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COURT OF APPEALS
DIVISION III

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Court of Appeals
Division III
State of Washington

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOSHUA WADE BRINK, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The State committed misconduct by vouching for the credibility of an expert witness, Dr. Michelle Messer.
2. The State committed misconduct by misstating and shifting the burden of proof.
3. The State committed misconduct by arguing facts not in evidence.
4. Defense counsel was ineffective for failing to object to witness testimony which stated an opinion on the defendant's guilt.
5. Defense counsel was ineffective for failing to object to speculative testimony from an expert witness, Dr. Michelle Messer.
6. Defense counsel was ineffective for failing to object to the State's misconduct during closing argument.
7. The trial court erred in admitting extraneous photographs which were prejudicial.
8. The cumulative errors of the State, trial court and defense counsel warrant reversal.
9. The trial court erred in sentencing the defendant beyond the statutory maximum.
10. An award of costs on appeal against the defendant would be improper.

II. ISSUES PRESENTED

1. Whether the prosecutor engaged in misconduct by vouching for the credibility of its expert witness, Dr. Messer, when he made it clear that it was a jury determination regarding witness credibility and they were free to disregard any witness' testimony, even Dr. Messer's?
2. Whether the prosecutor committed misconduct by misstating or shifting the burden of proof?

3. Whether the State committed misconduct by arguing facts not in evidence?
4. Whether defense counsel was ineffective for not objecting to certain testimony where the decision to not object was a tactical decision to not highlight unfavorable evidence?
5. Whether defense counsel was ineffective by not objecting to the State's closing argument?
6. Whether the aforementioned alleged errors were harmless considering the evidence presented against the defendant that he concealed the child's injury?
7. Whether the trial court abused its discretion in admitting four photographs of the victim's injuries when those photographs were used by the expert witness to explain the extent of the injuries sustained by the child?
8. Has defendant established cumulative error requiring reversal?
9. Whether the trial court erred in sentencing the defendant to 120 months of incarceration and 18 months of community custody where the maximum sentence for second degree assault of a child is 10 years?
10. Whether this court should decline to impose appellate costs if defendant is unsuccessful on appeal?

III. STATEMENT OF THE CASE

The defendant, Joshua Brink, was charged in Spokane County Superior Court with one count of second degree assault of a child, with aggravating circumstances. CP 1. The aggravators alleged were that the victim was particularly vulnerable and that the defendant used his position of trust to facilitate the commission of the crime. CP 1.

In 2012, Mr. Brink lived with his girlfriend, Ashley Brown, and her two-year-old son, K.S.D., in Elk, Washington. RP 143-143, 146. Mr. Brink worked as a logger, and Ms. Brown was the manager of a Subway restaurant. RP 147. While Ms. Brown was away at work, Mr. Brink would sometimes care for K.S.D. RP 148. Mr. Brink had known K.S.D. since his birth, and described their relationship as that of a father and son. RP 192. Usually, K.S.D. would attend day care while Ms. Brown was working, but in November 2012, Ms. Brown decided to keep him home due to a dispute with the child's biological father. RP 148.

On November 29, 2012, Mr. Brink took K.S.D. with him to work. RP 147, 152. At about 9:00 p.m., while she was at work, Ms. Brown received a telephone call from Mr. Brink. RP 148. Mr. Brink told Ms. Brown that she needed to come home from work because K.S.D. had been burned. RP 148. After picking up burn cream from the grocery store, Ms. Brown went home. RP 149. Upon arriving home, Ms. Brown found Mr. Brink holding K.S.D. fully dressed; Mr. Brink's friend Alex Groce was also at the home. RP 149. Ms. Brown looked at K.S.D.'s bottom, and saw that it was red. RP 149.

Mr. Brink told Ms. Brown that he and K.S.D. arrived home from work sometime between 3:30 and 5:00 p.m., and prepared to take a shower. RP 152-153. Mr. Brink placed K.S.D. on the toilet to go potty, because they

were working on potty training the child. RP 147, 152. Mr. Brink was adamant that K.S.D. should be potty trained, because he did not want him to go to the bathroom in his diaper. RP 147. While K.S.D. was on the toilet, Mr. Brink heard a truck pull up outside. RP 152. Mr. Brink told Ms. Brown that he took K.S.D. off the toilet and set him in the empty bathtub facing the faucet. RP 153. Ms. Brown said that Mr. Brink told her that he had a quick conversation with Ms. Groce,¹ who had arrived in her truck, and during that time, they heard K.S.D. scream in the bathroom.² RP 153. He told Ms. Brown that he rushed into the bathroom to find that K.S.D. had turned on the water in the bathtub and it burned him. RP 153. Ms. Brown never received any explanation why Mr. Brink did not call her until 9:00 p.m. to inform her that K.S.D. had been burned. RP 153.

During the next ten days, although Ms. Brown could tell K.S.D. was sore, he was still playing and eating. RP 150. During that time, however, she felt as though Mr. Brink was pushing her away from caring for K.S.D.³

¹ Ms. Groce did not testify at trial. RP at *passim*.

² It was 23 feet from the kitchen where Mr. Brink talked to Ms. Groce and the bathtub where K.S.D. was burned. RP 181.

³ And he was with Josh every day while I was at work, and so for the majority of the time, you know, he was with K.S.D., and when I would try to see the burn or, you know, try to deal with it, I felt like I was being pushed away from that because Josh had taken charge in doing it.

RP 161. However, she took K.S.D. to the hospital ten days after the incident because he appeared to be getting worse. RP 151. Mr. Brink did not accompany Ms. Brown and K.S.D. to the hospital. RP 165, 228.

On December 7, 2012, Dr. Michelle Messer, a pediatrician who specializes in child abuse and neglect, RP 59, treated K.S.D. at the hospital, RP 63. When she took off K.S.D.'s diaper, he yelled in pain. RP 65. The injuries K.S.D. sustained were serious burn injuries to his buttocks and the underside of his penis. RP 66. The location of the injuries had the potential to result in scarring that would cause problems with the child's penis. RP 66. The burns were not limited to the child's external skin as they extended into K.S.D.'s anus. RP 68. This surprised Dr. Messer because she did not expect to see burns extending into the child's anus based on the description of how the burns occurred. RP 68. During the years of Dr. Messer's practice, she had never seen burns like those sustained by K.S.D. RP 70.

Dr. Messer did not observe any other injuries on K.S.D.'s body. RP 71. In Dr. Messer's opinion, this fact was not consistent with a child

...

I didn't [change any diapers], and that was because I felt like Josh didn't really want me to see the burn days after it had happened. So that's why he was, you know, always making sure it was taken care of.

RP 161.

who had been in a tub filled with hot water. RP 73. With an “immersion burn”⁴ such as would occur in a tub of hot water, Dr. Messer would have expected to see other injuries to the child – or lack of injuries due to “sparing” which occurs when areas of skin are insulated in some fashion from the scalding water, whether by contact with the cooler tub surface or by contact with another area of the body (such as the leg area behind bent knees). RP 72. With a child who is mobile, Dr. Messer would also expect to observe splash marks on the child’s skin. RP 72. K.S.D. did not have any splash marks, and the child’s buttocks and legs lacked any sparing or burns indicative of him being seated in a tub with hot water. RP 72-74.

Despite Dr. Messer’s attempts to look at burns with the belief that they were the result of an accident, in K.S.D.’s case, she was unable to develop any explanation for the burn pattern that was consistent with an accidental burning:

Unfortunately in this case, I could not put this together with an accidental burn, but I went through that process in my mind. What if he was put into a tub that didn’t have any water in it yet. That was the story that was given, put here in the tub. There was a ding dong at the door. Just wait a minute. I’ll be right back kind of thing, and, you know, kids get bored. What does that thing do? What if I turn that?

⁴ Dr. Messer explained the term “immersion burn” as a burn that occurs where a child is “placed in a tub, typically, and if water is scalding hot, there’s going to be some burning happening to the skin. So it’s basically an immersion burn is when you get burns by being immersed in scalding hot water.” RP 63.

So if that happened and it was scalding hot water, I would expect the child to get up, to scream, to maybe stomp around, maybe try to get out. I don't have any evidence on his body that's what happened. There was no, you know, burn on his belly if he turned this thing on and hot water came flying out.

It was not anywhere I would have expected it. He did not have a water line on the legs. There were no, you know, if you're splashing in the water, there's sometimes drips. You know, you can find like drip marks and things. There was nothing like that at all, nothing that would go along with the child trying to get out of the tub where hot water is pooling in there.

Then I started thinking, well, just for fun, maybe the kid has his back to the little spouts. I don't know that I would expect a two year old or many children to like reach behind and try to turn the water on, but for the sake of thinking about any other scenario that would cause this. That might get the lower back, but I still don't get to the buttocks. I don't get it to the underside of the penis, and I, again, would imagine this kid would be up screaming and yelling, and somebody who was there as the adult might have responded to that.

So I just cannot figure out how the kid could do this to him. I just don't think it would have looked this way. I can imagine him turning it on, but I can't say that that would case the photos that we've been looking at. That doesn't fit this pattern. At that point, I have to figure out what does fit this pattern, and there are ways to do this. They are all abusive.

...

One of the things I thought about is sometimes it's difficult taking care of a two year old. I've had a few of those in my life and they can be a challenge. You know, sometimes they poop at inappropriate times or they get their hands in the diaper, and it goes everywhere, and you have to clean that up, and people get mad.

I could see where somebody could be so mad they would take the kid and use scalding hot water to clean him up. That would produce this. That's one way.

Do I know for sure what happened to do that? No, I don't. I wasn't there, but that would be one way to cause this kind of burn.

RP 75-77.

Dr. Messer concluded that K.S.D.'s injuries were not consistent with an immersion burn and were abusive in nature. RP 78. Dr. Messer also consulted with other experts in the field regarding K.S.D.'s injuries, and none believed the injuries were caused by immersion in a tub of water. RP 85-86, 93. It was also Dr. Messer's opinion that K.S.D.'s injuries were inconsistent with the statement Mr. Brink gave to police, because if K.S.D.'s buttocks had been touching the bathtub, she believed she would have observed "sparing" in that area. RP 88-90. Ultimately, when questioned by defense counsel, Dr. Messer agreed that it was "within the realm of possibility" that K.S.D.'s burns occurred in some other manner and that she could not say "one hundred percent" that the burns did not occur in some other fashion. RP 94-95.

The jury convicted the defendant as charged, and also found the State had proven both aggravating circumstances. CP 147, 149. The defendant, who had previously been convicted of 14 felonies was sentenced to a standard range sentence of 120 months. The court also imposed

18 months of community custody, and indicated that the length of community custody would be adjusted depending on the amount of good time the defendant received while incarcerated in order to ensure that the defendant's sentence would not exceed the statutory maximum.⁵ CP 178-180; RP 291. The defendant timely appealed.

IV. ARGUMENT

A. THE DEPUTY PROSECUTOR DID NOT ENGAGE IN MISCONDUCT, AND EVEN ASSUMING ERROR OCCURRED, IT WAS NOT FLAGRANT OR ILL-INTENTIONED.

In order to establish prosecutorial misconduct, a defendant must prove that a prosecutor's conduct was both improper and that it prejudiced his right to a fair trial. *State v. Thorgerson*, 172 Wn.2d 438, 442-443, 258 P.3d 43 (2011). A defendant can establish prejudice only by

⁵ I am going to impose the 120 months. You do have 18 months of community custody, but it cannot exceed the maximum, which is the 120 months. So how that works is you'll get good time, and whatever good time you get on the 120 months, you'll spend on community custody.

So if you basically get a third off for good time or a fourth off, that the amount of time you'll spend on community custody. If you end up sitting out the whole because they don't give you any good time and you won't have any. So it's 120 months with 18 months not to exceed a total statutory amount of 120 months.

RP 291.

demonstrating a substantial likelihood that the misconduct affected the jury's verdict. *Id.*

An appellate court does not review a prosecutor's statements in isolation, but rather in the context of the overall argument, the issues in the case, the evidence that was addressed in the argument and the jury instructions. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). If defense counsel does not object to a prosecutor's comments during closing argument, any error is deemed waived, unless the misconduct was so flagrant and ill-intentioned that no instruction by the trial court could have cured the resulting prejudice. *Id.*; see also *State v. Belgarde*, 110 Wn.2d 504, 755 P.2d 174 (1988).

The defendant alleges that, for a number of reasons, the following portion of the State's closing argument was improper:

The physical evidence, the observed evidence is of abusive injury. The doctor told you beyond a reasonable doubt – without hesitation, without hesitation at all that this was not nonaccidental. She gave a thorough and good consideration. So if it didn't happen that way, which way did it happen?

RP 259.

Each of the defendant's arguments fails as discussed below.

1. The deputy prosecutor did not improperly vouch for the credibility of the expert witness.

It is improper for a prosecutor to personally vouch for a witness's credibility; however, prosecutors may argue an inference from the evidence, and prejudicial error will not be found unless it is "clear and unmistakable" that the prosecutor is expressing a personal opinion. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). Here, nothing in the State's closing argument suggests that the prosecutor was expressing a personal opinion of Dr. Messer's credibility.

The portion of the State's argument from which the defendant now claims error was certainly unartfully worded. By using a double negative, "not nonaccidental" the prosecutor inadvertently argued that the injuries *were* accidental. Thus, if the court were to read the prosecutor's words literally, the prosecutor actually argued that the doctor testified without hesitation that the injuries to K.S.D. were accidental in nature.

The State would agree that this was certainly not the prosecutor's intended argument. The State posits that the prosecutor's use of the words "beyond a reasonable doubt" to characterize the doctor's testimony was also inadvertent. The prosecutor realized this misstatement and corrected the language he used to "without hesitation." RP 259.

Absent a contemporaneous objection to the prosecutor's closing argument, the defendant must demonstrate that the prosecutor's argument was so flagrant and ill-intentioned that no curative instruction would have obviated the error. He cannot do so on this record.

The court instructed the jury, both in writing and orally, that the determination of witness credibility was solely up to the jury. RP 240, CP 120. It also instructed the jury that it was not required to accept the opinion of any expert witness. CP 127; RP 244. The State also repeated the instruction that the credibility determinations were solely up to the jury. RP 276. The defense attorney also spoke regarding the credibility of the witnesses and those factors the jurors may consider in determining credibility. RP 263-264,⁶ 265.⁷

⁶ They're your witnesses. They're the ones presenting the evidence to you, which is one of the reasons why it says that it's your duty to determine the facts of the case.

That same instruction talks about things you can consider, the opportunity of a witness to observe ... any personal interest that the witness may have in the outcome...

RP 264.

⁷ There's an instruction that talks about the expert witness... It talks about, you know, they have special training, education or experience as to how they come an expert.

It, also, says you do not have to accept their position or opinion that they give to you...

RP 265.

Perhaps most importantly, the State, in its rebuttal closing, clarified that the jury need not believe Dr. Messer’s testimony and could use its own common sense:

It is extremely important that you follow the law and not what we tell you the law is.

RP 275.

Now the defense tells you that there’s evidence that Mr. Brink did not know how the water got on. That’s what he says, but you are the sole judges of the credibility of the witnesses. You’re, also, judges of the value of the weight to be given to the testimony of each witness.

What that means is the fact that if a witness says it, you don’t have to believe it or you can believe it entirely or you can believe it partially, and you can consider a number of things and anything else that you think is appropriate.

...

You get to judge whether the truth was told. You don’t have to – you don’t have to [sic] Dr. Messer absolutely. You can consult your common sense. You can listen to what she said and say oh, that makes sense or say no, it doesn’t.

RP 276-277 (emphasis added).

A consideration of the state’s argument in its *entirety*, rather than piecemeal, as the defendant would have this court do, reveals no ill-intent by the prosecutor. *See State v. Jackson*, 150 Wn. App. 877, 884, 209 P.3d 553 (Div. 2 2009) (declining defendant’s invitation to consider only “snippets of argument” rather than the entire closing argument of the prosecutor). The defendant cannot demonstrate that this particular statement

prejudiced him in any way when it is considered in light of the instructions and other arguments made regarding witness credibility.

Defendant has also failed to demonstrate how this argument was flagrant or ill-intentioned, especially where the literal meaning of the prosecutor's words actually benefited the defendant. Without a contemporaneous objection at trial, it is his burden to demonstrate flagrant or ill-intentioned conduct on the part of the prosecutor; he has failed to do so. And, any error in this regard could have been cured by an additional instruction by the court – but none was needed as the prosecutor clearly corrected any error in his rebuttal closing.

2. The prosecutor did not misstate or shift the burden of proof in closing argument.

A criminal defendant has no duty to present evidence, and it is error for the prosecutor to suggest otherwise. *State v. Cheatam*, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). An argument that shifts the State's burden to prove guilt beyond a reasonable doubt constitutes misconduct. *Thorgerson*, 172 Wn.2d at 453; *State v. Gregory*, 158 Wn.2d 759, 859-61, 147 P.3d 1201 (2006). However, a prosecutor is entitled to point out the improbability or lack of evidentiary support for the defense theory of the case. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). A prosecutor has wide latitude to comment on the evidence introduced at trial and to draw

reasonable inferences from the evidence. *Thorgerson*, 172 Wn.2d at 448. The “mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense.” *Jackson*, 150 Wn. App. at 885-86.

State v. Osman presents very similar facts to those presented here. 192 Wn. App. 355, 366 P.3d 956 (Div. 1 2016). In *Osman*, the prosecutor argued that the evidence demonstrated that the defendant was guilty of the crimes of unlawful imprisonment and assault, pointing to two pieces of evidence which indicated a struggle occurred between the defendant and victim - the victim’s broken fingernails and her lost earring. The prosecutor then asked:

If a struggle or some type of confrontation didn’t occur in the car how did that earring come out of her ear and get left on the floor and how did she break those fingernails if an encounter did not, and a struggle did not occur?

192 Wn. App. at 367.

The defense objected, and the trial court overruled the objection. *Id.*

Division One of this court held:

The prosecutor’s argument did not impermissibly shift the burden of proof to the defense. The argument was based on the evidence. The prosecutor did not argue that the defense had failed to offer another explanation. Rather, the prosecutor argued that the evidence did not support any other

reasonable explanation. Because the argument properly focused on the evidence, Osman cannot show misconduct.

Id. at 368.

In this case, defendant assigns error to the prosecutor's argument in closing, "So if it didn't happen that way, which way did it happen?" Appellant's Br. at 17. As discussed above, however, the court cannot view this argument in isolation, but rather in light of the issues at trial and the other arguments made. The primary issues at trial were whether K.S.D.'s injury was accidental or intentional, the manner in which the injury actually occurred, and Mr. Brink's mental state at the time of the injury.

The arguments preceding and following the alleged misconduct demonstrate that the prosecutor was making an argument *based on the evidence* presented at trial, and was arguing that Mr. Brink's version of events was inconsistent with the evidence. For instance, before the alleged misconduct, the prosecutor argued:

The physical evidence, the direct evidence, is that [K.S.D.] was severely burned on his buttocks, on his scrotum, and on the bottom of his penis, and nowhere else on his body. He was injured in a way that is what the doctor told you and what is common sense is inconsistent with the story given...

RP 258.

There is no splash marks. There's no burns to the feet. There's no burns to the hands. There's no burns to the legs. There's no nothing. The burning is there and only there, and there is no sparing on the buttocks, and the doctor told you

and you saw some pictures that sparing would occur if the child was sitting on a surface.

Mr. Brink told the detectives that he rushed into the bathroom. That the water was running into the tub. It was steaming. [K.S.D.] was sitting on the bottom of the tub. There was water rushing between his legs, and he pulled [K.S.D.] out, saw the injury. It's not consistent with the injuries.

[K.S.D.] simply – I mean, if he had been sitting on the bottom of the tub, there was sparing. If he had stood and fallen down, there would have been burns on the feet. If the hot water was rushing between his legs and coming up, he would have had some splashing or burning on his legs. There was none of that.

RP 259.

After the alleged misconduct, the prosecutor continued:

I'd ask you to consider a few things about the evidence.

First off, the evidence at the time is that Mr. Brink got home at 4:30. That they immediately went into the bath, and that there was – he left [K.S.D.] – he says he left [K.S.D.] in the bath for two minutes and then heard screaming. He put him in the – put him in the icy water for ten minutes and then called the victim's mother.

Members of the jury, it doesn't add up. Ms. Brown at the time told you that she got the call at 9:00. They're missing hours there. There's evidence by this person of concealment, and there's evidence from his testimony on the stand that he's changing times, changing things in ways that are consistent with what he wants you to think, rather than what happened.

...

The testimony is that it was an abusive injury. A mechanism might have been that he was placed or dipped in the hot

water by Mr. Brink. If that is true, it's a second degree assault without pre-adventure [sic] without a doubt.

RP 260-261.

The prosecutor's arguments all involved the evidence presented at trial and the version of events presented by Mr. Brink and whether the evidence was consistent or inconsistent with the testimony (and common sense of the jury). This did not shift the burden of proof to the defendant. The prosecutor was entitled to argue inferences from the evidence and to point out the flaws in the defendant's version of events. No misconduct occurred in this regard.

Defendant also claims that this argument is an impermissible "fill-in-the-blank" argument that required the jury to come up with a reason to acquit the defendant. Appellant's Br. at 18. The prosecutor did no such thing by arguing that the evidence did not support the defendant's version of events. The State is entitled to argue that the evidence supports its theory of the case, and does not support the theory presented by the defendant both before and during trial.

Defendant additionally claims that the prosecutor's argument minimized the burden of proof. It is doubtful that the prosecutor intended to suggest in any fashion that the witness' role was to determine whether the defendant was guilty beyond a reasonable doubt; after all, the prosecutor

immediately corrected his word choice to indicate that the doctor testified “without hesitation” rather than “beyond a reasonable doubt” and subsequently told the jury that it was free to disbelieve the doctor’s testimony altogether. Defendant cannot demonstrate that if this was error, it was so flagrant and ill-intentioned that no instruction from the court could have cured it. This argument is without merit.

3. Facts not in evidence

A prosecutor commits error where he or she urges a jury to decide a case based on evidence that is outside the record. *See e.g., State v. Claflin*, 38 Wn. App. 847, 690 P.2d 1186 (1984). Defendant asserts that the prosecutor’s statement that “[t]he doctor told you beyond a reasonable doubt – without hesitation, without hesitation at all that this was not nonaccidental,” RP 259, improperly argued facts not in evidence because the doctor never testified that she was sure beyond a reasonable doubt that the injuries were intentionally inflicted. And, that is accurate - the doctor did not testify that she was certain “beyond a reasonable doubt.” However, as previously indicated, the prosecutor corrected this inadvertent misstatement in closing to indicate that the doctor testified “without hesitation” that the injuries were intentionally inflicted, which does not misstate or mischaracterize the doctor’s testimony as set forth above.

In any event, without an objection contemporaneously made regarding statement, wherein the court could have cured the prosecutor's poor word choice, the defendant must demonstrate that the statement was so flagrant and ill-intentioned that it could not have been cured by an instruction. The trial court could have re-read the jury the portion of instruction number 1 that told the jury:

The lawyers' remarks, statements and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement or argument that is not supported by the evidence or the law in my instructions.

CP 120; RP 241.

Such an instruction, if given again, could have cured any resulting prejudice from the prosecutor's remark. And, as previously indicated, the prosecutor subsequently invited the jury to disregard the doctor's testimony if it did not make sense, curing any error that potentially occurred. The jury was able to view the photographs of K.S.D.'s injuries for themselves, use their collective common sense and determine whether the localized injuries to only the victim's buttocks and penis proved beyond a reasonable doubt that K.S.D. was assaulted.

B. DEFENSE COUNSEL WAS NOT INEFFECTIVE; THE DECISION TO NOT OBJECT TO ARGUMENTS AND EVIDENCE WAS A TACTICAL DECISION.

Review of an ineffective assistance of counsel claim begins with a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689, 80 L.Ed.2d 674, 104 S.Ct 2052 (1984). "To prevail on this claim, the defendant must show his attorneys were 'not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment' and their errors were 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *In re Personal Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998), citing *Strickland*, 466 U.S. at 687. Judicial scrutiny of counsel's performance is highly deferential and requires that every effort be made to eliminate the "distorting effects of hindsight" to evaluate the conduct from "counsel's perspective at the time"; in order to be successful on a claim of ineffective assistance of counsel, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689. In order to rebut the presumption of effective assistance of counsel, the defendant must establish the absence of any "*conceivable* legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (emphasis added).

The first element of ineffectiveness is met by showing counsel's conduct fell below an objective standard of reasonableness. The second element is met by showing that, but for counsel's unprofessional errors, there is a reasonable probability the outcome of the proceeding would have been different. *In re Personal Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992).

1. Dr. Messer's Testimony was not speculative.

Defendant claims that defense counsel should have objected when

Dr. Messer testified:

One of the things I thought about is sometimes it's difficult taking care of a two year old. I've had a few of those in my life and they can be a challenge. You know, sometimes they poop at inappropriate times or they get their hands in the diaper, and it goes everywhere, and you have to clean that up, and people get mad.

I could see where somebody could be so mad they would take the kid and use scalding hot water to clean him up. That would produce this. That's one way.

Do I know for sure what happened to do that? No, I don't. I wasn't there, but that would be one way to cause this kind of burn.

RP 77.

Defendant attempts to characterize this testimony as speculative and requiring an objection by counsel.

However, an expert witness may testify and give an *opinion* when “scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” ER 702. An expert may base an opinion or inference from facts or data perceived by or made known to the expert at or before trial. ER 703. An expert’s opinion is inadmissible if it amounts to nothing more than conjecture or speculation, or if it is based upon unwarranted assumptions. *See, e.g., Miller v. Likins*, 109 Wn. App. 140, 34 P.3d 835 (Div. 1 2001) (in a personal injury action the trial court properly excluded accident reconstructionist testimony where expert admitted in a deposition that he had no way of determining where the point of impact occurred and had no physical evidence to show where the plaintiff was located at the time of the incident); *Riccobono v. Pierce Cnty.*, 92 Wn. App. 254, 966 P.2d 327 (Div. 2 1998) (in a discrimination case the court erred in allowing accountant to testify as to the plaintiff’s future economic losses where the expert made assumptions without any basis for those assumptions, about the plaintiff’s future employability).

Dr. Messer is a medical doctor, RP 57, who had completed a residency in pediatrics and a fellowship in pediatric critical care, RP 58, who holds a specialty in child abuse and neglect, and teaches in that area, RP 59, 61. After personally observing K.S.D.’s injuries and in preparing to testify in Mr. Brink’s case, she researched abusive burns. RP 62-63. The

doctor explained that she is able to look at the “distribution of burns” and could determine “the mechanism of why we see what we see.” RP 71. She explained the phenomenon of “sparing” which is essentially a void in the distribution of burns from immersion in scalding water that occurs where certain areas of the skin do not contact the water, such as where the buttocks touch the cooler surface of the bathtub. RP 74.

When using her expertise in opining whether an injury is due to abuse, she approaches the issue with the mindset that the injuries occurred accidentally. RP 75. In K.S.D.’s case, that is the process she used; she viewed the burns and extrapolated from those burns and lack of sparing any conceivable mechanism by which the burns could have occurred. RP 75-77. In her opinion, the burns could not have occurred if a child was placed in an empty bathtub, because there would have been burns to other areas of the child’s skin – the feet, if he had stomped in the water in an attempt to get out; the legs, if he had been sitting in the water as it filled the tub; or the lower back, if he had managed to turn on the water with his back facing the faucet. RP 76. She explained that the pattern of burns on K.S.D.’s skin was inconsistent with the child turning on the water by himself. RP 77.

She indicated “at that point, I have to figure out what does fit this pattern, and there are ways to do this. They are all abusive.” RP 77. She indicated that she has had children, and knows that they can be a challenge

as they can “poop” at inappropriate times and make messes. RP 77. It was not improper for her, as a mother and a doctor to posit that the burns could have occurred by someone who used scalding water to clean the child’s diaper area out of anger or frustration.⁸ RP 77. She acknowledged that she could not say “for sure” that that is how K.S.D.’s burns occurred, but that K.S.D.’s burns could have been caused in this manner. RP 77. She further testified that the burns were consistent with the child’s bottom being dipped into scalding water. RP 78. Her ultimate conclusion was that the burn pattern did not match the story given by Mr. Brink. RP 78.

The doctor’s opinion was not improperly speculative or based upon unwarranted assumptions. All of her opinions were based on the evidence she personally observed - the burns to K.S.D.’s buttocks, scrotum, and penis, and the lack of burns anywhere else, and her personal knowledge as a doctor, specialist in child abuse, and as a mother. Defense counsel was not ineffective for failing to object to the doctor’s opinion, when it was a valid opinion based on her training, knowledge, and expertise.

⁸ On appeal, defendant also alleges that “nothing in the record indicated that K.S.D. had been burned because he had soiled himself.” Appellant’s Br. at 24. While there was no specific testimony that that is what motivated Mr. Brink’s actions, there was testimony from Ms. Brown that Mr. Brink was “adamant” that K.S.D. was potty trained because “he didn’t want him to be going to the bathroom in his diaper.” RP 147.

Furthermore, defense counsel tactically chose not to object to the testimony so as not to call further attention to it, or give the appearance that the testimony was damaging to Mr. Brink. Rather, counsel chose to extensively cross-examine Dr. Messer, with the ultimate goal of gaining her acknowledgment that the burns could have been caused in some other fashion. RP 78-87, 90-95. And, defense counsel succeeded in that regard, as Dr. Messer ultimately testified during cross-examination, “so can I tell you a hundred percent that almost anything, you know, can’t happen in any scenario. Probably not...” RP 94. And, that was the precise testimony that defense counsel needed from Dr. Messer, in order to argue that something occurred in that bathtub that caused K.S.D.’s burns other than abuse at Mr. Brink’s hand; “she does not have an alternate explanation, and all those other people she consulted with apparently didn’t have one on the list served [sic], but that does not exclude the possibility there’s some other way this hatched to have the injuries [K.S.D.] got.” RP 267.

Counsel was not ineffective for not objecting to Dr. Messer’s testimony because defendant is unable to show that his performance was deficient as the manner in which to attack a witness’ testimony is a trial tactic.

2. Defense counsel was not ineffective in failing to object to Ms. Brown's opinion testimony

Defendant alleges his trial counsel was ineffective for failing to object to Ms. Brown's testimony that she "believe[s] now after listening to the experts and seeing, you now, the reports and everything that it was done on purpose." RP 168.

In order to show that counsel was ineffective for failing to object to a witness' response, the defendant must show that the objection would likely have been sustained. *See State v. Johnston*, 143 Wn. App. 1, 20, 177 P.3d 1127 (Div. 3 2007). An objection would likely not be sustained where defendant has opened the door to the evidence.

In his learned treatise on evidence, Karl B. Tegland summarizes the "open door" evidence as follows:

A party may introduce inadmissible evidence if the opposing party has no objection, or may choose to introduce evidence that would be inadmissible if offered by the opposing party. In this sort of situation, the introduction of inadmissible evidence is often said to "open the door" both to cross-examination that would normally be improper and to the introduction of normally inadmissible evidence to explain or contradict the initial evidence. The rule is based upon the belief that an adversary system is essential to determining the truth.

5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW § 103.14, at 66-67 (5th ed. 2007).

The most cited case dealing with the “open door rule,” and the one cited by TEGLAND, *supra*, is *State v. Gefeller*, 76 Wn.2d 449, 458 P.2d 17 (1969), where our state supreme court explained:

It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. *To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths.* Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

Gefeller, 76 Wn.2d at 455 (emphasis added).

Here, during recross-examination, the defendant opened the door to Ms. Brown’s belief regarding how the incident occurred when he asked Ms. Brown to testify to her belief that there was no reason to suspect Mr. Brink abused K.S.D:

Defense Counsel: Prior to this incident happening, when you and [K.S.D.] were all living together, how did the relationship seem between your son, [K.S.D.] and Mr. Brink?

Ms. Brown: *Great, and that’s why it was very hard for me to understand the situation or to assume that the incident was on purpose or not because, you know, I would think that if a child was getting abused by somebody, that child would not want to be around that person, but at the same time, he was*

still wanting to be around Josh, you know. He would want to go outside and play with Josh.

Defense Counsel: So what you're saying, if I understand correctly, *just to sort of condense it is until this incident, it seemed everything was okay. There was no reason to suspect otherwise?*

Ms. Brown: For the most part, yes.

RP 167 (emphasis added).

Immediately following recross-examination, the prosecutor asked:

Prosecutor: Ms. Brown, has your understanding changed?

Ms. Brown: Yes.

Prosecutor: Can you explain that?

Ms. Brown: I believe now after listening to the experts and seeing, you know the reports and everything that it was done on purpose.

RP 168.

The defendant may not create an impression regarding his character without anticipating that the State will attempt to rebut that impression. Here, Mr. Brink questioned Ms. Brown regarding the good relationship he had with her son and her lack of reason to suspect any abuse. In creating the impression that everything was alright in the home and that she could not imagine that K.S.D. was or could be injured by Mr. Brink, the State was entitled to further inquire into the basis for that belief. Defense counsel was not ineffective for failing to object to that line of questioning as there was

no basis for an objection became he had previously opened the door for that testimony. *See Gefeller, supra.*

Furthermore, the prosecutor's request for Ms. Brown to "explain" how her understanding changed did not call for Ms. Brown to give an opinion on the defendant's guilt. Defense counsel was not ineffective for failing to object to her response to that question because to do so would both run the risk of re-emphasizing the unfavorable testimony and being overruled as discussed above, or, having the objection sustained, while still re-emphasizing the answer. Defense counsel's decision to not object to this answer was one involving trial tactics. Additionally, any error that occurred in Ms. Brown's nonresponsive answer to the State's re-re-direct examination was also harmless as the State never mentioned her original or changed opinion in its closing or otherwise in the case.

3. Defense Counsel was Not Ineffective for Failing to Object to Prosecutor's Statements in Closing Argument.

As discussed above, defense counsel did not object during the State's closing argument when the prosecutor stated that Dr. Messer "testified beyond a reasonable doubt – without hesitation, without hesitation at all..." Defendant claims that there can be no tactical reason for his trial counsel's decision to not object.

However, there are at least two reasons defense counsel would not object. First, he recognized that it was an inadvertent misstatement, corrected by counsel, or knew the literal meaning of the prosecutor's words, as discussed above, could work to the benefit of his client. After all, the prosecutor's literal words meant that Dr. Messer testified that the burning was accidental.

Second, it was a tactical decision to not object to the state's argument in favor of addressing the objectionable argument directly in the defense closing. In confronting an argument by objection, the defense attorney may call additional attention to or overemphasize the objectionable argument. Conversely, if the defense attorney presents the jury with a strong counterargument to the objectionable argument he may be able to greatly mitigate the effect of the prior argument, and maximize his own.

Here, defense counsel made such an argument in closing:

Instruction 3 is the one about the defendant having entered a plea of not guilty. It talks about the presumption of innocence, and as Mr. Brink sits here, he's still cloaked with that presumption of innocence. *That cloak remains until such time as the jury decides he is no longer presumed innocent.*

That is not a guaranteed thing to happen. Its one of the reasons why there's an expression innocent until proven guilty. I hate that expression. It sounds like, well, you're guilty. We're just going to take our time getting there, and when we do, you're done. Sort of like the Russian show trials.

That's not what this is. I prefer to think innocent unless proven guilty, and fortunately with the good sense that you jurors have ... I'm not terribly concerned because I have no doubt that until the evidence is complete and you're in deliberations, you're not going to make any decisions ahead of time.

RP 264-265.

[Instruction 7] says you do not have to accept [an expert's] position or opinion that they give you. You look at their training and experience, their knowledge, their abilities and each in their own way has a wealth of experience. I am not going to tell you they don't. That would just be insulting your intelligence.

...

The doctor I don't think she likes me, and I probably don't blame her. I was a little bit like a bulldog. I had a question towards the end of the time she was on the stand. All I wanted was a simple answer, and before we even got there, she had to be reminded by the Judge, the lawyers ask the questions.

The doctor doesn't ask the questions and it was simple. Is there in the realm of possibility a way this could have happened otherwise? That's yes or no, not yes, and a lot of explanation. It's yes or no. Is it possible? Yes, she conversed through list with doctors around the world. I have no doubt when she says around the world, she's accurate. Nobody had seen something that fit this, but my question was is it possible, and she finally admitted yes, it's possible.

RP 265-267.

Defense counsel proceeded to argue that simply because the doctor could not postulate another means for this injury to occur, "that does not

exclude the possibility there's some other way this hatched to have the injuries that [K.S.D.] got." RP 267. He posited that there were other ways that K.S.D. could have been burned that would have been accidental in nature, "[i]t is possible that when [K.S.D.] came in contact with the bottom of the tub, the water was already beneath him which would have resulted in the injuries, and there wouldn't have been any sparing to show because the tub had heated with the water." RP 269-270.

Defense counsel tactically chose to address the damaging aspects of the doctor's testimony in his closing argument, rather than objecting to the prosecutor's closing argument. In his closing argument, defense counsel addressed the burden of proof. He addressed the credibility of the witnesses, including the expert witnesses. He addressed the doctor's inability to give him direct answers when testifying, and he addressed her concession that the injuries could have occurred in some other way. He also suggested a way in which those injuries could occur. Defense counsel was not ineffective when he did not object during the State's closing argument because he chose to address those issues in his closing argument, avoiding the appearance that the defense viewed the prosecutor's closing argument as damaging to its theory of the case. Defense counsel remains entitled to the presumption that he was effective as his conduct was due to legitimate trial strategy.

C. ANY OF THE ABOVE ALLEGED ERRORS WERE HARMLESS, DUE TO THE OVERWHELMING EVIDENCE THAT K.S.D. WAS INTENTIONALLY BURNED.

Constitutional errors are harmless if an appellate 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. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). However, constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. *Id.*

The overwhelming evidence presented in Mr. Brink's case supports the defendant's guilt beyond a reasonable doubt, and a reasonable jury would have reached the same result.

The State presented significant evidence that Mr. Brink was attempting to conceal K.S.D.'s injuries from his mother. Mr. Brink originally told law enforcement that he arrived home with K.S.D. at 4:30 p.m. RP 217. At trial, he changed that time to 5:30 to 5:45 p.m. RP 196. Prior to trial, he told law enforcement that the first thing he and K.S.D. did was to unpack and shower. RP 218. At trial, he testified that he first started a fire and turned on the lights in the home. RP 218, 225.

At trial he testified that when Ms. Groce arrived at his home, he spoke with her for no more than "a couple minutes" before they heard K.S.D. scream in the bathtub. RP 225. All in all, it was approximately

17 minutes after he arrived home with K.S.D. that he heard the child scream in the tub. RP 225-226. And yet, Ms. Brown did not receive a call from him notifying her that K.S.D. had been burned until 9:00 p.m.

It also makes no logical sense that K.S.D. would have been as severely burned just 17 feet away from the area where Mr. Brink stood in the kitchen, without Mr. Brink or Ms. Groce hearing the water turn on, or hearing the immediate screams from the child – as it only took 40 seconds for the bath water to reach its peak temperature of 152 degrees. RP 134.

Furthermore, Mr. Brink acknowledged that he knew K.S.D. had sustained third degree burns, RP 208, and testified that K.S.D. was acting differently during the days after he was burned, RP 215, but apparently, even though Mr. Brink “recommended” that K.S.D. be taken to the hospital, RP 214, he was not concerned enough about K.S.D. to accompany Ms. Brown and the child (the child he regarded as a son) to receive medical attention.

Even disregarding the testimony from the doctor positing that a person could become so frustrated with a child over potty training, Ms. Brown’s opinion testimony, and the prosecutor’s inartfully worded argument during closing, a reasonable jury would still conclude Mr. Brink was guilty based on (1) the photographic evidence, (2) the testimony from the doctor that there would have been burns to areas of K.S.D.’s body, and

sparing on the buttocks if the child were seated in the tub, (3) the inconsistencies in Mr. Brink's story and (4) the evidence of concealment of K.S.D.'s injuries by Mr. Brink. Any error that occurred was harmless in this case.

D. TRIAL COURT DID NOT ERR WHEN IT ADMITTED PHOTOGRAPHS OF THE CHILD VICTIM'S INJURIES.

A trial court's evidentiary rulings are reviewed for abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A trial court abuses its discretion if its decision is manifestly unreasonable or based upon untenable grounds. *Id.* Thus, the trial court's decision will be reversed only if no reasonable person would have decided the matter as the trial court did. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). Moreover, an evidentiary error only requires reversal if it results in prejudice - that is, if it can be reasonably said that "the outcome of the trial would have been materially affected had the error not occurred." *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981); *see also State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Photographs, even including autopsy photographs, are admissible if they are "[a]ccurate," and "if their probative value outweighs their prejudicial effect." *State v. Yates*, 161 Wn.2d 714, 768, 168 P.3d 359 (2007); *State v. Crenshaw*, 98 Wn.2d 789, 806, 659 P.2d 488 (1983);

ER 403. Photographs are not inadmissible merely because they are gruesome. *State v. Adams*, 76 Wn.2d 650, 655, 458 P.2d 558 (1969), *reversed on other grounds*, 403 U.S. 947 (1971) (death penalty reversed). A “brutal crime cannot be explained to a jury in a lily-white manner to save the members of the jury the discomfiture of hearing and seeing the results of such criminal activity.” *Id.* at 656.

Photographs have probative value when they are used to illustrate or explain testimony regarding injuries. See, e.g., *State v. Lord*, 117 Wn.2d 829, 870, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992) (photographs illustrating and explaining pathologist’s testimony admissible). A trial court’s admission of autopsy photographs is reviewed for an abuse of discretion. *Crenshaw*, 98 Wn.2d at 806; *State v. Finch*, 137 Wn.2d 792, 812, 975 P.2d 967 (1999); *State v. Pirtle*, 127 Wn.2d 628, 653, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996) (a gruesome and horrible crime cannot be presented in a way that glosses over the fact). Photographs of a victim’s injuries can be relevant for a number of purposes, such as proving intent. *Finch*, 137 Wn.2d at 812-13.

The State bears the burden of proving all elements of a crime beyond a reasonable doubt. *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004). Accordingly, the State may introduce photographic evidence to prove every element of the offense and to rebut all defenses. “[T]he law requires an

exercise of restraint, not a preclusion[.]” *State v. Stackhouse*, 90 Wn. App. 344, 358, 957 P.2d 218 (Div. 3 1998). In *State v. Gentry*, 125 Wn.2d 570, 607-09, 888 P.2d 1105 (1995), for example, the Supreme Court upheld the admission of photographs that showed the victim’s head injuries. In one of the pictures, the skin was peeled back to show skull fractures. Despite their gruesome nature, the court found the photographs relevant to show the extent of the victim’s injuries, which were necessary for the contested issues of intent to kill and premeditation. *Id.* at 608-09. Ultimately, “unless it is clear from the record that the primary reason to admit gruesome photographs is to inflame the jury’s passion, appellate courts will uphold the decision of the trial court.” *State v. Daniels*, 56 Wn. App. 646, 649, 784 P.2d 579 (1990).

Defendant asserts that the four photographs of K.S.D.’s injuries were overly prejudicial to him because they were “unpleasant and quite gruesome.” Appellant’s Br. at 32-33. Certainly photographs of burns are “unpleasant” to view, but compared to autopsy photographs or other photographs depicting multiple stab wounds or gunshots, “gruesome” is an overstatement, and not supported by the record. The State is not required to ensure that evidence admitted at trial is pleasant for the jury to view. In child abuse cases, this is an impossibility. However, the State has the burden of proof and is required to prove each element of the charged crime – here, the

State was required to prove an intentional assault, not an accidental burning of K.S.D.

Dr. Messer explained the differences in the three photographs that defendant claims are overly prejudicial and cumulative with Exhibit P19. After State's Exhibit P24 was admitted, Dr. Messer testified that it demonstrated the burn "goes basically into the anus. It is not just on the outside skin. It's actually going in, which is interesting to me ... I was not expecting to see that from the description of how it happened." RP 68.

State's Exhibit P25 assisted Dr. Messer in demonstrating "another view of the burns on the buttocks that, also, start to show a little bit of where the penis is involved." RP 69. The doctor then testified to the significance of the burns on the child's penis and the severity of those burns. Regarding State's P26, Dr. Messer testified that it "depict[ed] a better close up of the underside of the penis." RP 70. It demonstrated "yellowish material along the underside of the penis" that was indicative of the occurrence of healing at that location. RP 71. From what she observed, depicted in that photograph, she could tell that the burn was not an "immediate burn" and had been there for some time. RP 71.

While these four exhibits show generally the same injury, they each have a different purpose: P19 was admitted to demonstrate the three photographs that were taken at the hospital; P24 was admitted to

demonstrate that the injuries to the victim involved his anus; P25 was admitted to show a different view of the child's buttocks and his penis; P26 was admitted as a closer photograph of the injuries to the child's penis that demonstrated the injury was healing.

It was well within the discretion of the trial court to allow the State to admit these four exhibits. There has been no showing that the admission of the photographs was for the purpose of inflaming the passions of the jury. While most evidence is prejudicial in some fashion, there is a difference between prejudicial evidence and evidence that is overly prejudicial or introduced for the primary purpose of appealing to the jury's emotions. These photographs were not introduced for the latter purpose.

The State has the right to prove its case without being required to whitewash the evidence. Here the State was required to prove that the defendant intentionally assaulted the victim, and this photographic evidence was the basis for Dr. Messer's opinion that the burns were abusive and intentional. These photographs demonstrated the lack of sparing on the child's buttocks, and demonstrated different angles by which the jury could see that the burns were limited to the child's buttocks, scrotum and the underside of his penis. The trial court did not abuse its discretion in admitting these photographs. No error occurred in this regard.

E. THE CUMULATIVE ERROR DOCTRINE IS INAPPLICABLE TO DEFENDANT'S CASE BECAUSE HE HAS NOT DEMONSTRATED MULTIPLE ERRORS THAT DENIED HIM A FAIR TRIAL.

The cumulative error doctrine applies to instances where there have been several trial errors that, standing alone, may not be sufficient to justify reversal but when combined deny the defendant a fair trial. *See State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). Cumulative error will not be found, however, where a defendant fails to demonstrate how each alleged instance of misconduct or how the combined effect of the instances of misconduct affected the outcome of his trial. *Id.*

Here, as explained above, the prosecutor did not engage in misconduct in his closing argument. The jury was properly instructed regarding the determination of witness credibility, and the prosecutor corrected his own inadvertent misstatement, and, in fact, told the jury that it did not have to believe Dr. Messer.

Counsel's decision to not object is clearly a tactical decision. No error may be predicated upon tactical decisions of defense counsel. As such, defense counsel's actions do not weigh into the cumulative error calculation.

As discussed above, the decision to admit photographs is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. Here, the State was required to prove abusive injury, rather than accidental injury. As such, the trial court did not abuse its discretion in allowing the State to introduce photographic evidence of the injuries supporting the doctor's conclusion that the injury was intentional in nature. No error occurred in this regard; therefore, this issue does not weigh into the cumulative error calculation.

Defendant has failed to show multiple errors that when combined affected the outcome of his trial. No cumulative error exists here.

F. THE STATE AGREES THAT THE DEFENDANT'S CASE SHOULD BE REMANDED TO THE SUPERIOR COURT TO STRIKE THE COMMUNITY CUSTODY REQUIREMENT.

A defendant's sentence cannot exceed the statutory maximum term for the class of crime for which the offender was convicted. RCW 9A.20.021(1). Second degree assault of a child is a class B felony. RCW 9A.36.021. Therefore, the maximum allowed sentence for that crime is ten years of incarceration. RCW 9A.20.021. Under RCW 9.94A.701(2), the trial court is required to impose 18 months of community custody for violent offenses; second degree assault of a child is a violent offense. RCW 9.94A.030(55)(a)(ix).

The legislature enacted RCW 9.94A.701(9)⁹ in 2009, which requires the trial court reduce the term of community custody if the combination of the term of confinement and community custody exceed the statutory maximum for the crime. Prior to the effective date of 9.94A.701(9), the Supreme Court allowed sentencing courts to make what was referred to as a *Brooks* notation in a judgment and sentence, indicating that the combined terms of confinement and community custody, while variable, “shall not exceed the statutory maximum.” See *In re Pers. Restraint of Brooks*, 166 Wn.2d 664, 675, 211 P.3d 1023 (2009). More specifically, the Court held that such a sentence did not exceed the statutory maximum where DOC “is required by the SRA to release the offender on or before the date the offender will have served the statutory maximum.” *Id.* at 672.

After RCW 9.94A.701(9) was enacted, the Supreme Court held a superior court could not impose a standard range sentence of confinement and community custody that when combined exceeded the offense’s statutory maximum, even if the sentence included a *Brooks* notation. *State v. Boyd*, 174 Wn.2d 470, 473, 275 P.3d 321 (2012); see also *State v. Winborne*, 167 Wn. App. 320, 329, 273 P.3d 454, review denied,

⁹ RCW 9.94A.701(9) states: “*The term of community custody specified by this section shall be reduced by the court whenever an offender’s standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.*” (Emphasis added.)

174 Wn.2d 1019 (2012). In *Winborne*, this Court recognized that a *Brooks* notation no longer sufficed under the amended statute to resolve the problem of a combined sentence exceeding the statutory maximum. Under the amended statute, the trial judge was required to correct the term of community custody for those sentenced after July 26, 2009. *Id.* at 328.

This case appears to fall within the category of cases that involve a post-2009 sentencing in which the trial court believed a *Brooks* notation would suffice to ensure that the defendant's sentence would not exceed the maximum. At sentencing, defense counsel expressed to the court its understanding that the length of incarceration¹⁰ must be adjusted if the court intended to impose community custody:

As [the deputy prosecutor] has indicated, the recommendation that the parties are making is the 120 [months]. I would call it the low end 120. [The deputy prosecutor] calls it the high end 120. The reality is that is the entire range, 120. If the court imposes the 18 months of community custody, the sentence would have to drop down to something like 102 months because community custody on top of 120 would take it 18 months outside the statutory maximum.

RP 289.

¹⁰ Defense counsel's argument was inaccurate, as RCW 9.94A.701(9) expressly states that it is the length of community custody, not incarceration, that must be reduced if the total sentence exceeds the maximum.

However, the trial court declined to make any adjustment to the defendant's sentence:

I am going to impose the 120 months. You do have 18 months of community custody, but it cannot exceed the maximum, which is the 120 months. So how that works is that you'll get good time, and whatever good time you get on the 120 months, you'll spend on community custody.

So if you basically get a third off for good time or a fourth off, that's the amount of time you'll spend on community custody. If you end up sitting out the whole because they don't give any good time and you won't have any. So it's 120 months with 18 months not to exceed a total statutory amount of 120 months.

RP 291.

The trial court clearly wanted the defendant to be placed on community custody for any amount of earned early release up to the maximum sentence of ten years. However, in a situation such as this, where the standard range sentence equals the maximum sentence allowed by law, RCW 9.94A.701(9) would require any community custody provision, that would be otherwise mandatory under RCW 9.94A.701(2) be stricken by trial court. Here, the notation on the defendant's judgment and sentence, CP 180, which directs that his total amount of incarceration and community custody is not to exceed the statutory maximum, is a *Brooks* notation, which, for this sentencing, was insufficient under *Boyd* and *Winborne*.

Therefore, the matter should be remanded for the trial court to strike the community custody provision. Resentencing is not necessary.

G. THE IMPOSITION OF APPELLATE COSTS IS WITHIN THE DISCRETION OF THIS COURT.

Mr. Brink requests that this court not impose costs normally associated with the appeal due to his continued indigency as reported to this court pursuant to its General Order of June 10, 2016. Should the defendant not prevail on appeal, it is within the sound discretion of this court to determine whether he has some future ability to pay toward any appellate costs.

The defendant was sentenced to ten years of incarceration as a result of his conviction on this charge, CP 197, and at the time of sentencing was only 28 years old, CP 193, RP 187. He has been trained in drywall installation and has previously held jobs as a core driller and logger. Report of Continued Indigency at 2; CP 6; RP 188. He has the potential to earn income while incarcerated, and if he is unable to pay after he is released from prison, he may petition the superior court for remission of his legal financial obligations at any time so long as he is not in contumacious default based on RCW 10.71.160(4).

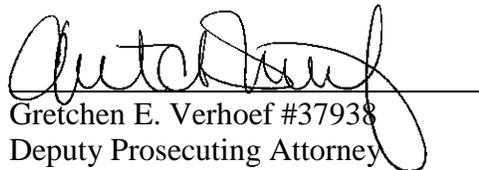
V. CONCLUSION

The State respectfully requests that this Court affirm the jury's verdicts in this case. The prosecutor did not engage in misconduct in his closing argument, and any error that did occur could have been cured by an instruction, had defendant objected at trial. Defense counsel was not ineffective for not objecting at trial; the lack of objections is attributable to trial tactics. The court did not abuse its discretion in admitting four separate pieces of photographic evidence of the victim's injuries. The cumulative error doctrine is inapplicable.

However, the State agrees that the matter should be remanded for the trial court to strike the community custody provision, as the imposition of community custody results in a sentence that exceeds the statutory maximum.

Dated this 20 day of January, 2017.

LAWRENCE H. HASKELL
Prosecuting Attorney



Gretchen E. Verhoef #37938
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA WADE BRINK,

Appellant.

NO. 34031-7-III

CERTIFICATE OF MAILING

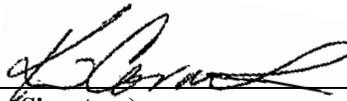
I certify under penalty of perjury under the laws of the State of Washington, that on January 20, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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1/20/2017
(Date)

Spokane, WA
(Place)



(Signature)