improper.

7. Seventh Allegation

The defendant excerpts a portion of the argument where the State argues that “[R.J.M.] needs justice. Our community needs justice. We need a finding of truth. We need a finding of justice.” Br. of Appellant at 55; Adams RP 1379.

The excerpt does not include the sentence that immediately followed: “And in this case, that is that the defendant is guilty and that she's guilty of Manslaughter in the First Degree.” Adams RP 1379.

The State understands that it must be very careful when mentioning needing justice and truth in closing argument. However, this argument is different from other cases where appellate courts found such arguments to be improper. Here, there was no attempt to substitute a search for the truth for determining whether the defendant was guilty of

the charged crime, which was the basis for the finding in *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009). Instead, the prosecutor tied the argument to finding the defendant guilty of Manslaughter in the First Degree. The reference to the truth was a reference to the prior arguments that the evidence, the facts and truth presented throughout the trial, showed that the defendant committed Manslaughter in the First Degree.

The one time reference in the present case, that the truth in the case was that the defendant was guilty, is different from the more detailed arguments about truth seen in *State v. Lindsay*, 180 Wn.2d 423, 326 P.3d 125 (2014). In that case, the prosecutor explained that verdict is Latin for “to speak the truth,” and that voir dire means the same in French. *Id.* at 430. The prosecutor finished by arguing, “Speak the truth. Convict both of these defendants.” *Id.* In that case, the effect of the argument was for the jury to search for the truth and therefore, convict, as opposed to arguing that the truth in this case was that the evidence showed that the defendant was guilty.

In other words, this is not a case where the State essentially asked the jury to render a verdict by searching for the truth instead of by finding the defendant guilty beyond a reasonable doubt. Instead, it was an argument to find the defendant guilty of the crime because, as discussed

earlier in the argument, the evidence showed that the truth of the case was that the defendant was guilty of Manslaughter in the First Degree.

Even if this Court found the reference to needing a finding of truth improper, it does not warrant reversal. First, the defense counsel did not object to the argument during trial. Second, the comments were not made specifically to inflame the jury. In *State v. Finch*, 137 Wn.2d 792, 841, 975 P.2d 967 (1999), the prosecutor made a statement that implied that if the jury disagreed with the State, it would be breaking its oath. While the Court found that the prosecutor's statements were improper, they were not "specifically designed to inflame the jury," and thus, were not prosecutorial misconduct. *Id.* at 842.

Even if the Court finds that the prosecutor's comments were improper, they were significantly less improper than those made in *Finch*, and they too were not designed to inflame the jury. Thus, this Court should not find the comments were prosecutorial misconduct.

D. The defendant has not met her burden of proving an accumulation of error of sufficient magnitude that would require retrial of this case a third time.

The defendant has the burden of proving that there has been such a significant error that retrial is necessary. *State v. Moses*, 193 Wn. App. 341, 367, 372 P.3d 147 (2016). However, even if the defendant can prove there has been error, if that error cannot be shown to be prejudicial, the

defendant will not be considered deprived of her rights such that a new trial would be required. *Id.*

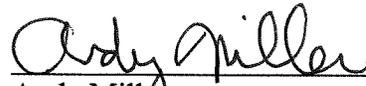
As discussed above, the defendant received effective assistance of counsel. And even if the defense counsel erred in some way, it was not prejudicial to the defendant. Additionally, the trial court did not err, and even if it did err in some way, it was harmless. Finally, there was no prosecutorial misconduct, and even if there was, it too was harmless. Thus, the defendant has failed to meet her burden of proving there was significant error such that retrial a third time is appropriate.

IV. CONCLUSION

Based on the facts of this case and the arguments provided above, this Court should deny the defendant's appeal and request for a third trial.

RESPECTFULLY SUBMITTED this 7th day of July, 2017.

ANDY MILLER
Prosecutor



Andy Miller
Prosecuting Attorney
Bar No. 10817
OFC ID NO. 91004

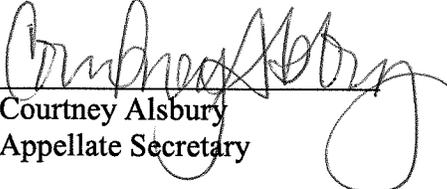
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Dennis Morgan
Attorney at Law
P.O. Box 1019
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E-mail service by agreement
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Signed at Kennewick, Washington on July 7, 2017.


Courtney Alsbury
Appellate Secretary

BENTON COUNTY PROSECUTOR'S OFFICE

July 07, 2017 - 5:12 PM

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